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

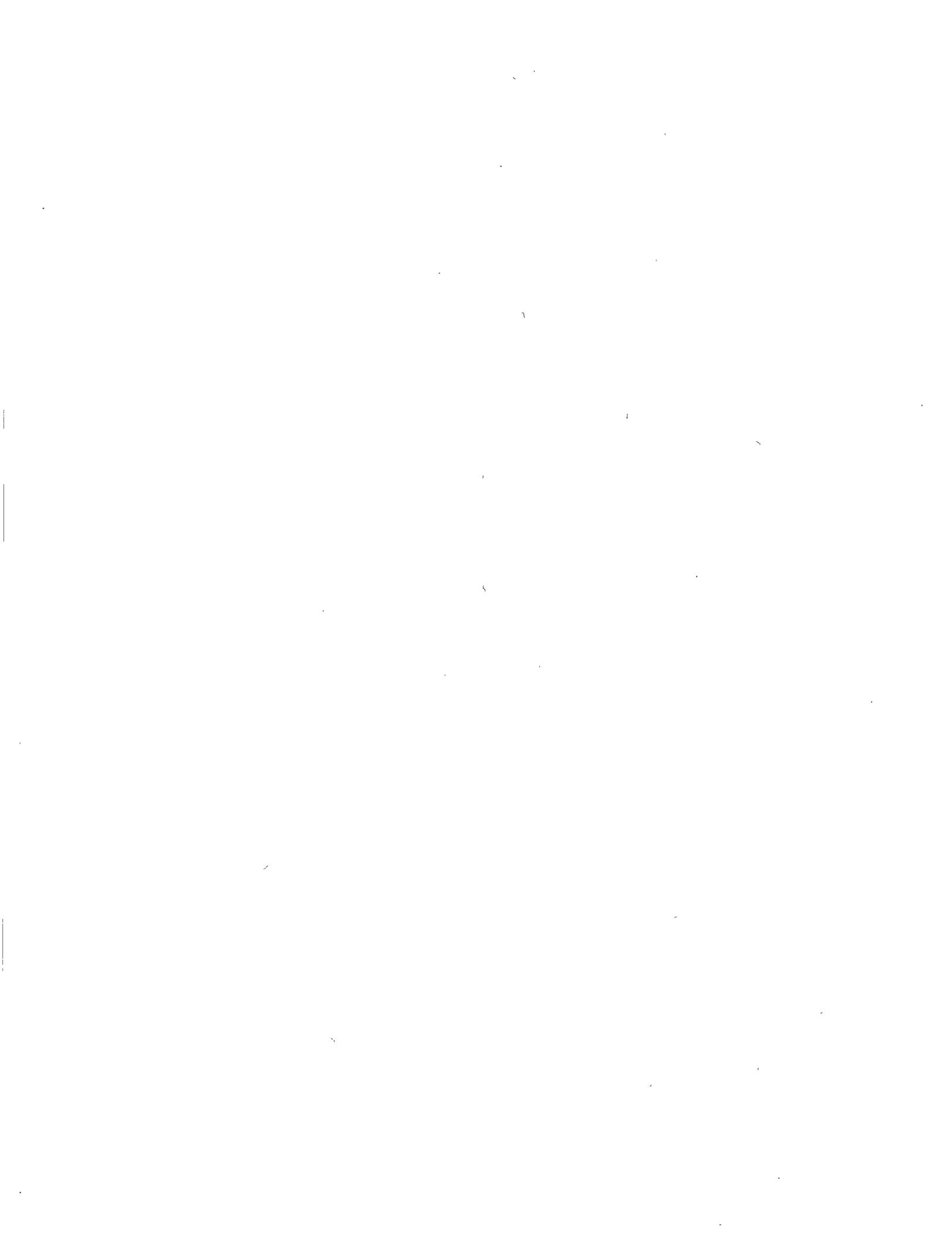
**Volume Four**



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

May 1, 1997

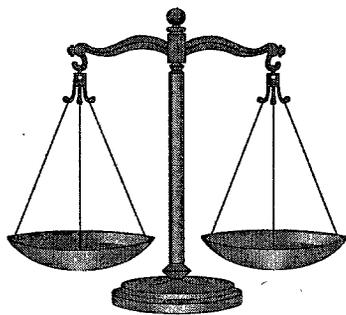
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**Working Papers  
of the  
Advisory Committee  
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Civil Rules  
on  
Proposed Amendments  
to Civil Rule 23**

**Volume Four**



Compiled by the  
Rules Committee Support Office

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

May 1, 1997

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

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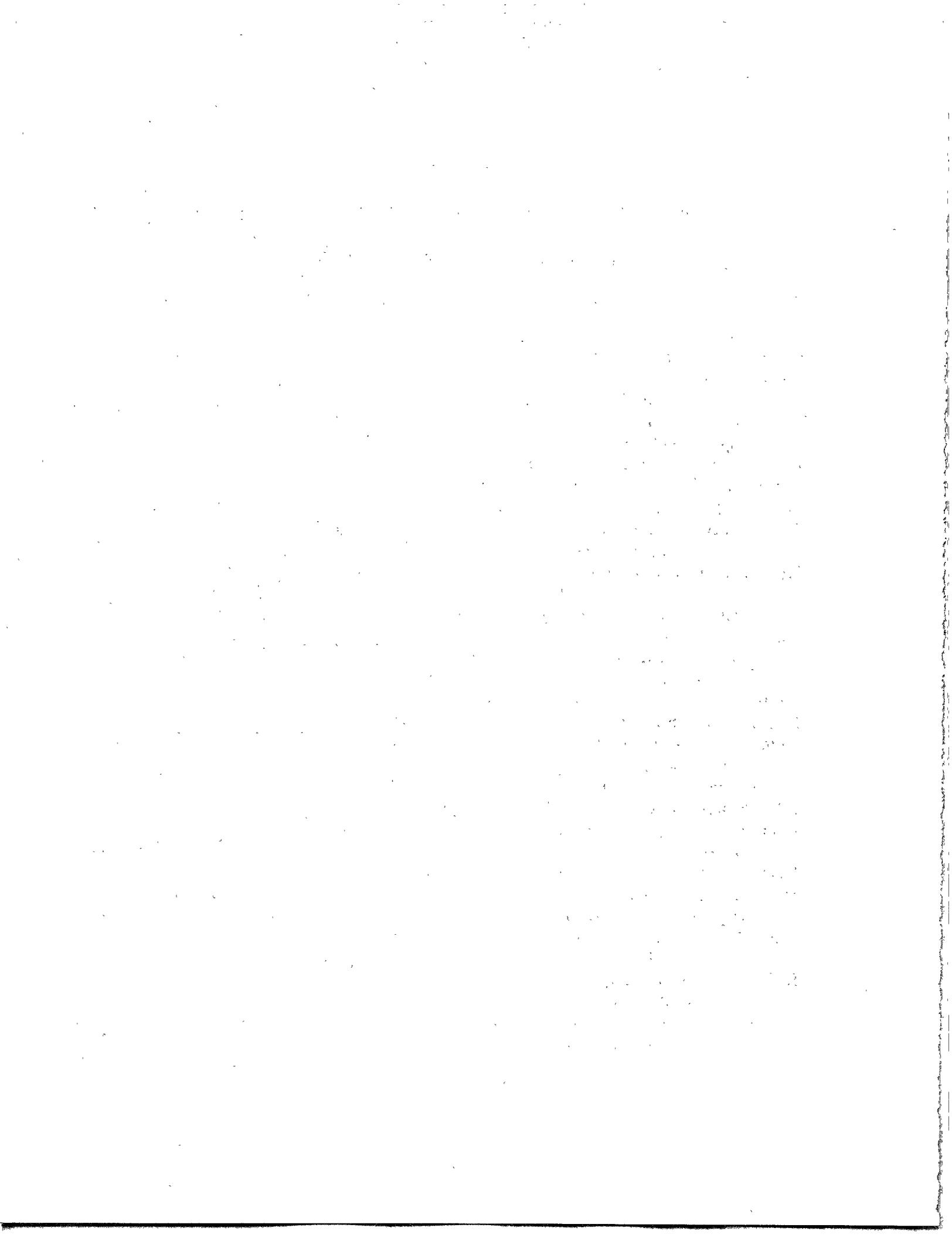
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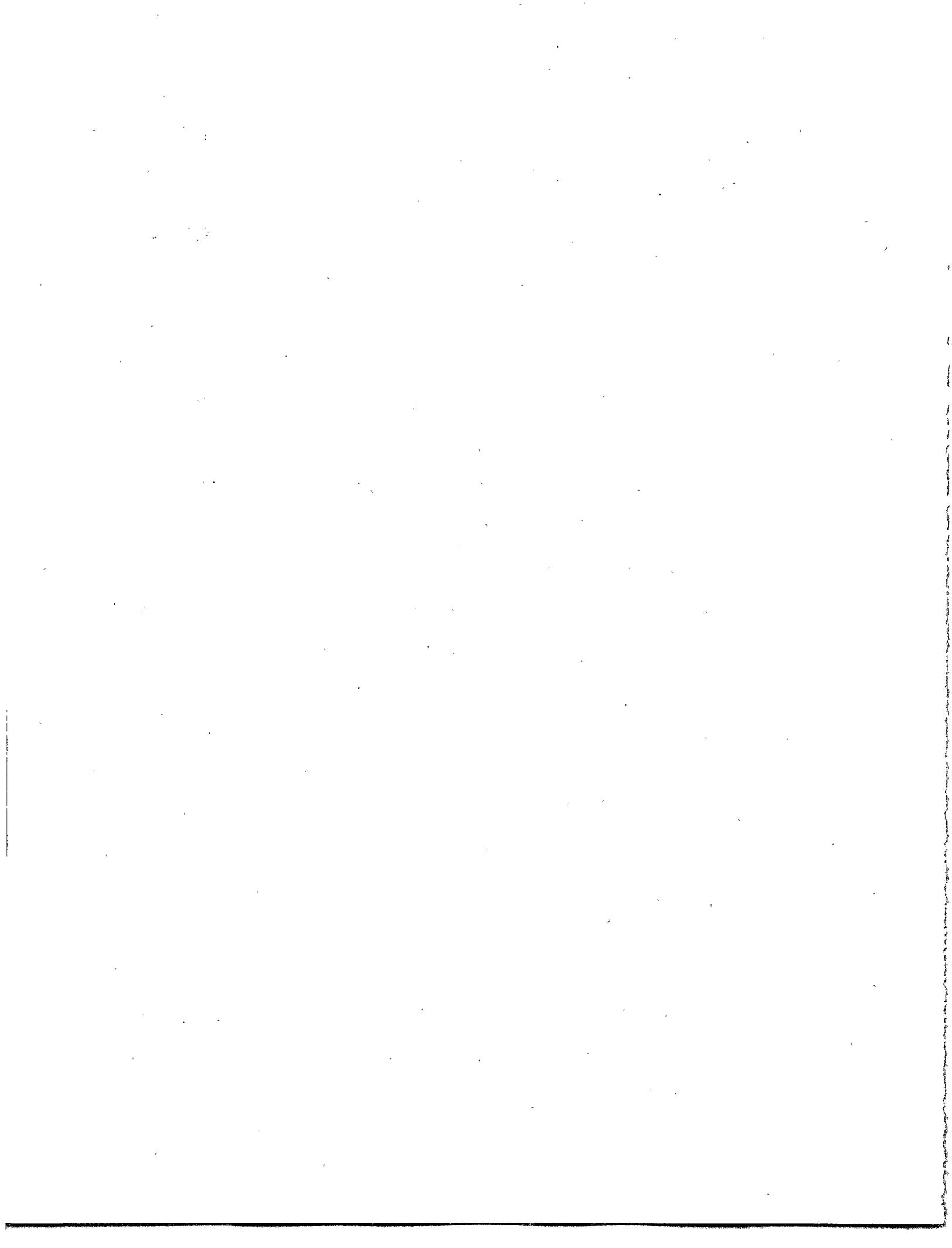
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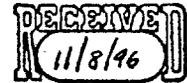
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#2191



Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure:  
November 22, 1996

96-CV-026

Statement of John Leubsdorf

Let me first thank the Committee for permitting me to present my views, as well as for the thought and time its members are devoting to the improvement of the Federal Rules of Civil Procedure. I sympathize with the difficulties of your situation, and hope I will not be adding to them. Preparing this statement has illuminated for me the complexities of the problems, and the contributions this Committee has already made to clarifying them.

In brief, my major point will be that the proposed new Civil Rule 23(b)(4) tends to increase the problems that settlement class actions pose. I will try to describe those problems, explain how the proposed rule would make them worse, suggest some alternatives, and lastly comment on the proposed rule 23(b)(3)(F).

I speak as a supporter and student of class actions. While in practice, I helped to litigate several class actions, usually on behalf of the plaintiff class but on one occasion for the defendant. Since then, I have written and taught about class actions. I believe they play a vital role in promoting access to law for many whose rights would not otherwise have been protected. Nevertheless, because the class action procedures can be abused, I wrote an *amicus* brief for a group of Professional Responsibility teachers criticizing aspects of the settlement in *Georgine v. Amchem Products, Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994), *rev'd*, 83 F.3d 610 (3d Cir. 1996), *cert. granted*, and testified as a paid expert for opponents of the settlement in *Ahearn v. Fibreboard Corp.*, 162 F.R.D.

505 (E.D. Tex. 1995), *aff'd*, 90 F.3d 963 (5th Cir. 1996).<sup>1</sup> A copy of my résumé is attached to this statement.

I

The dangers of class action settlements have long been recognized. On the one hand, such settlements may benefit the named plaintiffs and their lawyers at the expense of other class members, who are not present to protect themselves. On the other hand, defendants may pay more than they really owe to avoid the threat of a massive defeat. These dangers are interrelated: the prospect of being paid off to settle incites some named plaintiffs and their lawyers to bring strike suits. By the time the settlement reaches the court, both sides unite to support it, so that the court lacks information about its weaknesses. Despite or because of these dangers, the great bulk of class actions do settle, as do most civil actions, and no one would propose to forbid settlement.

In recent years, it has gradually become possible to arrange a settlement without an action, somewhat like the grin that remained when the Cheshire Cat disappeared in *Alice in Wonderland*. The first step in this direction occurred when courts reluctantly permitted an occasional settlement before the certification of a class. Considering the time that sometimes elapses before certification, and the reasons that may exist for settlement, this move was certainly tempting. Nevertheless, authorities such as the *Manual for Complex and Multidistrict Litigation, Third* § 30.45, at 243-45 (1995), although accepting pre-certification settlements, call for "closer judicial scrutiny than

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<sup>1</sup>I was not paid for my work in *Georgine*, or of course for preparing the present statement.

approval of settlements where class certification has been litigated" and warn of the problems such settlements can raise.

In the last few years, courts have confronted a further development: settlements negotiated at the very outset of a class action, usually before the complaint is filed. Here, there is no intention on either side to resolve the claim on its merits, either by trial or by summary judgment. Likewise, the named plaintiffs and defendants and their lawyers have no expectation of disputing the adequacy of representation of the class. Rather, the court is simply asked to approve the settlement so that it may be made binding on absent class members. Settlement before certification is not just the result of speed in settlement or slowness in certification; it is what the parties seek.

Such settlement class actions often feature further devices, each fraught with the possibility of abuse. Sometimes the defendant selects lawyers and invites them to negotiate a settlement for an action that will then be brought, thus choosing the representatives of the plaintiff class. Sometimes the lawyers who claim to represent the class have clients with similar claims, which are however excluded from the class action and settled on the side on terms different from those applicable to class members. Sometimes the settlement provides that large groups of class members will receive nothing at all for their claims. Sometimes the settlement includes "futures" claims that have not yet accrued, so that their unwitting holders have their claims reduced or eliminated without any real chance to protect themselves. Sometimes class members have no right to opt out of the settlement, which is certified under rule 23(b)(1) or (2) even though it involves damages claims. Sometimes the court is asked to enjoin class members from suing in any other court, thus restricting the traditional collateral attack on class actions in which class members received inadequate representation or were not subject to the court's personal jurisdiction.

Sometimes the settlement imposes on class members throughout the nation the law of a single state, or a new set of procedures and remedies negotiated by the defendants with the lawyers they have selected to represent the class. For the absent class members, such remodelling of the law cannot claim the legitimacy of either legislation, adjudication, or consent.

Those who approve the substantive results reached in one or another settlement class action should reflect that it is impossible to foresee just what legal fields this type of remodelling will reach, what new rules it will impose, or what court will be asked to impose it. The power of a single court to impose a nationwide rule, without adjudicating the merits of the dispute, is an alarming power. Already, one can detect some tendency of litigators to seek out certain courts in one state thought to be receptive to far-reaching class action settlements.

Settlement class actions are already having a very large effect. During the last year, every few weeks have brought word of a new questionable arrangement. Typically, each of these involves thousands or tens of thousands of class members. The Federal Judicial Center's recent study indicates that simultaneous motions to certify a class action and approve a class action are common, but does not provide information on the adequacy of these settlements.<sup>2</sup> Presumably, some abuses occur without giving rise to costly and difficult court challenges and therefore remain unknown. Academic commentators have been overwhelmingly critical of the rise of the settlement class action.<sup>3</sup>

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<sup>2</sup>Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *Empirical Study of Class Actions in Four Federal Courts: Final Report to the Advisory Committee on Civil Rules 34-35* (1996)(hereinafter "*Empirical Study of Class Actions*").

<sup>3</sup>E.g., Symposium, 80 Cornell L. Rev. 811 (1995)(including various articles); John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343 (1995).

Unfortunately, there is every reason to believe that improper settlement class actions will increase unless action is taken. Knowledge of how to arrange such actions will spread. Defendants and their lawyers will feel obliged to pursue an available legal option. Plaintiffs' lawyers will conclude that a settlement class action is good for class members, or their private clients, or themselves, or at least better than what some other lawyer might accept. Judges asked to approve settlements will continue to lack information, and will fear that rejection may lead to a worse result.

## II

The proposed new Rule 23(b)(4) would, in my opinion, increase the danger of settlement class actions. In what follows, I assume that the proposal will be reworded to make clear that it is not enough that the parties "request certification under subdivision (b)(3) for purposes of settlement" (emphasis added) but that they must be entitled to certification for that purpose, "even though the requirements of subdivision (b)(3) might not be met for purposes of trial." Even with the clarification that the requirements of subdivision (b)(3) must be met for purposes of settlement, the proposal should be withdrawn, for the following reasons.

Whatever else it may do, the proposal would increase the number of settlement class actions, and hence the number of improprieties associated with them. It would allow some settlement class actions that otherwise would not occur because the requirements of rule 23(b)(3) could not be met for trial. We are having more than enough trouble with settlement class actions as it is; this is hardly the time to encourage more of them.

These effects would be the stronger because the proposed modifications in rule 23(b)(3)

would make it harder to certify classes for trial. Rather than attempt to meet the new, higher standards, some would seek to settle first and file afterwards, confronting the court with a *fait accompli*. In other instances, plaintiffs would file but seek to settle before the court passed on certification--an approach facilitated by the proposed change in rule 23(c), which dilutes the requirement that the court pass on certification "[a]s soon as practicable".

Encouraging settlements before certification removes one of the strongest safeguards for the integrity of class actions. As the Federal Judicial Center study confirms, about half of all class action defendants challenge certification, typically contesting the representativeness of the named plaintiffs, the commonality of the issues facing different class members, and other requirements. These are serious challenges, involving substantial briefs and court opinions.<sup>4</sup> They help filter out instances in which class lawyers and named plaintiffs will not protect the interests of class members. Proposed rule 23(b)(4) would gravely undermine this safeguard because a defendant that has already settled will not thereafter dispute certification.

Allowing class certification on a weaker showing would also permit actions that the named plaintiffs and their lawyers were unable or unwilling to bring to trial. That would put them under stronger pressure to accept inadequate settlements, or settlements unfair to some class members. It would also increase the pressure on courts to approve the settlements presented to them, since there would be no alternative other than dismissal.

Promoting settlement before certification, moreover, would decrease the number of instances in which a court could choose the most adequate class representatives and lawyers from among

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<sup>4</sup>*Empirical Study of Class Actions* 36-39, 127-29.

several competitors. When the defendants have already reached a settlement with one group of lawyers and named plaintiffs, the court can reject those lawyers and plaintiffs only if it also sends the settlement back for renegotiation, which some courts will consider a risky move. The risk is much less when the court first selects among competing representatives of the class and then sends them off to discuss settlement. That order of proceeding also makes it easier for the judge to take the initiative in controlling attorney fees, rather than passing on fee arrangements as part of a settlement already reached.

By reducing the opportunity for the court to choose the best class representatives, proposed rule 23(b)(4) follows an approach contrary to that of the Private Securities Litigation Reform Act of 1995, P.L. 104-67, § 101, 109 Stat. 737, adding 15 U.S.C. §§ 77z-1(a)(3), 78u-4(a)(3). That Act provides detailed procedures for selecting lead plaintiffs in securities class actions, including published notice to the class within twenty days after suit is filed, an opportunity for class members to contest the claims of the original plaintiffs to represent them, and rules for choosing among contestants. How are these procedures to be followed if the defendant has already agreed to a settlement with the original plaintiff? That scarcely gives other class members a fair chance to advance their own claims to represent the class, or the court a fair opportunity to select the best representative. It is not a sufficient answer that the Act may perhaps displace the proposed rule 23(b)(4) in securities class actions. The rules should not undercut the Congressional policy in other actions either. Now that Congress has directed that courts hearing securities class actions should select the best plaintiff at the outset of the suit, the rules should not be amended to encourage delaying the certification decision in other class actions until after a settlement has been reached.

Finally, although the opportunity to arrange a settlement class action may help some

defendants in the short run, in the long run it may encourage the proliferation of strike suits by making them easier to bring and settle. If a plaintiff and a plaintiff's lawyer must file a class action capable of being tried and secure certification before serious settlement discussions begin, they will think twice before doing so. Under the proposed rule 23(b)(4), it becomes easier for them simply to write the defendant, threatening to bring a class action in a favorable forum and offering to work out a settlement. The defendant will then be under pressure to settle, rather than face the dangers of a contested suit. By reducing the price of a ticket to the extortion game, the proposed amendment will encourage more plaintiffs and lawyers to enter.

### III

For these reasons, I urge the Committee to withdraw the proposed rule 23(b)(4). I also urge that, if the proposed amendment to rule 23(c) is adopted, its Committee Note should not include the proposed sentence referring to settlement classes.

Let me also propose several alternatives that could help the courts deal with the dangers I have been discussing. These proposals are meant to continue the discussion started by the Committee, not to cut it off. No doubt they could be improved; no doubt there is much more to be said about them than I can say here.

First, rule 23 should provide that courts should not consider settlements until after deciding whether to certify a class, except in the most unusual circumstances. As already explained, a contested certification hearing is a vital safeguard for class members.

Second, rule 23(a)(4) should require that the class lawyers "will fairly and adequately protect

the interests of the class" just as it now imposes that requirement on named plaintiffs. It has long been clear that the lawyers bear the laboring oar in representing the class. Courts have recognized this in their certification decisions. The rule should recognize it too, and its Committee Note should draw attention to the problems of conflict of interest that confront class lawyers. The proposed versions of rule 23 circulated in 1993 and 1995 contained good language on these points, but the amendments now being proposed do not.

Third, the rule should require courts to appoint a lawyer to challenge any proposed settlement in any class action in which the estimated value of the relief (including attorney fees) exceeds \$1,000,000. As has long been recognized, once a settlement has been reached, named plaintiffs and defendants unite in arguing its merit to the court, which hence has no source of contrary information and advocacy. Objecting class members sometimes appear, but often lack the resources or stake to make an adequate presentation, and sometimes are seeking some benefit for themselves or their lawyers as the price of acquiescence. Court appointment of an objector is the obvious solution. (The procedure followed by the New York court in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) provides a model.) The objector would be entitled to obtain reasonable discovery concerning the settlement and would be paid out of the recovery. Please note that I am not proposing the appointment of a guardian *ad litem* to duplicate the court's function by evaluating whether the settlement is desirable, but an objector instructed to bring to the court's attention all relevant information and reasonable arguments supporting rejection of the settlement.

Fourth, the rule should require notice of any settlement under rule 23(e) to include comprehensible information about the essential terms of the settlement, attorney fees, any special benefits for class representatives, how the settlement is to be distributed and who is to get what, opt-

out rights, the terms under which class counsel have settled any similar claims of their clients outside the class action, and procedures for filing a claim or objecting. The *Handbook for Complex and Multidistrict Litigation, Third* § 30,212, at 228 (1995) provides some useful guidelines here. Unfortunately, the Federal Judicial Center study confirms that notice is often inadequate. The study also reveals that, even judging from what is disclosed on the record, at least one quarter of all settlements involve extra payments to named plaintiffs.<sup>5</sup> If this it to be allowed at all--the Private Securities Litigation Reform Act of 1995 forbids it, except for reimbursement of reasonable expenses and lost wages--full disclosure is essential.

Fifth, rule 23(c)(2) should be amended to require notice and opt-out rights in any class action in which significant money damages are claimed or awarded. The right to opt out is a significant safeguard. It is properly required when damages are claimed in a rule 23(b)(3) class action, and should also be required when an additional claim for injunctive relief or other circumstances lead to certification under rule 23(b)(1) or (2). This would have the added benefit of discouraging disputes about whether a class action should be certified under one rather than another subsection.

Once again, I do not claim that these are the only possible ways to improve rule 23. I do claim that they are directed against what experience shows to be the main problem with the present rule, and urge their consideration for that reason.

#### IV

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<sup>5</sup>*Empirical Study of Class Actions* 26, 49-52.

Proposed rule 23(b)(3)(F), to which I now turn, raises more subtle problems than proposed rule 23(b)(4), but in the end seems to me equally undesirable. Requiring that a court deciding whether to certify a rule 23(b)(3) class action consider "whether the probable relief to individual class members justifies the costs and burdens of class litigation" seems innocuous enough, but turns out to provide a misleading approach to measuring the costs and benefits of class actions, or any other civil litigation.

The proposed amendment limits consideration of the benefits of a rule 23(b)(3) class action to the "probable relief to individual class members", while using much broader language--"the costs and burdens of class litigation"--to describe the action's costs. One of the major benefits class actions provide--like damage suits in general--is to deter unlawful conduct. Deterrence does not fall within the proposed amendment because it does not constitute "relief" and often primarily benefits others besides "individual class members." In some cases, moreover, class actions have led to "floating recovery" and other forms of relief such as payments to relevant nonprofit organizations. These benefit persons who are not class members as well as those who are, and therefore would be considered only in part under the proposed amendment.

The amendment's reference to "the costs and burdens of class litigation" poses still more important problems because, unless given a most unobvious reading, it overlooks why damages are required in the first place. In class actions and all other damage litigation, defendants typically pay out substantially more than plaintiffs receive, if only because the legal and other expenses of both defendants and plaintiffs must be paid. If comparison between the relief to plaintiffs and the costs of defendants were the test, no civil suit would be justified. But litigation often is justified, both because of the social benefits it confers by deterring misconduct and creating precedents, and

because it is good to transfer money from those not legally entitled to keep it to those who are. Corrective justice is a benefit, not a cost, albeit one hard to assess in financial terms.

A final problem, which may lead to a solution, is that the proposed rule 23(b)(3)(F) seems to address the wrong question. Rule 23(b)(3)'s standard is not whether the benefits of a class action exceed its costs--a question hard to answer, and one which concerns more the substantive issue of whether to recognize a cause of action rather than procedural concerns. It is whether a class action is superior to other available methods for the adjudication of the controversy. The factors to be considered under rule 23(b)(3) should bear on the same comparison.

The proposed rule 23(b)(3)(F) should therefore be replaced by something to this effect: "how the benefits and costs of class litigation compare with those of other available methods". This directs the court toward the relevant, and relatively feasible, task of comparing one procedure with others.

Of course, one of the possible "available methods" a court may consider is to deny class action certification knowing that this means that the controversy will never be brought to any court, because the claims are simply not worth adjudicating. A court should approve such a course only after recognizing that it is foregoing the benefits of enforcing the law. The proposed language would steer the court toward considering this as part of the comparison that rule 23(b)(3) requires.

One final question affects both the proposed rule 23(b)(3)(F) and the alternative proposed above: is the court to consider the plaintiffs' likelihood of prevailing? The proposed rule's reference to "probable relief" suggests that it should, as does the whole notion of appraising in advance the benefits and costs of a class action. On the other hand, the Supreme Court has criticized a

preliminary determination of the merits as likely to be prejudicial.<sup>6</sup> Although I am not sure how to answer this question, it does seem to me that some answer should be incorporated in any version of proposed rule 23(b)(3)(F) that may be adopted.

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<sup>6</sup>Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

#2192



STATEMENT OF WILLIAM LEIGHTON

96-CV-02

relative to the proposed 1996 amendments  
to Rule 23(e) of the Federal Rules of Civil Procedure

Mr. Chairman and Members of the Committee:

My name is William Leighton. I appear before you as a witness whose experience in the courts is that of an objector to so-called settlements in large securities class actions. The April 18 and 19, 1996 Committee Draft Minutes succinctly state, at page 38 : Adversary process is provided only if there are objectors. I am a person in that category and, in the past, I have endeavored to participate in the adversary process.

The result of one such effort will appear from the attached excerpts from a federal case file which is now closed, as far as I am concerned. Presidential Life Insurance Company v. Michael R. Milken, et al., 92 Civ. 1151 MP, S.D.N.Y. This was a consent proceeding which was commenced on February 18, 1992 against scores of defendants. No answers were filed by any of these defendants. On March 11, 1992, a stipulation of settlement was reached and was enforced by a "preliminary approval order" of same date containing a preliminary injunction. This injunction was not served upon those enjoined. On April 22, 1992, a Notice of Pendency of Class Action, of Proposed Settlement and of Settlement Hearing was published and mailed to certain members of the putative class, including myself. A hearing was held on July 14, 1992. A decision was entered on the docket on July 17, 1992 accompanied by a separate order and final judgment of same date, including permanent injunctions. These injunctions were not served on those enjoined. A separate order was entered on November 12, 1992 striking the class allegations of my requests for exclusion. The classes consist of thousands of former shareholders of Beatrice Companies, Inc. and then current shareholders of American Brands, Inc. These shareholders were not notified of the court's action. All of this happened under the purported authority of current Rule 23(e). Despite this activity, the notice of April 22, 1992 expressly stated, at paragraph (24) :

the district court has not determined the merits of the claims asserted by plaintiff or the defenses of the settling defendants thereto. This notice does not imply that there has been or would

be any finding of violation of the law or that recovery could be had in any amount if the litigation were not settled.

Absent such a determination, it was not possible for the district court to determine that the settlement was "fair, reasonable and adequate". Clauses such as these will be found in most notices of hearings for class action settlements.

The proposed Rule 23(e) reads :

Dismissal or Compromise. A class action shall not be dismissed or compromised without hearing and the approval of the court, after notice of the proposed dismissal or compromise has been given to all members of the class in such manner as the court directs.

In my view, the revised Rule 23(e) should read :

Dismissal or Compromise. A class action shall not be dismissed or compromised without hearing and the approval of the court by final judgment making the determination required by Rule 54(b). Notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. Persons who are members of the class and who object to the dismissal or compromise shall be known as "objectors" and shall be permitted to intervene in the action for the purpose of taking an appeal from the final judgment or filing a motion pursuant to Rule 60(b);

The final judgment shall recite :

- (i) that the plaintiff(s) have commenced the action within the statute of limitations for the causes of actions alleged;
- (ii) that the plaintiff(s) has or have standing to assert such causes of action by reason of his/her/their being member(s) of the class;
- (iii) that the court has certified the class after a hearing at which putative members of the class have had an opportunity to be heard;
- (iv) that the court has jurisdiction over the person(s) of the plaintiff(s) and the defendant(s), jurisdiction over the subject matter of the complaint, that venue is proper in the district and that the complaint states a claim upon which relief can be granted;
- (v) that reciprocal discovery has been undertaken by the parties to the proposed settlement before the agreement therefor had been entered into;
- (vi) that there has been no oral or written agreement between the attorneys for the plaintiff(s) and those for the defendants with respect to plaintiff(s)' attorneys fees;
- (vii) that the damages sought by the plaintiff(s) on behalf of the class amount to a sum certain;

(viii) that the sum offered by the defendants in settlement of the plaintiff(s)' claims for damages is fair, reasonable and adequate;

(ix) that the judgment is binding only those members of the class who have been served with a copy of it;

(x) that the judgment shall not contain an injunction against the members of the class served with a copy of the judgment.

Proposed Rule 23(e), which follows, with slight modifications, the present Rule is inadequate because it does not provide for an adversary process. It does not mention an objector's right to be heard without which the adversary process is meaningless. It does not provide for the right to appeal the final judgment entered after the adversary process has run its course and the objector's obligation to seek intervention for the purpose of the appeal. Nor does it preserve the objector's right to file a motion to vacate if any of the conditions prescribed by Rule 60(b) are met in the future.

In Marino v. Ortiz, 484 U. 301 (1987), the Supreme Court has held that intervention is necessary for the purpose of prosecuting an appeal from a consent decree and that only parties to a lawsuit have standing to take an appeal. Judgments approving settlements of securities class actions are essentially consent decrees because they approve of stipulations of settlement filed by attorneys for the opposing sides. Such a document does away with any pretense that there is a Case or Controversy between the opposing sides.

The problem is exacerbated by the current practice of using Rule 23(e) settlement proceedings as a reverse process for procuring injunctions against those summoned to be heard. Every week several notices are published in the financial media summoning shareholders to "settlement" hearings and warning them of the consequences of failing to appear. Since stock mutual funds are major stockholders, it follows that the interests of thousands of people are at stake. Rule 23(e) reaches these thousands of persons directly as shareholders of record or indirectly through mutual funds and brokerage firms holding the stock as nominees.

From personal experience, I know that no stock mutual fund has appeared in opposition to the settlement of the Borden, Inc. case sub nom. Petersen v. Borden, Inc. et al., No. 94-Civ-8648 in the U.S.D.C., S.D.N.Y.

According to the proxy materials, 8.59 percent of Borden's outstanding stock, then worth about \$1.8 billion, was held of record by FMR Corporation, the parent of the Fidelity group of Boston mutual funds. In the reverse process of enjoining shareholders from ever pursuing the causes of actions consented to by the defendants, the attorneys for the putative plaintiffs had agreed with attorneys for all of the defendants to a "settlement" which provided for a payment of \$3,200,000 to the attorneys for the plaintiffs. I enclose a copy of that agreement as filed with the S.E.C. In short, the New York federal district court has approved of a contract between attorneys without a truly adversary hearing. Or, to put it differently, the putative defendants have written a complaint against themselves and, for \$3,200,000, have settled it on their own terms.

A final judgment has been entered enjoining the shareholders of Borden, Inc. from ever pursuing in other forums claims that have been "settled" by the attorneys' agreement. The judgment has not been served upon those enjoined. Thus, the pattern set by the 1992 Presidential action was repeated in 1996 in the Borden action. For ready reference, a copy of the order and final judgment in Borden is included in the appendix.

Respectfully submitted :

*William Leighton*

William Leighton

New York, N.Y.

November 6, 1996

249 West 11th Street

New York, N.Y. 10014

Tel. : (212) 255-0001

Fax : (212) 255-5899

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William Leighton  
249 West 11th Street  
New York, N.Y. 10014

November 26, 1996

Hon. Paul V. Niemeyer  
U.S.C.J.  
U.S. Courthouse  
101 West Lombard Street, #910  
Baltimore, MD 21201

Re : November 22, 1996 Hearing on Proposed  
changes to the Federal Rules of Civil Procedure

Dear Judge Niemeyer:

At the November 22 hearing, Melvyn I. Weiss, Esq., of Milberg Weiss Bershad Hynes & Lerach LLP ("Milberg Weiss") addressed the Committee based on the written statement which had been marked and filed under 96-CV-050. For ready reference, pages 1 and 10 of that Statement are attached.

As it appears from the small print on page 1 of that Statement, Sol Schreiber, Esq. is a partner of Milberg Weiss. Mr. Schreiber is also acting as a Liaison Member of the Committee. Therefore, Mr. Weiss' Statement and answers to the Committee's questions should be deemed the Statement and answers of Mr. Schreiber. Mr. Weiss has not prefaced his testimony with the disclosure that Mr. Schreiber was and is his law partner. Had he done so, a conflict-of-interest issue would have arisen for the Committee to resolve.

The issue is important because Mr. Schreiber has sharply questioned the first witness at the morning session concerning her statement filed under 96-CV-031. More appropriately, Mr. Schreiber should have disclosed the interests of his law firm, Milberg Weiss, in challenging that witness. As the Committee was sitting on November 22, an Order and Final Judgment containing an injunction against class members was entered in Lopez et al. v. Checkers Drive-In Restaurants et al., Case No. 94-282-Civ-T-17C, U.S.D.C., M.D. Fla. at Tampa, Fla. This is a case where Milberg Weiss is co-lead counsel for the plaintiffs, i.e. the persons enjoined. 4

On this basis, I suggest that Mr. Weiss' testimony and Statement should be stricken from the record. There is nothing in Mr. Weiss'

- 1 -

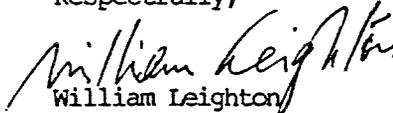
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Statement that discloses whether the final judgments which his law firm has won (1) have been served on each individual member of the class involved and (2) contain injunctions barring class members from ever asserting claims not disclosed at the time of the settlement hearing.

As I testified before the Committee, injunctions against class members and in favor of corporate defendants are common features of final judgments entered in class actions under the authority of present F.R.Civ.P. 23(e). Such injunctions violate the principles of Due Process of Law and F.R.Civ.P. 65(d). 1/

Two such injunctions are included in the final judgments submitted as part of the appendix to my statement filed under No. 96-CV-030. Neither injunction was served on the individuals enjoined. In my view, such injunctions are the quid pro quo for the defendants' willingness to settle with the plaintiffs' attorneys.

Respectfully,

  
William Leighton

cc : Committee Members  
Melvyn I. Weiss, Esq.  
Sol Schreiber, Esq.

1/

Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

2/

6. Members of the Class and successors and assigns of any of them, are hereby permanently barred and enjoined from instituting, commencing or prosecuting, either directly or in any other capacity, any Settled claims against any of the Released Parties. the Settled Claims are hereby compromised, settled, released, discharged and dismissed on the merits and with prejudice by virtue of the proceedings herein and this Order and Final Judgment. \* \* \*

#1983

Phone : (212) 255-0001  
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96-CV-030



William Leighton  
249 West 11th Street  
New York, N.Y. 10014

December 23, 1996

Peter G. McCabe, Esq.  
Secretary  
Committee on Rules of Practice  
and Procedures of the Judicial  
Conference of the United States  
Washington,, D.C. 20544

Re : 96-CV-030

Supplemental Statement re Proposed  
1996 Amendment to F.R.Civ.P. 23(e)

Dear Mr. McCabe :

I am submitting this Supplemental Statement based on an event that has occurred after the cut-off date (November 8, 1996) for the submission of statements in advance of the Committee's hearing of November 22, 1996 at Philadelphia.

On November 22, 1996, an Order and Final Judgment was entered by the U.S.D.C. for the Middle District of Florida, Tampa Division, in Lopez et al. v. Checkers Drive-In Restaurants, Inc. et al., No. 94-282-CIV T-17C. For ready reference, a copy of that seven page order is attached. Previously, on October 4, 1996, I have submitted to the trial judge a request for leave to be heard as a witness. A copy of that submission is also attached. I have not received a reply to my submission. The submission appears to be referred to in the judgment as "a matter otherwise submitted" but is not clearly identified as such. The trial court has not ruled on the points raised by the submission.

In my view, the entry of this judgment without the taking of the proffered testimony constitutes an abuse of discretion on the part of the trial judge and an error of law. However, the Civil Rules do not provide for appealing the judgment by a nonparty, such as a prospective witness. Nor is the mandamus remedy available to a nonparty, see F.R.App. Proc. 21, as it became effective on December 1, 1996. The result is that a major error of law went into effect without appellate review. Hence the necessity of amending Rule 23(e) in order to prevent the recurrence of similar results.

Sincerely,

A handwritten signature in cursive script that reads "William Leighton".  
William Leighton

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

RICHARD LOPEZ, et al.

Plaintiffs,

v.

CHECKERS DRIVE-IN RESTAURANTS,  
INC.; et al.

Defendants.

CASE NO. 94-282-CIV-T-17C

ORDER AND FINAL JUDGMENT

On this 22nd day of November, 1996, a hearing having been held before this Court to determine: (1) whether this action should be finally certified as a class action pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure on behalf of the Class as defined in this Court's Preliminary Order In Connection With Class Settlement Proceedings, dated September 12, 1996 (the "Preliminary Approval Order"); (2) whether the terms and conditions of the Stipulation and Agreement of Settlement, dated August 22, 1996 (the "Stipulation") are fair, reasonable and adequate for the settlement of all claims asserted by the Class against the Defendants in the Consolidated Amended Class Action Complaint (the "Complaint") now pending in this Court under the above caption, including the release of the Defendants and the Released Parties, and should be approved, and whether the terms and conditions for the distribution of the Checkers Warrants to purchase shares of Checkers common stock pursuant to the Settlement are fair, reasonable and adequate and are in the best interests of the Class;

\*FILM ROLL

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(3) whether judgment should be entered dismissing the Complaint on the merits and with prejudice in favor of the Defendants as against all persons or entities who are members of the Class certified herein and who have not requested exclusion therefrom; and (4) whether and in what amount fees and reimbursement of expenses should be awarded to Plaintiffs' Counsel. The Court having considered all matters submitted to it at the hearing and otherwise; and it appearing that a notice of the hearing substantially in the form approved by the Court was mailed to all persons or entities reasonably identifiable, who purchased Checkers Drive-In Restaurants, Inc. ("Checkers") common stock, during the Class Period, except those persons or entities excluded from the definition of the Class, as shown by the records of Checkers, at the respective addresses set forth in such records, and that a summary notice of the hearing substantially in the form approved by the Court was published in The Wall Street Journal and the Tampa Tribune; and the Court having considered and determined the fairness and reasonableness of the award of attorneys' fees and expenses requested; and all capitalized terms used herein having the means as set forth and defined in the Stipulation.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. This Action satisfies the applicable prerequisites for class action treatment under F.R.Civ.P. 23(a) and (b). The Class as defined in the Stipulation is so numerous that joinder of all members is impracticable, there are questions of law and fact

common to the Class, the claims of the Class representatives are typical of the claims of the Class, and the Class representatives have and will fairly and adequately protect the interests of the Class. Questions of law and fact common to the members of the Class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

2. This Action is hereby finally certified as a class action on behalf of a Class consisting of: "all persons who purchased Checkers common stock on the national securities markets between August 26, 1993 and March 15, 1994. Excluded from the Class are the defendants herein, members of their immediate families, and their heirs, successors and assigns, and any subsidiary or affiliate of or entity controlled by Checkers or any individual defendant herein." Also excluded from the Class are all the persons or entities listed on Exhibit A annexed hereto, each of which has filed a valid request for exclusion from the Class.

3. The Stipulation is hereby approved as fair, reasonable and adequate, and in the best interests of the Class, and the Class Members and the Parties are directed to consummate the Stipulation in accordance with its terms and conditions.

4. The terms and conditions for the distribution of the Warrants to purchase shares of Checkers common stock pursuant to the Stipulation are approved as fair, reasonable and adequate and in the best interests of the Class.

5. The Complaint is hereby dismissed with prejudice and without costs, except as provided in the Stipulation, as against the Released Parties including (1) Checkers and the Individual Defendants, (2) with respect to Checkers, its past or present subsidiaries, officers, directors, agents, employees, insurance carriers, attorneys, investment advisors, affiliates, successors and assigns; and (3) with respect to the Individual Defendants, the legal representatives, heirs, executors, successors in interest or assigns of the Individual Defendants.

6. Members of the Class and the successors and assigns of any of them, are hereby permanently barred and enjoined from instituting, commencing or prosecuting, either directly or in any other capacity, any Settled Claims against any of the Released Parties. The Settled Claims are hereby compromised, settled, released, discharged and dismissed on the merits and with prejudice by virtue of the proceedings herein and this Order and Final Judgment. Settled Claims do not include any claims arising out of the four accounting errors alleged in In re Checkers Securities Litigation, Master File N. 93-1749-Civ-T-17B (M.D. Fla.).<sup>1</sup>

---

<sup>1</sup> In that action, which is asserted on behalf of a class of purchasers of Checkers common stock between November 22, 1991 and October 8, 1993, claims have been asserted pertaining to (a) overstatement of revenue through improper use of percentage of completion accounting method for modular restaurant unit construction; (b) overstatement of revenue through misreporting of temporary transfers of ownership of franchises and modular restaurant units as sales; (c) understatement of expense items relating to warrant costs; and (d) understatement of expense items relating to payroll taxes and related costs. This Settlement shall not be deemed to release or otherwise affect those claims.

7. Neither the Stipulation, nor any of its terms and provisions, nor any of the negotiations or proceedings connected with it, nor any of the documents or statements referred to therein shall be:

a. Construed as or deemed in any judicial, administrative, arbitration or other type of proceedings, to be evidence of a presumption, concession, or an admission by any of the Plaintiffs or the members of the Class or the Released Parties of the truth or falsity of any fact alleged or the validity or invalidity of any claim that has been, could have been or in the future might be asserted in the Actions against the Released Parties, or of any purported liability, or of the deficiency of any defense that has been or could have been asserted in the Actions; or

b. Offered or received in evidence in any judicial, administrative, arbitration or other type of proceeding for any purpose whatsoever, including, but not limited to, as a presumption, concession or an admission of any purported liability, wrongdoing, fault, misrepresentation or omission in any statement, document, report, or financial statement heretofore or hereafter issued, filed, approved or made by any of the Released Parties or otherwise referred to for any other reason, other than for the purpose of and in such proceeding as may be necessary for construing, terminating or enforcing the Stipulation; or

c. Construed as a concession or an admission that the Class Representatives or the Class have or have not suffered any damage; or

d. Construed as or received in evidence as an admission, concession or presumption against the Class Representatives or the Class or any of them that any of their claims are without merit or that damages recoverable under the Complaint would not have exceeded the Settlement Fund.

8. Plaintiffs' Counsel are hereby awarded 30 % of the Cash Settlement Amount, which percentage fee amount the Court finds to be fair and reasonable, and \$ 250,819.35 in reimbursement of expenses, together with interest earned thereon at the same net rate as earned by the Cash Settlement Amount from the date such Cash Settlement Amount was funded to the date of payment of such amounts. In addition, Plaintiffs' Counsel are awarded 30 % of the Warrants. The cash and Warrants shall be paid to Plaintiffs' Co-Lead Counsel from the Gross Settlement Fund and shall be allocated among counsel for Plaintiffs' Counsel in a fashion which, in the opinion of Plaintiffs' Co-Lead Counsel, fairly compensates counsel for the plaintiffs and the Class for their respective contributions in the prosecution of the litigation. In setting the foregoing counsel fee, as a percentage of the common fund recovery obtained for the Class herein, this Court has considered the following factors set forth in Camden I Condominium Association, Inc. v. Dunkle, 946 F.2d 768 (11th Cir. 1991): (1) the novelty and complexity of the federal securities law issues involved; (2) the favorable result obtained for the Class; (3) the fact that this action was prosecuted for more than two years on a contingent fee basis; (4) the experience of counsel on both sides; and (5) the fee

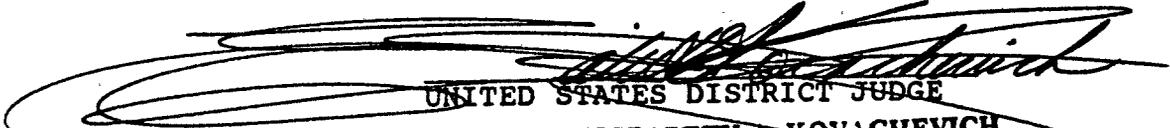
customarily awarded for such litigation in this District and other courts in this Circuit.

9. Plaintiffs Richard Lopez, Thomas W. Bianchi, Jerome Robbins, Donna Greenberg, Sam Einstein, Paul R. Jordan and Greg Fehrenbach are hereby each awarded the sum of \$ 2,500<sup>00</sup> in consideration for their time and effort in pursuing this matter, which sums shall be paid to the named plaintiffs from the Gross Settlement Fund.

10. Exclusive jurisdiction is hereby retained over the Parties and the Class Members for all matters relating to this litigation, including the administration, interpretation, effectuation or enforcement of the Stipulation and this Order and Final Judgment.

11. Without further order of the Court, the Parties may agree to reasonable extensions of time to carry out any of the provisions of the Stipulation.

DONE AND ORDERED at Tampa, Florida, this 22<sup>nd</sup> day of November, 1996.



UNITED STATES DISTRICT JUDGE

ELIZABETH A. KOVACHEVICH  
UNITED STATES DISTRICT JUDGE

Copies furnished:

See attached Service List

17662\final.jdg

Phone : (212) 255-0001  
Fax : (212) 255-5899

William Leighton  
249 West 11th Street  
New York, N.Y. 10014

October 4, 1996

Hon. Elizabeth A. Kovachevich  
U.S.D.J.  
U.S.D.C., Middle District of Florida  
611 North Florida Ave.  
Tampa, FL 33602

Re : Richard Lopez et al. v. Checkers Drive-In  
Restaurants, Inc. et al. 94-282-CIV-T-17C  
(The "Checkers Drive-In" litigation)

Your Honor:

A "Summary Notice of Pendency of Class Action, Proposed Settlement and Settlement Hearing", copy attached, has been published in the Wall Street Journal respecting the above litigation. I am submitting to Your Honor in accordance with F.R.Civ.P. 5(e) <sup>1/</sup> and respectfully request to be heard as a witness on the pending motions before the Court, F.R.Civ.P. 43(e). <sup>2/</sup> These motions are scheduled to be heard on November 22, 1996 at 10:30 A.M. The Court has the unquestioned power to call a witness whose testimony is necessary for the resolution of the issues before it, F.R. Evidence 614(a). <sup>3/</sup> The authority to rely on such evidence is F.R. Evidence 701. <sup>4/</sup>

As I see it, the issues before the Court will include (a) whether evidence should be received to show that the plaintiff's counsel, Milberg Weiss Bershad Hynes & Lerach, LLP, ("Milberg Weiss") is in breach of fiduciary duty to the shareholders of American Brands, Inc. and has been so since at least December, 1991, (b) whether, Milberg Weiss should be denied attorneys' fees and reimbursement of expenses if it has failed to disclose to this Court, in its application for counsel fees, such breach of fiduciary duty, (c) whether Milberg Weiss should be ordered to mail a copy of the judgment to be entered following the November 22 hearing to each and every shareholder of Checkers Drive-In since the judgment may contain a permanent injunction. <sup>5/</sup>

In 1988, Milberg Weiss was lead counsel to the putative plaintiffs in a class action in a Delaware state court at Wilmington, DE, entitled In re American Brands, Inc. Shareholders Litigation, C.A. 9586. That action was consolidated with a derivative action, In re American

Brands, Inc. Derivative Litigation, C.A. 9616 in the same court. The class action had been instituted for the purpose of providing a basis to enjoin the shareholders of American Brands, Inc. ("AMB") from ever pursuing claims in any court relative to a fraudulent arrangement between AMB and a company then known as E-II Holdings, Inc. The derivative action was intended to provide releases to the officers and directors of AMB from any derivative claims resulting from the AMB-E-II transaction. (Presumably, such a release would have to be signed by anyone filing a proof of claim in Checkers Drive-In).

E-II had borrowed on the public markets some \$1,500,000,000 by means of notes and debentures <sup>6/</sup> and had used a part of the proceeds for the purpose of purchasing a block of AMB stock. It had no independent sources of income from which to pay the enormous (\$200 million yearly) interest charges. E-II also sought to nominate six persons as AMB directors. This has led to litigation in a Delaware federal court, No. 88-37, American Brands, Inc. and AMER Holdings, Inc. v. E-II Holdings, Inc. and AMB Holdings, Inc. This suit was discontinued following AMB's arrangement with E-II which Milberg Weiss ostensibly complained of in the shareholders' litigation.

I became a shareholder of record of AMB in January, 1988 and continue to be such. When I filed a motion to intervene, <sup>7/</sup>, Milberg Weiss responded by securing a Delaware court order for the taking of my deposition at their offices in New York City. When the order, as enforced ex parte by a New York state court judge, was served on me, I moved to quash. The motion came on for hearing before another judge who changed the venue of the deposition from the offices of Milberg Weiss to the courthouse at 111 Centre Street in Manhattan. Whereupon Milberg Weiss failed to appear at the deposition and left the matter to other attorneys. This was a taste of Milberg Weiss' hit-and-run tactics.

When I moved to intervene, I did not know that Milberg Weiss was preparing to enter into a "stipulation of settlement" with AMB that provided Milberg Weiss with a \$2,000,000 fee "not to be opposed" by AMB. Nor did I then know that E-II was insolvent, on the verge of bankruptcy and was paying interest on its debt from the principal it had borrowed. Nor did I know that, since early 1988, a dispute had erupted between the

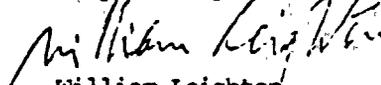
New York State court as required by the Uniform Enforcement of Foreign Judgments Act, CPLR 5408. As a result, the Delaware judgment is not effective in New York State, i.e. the State that has licensed Milberg Weiss attorneys to practice law.

It is my position that Milberg Weiss has had since December 20, 1991, and continues to have, a fiduciary duty to AMB's shareholders to retrieve the \$250,000,000 for the benefit of that corporation since they have conducted discovery with respect to the sale of E-II by AMB. As far as I know, Milberg Weiss has not done anything to recoup that huge sum of money plus the interest lost due to the "cancellation" of the preferred. It has since engaged in other class actions including Checkers Drive-In, where it has sought and obtained the status of fiduciary for other groups of shareholders.

The newspaper notice states that Checkers Drive-In has been certified as a class action by order dated September 12, 1996. Since the AMB-E-II episode may not be disclosed in the memoranda in support of the applications for counsel fees and expenses, it would appear that the appointment of Milberg Weiss as class counsel has been improvidently made. For this reason, the appointment should be revoked. I have the evidence upon which such a decision could be based.

For my part, I have worked very hard to prevent the AMB settlement from becoming effective. On my appeal to the Delaware Supreme Court from the final judgment approving the settlement, that court determined, on May 25, 1990, that my appeal had asserted (1) the plaintiffs' lack of standing; (2) the Court of Chancery's poor exercise of judgment; (3) various violations of Delaware corporation law; (4) various violations of federal securities law; and (5) a collusion-conspiracy theory between plaintiffs and defendants. There was no reference to the parallel Harris Trust and Savings Bank litigation, which had been initially decided by a Chicago federal court on September 5, 1989.<sup>8/</sup> The record before the Delaware supreme court did not show that American Brands stood to lose and did lose \$250,000,000 after the Delaware settlement was permitted to become effective. None of these issues were addressed by the Delaware supreme court

Respectfully,

  
William Leighton

cc : Michael C. Spencer, Esq.  
Milberg Weiss Bershad  
Hynes & Lerach LLP  
One Pennsylvania Plaza  
New York, N.Y. 10119

- 1/ F.R.Civ.P. 5(e) states, in pertinent part :  
The filing of papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk.
- 2/ F.R.Civ.P. 43(e) states :  
Evidence on Motions. When a motion is based on facts not appearing of record, the Court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition.
- 3/ F.R. Evidence 614 states, in pertinent part :  
Calling and Interrogation of Witnesses by Court  
(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.
- 4/ F.R. Evidence 701 states, in pertinent part :  
Opinion Testimony of Lay witnesses  
If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.
- 5/ F.R.Civ.P. 65(d) states, in full :  
Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.
- 6/ In May, 1993, these notes and debentures were cancelled and declared to be null and void by order of the bankruptcy court. They were

also involved in the Harris Trust case, see infra. Note 8 and in the McCrorry Parent Corporation bankruptcy, No. 91 B 15367 (CB), Milberg Weiss have entered their appearance in McCrorry on November 30, 1992 on behalf of other persons.

7/

The motion was denied by the Delaware Chancery court on a determination, among others, that "Leighton (has) offered no evidence in support of his claim that the existing plaintiffs and their counsel were not adequately representing the interests of AMB's stockholders."

The inadequacy of the representation became apparent five years later when E-II's bankruptcy disclosure statement dated February 17, 1993 became a public record.

8/

This litigation commenced less than three months after the Delaware settlement, see Harris Trust and Savings Bank et al. v. E-II Holdings, Inc. et al., 722 F. Supp. 429 (N.D. Ill., 1989), affirmed, 926 F. 2d 636 (C.A. 7, 1991). Assuming the truth of the Trustees' allegations on their motion to dismiss, it would follow that the 1988 Delaware stipulation of settlement between Milberg Weiss and AMB had been fraudulent.

9/

E-II's bankruptcy Disclosure Statement dated February 17, 1993, states, at page 17 :

"On July 1, 1988, McGregor Acquisition, then controlled by Riklis, purchased from American Brands all of the then outstanding shares of Old Common Stock of the Debtor (i.e. E-II). The price paid by McGregor Acquisition to American Brands was approximately \$50 million in cash, a promissory note having a principal amount of approximately \$900 million and preferred stock of McGregor Acquisition having a stated value of \$250 million, bearing (a) no dividends during the first year; (b) 5% during the second year; (c) 10% during the third year; (d) 15% during the fourth year; and 20% thereafter (the McGregor Acquisition Preferred Stock).

No dividends on the McGregor Acquisition Preferred Stock were ever paid. The outstanding shares of McGregor Acquisition Preferred Stock were redeemed by McGregor Acquisition on December 20, 1991 for a nominal consideration (i.e. \$1.00) plus payment of fees and expenses associated with the redemption totalling approximately \$100,000."

As of March 14, 1996, Riklis was alive, well and involved in yet another massive bankruptcy in the U.S. Bankruptcy Court for the Southern District of New York, the McCrorry case, supra, Note 6.

10/

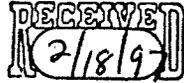
The Final Order and Judgment of October 28, 1988 states :

(3.) Plaintiffs in the Actions, all past and present stockholders of American Brands, all other members of the class, and American Brands and all other members of the class, and American Brands and all persons suing on behalf of or as successor in interest to American Brands or its stockholders, are hereby permanently barred and enjoined from instituting or prosecuting any action, either directly, representatively, or in any other capacity, asserting claims against any defendants, or against any past or present officer, director, employee, agent, attorney, investment banker, commercial banker, financial advisory, representative, affiliate or subsidiary of any defendants, or any heir, successor or assign

of any of them, or against anyone else, in connection with, or that arise now or hereafter out of or relate to any matter, transaction or occurrence referred to in any of the complaints or the Stipulation (except for compliance with the Settlement).

No provision was made for service of this injunction upon those enjoined and no such service was made. Similar provisions could be inserted in the proposed final judgment to be submitted to this Court on November 22, 1996.

Phone : (212) 255-0001  
Fax : (212) 255-5899



96-CV-030

*Supplemental  
Conspire*  
William Leighton  
249 West 11th Street  
New York, N.Y. 10014

February 12, 1997

Peter G. McCabe, Esq.  
Secretary  
Committee on Rules of Practice  
and Procedures of the Judicial  
Conference of the United States  
Washington, D.C. 20544

Re : No. 96-CV-030  
Submission of Found Document

Dear Mr. McCabe :

I have found an affidavit dated March 14, 1989 sworn to by a member of Milberg Weiss Bershad Specthrie & Lerach, ("Milberg Weiss") which I believe to be pertinent to the matters before the Committee. A copy of this affidavit and its enclosure are attached.

The Milberg Weiss affidavit in the Union Carbide case, attached, states at paragraph (7) :

"Milberg Weiss has incurred a total of \$365,592.57 in unreimbursed expenses, in connection with this litigation. Attached hereto as Exhibit C is a chart reflecting the unreimbursed expenses,"

i.e. expenses not paid by the class representatives in connection with that litigation.

This is an admission that Milberg Weiss has financed the Union Carbide litigation and was the real party in interest in that litigation since it claimed a "lodestar amount" of \$1,312,960.25 in addition to its unreimbursed expenses.

F.R.Civ.P. 17(a) states, in pertinent part :

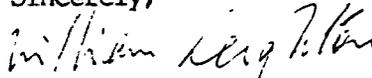
(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. \* \* \* No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; \* \* \*

F.R.Civ.P. 23, which is before the Committee, does not require that Rule 17(a) be complied with as a condition precedent to the commencement or continuation of a class action. Certain law firms, like

Milberg Weiss, are working on a contingency basis and risk their own resources in the prosecution of class actions. Some of these law firms have filed statements under 96 Civ-053, 048, 055, 046, 059 and 031.

Milberg Weiss has filed its statement under 96 Civ-050. That document does not disclose its interests in cases arising under Rule 23.

Sincerely,



William Leighton

Enclosure

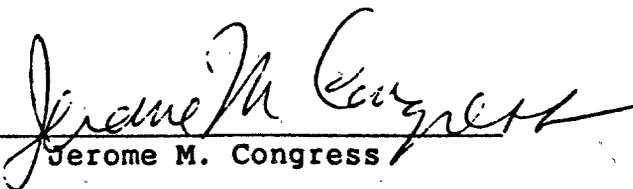


in the Superior Court of the State of California, for the County of Los Angeles. That action was removed by defendants to the United States District Court for the Central District of California. Upon a decision denying plaintiffs' remand motion and ruling that the action should be transferred, plaintiffs voluntarily dismissed the pending action and refiled the action in this Court.

3. Subsequent to the commencement of litigation in this Court, Milberg Weiss took the lead in organizing and prosecuting this litigation. We had a primary responsibility in all aspects of the case, including drafting of pleadings and of discovery requests; reviewing documents produced by defendants and third parties; taking depositions (Milberg Weiss conducted the depositions of more than 20 witnesses); researching the relevant law; drafting portions of plaintiffs' papers in response to defendants' motions to dismiss and for summary judgment, and participating in the finalization of those papers; participation in strategy discussions; conducting settlement and other negotiations with defendants; drafting settlement papers; communicating with class members with respect to a proposed plan of allocation of the settlement fund; and presentations at Court hearings.

4. The chart attached hereto as Exhibit A presents a summary of the time, by category, spent by Milberg Weiss attorneys and paralegals at rates which were in effect at

expense vouchers and related bookkeeping entries and accurately record the expenses incurred.

  
Jerome M. Congress

Sworn to before me on this  
14<sup>th</sup> day of March 1989

  
Notary Public

GEORGE A BAUER III  
Notary Public, State of New York  
No. 41-4713959  
Qualified in Queens County  
Term Expires November 30, 1990  
N.Y.S. 46

UNION CARRIDE SECURITIES LITIGATION LODESTAR  
MILBERG WEISS BERSHAD SPECTHRIE & LERACH

ATTORNEY	1	2	3	4	5	6	7	8	TOTAL HOURS	HOURLY RATE	LODESTAR
MELVYN I. WEISS		1.00			1.55		20.30		22.85	\$350.00	\$7,997.50
WILLIAM S. LERACH	61.70	14.50	10.10						86.30	\$325.00	\$28,047.50
DAVID J. BERSHAD	2.60	5.70	24.90	3.50	58.75		53.80		149.25	\$300.00	\$44,775.00
JARED SPECTHRIE							3.00		3.00	\$300.00	\$900.00
LAWRENCE MILBERG	14.70						24.55		39.25	\$295.00	\$11,578.75
RICHARD M. MEYER					2.00		3.20		5.20	\$285.00	\$1,482.00
SOL SCHREIBER	186.50	798.50	48.00	6.50	87.00		39.50		1,166.00	\$280.00	\$326,480.00
JEROME M. CONGRESS	397.10	783.90	82.80	30.75	253.00		107.90		1,655.45	\$260.00	\$430,417.00
ROBERT P. SUGARMAN							3.70		3.70	\$235.00	\$869.50
ARNOLD N. BRESSLER					4.50		2.60		7.10	\$230.00	\$1,633.00
EUGENE MIKOLAJCZYK	73.30	25.30	20.30						118.90	\$215.00	\$25,563.50
ROBERT A. WALLNER	510.30	1,256.05	32.15		36.50		34.30		1,869.30	\$185.00	\$345,820.50
GEORGE A. BAUER III	150.30	10.00					2.00		162.30	\$180.00	\$29,214.00
GEORGE COHEN							2.30		2.30	\$180.00	\$414.00
MARTHA EVANS	13.80		8.00				1.80		23.60	\$165.00	\$3,894.00
JEFFREY N. BERNSTEIN	21.50								21.50	\$165.00	\$3,547.50
JOYCE FITZPATRICK	37.00	4.00							45.20	\$140.00	\$6,328.00
PARALEGALS	75.20	482.25		104.75			4.20	14.70	676.90	\$65.00	\$43,998.50
<b>TOTALS:</b>	<b>1,544.00</b>	<b>3,381.20</b>	<b>226.25</b>	<b>145.50</b>	<b>443.30</b>	<b>0.00</b>	<b>303.15</b>	<b>14.70</b>	<b>6,058.10</b>		<b>\$1,312,960.25</b>

CATEGORIES:

- 1 - PLEADINGS, MOTIONS, ETC.
- 2 - DISCOVERY, INVESTIGATION, ETC.
- 3 - COURT APPEARANCES
- 4 - CLASS ACTION PROCEDURES
- 5 - SETTLEMENT NEGOTIATIONS, ETC.
- 6 - SETTLEMENT PROCEDURES
- 7 - STRATEGY & ANALYSIS
- 8 - MISCELLANEOUS

#2170

RECEIVED  
11/2/96  
96CV031

Comments on Amendments to Rule 23  
November 1996

Susan P. Koniak  
Professor of Law, Boston University

031  
96-CV-031

Introduction

The Draft Note to Proposed Rule 23 begins: "Class action practice has flourished and matured under Rule 23 as it was amended in 1966." Beginning with this upbeat vision of the world of class action practice, the Committee proposes what it describes as "modest" changes because, in the words of the Draft Note, "[t]he experience of more than three decades, however, has shown ways in which Rule 23 can be improved."

In contrast to the view of class action practice contained in the Draft Note, there is the world of class action practice described by the press<sup>1</sup>--a world in which abuse flourishes, a world in which lawyers' bank accounts mature and grow, a world in which defendant-corporations make sweet deals to dispose of serious liability at bargain-basement rates, a world in which class members end up with useless coupons or pennies on the dollars as compensation for their alleged injuries, a world in which respect for our judicial system erodes as story after story of abuse is reported and meaningful reform does not seem to be on the agenda. The so-called "modest" amendments proposed by this

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<sup>1</sup> See e.g., Scot J. Paltow, Judge Acts to Settle Prudential Class Action; Courts; Controversial Ruling, Which Would Affect 750,000 Policy Holders in California [and 10.7 million nationwide], Was Made in Secret, L.A. Times, Oct. 31, 1996 at D1; Schmitt, The Deal Makers: Some Firms Embrace the Widely Dreaded Class-Action Lawsuit, Wall St. J., July 18, 1995 at A1; Barry Meier, Math of a Class-Action Suit; 'Winning' \$2.19 Costs \$91.33, N.Y. Times, Nov. 21, 1995 at A1; Barry Meier, Fistful of Coupons, N.Y. Times, May 26, 1995 at D1; Scot J. Paltow, Lawyers to Get 25% of Prudential Class-Action Settlement: Securities; Judge Apparently Ignores Complaints from SEC and California Officials that the Fee Requests Were Excessive, L.A. Times, May 20, 1994 at D2; Kurt Eichenwald, Millions for Us, Pennies for You, N.Y. Times, Dec. 19, 1993 at ss 3.

Committee do not address the many problems that plague class action process today--collusive settlements, inadequate representation of class members' interest, incomprehensible notices and judges with too little information to make informed judgments on the settlements they are supposed to review--instead proposed Rule 23(b)(4) invites more abuse by broadly licensing the settlement of claims en masse that would not be appropriate to lump together for purposes of trial.

Rule 23(b)(4) should be rejected, and this Committee should turn its energy toward cleaning up class action practice, not expanding its reach, before this valuable and important tool for achieving justice--the class action device--becomes so discredited that responsible persons find themselves advocating the elimination of the device altogether.

#### The Experiences that Inform My Testimony

Some seek to dismiss the criticisms and proposals of academics by arguing that all or most of us live in some alternate universe of experience, the proverbial ivory tower that supposedly looms so far above the real world that those within the tower can no longer see the world or comment intelligently upon it. I am a tenured law professor at Boston University Law School, but I live, not in some sheltered environment, but in the same real world inhabited by the lawyers who will testify here today. My criticisms of this Committee's proposals stem from my experience of actual class action practice, not from academic musings or abstract concerns. Since 1987, I have taught, researched and written on the law that governs lawyers, sometimes referred to as legal ethics or professional responsibility. I also teach and write on constitutional law.

My experience with class actions began in the summer of 1993 when I was retained as an expert witness on the representation afforded class members by class counsel in the case now-known as

Georgine v. Amchem Products, et al.<sup>2</sup> I was paid for my work on that case and have recently testified for the objectors in another class action case now pending before another federal district court. I was paid for my involvement in that case as well. Aside from those two instances, I have received no money for my work in this area.

After my involvement as an expert witness in Georgine, I wrote an article on what I perceived-to-be, and described as, the corruption and abuse in that case and the threat to the integrity of the judicial system that Georgine and its progeny posed.<sup>3</sup> As that Article circulated in draft form and particularly after it was published, I began to be contacted by plaintiffs' lawyers, defendants' lawyers, legislators and members of the press with questions about other class actions. Class action notices and court opinions approving settlements were sent to me involving class actions pending all over the country. Those notices and opinions represented a wide array of cases ranging from large actions that received national attention to smaller actions that barely registered on anyone's radar screen. In this ad hoc manner I developed quite a private library on class action practice and one not readily duplicated because many court opinions approving class actions are not published and class action notices are likewise not always easy to come by. These documents were vitally important in shaping my understanding of the world of class action practice in the 1990's and in educating me on the problems of abuse.

As important as those documents were the stories I heard from the various participants in the class action process: the concerns expressed by the players in the system, and the questions they asked me. I listened as lawyers representing or seeking to represent classes of people expressed their interest in representing as big and undivided a class as possible, which

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<sup>2</sup> 83 F.3d 610 (3d Cir. 1995), cert. granted, Nov. 1, 1996.

<sup>3</sup> Susan P. Koniak, Feasting While the Widow Weeps: Georgine v. Amchem Products Inc., 80 Cornell L. Rev. 1045 (1995).

would mean bigger fees and would make it easier to cut a deal with the defendant whose interest is always in wrapping up as much liability as possible in one fell swoop (with as few lawyers as possible on the other side to muck things up). I listened to defense lawyers explain the importance of finding methods to lock class members into settlements--methods to transform opt-out classes into non-opt-out classes to ensure as much "finality" as possible for corporate clients.<sup>4</sup> And I listened as lawyers whose practices chiefly involve defending corporations said--what they will only say in confidence and off-the-record--that they fear that the current trend in class action settlements will mean that their practices will devolve into a search for the friendliest plaintiffs' lawyer: the lawyer most willing to sell-out class members in exchange for fat fees (preferably a lawyer with enough of a reputation to make the deal look plausible to a court and other observers).

I have listened to plaintiffs' lawyers looking for ways to attack a proposed class settlement and have discerned that many of those would-be-objectors seemed concerned, not with the paltry treatment provided the class, but with the fact that they themselves have been cut out of the action. I have watched some of those would-be-objectors quietly disappear and have discovered that some substantial number are all too happy to disappear once class counsel and the defendant arrange to pay them something to go along with the settlement, which is all that some of them were after in the first place.

I have read notice after notice that with my law training and experience I could barely understand and which the average citizen could not hope to understand--incomprehensible notices approved as the best practicable notice by state and federal

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<sup>4</sup> Thus, among the many problems I see with proposed Rule 23(b)(4) is the omission from the text of the rule of any mention of class members' right to opt out of the proposed settlement. I understand that the Draft Note asserts that an opt-out right is guaranteed in 23(b)(4) situations, but nothing in the Note is binding on courts as the use of Rule 23 in mass tort actions demonstrates.

judges alike. I have talked to average people, who have been involved in class actions, and who have found the experience to be disillusioning at best and downright appalling in some cases. And I have talked to members of the judiciary, who themselves can scarcely believe how our legal system has been transformed by class action mania and who worry now as much about class action abuse as they once worried about docket overload.

These experiences with the real world of class action abuse bring me here today, not abstract academic concerns. These experiences prompted me to help organize 144 law professors to write the Standing Committee to urge that Committee to refuse to send this Committee's proposed amendments out for public comment. These experiences have inspired me to write, not just the Article on Georgine, but two other works on class action abuse--one already published<sup>5</sup> and one to be published soon in the Virginia Law Review.<sup>6</sup> I have worked with Senator Cohen's office on legislation to make the promise of notice more meaningful and to help ensure that government agencies are kept aware of the class settlements pending before the many courts in this nation. I have spoken to numerous groups on reforming class action process, including most recently a meeting of the Consumer Fraud section of the National Association of Attorneys General.

Finally, my efforts in this area have not been inspired by a desire to get rich. I receive on average about one call every 10 days from some lawyer in need of an expert witness or a consultation on some matter of professional responsibility and turn down almost all such requests for my services. As I have already mentioned, I have only testified in two class action cases, despite many such requests, and aside from the class action area, I have testified as a paid expert in only two other

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<sup>5</sup> Susan P. Koniak, Through the Looking Glass of Ethics and the Wrong with Rights We Find There, 9 Geo. J. of Leg. Ethics 1 (1995).

<sup>6</sup> Susan P. Koniak and George M. Cohen, Under Cloak of Settlement, Va. L. Rev. (forthcoming 1996).

cases. I avoid testifying for money because even if one is careful to offer only such testimony as one can stand by proudly, testifying with any frequency tends to tarnish one's reputation and credibility and my reputation and credibility are too important to me to risk even false accusations that my opinion is for sale.

My commitment to exposing the abuse in the system and calling for reform strikes many as conduct unbecoming a true academic, who is supposed to see gray everywhere and maintain an air of detachment toward the subject one studies. In other words, my participation in this process is not a career-enhancing move. My motive for being here is simple: I think the proposed amendments, particularly proposed Rule 23(b)(4) but also Rule 23(b)(3)(f),<sup>7</sup> are bad for the judicial system and for the American people.

Having set forth a summary of my experience in the world of class actions and discussed possible interests that might color my testimony,<sup>8</sup> I now proceed to the merits of the matter before

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<sup>7</sup> I have limited my comments here to Rule 23(b)(4), but I want to endorse the comments of Professor John C. Coffee on Rule 23(b)(3)(f), which stress the importance of deterrence in the court's consideration of whether to certify a settlement class and not just the aggregate sum claimed as damages on behalf of the class. Moreover, I reaffirm the views expressed in the letter from the Steering Committee in Opposition to the Proposed Amendments to Rule 23 on the problems with Rule 23(b)(3)(f) and with Rule 23(b)(4).

<sup>8</sup> While it may be impolite to mention, it is nonetheless true, as every judge and lawyer knows, that the interest that witnesses have in the resolution of a matter is one factor to consider in assessing their testimony. That is why I have bothered to discuss in some detail the possible interests that might be thought to color my testimony and my view of class action abuse. Other witnesses may tell this Committee that class action practice is largely free of abuse and when abuse is present that judges detect and stamp it out almost without fail. In assessing the credibility of that tale in comparison to the tale I tell, I ask this Committee to be realistic about the motives of all those who testify here: the academics, the lawyers and the judges alike. When one stands to make millions and

this Committee.

Proposed Rule 23(b)(4) Does Not Codify the Law Expressed in Weinberger v. Kendrick and In Re Beef Industry; It Changes that Law.

To decide whether it is wise to license, prohibit or restrict settlement classes, one should begin with some definition of what a settlement class is. At least two plausible definitions of a settlement class action exist. The first, which I shall call the benign settlement class, can be defined as follows: a class action that settles and which looks to the judge, who is asked to accept the settlement, like a class that could have been certified for trial but because the defendant settled before having raised all possible objections to the propriety of class certification is a class that the judge cannot say (with the certainty provided by adversary process) is a class that would definitely qualify for class status as a litigation class. The second form of a settlement class, which I shall call the malignant form, can be defined as follows: a class action that settles and which the judge (and often the parties) believe is one that could not possibly qualify for certification as a litigation class. These are two very different animals. And the first serious problem with the Committee's proposed Rule 23(b)(4) is that it licenses the malignant form, a new device, by conflating and confusing it with the older more benign version.

The Committee's Draft Note discusses Rule 23(b)(4) as if it licensed only what has long been allowed by appellate courts,

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millions of dollars on a proposed rule change, which is the case for some plaintiffs' lawyers and the corporate defendants whose lawyers will speak here today--or even more modest, but still substantial sums, as may be the case for some others who will offer testimony, those who have a financial interest in being appointed to serve as a special master, trustee or guardian for the class-- while it may be impolite to suggest that their views on this rule are colored by financial interest, it is nonetheless sensible. In my opinion the Committee has an obligation to take the interests of the witnesses into account and for that reason I have discussed the interests people might ascribe to me.

citing Weinberger v. Kendrick<sup>9</sup> and In re Beef Industry Antitrust Litigation.<sup>10</sup> The Committee's presentation suggests that all Rule 23(b)(4) does is reinstate the law as it existed prior to two decisions by the Third Circuit: Georgine and In re General Motors Pick-Up Truck Fuel Tank Litigation.<sup>11</sup> But this is not true. Neither Weinberger nor In re Beef Industry licensed courts to settle as class actions matters that could not possibly be tried as class actions.<sup>12</sup> They licensed, cautiously and only with appropriate safeguards, what I have labeled here, the benign form, not its new malignant cousin, which is the device that the Third Circuit rejected in Georgine. Consider what the Second Circuit actually said in Weinberger:

Although we thus refuse to adopt a per se rule prohibiting approval when a class action settlement has been reached by means of settlement classes certified after the settlement, with notice simultaneous with that of the settlement, we emphasize that we are permitting, not requiring, use of this procedure, and also underscore that ... district judges who decide to employ such a procedure are bound to scrutinize the fairness of the settlement agreement with even more than the usual care. This is necessary in order to meet the concerns, noted in the Manual, regarding the possibilities of collusion or of undue pressure by the defendants on would-be class representatives. Accordingly, we will demand

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<sup>9</sup> 698 F.2d 61 (2d Cir. 1982).

<sup>10</sup> 607 F.2d 167 (5th Cir. 1979).

<sup>11</sup> 55 F.3d 768 (3d Cir. 1995).

<sup>12</sup> This Committee's Draft Minutes state: "A class that could not be certified for litigation because of choice-of-law problems, general problems of manageability, the need to explore many individual issues, or the like, may profitably be certified for settlement. Subdivision (H) is the law everywhere, with the possible exception of the Third Circuit." (Emphasis added). The first sentence is undoubtedly true, but to the extent that the second sentence is meant to imply that the law everywhere but the Third Circuit already allowed the settlement of cases that "could not be" litigated that statement is false.

a clearer showing of a settlement's fairness, reasonableness and adequacy and the propriety of the negotiations leading to it in such cases than where a class has been certified and class representatives have been recognized at an earlier date. As discussed below, we are satisfied that the settlement in this case meets these requirements.<sup>13</sup>

Nowhere in the Weinberger decision does the court intimate that it is licensing the approval of settlements in cases in which it is clear that the class would not be certifiable for trial purposes.

In re Beef Industry concentrates on whether a court can certify what it calls "a tentative settlement class" to facilitate early settlement negotiations without requiring a defendant either to waive possible objections to certification or to wage a costly fight on certification when settlement might be a more efficient resolution. In that case the Fifth Circuit said it agreed with the following definition of a settlement class provided by Professor Newberg: "On analysis, the temporary settlement class is nothing more than a tentative assumption indulged in by the court to facilitate the amicable resolution of the litigation, rather than as some sort of conditional class ruling under Rule 23 criterion."<sup>14</sup>

It makes little sense to suggest that what the Fifth Circuit

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<sup>13</sup> 698 F.2d at 73 (citation omitted).

<sup>14</sup> In re Beef Industry, 607 F.2d at 177 (citing 3 Newberg, Class Actions § 5570c at 476 and stating it agreed with this description) (emphasis added). While this case, unlike Weinberger, does suggest that certification of a settlement class might be appropriate when "a court might have had more difficulty reaching this determination in a different context," this too is a far cry from the statement that a settlement class is appropriate when a court could not reach the determination that the class could be certified for trial, a possibility under Proposed Rule 23(b)(4). Having "more difficulty" and knowing that the class could not be certified for trial are different propositions.

meant was that courts should engage in "tentative assumptions," that those courts knew could not possibly be sustained, i.e., that courts should assume class actions to be certifiable for trial that they understood could not possibly be certified for trial. Yet, that is exactly what proponents of Rule 23(b)(4) would have this Committee believe when they cite Weinberger and In re Beef Industry as supporting the settlement of a class action, like the class action in Georgine, which all the parties and the court in that case understood could not possibly survive certification as a litigation class.<sup>15</sup> More troubling, the Committee's Draft Note suggests that Weinberger and In re Beef Industry say something neither case says when it cites those cases as supporting the broad rule proposed here.<sup>16</sup>

And make no mistake about it: the proposed rule does license the malignant form of settlement class.<sup>17</sup> Indeed, that appears to be its purpose in that it is justified as a means of overruling the holding in Georgine. If all the Committee meant to do was to reaffirm the legitimacy of the benign form of class action, it should reject the proposed amendment on the ground that the proposed amendment licenses actions not intended by its

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<sup>15</sup> "We agree that mass-tort cases are too big and too unmanageable to be tried, but that doesn't mean that they can't be settled." Edward Felsenthal, Court to Consider Asbestos Settlement, Wall St. J., Nov. 4, 1996 B11 (quoting John Aldock, who represents the defendant-group in Georgine).

<sup>16</sup> The fact, cited in the Committee's Draft Minutes, that the Federal Judicial Center's study found that of 150 certified classes, 60 were certified for settlement only, does not support the proposition that the law everywhere prior to Georgine licensed the settlement of cases that could not be tried. Almost all of those 60 cases might fall into the category of what I have been calling the benign form of settlement class. I would not, however, be surprised if most of the courts in those cases did not bother with Weinberger's requirement of special scrutiny, anymore than the proposed rule and Draft Note does, but that should be corrected not endorsed.

<sup>17</sup> See the Committee's Draft Minutes, which make this intention relatively clear, as well as the Committee's Draft Note with its reference to undoing Georgine.

drafters. Moreover, if all this Committee intended to do was to reaffirm Weinberger and In re Beef Industry benign form of settlement class actions, it should do so with the safeguards of Weinberger in place. Neither the Committee's Draft Note or Minutes provides any justification for omitting mention of the Weinberger's rule that a "clearer showing of a settlement's fairness, reasonableness and adequacy and the propriety of negotiations leading to it ..." is required when certification is uncontested.<sup>18</sup>

The New Form of Settlement Class Actions Licensed by the Proposed Rule Should Not Be Licensed

Putting aside, the question of what Weinberger and In re Beef Industry actually license and the related question of how far-reaching the proposed amendment actually is, it is unwise in the extreme for this Committee to license the new form of settlement class, which I call and believe to be, malignant. To encourage courts to accept settlements in actions that could not be tried is to encourage settlements in which all the leverage is with the defendant and none with the plaintiffs' representatives. One of the dangers identified by the court in Weinberger of benign settlement class actions was that defendants would place "undue pressure ... on would-be class representatives."<sup>19</sup> The Committee's rule ensures that just such "undue pressure" will be present. Why? Because the plaintiffs' lawyer who walks away from a bad deal in a non-triable class suit walks away from any possibility of collecting class counsel fees. True, he walks away with the inventory of cases that brought him to the table in the first place, but by refusing to sell-out his clients on the cheap along with the rest of the class he gives up all chance of representing the larger group (whose cause can only be settled but not tried). Moreover, he risks losing even his inventory of cases and his future business in this area, when a more compliant plaintiffs' lawyer sits down and cuts a deal the first lawyer

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<sup>18</sup> Weinberger, 698 F.2d at 73.

<sup>19</sup> Id.

would not accept.

What are the first lawyer's options then? To mount a virtually hopeless, and surely expensive, challenge to the settlement by encouraging his clients to stay in the bad deal (against his real judgment), so that he might file objections? Aside from the obvious ethical problems with using one's clients in this fashion, it is also irrational to pursue such a course of conduct given how few settlements are actually rejected by courts, how little information is typically available to objecting counsel, how enormously expensive objecting can be and how little is to be gained by objecting counsel even if they succeed in scuttling a deal. Better to threaten such a move and accept a cooperating counsel role that gives one a share, however small, of the spoils instead of incurring the costs of actually objecting.

The extortion I have described by pretend-objectors is not theoretical. I have talked to a number of lawyers that seemed to be contemplating just such a gambit. And how is a judge, even one well-motivated to scrutinize the deal in front of her, to discern that behind the scene objectors have extorted payments or been bribed by the settling parties to drop what would have been legitimate objections? The proposed rule is an invitation to just such sell-outs, bribery and extortion. Are the lawyers here going to tell you that they know that the scenario I have just described is likely and becoming increasingly commonplace? Will they tell you that defense counsel would find themselves shopping for friendly plaintiffs' lawyers to roll-up corporate liability on the cheap, if Rule 23(b)(4) is adopted? I hope so, but I doubt it. Unfortunately, such candor is not in their interest, but I assert that they know that what I have described is actually happening out there and that this proposed rule not only does nothing to stop it but promises to make such abuse even more commonplace.

Abuse Exists Aplenty Under the Present Regime and Care Must Be Taken Not to Make a Bad Situation Even Worse

Rejecting proposed Rule 23(b)(4) will not stop all this abuse. Objectors will still be bought off. Some class lawyers will still be subjected to "undue pressure" to accept a settlement rather than engage in a costly and risky fight over certification. Collusion will still be possible even without the proposed amendment. But that reality does nothing to further the cause of those who argue for this rule. What they cannot effectively dispute is that all these problems will be exacerbated by a rule that licenses the settlement of matters that cannot be tried. They are then left to argue that the existing abuse is not really so bad--that court review catches all the worst instances of abuse and that the courts having done such an admirable job thus far of catching abuse will be more than able to handle any greater risk of abuse inherent in this rule. Of course, they cannot prove that courts catch existing abuse. And while I cannot prove that courts do not, a little common sense suggests that I have the better of this argument.

What I mean by common sense is this. It is undisputed that courts accept virtually every class settlement proffered to them and that few settlements are disturbed on appeal. The study conducted by the Federal Judicial Center at this Committee's request amply supports those statements. If courts catch most cases of abuse, then there must be precious little abuse occurring. But that conclusion is belied by the interests of the parties and the agency problems we all understand to be quite serious in every class action suit. The astronomical fees now being requested in global settlement class actions--34 million here, 90 million there--again only make the argument that abuse is rare all the more unbelievable. When there's 90 million dollars to gain by accepting some deal that pays class members 10 cents on the dollar for their legitimate claims, how many lawyers will refuse? As for the courts, how would judges discern that a deal is collusive? Few objectors with any credibility or sufficient resources to launch a credible challenge appear, given how expensive objecting can be and how small the chance of success and reward is. Given that scuttling a deal is likely to get the objector nothing but big expenses, it is simply not

rational for most actors to launch such challenges.

Finally, courts are not well motivated to look for abuse. Judges are predisposed to accept settlements,<sup>20</sup> which means that they are likely to be easily persuaded by the joint presentation by class counsel and the defendant of the merits of the deal, the weakness of the underlying claims and the enormous benefits to be reaped by all under the settlement terms. Even the most vigilant judge is poorly positioned to discover abuse, but politeness should not stop us from acknowledging what we all know to be true: most judges find class settlements all but irresistible and spend precious little energy ferreting out abuse.<sup>21</sup>

The Weak and Troubling Justifications Offered to Support  
Licensing Settlement Classes That Cannot Be Certified for Trial

Once the Committee's version of the law pre-Georgine is rejected, it is impossible to describe Rule 23(b)(4) as modest. I have already explained why in addition to being far-reaching the change is unwise in my discussion of how it fosters abuse. But before turning to other matters, I want also to suggest that this far-reaching change is unwise even if you believe that I overstate the potential for abuse that the proposed change

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<sup>20</sup> "All the dynamics conduce to judicial approval of [the] settlement[]" once the adversaries have agreed." Alleghany Corp. v. Kirby, 333 F.2d 327, 347 (2d Cir. 1964) (Friendly, J., dissenting), aff'd en banc by equally divided court, 340 F.2d 311 (2d Cir. 1965), cert. dismissed, 384 U.S. 28 (1966). "In deciding whether to approve this settlement proposal, the court starts from the familiar axiom that a bad settlement is almost always better than a good trial." In re Warner Communications Sec. Litig., 618 F. Supp. 735, 740 (S.D.N.Y. 1985).

<sup>21</sup> This Committee's draft minutes contain the following statement: "There is evidence that some state-court judges are simply rubber-stamping settlements." While this reference displays a willingness to risk impoliteness in the interest of truth, limiting this problem to state court judges demonstrates a diplomacy that seems ill-suited to the occasion.

creates. Consider what kinds of cases are not suitable for trial but which the Committee's draft would allow lawyers to settle. The Committee's Draft Note alludes to three examples: cases in which choice-of-law problems would prevent certification of a litigation class; other situations that might require for trial the creation of many subclasses; and cases involving "comprehensive solutions to large-scale problems that defy ready disposition by traditional adversary litigation."

Let's take the last category first. Whatever the Draft Note means by "large-scale problems that defy . . .," it seems highly questionable whether such matters are within the proper province of the judiciary. If the matter defies "ready disposition by traditional adversary litigation," perhaps that should tell us it does not belong in a court. In any event, this vague and grandiose-sounding agenda seems far from modest and what the Committee has in mind should be more clearly explained before the public is asked to comment on whether to support a rule that invites courts to take jurisdiction over matters that now seem outside the reach, if not the constitutional authority, of the federal judiciary.

Next, the settlement class amendment is justified as a means to overcome "choice-of-law difficulties" that might otherwise "force certification of many subclasses or even defeat any class certification, if claims are to be litigated." Choice-of-law difficulties are "our federalism." There is nothing modest about proposing a method to "overcome" them because "they" are the laws of the several states enacted to protect the citizens of those states: persons and entities, plaintiffs and defendants.

While it is undoubtedly true that subclasses complicate and may prevent settlement, they are designed to protect absent class members from being lumped together with those who have dissimilar claims. Yes, it makes settlement easier to have one group of plaintiffs' lawyers represent all those injured by a defendant or group of defendants, but it also gives agents (plaintiffs' lawyers) whose interests are not perfectly aligned with those of

their principals an opportunity to short-change their purported clients. In a case with thousands of good claims and tens of thousands of marginal claims, class counsel and the defendant can both profit by a settlement that trades one group's rights off against the others. Absent class members, particularly those with good claims, do not similarly benefit from a system that allows courts and lawyers to ignore substantial differences among claims.<sup>22</sup>

Finally, while the Committee professes to be saying nothing on the propriety of so-called "futures classes," like the class in Georgine, we all know that "futures classes" are a paradigm of a class action that cannot be tried but might be settled. Moreover, the reference to "comprehensive solutions to large-scale problems ..." in the Draft Note invites courts and lawyers to use Rule 23(b)(4) to settle the claims of people who do not yet realize that they are injured. Such an invitation is not modest, is extraordinarily unwise because of the extreme vulnerability of such absent class members--people who may have no idea that their rights are being adjudicated and thus cannot monitor what is happening to them in any way--and is a stretch of

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<sup>22</sup> I understand that my colleague Professor Coffee will suggest a limited use for what I have labeled malignant settlement classes, namely in small claims litigation in which the claims could otherwise not be brought and in which certification for trial as a class action would not be possible. I am uncertain that there are many cases that would fall into this two-pronged category, but if there are I would urge this Committee not to license even such limited use of this form of settlement class without first setting out in detail the safeguards that would be required to protect the class and the judicial system from abuse and corruption that might attend such proceedings. Finally, however interesting Professor Coffee's suggestion is, it is obviously not what this Committee had in mind, given its proposal of 23(b)(3)(f) along with 23(b)(4). Indeed, one of the more disturbing implications of the simultaneous proposals is that the invitation to settle matters that cannot be tried seems to extend primarily to matters involving significant stakes for individual class members, i.e., mass tort cases, and not small claims litigation. This makes the possibility of increased collusion and abuse more troubling and the failure to detail protections for the class more troubling as well.

judicial power that could threaten the integrity of the entire judicial system, should the experiment meet resistance at some point from the hundreds of thousands of Americans stuffed into such classes when they recognize at some later point what has been done to them.

In Georgine, there is no doubt that settlement was made easier by class counsel purporting to represent present class members, future class members, class members dying from mesothelioma and class members with no substantial impairment from their exposure to asbestos (not to mention simultaneously representing their own "clients" outside the class deal), but how a lawyer with so many conflicting interests to represent can adequately represent any of them is another matter entirely.

Such a system asks lawyers to play the role of detached legislator seeking some "comprehensive solution" to some massive problem, not the role of advocate. Many lawyers may be masterful at crafting such solutions, but the fact remains that the absent class has not elected them to perform this function. The notice sent to the class tells absent class members they will get a lawyer, not a legislator, and insisting on, not dispensing with, subclasses is the way to ensure that a lawyer is what absent class members get.

The proposed amendment and the Committee's Draft Note and Minutes speak as if all this Committee were proposing is a method that would encourage "parties" to reach settlement. But "parties" do not reach agreement in class action; those claiming to represent the absent class and the defendants reach agreement. While encouraging settlement between "parties" may be an admirable goal, encouraging would-be-representatives with their own significant interests at stake to settle on behalf of absent others is a much more questionable goal. To encourage settlement without appropriate safeguards to protect the absent class is irresponsible; to pretend that existing safeguards are adequate when there is great reason to doubt that proposition is irresponsible; to weaken the few safeguards that now exist (by

discouraging subclasses, ignoring the higher burden of proof dictated by Weinberger and conflating benign settlement classes with their more virulent cousin) is more than irresponsible; it is reckless.

### The Need to Increase the Safeguards in Benign Settlement Class Actions

Returning to what I have been calling the benign form of settlement class--a class that looks on its face as if it could be certified as a litigation class but one in which no objections to certification have been urged upon the court<sup>23</sup>--this benign form of settlement class seems a sensible, if potentially dangerous device. Sensible because it fosters settlement and promotes the efficient resolution of disputes to allow defendants to forego raising every objection to class certification before engaging in settlement negotiations and because judicial decisions on any matter, including class certification, that are made without full adversary presentation by the interested parties should have less precedential value.<sup>24</sup> Nonetheless, however sensible the benign form of settlement class might be, it is dangerous and requires that safeguards be put in place to ward

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<sup>23</sup> Implicit in my understanding of a benign settlement class is that when certification is actually and vigorously contested by objectors, if not the parties, the court must find that certification as a litigation class is proper on Rule 23(b)(3) and not resort to the settlement class label. Of course, as the study requested by this Committee shows, objectors rarely appear, so there would still be many instances in which the benign settlement class category would be appropriately invoked.

<sup>24</sup> By this I mean that when the court finds that the class appears to meet the requirements of Rule 23, it should indicate that this finding was made without the benefit of hearing all the objections that might have been raised by the defendant. Findings that a class met the requirements of 23(a) and 23(b)(3) made in such cases should have little precedential force in any later class action in which a defendant contests certification of a similar class. And the Note to Rule 23 should make that point clear.

against abuse.

Weinberger and In re Beef Industry recognized these dangers.<sup>25</sup> In short, the benign form of settlement class is dangerous because the requirements of Rule 23 are in place to protect class members from having their claims lumped together with dissimilar claims and from self-dealing by class lawyers and named representatives. Allowing the agents that might benefit from ignoring these protections (class counsel and the defendant who might also greatly benefit from ignoring these requirements) to waive by agreement a contest over those requirements invites collusion and the selling-out of class members' interests. That is why Weinberger, while approving benign settlement classes, insisted that courts hold such settlement agreements, the representation afforded the class and the process of negotiations to a higher standard than the standard used to approve settlements in which certification and representation had been vigorously contested. Unfortunately, courts have paid all too much attention to Weinberger's license and all too little attention to its warnings, and the proposed amendment recreates and magnifies that error.

#### Alternative Avenues of Reform

In the months since this Committee's draft has been proposed, I have been implored and cajoled to stop criticizing the Committee's work and start proposing alternatives. I have consistently pointed out that rejecting Rule 23(b)(4) is an alternative, and I maintain that position. But I have other alternatives to suggest. One, this Committee should prohibit the settlement of class actions that cannot be tried, settlement classes that I have called malignant. Second, the Committee should make explicit that benign settlement class actions invite collusion and undue pressure on would-be-class lawyers and representatives to settle. The rule should thus mandate that in

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<sup>25</sup> In re Beef Industry, 607 F.2d at 174; Weinberger, 698 F.2d at 73.

any case in which certification is uncontested courts must subject the settlement, the representation of the class and the process of negotiation to special scrutiny. That would qualify as a modest change because it would do no more than codify and reaffirm the rule of Weinberger.

Next, the rule should provide that class notices be written in language comprehensible to the average layman of ordinary intelligence and be printed in normal type-size, not small print. The study requested by this Committee found that most notices were well-nigh unintelligible. But neither the Committee's rule nor the proposed Note to the Rule deal with this problem. Indeed, one of the most alarming thing about this Committee's proposed amendments is that no significant safeguards for class members are proposed. Moreover, the idea that Rule 23(b)(4)'s insistence that settlements be reached before settlement class status is requested somehow protects the class is incomprehensible.<sup>26</sup> As the Draft Note and Minutes suggest, this

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<sup>26</sup> The paragraph in the Committee's Draft Note that begins with the proposition that protections afforded class members have been increased lists not a single enhanced protection for the absent class. The idea that the class is protected because certification is dependent on the request of the "parties" is misleading at best. Certification is dependent on the request of would-be-representatives, not the parties, and those self-appointed or defendant-selected representatives are just as likely to be requesting approval of a settlement because it is in their own interests as they are to be requesting approval because it is in the classes' best interests. Second, requiring the representatives to have the settlement in hand before asking for 23(b)(4) status does nothing to protect the class. Allowing certification as a settlement class before settlement had been reached might "exert untoward pressure to reach agreement" on defendants, not on the absent class or their representatives. Thus, insisting that the settlement come before the request protects defendants, not the class. On the other hand, the existence of actions that can only be settled and not tried exerts "untoward pressure" on the absent classes' representatives, but that is not mentioned. Last, the idea that a settlement class might be transformed into a litigation class "without adequate reconsideration" threatens defendants, as I have argued in the text, not the absent class. So this paragraph's attempt to show how class members are afforded protections to compensate for the dangers of the procedure

insistence protects defendants from the threat that settlement class status will be conferred before settlement is reached and somehow then become converted into litigation class status, but it provides no protection for the class.

In my writing, I have suggested and I now urge this Committee to consider ways to make the standard of adequate representation meaningful.<sup>27</sup> Adequate representation for absent class members must mean something more than having a licensed lawyer with some experience in the area of practice propose a settlement to a court. But presently that is all it means in most cases. I have urged a ban on class counsel simultaneously representing other clients against the same defendant against whom class counsel is prosecuting a class suit (or settling one). Simultaneous representation provides the defendant with another pocket in which to put money to pay the class lawyer for short-changing the class. Moreover, it undermines the court's ability to monitor attorney's fees.

Rule 23 should also make it clear that because fairness hearings are non-adversary proceedings, class counsel and the defendants have a duty to present all material facts, including adverse facts, to the court.<sup>28</sup> Every brief supporting a petition for approval of a class settlement should include a section that lays out potential objections to the settlement, weaknesses in the terms proposed, potential conflicts of interest of class counsel and any other material adverse facts. A petition without such a section or with only a cosmetic presentation of adverse facts should be grounds for rejecting the settlement.

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licensed by Rule 23(b)(4) shows the opposite: neither the proposal nor the Draft Note contain increased protection for the class, and it is misleading to suggest that either does.

<sup>27</sup> Koniak, Feasting While the Widow Weeps, 80 Corn. L. Rev. at 1115-1126.

<sup>28</sup> Id. at 1126-1128. See generally Model Rule of Professional Conduct 3.3(d).

I also endorse the proposals that will be offered this afternoon by Professor Leubsdorf, including a proposal that in certain cases involving individual class claims over a certain dollar amount, that courts be required to appoint, not a guardian or special master, but an advocate for the class with the responsibility of challenging the settlement and representation afforded the class. This would ensure some modicum of adversary process to class settlement proceedings, providing judges with the information necessary to make informed decisions on behalf of the absent class.

For many, and perhaps most, Americans the only contact they will ever have with our judicial system will be as an absent class member in a suit that is settled by others on their behalf. For that reason alone this Committee needs to proceed with great caution before loosening in any way the already weak mechanisms designed to protect these Americans from the self-dealing of their own lawyers. At a time when few institutions in our society command any respect or confidence, this Committee must take no role in weakening the respect and confidence in the one institution that Americans still have some faith in, our courts. By inviting judges to approve deals cut to benefit corporations and plaintiffs' lawyers at the expense of the absent class, the Committee risks eroding confidence in those judges and in the system in which they serve. Do not be tempted to go down that road. Instead, I urge this Committee to spend its energy and the considerable talents of its membership devising methods to clean up the class action process, which is already too amenable to self-dealing and already bears a not-too faint scent of corruption. There is much to be done to preserve this valuable procedural device. I have tried to suggest some concrete steps that this Committee should consider taking.

I sincerely hope my comments have been helpful.

LAW OFFICES OF  
**STEPHEN GARDNER**  
ATTORNEY AT LAW

RECEIVED  
12/6/96

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December 5, 1996

96-CV-034

**FEDERAL EXPRESS**

Peter G. McCabe  
Committee on Rules of Practice and Procedures  
Judicial Conference of the United States  
Washington, D.C. 20544

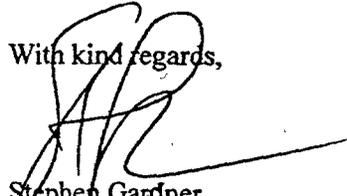
Re: Dallas Hearing on Proposed Amendments to Federal Rule of Civil Procedure 23

Dear Mr. McCabe:

Enclosed please find a copy of my written statement, which I will summarize orally at the December 16 hearing here in Dallas. Please excuse the slight delay in getting this to you, but I wanted to circulate the draft to other attorneys for comment.

Thank you again for your consideration.

With kind regards,

  
Stephen Gardner

SG/bkm  
Enclosure

Before the  
Advisory Committee on Civil Rules  
of the  
Committee on Rules of Practice and Procedure  
of the  
Judicial Conference of the United States

**Comments on Proposal to Amend Federal Rule of Civil Procedure 23**

by  
Stephen Gardner

December 16, 1996  
Dallas, Texas

**Introduction**

At the present, class action practices and procedures suffer from many ills, both real and perceived. These comments focus on ways to address these problems, as well as new problems that would be created by many of the proposed amendments to Rule 23. The comments are from the perspective of a consumer advocate attorney with wide and varied experience relating to class actions.

In summary, the author has concluded that the proposed amendments to Rule 23 should generally be withdrawn for further consideration. In specific, these comments:

- Oppose the concept of settlement classes entirely.
- Oppose the proposal to apply a cost-benefit analysis to class certification.
- Oppose the proposed interlocutory appeal process, as it is now drafted.
- Propose that the Committee consider and institute procedural controls on excessive class counsel attorneys' fees.
- Propose that the Committee consider an amendment to Rule 23 that explicitly gives trial courts the discretion to impose the costs of post-certification notice to the class upon the defendant.
- Propose that the Committee consider an amendment to Rule 23 to ensure improved and effective notice of settlement to the class members.
- Propose that the Committee consider changes to the law to provide for more efficient consideration of multiple class actions, including amending the removal statute.

Each of these positions will be discussed in detail. First, however, it is appropriate to advise the Committee of the qualifications and biases of the author of these comments.

#### Author's Background and Bases for Comments

The author of these comments has been a consumer advocate and attorney for over two decades. He has served as a legal services attorney, the Students' Attorney for the University of Texas at Austin, and Assistant Attorney General for the States of New York and Texas. He also served for three years as a visiting Assistant Professor of Law at the Southern Methodist University School of Law, including one year as Assistant Dean for Clinical Legal Education. He is currently in private practice in Dallas. He has participated extensively as a consumer advocate in significant litigation, in both state and federal trial and appellate courts, and has also written numerous articles relating to consumer protection. Of specific relevance to these comments, the author represented objectors and the Center for Auto Safety in the *General Motors* case discussed below.

It is the author's opinion that class actions can be highly-effective and -efficient tools to permit consumers to right the multiplicity of wrongs that are heaped upon them daily by various businesses and to provide courts with the appropriate mechanism for addressing these wrongs. The need for a class action is particularly acute with respect to small claims types of consumer fraud cases. In the author's experience, the vast majority of victims of consumer fraud do not have sufficient damages individually to make it economically feasible for an attorney to represent that individual consumer. Therefore, the continued availability and viability of class actions for small claims cases is essential.

It is, however, the unfortunate but extensive experience of the author that many consumer class actions, especially the small claims actions, are subject to abuse by a

small coterie of class counsel whose apparent motivation is entirely maximization of their firm's income through attorneys' fees, without regard to obtaining real benefits for the members of the class.

This issue will be discussed more in the body of these comments, but the author wishes at this time to make it clear that this opinion is based on his repeated encounters with this abusive practice, beginning when he was Assistant Attorney General for the States of New York and Texas and continuing to this day. As Assistant Attorney General, the author participated in numerous consumer fraud actions against major national companies, primarily in the marketing and advertising area. By the very nature of marketing and advertising practices, identifying the individual members of the class of persons effected by deceptive marketing and advertising practices and quantifying the dollar amount of their damages is impossible in any instance that the author can posit. Accordingly, as Assistant Attorney General, he focused the State's law enforcement efforts in these matters to stopping the unlawful practice, obtaining injunctive relief prohibiting the company from ever again engaging in the unlawful practice, and sanctioning the company through imposition of penalties or costs and, significantly, by exposing the company to public scrutiny of its practices.

In case after case, after all meaningful relief to the class had been obtained by action of the Attorney General, the author encountered members of the class counsel coterie who sued the defendant company only after learning of the State's settlement with that company. These carrion feeders are why, in the words of Carl Sandberg, the hearse horse snickers carrying a lawyer to his grave. The author can imagine no reason for these lawsuits being brought but to enhance the coffers of the lawyers' firms. Experience proved the author correct. The relief obtained, if any there was, generally consisted

of meaningless promises by the company or worthless coupons to the class, but enhanced (in the eyes of the class counsel) by hundreds of thousands or even millions of dollars in attorneys' fees. In one such case, the author wrote a brief that was filed by the Iowa Attorney General opposing class certification, on the basis that all meaningful relief had already been obtained by a coalition of State Attorneys General. The court agreed with this view and refused to certify the class. The *General Motors* case was also an eye-opening experience for the author.

The author himself is engaged in a very limited consumer class action practice. Predominately, his class actions seek injunctive relief, similar to civil rights class actions, and therefore he only seeks lodestar-based recovery of his attorney's fees. It is the opinion of the author that many of the consumer class actions that are brought as (b)(3) classes and settled as such could have been equally effectively brought as injunctive classes. The author concludes from the fact this is not the case that the motives of class counsel in seeking more than an injunctive class were to create a fictional benefit to the class, to serve as the basis for requesting significant percentage attorneys' fees. It is with this background that the author approaches his comments, and that the Committee should interpret them.

#### **Reality Check 101—Current Consumer Class Action Practices**

There can be no question that there are indeed numerous problems with consumer class actions today. First and foremost among them is the simple fact that many consumer class actions are brought for no other purpose than to obtain relief in the form of attorneys' fees to class counsel, with relief for individual class members at best only a *lagniappe* that is tossed in by class counsel to give an aura of legitimacy to their fee requests.

This is not to say that the lawsuits are groundless either on the facts or on the law. On the contrary, the class counsel who are the worst abusers of the process are among most skilled class action practitioners in the country, as long as that characterization is limited to technical skill and does not include ethical standards. In other words, the lawsuits they file are based on actual and significant wrongdoing by the defendants that significantly and materially cause harm to the members of the class, both individually and as a group.

The problem arises at the settlement stage. In the opinion of the author, the very concept of actually trying a consumer class action is so foreign to the *Weltanschauung* of these class counsel as to be incomprehensible. For example, at a recent meeting of consumer attorneys, one such class counsel offered an apology for what many in the room considered an inadequate settlement. That lawyer said words to the effect of, "Believe me, we did all we could; there was no way that the company was going to settle for one cent more than we obtained." Of course, questions immediately arise: Why is settlement the *sine qua non* of a consumer class action lawsuit? Why is the decision to take the case to trial simply not one of the options that was apparently even considered in this instance?

And the option of trial is certainly one that must be considered. For example, the study by the Federal Judicial Center demonstrates that, at least in the four districts surveyed in that study, the statistical probability that a class action would go to trial is approximately the same as the probability that an individual civil action would go to trial. Thomas E. Willging, Laural L. Hooper, & Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*, page 68 and Table 16 (Federal Judicial Center 1996) ("FJC Study").

In virtually every settled class action of which the author is aware, class counsel, who filed the lawsuit claiming at the time that it was greatest since sliced bread, become extraordinarily pessimistic of the possibility of victory once their fees are sewn up. They file motions with the court supporting settlement that almost unanimously express doubts as to the factual or legal merits of the very lawsuits that they have brought. In the author's opinion, class counsel doing so should, rather than seeking court approval of the settlement and their sizable fees, be filing a Rule 11 motion against themselves, suggesting to the court that they be sanctioned for filing a lawsuit whose claims are neither warranted by existing law or by a non-frivolous argument for the extension, modification or reversal of existing or the establishment of new law and that their allegations and other factual contentions had no evidentiary support.

This sudden crisis of faith that miraculously occurs subsequent to settlement with many class counsel tends to confirm the presumption that many in the public hold that class action lawyers are merely in it for the money. "Once a settlement is agreed, the attorneys for the plaintiff stockholders link arms with their former adversaries to defend their joint handiwork . . ." *Alleghany Corp. v. Kirby*, 333 F.2d 327, 347 (2d Cir. 1964) (Friendly, J., dissenting).

This self-serving advocacy has lead to a public perception of class actions as lawyer-driven and lawyer-benefiting. It has also provided many defendants with a bully pulpit from which to denounce the very concept of class actions.

This Committee must not let these abuses serve as any excuse or prod to fix what isn't broken. In large part, the substantive provisions of current Rule 23 work just fine when applied as the law requires. They do not require additional substantive changes or any significant tinkering in order to improve the lot of either class members or class

action defendants. The problem is that many trial courts do not fulfill their duties under Rule 23.

## COMMENTS

### I

**The *General Motors* case is a paradigm of the problem.**

The *General Motors* case is quite instructive as to what can go wrong when class counsel and the trial court do not do their jobs when a class action is settled before certification. It is actually two cases: (1) the federal Multi-District Litigation ("MDL") proceeding that was reversed by the Third Circuit, *In re: General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3d Cir.), cert. denied sub nom. *General Motors Corp. v. French*, 116 S.Ct. 88 (1995), and (2) a parallel Texas state case that was reversed both by a Texas State Court of Appeals and the Texas Supreme Court, *General Motors Corp. v. Bloyed*, 916 S.W.2d 949 (Tex. 1996). The facts of both cases are identical, as were the rejected settlements.

The settlements failed to address the worst vehicle-fire safety hazard in history—exploding side-saddle gas tanks on General Motors pick-up trucks that have burned to death hundreds of people and badly burned thousands more. The trucks are flawed by a dangerous and latent design defect—the placement of the gas tanks outside the frame rail—that increases the likelihood that their fuel tanks will rupture in side-impact crashes, causing fuel-fed fires.

Both state and federal class actions sought, *inter alia*, a recall of all General Motors trucks, with restitution and refunds to all class members, and an order directing General Motors to pay for the retrofitting of all General Motors pickups to correct the fuel tank defects.

However, in the settlement, class counsel abandoned the recall/retrofit remedy in favor of an approach that limited class members' recovery to discount coupons to buy new General Motors trucks. There was no provision requiring General Motors to recall or repair the trucks, or to reimburse owners who made the repairs themselves, nor was there any provision requiring General Motors to warn consumers about the hazards of the trucks, despite the demand for such relief in the original petition filed by class counsel. In other words, nothing in the settlement addressed the animating principle of the lawsuit: that these General Motors pickup trucks pose a serious—but remediable—safety hazard.

If anything, the settlement would have adversely affected safety while increasing General Motors' profits at the expense of the consumer. In exchange for a promise of a discount that was nothing more than the type of marketing device often used by General Motors and other manufacturers and that only a very small portion of the class could use, the settlement allowed General Motors to walk away from its obligations to its customers after having created, and then concealed, one of the most serious safety problems in the history of the automobile.

*General Motors* serves as a useful paradigm for consideration of abuses of existing Rule 23, for a number of reasons: (1) it was a settlement class; (2) the sole relief to the class members was in the form of coupons; (3) the compensation for class counsel was not in any way based on money paid to the class; (4) the Third Circuit opinion served as a warm-up to its decision in *Georgine v. Amchem Products, Inc.*, 83 F.2d 610 (3rd Cir. 1996), writ granted *sub nom. Amchem Products, Inc. v. Windsor* (herein, "*Amchem Products*"); (5) the Texas Supreme Court used the *General Motors* case as a vehicle to establish significant reforms to class action practices in Texas state courts; and (6) it is an example

of a small claims class action that could and should have been brought. It should be instructive to this Committee that this settlement was rejected by two levels of Texas state appellate courts and by the Third Circuit. Although in *General Motors* both state and federal trial courts abused their discretion and thus failed to do their jobs, the appellate courts corrected those abuses of discretion. Unfortunately, this level of appellate oversight is rare and likely required as poor a settlement as in *General Motors* to get an appellate court's attention.

## II.

**Trial judges are the wrenches in the class action machinery.**

As distinguished from virtually any other type of civil action, class actions involve a triad of responsibility. First, class counsel have a duty to represent the class adequately and to obtain the best relief possible. Second, the defense lawyers have a duty to defend their client with all possible zeal. Third—and this is where class actions differ from the ordinary civil lawsuit—the trial court has an affirmative duty to scrutinize class actions, both at the time of certification and at the time of settlement to ensure that, first, the case is appropriately brought as a class action and, second, that any settlement is fair, adequate and reasonable to the class as a whole.

Unfortunately, only one part of this triad—the defense lawyers—are doing their jobs. As discussed above, in many instances class counsel are not fulfilling their fiduciary duty to represent the interests of the absent class members. This would not be a problem were it not for the signal fact that the trial bench is in many instances absolutely failing its independent duty to scrutinize any settlement and to ensure that the settlement is in fact fair, adequate and reasonable.

This failure by the trial bench is understandable. In these days of ever-expanding dockets, trial judges do whatever they can to administer their dockets effectively and to encourage settlements. This approach works well with individual cases, where all parties affected by a settlement are present in the litigation. However, it fails miserably with respect to class actions, where the trial judges have a duty to ensure, after rigorous analysis, that the interests of the hundreds, thousands, or even millions of absent class members are guaranteed. See *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982); *Weinberger v. Kendrick*, 698 F.2d 61, 73 (1st Cir. 1982). Rather than meet this duty, trial courts fall back on the hoary precept that settlements are to be viewed with favor and bend over backwards to find ways to approve them. "In deciding whether to approve this settlement proposal, the court starts from the familiar axiom that a *bad settlement is almost always better than a good trial.*" *In re Warner Communications Securities Litigation*, 618 F.Supp. 735 (S.D.N.Y. 1985) [emphasis added].

Most appellate courts exacerbate this problem, primarily by accepting the pro-settlement bias that the trial courts express. As Judge Friendly said in a dissent, "All the dynamics conduce to judicial approval of such settlements." *Alleghany Corp. v. Kirby*, 333 F.2d 327, 347 (2d Cir. 1964). In addition, adequate and appropriate appellate review is hampered by the existing rule of law that trial court approvals are to be disturbed only upon a finding of abuse of discretion. This rule effectively turns appellate courts into rubber stamps rather than what they should be—another layer of protection to ensure that the interests of the absent class members are protected.

The rationale for an abuse of discretion review is absent in the class action context. Contrary to most decisions made by a trial court, the trial court is no more qualified than the appellate court to review the adequacy of a class action settlement on the

record. Approval of settlements rarely, if ever, actually turns on a trial court's evaluation of witnesses or factual findings. Instead, approval rests on review of the record presented by the proponents of the settlement—the class action counsel and defense counsel. There is no jurisprudential reason not to abandon the abuse of discretion standard.

The proposed Rule 23(b)(4) takes this compliancy to a fatal extreme, as will be discussed later in these comments. Rather than proposing a rule that permits a settlement class that is virtually unreviewable on appeal, this Committee should instead consider and propose an amendment to Rule 23 that abrogates the abuse of discretion standard and instead permits plenary review by appellate courts of any decision approving a settlement.

### III.

#### **Excessive attorneys' fees for class counsel must be eliminated.**

The issue of attorneys' fees is an important issue in class actions today, both because it serves as a rallying point for defendants to criticize class actions and because the criticisms of excessive fees are in some instances well-based.

It is also by far the most complicated issue. There is no one problem and no one cure. The prime focus of criticism is the size of the fees. In many instances, this problem is more apparent than real. For example, when the individual recovery is \$50.00 per consumer, an attorneys' fee of \$2 Million seems excessive at first glance. However, if the dollars actually recovered by the individual class members in such a case were to be \$15 Million, then fees are less than 14% of the total recovery achieved for the class. This makes the fees reasonable in relation to the total actual recovery.

However, the cases that receive the most criticism are those where the class is in fact not getting a cash recovery that is many-fold the fees received by the attorney. In-

stead, the actual cash received by the class is minimal if any, and the only other benefits received by the individual members are often coupons, if they get that much. The *General Motors* case is a well-known example of this problem, but it had its roots in cases such as the airline antitrust settlement, which also provided certificates to travelers and many millions in attorneys' fees to the class lawyers.

There are a variety of proposed solutions, none of which would take care of the problem entirely. One viewpoint holds that class counsel should be paid only by hourly lodestar rates, enhanced by multipliers when appropriate, and that percentage calculation of fees is not appropriate. This approach could make an unknown number of class actions impossible to bring, if the resources needed to commit to the litigation were so sizable that the only way a law firm could economically justify taking on the case would be the potential of a large percentage recovery. In addition, some commentators have suggested that basing a fee on an hourly rate would lead some class counsel to perform unnecessary work in order to churn fees artificially high.

The opposite end of the spectrum from this viewpoint holds that a percentage recovery in the 20-30% range is entirely appropriate and should be left to negotiation and court approval. Some commentators urge that this approach will have the same result as fee churning on a lodestar basis—that class counsel will be unduly compensated for insufficient time and effort.

The author of these comments believes that, in a consumer class action context, the best way to avoid abusive settlements is to require the class counsel be paid on a lodestar basis, with multipliers when appropriate, rather than on a percentage. This approach is bolstered by the fact that virtually every consumer class action is in truth a fee-shifting case and not a common-fund case. That is, virtually all consumer class ac-

tions are brought pursuant to a state or Federal statute that provides specifically for attorneys' fees. In addition, the experience with settlements in civil rights class actions, wherein the lawyers are paid based on lodestar fees, proves this point. There is, to the author's knowledge, no significant claim that there now exist problems with settlements of civil rights class actions. Yet they continue to be brought and attorneys continue to make adequate and honest livings by bringing them, even without the prospect of a large percentage pot of gold at the end of the settlement rainbow.

Even if the Committee determines that it is impossible to base attorneys' fees on a lodestar calculation alone, the Committee should consider and implement changes to Rule 23 to require that award of the attorneys' fees to class counsel occur only after all the relief to the class members has actually been distributed. This problem is particularly acute with respect to coupon settlements, which will be discussed later in these comments, but it applies equally well to others.

The FJC Study provides empirical reasons for this delay in payment. In the settlements reviewed in the Study wherein the average net distribution was less than \$100.00 per class member, class counsel sought and were awarded fees that ranged from 16-33% of the gross monetary award to the class. FJC Study, Table 1. The average percentage of the gross monetary award was nearly 28%. FJC Study, Table 1. However, when the *net* monetary award to the class is considered rather than the *gross* monetary award, these fees actually range from 27-61% of the class recovery, with an average percentage in excess of 46%. FJC Study, Table 1. This appears to be in large part because the amount ostensibly to be awarded the class was not actually distributed. Requiring postponement of the award of fees until after the class has received its recovery encourages class action attorneys to (1) settle the case for the highest economic value to the

class, (2) seek automatic payments rather than making class members file claims, (3) make any claims process easy for consumers in order to encourage a high return of claim forms, and (4) ensure that all potential claimants get adequate notice of the claims process.

The argument against this approach presupposes that consumer class actions will not be brought unless the class counsel can anticipate that large pot of gold at the end. In the author's opinion, this is simply not the case. However, there will be a diminution in the absolute number of class actions, because those that are brought solely as a basis for obtaining attorneys' fees will not in fact be brought. To base a percentage method on the presumption that good cases will not be brought because the attorneys will not have the financial incentive to do so belies the fact that injunctive class actions in civil rights and other cases, which are settled on a lodestar fee basis, are being brought and continue to be brought. There is no evidence that lawyers who represent civil rights plaintiffs are any different in motivation or ability than lawyers who will continue to bring good, solid consumer class actions when their efforts will be compensated on a lodestar basis only.

In addition, any percentage calculation should be based solely on the cash recovery to the class, without consideration of noncash recovery such as coupons. Regardless of the actual fees awarded, a court should examine the reasonableness of the fees by reviewing the award to be given both on a percentage basis and a lodestar basis.

There are three additional matters that the Committee should consider. First, it is never appropriate to discuss fees, regardless of the method by which they are to be calculated and regardless also of whether the case is a common-fund or fee-shifting case, until final agreement is reached as to the relief to be given the class. The best procedure is

to obtain the defendant's binding agreement to all class relief and then to submit the fees issue to the court for determination. However, it is acceptable to negotiate fees after all relief has been agreed for the class, and then to submit the entire agreement to the court and the class for review and approval. Either the Rule or the Committee Note should make this clear.

A second essential component of reform in the area of attorneys' fees is a requirement that the maximum amount of attorneys' fees to be sought must be disclosed to the class members at the time the notice of proposed settlement is sent to them, stated as a total dollar amount. While it is appropriate to disclose the amount of fees per class member, the members of the class have the right to know how much overall their attorneys are making in total. That is, in the example above, the class *must* be told that the lawyers will receive \$2 Million, but could *also* be told that this amounts to only \$6.67 per class member.

Third, objectors who are successful, whether at trial court level or on appeal, in persuading a court to refuse to approve a settlement should be entitled to apply for fees. Because of the nature of objections and the adversary relationship of objectors counsel to class counsel, objectors should be limited to lodestar, with a multiplier where appropriate.

#### IV.

##### **Uncertifiable settlement classes should be outlawed, not encouraged.**

One of the prime tools of abusive class action settlements is the use of settlement classes which could not be certified pursuant to current Rule 23. It is an absolute mistake for the Committee to consider adoption of proposed Rule 23(b)(4) that would institutionalize this abusive practice. In testimony before this Committee at the hearing in

Philadelphia in November, 1996, Susan P. Koniak, a Professor of Law at Boston University, describes what she refers to as "benign" and "malignant" settlement classes. While the author agrees with the comments of Professor Koniak, the author stresses to the Committee that regardless of whether settlement classes are considered benign or malignant, they are tumors nonetheless. And they are tumors whose benign or malignant status is often not easily determined.

Rather than repeat the excellent discussion of the problems with settlement classes made in the testimony of Professor Koniak and in the May 28, 1996 comments of the Steering Committee to Oppose Proposed Rule 23, the author simply adopts them as his own, and adds a few points.

It is generally recognized that the preferred approach is to seek and obtain class certification prior to any discussion of settlement. By seeking court involvement at an early stage, the class has the advantage of an adversary-based determination of such vital issues as adequacy of representation of the class, adequacy of class counsel, and the exact make-up of the class.

One approach to post-settlement certification entails a two-step process. First, the issue of certification would be the subject of a plenary hearing, after notice to the class but without notice of settlement of the merits. After the trial court has determined that the case should be certified as a class following hearing, the notice of settlement and fairness hearing would be given to the members of the class. At that hearing, the issues of class certification would not need to be addressed again, and the trial court would focus on the Rule 23(e) determination that settlement is fair, adequate, and reasonable to the class as a whole. This is the better approach.

Another approach to post-settlement certification combines the two hearings into one, with notice to the class of both the certification and the fairness issues to be considered. The trial court would conduct a plenary hearing into both the certification of the class and the fairness issues, only reaching the fairness issues after determining the nature of the class to be certified pursuant to both subsections (a) and (b) of the Rule.

Under Rule 23(c)(1), the trial court has always had the power to make certification conditional, before decision on the merits. It would appear to be within the scope of the Rule to make certification conditional on finality of the settlement, providing no subsequent res judicata effect if the settlement itself is rejected. Certainly, this approach adheres much more closely to the Rule than certification after less than full consideration of all Rule 23 requirements.

This approach meets the holdings of the Third Circuit in *Amchem Products* and *General Motors*, as well as the Texas Supreme Court's *General Motors* holdings, and also provides the salient benefit of avoiding both the appearance and the actuality of either collusion or inadequate representation of the absent class members.

One type of settlement class requires particular scrutiny and skepticism—settlement classes wherein the class members get relief solely in the form of coupons they must use to purchase new goods or services from the wrongdoing defendant. The primary problem with a coupon settlement is that it flies in the face of the sound precepts upon which our capitalist economy is based. Rather than punishing a wrongdoer for its wrongful actions, it instead rewards that wrongdoer with additional business from the very persons it caused harm. “Thus, rather than providing substantial value to the class, the certificate settlement might be little more than a sales promotion for GM, in just the way that the *Bloyed* court characterized the settlement as a ‘tremendous sales

bonanza' for GM." *In re: General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3d Cir.), cert. denied sub nom. *General Motors Corp. v. French*, 116 S.Ct. 88 (1995), quoting *Bloyed v. General Motors Corp.*, 881 S.W.2d 422, (Tex.App.—Texarkana 1994).

As noted above, the Third Circuit expanded on its decision in *General Motors in Amchem Products*, currently pending before the United States Supreme Court. That case involved a settlement of all personal injury claims of asbestos victims, which was rejected by the Third Circuit. After the Third Circuit rejected the settlement, the Fifth Circuit approved virtually the identical settlement. *In re Asbestos Litigation*, 90 F.3d 963 (1996). Just recently, the Fifth Circuit refused rehearing *en banc*. *In re Asbestos Litigation*, 1996 WL 681509 (5th Cir. November 26, 1996). The rehearing vote was aberrant. Six judges did not participate in the decision, leaving only 11 judges that could vote on rehearing. Of the 11, a majority of six voted in favor of rehearing. However, because Fifth Circuit rules require a majority of all 17 judges on the Court, rehearing was denied. Judge Jerry Smith, who had dissented from the panel decision, wrote a brief dissent joined by five other judges, pointing out this absurd result. *In re Asbestos Litigation*, 1996 WL 681509 \*1 (5th Cir. November 26, 1996).

The fact that the United States Supreme Court has granted writ of certiorari in *Amchem Products* is informative. First and foremost, the Committee should defer any consideration of settlement classes until the Supreme Court has considered that very issue in *Amchem Products*. In every probability, application for writ of certiorari will soon be made in *In re Asbestos Litigation*. The Supreme Court will then have before two diametrically opposed court of appeals decisions on the issue of the propriety of settlement classes.

However, one comment is necessary at this point. Some commentators have expressed the conclusion that, in granting certiorari in *Amchem Products*, the Supreme Court betokened an intent to overturn the decision of the Third Circuit, thus already casting grave doubts on the viability of the Third Circuit's rejection of settlement classes. This is an incorrect interpretation. First, it must be remembered that the discussion of settlement classes in *Amchem Products* was anticipated by the Third Circuit in *General Motors* and that the Supreme Court denied writ of certiorari in that case. Therefore, merely denying writ in a case involving settlement classes betokens no intent on the part of the Supreme Court to rule one way or the other. Further, commentators have noted that the Supreme Court took writ in *Amchem Products* rather than waiting for application for certiorari in *Asbestos Litigation*, and have inferred from that fact a pro-settlement class bias on the Court. This interpretation also is incorrect. As noted above, *en banc* rehearing in *Asbestos Litigation* was only very recently denied by the Fifth Circuit. Therefore, the case was not ripe for an application for writ of certiorari when the certiorari application in *Amchem Products* was before the United States Supreme Court. The author believes it is probable that, especially because of the odd rehearing ruling of the Fifth Circuit, the Supreme Court will take writ in *Asbestos Litigation* and consolidate it for argument with *Amchem Products*. The Supreme Court will then have two diametrically opposed courts of appeals decisions that bring the issue of settlement classes into stark contrast. For this reason alone, the Committee should not recommend adoption of proposed Rule 23(b)(4).

## V.

**Proposed Rule 23(b)(3)(F) would be an inappropriate death knell to small consumer class action claims and must be withdrawn**

One of the best uses of the class action device is to aggregate multiple small claims by consumers damaged by wrongful actions of a company. It is the experience of the author that, in most consumer fraud matters, it is economically impossible for an attorney to represent individuals with damages of less than \$10,000. The cost of the litigation, primarily caused by dilatory tactics by the defendant, is likely to exceed the recovery to the individual by such an extent that the lawyer will never be adequately compensated for his or her time, whether on a percentage or lodestar basis. Therefore, Rule 23 has long been recognized as an appropriate vehicle for resolving small claims cases in an efficient and effective manner. Current Rule 23 contains adequate safeguards to ensure that cases are not brought that are truly inefficient uses of court resources.

The proposed Rule 23 (b)(3)(F) requires a court to consider whether the probable relief to individual class members justifies the cost and burdens of class litigation. This new rule would, in the author's opinion, serve as justification for a court hostile to small consumer claims to reject a case that should in fact be certified.

The predominant problem with this proposal is that by its very nature cost-benefit analysis is a slippery slope that is subject to extraordinarily subjective, and non-legal, decisions by the trial court that effectively amount to second-guessing legislative intent.

Many consumer protection statutes, both at the state and federal level, provide for a right of consumers to bring small claims for redress. In fact, some of these statutes are by design structured to create situations wherein the recovery to the class is limited.

For example, in the Truth in Lending Act, Congress provided that class actions are in some instances capped at a maximum of \$500,000 (or 1% of the defendant's net worth, which could well be less) in relief to the class, regardless of the size of the class. 15 U.S.C. § 1640(a). In one pending case of which the author is aware, the class members number approximately one million, yet Congress has mandated that their recovery be limited to \$500,000. Thus, Congress has expressed its clear intent to set up a type of class action whereby, in this particular instance, the relief to the class is approximately 50¢ per consumer. The author disagrees with Congress's intent in so doing, but the intent of Congress is clear and should be followed. A cost-benefit analysis, as this proposed rule change permits, would enable a court to reject any such class for which certification is sought.

A second intrinsic problem with this standard is that it constitutes an open invitation to social engineering by the trial courts, which are empowered by this new proposal to consider matters beyond the law and beyond the facts of the case. This is inappropriate.

A third problem area exists with respect to cases originally filed in state courts seeking compensation under state laws but later removed to federal courts. Although the cases in the state courts would not be subject to a cost-benefit analysis, this rule would permit such analysis once the case was removed, thereby causing serious federalism concerns with respect to the right of a federal trial court to second-guess the decisions of State legislatures.

It is impossible for this author to reconcile the negative effect of this proposed rule with proposed Rule 23(b)(4) that allows certification of any class whatsoever without regard to a cost-benefit analysis or any of the existing requirements of 23(b)(3), as

long as the parties agree to it, as discussed above. On the one hand, the Committee proposes a wide-open approval of a settlement class, without reference to any standard, but at the same time proposes Rule 23 (b)(3)(F) which, in the absence of the class counsel and the defendant linking arms in settlement, permits a form of scrutiny without any standards and without any safeguards to protect the class. In this regard, the author agrees with and adopts the comments of Public Citizen Litigation Group in opposition to this subsection and will not restate them here.

The sole aspect of small claims classes with which the Committee ought to be concerned occurs, not when the individual relief is small, but when distribution of that relief would be more expensive than the relief itself. For example, if the award to individual consumers in a settlement were only \$2.00, it does not make economic sense to spend \$10.00 or more per class member in order to distribute that money. However, that is a matter of appropriate crafting of a settlement or a judgment, and not a basis for deciding whether or not the case should be certified. This is an instance where *cy pres* remedies should be encouraged, as should other methods of obtaining redress without significant administrative costs, such as crediting amounts to an existing account class members have with the defendant. The author has used just such an approach in resolving a class action against a major home mortgage lender for violations of the Real Estate Settlement Procedures Act, where the average recovery to the class was in excess of \$100.00 and was easily credited, by simple modification to the computer program, to the class members existing home mortgage accounts with that defendant.

VI.

**Rule 23 should require improved notice of settlement  
to absent class members**

The current practice in giving notice to absent class members of settlement of a class action virtually ensures that the class members will not have adequate information to make an informed and knowing choice as to whether or not to accept the settlement. Settlement notices frequently omit significant and pertinent information and are worded in a way as to make it virtually impossible for the class member to understand any aspect of the settlement.

This issue was reviewed in the FJC Study. The Study found that settlement notices generally failed to provide (1) the net amount of the settlement, (2) the estimated size of the class, and (3) the dollar amount of attorneys' fees to be requested by settling class counsel. FJC Study at 50-51. In the Texas *General Motors* case, class counsel failed to advise the class members of the dollar amount of attorneys' fees which they planned to seek. This failure alone caused the Texas Supreme Court to reject that settlement. *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 957 (Tex. 1996).

There is no reason why this should be the case. This notice should include the following:

- The number of members of the plaintiff class.
- The total amount of relief to be granted the class, stated in dollars where the payment is in cash or credit to an account.
- The individual relief to be received by each member of the class, broken down into sub-classes if necessary.
- The total fees to be awarded to, or sought by, the class attorneys, and the method whereby they were calculated (hourly, hourly with a multiplier, percentage, or a combination).

- If any unclaimed funds may revert to the defendant, notice of that reversion.
- Options available to class members including at least opting out and objecting.
- An address to write for further information regarding the settlement.

Without a readable and understandable plain language notice to the class, the purposes of giving notice are nullified.

#### VII.

**Rule 23 should explicitly permit a trial court the discretion to impose the cost of post-certification notice on the defendant.**

In cases that are not settled prior to class certification, one significant cost component is giving notices to the class after the court has certified the case as appropriate to proceed as a class action. As a general rule, current case law requires the plaintiff to bear the full amount of those costs. In the author's experience talking with other lawyers interested in bringing class actions, the specter of incurring hundreds of thousands of dollars in upfront expenses in giving this notice is often a disincentive to all but the most-well-funded lawyers. In some instances, where the liability appears relatively clear, it is entirely appropriate to permit the trial court discretion to order that the defendant pay these costs, and the Committee should consider and implement a rule change that would do just that.

#### VIII.

**Interlocutory appeal of a certification decision should be permitted only to a plaintiff who is denied class certification.**

The Committee also proposes new Rule 23(f), permitting interlocutory appeals of a district court order granting or denying class certification, discretionary with the court

of appeals. The proposed rule provides also that such an appeal does not stay the proceedings unless the district or appellate court orders.

It is difficult to imagine a scenario where a defendant would not attempt to appeal an order granting class certification. It is also difficult to imagine a scenario where, if appeal is permitted, either the district court or the court of appeals would not stay the proceedings, in order to avoid the possibility of subsequent appellate reversal of an ongoing case.

On the other hand, the likelihood of a plaintiff appealing a denial and seeking a stay of proceedings is minimal. However, it is virtually certain that, if the plaintiff did appeal a denial of certification, the defendant would seek, and likely obtain, a stay pending the appeal.

Therefore, the rule as written does little to advance a plaintiff's situation, but does provide significant dilatory opportunities for defendants.

The California state court approach is a variant on this theme. It is silent on the issue of stay, but permits appeal only of denial of certification, since a denial is fatal to the plaintiff's case but granting certification is only harmful to the defendant if the plaintiff prevails at trial and on appeal, both on certification issues and on the merits. *See Stephen v. Enterprise Rent-A-Car*, 235 Cal.App.3d 806 (1991) and *Rosack v. Volvo of America Corp.*, 131 Cal.App.3d 741 (1988).

The California state court approach is a balanced approach that preserves the rights of both plaintiffs and defendants. The Committee should modify Rule 23(f) to provide for a discretionary appeal only if certification is denied.

## IX.

**The Committee should consider and address intrinsic problems with nationwide classes and multiple pending uncertified class actions against the same defendant for the same practice.**

There is a problem with multiple class actions being filed in a variety of state and federal courts around the country that accuse the same defendant of the same illegal practices and seek the same relief.

This situation is this: Our federal system, bolstered by the Supreme Court's ruling in *Matsushita Electric Industrial Co. v. Epstein*, 116 S.Ct. 873 (1996) that permits state courts to certify nationwide classes, has fostered a situation where there is a real likelihood that any significant consumer class action will be brought by different (but sometimes allied) class counsel in diverse state and federal courts around the country.

The *General Motors* case is one such example, initially consisting as it did of one MDL proceeding in United States District Court in Philadelphia (which consolidated a number of both state and federal lawsuits from around the country) and one Texas state court proceeding in Marshall, Texas. All those litigants have now converged on a Louisiana state court in Plaquemine, Iberville Parish, to seek approval of a new and somewhat improved settlement. The fairness hearing was held on November 6, but the court had not ruled on approval of the settlement as of the date these comments were drafted. Although now all class counsel have linked arms with General Motors in Plaquemine, the earlier parallel proceedings in Philadelphia and Marshall, with appeals through two levels of both federal and state courts, made for duplication of efforts and created the very real possibility of conflicting decisions, both at the trial court level and on appeal.

The MDL statute, 28 U.S.C. § 1407, at least provides a potential to bring all pending related federal class actions into one court. However, no such mechanism ex-

ists for state courts. As it is, there exist 50 co-equal but not co-joinable judicial branches across the country that may control what goes on in the rest of the country. To the author's knowledge, few if any state court systems provide for an MDL-like procedure that could consolidate two state court proceedings in the same state on the same facts. In other words, one lawsuit in Dallas could proceed without regard to or effect on another identical (but for the named plaintiff) lawsuit that was filed in El Paso, 600 miles and one time zone away from Dallas.

A class member who objects to a settlement will find it difficult to attend hearings in these disparate venues. Having traveled to Plaquemine, Marshall, and Philadelphia on the *General Motors* case, the author can advise the Committee that neither Plaquemine nor Marshall has a commercial jet airport and that on the whole he'd rather be in Philadelphia. He is also aware that class members who objected to the most recent settlement were unable to make it to Plaquemine.

Added to the inconvenience is the uncertainty of dealing with local practice in a variety of state courts, where the Good Old Boy system frequently prevails. The author agrees with the Supreme Court's *Matsushita* decision, both as law and as policy. The challenge is to make federalism work when there are multiple class actions.

The Committee's proposed Rule 23(b)(4) stretches these problems to the point of crisis. Providing an unchallengeable settlement that can be supported by whichever of several class counsel a defendant chooses to link arms with makes the process grind to a halt, as far as protecting the interests of the absent class members.

A very recent example illustrates the potential for abuse. *The Wall Street Journal* reports on a settlement with Apple Computer Inc. that was successfully urged by class counsel and Apple in state court in Hidalgo County in far south Texas only after differ-

ent class counsel in Ohio refused to settle on the terms Apple successfully dictated to the Texas lawyers. Suit was first filed in 1994 in federal court in Ohio. United States District Judge James Carr subsequently ruled that Apple had engaged in deceptive practices, which left only the issue of damages for jury trial. Then, in 1996 the Texas lawyers filed a separate suit, and were promptly whisked to Apple's California headquarters to discuss settlement, which was soon reached. The Texas judge, who is the brother of a partner of the local class counsel, asked the parties after a brief fairness hearing, "What do you all want me to sign?" The local class counsel saw no problem with presenting the settlement for approval by his partner's brother. The Ohio class counsel, among others, did see something wrong and has successfully obtained a rehearing of the fairness ruling before a different (and, one hopes, unrelated) state judge. Richard B. Schmitt, *Behind Apple's Class-Action Settlement*, WALL ST. J., Dec. 4, 1996, at B1.

In such cases, there is the very real probability of conflicting decisions when several cases are all brought as nationwide class actions. In addition to creating a potential for conflicting decisions, this practice also encourages an unseemly and unnecessary race to the courthouse. Often, the case that gets certified first is the case in which the defendant is able to find the most complacent and compliant class counsel who will agree to a stipulated settlement class in exchange for high fees and minimal relief. The effect of the Supreme Court's decision in *Matsushita* is that one state court can pre-empt the processes of other state courts and of the federal courts by being the first to certify the class.

When defendants conspire with the most complacent class counsel in order to finesse a settlement that more aggressive class counsel refuse, the interests of the absent

class members will be lost in a race to the bottom. And it is only the class counsel who choose to be bottom feeders who will win. The absent class members invariably lose.

This practice also imposes, in the opinion of the author, unnecessary and sizable costs on the defendant. A company that has done wrong certainly should not be able to avoid liability, but there is no sound jurisprudential basis for requiring it to defend itself on many fronts.

This situation is untenable from a public policy standpoint. Although the author, as a plaintiff's lawyer, is well aware of the beneficial effects of judicial forum shopping, these effects should not be encouraged in the class action context.

Therefore, the Committee should explore the possibility of amending the federal removal statutes, 28 U.S.C. § 1441 *et seq.*, to permit, without regard to amount in controversy or federal question or any other limitation, removal of an uncertified state court class action if identical class actions are pending in other state or federal courts. This concept must be approached with caution, due to federalism concerns and issues of fairness to class action plaintiffs with regard to their choice of forum, but it is concept that is fundamental to any reform of class action practices and should be explored in detail by the Committee.

#### Summary

The Committee is at the beginning, rather than near the end, of a very long and bumpy road. It is beyond dispute that there are problems with class actions as they are practiced. In the opinion of the author, these problems are caused equally by the failures of class counsel and of the trial courts to fulfill their responsibilities. The Committee must focus its efforts on finding ways to stop this abandonment of responsibilities,

without substantively affecting the rights of people to bring class actions to redress multiple instances of individual harm, often with minimal individual damages.

**STATEMENT OF LESLIE A. BRUECKNER  
ON BEHALF OF  
TRIAL LAWYERS FOR PUBLIC JUSTICE  
AND THE TLPJ FOUNDATION**

**before the  
Advisory Committee on Civil Rules  
of the Judicial Conference of the United States**

**Philadelphia, Pennsylvania  
November 22, 1996**

Mr. Chairman and Members of the Committee:

My name is Leslie Brueckner. I am a staff attorney with Trial Lawyers for Public Justice, a Washington D.C.-based public interest law firm that specializes in precedent-setting and socially significant tort and trial litigation. On behalf of TLPJ, I would like to thank the Committee for the opportunity to testify today regarding the proposed amendments to Federal Rule of Civil Procedure 23, which governs class actions.

By way of background, let me explain who we are and why we are appearing here today. TLPJ's central mission is to prosecute cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. As part of its efforts to ensure the proper working of the civil justice system, TLPJ is dedicated to monitoring, exposing, and preventing abuses of the class action device nationwide. Through its Class Action Abuse Prevention Project, TLPJ works to protect the rights of class members to opt out of damages class actions, prevent the inclusion of future personal injury victims in class action settlements for monetary damages, develop constitutional and procedural limitations on class action abuses, and otherwise preserve class members' rights.

I am here today because we believe that the proposed amendments to Rule 23 could significantly worsen the problem of class action abuse and improperly restrict small-claims consumer class actions. I will focus my remarks on two provisions. First, we strongly object to the proposed addition of subparagraph (b)(4), which would permit judges to certify a class whenever "the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement even though the requirements of subdivision (b)(3) might not be met for purposes of trial." In our view, this change is a prescription for class action abuse. By permitting settlement of class actions that could never be tried, the changes would inevitably foster collusive settlements that benefit defendants and harm victims.

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

**I. Proposed Rule 23(b)(4) Is A Prescription For Class Action Abuse:**

Proposed Rule 23(b)(4) would permit the parties to a proposed class action settlement to "request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial." The Advisory

Committee seems to believe that this proposal is good public policy and contains sufficient safeguards to protect class members against class action abuse. TLPJ respectfully disagrees on both counts.

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

In TLPJ's view, Proposed Rule 23(b)(4) would vastly increase the potential for abusive class action settlements. Under this rule, a case could be certified as a class action *for settlement purposes only* even if it would not (or could not) be tried as a class action, as long as the parties seeking certification had already reached a settlement. In other words, an attorney could file a case as a class action (involving, for example, a wide range of personal injuries), the defendant could settle it, and the court could approve the settlement -- imposing the terms of the settlement on the class members -- even though everyone involved knew the case could not be litigated (much less tried) as a class action.

Such an outcome might be tolerable if the settlement negotiations were likely to yield a fair result for the class. In fact, however, precisely because the participants in the settlement negotiations would know the case could not be litigated as a class action, the settlement negotiations would be truly perverse. Both parties would have an extraordinarily strong incentive to collude against the class.

To begin with, the mass tort defendant would want to settle to avoid the results of other cases (present and future) as long as it could pay significantly less than those cases were likely to cost on an individual basis. (The defendant would have no reason to fear class counsel, since there would be no realistic threat of a class action trial.) The plaintiffs' counsel would want to settle, even on unfavorable terms for the class, for an equally

compelling reason -- to recover attorneys' fees. (Since the defendant would not settle to avoid a non-existent threat of class litigation, class counsel could only obtain fees by agreeing to accept a bargain-basement settlement that would buy the defendant "global peace" from individual litigation.) A settlement would take place if both sides got what they wanted. But the class members would get far less than they deserved.

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

Even more disturbing is the fact that, under proposed Rule 23(b)(4), a settlement could be reached before a complaint was even filed. *See* Committee Notes at 12 (noting that the settlement agreement could be "worked out even before the action was filed"). In other words, defendants could -- prior to the filing of any litigation -- choose their own friendly plaintiffs' counsel and reach a settlement. Under this scenario, the plaintiffs' lawyer would have even less leverage with which to negotiate a fair settlement. If the first plaintiffs'

lawyers approached by the defendants refused an unreasonably low offer of settlement, the defendants could simply offer the settlement to another lawyer, and so on, until the defendants found one unscrupulous lawyer willing to play along. Faced with these alternatives, even the most ethical attorney might feel justified in accepting a poor settlement offer, because the next firm approached by the defendants might be willing to accept an even lower offer from the defendants. This result is, we submit, simply unacceptable.

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

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

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

The Committee also suggests that class members will be protected from collusive settlements because they can always opt out -- a right that is enhanced, in the Committee's view, by the fact that the terms of settlement will be known at the time class members must

decide whether to remain in the class. See Committee Notes at 13. This, however, provides little meaningful protection for class members. Although the right to opt out is an essential due process protection, in reality few class members are in a position to exercise that right in a meaningful fashion. Even the "coupon" settlement rejected by the Third Circuit in *In re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litig.*, 55 F.3d 768 (3d Cir.), cert. denied, 116 S. Ct. 88 (1995), generated relatively few opt-outs, despite its notoriously meager terms. See *id.* at 781, 812-13. And, in many cases involving "future" victims, class members may not even realize that they are included in a class action settlement, let alone have the wherewithal to opt-out. See, e.g., *Georgine v. AmChem Products*, 83 F.3d 610 (3d Cir. 1996), cert. granted sub nom. *Amchem Products, Inc., v. George Windsor*, No. 96-270 (November 1, 1996). Thus, in TLPJ's view, it is unrealistic to rely on the opt-out requirements of Rule 23 to protect class members against collusive settlements generated by Proposed Rule 23(b)(4).

Finally, the Committee suggests that, to protect against the risk of collusive settlements, "court[s] also must take particular care in applying some of Rule 23's requirements," including making sure that the notice is clear, that the class definition is not overly broad, and that "there are no disabling conflicts of interest among people who are urged to form a single class." Committee Notes at 13. We appreciate the Committee's effort to emphasize the importance of close judicial scrutiny of class action settlements, but these factors do not, in our view, cure the defects in Proposed Rule 23(b)(4). For example, while it may be an easy matter to determine whether a class definition is "overly broad" for purposes of litigation, the inquiry becomes far more subjective when a class action is viewed from the

standpoint of settlement. What factors are to be applied when making this inquiry? Is a class definition that would be "overly broad" for litigation purposes permissible so long as the case is settled? Similarly, how is a court to determine that a class settlement is so riddled with "disabling conflicts of interest" as to render certification inappropriate? Is a court to apply the same standards here to litigation and settlement classes, or does a more lenient standard apply to conflicts that are resolved in a settlement vehicle? The Committee's proposal raises more questions than it answers on these points, and provides district judges with no guidance on how to go about the crucial task of policing "settlement" classes. In light of the Committee's recognition that settlement classes pose special risks to absent class members, this fact alone is sufficient reason to withdraw the proposal for further consideration and refinement.

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

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

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

As a threshold matter, we note that it is extremely difficult to predict how the standard would be applied in practice. The most serious confusion exists with respect to the measurement of "probable relief to individual class members" under the proposed rule. The Committee's Draft Minutes suggest that the relevant measurement is the amount an individual

class member would obtain under a settlement or at trial. See Draft Minutes at 25 ("even a significant aggregate sum, when divided among a large number of plaintiffs, may provide such trivial benefit that the justification for class litigation must be on grounds other than the benefits for individual class members.") Yet Advisory Committee Chair Patrick Higginbotham's August 7, 1996, Memorandum to the Standing Committee on Civil Rules states that a court can *aggregate* claims when determining probable relief to class members under Proposed Rule 23(b)(3)(F). See Higginbotham Memorandum at 4 ("This new factor is not intended . . . to require that the amount of relief to any single class member be balanced against the overall costs and burdens of litigating the class action. The aggregation of many small individual recoveries may readily justify aggregate costs that overshadow any single individual recovery.") Clarification on this point is obviously critical, since the impact of Subfactor (F) will depend, in large part, on whether "probable relief" is measured individually or on a group basis.

There also appears to be some confusion as to whether the "probable relief to class members" may include consideration of the "deterrent" effect of small claims class actions. Here, too, the Committee has sent mixed signals. See Draft Minutes at 26 ("The 'corrective justice' and 'deterrent' elements of small-claims class actions were noted repeatedly as a supplement to the focus on private remedies. It was urged that consideration of the value of probable relief to individual class members does not foreclose consideration of these elements as well. But it also was urged that indeed this factor should focus only on the value of private relief.") Since the text of the Proposed Rule is silent on this subject, courts would presumably have discretion whether to consider the public benefits of small claims class

actions under Proposed Rule 23(b)(3)(F). This, too, requires clarification before the potential impact of the proposed amendments can be fully assessed.

Third, it is manifestly unclear whether subparagraph (f) would permit (or, indeed, require) consideration of likelihood of success on the merits when evaluating "probable relief to class members." At its April meeting, the Committee voted to reject language that would have explicitly incorporated likelihood of success on the merits in the determination of probable relief. See Draft Minutes at 33. Then, a motion was made to "say nothing about consideration of the merits in conjunction with the factor (F) determination." *Id.* In response, one Committee member objected that "the Note has to say something, because in the face of silence many courts will read factor (F) to support consideration of the probable result on the merits." *Id.* Despite this observation, the "motion to say nothing" passed, 7 to 6. *Id.* The upshot is that, if Proposed Rule 23(b)(3)(F) were to become law, a court would lack any guidance as to whether its determination of "probable relief to class members" should take into account the likelihood of success on the merits.

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

test is rendered even more unworkable by the fact that, in the usual case, a court would be required to evaluate these factors shortly after the complaint is filed. (Indeed, even the Committee Notes acknowledge that "[o]ften it will be difficult to measure these matters at the commencement of an action, when individually significant relief is likely to be demanded and the costs of class proceedings cannot be estimated with any confidence." Committee Notes at 50.) The outcome of the balance in any given case would be virtually impossible to predict.

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

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

This result, in our view, flies in the face of one of the most important purposes of Rule 23: to compensate victims and deter wrongdoing by aggregating large numbers of small claims that would not support individual litigation. As Judge Posner recently commented, the "most compelling" rationale for the class action device involves those instances where "individual suits are infeasible because the claim of each class member is tiny relative to the expense of the litigation." *Matter of Rhone-Poulenc Rorer Inc.* 51 F.3d 1293, 1299 (7th Cir. 1995). See also *Deposit Guaranty National Bank v. Roper*, 445 US. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.") Proposed Rule

23(b)(3)(F) could destroy this traditional use of the class action device, leaving many individuals with small claims with no means of obtaining relief.

Equally important, the Committee's proposal would also limit the deterrent effect of the class action device. It is well understood that class actions play an important role in deterring wrongdoing that harms a lot of individuals a little bit. Since small claims cannot support individual litigation, class actions are the only litigation device that can help to prevent large scale wrongdoing of this sort. If the Committee succeeds in "effecting a retrenchment in the use of class actions to aggregate trivial individual claims," Committee Notes at 10, then there will be less to deter defendants from engaging in large scale consumer ripoffs.

This result might make sense if there was some showing that the burdens of small-claims consumer class actions outweigh their social utility. But no such showing has been made. Instead, the Committee appears to have relied on anecdotal evidence of certain "trivial" class actions that, in its view, did not further any social goal. The problem with the Committee's approach is that it could conceivably eliminate *all* small-claims class actions, even those that the Committee itself would admit serve a useful social function. There is no evidence supporting a need for such a drastic result, and we urge the Committee to reconsider its proposal.

### Conclusion

For all these reasons, we respectfully urge the Committee to withdraw Proposed Rule 23(b)(4) and Proposed Rule 23(b)(3)(F). I would like to thank the Committee for consideration of these views. I am happy to respond to questions.

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TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C.

A PROJECT OF THE TLPJ FOUNDATION

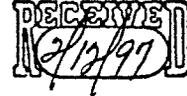
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90-CV-035

February 12, 1997

**BY HAND**

Peter G. McCabe  
Secretary, Committee on Rules of  
Practice and Procedure  
1 Columbus Circle N.E.  
Room 4-170  
Washington, D.C. 20544

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

Dear Mr. McCabe:

Enclosed are the comments of Trial Lawyers for Public Justice and The TLPJ Foundation on the proposed amendments to Rule 23. Please do not hesitate to call if this submission is inadequate in any respect, or if you require anything further.

Thank you very much for your assistance.

Sincerely,

A handwritten signature in cursive script that reads "Leslie A. Brueckner".

Leslie A. Brueckner

Enclosure

TESTIMONY OF ALLEN D. BLACK  
BEFORE THE ADVISORY COMMITTEE ON THE  
FEDERAL RULES OF CIVIL PROCEDURE

My name is Allen D. Black. I am a graduate of Princeton University and the University of Pennsylvania Law School, after which I clerked for the Hon. John Minor Wisdom of the Fifth Circuit. I am one of the founding partners of the Philadelphia law firm, Fine, Kaplan and Black. Since 1975 my firm and I have specialized in commercial litigation, with an emphasis on plaintiff-side class action litigation. In the class action area we have concentrated on antitrust price-fixing cases and securities fraud cases, although we have successfully prosecuted class actions in other areas as well.<sup>1</sup>

In the antitrust area, I was one of the six counsel who successfully tried the Corrugated Container Antitrust Litigation to a jury, ultimately resulting in a recovery of more than \$ 550 million. I have taught courses at the University of North Dakota Law School, Rutgers-Camden Law School, Temple University Law School, and the University of Pennsylvania Law School. I have also taught numerous CLE courses for ALI-ABA and PLI.

I am a member of the Council of the American Law Institute, an adviser to ALI's Restatement (Third) of the Law of Agency, and a member of the Philadelphia and Pennsylvania Bar Associations.

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<sup>1</sup> In candor, I must say that we have had minimal experience in mass tort class actions.

I address my testimony primarily to three of the proposed amendments to Rule 23 -- new subsection (b) (3) (A), new subsection (b) (3) (F), and new subsection (f). In addition, I would like to make a few modest suggestions with respect to the text and committee notes regarding other parts of that Rule.

I believe it would be a mistake to adopt proposed new subsections (b) (3) (A) and (b) (3) (F). While both sections seek to accomplish laudable objectives, as currently drafted they entail undesirable and perhaps unintended consequences that in my view far outweigh their possible benefits. I believe the laudable objectives could be accomplished through more narrowly drafted amendments (or simply expanded commentary in the Committee Notes) that would avoid the objectionable consequences.

The two sections, taken together, could be read to create a Catch 22 situation in which a Court is told by (A) to deny a class if some unspecified number of the claims are too large; and by (F) to deny a class if some unspecified number of the claims are too small. Since almost all classes include a wide variety of large, medium, and small claims,<sup>2</sup> the proposals

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<sup>2</sup> For example, in the Corrugated Container Antitrust Litigation, 1983-2 Trade Cas. (CCH) ¶ 65,628, at p. 69,158 (S.D.Texas 1983), a few of the largest claimants received millions of dollars each, while the smallest claimants received less than a hundred dollars apiece.

Another example is a tax refund class action our firm brought against the City of Philadelphia challenging an unlawful  
(Footnote continued)

taken together could require (or at least permit) a Court to deny certification in nearly all cases -- under (A) because almost any class will include some large claims, or under (F) because almost any class will include some small claims. The only kind of class to escape would be one comprised entirely of medium sized claims. I doubt this is what the drafters intended; but it is certainly how some counsel with whom I have spoken are interpreting the proposals.

Rule 23 as revised in 1966 is supported by two complementary rationales: 1) to aggregate efficiently large claims so that the judicial system doesn't have to litigate the same issues over and over again; and 2) to allow the aggregation of small claims that could not otherwise practicably be asserted. See 39 F.R.D. 95, 104; Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1754 at 49 (1986). New (A) and new (F) seem to undermine those dual rationales without expressly saying so.

Another serious problem is that both sections would invite or require an exploration of damages in situations where one side (usually the defense) initially has superior access to the relevant information. Heretofore the Supreme Court decision

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increase in real estate transfer taxes. Eventually, we recovered \$26,000,000 for the class members, representing a full refund plus interest. Depending on the value of the real estate, ranging from an individual row house in a depressed neighborhood to a soaring office tower, individual recoveries ranged from less than \$100 to nearly \$800,000.

in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), has required that the initial class determination be made apart from any determination of the merits. By contrast, the proposed new sections would require plaintiffs to make a showing of probable damages to individual class members as part of the class certification process. Without discovery, these proposals would stack the deck unfairly against plaintiffs.

To avoid such unfairness, courts will have to allow substantial discovery on damages prior to class certification. Moreover, in most cases damages cannot be determined in a vacuum without considering liability issues.<sup>3</sup>

It is unclear whose ox ultimately would be gored by any amendment requiring that damages be explored and adjudicated in the initial class certification. Defense counsel, who generally oppose (and seek to stay) merits discovery prior to class certification, may want to think twice about any amendment that would require exploration of damages as part of the initial class determination.

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<sup>3</sup> See, e.g., J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 451 U.S. 557 (1981) (In antitrust cases, damages cannot be determined prior to determining liability). Likewise in securities fraud cases, estimation of damages requires construction of a "value line", which in turn requires analysis of the liability issue of what the defendant should have disclosed and when. See, e.g., Green v. Occidental Petroleum Corp., 541 F.2d 1335, 1341-46 (9th Cir. 1976) (Sneed, J., concurring); Ziemack v. Centel Corp., 164 F.R.D. 477, 482-83 (N.D. Ill. 1995).

Proposed Rule 23(b)(3)(F) is particularly dangerous in this regard. Since it requires courts to determine "whether the probable relief to individual class members justifies the costs and burdens of class litigation", the question naturally arises of "costs and burdens" to whom. Does this encompass costs and burdens to defendants? I should think so, since the rule would not be meaningful otherwise. The proposal will thus open the door to exploration of the costs of defense, including financial arrangements with defense counsel (and possibly the costs of defense in similar cases involving the same defendants or the same defense counsel).

By requiring an exploration of "the costs and burdens of class action proceedings", new (F) would open up a Pandora's Box of discovery, not only on issues that defense counsel usually attempt to defer (i.e., damages), but also on matters that heretofore have often been irrelevant (i.e., costs of defense). As a result, class determination would be more time consuming, more expensive, and probably more distasteful for all concerned.

Proposed new (F) also fails to address the recurring situation where class action complaints seek both monetary and injunctive relief. Some courts hold that where monetary relief is a primary objective, class certification should be considered only under Rule 23(b)(3), although other courts have certified such hybrid claims under a combination of (b)(2) and (b)(3). New (F) would require a weighing of costs against individual benefits

in (b) (3) class actions without suggesting that requested injunctive relief also should be considered, or proposing any test by which it could be weighed in the balance.

A case in point is Sutton v. Independence Blue Cross and Pennsylvania Blue Shield, a class action in which our firm represented the plaintiff, Tom Sutton, who will testify this afternoon. That case arose from the defendants' practice of denying Major Medical claims submitted on Blue Shield claim forms, without informing subscribers that the claim was insured and would be paid if submitted on a Major Medical form. The denial simply stated that the claim was not covered.

As a result of that class action every Blue Cross and Blue Shield customer in Eastern Pennsylvania was given the opportunity to recover 100 cents on the dollar for previously unpaid Major Medical benefits. These payments undoubtedly ranged from a few dollars at the low end to many thousands of dollars at the high end. The settlement further required Blue Cross and Blue Shield in the future either to pay all Major Medical benefits automatically, even if submitted on Blue Shield or basic Blue Cross forms; or at very least to provide a clear and prominent notice that the claim would be paid if re-filed on a Major Medical form. In fact, Blue Cross and Blue Shield opted for automatic payment of all benefits.

In approving the settlement, the Court emphasized the very aspect of this class action that would be ignored by the

proposed rule change. The Court stated that the "most significant aspect of this Settlement ... is that it will change the way in which the defendants do business in the future".<sup>4</sup> Benefits of that kind should not be ignored in any cost/benefit equation.

The Blue Cross case also illustrates that calculating "the probable relief to individual class members" under new (F) would be no simple matter, even considering only monetary damages. Defendants there filed a summary judgment motion claiming that the Major Medical benefits unpaid to the class representative, Tom Sutton, were less than his \$100 annual deductible, and arguing that he therefore suffered no damage. Following discovery of the defendants' records (which were superior to the records that Mr. Sutton had retained personally) we were able to show that his individual damages over a two-year period exceeded his deductibles by several hundred dollars.

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<sup>4</sup> Sutton v. Medical Service Association of Pennsylvania, d/b/a/ Pennsylvania Blue Shield, et al., Civ. No. 92-4787 (E.D. Pa.), Memorandum dated June 8, 1994 at 7. As the Court found:

Thus, the settlement provides not only a 100% net monetary recovery, it also provides comprehensive improvements in defendants' future practices. Never again will a class member receive an Explanation of Benefits message that leaves the subscriber in the dark about the availability of, or method of obtaining, Major Medical benefits.

Id. at 8.

I would be happy to supply copies of the unreported Opinion, if the Committee would like.

New (F) would inject summary judgment or trial issues of that kind into every (b) (3) class determination. Moreover, it is unclear whether new (F) is intended to address the median individual recovery, the average individual recovery, or the class representative's recovery alone. If it is intended to address median or average recoveries, the rule would require classwide discovery and an adjudication of likely damages, not only for the named plaintiff, but with respect to the entire class.

Let me now address individually each of the three proposed additions.

New (b) (3) (A)

1. I do not understand why the concerns that prompted the proposal of new (A) are not already addressed fully by the right of class members with large individual claims to opt out of a (b) (3) class. The rationale given in the note (at 6-7) -- that such individuals should not be forced into a mandatory (b) (1) or (b) (2) class -- has no bearing on a (b) (3) class, which is the only class to which new (A) is addressed.

It seems to me that the laudable purpose of new (A) -- to prevent individuals with large claims from being swept into a class without their consent -- could be addressed quite adequately by leaving present (A) as it is, or substituting the proposed language of new (B), and beefing up the Committee Note

to suggest that in mass tort cases particularly (i) the Court should be careful in defining the class (as in the example given in the middle of p. 6 of the draft note), and (ii) the Court should be especially careful to make sure the right to opt out is adequately communicated to class members.

2. If it were decided to add new (b) (3) (A) to the Rule despite the problems noted above, the Committee Note should be revised and clarified in two ways. First, the sentence that begins at the bottom of page 7 and runs over to the top of page 8 should be clarified. That sentence says that certification is to be discouraged "when individual class members can practicably pursue individual actions," but it does not specify how many individual class members must be in that position to trigger the discouragement. Does it mean that certification should be discouraged if as few as two or three class members could practicably pursue individual actions? Surely not. Does it require that all class members be able to proceed individually? Most? Some? A substantial number? What about cases like Corrugated Container in which the class included many large claimants as well as many smaller ones? I should hope the rule is not meant to discourage certification of price-fixing cases such as Corrugated, which until now at least have been generally considered as paradigms for class treatment.

It seems to me that a (b) (3) class should be certified regardless whether some class members may have large claims. Any

class members with large claims should be free to make up their own minds whether to litigate as part of the class, which efficiently avoids the burden and expense of individual litigation, or to opt out. If that position is rejected, I would suggest the "bright line" test should be whether a majority of class members can practicably pursue individual actions.<sup>5</sup>

The Committee Note is also ambiguous in how new (A) is to be applied. If a Court finds that new (A) is triggered because the requisite number of class members could practicably pursue individual actions, is it open to the Court simply to carve all class members with large claims out of the class? I should hope not. Class members with large claims may have many legitimate reasons for desiring to remain part of a class -- for example a desire to avoid retaliation from defendants, or simply to avoid the burden and expense of individual litigation. Those class members should be allowed to make their own decisions, in the opt-out process, rather than having a Court make those decisions for them without even knowing those class members' concerns or desires.

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<sup>5</sup> It seems to me that fairness would dictate that the party opposing the class should have the burden of showing that the majority of class members have claims large enough to support individual actions.

New (b) (3) (F)

As I understand it, the intent of new (F) is to permit district courts to deny class certification where the probable recovery to individual class members, even upon complete success on the merits, is likely to be so trivial as not to justify the costs and burdens of the litigation necessary to get there.<sup>6</sup>

I do not believe that new (F) is necessary to deal with such triviality problems. Most courts would reject certification in these circumstances under the manageability criterion already expressed in Rule 23(b) (3). See, e.g., In re Hotel Telephone Charges, 500 F.2d 86 (9th Cir. 1974).

I understand and sympathize with the triviality concern in the sense that occasional cases such as Milli Vanilli stir public outrage and arguably demean the entire legal system. But as shown in the 1996 Federal Judicial Center Empirical Study, such cases are not a major problem in terms of numbers. 1996 Empirical Study at 11, 14, 77-78. Indeed, the Empirical Study found no evidence of the so-called "two dollar" cases:

"There were nine . . . cases in the four courts [where the average recovery was less than \$ 100]. These data did not include any two-dollar cases . . . . The absence of any

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<sup>6</sup> An example of such a case would be where the Complaint claims damages of \$ 1 per class member on behalf of a class of 10 million members. If the case is estimated to cost plaintiffs \$ 3 million to litigate (including the cost of notice and attorneys' fees), and 50¢ per class member (or another \$ 5 million) to distribute the recovery, a full recovery of \$ 10 million would net 20¢ to each class member. It would hardly be worth the effort, even if defendants' liability were clear and the damages certain (which they never are).

such nominal recoveries in the four districts suggests that the anecdotal cases on which the discussion was based, which presumably arose in other districts, may represent outlier cases at the bottom of the range of class action recoveries." Empirical Study at 14.<sup>7</sup>

Unfortunately, proposed new (F) and the Advisory Committee Note as they now stand can be read to reach much more broadly than truly trivial cases. One very serious problem is that both new (F) and the accompanying note suggest an unfair "apples to oranges" comparison of individual recovery to aggregate costs. The rule itself would require courts to determine "whether the probable relief to individual class members justifies the costs and burdens of class litigation." (Emphasis added.) The Note reads in pertinent part:

If the probable relief to individual class members does not justify the costs and burdens of class litigation, a class action is not a superior means of efficient adjudication.

and

The value of probable individual relief must be weighed against the costs and burdens of class-action proceedings. (Draft, p. 10, emphasis added.)

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<sup>7</sup> See also, Willging, Hooper & Niemic, An Empirical Analysis of Rule 23 To Address the Rulemaking Challenges, 71 N.Y.U.L. Rev. 74, 177-78 (1996) (finding that "there were no objective indications that settlement was coerced by class certification"; that frivolous or "strike" suits are most frequently dismissed on motion or summary judgment, or are not certified under Rule 23; and that there was no evidence of abuse in the form of attorneys' fees that were disproportionate to class recoveries).

Read literally, the rule, as illuminated by these notes, would require denial of class certification in virtually all cases, because by the very nature of class actions, aggregate costs will almost always exceed "individual relief".<sup>8</sup> Surely, that is not the intended result.

A more logical comparison would be expressly to compare aggregate costs to "aggregate relief", or expressly to compare the individual share of "costs and burdens" to individual relief. The latter is probably the most apt comparison given purpose of the proposed amendment.<sup>9</sup>

Another serious problem is that the rule and notes could be read to allow a court to make a preliminary determination of the parties' likely success on the merits, and reason that because of a low probability of success, the likely individual recovery is trivial. I doubt very much if that is what the Committee has in mind, since the Note makes no reference to an intention to overrule Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).<sup>10</sup>

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<sup>8</sup> Indeed, one of the principal purposes of class actions is to spread aggregate costs.

<sup>9</sup> Presumably in antitrust and other class actions where there is usually a wide range of individual recoveries, one would compare pro rata costs to average individual recovery.

<sup>10</sup> To foreclose that possibility, I would suggest adding a sentence or two along these lines, perhaps on page 11 of the draft at the very end of the section dealing with (b) (3) (F):

(Footnote continued)

For the above reasons, I believe new (F) is both unnecessary and undesirable. If the Committee disagrees, however, I think it would be far preferable to attack triviality directly, rather than through proposed new (F) with all the undesirable baggage it brings with it. I would suggest something like: "(F) whether the claimed relief to individual class members is trivial."

Finally, if new (F) is adopted, I think some guidance should be given as to what recoveries may properly be considered trivial. The Committee Note as it now stands provides absolutely no guidance to courts about how to determine "the probable relief to individual class members". Is the court to conduct a mini-hearing as to liability and/or damages? I hope not. On the other hand, is the court simply to follow a visceral instinct as to whether individual recoveries are likely to be substantial? Again, I hope not. I have no idea how a court could properly make the required determination without substantial discovery and adjudication of the merits.

As pointed out at page 6 of the draft, median recoveries under current practice range from \$ 315 to \$ 528. I

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"This section is meant to deal with cases in which individual relief would be trivial even if the class were entirely successful in proving the merits of their claims and the damages they seek. A court should not consider the likelihood of success in assessing the value of probable individual relief."

should think a recovery would have to be much smaller than that to be considered trivial. Although I understand the reluctance to deal in precise dollar figures, perhaps it would be helpful to refer to the current median figures in some way, for example by adding a phrase at the end of the second sentence in the third full paragraph on page 10, so it would read:

No particular dollar figure can be used as a threshold, although the threshold should certainly be much smaller than the median recovery figures reported in the 1996 Empirical Study (\$ 315 to \$ 528).

#### New Rule 23(f)

My concern with proposed new 23(f) is that in the medium to long term, it will result in the development of a body of appellate class certification law that is based upon only the most extreme cases. Under the current regime, class certification law comes mostly from the district courts and is based upon their exposure to the whole range of cases in which class status is sought. By contrast under 23(f), only the most egregious cases are likely to be accepted for review by the Courts of Appeals, and the body of law thus developed is likely to be skewed. And, of course, that skewed body of law will have the added weight of coming from the appellate level.

Moreover, given their generally superior financial resources, defendants may attempt to appeal virtually every class certification, requesting a stay pending appeal. The additional

cost and delay inherent in this likely scenario would be extremely inefficient even if the Courts of Appeals ultimately reject most such appeals.

In my view, the problems are serious enough that 23(f) ought not to be adopted. The Courts of Appeals have dealt adequately with egregious cases through their mandamus power.

#### Other Comments and Suggestions

Rule 23(e). The Committee Note should be expanded to make clear that the new requirement for a hearing does not require an evidentiary or testimonial hearing in every instance. I would suggest adding a sentence at the end of the paragraph at the bottom of page 14 along these lines: "Whether the hearing should be evidentiary or not is left to the discretion of the District Court."

Rule 23(b)(3)(C). The Committee Note should be expanded to clarify that the "maturity" factor has no application to areas of the law in which the courts have had many years experience dealing with class actions, such as antitrust price fixing, civil rights, or securities fraud cases. A logical place for such expansion would be at the end of the first full paragraph on page 7.

New 23(b)(3)(E). In the text of the rule, I would suggest substituting "any" for "the" as the first word, so the text would read: "any difficulties likely to be encountered in

the management of a class action." Without the change the text suggests that difficulties are always encountered in managing class actions. That is contrary to my experience, in which many antitrust price fixing and securities fraud class actions have been litigated successfully with no significant management problems.

Thank you very much.

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November 27, 1996

Peter G. McCabe  
Secretary of the Committee on Rules of  
Practice and Procedure  
Administrative Office of the U.S. Courts  
1 Columbus Circle, N.E.  
Washington, D.C. 20544

Re: Proposed Revisions to Rule 23

Dear Mr. McCabe:

Because of time constraints at the November 22 hearing, there was one important point I was unable to make. I was unable to make the point in my written testimony because I had not (by that time) had an opportunity to review the 1996 Empirical Study or Bill Coleman's prepared testimony.

This letter deals with that single point. I would very much appreciate it if you would circulate copies of this letter to the members of the committee.

I see no necessity for the adoption of proposed new 23(b)(3)(F). There simply is no explosion of frivolous or trivial litigation, as some have claimed. This is confirmed by the empirical study commissioned by this Committee.

"We did not find any patterns of situations where (b)(3) actions produced nominal class benefits in relation to attorneys' fees. Nor did we find any (b)(2) cases that appeared to result in clearly trivial injunctive relief accompanied by high fees." Page 11, Finding 17.

"Discussion at the advisory committee's November 1995 meeting raised a question about the incidence of the 'two-dollar' individual recovery. . . . [In all the cases studied, the] data did not include any two-dollar cases. . . . The absence of such nominal recoveries in the four districts suggests that the anecdotal cases on which the discussion

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Page 2

was based, which presumably arose in other districts, may represent outlier cases at the bottom of the range of class action recoveries." *Id.* at page 14. (I think the researchers were being kind when they indulged in the presumption that the anecdotal "two-dollar" cases indeed existed, but in other districts.)

See also *Id.* at 90.

Moreover, the study shows that when trivial cases are filed, they are almost always dismissed, or class is denied. Empirical Study at 90.

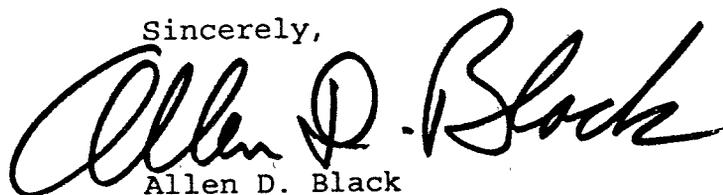
In other words, there is no problem with trivial cases.

My friend, Bill Coleman, disagrees vehemently with that conclusion; but his testimony is supported by no facts or even any anecdotal examples. His view is entirely contradicted and refuted by the Empirical Study.

To me, the findings of the Empirical Study demonstrate beyond peradventure that there is no reason to adopt a provision like new (b) (3) (F).

Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Allen D. Black". The signature is written in dark ink and is positioned above the typed name.

Allen D. Black

#2196

96-CV-037

October 30, 1996

Committee of Rules of Practice and Procedure  
Administrative Office of the United States Courts  
One Columbus Circle NE  
Washington, DC 20544



re: Comments on Proposed Changes to  
Federal Rule of Civil Procedure 23

Dear Members of the Rules Committee:

#### Introduction

We appreciate an opportunity to comment on the proposed changes to Rule 23. The focus of this commentary is primarily on settlement classes.

First, we do not object to the Advisory Committee's decision to include a discussion of settlement classes in the text and notes of the rule. Indeed, in light of contemporary controversies and case law, we believe it wise for the Advisory Committee to take up the topic and to address it in the rule.

Second, we do not object to judicial certification of classes in instances in which the ability to try the case as a class action is in doubt. Rather, given the role that settlement has come to play in the civil process, class actions -- like other cases -- should be able to be commenced and pursued despite the fact that trial of the class action may be so difficult as to be improbable.

We do, however, object to the proposed formulation of 23(b)(4). The new text is:

"the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial."

We believe that the rule should not, as the language currently does, suggest that the possibility of a settlement class depends upon the fact of pre-negotiation of a proposed settlement.

#### The Incentive Structure Created

Our central objection thus concerns the phrase "the parties to a settlement." By that statement, the rule invites small collectives of plaintiff and defendant lawyers to negotiate among themselves and to present the court with an agreement that could

then bind absentees. Such negotiations would proceed without any court having determined that the lawyers acting are in fact adequate representatives for the class they plan to represent, without notice to anyone beyond a small group that negotiations have commenced, and in some instances, without the development of information by means of discovery. Such an invitation creates incentives for behavior that is the center of criticism of settlement classes: the fear of collusive bargaining in which lawyers profit to the detriment of class members.<sup>1</sup>

The Advisory Committee's proposed ameliorative (the revision of 23(e) to provide expressly for a hearing when the court considers the adequacy of such settlements) is insufficient. A judicial hearing -- after an agreement is reached -- is no substitute for a process, before agreement is reached, that is inclusive. The process shapes the kind and nature of agreements that are reached. Once the "deal" is made, those affected are presented with the choice either of opting out, which is often impractical in practice, or of accepting the agreement. Reshaping of the agreement, if it happens at all, is at the margins. In contrast, if the diverse interests are present at the outset, the configuration of a proposed agreement will in turn reflect that participation.

Instead of encouraging interactions among self-selected attorneys, the rule should promote the opposite: that proposed settlements of class actions be negotiated in a manner that:

- a) makes visible the many different aspects of the alleged injuries suffered by class members, and
- b) puts responsibility on the court for ensuring fairness during the course of such negotiations.

Empirical data on class actions, while more abundant with the help of the Federal Judicial Center's study,<sup>2</sup> are still very limited. Although several high profile cases have raised concerns about the negotiations of settlement class actions, we know little as yet about all of the ways in which such negotiations might proceed. Given these empirical limitations, we believe it would be unwise to preclude -- across the board -- all proposed settlements filed concurrently with the request for class certification, but,

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<sup>1</sup> See, e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995); Commentary provided by John Frank, included in the *Draft Minutes, Civil Rules Advisory Committee* (April 18, 19, 1996), reprinted in *Proposed Rules: Amendments to Federal Rules, Amendment to the Federal Rule of Civil Procedure 23*, 931 F. Supp. CLV, CLXXXVIII (1996) (raising concerns about "sell-out settlements").

<sup>2</sup> See Thomas E. Willging, Laura L. Hooper, & Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. Rev. 74 (1996).

given what is known, we also think it unwise to promote such practices.

### **An Alternative**

What should be done instead? The rule should be written to recognize three points, specifically that: 1) settlement is a likely conclusion of many kinds of lawsuits, class actions included; 2) judges have fiduciary obligations to absent members to create a representative structure and to monitor the creation of class-wide resolutions; and 3) some class actions present sufficient differences among class members such that more, rather than fewer, participating representatives are appropriate when negotiating settlements.

Below, each of these points is explained.

1) *The rule should recognize that aggregate litigation, like individual litigation, should be permitted to proceed although trial is unlikely and may not even be feasible.*

We know that an array of lawsuits are begun with little expectation of trial. Indeed, not only is settlement a fact of life in the civil process, it is the policy of the federal courts to encourage such resolutions. District and magistrate judges are now mandated to superintend the pretrial process and to help create conditions under which settlements could occur.<sup>3</sup>

To insist that class actions -- unlike the rest of civil litigation -- may only proceed as if trial were the expected mode of resolution is to unduly burden this form of aggregate litigation. Moreover, as the rule drafters correctly recognize, class actions are not the only form of aggregate litigation.<sup>4</sup> However, not all the other forms of aggregation, both informal and

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<sup>3</sup> See, e.g., the 1983 and 1993 amendments to Rule 16; the Civil Justice Reform Act of 1990, 28 U.S.C. §471 et seq; *Matsushita Electrical Industrial Col, Ltd. v. Epstein*, 116 S.Ct. 873 (1996). See generally Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 Wis. L. REV. 631 (1994); Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471 (1994); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

<sup>4</sup> See proposed revisions to 23(b)(3), making plain that the options available are not individual control vs. class action status. See also Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROB. 5 (1991).

formal, obligate the judge to attempt to protect the interests of absentees. Rule 23 thus has the potential to provide process (such as proceedings under 23(e) at the time of settlement and compromise) that offers greater protection than do some other forms of aggregation. Therefore, Rule 23 should not be written to push out all aggregate cases in which settlement is anticipated and trial unduly difficult.<sup>5</sup>

2) Courts create class actions; judges have special obligations therefore to monitor these creations to ensure that the individuals within them are fairly represented.

Of course, the concept of judges as specially-situated in class actions is not novel; courts have long recognized their obligations to absent class members.<sup>6</sup> However, courts have also recognized that the implementation of that obligation is not easy. "Judging" consent -- evaluating the reasonableness, adequacy, and fairness of an agreement -- is a very difficult task, especially if the bargaining has occurred prior to the commencement of litigation and without notice to those affected.<sup>7</sup>

The question is how to implement the judicial fiduciary obligation in the context of settlement classes. We know that a range of cases fit within this framework; indeed the proposed revisions are frankly written with the expectation that mass torts do and should come within the class action rubric, along with consumer, securities, civil rights, and a myriad of other kinds of lawsuits that currently fit within the genre.

In mass torts, some litigants within the proposed class may have individual attorneys, retained prior to the creation of a class, while others do not. The relationships between attorney and client in the case of such individually-retained plaintiffs' attorneys ("IRPAs") are varied; some clients may have personal one-on-one relations while others may be part of what is (sadly) referred to as a "stable" or "warehouse" of cases. In aggregate actions, judges typically appoint "plaintiff steering committees"

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<sup>5</sup> For example, imagine a mass accident such as a fire. It is possible that trial en masse would be difficult but that group-based pretrial processing is appropriate. Rather than remit such a case to the MDL process, in which judges create ad hoc representative structures, class action certification should be an option.

<sup>6</sup> See generally Jack Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 538-60 (1994).

<sup>7</sup> See Judith Resnik, *Judging Consent*, 1987 U. CHI. LEGAL FORUM 43.

("PSCs"). Lawyers on such committees may themselves be a diverse lot, ranging from those who "bankroll the case" and are expert at large financial management to those who work in roles more traditionally associated with lawyering, such as the coordination of massive discovery and the like.<sup>8</sup>

We know further that the incentives of this diverse set of lawyers and clients vary -- that some want early settlements to "cash out" and move on; that the stakes of the individual plaintiffs often reflect a range of alleged injuries; that the relationship of lawyer to client may be attenuated to the point of fiction or, on the other hand, close and intense; that the relationships among the various sets of lawyers is shaped by their personal understandings of ethical obligations to clients and of expected economic return; that some plaintiff counsel have ongoing relations with some members of the defense bar, and others do not; and that clients have a difficult time in superintending and monitoring the adequacy and loyalty of their lawyers.<sup>9</sup> Further, and again varying with the kind of case, some classes involve difficult evaluative problems, ranging from causation to estimation of the number of individuals affected and the nature and severity of their injuries.

In short, judicial discharge of fiduciary obligations is difficult in class actions in which the set of interests represented is diverse and in which multiple layers of lawyers interact. That work is further complicated when a settlement proposes an overall remedial plan under which distinct groups of class members benefit unevenly. Therefore, the rule needs to design a process that attempts to respond to these difficulties and that aspires to bring differences to light rather than to obscure their existence.

3) Because some class actions include class members with diverse interests, judges should seek to ensure that sufficient numbers and kinds of representatives participate in bargaining for settlement.

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<sup>8</sup> See generally Judith Resnik, Dennis E. Curtis, Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 312-14 (1996); Coffee, *Class Wars*, supra note 1, at 1364-65.

<sup>9</sup> See, e.g., Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991); Nancy Morawetz, *Bargaining, Class Representation, and Fairness*, 54 OHIO ST. L. J. 1 (1993); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982).

Judges should face the difficulty of monitoring the quality and nature of settlements by ensuring adequate access by representatives of different interests to the bargaining process as settlement negotiations occur. The proposed language to the rule takes the opposite approach and implicitly encourages lawyers to try to shut out a range of perspectives, appoint themselves as representatives without either knowledge by or consultation with clients, and then walk into court with a "deal," ready-made for approval.

Instead, the rule should be revised to articulate the obligations of the judge to protect class interests during the pretrial/settlement process -- to permit inquiry, prior to certification, of the adequacy of class representation and to make provisions, when appropriate, for more than one set of attorneys, guardians ad litem, or other participants, to be part of the bargaining process.

#### Some Possible Language

Given that we share with the Advisory Committee the view that the rule should recognize the possibility of certification of class in cases in which trials may be impracticable, we thought it appropriate to offer some illustrative language to capture these thoughts. The rule could be revised, for example, to state the following:

In certifying a class action, the court may consider the difficulties that would emerge were the lawsuit to proceed to trial. The court may certify a class conditionally and allow it to proceed through some or all of the pretrial process, including notice, discovery, and settlement negotiations. When certifying class actions that the court believes do not or might not meet all the criteria for certification if trial were to occur, the court should so state in its opinion and should revisit the question of class certification, either upon motion of the parties or sua sponte, if it appears that settlement of the dispute is unlikely to occur or if other information is developed that makes plain the impropriety of class certification.

A few comments on this illustrative proposal are in order. First, this proposed conditional certification should not preclude the use of the Advisory Committee's proposed Rule 23(f), permitting discretionary appeals. Thus, our suggestion does not impinge on the drafters' view that increasing the potential for engagement (without mandamus) of appellate courts is appropriate.

Second, judges considering conditional certification may take

into account the concerns that animated Judge Posner's opinion in *In re Rhone Poulenc*, 51 F.3d 1293 (7th Cir.), cert. denied, 116 S.Ct. 184 (1995), to wit that class certification inappropriately creates undue pressures to settle. Similarly, the illustrative language enables judges to determine -- as well as to revisit -- the size and shape of a proposed class and whether the aggregate truly represents a group of litigants linked by common interests. Importantly, the proposed language also acknowledges that whatever a judge does (be it decline certification, certify with hesitations about trial, or certify the class without such caveats), that decision has a strategic impact on the subsequent course of proceedings and on the respective parties' bargaining positions.

Third, classes certified to explore settlement offer the advantage of providing notice to class members that will in turn bring useful information to the settlement negotiations and (hopefully) improve the quality of bargaining on behalf of the litigants, thereby responding to some of the current criticism of settlement classes. Such conditional certifications provide for the development of facts, the recourse to experts when appropriate, and some exchanges between lawyers and class members. Moreover, uncoupling certification from settlement diminishes the likelihood of dealmaking among a very few self-selected attorneys and helps judges discharge their fiduciary obligations.

To the extent that certification with the prospect of settlement and the resulting notice results in an increase in participation by class members and/or their attorneys, that process may in turn facilitate the district judge's task in considering the adequacy of proposed settlements and in monitoring the role of the lawyers. It should also be noted that, because this proposal anticipates that more lawyers may participate in the pretrial proceeding and in the negotiations, judges should -- in cases involving court-awarded attorneys' fees -- consider awarding attorneys' fees to a wider array of lawyers than those designated as attorneys for a class, in a PSC or in other "lead counsel" positions.<sup>10</sup>

Fourth, unlike the current draft, this proposal complements the spirit of the other rules involving parties, specifically Rules 19 and 24, which endeavor to enable participation of litigants with somewhat divergent interests within a single lawsuit. (It might also be useful for a revised Rule 23 to borrow some of the language from these rules or for the notes to refer to the concepts of "interests" not adequately represented by those already present within the existing litigation structure and to the importance of the practical effects of a decision or judgment.)

Fifth, this wording does not decide the propriety of "futures"

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<sup>10</sup> See Resnik, Curtis, & Hensler, *supra* note 8, at 395-98.

classes per se. It neither bans them nor necessarily encourages them but permits case by case decisionmaking on particular proposals for class certification.

Sixth, we recognize that allowing more participants and the development of a broader information base may well make it harder to settle cases. As the current crop of disputed settlement classes demonstrates, closing out potential dissenters increases the likelihood of accord; inviting them in may make bargaining more complex. On the other hand, one risk of our proposed inclusive method is that a small segment of class members might attempt to exert control over the shape of a settlement in a fashion that proves detrimental to other, and possibly most, members of the class.

The hope, of course, is that when such settlement negotiations occur after certification, the participants are in a structured, court-based setting and could have recourse to judicial assistance, special masters, experts, and the like to mediate such risks. Further, we hope that those settlements that do result work to the benefit of more litigants.

Thank you for consideration of these comments.

Sincerely,

Judith Resnik  
Visiting Professor of Law, NYU School of Law  
Orrin B. Evans Professor of Law, USC Law School

Margaret A. Berger  
Suzanne J. & Norman Miles Professor of Law  
Brooklyn Law School

Dennis E. Curtis  
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Clinical Legal Education, USC Law School

Nancy Morawetz  
Professor of Clinical Law, NYU School of Law

[All affiliations are for identification purposes only; these comments are submitted in our individual capacities and do not represent the views of any organizations.]

Outline of Testimony  
of Professor John C. Coffee, Jr.  
On November 22, 1996  
before the Advisory Committee on the  
Federal Rules of Civil Procedure

My comments will be limited to the two principal changes in Rule 23: (1) proposed Rule 23(b)(3)(F), which permits the court to refuse to certify a "small claimant" class action based on its own cost/benefit analysis, and (2) proposed Rule 23(b)(4), which would seemingly liberalize the standards for "settlement class" actions and expressly reject the Third Circuit's decisions in Georgine v. Amchen Products, Inc., 83 F.3d 610 (3d Cir. 1996), and In re General Motors Pick Up Truck Fuel Tank Prods. Liab. Litig., 55 F3d 768 (3d Cir. 1995).

1. The "Small Claimant" Class Action

Proposed Rule 23(b)(3)(F) is remarkably ambiguous as to whether its intended cost/benefit analysis would compare the expected average individual recovery or the expected aggregate class recovery against the "costs and burdens of class litigation." The Federal Judicial Center's recent study finds that the average individual recovery in class actions in the four district courts it studied ranged between approximately \$300 and \$500. On this basis, the typical class action could not be certified. Nor is it clear what the rule contemplates when it refers to the "costs and burdens of class litigation." Does this refer to the costs to the judicial system as well as to the defendants? If so, what imputed value is to be placed on Judicial time? More importantly, there is an asymmetry here: Why is it that we should look to the costs to all defendants, plus possibly those of the courts as well, but only to the benefits to the individual plaintiff? Because these issues about whether the proposed Rule intends a comparison of individual benefits to aggregate costs have a day-versus-night significance for the future of the

class action, one suspects that they could not have been simply overlooked; rather, they seem to have been deliberately swept under the rug in an attempt to maximize judicial discretion.

Nonetheless, this is not the most surprising omission in proposed Rule 23(b)(3)(F). Class actions have long been viewed as a means of generating deterrence (both specific and general). Even in the rare case where the class members receive only pennies and the class attorneys pocket millions, the result may still be to punish unlawful behavior. The antitrust class action supplies an obvious case in point. When Congress authorized treble damages for antitrust violations, it obviously intended to do more than provide compensation to victims; it intended to punish. Since the Supreme Court recognized implied private causes of action under the federal securities laws in the 1960's, the rationale has been that private enforcement of the federal securities laws was essential because the SEC could not alone hope (even back then) to enforce these statutory policies by itself and instead must rely on private enforcement.

Private enforcement of law by private attorney generals is a long-standing policy of American law. To ignore it is to frustrate clear statutory policies (such as the treble damages provision of the antitrust laws) in a manner that violates the intended neutrality of the Rules Enabling Act. Indeed, I invite the Committee to explain why Congress would have endorsed treble damages (under the antitrust laws, RICO or elsewhere) if it was not for the purpose of generating deterrence. But this purpose will often be frustrated if the small claimant cannot utilize the class action device.

What should be done? If proposed Rule 23(b)(3)(F) is to be retained (and I doubt that it should be), it should explicitly focus on both the probable aggregate relief to all class members and the likely deterrent value of the action in ensuring law compliance. For example, a revised

rule might read:

“(F) whether the probable aggregate relief to all class members and the deterrent value of the action in assuring compliance with law justifies the costs and burdens of class litigation; or”

2. Settlement Class Actions In light of the grant of certiorari in Georgine v. Amchem Products, Inc., supra, it seems premature for the Advisory Committee to take any position on settlement class actions, pending the Court’s decision and an opportunity for this Committee to review the Court’s analysis.

Nonetheless, because we are all gathered here today to discuss “settlement class” actions, I cannot resist the temptation to criticize the proposal.

The Committee Note to proposed subdivision (b)(4) is explicit that subdivision (b)(4) would permit “certification of a class under subdivision(b)(3) for settlement purposes, even though the same class might not be certified for trial.” The same Committee Note is opaque, however, in what shortfalls would be permitted. To be sure, the next paragraph of the this Committee Note maintains that “the predominance and superiority requirements of subdivision(b)(3) must be satisfied.” However, the implicit view in this Note is that these requirements apply very differently in the litigation and settlement contexts. The one illustration that is given shows the conceptual problem that the Committee Note fails to confront candidly. In that example, it is suggested that a multi-state class action often could not be certified because of “choice-of-law difficulties”, but that “settlement can be reached... on terms that surmount these difficulties.” Indeed, settlements can surmount any “difficulties”--but only at the cost of legitimizing inherently non-adversarial and weak settlements. The problem is that this proposal to

permit the parties to settle a class action that could not be litigated overlooks the dynamics that underlie settlement. Defendants do not settle class actions that they could have had dismissed out of charitable motives or based on a desire to bestow largess on class members. Plaintiffs who cannot get to trial have no leverage. To state the obvious and the undeniable, a plaintiffs' attorneys' leverage in settlement negotiations comes from the attorney's ability to threaten a potentially greater loss at trial if settlement is not reached. Take away this threat, and the attorney's negotiating leverage will be greatly weakened (or extinguished), and the resulting settlement will be predictably weaker. That any settlement is reached at all is the product of the plaintiff's attorney's ability to divest absent class members of the right to sue in other proceedings (either in individual proceedings or in class actions in state court). Thus, settlement class actions in the mass tort context have been attractive to defendants precisely to the extent that such actions can resolve the claims of future claimants (who may not sue for decades) at discounted prices. In seeking to resolve these claims that could only be litigated in other proceedings, the plaintiffs' attorney in a class action that could not be asserted as a "litigation" class action is subject to a crippling conflict of interest: the attorney can only profit if the proceeding is resolved, whereas the clients may fare much better if their claims were resolved elsewhere. In short, the attorney gains only if the settlement class is certified (however unsatisfactory the relief), while the class may do much better if the settlement class is not certified (and they sue later, for example, when their individual claims mature). Such a conflict can corrupt (and in some cases clearly has corrupted) the settlement process.

In addition, the district court is poorly positioned to evaluate the fairness of such conflicted settlements, because it does not have the ability to estimate the litigation merit of the

actions (individual or class) that are thereby precluded. All that can be said is that settlements in which the plaintiffs' attorney has little leverage will be inherently weak and unsatisfactory.

The one possible exception to this generalization is the case where litigation in alternative forums does not appear to be viable (this might often be the case in the "small claimant" class action when it is predictable that no one would sue individually for a few dollars). Even here, however, an alternative class action might be available (probably on a state-by-state basis) in state court. Nor is it clear why a defendant would ordinarily settle a class action (even as a settlement class action) unless there was a threat that it could be litigated somewhere else.

In this light, I would recommend that this Committee grant no more than a very, very modest role for settlement class actions. Preferably, no separate rule should be carved out in subsection(b)(4), but rather a statement should be added to the Committee Note under subdivision (b)(3) that the existence of a settlement may be considered in evaluating the "superiority" requirement under subdivision(b)(3). Clearly, cash today is "superior" to the possibility of cash tomorrow, and no court (including Georgine) has ever denied this.

Beyond this, the more debatable rationale for the settlement class action is that it is often uncertain whether the class could be certified for litigation purposes and thus the parties should be able to settle this issue (just as they can compromise other debatable issues). As noted above, however, my basic answer to this claim is that opposing counsel are not true adversaries on this issue, because plaintiffs' counsel will be compensated only if it agrees to a settlement class (and today not otherwise). Thus, if the decision is made to broadly approve a settlement class action in a separate provision of Rule 23 (against the advice of most academics who have commented on this issue), the minimum requirement should be a judicial finding that there is no other forum in

which an individual or representative action raising the same legal claims would be viable. To

state this in more draftsmanlike, language subdivision(b)(4) should read:

“(4) the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the predominance requirement of subdivision(b)(3) might not be met for purposes of trial, and the court finds that there is no realistic possibility that the same or similar claims could be successfully asserted (on either an individual or class basis) in any other court or forum.”



✓ 96-CV-037

JUDITH RESNIK  
Visiting Professor of Law  
New York University School of Law

96-CV-049

JACK COFFEE  
Adolf A. Berle Professor of Law  
Columbia Law School

January 8, 1997

The Honorable Paul Niemeyer  
United States Court of Appeals for the Fourth Circuit  
Room 740  
101 West Lombard Street  
Baltimore, Md. 21201

re: Additional Comments on  
Proposed Changes to Federal  
Rule of Civil Procedure 23

Dear Judge Niemeyer:

You had asked us to provide you with joint commentary -- outlining our areas of agreement about settlement classes and offering language for proposed changes to Rule 23 that take into account our different concerns. Below, we do both. Please note that we address here only the issue of settlement classes and do not reiterate the concerns we have about the proposed balancing test set forth in 23(b)(3)(f).

**Our Shared Assumptions**

Although we have somewhat divergent views about settlement class actions, we in common recognize that there is a serious potential for abuse associated with them (particularly in cases involving future claims). At the same time, we do not believe a broad prophylactic rule, prohibiting settlement classes when an action cannot be certified for trial, is necessary. Thus, we offer below a possible compromise that attempts to protect against these abuses without adopting an overbroad prohibition.

At the outset, however, we should also note that we both object strongly to the proposed formulation of 23(b)(4). The text now states:

"the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial."

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The rule should not suggest that the possibility of a settlement class depends upon the fact of pre-negotiation of a proposed settlement, nor should the rule encourage the behavior that is most problematic: inviting small collectives of plaintiff and defendant lawyers -- before a class action has been filed or certified -- to negotiate among themselves and to present the court with an agreement that could then bind absentees. Such negotiations proceed without any court having determined that the lawyers acting are in fact adequate representatives for the class they plan to represent, without notice to anyone beyond a small group that negotiations have commenced, and in many instances, without the development of sufficient information by means of discovery.

Such an invitation creates incentives for behavior that is the center of criticism of settlement classes: the fear of collusive bargaining in which lawyers profit to the detriment of class members or one set of claimants benefit to the detriment of co-claimants.<sup>1</sup> Once such "deals" are made, those affected are presented with the choice either of opting out, which is often impractical in practice, or of accepting the agreement. Reshaping of such settlements, if it happens at all, tends to be at the margins.

Instead of encouraging interactions among self-selected attorneys, the rule should sort out the problems posed when certifications are presented jointly by attorneys for plaintiffs and defendants. The rule should also address the distinct question of cases in which class status may be appropriate for the pretrial, litigation and possibly settlement process, but it is not known, at the time of certification, whether class certification is proper for trial. Finally, the rule should require court scrutiny of all class settlements to try to guard against abuses that have become apparent, particularly in mass torts.

Below we provide proposed language. Our proposal entails what we take to be an intermediate approach; we do not ban settlement classes in all forms but impose standards by which to assess their propriety.

Two other introductory remarks are in order. First, some may object that our rule places more burdens on negotiators of proposed settlements than does the current draft. As was discussed at the hearings, because these proposals emphasize the desirability of a broad array of participants, the development of a comprehensive information base, and more exacting scrutiny

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<sup>1</sup> See, e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995).

of proposed settlements, it may make more difficult the process of achieving settlement in some cases. On the other hand, it will also enable some settlements that might not have occurred and make better (we hope) the quality of the settlements proposed. Second, we have not provided what an ideal, final drafted version would contain. Our draft is meant to convey the concepts and not to represent the final drafting language in which the rule would be expressed. What this draft provides are the principles that are at the core of a revision that we can support.

#### The Proposed Language

#### Proposed 23(b)(4)

(4) the court finds that provisional certification under subdivision (b)(3) for the purposes of litigation or settlement would constitute a fair and efficient method by which to advance the resolution of the dispute, and such certification is requested either:

A) by the plaintiffs, who seek certification but are not able to establish that they can meet all the requirements of 23(b)(3). When making such a provisional certification, the court shall:

i. indicate that the proposed certification is conditional and for litigating purposes only ("litigating certification");

ii. make specific findings as to which requirements of subdivision (b)(3) it finds satisfied, unsatisfied, or to which it reserves judgment;

iii. require that members be notified of the limitations placed on the certification. Should defendants or class members object, the court shall provide a hearing, after notice, on the issue of the propriety of certification. After such a hearing, the court may alter the certification and/or appoint additional representatives, a guardian ad litem, or employ other procedures to ensure that all interests within the class are adequately represented during the litigation process.

iv. either upon motion of the parties or sua sponte, revisit the certification and alter it, either by decertifying the class, recertifying it under subdivision (b)(3) or (b)(4)(B), or by creating subclasses for certification as it deems appropriate; or,

B) jointly by one or more of the defendants to the action and by a plaintiffs' steering committee, appointed by the court, even though all of the requirements of subdivision (b)(3) might not be satisfied for the purpose of trial. Before certifying such a provisional class, the court shall:

i. make specific findings as to whether each of the requirements of subdivision (B)(3) are satisfied;

ii. if one or more of the requirements of subdivision (b)(3) are found not to be satisfied, determine whether any discrete subcategory of class members would be likely to obtain a superior result (via settlement, trial or other form of disposition) in another available forum or proceeding (including actions pending or to be commenced in the foreseeable future). In so determining, the court shall consider whether similarly situated individuals have obtained superior results in the past in other proceedings; whether individual or representative litigation in the future in other proceedings constitutes a viable alternative for most of the class or an identifiable subcategory thereof, whether delay is likely to affect materially the effectiveness or enforceability of any judgment or remedy, and other factors (including the availability of counsel) bearing on the ability of class members to receive just and fair treatment. If the court determines, either before or after certification, that one or more discrete subcategories of class members would likely obtain or has obtained a superior result in another forum or by means of another procedure, the court shall exclude such subcategory from the certified class; and

iii. determine and make specific findings as to whether a need exists for subclasses, special counsel, guardian ad litem, or other additional procedures are needed, because of the potential differential in impact of any proposed settlement upon class members or because of the need for negotiation among subcategories as to the allocation of any proposed settlements.

C) When considering the request to approve a class action settlement, and whether the class is certified pursuant to 23(b)(3) or 23(b)(4), the court has fiduciary obligations to protect the interests of absentees. Prior to approval of any proposed settlement, the court shall require that the parties

requesting the settlement provide the court with detailed information about:

- i. the means by which the lawyers seeking to represent the plaintiffs came to engage in negotiations with lawyers seeking to represent defendants;
- ii. the degree to which the proposed settlement treats all members of the class equally or, if distinctions are made, the bases on which such distinctions are claimed to be proper;
- iii. the means by which the remedial provisions shall be accomplished;
- iv. why it is in the interest of the members of the proposed class action to accept the proposed settlement in lieu of either individual litigation or other forms of aggregate litigation, in either state or federal court or in an administrative proceeding;
- v. information, if available, about the amount of compensation, including costs and fees, provided to the attorneys representing the class and the relationship between that compensation and that received by class members;
- vi. information about payment of fees or costs associated with special counsel, guardians ad litem, court experts, objectors, or others;
- vii. information about the methods by which other lawyers, if any represent individual class members, shall be compensated (including fees and costs) and the amounts of such compensation; and
- viii. such other information as the court deems necessary and appropriate.<sup>2</sup>

#### **A Proposed Advisory Committee Note**

Under this subdivision, a court may consider two kinds of certification not provided for in 23(b)(3) -- certification of classes in which, at the time of certification, it is not yet known whether the case can proceed through all phases, and particularly through trial as a class action ("litigation

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<sup>2</sup> The provisions we have proposed for 23(b)(4)(C) could alternatively be placed in an expanded 23(e).

classes") and certification of classes jointly requested by lawyers for plaintiffs and defendants (and often, but not exclusively, including proposed settlements as well).

The purpose of litigation classes is to enable an initial exploration, on notice to affected parties, of the possibility of a group-wide disposition, either through the pretrial process or via settlement. Building on the model of the multi-litigation statute, 28 U.S.C. §1407, a litigation class permits discovery and exploration of settlement on a class wide basis, but only upon notice to affected members and opponents. This rule revision is proposed to complement the spirit of other rules involving parties, specifically Rules 19 and 24, which endeavor to enable participation of litigants with somewhat divergent interests within a single lawsuit. The rule revision is also designed to make the practice in class actions accord with that in other aspects of civil litigation, namely that few cases are in fact disposed of by trial but many proceed through pretrial litigation under the aegis of amended Rule 16. The proposed amendment to Rule 23 places burdens on judges to ensure that those affected by such litigation are adequately represented throughout the pretrial process, and further requires judges to revisit the question of certification when appropriate.

The other kind of certification contemplated by the rule is that requested jointly by plaintiff counsel, seeking to represent a class, and one or more of defendant counsel, joining in that application. A common form of such requests is that of the settlement class, in which a certification of a class is a means to implement a settlement but the findings in 23(b)(4)(B) should be made whenever the court has reason to believe that the requests for class certification and for approval of a settlement are linked. Given contemporary concerns about such cases (see John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995)), the rule imposes higher burdens on such joint certification requests, including that courts determine whether subclasses should also be certified to ensure that all of the interests of class members are adequately represented within the litigation structure and that those affected either legally or practically by a judgment are either appropriately represented or beyond the scope of any proposed judgment.

As used in subdivision 23(b)(4)(B), the term "superior result," achieved "via settlement, trial or other form of disposition," requires the court to consider more than a comparison of the likely monetary results of the pending action as compared with likely results in another forum (e.g. an individual action in state or federal court, an administrative remedy, other forms of aggregate litigation, formal or informal,

in state or federal court). In class actions involving monetary recoveries, the court should also evaluate how proposed recoveries will be funded (including the adequacy of insurance coverage) and whether relegating class members to individual actions, to multi-district litigation, or to other processes will give such class members viable remedies, if liability is established, against defendants who are likely to remain solvent in the foreseeable future. When evaluating non-pecuniary aspects of proposed settlements, the court should evaluate carefully the actual utility of those proposals and the means by which they will be provided to class members. If the court finds that identifiable groups of class members have a viable and established remedy by means of processes other than a settling on certification class, the court shall consider the effect of divesting class members of such remedies by approving of the proposed certification. In short, this comparative analysis requires the court not only to consider the class and settlement proposed simultaneously but the other options practically available to class members, the incentives of the litigants and their attorneys to proceed by means of a class as compared to those other ways, and the availability of counsel and of access to such other fora. The question before the court is whether there are better ways to respond to the alleged injuries of the plaintiffs than by means of a settlement class action or whether, under the particular circumstances of a specific case, such a certification is appropriate.

When certified under any provision of 23(b), the provisions of 23(f) that permit discretionary appeals apply. Judges considering certifying litigating classes may take into account the concerns either that class certification inappropriately creates undue pressures to settle or, alternatively, inappropriately undermines the authority of the class representatives.

Classes certified for litigation and those certified at the behest of both plaintiffs and defendants should be accompanied by notice to class members, thereby enabling the development of information relevant to the settlement negotiations and relevant to the propriety of maintaining the class certification.

The proposed revision also provides for the appointment, by the court, of more than one kind of representative or lead counsel and the utilization of an array of lawyers and others to ensure a process of litigation and negotiation that will, in turn, facilitate the district judge's task in considering the adequacy of proposed settlements, if any result, and will assist the judge in the discharge of his/her fiduciary task of monitoring the class representatives. "Judging" consent -- evaluating the reasonableness, adequacy,

and fairness of an agreement -- is a very difficult task. See Judith Resnik, *Judging Consent*, 1987 U. CHI. LEGAL FORUM 43. The proposed language provides the framework by which judges are to discharge their fiduciary obligations to the absent members of the class. Because this proposal anticipates that more lawyers may participate in the pretrial proceeding and in the negotiations, judges should -- in cases involving court-awarded attorneys' fees and costs or when approving settlements that provide for fees and costs -- consider awarding or requiring that attorneys' fees be paid to a wider array of lawyers than those designated as attorneys for a class, those on a Plaintiffs' Steering Committee, in other "lead counsel" positions. See Judith Resnik, Dennis E. Curtis, & Deborah R. Hensler, *Individuals within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296 (1996). The new language expressly calls for information to be provided to the court about the proposed compensation, including costs and fees, for all lawyers, be they class representatives, individually-retained attorneys, objectors, or others.

While the standards for considering of settlements filed concurrent with requests for certification do not preclude so-called "futures" classes per se, the standards require close scrutiny by the court of the treatment of all segments of a class when settlements are proposed.

The court should ensure an inclusive array of representatives during the course of class action litigation but should also guard against the risk that small segments of class members or their attorneys might attempt to exert control over the shape of a settlement in a fashion that proves detrimental to other, and possibly, most, members of the class. The requirement of disclosure of all fee and cost arrangements, including those among plaintiffs' lawyers as well as between plaintiffs and defendants, is aimed at enabling the court to assess the interests of all participants and the degree to which specially-identified participants (lead counsel, PSC members, special counsel, objecting counsel, defense counsel, etc.) represent the interests of the disputants.

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### Conclusion

We have erred on the side of being comprehensive in terms of our explanation, our draft, and our notes. We would be happy to meet with you to discuss means by which we could shorten these proposals or otherwise redraft them. We remain willing to help the Advisory Committee in any way that is useful to you.

rule23.pro  
January 8, 1997

Thank you for consideration of these comments.

Sincerely,

*Judith Resnik*

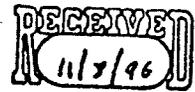
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cc: Professor Ed Cooper, Reporter to the Advisory Committee

#2197



96-CV-038

TESTIMONY OF ROBERT N. KAPLAN AT  
THE PUBLIC HEARING ON PROPOSED AMENDMENTS  
TO RULE 23 OF THE FEDERAL RULES OF CIVIL  
PROCEDURE - NOVEMBER 22, 1996, PHILADELPHIA, PA

The memorandum of Honorable Patrick E. Higgenbotham, Chair Advisory Committee on Civil Rules, dated May 17, 1996, states that the proposed revisions to Civil Rule 23 "result from a course of Committee study that began when . . . the Judicial Conference requested that this Committee direct the advisory committee on Civil Rules to study whether Rule 23, F.R.C.P. be amended to accommodate the demands of mass tort litigation." The memorandum also states that "the proposals address some of the issues that arise in contemporary mass tort litigation, and address as well some issues that arise in small-claims class litigation."

I have not had experience in litigating "mass tort litigation" or "small-claims class litigation." However, for nearly twenty-five years, I have been engaged in litigating antitrust and securities class actions.

Rule 23 has worked well in those litigations. Yet, several of the provisions of the proposed amendments to Rule 23 would have unintended, negative consequences in antitrust and securities class litigation.

In particular, proposed Rules 23(b)(3)(A) and (F) may unnecessarily dismember classes in antitrust and securities class actions, because those classes always consist of disparate class members, some with "small" and others with "large" claims. Those

proposed Rules would also greatly increase expense and create procedural nightmares in those actions.

I also question whether proposed Rule 23(f) makes sense in antitrust and securities class actions, where legal jurisprudence has evolved so that normally there is a minimum of satellite class action discovery and motion practice, and in securities cases, the parties often stipulate to classes. Rule 23(f) would encourage routine motions to appeal grants and denials of class certifications.

I support enactment of proposed Rule 23(b)(4) since settlement classes have been routinely utilized in antitrust and securities litigation, without any adverse consequences.

1. Rule 23(b)(3)(A): "The practical ability of individual class members to pursue their claims without class certification" and Rule 23(b)(3)(F): "whether the probable relief to individual class members justifies the costs and burdens of class litigation."

As stated earlier, in antitrust and securities class actions, the classes always consist of class members with a great variety of different size claims. Yet, classes have been routinely certified and the litigations resolved without a great deal of opt-out litigation.

The notes to Subparagraph A state that this proposed provision "discourages - but does not forbid - class certification when individual class members can practicably pursue individual actions." The notes state that Subparagraph F has been added to "effect a retrenchment in the use of class actions to aggregate trivial individual claims."

Subparagraph A does not quantify the size of a claim or the financial wherewithal of a class member which would give that class member "the practical ability" to "pursue" its "claims without class certification". Subparagraph F does not set forth what "probable relief" would justify "the costs and burdens of class litigation." These provisions will cause procedural nightmares and greatly increase satellite litigation and the costs of litigation.

If these provisions are effected, in opposing class certification, a clever defense attorney would engage in extensive discovery, inter alia, concerning (1) who are the members of the class, (2) what is the size of each of their claims, and (3) what is their ability under Subparagraph A to "pursue their claims without class certification." In addition, under Subparagraph F, counsel opposing class certification would seek discovery concerning "the probable relief" to each "individual class member." This would involve an assessment of the strengths of the claim, both with respect to liability and damages. When plaintiffs assert that the class may recover a certain amount, defendants will engage in discovery (1) with respect to plaintiffs' damage expert to attempt to show that the damages are much lower than claimed, and (2) will assert that the "probable" chances of recovery are low. This approach is directly contrary to the established teaching of the federal courts that in deciding class certification motions, courts should not attempt to prejudge the merits of the claims.

Furthermore, defendants would file affidavits and, if necessary, seek to introduce testimony setting forth a parade of horrors about alleged "costs and burdens of class litigation."

This could greatly expand class discovery, which would greatly change the manner in which classes are currently certified. At the present time, while courts generally permit discovery of named plaintiffs to determine whether they are adequate and typical class representatives, normally discovery is not permitted of absent class members. If these provisions are effected, they may lead to routine discovery of hundreds and thousands of absent class members.

However, even after all of this discovery, the language of Subparagraphs A and F is so nebulous that they give virtually no guidance as to the standards to be applied. For example, under Subparagraph A, it is unclear in what instances a class member would have the "practical ability" to "pursue" its "claims without class certification". In an antitrust class action, a class member may have a claim in the hundreds of thousands, millions or tens of millions of dollars. What size claim would give a class member the "practical ability" to "pursue" its "claims without class certification"?

Even though the claim may be large, what are the realistic possibilities of recovering a high percentage of the alleged damages? What attorneys' fees and expenses would the class member have to incur to pursue its claims "without class certification"? Antitrust and securities class actions are very

expensive to prosecute in terms of attorneys' time and expenses. Recently in the Travel Agent Antitrust Litigation, which was litigated as a class action and settled on the eve of trial, the lodestar of plaintiffs' attorneys was more than \$10 million. Could a substantial class member, with a large claim, have the "practical ability" to incur millions of dollars of attorneys' fees and expenses? Does it make sense to require class members with large claims to litigate their claims separately, in a duplicative fashion? If there are separate actions by persons (who had been members of the putative class) would not that make it more difficult for the court to process the litigation, and more complicated and difficult to try or settle?

Furthermore, large class members already make a judgment whether they have the "practical ability" to "pursue their claims without class certification." If they do have this ability, they can elect to exclude themselves from the class and pursue the action separately. They are in the best position to make this determination.

In an antitrust or securities class action, after extensive inquiries of absent class members, how will a court determine whether "the probable relief to individual class members justifies the costs and burdens of class litigation" as required by Subparagraph F? If smaller class member have claims of less than \$100, \$100-\$1,000, \$1,000-\$10,000, \$10,000-\$100,000 or \$100,000-\$1,000,000 or greater, do such claims justify the "costs and burdens of class litigation"? Again, the court would

have to determine what the chances are for a class member to recover all or a percentage of its alleged damages, while defendants will assert enormous "costs and burdens." If plaintiffs assert that the class could recover \$1,000,000, but defendants assert that it will cost them \$2,000,000 to defend, should the court certify the class? If plaintiffs assert that the class could recover \$10 million, but defendants assert that it will cost them \$5 million to defend, should the court certify the class?

If, after all of this, the court eliminates "large" and "small" claimants from the class, what will be the result? The class action would proceed for some middle-size claimants who are considered to be appropriate for class certification. Therefore, the class action will proceed, but small claimants who most need class protection will not receive it. This approach contradicts the accepted proposition that the class action device was intended to permit those whose individual claims are not sufficiently large to support expensive litigation, to receive the benefits and protections provided by our laws. Furthermore, private actions, including class actions, have long been recognized as an important adjunct to government action in enforcing the antitrust and securities laws. The proposed new Rules run counter to these propositions.

Also, large claimants who may have preferred to have been part of a class will have been forced to bring their own litigation and the costs of litigation will have increased, and

it will be much more difficult to settle or try the litigation. From a policy and practical point of view, Subparagraphs A and F do not make sense in antitrust and securities class litigation.

2. Proposed Rule 23(f) - "A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order."

During the last twenty-five years, in antitrust and securities class actions, class certification jurisprudence has been developed. The class certification issue is normally dealt with with a minimum of discovery and motion practice. Often, especially in securities class actions, after a minimum of discovery, the parties stipulate to certify the class. The proposed rule is not needed in antitrust and securities class actions. It will only tend to increase class discovery and the costs of the litigation, and will encourage routine applications to appeal from the granting or denial of a class.

3. Rule 23(b)(4) - "The parties to a settlement request certification under subdivision (b)(3) for purposes of settlement even though the requirements of subdivision (b)(3) might not be met for purposes of trial."

Settlement classes have been routinely utilized in antitrust and securities litigation for many years, without any adverse effect. Indeed, as set forth above, often in securities actions, the parties stipulate to a class. While there may be issues in the mass tort area concerning settlement classes, there have not been these issues in antitrust and securities litigation. This proposed rule would recognize what has been a routine practice in those litigations.

RECEIVED  
1/3/97

96-CV-039

Before the Committee on the Federal Rules  
of the Judicial Conference of the United States

**HEARINGS ON THE  
PROPOSED AMENDMENTS TO RULE 23**

**Written Remarks of Patricia Sturdevant on Behalf of the  
National Association of Consumer Advocates**

**San Francisco, California  
January 17, 1997**

**Written Remarks of Patricia Sturdevant and the  
National Association of Consumer Advocates  
on the Proposed Amendments to Rule 23  
of the Federal Rules of Civil Procedure**

Patricia Sturdevant submits the following remarks on her own behalf and on behalf of the National Association of Consumer Advocates, of which she is General Counsel. A copy of her resume, which includes a listing of some of the class action and private attorney general cases she has litigated is attached hereto.

The National Association of Consumer Advocates ("NACA") is a non-profit association of consumer protection lawyers, law professors, legal services attorneys and law students dedicated to the advocacy and advancement of consumer interests throughout the United States. NACA's mission is to promote justice for all consumers by maintaining a forum for communication, networking, and information sharing among consumer advocates across the country and by serving as a voice for its members and consumers in the ongoing struggle to curb unfair and abusive business practices that adversely affect consumers.

NACA's General Counsel and member attorneys have a great deal of expertise and experience in litigating consumer class actions, sometimes involving relatively small recoveries for each class member, and consequently bring a wealth of real world experience to this discussion and these proceedings.

**1. Class Actions Are Entirely Appropriate When Individual Recoveries Are Small.**

We strongly oppose adoption of the proposed new subparagraph (F) to Rule 23(b)(3), which would allow courts, in deciding whether to certify a class, to weigh the probable relief to individual class members against the costs and burdens of class litigation. The proposed amendment is based on the flawed assumption that cases like many of our consumer cases are inappropriate for class treatment

because individual recoveries are too small to warrant individual actions and the attorneys fees which are recovered dwarf the individual damages. The Summary for Bench and Bar distributed by the Administrative Office of the U.S. Courts, contains the following comment about proposed subparagraph (F): "In 'small claims' class actions, it may justify refusal to certify a class even though subparagraphs (A) and (B) would push toward certification because individual class members are not practically able to pursue separate actions."

The genesis of the new proposed subparagraph requiring that the importance of the relief to individual class members is to be emphasized, even when a significant sum in the aggregate is involved, appears to be the unsupported and biased viewpoint that some recoveries to class members may be so trivial that they do not warrant redress. The assumption that recoveries of one hundred or several hundred dollars are "trivial" is entirely unwarranted. For many low income class members who are overcharged by finance companies, like those in Patterson v. ITT et al., San Francisco Superior Court Case No. 936818, recoveries of such amounts can make an enormous difference in the quality of their lives, while also providing them with a sense that justice has been done and that our system of justice works. As Justice Marshall so eloquently observed in dissent in United States v. Kras, 409 U.S. 434, 460 (1973), the significance of a particular sum of money varies according to the wealth of the affected individual:

It may be easy for some people to think that weekly savings of less than \$2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are. A sudden illness, for example, may destroy whatever savings they may have accumulated, and by eliminating a sense of security may destroy

the incentive to save for the future. A pack or two of cigarettes may be, for them, not a routine purchase but a luxury indulged in only rarely. The desperately poor almost never go to see a movie, which the majority seems to believe is an almost weekly activity. They have more important things to do with what little money they have--like attempting to provide some comforts for a gravely ill child, as Kras must do.

It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.

It is equally improper for modifications to the Federal Rules of Civil Procedure governing class actions to be based on unsupported assumptions that one or a few hundred dollars is so insignificant to an individual or family as to be trivial. While that may be true for most members of the Committee, it is not true for many of the clients we represent.

Further, noting that the traditional justification for litigation is individual remedial benefit, and that most private wrongs go without redress, the proponents of this rule change urge that "class actions should not stray far from this source of legitimacy" and that "we should not establish a roving Rule 23 commission that authorizes class counsel to enforce the law against private wrongdoers." Request for Comment at 26.

On the contrary, it is a venerable maxim of jurisprudence that "For every wrong there is a remedy". See e.g. California Civil Code §3523, enacted in 1872 and derived from the Field Code, which was brought into being in 1848 and served as the model for state civil procedure codes and rules. It is indeed strange to

premise a system of justice on the notion that wrongdoing should be unredressed and thereby encouraged. We strongly disagree with the comments of John Frank, who testified before this Committee that: "trivial claims class actions are a major problem, providing token recoveries for class members and big rewards for attorneys". Request for Comment at 27. These class actions are not the problem, but are part of the solution. The major problem we see is preying by business interests on our nation's citizens, particularly the elderly, the poor, and members of racial minorities through overcharging them by using unlawful practices. See **MERCHANTS OF MISERY: HOW CORPORATE AMERICA PROFITS FROM POVERTY**, edited by Michael Hudson, Common Courage Press, 1996, describing the poverty industry, the dirty underside of American finance, which is made up of businesses like pawnshops, check-cashing outlets, rent-to-own stores, finance companies, used-car dealers, high-interest mortgage lenders, and trade schools for the poor and uneducated. Id. at 1. These businesses are financed by big banks and corporations, target people on the bottom third of the economic ladder, and charge exorbitant prices. They also regularly utilize dishonest sales pitches, hidden charges, forged loan documents, and excessive fees and charges. Id. at 2.

These practices are not new. As the Kerner Commission found nearly thirty years ago, many people who reside in low income neighborhoods experience grievous exploitation by vendors using such devices as high pressure salesmanship, bait advertising accompanied by switched products, misrepresentation of prices, exorbitant prices and credit charges, and sale of shoddy merchandise.

Compounding the problem, state laws governing relations between consumers and merchants are generally utilized only by informed, sophisticated parties, affording

little practical protection to low income families. Report of the National Advisory Commission on Civil Disorders (Bantam ed. 1968) pp. 275-276.

We believe the Committee is misguided in focusing on the monetary damage done to each individual and on the attorneys fees paid to class counsel who further the public interest and Congressional statutory purposes by challenging unlawful business conduct, while disregarding the public interest or the aggregate amount of damage or profit which results from a wrongful practice. It serves no useful social purpose, but instead leads to social discontent and unrest, to allow unscrupulous, fraudulent and deceptive practices to flourish, and big business to reap huge profits, at the expense of those of our citizens whose lack of income and financial sophistication relegates them to the fringe economy.

We also believe that it is entirely wrong to suggest that "small claims" class actions "breed cynicism about the courts" Request for Comment at 27. In today's business climate, overcharging consumers is good business and large corporations can reap enormous profits from garbage fees on mortgages, administrative fees or non-filing insurance fees on small consumer loans, and late and overlimit charges on credit card accounts, among other practices. Security Pacific Bank, for example, paid a \$10,000 bonus and gave a plaque to the employee who suggested charging a \$10.00 overlimit fee, and took in several million dollars in such fees before settling a consumer class action which the proposed rule would not allow to be certified. In our view, it would lead to far more cynicism about, and public distrust of, the courts if the rule were changed to allow defrauding of large numbers of people in small amounts.

Additionally, and also contrary to the view of the proponents of this proposed rule change, the legitimacy of class actions derives in large measure from

their value as a deterrent for unlawful conduct, and the importance to society of protecting consumers from being duped by unscrupulous business conduct. See generally, Vasquez v. Superior Court, 4 Cal. 3d 800, 808 (1971). Consumer class actions provide compensation to those who have been injured by wrongful business practices. In addition, they generally have beneficial by-products, including a therapeutic effect on sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance of multiple lawsuits involving identical claims. Id.

Consumer class actions serve an important function and can be a major force for economic justice. They often provide the only effective means for challenging wrongful business conduct, requiring that such conduct end, and obtaining recovery of damages caused the class by reason of that conduct. It is frequently the case that numerous individuals are subjected to the same wrongful practice, yet individual actions are usually impracticable because the individual recovery would be insufficient to justify bringing a separate lawsuit. Without class actions, wrongdoing businesses would be able to profit from their misconduct and retain their ill-gotten gains. Class actions by consumers aggregate their power, enable them to take on economically powerful institutions, and make wrongful conduct less profitable.

The class action device is particularly appropriate in consumer cases where individual recoveries are small, but which, in the aggregate, involve millions of dollars in damages. Class actions serve an important purpose beyond simply compensating the injured. Often, class counsel and class representatives act as private attorneys general vindicating cumulative wrongs and obtaining significant injunctive relief or institutional change, and requiring disgorgement of illegal profits.

To refuse to permit class actions on the grounds that individual recoveries are paltry would encourage wrongful conduct and largely immunize from redress entities engaged in schemes to steal millions in \$10 increments.

An illustrative example is found in the consumer class actions challenging excessive late and overlimit charges on credit card accounts which were criticized on the grounds that class members "are eligible for only a few dollars apiece in compensation" while class counsel get "millions" (Max Boot, Wall Street Journal, September 19, 1996). If Rule 23(b)(3)(F) were adopted, it could provide a basis for refusing to certify these classes because individual recoveries ranged from \$3 to \$50, which a court might deem to be trivial. Such a constricted view disregards the facts that in, for example, the related Wells Fargo Bank and Crocker National Bank cases, total damages of almost \$10 million were recovered, plus interest, that more than \$6.5 million was distributed directly to the plaintiff classes at defendants' expense, with each member receiving the amount which he or she was overcharged, plus interest, through credits to current customers' accounts and refunds to former customers, that \$3.3 million was given to consumer organizations which provided indirect benefit to absent class members, and that the Banks were required to pay all but \$115,668 of the \$2,130,118 awarded in attorneys fees for work in the trial court. The plaintiff classes were required to pay only 1.28% of the fund for fees.

Other examples of consumer class actions litigated in California state courts include Kagan v. Gibraltar Sav. & Loan Ass'n, 676 P.2d 1060 (1984), involving deceptive advertising that customers would not be charged management fees on Individual Retirement Accounts; Occidental Land. v. Superior Court, 556 P.2d 750 (1976), involving alleged misrepresentations of the amount of maintenance fees in a

housing subdivision; Lazar v. Hertz Corp., 191 Cal. Rptr. 849 (1983), challenging an automobile rental company's practice of charging excessive prices for gasoline when cars were returned with less than a full tank; and McGhee v. Bank of Am. Nat'l Trust & Sav. Ass'n. 131 Cal. Rptr. 482 (1976), challenging as adhesionary impound account provisions of standardized deeds of trust that did not provide for interest to homeowners. The proposed rule change would affect all similar future cases in states, like California, who look to federal class action law when state law is nonexistent or unclear and would effectively insulate a vast array of wrongful practices from any meaningful challenge.

The Supreme Court has long recognized that without Rule 23 claimants with small claims would be unable to obtain relief. See Deposit Guaranty National Bank v. Roper, 445 U.S. 326, 338 n. 9 (1980), where the Supreme Court stated:

A significant benefit to claimants who choose to litigate their individual claims in a class-action context is the prospect of reducing their costs of litigation, particularly attorney's fees, by allocating such costs among all members of the class who benefit from any recovery. Typically, the attorney's fees of a named plaintiff proceeding without reliance on Rule 23 could exceed the value of the individual judgment in favor of any one plaintiff. Here the damages claimed by the two named plaintiffs totaled \$1,006.00. Such plaintiffs would be unlikely to obtain legal redress at an acceptable cost, unless counsel were motivated by the fee-spreading incentive and proceeded on a contingent-fee basis. This, of course, is a central concept of Rule 23. Id. (Emphasis added).

To the same effect is Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), "Class actions... may permit the plaintiffs to pool claims which would be uneconomical to

litigate individually. For example, this lawsuit involves claims averaging about \$100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available." Id. At 809.

While consumer class actions may be abused, protections against abuse already exist. Courts may and do refuse to allow classes to be certified where the potential recovery to each individual is nominal and when a distribution would consume such substantial time and expense that the class members are unlikely to receive any appreciable benefit. See e.g., Blue Chip Stamps v. Superior Court (1976) 18 Cal. 3d 381, 386; City of San Jose v. Superior Court (1974) 12 Cal. 3d 447, 459; Vasquez v. Superior Court, supra, 4 Cal. 3d at 811. Further protections are found in the requirements that courts must find any settlements to be fair and reasonable to the class.

The class action device is particularly appropriate in consumer cases where individual recoveries are small, but which, in the aggregate, involve millions of dollars in damages. This is precisely the type of case which encourages compliance with the law and results in substantial benefits to the litigants and the court. Denial of class certification in such instances would result in unjust advantage to the wrongdoer. So long as consumer actions are not a vehicle for lawyers to make huge fees in the absence of significant pecuniary and/or nonpecuniary benefit to class members, class actions should be deemed appropriate precisely because individual damages are too small to warrant redress absent a class suit.

## 2. Approval of Settlement Classes.

This Committee has also proposed for comment an entirely new Rule 23(b)(4) that specifically authorizes certification of a class for purposes of settlement even though the case does not otherwise meet the requirements of Rule

23(b)(3). This proposal does not provide any criteria for a court's determination whether such settlement certification is proper; it is based solely on the agreement of the parties. Among others voicing strong opposition to this proposal is a group of some 150 law professors. We concur with the threefold objections of the law professors: (1) the proposal contains no limiting guidelines or principles, (2) it fails to address serious constitutional and statutory problems, and (3) it formalizes what has until now been an extremely controversial practice and invites collusion.

The new Rule 23(b)(4) proposal must be rejected. It is unnecessary to amend Rule 23 at all to obtain the positive benefits of appropriate settlement classes. It is particularly inappropriate to consider amending the Rule at this time. The United States Supreme Court on November 1, 1996 granted the petition for writ of certiorari in Amchem Products, Inc. v. Windsor, U.S. Sup. Ct. Docket No. 96-170. This case presents to the Supreme Court the question of what legal and factual issues a court may consider in deciding to certify a putative class for settlement purposes. NACA believes that since the Supreme Court will address the question of settlement classes under Rule 23, adoption of this rule is premature and unwise. We would, therefore, urge the Committee to defer consideration of the adoption of Rule 23(b)(4) until it has the benefit of the Supreme Court's views in Georgine.

### 3. Interlocutory Appeal of Class certification.

The Committee also proposes new Rule 23(f), permitting interlocutory appeals of a district court order granting or denying class certification. The right to appeal is discretionary with the court of appeals. The proposed rule provides also that such an appeal does not stay the proceedings unless the district or appellate court orders.

NACA also opposes this proposed rule because it would favor defendants over plaintiffs, encourage dilatory appeal by the party of greater economic power and unnecessarily delay proceedings. Defendants will in all likelihood appeal all orders granting class certification. If an appeal is permitted, either the district court or the court of appeals would doubtless stay the proceedings.

On the other hand, the likelihood of a plaintiff appealing a denial and seeking a stay of proceedings is minimal. However, it is virtually certain that, if the plaintiff did appeal a denial of certification, the defendant would seek, and likely obtain, a stay pending the appeal. Therefore, the rule as written does little to advance a plaintiff's situation, but does provide significant dilatory opportunities for defendants.

The California state court approach is a variant on this theme, and is preferable to the proposed rule. It is silent on the issue of stay, but permits immediate appellate review only of denial of certification, since a denial is a "death knell" because it effectively terminates the entire action as to the class. Granting class certification is not such an order, and is only harmful to the defendant if the plaintiff prevails at trial and on appeal, both on certification issues and on the merits, so is not immediately reviewable. See Stephen v. Enterprise Rent-A-Car, 235 Cal. App. 3d 806 (1991) and Rosack v. Volvo of America Corp., 131 Cal. App. 3d 741 (1988).

The California state court approach is a balanced approach that preserves the rights of both plaintiffs and defendants. Appeal should be discretionary and only allowed if certification is denied.

## CONCLUSION

As consumer advocates, we have seen at first hand the importance of class actions as a means of ending and deterring wrongful business practices and obtaining redress for consumers even where individual recoveries are small.

We advocate maintaining class actions as a means of protecting consumers and holding economically powerful interests responsible for the harm they do, and oppose the proposed rule changes as unwise, unnecessary, and adverse to the interests of consumer protection and economic justice.

November 12, 1996

STATEMENT OF ROGER C. CRAMTON<sup>1</sup>

Public Hearing on Proposed Amendments  
to Rule 23 of the Federal Rules of Civil Procedure  
Philadelphia, November 22, 1996

An August 7, 1996, report of the Advisory Committee commented on the proposed changes to Rule 23 that are under consideration today.<sup>2</sup> After summarizing the extensive consideration the Advisory Committee had given to Rule 23 since March 1991, the report sought to provide an explanation of the "modest" changes it was proposing. Three points were made:

\* First, the line between procedure and substance is especially "difficult to locate" in the field of class actions, which "travels more along substantive than procedural lines" and is best described "as a softly defined legal culture than a coherent body of case law ...." Consequently, many of the current problems in the field, such as the controversy over "mass torts," are substantive illnesses "beyond the charge of the rulemakers."

\* Second, the hodgepodge of different "legal cultures" in various substantive arenas in which class actions are employed, such as private antitrust litigation, securities litigation, employment discrimination, and mass disaster tort litigation "illustrates that we need to encourage the development of a coherent body of law by making greater use of the appellate courts."

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<sup>1</sup> Roger C. Cramton is the Robert S. Stevens Professor of Law, Cornell University Law School, Ithaca, NY 14853.

<sup>2</sup> Memorandum of Patrick E. Higginbotham and Edward H. Cooper to the Standing Committee on Rules and Practice, Comment on Proposed Changes to Rule 23 (August 7, 1996). The report, although not formally considered by the Advisory Committee, reflected the Committee's "vision" of the "forces of change" that had resulted, after five years of study, in the proposed amendments.

\* Third, because of these special features of class action law, "rule change ought here to proceed with caution, in increments."

I agree with these perceptive and wise observations. My major point today is that some of the proposed changes, especially the encouragement of settlement class actions by proposed Rule 23(b)(4), fail to comport with the Committee's own objectives:

- \* They are not "modest" changes but open up a Pandora's box.
- \* They carry important substantive implications but are essentially standardless in transsubstantive procedural terms.
- \* They foreclose pending appellate litigation on one issue (the *Georgine* case now before the Supreme Court) and provide no standards for appellate decisions on others.
- \* Hence, the proposals are not a "cautious" "increment" but an unwise initiative.

My experience with class actions flows from teaching and writing from time to time concerning the procedural, tort, and legal ethics implications of class actions.<sup>3</sup> I have taught Torts and Legal Ethics for more than ten years; and I am currently an adviser to two relevant ALI projects--the proposed Restatements of Torts--Products Liability and Restatement of the Law Governing Lawyers. I was a paid expert on legal ethics issues on behalf of objectors in the *Georgine* case;<sup>4</sup> and have served as a consultant to lawyers involved in several other settlement class actions in the mass tort field. I appear today as a lawyer, teacher, and citizen concerned about the issues involved.

My comments fall into two parts: first, the unsoundness of the open-ended authorization of settlement class actions that may not be suitable for trial in proposed

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<sup>3</sup> See, e.g., Roger C. Cramton, Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction, 80 Cornell L.Rev. 811-36 (1995).

<sup>4</sup> *Georgine v. Amchem Products, Inc.*, 157 F.R.D. 246 (E.D.Pa.1994), rev'd, 83 F.3d 610 (3d Cir.1996), cert. granted sub nom. *Amchem Products, Inc. v. Windsor*, 1996 WL 480936 (Nov. 1, 1996).

Rule 23(b)(4);<sup>5</sup> and second, some constructive proposals for the Committee's consideration concerning amendment of Rule 23.

## I. SETTLEMENT CLASSES

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

- (4) the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement even though the requirements of subdivision (b)(3) might not be met for purposes of trial.

Subdivision (b)(4) is unsound because it anticipates a question now pending before the Supreme Court (whether current Rule 23(b) permits certifications for purposes of settlement of cases that could not be certified for trial); because it exceeds the limits on rulemaking of the Rules Enabling Act; and because it encourages a type of class action that is peculiarly subject to abuse without providing meaningful standards or dealing with the problems that recent experience has shown to be common: inadequate representation of the class, inadequate scrutiny of settlements by trial courts, conflicts of interest on the part of class counsel, and collusion between the settling parties. I will not discuss the first point, viewing it as obvious that the ruling of the Court in the *Georgine* case is likely to influence future consideration of settlement class actions, but will discuss the remaining points.

### A. *The Proposal Exceeds the Limits on Rulemaking*<sup>6</sup>

The Rules Enabling Act, 28 U.S.C. §2072, restricts the judicial rulemaking power to "general rules of practice and procedure," explicitly forbidding the Supreme

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<sup>5</sup> This portion of my comments draws upon a letter of May 28, 1996 to the Standing Committee on Rules of Practice and Procedure submitted by a group of sixteen distinguished law professors. This letter, primarily drafted by Susan P. Koniak and revised and approved by some members of the steering committee of sixteen, including me, was ultimately endorsed by 144 law professors. My restatement of a portion of these views is intended to put them in the hearing record. Revisions are entirely my own work; I do not represent that any member of the larger group agrees with my comments today.

<sup>6</sup> This part of my comments draws on a letter by Paul D. Carrington to the Standing Committee (August 7, 1996).

Court to make rules modifying substantive rights. The restriction rests on fundamental principles of separation of powers and federalism. Although the line between "general rules of practice and procedure" and substantive law is a shadowy one, it has special relevance to the class action context, as indicated by the Advisory Committee's August 7 report to the Standing Committee. That report, as noted above, stated that the problems in the field were largely substantive and that there was a danger that courts were being called on to do things they were not authorized to do. The proposed rule in effect licenses federal district courts to promulgate new substantive law, applicable nationwide, by ratifying settlement class actions brought for that purpose.

Settlement class actions that are not and cannot be tried in the federal courts present the issue starkly. They involve the federal courts in approving private settlement arrangements that displace applicable state or federal law, creating or destroying rights held by large numbers of absent persons, in situations in which adversary proceedings are not appropriate, information is limited and within the control of the settling parties, and trial judges are often placed in the unjudicial posture of passing on agreements that they have earlier participated in crafting.

The substantive nature of the use of the settlement class action in the mass tort field is especially apparent. The three problems mentioned in the Advisory Committee Note<sup>7</sup> as indicating the "settlement perspective" applicable to evaluating whether the (b)(3) requirements have been met all involve substantive issues or stretch the bounds of judicial power: (1) *choice of law*: the displacement of applicable federal or state law for rules of the settling parties' own devising rather than by the choice of law required by principles of federalism (e.g., determining victims' rights without regard to the state law that creates them);<sup>8</sup> (2) *judicial management*: "managing" a settlement process in which class counsel and defendants have already agreed on a deal, objectors either are not present or have limited resources, and the judge often is an active participant in

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<sup>7</sup> Request for Comment on Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Civil and Criminal Procedure, August 1996, pp. 51-52 [hereinafter Request for Comment].

<sup>8</sup> See Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L.Rev. 547 (1996) (arguing that the procedural maneuvers used by federal courts to circumvent ambiguous Supreme Court precedents, which preclude federal courts from creating nationally applicable choice-of-law rules in complex litigation, are both illegitimate and unnecessary).

creating settlements rather than a neutral umpire expediting and deciding cases under the ordinary rules of adversary litigation; and (3) *wholesale schemes of reparation*: "devising comprehensive solutions to large-scale problems that defy ready disposition by traditional adversary litigation."

The modern class action has antecedents in the historic practices of equity judges and the more recent phenomenon of "managerial judges" who actively participate in case handling and take a forceful role in pressing settlement. The recent application of the settlement class action to mass torts, however, involves a wholly novel combination of features: class actions with prearranged settlements that could not be certified for trial and are not intended to be tried; huge classes of tort victims who are represented by lawyers that may be chosen by the defendants; some classes composed partly or solely of future claimants, many of whom have yet to suffer a legally cognizable injury; decrees purporting to bind absent class members, some of whom have not had an effective opportunity to opt out of the class; settlement decrees that affect claims nationwide and may have the effect of a federal decree eliminating claims governed by state law or a state decree eliminating claims governed by federal law; jockeying for a favorable forum in which to obtain judicial approval of a prearranged settlement; and, in some of the cases, side settlements by class counsel with defendants, giving their current clients different and more favorable relief than the class settlement provides to their other clients--the class of future claimants. A class action settlement with these features would have been unthinkable to lawyers and judges of a decade or so ago.

The proponents of mass tort settlements echo repeatedly the very point that these arrangements are a substitute for legislation: the courts must act because legislatures have refused to intervene and ordinary litigation is deemed inadequate or burdensome. So a regime comparable to bankruptcy, without its safeguards and procedures, is provided by judicial approval of private agreements negotiated by the defendants and lawyers purportedly representing the class.<sup>9</sup>

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<sup>9</sup> My reference to "lawyers purportedly representing the class" is an accurate description. The Advisory Note repeatedly refers to the two sets of lawyers as "the parties," a designation that is often fictional insofar as the class is concerned. Although some classes are small, identifiable and active, e.g., a class of 17 employees in an employment discrimination case, the classes I am concerned with are those that are

The Advisory Committee should follow its own warning and recognize that it is legislating on substantive matters, not framing judicial procedures. First, settlements are a form of contract law, substantive in character, and generally governed by state law (apart from certain federal-question aspects). Tort law in the United States is also generally a field left to the states. Congress may legislate on some of these matters but has largely refrained from doing so. Federal courts are constrained by constitutional principles of separation of powers and federalism in dealing with these matters. Second, because the characteristics of these cases stretch or violate limits on federal judicial power, judicial actions may undermine judicial legitimacy, just as did the issuance of labor injunctions by federal judges at an earlier time. Third, vast administrative schemes to resolve mass tort claims require legislative tools and action, or, in the absence of legislation, resort to existing laws and procedures such as bankruptcy or ordinary judicial proceedings. Mass torts cannot be handled appropriately by judicial rulemaking that vests discretionary authority in federal district courts.

*B. The Unsoundness of Proposed 23(b)(4)*

Proposed Rule 23(b)(4) is flawed for three further reasons: first, it contains no limiting principles, standards, or other guidelines, except for the basic requirements of 23(a), to help trial judges decide when a settlement class is desirable and what form the class should take; second, it raises serious constitutional and statutory questions that have not been adequately addressed by the Advisory Committee; and third, it lends official approval to an extremely controversial practice, one plagued by serious agency problems and risks of collusion, and threatens to make those problems worse by

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large in number, spread out over the nation, and containing many persons whose identity is unknown, including some persons who are unaware of the circumstances that give rise to class membership (e.g., exposure to a particular toxic substance). It is common knowledge that these classes are created by the lawyers who appoint themselves as class counsel, recruit the party representatives, and determine the interests of the class. Aside from occasional objectors, classes of this character, especially those with a stake not justifying separate litigation, are invariably passive in character. In settlement class actions under proposed Rule 23(b)(4), class counsel may also be selected by defendants, will generally be unable to pursue discovery prior to negotiating a settlement, and lack the leverage in negotiating the settlement that is provided by a credible threat of litigation.

insisting that all settlements in settlement classes be negotiated before class certification is sought or approved by a court.

*1. The open-ended nature of (b)(4)*

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

The Advisory Committee's Note states that "the predominance and superiority requirements of subdivision (b)(3) must be satisfied," but goes on to say that "implementation of the factors that control certification of a (b)(3) class is affected by the many differences between settlement and litigation of class claims or defenses."<sup>10</sup> The examples given (elimination of choice-of-law difficulties, greater manageability, and "devising comprehensive solutions to large-scale problems that defy ready disposition by traditional adversary litigation")<sup>11</sup> suggest that all of the factors bearing on predominance and superiority specified in existing or proposed Rule 23(b)(3) are in fact rendered meaningless.

What role is left for factors such as "the practical ability of individual class members to pursue their claims," "class members' interests in maintaining or defending separate actions," "the extent, nature, and maturity of any related litigation involving class members," and the other factors listed if they all can be overcome by the desire to provide "comprehensive solutions" that rest on judicial convenience, federalism difficulties, and the large number of present and future cases? A trial-court determination that a "comprehensive solution" to an intractable problem is a good thing, one that could not be solved by applying applicable state law in our federal system through normal adjudicatory procedures, has the effect of trumping the listed factors. Case load management and judicial convenience displace the certification standards listed in 23(b). Meaningful judicial review of trial court discretion is not possible when the rule itself suggests that the factors either are inapplicable or have less effect when a settlement class action is involved.

By allowing a settlement class when the requirements of (b)(3) are not really satisfied, the proposed subdivision (b)(4) unhooks the settlement class from (b)(3)'s

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<sup>10</sup> Request for Comment, p. 51.

<sup>11</sup> *Id.*, pp. 51-52.

limits and substitutes nothing, leaving it constrained only by the relatively weak 23(a) requirements. This open-ended approach should be abandoned.

The potential problems with settlement class actions, especially those involving global settlements of mass tort cases, have been much debated recently. Many in the judiciary and academia have elaborated on the serious agency problems that undermine the accountability of class counsel and create a substantial risk of collusion between class counsel and defendants.<sup>12</sup> Even if settlement class actions have benefits in some circumstances, those circumstances should be delineated. At the least, the rule must limit the court's discretion to authorize such settlement classes to those instances where the risks of abuse have been minimized and the potential benefits justify the risks that remain.

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

First, Rule 23(a) requirements--numerosity, common questions of law or fact, typicality of named representatives' claims, and adequate representation--cannot and should not alone bear the burden of constraining settlement classes. It is worthwhile mentioning at the outset that the 23(a) requirements have never been thought sufficient by themselves to justify representative adjudication. This is, after all, why 23(b) was included. Yet, new subdivision (b)(4) contains no additional restrictions and reduces the 23(b) requirements of predominance and superiority to a discretionary judgment that settlement is better than litigation. Moreover, (b)(4) lowers its guard just when the danger is the greatest. The proposed rule does not support the kind of rigorous and careful scrutiny of attorney incentives that certification of a settlement class demands. In the usual class action, the defendant has a powerful incentive to expose problems with class counsel, the definition of the class, and other matters. In the settlement class,

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<sup>12</sup> See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 *Colum.L.Rev.* 1343 (1995); and Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 *Cornell L. Rev.* 1045 (1995).

defendant's incentives are exactly the opposite because the defendant joins with class counsel to urge certification of the class and approval of the settlement. This means that court findings under 23(b)(4) are likely to be less reliable, not more.

Second, opt-out is hardly a panacea. Many ordinary Americans do not understand that they should read class notices to decide whether to forgo their right to sue. Moreover, many notices in complex class actions are unintelligible to ordinary Americans. Moreover, many among those who do read the notices have trouble understanding that an affirmative step is required to avoid being part of the court proceeding described. Classes involving future claimants present a special notice problem. The Manual for Complex Litigation, Third, states correctly that "persons who may not currently be aware that they have a claim or whose claim may not yet have come into existence ... cannot be given meaningful notice."<sup>13</sup> Because the "consent" implied by a class member's failure to seek exclusion from the class is often no more than a legal fiction, Rule 23(b) has always limited the kinds of claims that could be treated as class actions.

Third, it is not wise to leave these important issues to relatively unconstrained trial judge discretion. While trial judges have power under the amended rule to review settlement classes for conformity with 23(a) and to review the settlement itself for fairness and reasonableness under 23(e), they are not likely to exercise that power vigorously without an explicit directive in the rule. Judges are under pressure to resolve mass litigation expeditiously, and trial judges, understandably worried about crowded dockets, are strongly inclined to approve settlement classes, especially in mass litigation, and thus not sufficiently interested in scrutinizing a settlement class closely.

Finally, even the unnaturally industrious judge labors under a handicap in the absence of aggressive advocacy.

Controversial normative questions going to the fundamentals of a procedural device like the class action should be resolved in a uniform and centralized way through the deliberative process established by the Rules Enabling Act. It is an abdication of rulemaking responsibility to leave these questions to trial judge discretion and case-by-case resolution. Because the settlement class action is such a major innovation, it is imperative that the Advisory Committee, the Standing Committee, and the other bodies

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<sup>13</sup> Manual, p. 244.

with a role in the formal rulemaking process, grapple with the fundamental questions that the new device presents. Subdivision (b)(4) falls way short of this standard.

## *2. Constitutional concerns*

Whether courts have the power to approve the settlement of a "matter" that could not be tried as a dispute between the named parties is an unresolved question of constitutional proportions. An argument could be made that many "actions" within (b)(4)'s purview are not "cases" or "controversies" that may properly be heard by Article III judges because when they are filed nothing remains in dispute between the named representatives and the defendants. An argument could also be made that "actions" that cannot be tried as class actions are not "cases" or "controversies" that Article III judges may settle, which would seem to implicate all (b)(4) actions. Proposed Rule 23(b)(4) ignores these problems and by doing so invites much litigation over such thorny questions. Moreover, the constitutionality of class settlements that involve such untriable matters as claims for "future injury" is currently pending before appellate courts, and it is inappropriate to employ rulemaking to suggest how such matters should be resolved.<sup>14</sup>

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

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<sup>14</sup> The draft minutes of the Advisory Committee's April 18-19, 1996, meeting state in several places that the proposed changes do not speak to "futures" settlements. See Request for Comment, pp. 34-35. The Advisory Committee Note to proposed Rule 23(b)(4), however, states that "perhaps [the] most important" need met by the proposal is that of "devising comprehensive solutions to large-scale problems that defy ready disposition by traditional adversary litigation." (P. 52.) Since "comprehensive solutions" must take into account future claimants, the Committee's proposal encourages use of class action settlements involving classes composed partially or solely of future claimants.

based on claims of inadequate representation, which would itself undermine many of the supposed benefits to be gained by the proposed rule.

### 3. *Inviting collusion*

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

Proposed Rule 23(b)(4) licenses a regime under which plaintiffs' lawyers are encouraged to compete to sell-out the claims of people in order to gain the defendant's acquiescence to a (b)(4) class. The plaintiffs' lawyers cannot leverage the defendant into settling by threatening trial: by definition (b)(4) actions need not be triable. Thus, instead of the best plaintiffs' lawyers being able to negotiate a settlement because the defendant fears opposing those lawyers at trial, we have a situation in which the plaintiffs' lawyers least committed to the class's interest are most likely to serve as (b)(4) counsel and most willing to collude with the defendant in exchange for an award of class counsel fees. Class counsel in (b)(4) actions may often be the lawyers most willing to join with the defendant to help convince a court to accept a settlement providing meager benefits to class members by arguing that their own clients' claims are not worth much and that the meager recovery provided by the settlement should be valued at some inflated rate. Given that a court's fairness judgment is so dependent on the joint petition of class counsel and the defendant and that objectors are relatively rare and have limited information, encouraging such collusion greatly undermines the ability of courts to assess what it is they are being asked to approve in fairness hearings.

Moreover, the collusion that the proposed rule would encourage is not limited to the collusion engaged in by a few consciously corrupt lawyers. Upstanding, well-intentioned, and committed members of the bar are invited to convince themselves that any settlement of a (b)(4) variety is better than no settlement, because walking away from the negotiating table means no fees for all one's efforts. Moreover, the good lawyer must walk away from a bad settlement with the almost certain knowledge that somewhere there is a lawyer who would accept it and reap the fees. I know of no cases

in which a class lawyer has been sanctioned for underselling a class; nor do I expect courts or disciplinary committees to begin imposing such sanctions. The well-intentioned lawyer then must walk away, although there is a good chance--given the high rate of court-approval of class settlements--that the class will end up with the bad deal anyway or one worse. Any lawyer with the opportunity for fees riding in the balance is more than capable of convincing himself that the bad deal he would strike is more "fair and reasonable" than the bad deal some less scrupulous lawyer would strike. Thus, it would take something more like an impractical saint than an ordinarily ethical lawyer to forgo settling the kind of open-ended (b)(4) action contemplated by the new role.

## II. SUGGESTIONS FOR THE COMMITTEE'S CONSIDERATION

The draft minutes of the Advisory Committee's April 18-19, 1996, meeting indicate that "[t]he Committee has never explored" the suggestions advanced by Judge William W Schwarzer that Rule 23(e) be amended to require that specific matters be considered by the court in approving a settlement.<sup>15</sup> After surveying current issues and problems in the field, Judge Schwarzer concludes that Rule 23(e) should be amended to provide the standards that are lacking from the Committee's proposal. His proposal would require the court to make findings on, and hence to ensure its consideration of, a number of factors relevant to the fairness, adequacy and reasonableness of the settlement and the adequacy of representation by class counsel.

Judge Schwarzer's proposal would add the following language to the current text of Rule 23(e):

When ruling on an application for approval of a dismissal or compromise of a class action, the court shall consider and make findings with respect to the following matters, so far as applicable to the action:

- (1) Whether the prerequisites set forth in subdivisions (a) and (b) have been met;
- (2) Whether the class definition is appropriate and fair, taking into account among other things whether it is inconsistent with the purpose

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<sup>15</sup> See William W Schwarzer, *Settlement of Mass Tort Actions: Order Out of Chaos*, 80 Cornell L.Rev. 837-844 (1995).

for which the class is certified, whether it may be over inclusive or under inclusive, and whether division into subclasses may be necessary or advisable;

(3) Whether persons with similar claims will receive similar treatment, taking into account any differences in treatment between present and future claimants;

(4) Whether notice to members of the class is adequate, taking into account the ability of persons to understand the notice and its significance to them;

(5) Whether the representation of members of the class is adequate, taking into account the possibility of conflicts of interest in the representation of persons whose claims differ in material respects from those of other claimants;

(6) Whether opt-out rights are adequate to fairly protect interests of class members;

(7) Whether provisions for attorneys' fees are reasonable, taking into account the value and amount of services rendered and the risks assumed;

(8) Whether the settlement will have significant effects on parties in other actions pending in state or federal courts;

(9) Whether the settlement will have significant effects on potential claims of class members for injury or loss arising out of the same or related occurrences but excluded from the settlement;

(10) Whether the compensation for loss and damage provided by the settlement is within the range of reason, taking into account the balance of costs to defendant and benefits to class members; and

(11) Whether the claims process under the settlement is likely to be fair and equitable in its operation.

I strongly urge the Advisory Committee, if it decides to pursue possible amendments of Rule 23, and whether or not it goes forward with proposed 23(b)(4), to include in its product the approach recommended by Judge Schwarzer. His approach provides neutral guidelines that would require a district court to give a careful examination to a class action settlement; ensures that the relevant information

concerning its fairness, adequacy, and reasonableness is presented to the court; gives assurance that possible collusion and other conflicts of interest are explored; and permits meaningful judicial review and the development of coherent federal law by providing detailed findings and a supporting record to the appellate court.

I also agree with a number of the suggestions concerning possible amendment of Rule 23 made by my friend and colleague, John Leubsdorf, in the statement he has prepared for today's hearing.<sup>16</sup> Because he has provided arguments in support of each proposal, I will merely list them here:

1. Because a contested certification hearing is a vital safeguard for class members, Rule 23 should provide that courts ordinarily should consider settlements only after deciding whether to certify a class.

2. Rule 23(a)(4) should require that class counsel as well as "the representative parties" are obligated to "fairly and adequately protect the interests of the class." The accompanying Committee Note should also mention a number of common conflict-of-interest problems, perhaps adopting the language of the Manual for Complex Litigation Third, at 244 (1995).

3. The rule should require courts to appoint a lawyer to challenge any proposed settlement in any class action in which the estimated value of the recovery and attorneys' fees is large enough to justify this elementary safeguard.

4. The required notice of the settlement under Rule 23(e) should include comprehensible information, written in plain English, about the essential terms of the settlement, attorneys' fees, any special benefits for class representatives, how the settlement is to be distributed and who is to get what, opt-out rights, and procedures for filing a claim or objecting.

5. The notice and opt-out rights of Rule 23(b)(3) should apply to any class action in which significant money damages are claimed or awarded, even though the action also includes an additional claim for injunctive relief under Rule 23(b)(1) or (2).

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<sup>16</sup> I also share Professor Leubsdorf's criticism of the proposed addition of new factor (F) to Rule 23(b)(3), a change that threatens the viability of small claimant class actions. The Committee's proposal is deliberately ambiguous concerning the extent to which public benefits of deterrence are to be considered in the benefit-cost analysis. Proposed factor (F) also requires consideration of issues that are amorphous, uncertain and substantive in character. If retained at all, it should be revised, as Leubsdorf suggests, to require a more feasible inquiry: "how the benefits and costs of class litigation compare with those of other available methods."

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I thank the Committee for its consideration of these comments and my oral remarks. I wish you well in your further consideration of this exceedingly challenging but important topic.

# Cornell Law School

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96-CV-040  
*subsequent comment*

November 23, 1996

Honorable Paul V. Niemeyer  
United States Court of Appeals  
United States Courthouse  
101 Lombard Street  
Baltimore, MD 21201

Re: Consideration of Rule 23 Amendments by Civil Rules Committee

Dear Judge Niemeyer:

I write to comment on several matters raised in connection with my oral remarks to the committee at the recent hearing in Philadelphia.

*1. The "substantive" character of class action settlements in the mass tort field*

First, a follow up on my argument that the authorization of "class action settlements" in the mass tort field is substantive in character and exceeds the authorization of the Enabling Act. Professor Stephen Burbank responded, if I understood him correctly, with the following argument: (1) nearly every procedural rule has some effect on substantive rights (which is a truism); (2) the Supreme Court decisions on the characterization of a rule as "procedural" rather than "substantive" were so fluid in character that judicial rulemakers were pretty much free to do what they wanted (which I concede); and (3), since the matters involved were "controversial," the political process was likely to become involved (a prediction that is probably correct). None of this addresses the problem of a conscientious rulemaker: Is the proposed action violative of the spirit of the Enabling Act?

Professor Burbank did not respond to the three specific arguments that I made concerning the recent and novel use of settlement class actions to resolve mass torts: (1) the weakening or absence of the notion of consent as justifying the substitution of settlement deals for the legal rights under applicable state or federal law in class actions

that involve claims of absent class members (especially those who are future claimants with large-value claims); (2) the federalism concerns involved in allowing a private deal between a plaintiffs' lawyer and a tort defendant to displace state tort and contract law (*Erie*, *Klaxon*, *Van Dusen*); and (3) the separation-of-powers concerns involved in a federal district court, through approval of a settlement process, putting into place a vast administrative scheme to handle perhaps thousands of cases without any legislative authorization (and in some cases as an alternative to the legislative scheme now in place, the bankruptcy system).

I urge the Committee to consider the spirit underlying these concerns, not the technical issue of whether good lawyers can argue that the characterization issue is so fluid that there is no problem. I also offer the views of three other academics who, like Professor Burbank, qualify as experts on the Rules Enabling Act: Professors Paul D. Carrington, Arthur R. Miller, and David L. Shapiro. In his letter of May 21, 1996, addressed to the Standing Committee, Professor Carrington argues that expansion of the class action concept to deal with mass tort settlements is substantive in character and should be left to the political process. The joint letter of May 23, 1996 of Professors Arthur R. Miller and David L. Shapiro, stated that the Committee's proposed amendments to Rule 23 "can only exacerbate the concerns of many that the rulemaking process has spilled over its bounds to the point where substantive rights are being profoundly affected, and even shaped." With permission of their authors, copies of both letters are attached. The question of authority, and its appropriate use, is not as open and shut as Professor Burbank would have the Committee believe.

## *2. Candor to the court on the part of the settling parties*

You will recall that my statement that the settling parties, and especially class counsel, owe a duty of candor to the court when they jointly petition for approval of a settlement led to a vigorous exchange with Francis Fox. Mr. Fox strongly objected to my view: The lawyer's role, he said, is that of an advocate; and the advocate cannot and must not reveal facts that weaken his case. (I had cited Melvyn Weiss's statement earlier in the hearing that as class counsel urging approval of a settlement, he "could not always be candid with the court" about the weaknesses of his case. Class counsel's duty of candor, however, requires disclosure of weaknesses of a settlement as well as its strengths.)

The underlying problem is whether the court, in the absence of a full adversary presentation, can reach an informed decision concerning the adequacy of representation of the class and the fairness and reasonableness of the proposed settlement to *all* its members. Although frequent assertions were made by lawyers who are engaged in settling class actions that objectors performed this function, the FJC study indicates that no written objections were filed in "about one-half" of the settlements in the four districts; and that over 90% of settlements were approved. It is also well known that

many objectors are acting pro se and raise very limited issues, and that many lack the resources for a meaningful contest at the settlement "hearing," which often takes the form of a 10-30 minute courtroom conversation between the judge and the settling parties.

The information problem can be approached in a number of ways. I suggested three: (1) requiring the judge to make findings on a number of matters that we know frequently arise in these cases (the approach recommended by Judge Schwarzer); (2) introducing an adversary process in major cases in which able and well-funded objectors do not appear (e.g., the appointment by the court at the settling parties' expense of an "advocate for the class" as urged by Professor Leubsdorf and others); and (3) the explicit recognition and enforcement in this context of the rule of professional conduct that now prevails but is largely ignored: a duty of candor to the court on the part of the settling parties.

Rules of professional ethics and other binding law generally require a duty of candor to the court (i.e., a departure from the advocate's normal duty not to inform the court of facts adverse to the position of the advocate's "client") in two situations: (1) ex parte proceedings; and (2) cases involving the rights of persons who are under the protection of the court (e.g., children, wards, and incompetents). The rule requiring candor in ex parte proceedings is stated in Model Rule 3.3(d), which has been adopted in about 40 states. The law concerning protection of those who are wards of the court exists in one form or another in every jurisdiction. In a class action involving absent and passive class members, the court is a guardian for the class, and the lawyers for the class are trustees of the interests of all members of the class. The lawyer for a class owes fiduciary duties to its absent members and therefore has a duty to inform the court about aspects of the settlement that may not be in their interest. In short, the lawyer for a class, like a prosecutor or a lawyer representing an incompetent, exercises powers and is subject to corresponding duties that are not applicable to other lawyers, except in situations such as ex parte proceedings.

The implication of these old-fashioned ideas is plain: the lawyer for the class must reveal to the court any adverse facts that are relevant to the adequacy of representation and the fairness and reasonableness of the settlement. Class counsel testifying at the Philadelphia hearing repeatedly stated that they acted in the best interests of the class; yet their comments conceded at crucial points that they did not accept the notion that it was the court's function, not that of class counsel, to determine whether the settlement was in the best interests of the class. Mr. Weiss' statement and Mr. Fox's vigorous endorsement of an advocate's concealment of adverse facts from the court (an appropriate and required approach in ordinary civil litigation in which a well-represented adversary is expected to dig out these facts by investigation and discovery) are important indications that a duty of candor needs to be made explicit in Rule 23(e). The settling parties should be required to disclose to the court all relevant facts

concerning the negotiation of the settlement and its terms so that the court may make an informed determination that the settlement is in the best interests of the class.

The lawyers who make their living in bringing, defending and settling class actions will strongly oppose a recognition of what I believe already exists--a duty of candor to the court on the part of the settling parties when they ask the court to approve it as fair and reasonable. Recognition and enforcement of this existing duty will make it somewhat more difficult to arrive at deals and lead, as it should, to the rejection of some settlements by judges who are more fully informed. But procedural rules must be designed in the interests of justice, not in those of the class action lawyers and those of their clients who are active and present. For example, the court should be told, without having to ask, whether class representatives are getting special treatment, whether side settlements have carved some similarly situated persons out of the class on terms different than those applied to class members, whether the resulting negotiation sacrifices the claims of a group of class members to provide larger awards to another group, etc.

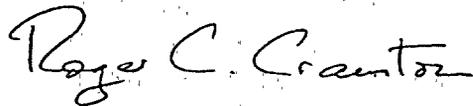
My own view is that the Committee, wholly apart from any legitimization of "settlement class actions, should propose amendments to Rule 23(e) that put in place all of the three safeguards mentioned: (1) requirement of specific findings in every case, (2) appointment of an advocate to oppose settlement in appropriate cases, and (3) a duty of candor on the part of the settling parties. The approaches are not mutually exclusive and in combination will provide the information that is required for the court to exercise the truly judicial function of determining whether absent class members are being fairly treated.

### 3. *An apology*

One final matter. At one point in my testimony, I suggested that an appearance of impropriety may be involved when a trial judge actively participates in managing a class action settlement (encouraging or structuring it) and then passes on the fairness and reasonableness of the resulting settlement. As Professor Burbank remarked, I misspoke when I said that Judge Reed had participated in the settlement discussions in the *Georgine* case; I should have said that Judge Weiner, who then designated Judge Reed to handle the fairness hearing, had done so.

I do not envy you the challenge of working out an acceptable and wise solution to such a tangle of thorny problems. I know you will do your best.

Sincerely yours,

Handwritten signature of Roger C. Cramton in cursive script.

Roger C. Cramton  
Robert S. Stevens Professor of Law

cc: Professor Edward H. Cooper  
Professor Stephen B. Burbank

STATEMENT OF ROBERT J. REINSTEIN CONCERNING  
PROPOSED AMENDMENTS TO RULE 23 OF THE  
FEDERAL RULES OF CIVIL PROCEDURE

Thank you for allowing me to present this statement on the proposed amendments to Rule 23 of the Federal Rules of Civil Procedure. I have been the Dean of the Temple University School of Law since 1989. Before being appointed to that position, I had brought, participated in and defended against numerous class actions in a variety of capacities--as a private civil rights attorney, as an attorney with the United States Department of Justice, and as the University Counsel for Temple University. In addition, the study of class actions informs my teaching of federal jurisdiction and constitutional law. I am therefore greatly interested in the effects that proposed amendments to Rule 23 might have on the administration of justice in the federal courts, and I appreciate the opportunity to provide these comments.

In the thirty years since its enactment in 1966, the provisions of Rule 23 have been applied successfully to effectuate their original purposes. Rule 23(b)(2) has been a critical vehicle for providing relief against violations of fundamental civil rights that are secured by the Constitution and federal statutes. Rule 23(b)(3) has provided an essential mechanism for providing relief against widespread violations of the law that damage large groups of people who could not secure effective redress in multiple individual lawsuits. In serving these functions, Rule 23 has proven to be a powerful and indispensable mechanism for enforcing our nation's commitment to the rule of law.

It is also not surprising that a device as powerful as Rule 23 would generate substantial controversy. There is no doubt that errors and abuses have occurred in the application of Rule

23, and the proposed amendments are said to be necessary in order to address those errors and curb those abuses. Nevertheless, in light of the substantial public benefits that have been realized by Rule 23, proposed changes to the Rule must be scrutinized with extreme care. In particular, I believe that the proposed changes should be evaluated by examining the following questions: Are the problems which the proposed amendments seek to rectify so widespread as to require changes in the Rule itself? Or are these problems of such an anecdotal nature that they can be dealt with through a more rigorous application of existing safeguards in the Rule and by other conventional litigation devices? Are the proposed amendments tailored in any event to correct these problems? Or will the proposed amendments have the unintended consequence of reducing the beneficial applications of Rule 23?

Judge by these criteria, I believe that several of the proposed amendments should not be enacted. In my opinion, there is insufficient evidence that the problems that they address are widespread; these proposed amendments are not narrowly tailored to actually address those problems; and any potential benefits of these proposed amendments are insignificant in comparison to the potential adverse effects that they may have on the maintenance of viable class actions.

Before examining the proposed amendments specifically, I wish to commend the Advisory Committee for following such a deliberative process. The Advisory Committee wisely asked the Federal Judicial Center to conduct an empirical study on the application of Rule 23.

No such study had been conducted in many years, and a comprehensive examination of how class actions are actually administered is plainly necessary to evaluate the conflicting claims that are advanced by attorneys and litigants, based largely on their individual experiences, perceptions and interests. That study (which I will refer to as the Federal Judicial Center study<sup>1</sup>) provides important information that bears directly on the proposed amendments.

#### **Proposed Rule 23(b)(3)(A)**

Proposed Rule 23(b)(3)(A) would require the district court to consider, in any (b)(3) class action, "the practical ability of individual class members to pursue their claims without class certification." If this provision were added, the district court would have the discretion to refuse to certify a class under Rule 23(b)(3) when it believes that the potential damage awards to individual class members are substantial enough to support multiple individual actions.

Of the 407 cases brought as class actions in the four districts examined in the Federal Judicial Center study, 62 resulted in damage awards to class members. The *maximum* awards ranged from \$1,505 to \$5,331 across the districts. As the authors of the study concluded, not a single case yielded individual damages awards that were even close to the amounts sufficient for class members to have brought individual actions.<sup>2</sup>

Of course, the Federal Judicial Center study examined a sample of judicial districts; another, more comprehensive study may find a different pattern. But in the absence of such

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<sup>1</sup> T. Willging, L. Hooper & R. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (Federal Judicial Center 1996). I acknowledge, of course, that the views expressed in the study are those of the authors and not necessarily those of the Federal Judicial Center.

<sup>2</sup> *Id.* at 7, 13.

contrary evidence, there is no empirical basis that would justify a change in Rule 23(b)(3) to give the district courts the discretion contemplated in this proposed amendment.

This proposed amendment is also problematic because it could lead to results that are contrary to the purposes underlying Rule 23(b)(3). One might wonder why a defendant would ever invoke this proposed amendment. If the district court refuses to certify a plaintiff class because potential individual recoveries are so great, the defendant could thereupon face multiple independent lawsuits, perhaps in different districts and parts of the country. The result would not only be inefficiency in the administration of justice but a substantial increase in the defendant's litigation costs.

Nevertheless, it is probable that defendants would assert this proposed amendment as a reason to deny class certification. Whatever the district court might think about the practical ability of class members to pursue individual claims, the plain fact is that many will not do so-- either because the district court has under-estimated the level of potential damages that could support individual actions,<sup>3</sup> or because class members are unable to find competent and experienced counsel, or because they are unaware of their rights. Thus, as against a potential increase in litigation costs, the defendant who successfully invokes this provision will save many times over in the claims that are not pursued.

Rule 23(b)(3) was drafted with the recognition that many class members with viable claims would not bring individual actions. It therefore adopted an opt out procedure, and

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<sup>3</sup> I have been told by several leading plaintiff personal injury attorneys that they will not bring a medical malpractice or products liability case unless the potential recovery exceeds \$100,000.

rejected an opt in procedure, for the very purpose of preventing windfalls from accruing to defendants who cause substantial injuries to many people. The proposed amendment departs from this approach without a sound factual or policy justification. Moreover, if members of the class believe that potential damage awards could sustain individual actions, they can fully protect their interests by exercising their rights to opt out of (b)(3) actions and bring their own lawsuits.<sup>4</sup>

The Advisory Committee Note observes that this proposed amendment could be read to encourage district courts to certify class actions in which the potential individual recovery would not sustain separate actions. But the addition of this proposed amendment for that purpose is unnecessary because that principle is already embedded in Rule 23(b)(3). Whatever effect this language might have to reinforce that principle is marginal at best. Moreover, that marginal benefit would be more than negated by the potential adverse effects of proposed Rule 23(b)(3)(F).

#### **Proposed Rule 23(b)(3)(F)**

Proposed Rule 23(b)(3)(F) would require the district court to consider, in any (b)(3) class action, "whether the probable relief to individual class members justifies the costs and burdens of class litigation." If this provision were added, the district courts would have the discretion to deny class certification in (b)(3) actions when it believes that the probable individual damage awards are likely too small.

This proposed amendment is of course the converse of proposed Rule 23(b)(3)(A). Under (b)(3)(A), a class may not be certified if the potential individual recovery is deemed large

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<sup>4</sup> See Federal Judicial Center study, *supra* at 52 (reporting opt out rates in cases surveyed).

enough, while under (b)(3)(F), a class may not be certified if the potential individual recovery is deemed small enough.

As with proposed (b)(3)(A), however, there appears to be insufficient empirical evidence that the proposed (b)(3)(F) is necessary. Contrary to what one might have expected from anecdotal accounts, the Federal Judicial Center study found only nine class actions, in the four districts that were surveyed, in which the average individual awards were less than \$100.<sup>5</sup> This finding strongly suggests that the incidence of mass tort class actions involving trivial individual recoveries is actually quite rare and that this proposed amendment is not necessary..

I am also concerned that this proposed amendment not only will produce trivial benefits, but that its overall effect will be very detrimental to the operation of Rule 23(b)(3). Let us assume, for example, that this proposed amendment had been invoked as a reason to deny certifying class actions in the nine cases in the Federal Judicial Center study involving individual class awards that averaged less than \$100. The median aggregate award in those nine cases was \$2.55 million, with the aggregate awards in seven of those cases exceeding \$1 million.<sup>6</sup> Thus, although the individual awards in those cases could be characterized as nominal, the aggregate awards were quite substantial. The consequence of applying this proposed amendment could have been that mass torts causing large aggregate damage to many people would go unremedied. This would defeat a central purpose of Rule 23(b)(3).

Of course, it is possible that this proposed amendment would not have been applied so as

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<sup>5</sup> *Id.* at 8, 14.

<sup>6</sup> *Id.* at 14, 160-61 (Table 1).

to prevent the certification of those nine cases as (b)(3) class actions. But if the proposed amendment would not affect even those few cases in which there was nominal individual relief, then the amendment will likely have more impact on law school examinations than on actual litigation.

This speculation points up, however, a central problem with this proposed amendment: no one knows how it will be applied. The draft minutes and note of the Advisory Committee are conspicuous in their failure to predict how this proposed amendment would have affected even one specific case that has actually been litigated, or how it will affect even one specific case that will be litigated in the future.<sup>7</sup> The reason for this failure is, I believe, that this proposed amendment would require the district courts to engage in a process of speculative, individualized *ad hoc* balancing without any standards or guiding principles.

The *ad hoc* balancing approach called for by this proposed amendment is very different than the categorical approach that has heretofore been taken in rules governing such matters as subject-matter jurisdiction and class actions. Those rules result from a process of categorical balancing: the values and costs of litigating certain types of cases in federal court are weighed in advance, the resulting rules then describe the categories of cases that can proceed, and individual cases may be brought if they fall within those categories. In this proposed amendment, however, the values and costs of permitting class actions have not been identified, let alone weighed. Instead, the district courts are directed to perform that function, without guidance, on a case-by-case basis. An analogy would be Congress eliminating the fixed amount in controversy

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<sup>7</sup> See, e.g., Advisory Committee Note at 50-51.

requirement in diversity cases and instead directing the district courts to determine, in each diversity case, whether the probable relief justifies the costs and burdens of trying that lawsuit.

Under this proposed amendment, the district courts are directed to balance, in every (b)(3) class action, the "probable relief to individual class members" against the "costs and benefits of class litigation." What standards are the district courts to apply in evaluating each side of the balance, and then making a comparative judgment?

On one side of the equation, the district court must somehow *predict* the "probable relief to individual class members" at an early stage in the litigation. Unless the district court is to rely on its own speculation or intuition, or on the self-serving claims of the parties, it will have to conduct some kind of evidentiary hearing that could well turn into a mini-trial on both the merits and liability.

After considerable debate on this question, the Advisory Committee decided not to discuss whether this mini-trial process was appropriate.<sup>8</sup> The arguments against it may appear convincing. Such a process would result in a substantial increase in litigation costs and burdens; and whatever findings result from this process would influence, and perhaps prejudice, the future course of the litigation on the issues of liability and damages. On the other hand, it is difficult to see how this mini-trial process could be avoided. The strongest argument that "probable relief" would not justify the costs and burdens of class litigation is that the case lacks merit. And if that hurdle is overcome, the "probable" amount of damages will likely turn into a premature battle of expert witnesses.

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<sup>8</sup> See Draft Minutes, Civil Rules Advisory Committee, April 18 and 19, 1996, at 26-34.

On the other side of the equation, the district court will have to *predict* the costs and burdens of having the case proceed as a class action. Those costs and burdens depend largely on the willingness of the parties to cooperate on such matters as discovery, notice and the allocation of a potential damages award. If this proposed amendment applies, however, it will provide an incentive to the party opposing class certification to minimize that cooperation and to thereby maximize the costs and burdens of class litigation.

Even if the district court can somehow make accurate predictions of the probable relief to individual class members and the costs and burdens of class litigation, the court is given no guidance on how to weigh those factors. The proposed amendment does not instruct the district court on what values should then govern its decision. Should the district court consider the public interest served by (b)(3) class actions in providing meaningful relief for widespread injuries? Should the district court take into account the nature of the case, that is, whether the class representatives are acting as "private attorneys general" to enforce federal statutes, or whether they are bringing diversity cases? Should the district court consider the potential aggregate recovery to the entire class? Should the district court consider the costs and burdens to the judicial system that would result if the refusal to certify a class action produced multiple individual claims?

Unfortunately, the terms of the proposed amendment provide no answers to these questions, and the Advisory Committee has not provided the necessary guidance. In the absence of such standards or guidance, the district courts will be left with unchannelled discretion.

The unchannelled discretion generated by this proposed amendment will, I believe, substantially diminish the effectiveness of viable (b)(3) class actions. At the least, it will add

substantial costs and delays to those proceedings. Moreover, in light of the findings of the Federal Judicial Center study, there is reason to fear that the proposed amendment will have the principal effect of nullifying viable class actions. This proposed amendment directs the district courts to remove the proverbial needle in the haystack. More often than not, such attempts result in the dislocation of hay rather than in the location of the needle.

#### Proposed Rule 23(c)(1)

As the Federal Judicial Center study points out, there are real problems with (b)(3) class actions; but, as with civil litigation generally, those problems relate more to non-meritorious claims than to claims seeking trivial individual relief.<sup>9</sup> The Congress recently addressed the problem of "strike suits" in the recent securities legislation; and, as the Federal Judicial Center study observes, that problem also appears to be capable of resolution through conventional techniques. Approximately 30 percent of all of the class actions brought in the four districts surveyed in this study were terminated as a result of motions to dismiss or for summary judgment.<sup>10</sup>

One of the criticisms of the present Rule is that it is not suited to weeding out non-meritorious class actions because Rule 23(c)(1) requires that the decision on class certification should be made "[a]s soon as practicable after the commencement of [the] action." This language suggests that the district court may not consider motions to dismiss or motions for summary judgment before ruling on class certification. The circuits are divided on this issue.

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<sup>9</sup> Federal Judicial Center study, *supra* at 32.

<sup>10</sup> *Id.* at 32-34.

The Advisory Committee has proposed that Rule 23(c)(1) should be amended to provide that the class certification decision should be made "[w]hen practicable after the commencement of [the] action." This proposed amendment would authorize the district courts to entertain precertification motions to dismiss and for summary judgment. The Federal Judicial Center study found that the district courts in all four districts surveyed have been following that procedure, with salutary results.<sup>11</sup> I support this proposed amendment because it will strengthen the enforcement of Rule 23 by explicitly legitimating a practice that provides an important safeguard against non-meritorious class actions.<sup>12</sup>

#### Proposed Rule 23(f)

Proposed Rule 23(f) would allow the court of appeals, in its discretion, to permit an appeal from a district court order granting or denying class certification.

One of the hallmarks of federal appellate jurisprudence is the strong presumption against interlocutory appeals. This presumption is based on sound policy reasons--to avoid delays in litigation and piecemeal appellate review, and to prevent the premature review of rulings that may be modified by the district court or that may become moot by the outcome of the litigation.

This proposed amendment runs contrary to that presumption by allowing discretionary interlocutory review of an entire class of preliminary rulings. It creates all of the dangers incident to interlocutory review of preliminary trial rulings. The filing of appeals on class certification rulings is bound to cause some delay in the litigation, whether or not a stay of the

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<sup>11</sup> *Id.* at 30-32.

<sup>12</sup> For similar reasons, I support the enactment of Proposed Rules 23(b)(3)(B), (b)(3)(C), (b)(4) and (e).

proceedings is granted. It invites piecemeal appellate review over the case, as well as the premature review of class certification rulings that may be subsequently modified by the district court. And, in light of the fact that most class actions settle (at a rate, according to the Federal Judicial Center study, that is about the same as non-class civil litigation<sup>13</sup>), most of the rulings on class certification will become moot.

While advocating this new appellate procedure, the Advisory Committee recognizes that the Federal Judicial Center study found that most rulings on class certification present "familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings."<sup>14</sup> The question, therefore, is whether there is an identifiable subset of rulings on class certification that warrant special appellate treatment. That subset is said to exist in those cases in which a class certification ruling may be especially important to the outcome of the litigation, and, in particular, can have the effect of forcing a defendant to settle in order to avoid large litigation costs and a potentially ruinous liability judgment.

I do not believe that a persuasive case has been made that these reasons warrant such a striking departure from the normal principles of federal appellate review. It is true that a class certification ruling can have a significant effect on the outcome of litigation; but this also true of many other preliminary rulings, including, for example, the denial of a motion to dismiss or for summary judgment, or the grant of partial summary judgment on liability, or a ruling limiting the scope of discovery, or a ruling on the admissibility of evidence. Yet none of those rulings are

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<sup>13</sup> Federal Judicial Center study, *supra* at 19.

<sup>14</sup> Advisory Committee Note, *supra* at 55.

subject to the kind of discretionary interlocutory review that is allowed by this proposed amendment. Moreover, the Federal Judicial Center study does not substantiate the assertion that orders granting class certification have the effect of coercing defendants into settling.<sup>15</sup> This appears to be another instance in which proposed rule changes are being driven by anecdotal accounts that are not supported by the available empirical evidence.<sup>16</sup>

At present, class certification rulings are subject to limited interlocutory review according to the same standards as other preliminary rulings. Under Section 1292(b), the court of appeals may allow an appeal if the district court certifies the appeal as "involving 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." And, in extraordinary cases, the court of appeals may review class certification orders by accepting petitions for writs of mandamus.

Even if existing mechanisms for interlocutory review of class certification orders are insufficient, I am concerned that the proposed amendment does not contain any standards to govern the exercise of discretionary review. At the least, I would urge that the proposed amendment be modified to dispense with the necessity of district court certification but require that an immediate appeal of a class certification ruling must satisfy the other limiting requirements of Section 1292(b). If an interlocutory appeal over a class certification order does

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<sup>15</sup> Federal Judicial Center study, *supra* at 59-62.

<sup>16</sup> In my own experience, the two types of rulings that had the greatest impact on defendants' willingness to settle were denials of motions for summary judgment and orders setting the case for trial.

not present a debatable controlling question of law, and if immediate review would not materially advance the litigation, it is difficult to understand why the appeal should be allowed. The Advisory Committee does not identify any other basis for allowing immediate review, and none is apparent. The enactment of the proposed amendment without these limitations is bound to generate confusion; and, until the standards governing discretionary review are sorted out, it is bound to encourage routine, unnecessary appeals by disgruntled litigants who have nothing to lose and everything to gain in seeking review of a class certification order.

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COMMENTS OF PUBLIC CITIZEN LITIGATION GROUP  
CONCERNING PROPOSAL TO AMEND FEDERAL  
RULE OF CIVIL PROCEDURE 23

These comments concerning proposed amendments to Rule 23 are presented on behalf of Public Citizen Litigation Group, a division of Public Citizen, a non-profit consumer advocacy organization with approximately 100,000 members nationwide. Because of our considerable practice in the federal courts in civil matters, we have regularly commented and testified on proposed changes to the Civil and Appellate Rules.

With respect to the particular proposal now before the Advisory Committee, Public Citizen Litigation Group has considerable day-to-day experience with Rule 23. We sometimes represent plaintiffs in class actions, but more often we represent absent class members who object to proposed class action settlements. In the past several years alone, we have represented objectors in more than a dozen nationwide class actions, ranging from the Bowling v. Pfizer heart valve matter to the General Motors coupon case to the Georgine "futures" asbestos settlement.<sup>1</sup> These

<sup>1</sup> See, e.g., Georgine v. Amchem, 83 F.3d 610 (3d Cir. 1996), cert. granted, 65 U.S.L.W. 3333 (Nov. 1, 1996) ("Georgine"); In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir.), cert. denied, 116 S. Ct. 88 (1995); In re Ford Motor Co. Bronco II Products Liab. Litig., 1995 U.S. Dist. Lexis 3507 (E.D. La. 1995); Bowling v. Pfizer, 143 F.R.D. 141 (S.D. Ohio 1992) (merits); Bowling v. Pfizer, 922 F. Supp. 1261 (S.D. Ohio 1996), on reconsideration, 927 F. Supp. 1036 (S.D. Ohio 1996) (fees).

cases presented important questions about Rule 23's class certification criteria, due process for absent class members, and attorney's fees, among others, and the comments that follow incorporate what we have learned in our practice.

For each of the proposed changes, we now provide our comments, and, where appropriate, alternative suggestions for textual amendments.

#### Subsections (b)(3)(A) and (b)(3)(B)

We support these changes to make explicit that the practical ability of individual class members to control litigation is a factor that the district court should consider in deciding whether to certify the class. Thus, new subsection (b)(3)(A) may be applicable in many class actions under federal consumer protection and securities laws, where the majority, if not all, of the class members have small claims. In those circumstances, a class action may be the only way to secure justice for the injured parties and to deter wrongful conduct because the maintenance of an individual suit would be inefficient and far too costly. The other side of the issue is contained in revamped section (b)(3)(B) (formerly (b)(3)(A)), in which the court is directed to consider the individual class member's interest in maintaining or defending a separate action as a reason not to grant certification.

However, neither the Rule's text nor the proposed committee note mentions an important variation on this approach. In many cases, particularly nationwide class actions in which state

substantive law controls, the fact that individual litigation may not be practicable does not necessarily favor nationwide class certification. For instance, in a breach-of-warranty case seeking damages under state law for diminution in value of a consumer product, see, e.g., In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir. 1995), although individual litigation is not practical, certification of a nationwide case may not be called for either. However, a more narrowly defined action limited to one state (with one set of applicable laws) would be more manageable. Or, if the law in a particular jurisdiction is favorable to the plaintiffs, and a state-wide class action is pending there, the certification order might properly carve out that state class from the national class.

Moreover, the ultimate result in a case certified on a state-wide basis may be more just for the absentees than in a case certified on a national basis, since any settlement or judgment in a nationwide case will inevitably smooth other real differences in state law for the purposes of efficiency. Id. at 817-18; In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300-01 (7th Cir.), cert. denied, 116 U.S. 184 (1995). Of course, in some situations, subclassing may alleviate choice-of-law problems, see In re School Asbestos Litig., 789 F.2d 996, 1010 (3d Cir. 1990), cert denied, 479 U.S. 852 (1986), but in complex nationwide cases, multiple subclasses may make the litigation unmanageable.

To deal with this problem, we suggest that subsection (b)(3)(B) be revised as follows:

The matters pertinent to the findings include ... class members' interests in maintaining or defending separate actions, including their interests in maintaining or defending other class litigation.

If this suggestion is adopted, the committee note should be revised to explain that, on some occasions, class certification should be denied or limited because other class litigation is more likely to protect the interests of all or some of the class members.

**Subsection (b) (3) (C)**

We support the new language that would allow the district court to take into account the maturity of related litigation when deciding whether to certify a class. We have one minor grammatical suggestion for the committee note. On page 47, line 13 of the first full paragraph, we suggest changing "Pre-maturity class certification..." to "Premature class certification...."

**Subsection (b) (3) (F)**

Public Citizen Litigation Group strongly opposes the proposed Rule 23(b)(3)(F). This new subsection directs the court, in deciding whether to certify a class under Rule 23(b)(3), to evaluate whether "the probable relief to individual class members justifies the costs and burdens of class litigation." As explained in the committee note, this provision mandates some sort of cost-benefit evaluation of the merits of the case as a factor in Rule 23(b)(3)'s superiority analysis. Indeed, the note suggests that, where costs exceed benefits, a class action is not, by definition,

"superior."

Before discussing the merits of the proposal, we address two threshold concerns. First, we are not aware of any evidence that suggests a need for this drastic revision. Presumably, this rule change is urged on the ground that in a significant number of class actions the relief is trivial or the underlying claims are frivolous. But there is no evidence that this is a serious problem. Indeed, the general view of the practitioners who addressed the committee was that such suits were not a problem, and the view was expressed that the size of individual class members' claims should be irrelevant where the aggregate harm was substantial. Request for Comment, at 29-30. One commenter stressed that "[a]necdotal views of frivolous suits, settled by supine defendants, do not justify an unguided discretion to reject class certification" under proposed Rule 23 (b) (3) (F).

Indeed, the anecdotal evidence, if any, that may have prompted the committee's proposal is not justified by the findings of the recent Federal Judicial Center study, which was commissioned by this Committee for the express purpose of providing hard data on the matters under review. The FJC's study found very few cases in which the recovery could be deemed trivial, either as compared to the amount of attorney's fees awarded or based on the average individual award. Empirical Study of Class Actions in Four Federal District Courts -- Final Report to the Advisory Committee on Civil Rules 7, 11 (FJC 1996) (hereafter "FJC Study"). In sum, the case has not been made that a problem exists.

Second, quite apart from the serious substantive problems with the proposal, the Rule provides no standards to guide the district court's discretion. The Rule tells the court virtually nothing about how to gauge "probable relief." Should the value of the relief be discounted by the likelihood of obtaining the relief? How is the court to gauge probable relief early in the litigation, when the courts usually make class certification rulings? The committee note indicates that the question could be revisited as matters develop, Request for Comment, at 50-51, but that is hardly efficient or fair to a class that has obtained certification, expended considerable resources developing the merits, and still meets the other 23(a) and (b) criteria.

And, perhaps more important, what constitutes the "costs and burdens" of the litigation? Judge Higginbotham indicates his belief that the "costs" side of the equation will include not only "costs to the parties," but also "burdens on the court of resolving the merits." Request for Comment, at 21. In what manner would the parties obtain reliable data on these costs, particularly those of the court? Would the parties be able to take discovery of one another regarding anticipated litigation costs? And on the question of court "burden"--which the proposed Rule itself does not mention--it would be peculiar, if not discriminatory, to require plaintiffs alone in (b)(3) class actions to pay the price for any "burden" on the court. After all, it is the parties and the public generally who benefit from the court system, yet it is only the plaintiffs who would suffer, since it is they who would lose the

opportunity to go forward if certification were denied on this basis.

Turning to the merits of the proposal, new subsection (b)(3)(F) is very troubling because it is at odds with one of the main purposes of Rule 23(b)(3): to provide access to the courts for persons with low-value claims who, absent the class device, would go without recompense. Taken literally, the proposal would allow the denial of class certification if the value of an individual claim is outweighed by the costs of the litigation. But even in cases where the individual claims are \$5,000, the total costs of the litigation to the defendant are greater. Nonetheless, the Rule appears to allow denial of certification based on these facts and the proposed committee note underscores this approach. Request for Comment, at 50; see also Request for Comment, at 26-30 (Draft Reporter's Minutes). Nonetheless, the Committee surely does not intend to allow denial of class certification wherever the costs of litigation are greater in dollar terms than "the probable relief" to an individual class member. This interpretation of the Rule, however, could result in the elimination of class actions whenever they are not individually viable, which is in direct contradiction to revamped subsection (b)(3)(A) and to one of the principal purposes of (b)(3) class actions.

In light of these apparent contradictions, we are left wondering what class actions now being certified are thought to fall below (b)(3)(F)'s certification threshold. At the very least, the Committee should identify some actual cases that would not meet

this threshold and explain why not. Without clear guidance on this point, the proposed cost-benefit test could well become a tool to justify highly subjective judgments about which cases merit class action status and which do not.

Moreover, if a cost-benefit analysis were ever to be appropriate, it would surely have to weigh the aggregate value of the class claims against the costs of the litigation. Thus, the fact that a class member had only \$200 at stake would be irrelevant; the question would be whether the total recovery was greater than the costs of the litigation. In a case where there were 100,000 class members with \$200 claims, the \$20 million recovery is not trivial and would, absent very unusual circumstances, outweigh the costs of the litigation.<sup>2</sup>

But even if the Rule were to direct the court to balance the aggregate probable recovery against the litigation costs, we would still object to it. Perhaps the most fundamental problem with the proposal is that it contains no recognition--on the "benefit" side of the equation--of the deterrent effect that the litigation might have on the defendant's future conduct or on the conduct of similarly-situated defendants not before the court. We believe the courts should not be engaged in economic/social analysis in determining class certification. However, if that is to be done,

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<sup>2</sup> We recognize that very small individual recoveries, i.e., those not worth the cost of distributing the recovery to each class member, may be problematic from a compensation, but not a deterrence, perspective. As the Federal Judicial Center study concluded, such cases are few and far between, and may sometimes be resolved by providing cy pres recoveries to charities whose programs are germane to the class complaint. See FJC Study, at 78.

the court should be required to give significant weight to whether a judgment in the case would have either a specific deterrent effect on the defendant or play a general future role in furthering the goals of the substantive law.

This brings us to our last substantive point. As the Reporter's Minutes indicate (Request for Comment, at 29), subdivision (b)(3) historically has permitted certification of small-claims consumer class actions. The substantive law either implicitly or explicitly has taken this fact into account. In the area of securities law, for instance, Congress is aware that the only feasible way to maintain most cases is through the class action device, since the size of the claims will usually not support individual litigation. Last year, Congress enacted significant amendments to the securities laws. One in particular--the presumption in favor of representative plaintiffs who are high stakeholders--bears on the way in which class claims may be prosecuted. Requiring a cost-benefit analysis in the Rule might well change the substantive law by, in effect, creating a different cost-benefit calculus than that struck by Congress in the enactment and amendment of the substantive law.

Other examples are contained in various federal consumer protection statutes, such as the Truth in Lending Act or the Fair Debt Collection Practices Act, in which it is plain that Congress saw general deterrence as more important than the type of limited cost-benefit analysis suggested by the Rule. These laws impose statutory damages of \$1,000 for any violation, regardless of actual

damages. See 15 U.S.C. 1640(a), 1692k(a). Although the availability of statutory damages, along with provisions for awards of attorney's fees to prevailing parties, may suggest that individual litigation of such claims is viable under Rules 23(b)(3)(B), the very existence of these statutes underscores that Congress often eschews the approach taken by the proposed Rule. Indeed, these Acts provide that statutory damages in class actions are limited to the lesser of 1% of the defendant's net worth or \$500,000, no matter how many class members are present, making clear that Congress intended small-claims consumer class actions to go forward. See 15 U.S.C. 1640(a)(2)(B), 1692k(a)(2)(B); see also, e.g., Ford Motor Credit v. Shore, No. 91 M1 202394 (Chancery Div., Circuit Court, Cook County, Ill.) (Truth in Lending action involving more than one million class members).

In cases where state substantive law is applicable, these problems are exacerbated by serious federalism concerns. Take, for example, a class action brought in state court under a state consumer protection statute against an out-of-state defendant. Despite arguments that such cases do not have the requisite amount-in-controversy, such cases have been removed to federal court on the theory that 28 U.S.C. 1367 impliedly overruled the requirement that each class member individually have \$50,000 in controversy. See In re Abbott Laboratories, 51 F.3d 524 (5th Cir. 1995). On other occasions, the presence of a claim under the Magnuson Moss Warranty Act--under which state law provides the applicable substantive law--justifies removal. In any event, it is reasonable

to assume that state legislatures, like Congress, recognized that consumer protection laws can often be enforced only on a class basis precisely because the value of the individual claims are small. These substantive legislative judgments should not be second-guessed under a federal rule of procedure, the conceded purpose of which is to effect a "retrenchment" of claims, which, on an individual level, are deemed "trivial." Advisory Committee Note, Request for Comment, at 50.

To be sure, the class action rule, whether the case involves federal or state law, inevitably has an effect on the enforceability of substantive law. And to the extent that state and federal class action rules differ, state substantive law may effectively obtain more or less enforcement depending on whether certification is sought in a state or federal forum. But proposed Rule 23(b)(3)(F) is fundamentally different because, instead of focusing on trans-substantive class action principles, such as adequate representation or alignment between the representatives and the class members--matters which legislators have generally ceded to rulemakers--it makes a judgment about the substantive merits of the individual claims for relief. Whether or not this amendment comes "dangerously close to the limits of the Enabling Act," as one early commenter put it, Request for Comment, at 30, it is not good policy and should be rejected for the reasons given above.

Rule 23(b)(4)

Under this proposed Rule, a class can be certified if "the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement even though the requirements of subdivision (b) might not be met for purposes of trial." This Rule offers no guidance, standards, or criteria for certifying a settlement class. Taken literally, a court could hold that the mere existence of a settlement warrants certification as long as the Rule 23(a) criteria are met. Surely, the standardless certification of settlement classes would be an odd and unwelcome development in an era where commentators have decried the complete absence of criteria for settlement approval under Rule 23(e). See, e.g., Schwarzer, Settlement of Mass Tort Class Actions: Order Out of Chaos, 80 Corn. L. Rev. 837, 843-44 (1995). Nor does the Advisory Committee Note provide significant guidance. On the one hand, the Note says that the predominance and superiority criteria of Rule 23(b) would still have to be met (although the Rule itself appears to provide otherwise), but then suggests that "the many differences between settlement and litigation of class claims or defenses" may serve to meet the predominance and superiority criteria. Given the lack of any standards in the new Rule (and the apparently contradictory position taken in the Note), the proposal should be withdrawn on this basis alone.

Two other aspects of the proposed Rule underscore our concern. First, the Rule indicates, and the committee note makes clear, that settlement classes may be certified only under subdivision (b)(4)

and only for settlements that are reached prior to the request for certification. This creates a breeding ground for settlement classes in which the defendants have chosen the class counsel, apparent in cases such as Georgine and In re Asbestos Litig., 90 F.3d 963 (5th Cir. 1996). The Rule should be structured, we believe, to encourage the participation of class counsel who are champions of the class; the proposed Rule will have the opposite effect: it will encourage defendants to seek out counsel most likely to accept a settlement favorable to them.

The Rule and particularly the Note, see Request for Comment, at 51-53, contemplate that (b)(4) class actions will have several important (b)(3) attributes, such as the notice and opt-out rights guaranteed by subsection (c)(2), but there is one important difference: the (b)(4) class action will be one which cannot meet the criteria for (b)(3) class certification for one of many possible reasons, including, for instance, choice-of-law difficulties present in nationwide diversity class actions. See Request for Comment, at 51. As a practical matter, then, the case will be settled either before the filing of the complaint, or, in a case originally filed under (b)(3), simultaneously with the filing of an amended complaint seeking certification under (b)(4).

Under such a scenario, the defendants will have enormous leverage. Because the case cannot be litigated as a (b)(3) class action, defendants will tend to settle with counsel of their choosing on terms favorable to them. This likelihood is of particular concern in the current litigation climate, where

defendants often face multiple class actions filed by different class counsel in different forums. Under the proposed rule, without having to show that the (b) (3) class certification criteria have been met, defendants will be free to conduct, to use Professor Coffee's term, an unrestrained "reverse auction" in which the defendant will bid as low as possible.

Proponents of the proposed rule argue that other restraints on the settling parties are sufficient to assure that defendants will settle on fair terms so that the rights of absentees are protected. They point to external pressures, such as the crush of individual cases in the asbestos litigation, and Rule 23(e)'s fairness hearing. As to the former, external pressures are not always present, and even when they are, it is unclear how they protect the absent class members. In the asbestos litigation, for instance, defendants sometimes have incentives to seek global solutions, but that, in itself, does not protect class members where class counsel have been chosen by the defendants precisely because they are willing to settle on the defendants' terms. As to Rule 23(e), all class actions that settle--that is, settlements that occur before and after certification under Rules 23(b) (1), (b) (2), and (b) (3)--must be determined fair, adequate, and reasonable. Thus, the fairness hearing provides no additional protection for absentees in a (b) (4) action to make up for the protections afforded by strict compliance with the certification criteria. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974) (finding of adequacy of representation is not substitute for notice and opt-out rights

under subsection (c)(2), because Rule 23's procedural protections for absentees are cumulative not alternative); cf. General Telephone Co. v. Falcon, 457 U.S. 147, 161 (1982) (class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied").

In this regard, the committee note, rather than providing needed assurance that due process protections will be enhanced in (b)(4) cases, actually underscores the Rule's inherent problems. The note first acknowledges the potential for serious problems of unfairness to absentees in settlement classes, which are "especially troubling if the class would not have been certified for litigation, or was shaped by a settlement agreement worked out even before the action was filed," i.e., precisely the type of settlements authorized by the proposed rule. Request for Comment, at 52. The Committee then states that

[t]hese competing forces are reconciled by recognizing the legitimacy of settlement classes but increasing the protections afforded class members. Certification of a settlement class under (b)(4) is authorized only on request of parties who have reached a settlement.... Certification before settlement might exert untoward pressure to reach agreement.... These protections cannot be circumvented by attempting to certify a settlement class directly under subdivision (c)(3) without regard to the limits imposed by (b)(4).

Id. at 52-53.

With all respect, we do not know what "protections" the Committee has in mind. We do not understand, nor does the committee note explain, how requiring that settlement predate the parties' request for (b)(4) certification protects the class

members. Moreover, as noted above, many (b)(4) certifications will be preceded by the filing of a (b)(3) complaint. Thereafter, the parties may determine that certification is not possible and/or class counsel may determine that she does not wish to risk denial of class certification. If so, class counsel wishing to take advantage of (b)(4) will simply file an amended (b)(4) complaint and a settlement. Frankly, we are mystified how this procedure protects the class.<sup>3</sup>

Second, the Rule not only fails to provide any standards for the certification of settlement classes, but it sidesteps entirely the issue of whether a settlement class can settle the claims of "futures," *i.e.*, class members whose injuries have not yet become manifest. Although we have grave concerns about the use of class actions to settle future claims under any circumstance, it seems odd for the Rule to ignore this issue at the same time that it endorses settlement classes. This problem is exacerbated by the committee note, which rejects the decision in Georgine, an attempt to settle unripe future claims held by millions of class members exposed to an airborne toxin (asbestos). The Note rejects Georgine's holding that settlement classes can only be certified if all Rule 23's certification criteria are strictly met. Request for Comment, at 51. But the Committee does not say whether it endorses the possibility of a "futures" settlement class under the new

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<sup>3</sup> The committee note refers twice to special "protections" afforded the class under subsection (b)(4), but it refers solely to the requirement that settlement must predate the request for (b)(4) certification.

subsection (b)(4), refusing to acknowledge that Georgine is such a case.

We oppose amending the Rule to provide for separate settlement classes. However, it would be a mistake to approve the Rule and Note in their current forms if, while purporting to deal with settlement classes, they fail to provide any guidance on the critical "futures" question. At the very least, the Note should make clear that the Committee is not endorsing "futures" class actions, which raise fundamental due process concerns regarding notice and opt out, Manual for Complex Litigation, Third § 30.45, at 244 (Federal Judicial Center 1995), and serious justiciability problems. Georgine, 83 F.3d at 617, 622-23; id. at 635-38 (Wellford, J., concurring); J. Coffee, Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343, 1422-33 (1995).

#### Rule 23(c)(1)

We support this amendment which confirms current practice and makes clear that the court should not certify a class before it carefully considers the certification criteria. We also agree that courts are empowered to rule on motions to dismiss or for summary judgment prior to ruling on class certification and that any inference to the contrary contained in the "as soon as practicable" language ought to be corrected. In the interest of simplicity, we suggest that the opening sentence of subsection (c)(1) read as follows: "The court shall determine by order whether an action brought as a class action is to be so maintained."

Rule 23(e)

We agree with this proposal, which endorses the practice of holding hearings before the court rules on a proposed class settlement. We believe the Rule should go further, however.

With respect to the procedures for the fairness hearing, the committee note states that, because the settling parties are acting in concert, "objectors may find it difficult to command the information or resources necessary for effective opposition." Request for Comment, at 54. We agree emphatically. Having represented objectors to many class settlements, we know full well how difficult it is to obtain adequate information. At a minimum, the Rule should state explicitly that the rules of discovery are applicable to the Rule 23(e) settlement hearing, and that the settling parties should be required to file with the court their evidentiary basis for the settlement and their legal and other arguments in support thereof at least 45 days prior to the date by which objectors must file their objections, thus permitting the adversary process that the committee note seeks to encourage. The failure to follow this procedure has been a serious problem in many class actions. Absentees wishing to object--who generally lack the financial wherewithal that the settling parties enjoy--are often ambushed with last minute evidentiary submissions filed after the objections have been filed and just prior to the fairness hearing. See B. Wolfman & A. Morrison, Representing the Unrepresented in Class Actions Seeking Monetary Relief, 71 N.Y.U. L. Rev. 439, 485-90 (1996) (setting out detailed proposals for discovery and

presentation of information by settling parties and objectors).

On the same note, the pressure toward settlement approval is greatly amplified after the court grants preliminary approval of the settlement, and the parties are directed to expend considerable resources to notify the class, triggering the opt-out, objections, and fairness hearing process. See Manual for Complex Litigation, Third § 30.41, at 236-37 (Federal Judicial Center 1995). In our experience, preliminary hearings often take place in near secrecy, without permitting known potential objectors, interested governmental entities, including state attorney generals, and advocacy groups with an interest in the matter to have any participation. A closed preliminary hearing is a mistake, because inadequacies with the class notice, basic intra-class conflicts, and other settlement problems can sometimes be ironed out at this juncture, if other interested parties are brought into the process. See Representing the Unrepresented, supra, 71 N.Y.U. L. Rev. at 480-85 (describing cases in which lack of preliminary hearing caused problems, and those in which broader participation was quite useful). We therefore suggest that Rule 23(e) be amended to require that the preliminary hearing be held on the record with notice to all known interested parties, including self-identified class member-objectors.

In addition, the proposed rule still provides no standards to guide the district court on whether to approve a proposed settlement. The Committee should require the court to consider a non-exclusive list of factors, such as the fairness of the

procedures for obtaining class relief and the effect the class settlement will have on parties in other pending actions, as set out in Judge Schwarzer's thoughtful 11-point proposal. Schwarzer, supra, 80 Corn. L. Rev. at 843-44. While district courts must retain considerable discretion on settlement approval, the current judicial gloss on Rule 23(e)--whether the settlement is "fair, adequate, and reasonable"--is far too vague, can lead to inconsistent results, and makes meaningful appellate review very difficult. See id.

#### Rule 23(f)

We support this change to permit interlocutory appeals of class certification rulings at the discretion of the court of appeals. In some cases, the court of appeals will be assisted by knowing the district court's views on whether interlocutory appeal is appropriate. We agree that the "gatekeeper" provision of 28 U.S.C. 1292(b) gives the district court too much power. We favor a mechanism that will allow the district court to express its views without delay. Thus, we recommend that the following sentence be added to Rule 23(c)(2): "In order to assist the court of appeals if an application for interlocutory appeal is filed under subdivision (f), the district court may, in an order granting or denying class certification, express its views on whether interlocutory appeal is appropriate."

November 8, 1996

WRITTEN TESTIMONY OF H. LADDIE MONTAGUE JR.  
RE PROPOSED AMENDMENTS TO RULE 23, F.R.CIV.P.

I offer this testimony to the Advisory Board as an attorney who has litigated class actions for over 30 years, first under the old spurious class action rule which was supplanted by the 1966 Amendment to Rule 23. Almost all of the cases in which I have been counsel for the class involved antitrust violations; the notable exception was the mandatory punitive damages class that was tried to verdict in the Exxon Valdez Oil Spill Litigation, No.A89-0095-CV (Consolidated) (D.Ak.). My firm, Berger and Montague, P.C., has been and is class counsel in many types of cases, including, inter alia, securities, mass torts for property damage, environmental and ERISA. Thus, it is fair to conclude that I am a strong advocate of an effective class action rule which promotes judicial economy and just and reasonable results for class members. It is in this context that I offer my views on the proposed amendments to Rule 23.

It appears that the proposed amendments are driven by concerns over class actions involving mass torts causing personal injuries. Mass tort cases seeking personal injury damages were recognized by the Advisory Committee in its 1966 Notes as being "ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability, would be present, affecting individuals in different ways." The proposed amendments seem to be an attempt to set criteria which may bring those types of cases within the

possibility of certification. However in doing so, it would be a disservice if those amendments gave defendants more criteria to oppose class certification in the recognized and traditionally certified class cases, such as those involving antitrust, securities, environmental and ERISA violations, thus making those class actions more difficult to certify. I fear that the amendment to subsections (b) (3) (F) will do just that.

Amended Rule 23 (b) (3) (F):

Reference to "probable relief to individual class members" ignores one of the important functions served by Rule 23(b) (3) in allowing small claimants to band together to bring litigation otherwise not practical<sup>1</sup>. That function is the deterrent and prophylactic effect of class actions, especially where the amount of affected commerce or the size of the classwide injury is substantial, even where the relief to individual class members is small. A substantial amount of aggregate damages or affected commerce should be sufficient to justify maintenance of a class action, despite relief to individual class members being small, where a policy of deterrence is in the public interest.

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<sup>1</sup> Proposed Amendment 23(b) (3) (A), when read with 23(b) (3) (F), seems to require that a class representative cannot be too big and cannot be too small. The courts have faced the "too big" issue and resolved it in favor of class representation by a class member with wealth or a large claim. See e.g., Fulco v. Continental Cablevision, Fed. Sec.L. Rep. (CCH), ¶95, 346 (D. Mass. 1992); In re IGI Securities Lit., 122 F.R.D. 451, 461 (D.N.J. 1988); Sterling v. Velsicol Chem. Corp. 855 F. 2d 1188 (6th Cir. 1988); In re Corrugated Container Antitrust Lit., 80 F.R.D. 244, 252 (S.D. Tex. 1978) ("Even a successful business might well shrink from the investment in time and money which this type of [complex antitrust] litigation entails.")

Indeed a class action is the only procedural device which threatens wrongdoers with the prospect of having to disgorge their ill-gotten gains from the totality of the affected commerce or to be accountable for the totality of damage caused by their unlawful acts. In the early case of Weeks v. Bareco Oil Co., 125 F.2d 84, 88 (7th Cir. 1941), the Court of Appeals stated:

To permit the defendants to contest liability with each claimant in a singly, separate suit, would, in many cases give defendants an advantage which would be almost equivalent to closing the door of justice to all small claimants. (This is what we think the class suit practice was to prevent. Like many another practice, necessity was its mother. Its correct limitations must be ascertained by the experiences which brought it into existence.

In today's world, with escalating costs of litigation, the availability of the class action becomes even more important.

Most plaintiffs in (b)(3) classes are represented by counsel on a contingent fee basis. That fact alone encourages (if not guarantees) that irresponsible cases involving insignificant amounts of commerce or classwide damages will not be brought.

Often, at least in antitrust and securities and ERISA cases, a plaintiff does not know at the time of class certification the extent of his or her damages or those of individual class members. The factor introduced by this amendment -- probable relief to individual class members-- is something that very often cannot be determined until discovery of defendants is completed and plaintiffs' experts conduct a study of the discovered material. But plaintiff may have available the amount of commerce involved (i.e., amount of sales involved; the total shares of stock

affected; the amount of benefits involved), and that should be sufficient for a court to determine the superiority of the class in that particular fact situation. Under current Rule 23 requirements, that, not the amount of individual relief, was relevant to the issue of superiority.

One can imagine the discovery hoops through which defendants will attempt to put small plaintiffs in the hope of defeating class certification under (b) (3) (F). And what complex economic discovery will plaintiffs need from defendants to attempt to satisfy this subdivision's criteria? Thus, "probable relief to individual class members" is not only not relevant to justify the costs and burdens of class litigation, but it will add complexity, cost and delay to the class certification process.

Lastly, if proposed Rule 23(f) is adopted, will satisfaction of Rule 23 (b) (3) (F) be subject to interlocutory review? See infra.

For the foregoing reasons, I do not support this proposed amendment.

Amended Rule 23(b) (4):

Of all the proposed amendments, Rule 23 (b) (4) is the most significant and constructive. Settlement classes serve a valuable function to the litigants and to the federal courts. Many cases could proceed as class actions if the parties agreed to certain criteria, such as how to determine individual causation and/or a damage formula. But very often, those are the very issues that are vigorously disputed and jeopardize certification. However,

if the parties can agree on those factors, then the predominance and manageability issues are satisfied -- albeit in a settlement context -- and there is no reason why a settlement cannot be consummated under Rule 23. In that case, everyone benefits -- the plaintiffs, the defendants and the court -- assuming of course that the settlement reached is fair, adequate and reasonable.

Many safeguards can be adopted to aid in assuring fairness. For example, the plan of distribution to the settlement class should be presented to the court at the same time that the settlement is presented to the court for approval. (Of course, court approval to assure a fair, adequate and reasonable settlement remains a requirement.) The plan of distribution can solve many of the problems that might have caused hesitancy in certifying the class. Also, the risk of whether or not the class would be certified should not be considered in determining the fairness and adequacy of the settlement. Rather, the settlement should be assessed on its own merits and not bootstrapped by the inherent risks of class certification. And class members must be allowed to elect to opt-out of a settlement class.

Lastly, in a settlement class, the settling defendants are protected against what many class action foes allege to be coercion to settle. A settlement class is strictly voluntary on the part of defendants. It represents defendants' election to settle all or almost all of their liabilities weighed against the risks of opposing class certification and/or litigating the merits.

Thus, the availability of a settlement class protects the

class and the defendants and allows complex and protracted litigation, either potential or actual, to be resolved efficiently and fairly.

I support proposed amendment Rule 23(b)(4).

Amended Rule 23(f):

28 U.S.C. §1292(b) provides guidelines for interlocutory appeals, as well as requiring both the trial and the appeal courts to find that those requirements are satisfied. In stark contrast, proposed Rule 23(f) contains no guidelines or limitations or restraints whatsoever (even though the Advisory Committee Notes state "Permission to appeal should be granted with restraint") and ignores the views of the trial judge -- the one responsible for managing the class action -- as to whether an interlocutory appeal is appropriate.

What has a party to lose in seeking an interlocutory appeal, especially a defendant. This is particularly so in light of the Advisory Committee's statement that "Permission is most likely to be granted . . . when, as a practical matter, the decision on certification is likely dispositive of the litigation." This suggestion of appropriateness for interlocutory appeal targets the essence of many (b)(3) classes where small claims are aggregated together. It is no secret that many claims would never be brought unless the class action device was available. In each such instance, will an interlocutory appeal lie? Will interlocutory appeals be granted both ways: where the class is denied as well as where class is granted. Is it intended that the "death knell"

doctrine will be reinstated? Under §1292(b), the rights of interlocutory appeals from class certification decisions appear to be well defined by judicial decision. Without flaws in that developed body of opinions, why redefine this area?

Lastly, Rule 23(c)(1) continues to give the district court the power to alter or amend the class finding prior to a decision on the merits. Does the district court realistically retain that power if the interlocutory appeal is granted? As a practical matter, probably not. With the power to alter or amend, the need to expand the opportunity for interlocutory appeal seems unnecessary.

Lastly, although the proposed rule provides for no automatic stay, it is likely that stays during interlocutory appeals will be granted, maybe even stipulated to by the parties. Thus, these interlocutory appeals will tend to cause more delay in resolving the merits.

#### CONCLUSION

We should not forget the prefatory statement in the initial Manual for Complex Litigation: "There are no inherently protracted cases, only cases which are unnecessarily protracted by inefficient procedures and management." I am fearful that the proposed amendments to Rule 23(b)(3)(F) and 23(f) will have the effect of protracting cases.

I am aware of all the careful thought and deliberation which went into the proposed revisions, and as a result, I feel

somewhat presumptuous expressing views contrary to those of the Committee. The views I have expressed, however, reflect my perception of the ramifications of these proposed amendments in practice, based on my experience of over 30 years in class actions. I thank you for this opportunity.

Respectfully,



H. Laddie Montague, Jr.

152699

COMMENTS OF JONATHAN W. CUNEO  
ON PROPOSED REVISIONS TO FRCP 23 BEFORE THE  
ADVISORY COMMITTEE ON CIVIL RULES  
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES  
PHILADELPHIA, PA  
NOVEMBER 22, 1996

I am the principal of a small law firm in Washington, D.C., engaged in a diversified practice that includes judicial, regulatory, and legislative matters; civil and criminal matters; plaintiff and defendant representation; and class and non-class litigation. I served as a law clerk to a judge on the U.S. Court of Appeals for the D.C. Circuit and as a staff attorney at the Federal Trade Commission and as counsel to the House Committee on the Judiciary. While I serve as General Counsel of the Committee to Support the Antitrust Laws and formerly served as General Counsel of the National Association of Securities and Commercial Law Attorneys, my comments represent my personal views and do not represent the position of any organization.

Over the past twenty years, I have had an interest in matters affecting the Judiciary and in matters affecting consumers and have witnessed first-hand how important class actions can be to both. Well-intentioned in principle, the proposed revisions to Rule 23 could have many unintended and seriously damaging consequences in practice. Rather than discuss all of the potential problems that could occur, I would instead focus on two proposed revisions (subsections (b)(3)(A) and (F)), which direct courts to weigh new factors in the decision of whether to permit class actions. These new factors could, in practical effect, preclude injured parties from obtaining relief in many meritorious class actions.

## I. General Problems With the Proposals

Class actions often are essential in affording injured consumers and small businesses a practical remedy against large corporate defendants, particularly when the amounts of individual claims are lower than the transaction costs of individual litigation. Class actions have proved highly effective in permitting victims of securities frauds a means of recouping their losses from culpable large corporations, accounting firms, banks, and brokerage houses. Class actions also have also been effective in antitrust cases to enable ordinary consumers and business competitors to bring price-fixing, monopolization, and other unfair competition actions against more powerful and better financed corporate adversaries.

These class actions and others have proven highly effective in supplementing government enforcement (especially in the modern era of sharply reduced government budgets and resources), compensating injured parties, enhancing deterrence, and generally keeping our society safe and our commercial markets fair and competitive. They have promoted economies of time, effort, and expense. Finally, they have fostered important uniformity in the law by bringing together related actions in one court for one ruling, rather than having multiple actions in multiple courts with multiple rulings.

Without class actions, nearly all individual consumers and most small businesses could not afford the daunting task of litigating a complex antitrust, securities, or other commercial case involving nationwide activities, multiple wrongdoers, and large corporate defendants. They simply would be denied any

effective remedy at all.

This is not to suggest that the proposed revisions to Rule 23 that I specifically address -- which constitute factors to be considered by courts, rather than direct mandates -- would end all class actions. However, in practice, the new factors could eviscerate the overarching goals of Rule 23(b)(3) by leading courts to view class actions with disfavor.

Although the rule is intended to allow class actions if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy," the new factors "pertinent" to this central standard run the risk of transforming and overtaking the standard itself. The proposed factors are less objective and more suggestive than the current factors, as they have been interpreted and applied by the courts. The thrust of the revisions and the Committee notes is to reduce class actions, and they are likely to be interpreted by the courts in that light. Unlike the current factors, which have assumed fairly well-developed meanings and been regarded as guiding considerations in the court's application of the central standard, the new factors are more likely to cause considerable uncertainty and be regarded as threshold tests in the certification analysis. There is a risk that the central Rule 23(b)(3) standard would be hijacked by the two new factors and devolve predominantly into a "practical ability/cost-benefit test" that inherently weighs against class actions.

The preeminence of the new factors is suggested by the Committee notes

themselves, which state that "[h]igher figures should be demanded if the legal issues are complex or complex proceedings will be required to resolve the merits, identification of class members and notice will prove costly, and distribution of the award will be expensive" (p.10) and that the fact that individual class members cannot pursue individual actions "may be offset by new subparagraph (F) if the probable relief to individual class members is too low to justify the burdens of class litigation" (p.8).

This "practical ability/cost-benefit test" also threatens to upset established Rule 23 jurisprudence by potentially affording any judge who disapproved of a class action not merely a partial, but a sufficient, basis upon which to deny certification. This is not meant to suggest something sinister; it is meant only to point out the inevitable.

The adverse consequences of such a development are relatively easy to predict: (1) many injured parties would be denied effective relief; (2) the relatively uniform and predictive standard that has evolved under Rule 23 would be shattered into widely varying, less predictable, and much more subjective judicial interpretations; (3) the amount and duplicativeness of litigation would increase significantly, compromising judicial economy and efficiency; and (4) forum shopping would rise in importance and prevalence.

In light of the fact that Rule 23 generally has worked extremely well in practical application and has largely fulfilled the purposes for which it was adopted, the relatively confined perceived problems with Rule 23 are not worth the considerable risks these revisions would pose to the judicial system and the accessibility of meaningful relief.

It appears that the primary motivations to revisit Rule 23 stem from specific concerns with the discrete area of mass torts (which the proposals do not directly address) and a general concern that class certification may potentially "coerce" a defendant to settle a non-meritorious claim. Putting aside the question of whether specific changes are needed in the distinct area of mass torts, as do the proposals, the "coercion" potential is wildly exaggerated, "supported" almost entirely by the anecdotal claims of interested parties, and controverted by current experience as reflected in the Federal Judicial Center's recent empirical study.

The management of civil litigation in the federal courts has, by all accounts, undergone enormous and positive change in recent years with all trends pointing toward continued progress. Whatever may have been the case years ago, the courts' recent increased emphasis on active case management and early screening of cases has ensured careful judicial scrutiny and made it highly unlikely that a court would allow its decision or anything else to coerce a settlement irrespective of the merits. On the whole, courts currently are highly engaged in weeding out weak cases early through motions to dismiss, targeted discovery, and summary judgment. Specifically with respect to class certification decisions, courts can, and often do, modify them, place any conditions on them, postpone them, or revoke them at any time.

In general, then, both the perceived problems under the existing Rule 23 tend to be exaggerated and misapprehended and also that the proposed revisions amount to overly strong medicine that would be much worse for the patient than

the presumed malady.

## II. Specific Problems With the Proposals

### A. New Rule 23(b)(3)(F)

Proposed subsection 23(b)(3)(F) would add a new cost-benefit test for certification that compares the probable relief to individual class members with the aggregate costs and burdens of class litigation. This revision could have dire consequences for many meritorious class actions.

The proposed cost-benefit test is, by its very nature, heavily biased against class actions. The amount of individual claims in a class action will seldom be larger than the aggregate costs of the class action. Class actions were invented for the purpose of facilitating the redress of injuries that are smaller in amount than the costs of litigation. Therefore, the cost-benefit test inherently conflicts with the fundamental purposes of class actions to afford access to justice for all, irrespective of wealth or the amount of the claim.

Rule 23 has never permitted the courts to make certification decisions on the basis of any evaluation of the merits of the case. The latter has always been the province of other federal rules. The grafting of what would essentially be a merits analysis into the certification decision (since it is not possible to determine what relief is "probable" without delving deeply into the merits) would inappropriately and unfairly accord extraordinary power to any judge who disfavored a class action and provide new ammunition to wrongdoers to escape liability and defeat class actions. The merits of a case should determine who wins and who loses, not whether the case should

proceed as a class action.

In addition, the balancing test is, by its very nature, an unfair and illogical comparison. Why should individual relief be compared to aggregate costs? A much more apt comparison would be between aggregate relief and aggregate costs. After all, the aggregate relief represents the defendants' total liability. Why should a class action be deemed unworthy if the defendants' liability exceeds the costs of the case?

Given the fact that the balance will never favor class actions in absolute terms and that the Committee does not intend to eliminate class actions altogether, the question then becomes: how much is enough? What ratio or percentage of the benefits to the costs magically "justifies" a class action? Although the Committee notes make clear that "[n]o particular dollar figure can be used as a threshold," they also state that "[h]igher figures should be demanded if the legal issues are complex or complex proceedings will be required to resolve the merits, identification of class members and notice will prove costly, and distribution of the award will be expensive" (p.10). Again, the bias against class actions is evident. Class actions almost invariably involve complex legal issues, by their very nature involve complex proceedings, and nearly always require expensive identification, notice, and distribution.

In addition, the notion that small claims should go uncompensated and guilty parties should get a windfall merely due to legal complexity or expense is wholly foreign to our system of justice. Moreover, the cost-benefit test turns the rationale for class actions on its head: while class actions are intended to facilitate the redress of injuries in cases where the small size of the relief, heavy costs, and legal complexities make

individual litigation economically unfeasible, those very same factors would be used under the proposed revision to defeat class actions.

Another problem with the cost-benefit test is that there are no bounds on what ratio the courts could use to perform the requisite balancing test. The sliding-scale approach suggested by the Committee notes (i.e., the higher the complexity and costs, the higher the threshold of probable monetary relief required for a class action) is open to subjective interpretation and would greatly decrease uniformity and predictability in litigation. The proposed sliding-scale cost-benefit test raises further uncertainty over whether courts may consider the public interest as well as the private interests in evaluating the relief or the costs and burdens of class actions.

Yet another flaw with the cost-benefit test is that it fails to specify how non-monetary relief is to be weighed in determining the sufficiency of a (b)(3) class. The answer appears to be either that equitable relief is to be accorded no weight at all or that courts would be free to accord any degree of weight whatsoever -- both of which are problematic. Weighing the relief against the costs of class litigation strictly in monetary terms would completely ignore the often significant public and/or private value of equitable relief, even in (b)(3) class actions in which the predominant relief is monetary. On the other hand, according some weight to equitable relief would lead courts into the quagmire of determining, first, whether they should weigh equitable relief based on its private value, its public value, or both, and, second, how they can justify imposing their views of such values on the parties.

The proposed revision also suffers from vagueness in so many respects that it likely would add a new layer of complexity, time, and expense, if not transform the certification process into a full-blown mini-trial prior to the actual trial. What kind of showing would be necessary to establish that relief is "probable"? How would it differ from dispositive motions? Are issues of law and fact to be resolved in the plaintiffs' favor for purposes of the probability determination? Does all requested relief have to be probable or just some of it? How can courts accurately measure what relief will "probably" be awarded in the early stages of a case? Can a party take discovery to determine or challenge the "costs and burdens" defense? If not through discovery, how are the "costs and burdens" of class litigation to be determined? How are "costs" and "burdens" measured? Are the costs and burdens to the judicial system as well as to the parties included in the analysis? By what standard or formula, other than the court's own subjective beliefs, is the court to determine whether the probable relief "justifies" the costs and burdens of class litigation? Does each individual's probable relief have to meet the standard or is an average of the probable relief of all class members used?

Finally, the merits test could result in unfair prejudice to either side by essentially forcing the premature adjudication of matters now reserved for trial, without the traditional rules and procedures applicable to trials. For example, a tentative finding, made in the absence of established safeguards, that the "probable relief" would not "justify" the case proceeding as a class action could unfairly prejudice any subsequent individual litigation. Similarly, a finding that the "probable relief" that will be awarded to the plaintiffs does "justify" the class action would color and distort the subsequent

proceedings and place a significant burden on defendants.

The cost-benefit test would place courts in a lose-lose situation; whichever side loses the certification decision will argue that the court incorrectly weighed the merits. This inevitable problem arises from the fundamental flaw of the cost-benefit test: no matter how it is applied it ultimately obliges courts to make value judgments for which it is ill-equipped. Cost-benefit evaluations are the stuff of legislatures and agencies, not courts. If the proposed revisions are adopted, there will be a perpetual struggle with this problem and the courts will be the subject of perpetual criticism from all sides.

**B. New Rule 23(b)(3)(A)**

This new factor for class certification would ask courts to weigh "the practical ability of individual class members to pursue their claims without class certification." Certainly, the determination of whether a class action is the superior method of proceeding involves a consideration of the feasibility of individual actions. But, like (b)(3)(F), this new factor would inappropriately elevate this consideration essentially to the status of a threshold test, which could operate to preclude recovery in many cases.

The proposed revision and Committee notes fail to make clear whether the presence of parties that could litigate separately precludes any class action or whether a class action may proceed to the exclusion of such parties. It is at least possible, then, that some courts would preclude any class action in these circumstances. This would be highly unfair to average consumers and small businesses, who, after all, cannot control who else may also have been the victim of the wrongful conduct and who cannot afford to undertake the litigation by themselves. Interpreted in this fashion,

the proposed revisions would deprive many injured parties of their only means of obtaining any remedy at all.

Even if a court were to change the definition of the class so as to exclude only those class members who could afford to litigate separately, this would result in multiple cases on the same issues against the same defendants and would make complete relief and an entire resolution of the matter much more difficult.

Regardless of which way the proposed revision were interpreted, the primary problem with its "practical ability" test is that it suffers from an incorrect underlying premise that a disparity of interests, in which some of the largest claimants could pursue a separate action, indicates that a class action by all of the claimants is inappropriate. At very least, it divests the large class members of the decision whether to remain in the class or opt out.

In all types of class actions, class members vary in terms of the extent of their injuries and their interests in the recovery. For example, in antitrust class actions, large corporations are the largest direct purchasers in a price-fixing scheme and therefore suffer more extensive damages and have greater interests in the recovery than other members of the class (including smaller companies and consumers). In some of these cases, the large corporations may have an ability to pursue a remedy without class certification. Similarly, in securities fraud class actions, large institutional investors which are victims of the fraud suffer more extensive damages than do individual investors.

The "practical ability" test, however, would suggest that no class action could

proceed, leaving small claimants remediless. The view that a class action is improper merely because of the presence of large claimants would amount to a nearly automatic negative presumption against class actions in a large number of cases.

Second, such a negative inference could prompt courts to adopt another faulty presumption that class actions are appropriate exclusively for small claims. Such a presumption is wholly unsupported by the rule or any of the rationales supporting it. Class actions may primarily benefit smaller litigants, but Rule 23's purposes in promoting judicial economies are not somehow rendered irrelevant solely because of the presence of some large claimants.

Third, and perhaps most important, the negative inference of the "practical ability" test runs directly counter to the interests of judicial economy and efficiency that led to the initial adoption of Rule 23. The preclusion of otherwise viable class actions in cases that involve large corporate plaintiffs would result in the type of judicially-burdensome duplicative and multiplicative litigation that existed prior to the institution of Rule 23.

Fourth, the negative inference would lead to a situation in which incomplete relief would be accorded in actions by individual claimants that could have been completely resolved in a class action. While large parties would recover their losses, small parties would recover nothing or be forced to accept a lesser percentage of their losses in individual actions. Any effect that allowed defendants to reduce their liability through separate negotiations with large corporate plaintiffs would unfairly reduce the settlement values and recoveries in cases brought by smaller claimants.

Finally, the negative inference could seriously undermine the deterrence effects and purposes of many federal statutes. The preclusion of many class actions will result in victims going uncompensated and wrongdoers going unpunished.

In addition, large corporations often have ongoing commercial relationships with one or more participants in the wrongdoing, such as in a typical price-fixing scheme for example. The ability of defendants to negotiate and procure separate settlements with the large claimants obviously affords them opportunities to reduce their liability and may even foster collusive or coercive arrangements that further undermine the deterrence purposes of federal law.

In addition to these problems, the "practical ability" test suffers from the same kind of vagueness problems as the "cost-benefit" test. For example, how would the "practical ability" to pursue an individual action be measured? What factors would the courts use to make such a determination? Would other parties have a say in the matter? What if parties were practically able to pursue individual actions but did not want to or wouldn't pursue such actions for fear of retaliation or other reasons? How many plaintiffs would have to possess the practical ability to pursue individual actions for the class action to be precluded? What if "practically able" class members could not yet be identified but the defendant argued that they existed? Would the court preclude a class action on the assumption that they existed?

The fundamental flaw of the proposed revision lies in its potential to distort the certification decision into one based solely on whether individual litigation were possible, not on what would best resolve the dispute and serve the interests of the

judicial system and the general public. Defendants would routinely attempt to defeat class actions merely by showing that it was "possible" for one or more class members to file their own actions.

iii. **Conclusion**

The proposed revisions discussed above represent a marked over-reaction to the perceived problems with Rule 23, for which much less drastic alternative remedial measures are available. In their attempt to avoid the potential of a few rare non-meritorious certifications, the proposed revisions would preclude many meritorious class actions altogether. Therefore, I strongly oppose these proposed revisions and suggest that the concerns of the Committee can be more appropriately and effectively addressed through a focus on active judicial case management, existing rules governing substantive motions and sanctions, and the timing of substantive motions. Such neutral measures should at least be attempted as an initial response before resorting to the type of purposeful scale-tilting measures represented by the proposed revisions. The Committee can always revisit the rule if further experience shows the initial neutral measures to be insufficient.

Comments of Stuart H. Savett, Esquire  
on November 22, 1996  
Before the Committee on Rules of Practice and  
Procedure With Regard to the Proposed Amendments  
to Rule 23 of the Federal Rules of Civil Procedure

Good afternoon. Thank you for giving me the opportunity to address the Committee today.

I am Stuart H. Savett, the senior member of Savett Frutkin Podell & Ryan, P.C. In 1969, I was a founding member of Kohn, Savett, Klein & Graf, P.C., where I practiced law for more than 20 years, until the opening of my present firm in 1991. During my career of more than thirty years, I have concentrated on representing plaintiffs in numerous securities class actions and have served as lead or co-lead counsel or a member of the executive committee for plaintiffs in many class actions, a partial list of which is included in my resume, attached hereto. At Villanova Law School, from which I received a Bachelor of Law degree in 1963, I was a member of the Order of the Coif and Editorial Board of the Villanova Law Review. I respectfully submit the following comments on the proposed amendments to Rule 23 of the Federal Rules of Civil Procedure.

**I. Proposed Rule 23(b)(3)(F) Should Be Rejected.**

The proposed amendment to Rule 23(b)(3)(F) would require courts to determine "whether the probable relief to individual class members justifies the costs and burdens of class litigation." I respectfully recommend rejection of this provision. It not only is contrary to the traditional mission of class actions -- to afford access to the courthouse for those who otherwise would be

barred by overwhelming costs -- but would also lead to unwarranted inquiry into the merits of the underlying claim under the pretext of determining the "probable relief" sought by the lawsuit.

The rights of small claimants have traditionally been championed by class actions. The thrust of the proposed amendment is clearly intended to eliminate small claim class actions regardless of their potential public policy benefits. As the proposed Note to the Rule states:

Subparagraph (F) has been added to subdivision (b)(3) to effect a retrenchment in the use of class actions to *aggregate trivial individual claims* ....

The prospect of significant benefits to class members combines with the public values of enforcing legal norms to justify the cost, burdens and coercive effects of class actions that otherwise satisfy Rule 23 requirements. *If probable individual relief is slight however, the core justification of class certification fails.* (Emphasis supplied).

The Note effectively eliminates consideration of any policy concerns that might otherwise justify the aggregation of small claims into a class action, e.g., deterrence of wrongdoing or disgorgement of ill-gotten gains. In essence, so long as the wrongdoer inflicts only a small injury upon each of a number of persons, it may not be subjected to a class action and thus can keep its windfall regardless of the cumulative benefit to the perpetrator.

Courts have long endorsed class actions for these very reasons. In In re Antibiotic Antitrust Actions, 333 F. Supp. 278, 2828-83 (S.D.N.Y.), amended, 333 F. Supp. 291 (S.D.N.Y.) mandamus

denied, 449 F.2d 119 (2d Cir. 1971), the Court addressed certification of consumers who overpaid for prescription drugs;

The Court would be hesitant to conclude that conspiring defendants may freely engage in [price fixing]... to the detriment of millions of individual consumers and then claim the freedom to keep their ill-gotten gains which, once lodged in the corporate coffers, are said to become a "pot of gold" inaccessible to the mulcted consumers because they are many and their individual claims small.

Significantly, the proposed amendment could sound the death knell for many actions expressly authorized by Congress regardless of the size of the claim. It would directly contravene the The Truth In Lending Act, 15 U.S.C. § 1640(a)(2)(B), which authorizes class actions for violations of the act, and explicitly provides that "as to each member of the class *no minimum recovery shall be applicable* ...." Similarly, the Social Security Act, 41 U.S.C. § 405(g), provides that any recipient can bring a civil action "irrespective of the amount in controversy". The Magnuson Moss Warranty Act, 15 U.S.C. § 2301(d)(3) permits federal court actions so long as individual claims total \$25.

The proposed amendment to Rule 23 arguably violates the Rules Enabling Act, 28 U.S.C. § 2072, which expressly prohibits enactment of rules of "practice and procedure" which would "abridge, enlarge or modify any substantive rights". Since Congress provided that claims under these, and other statutes, should proceed regardless of their size, it is not the province of the courts to eliminate those claims because of the potential costs of litigation.

Furthermore, while this proposed amendment is ostensibly aimed at eliminating certification of "trivial claims", its failure to set a threshold for sufficiently large individual claims that would per se warrant certification opens the floodgates to attacks upon certification of all claims so long as costs associated with their defense would be significant. Indeed, the Note effectively invites such attacks; "Higher [levels of probable individual relief] should be demanded if the legal issues are complex or complex proceedings will be required to resolve the merits ...." Thus, the "sliding scale" approach for measuring the appropriateness of class certification that this amendment envisions will only result in significantly burdening class motion practice. Counsel for defendants will urge in virtually every case that losses sustained by class members are "trivial" relative to the significant costs that will be incurred in defending the claim.

My second major criticism of this provision is its use of the term "probable relief". Counsel for defendants will undoubtedly urge that a court must consider the merits of a claim to determine its likely size, particularly in the face of arguments that no relief is "probable" since the claims are "meritless". While the Minutes to the Advisory Committee insist that "'probable relief' in the (b)(3) context is damages", there is no explanation why the Committee rejected use of the terms "requested relief" or "demanded relief". Use of these terms would have focused any inquiry on the size of the damages, not on the merits or likelihood of their recovery.

In summary, I respectfully submit that there is no evidence of courts being deluged by trivial claims for class certification, and that this provision would not only unnecessarily restrict the discretion already available to courts in determining certification, but would significantly burden courts by requiring an assessment of likely recovery at the class certification stage.

**II. Proposed Rule 23(f) Should Be Rejected.**

Proposed Rule 23(f) provides for interlocutory appeals of class certification rulings if application is made within ten days following entry of the ruling. I respectfully oppose this amendment.

I am concerned that adoption of the amendment would encourage routine interlocutory appeals by defendants whenever a class is certified or by plaintiffs whenever a class is not certified (requiring briefing on both the appropriateness of an appeal and the merits of class certification), thereby increasing litigation costs to the litigants and taxing judicial resources. See Shelter Realty Corp. v. Allied Maintenance Corp., 574 F.2d 656, 657 n.1 (2d Cir. 1978). Given the current availability of appellate review in appropriate cases (whether by mandamus or interlocutory appeals), the imposition of such costs upon the litigants and the judicial system, along with the concomitant delays inevitably caused by appeals, would be extremely wasteful and potentially prejudicial to the litigants.

Appellate courts already have the discretion -- which they have exercised increasingly in the mass tort area -- to issue writs of mandamus directing district courts to decertify plaintiff classes. See, e.g., In re American Medical Sys., Inc., 75 F.3d 1069 (6th Cir. 1996); In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995); In re Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990). Interlocutory review of class certification rulings under 28 U.S.C. § 1292(b) has also been undertaken with increasing frequency. See, e.g., Valentino v. Carter-Wallace, Inc., 1996 U.S. App. LEXIS 26300 (9th Cir., Oct. 7, 1996); Andrews v. American Tel. & Tel. Co., 1996 U.S. App. LEXIS 24472 (6th Cir., Sept. 19, 1996); Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996); Watson v. Shell Oil Co., 979 F.2d 1014 (5th Cir. 1992). The availability of mandamus or interlocutory review thus renders the proposed amendment unnecessary.

I also note that the concerns, precipitating this proposed amendment, have been raised primarily in the context of mass tort cases, yet the proposed amendment would apply to all class action cases. In enacting the Private Securities Litigation Reform Act in December of 1995, Congress has demonstrated its ability to address perceived class action issues in a particular area of substantive law. To the extent that the rules governing the litigation of mass tort class actions deserve reexamination, such reexamination should be done legislatively rather than by a wholesale revision of Rule 23.

Finally, the proposed amendment sets forth no guidelines concerning when an appeal should be permitted, or when a stay of district court proceedings pending an appeal should be imposed. I believe that if the amendment is approved, the Advisory Note should explicitly insure that the grant of appeals is limited to exceptional cases, and stays of proceedings are discouraged.

**III. Proposed Rule 23(b)(4) -- Settlement Classes -- Should Be Adopted.**

Proposed Rule 23(b)(4) would allow a court to certify for settlement purposes a (b)(3) claim "even though the requirements of subdivision (b)(3) might not be met for purposes of trial". I am in favor of this proposed amendment. The "settlement class" is an important method for achieving many of the core purposes for which the class action mechanism of Rule 23 was fashioned. The purposes served by the settlement class include, from the plaintiff class perspective, the speedy and efficient resolution of the class claims and the economical and prompt provision of benefits for class members. From a defendant's perspective, the settlement class allows a defendant to resolve the claims against it and obtain res judicata protection against all actual or potential class member claimants. From the court's perspective, the device affords the opportunity for resolution of a significant matter on its docket without the full blown inquiry and consideration involved in a contested class motion.

Because the settlement class device affords a relatively efficient and convenient way to dispose of cases, concerns have

been raised about the potential for cursorily examined and collusive settlements entered into by plaintiffs' and defendants' counsel. The proposed amendment addresses these and similar concerns by increasing the protections afforded to class members.

Among those protections is the requirement that the settlement class not be certified until after a settlement has been reached in order to reduce the opportunity for undue pressure to reach settlement. More importantly, in the words of the Committee, "notice and the right to opt out provide the central means of protecting settlement class members", particularly if the court makes a finding that the notice of settlement "fairly describes the litigation and the terms of the settlement". Moreover, the court should take "particular care" to ensure that disabling conflicts of interests among members of a common class be avoided.

The final safeguard to minimize the potential for abuse of the settlement class device is the expanded court hearing obligation contained in the revised version of subdivision (e). Because parties to the settlement/certification agreement have ceased to be adversaries and have a common interest in having the agreement approved, the court's obligation to the class members takes on an added significance, which obligation can only be met by a full and fair hearing inquiring into the propriety of settlement.

In conclusion, I believe that the benefits of the settlement class concept to the class, the defendants and the efficient administration of complex litigation far outweigh any potential concerns that have been raised. Therefore, I support

proposed Rule 23(b)(4), which would formalize the requirements for a settlement class, while providing the protections necessary to alleviate concerns about collusive settlements. I strongly recommend approval of this amendment.

**IV. Proposed Rule 23(e) Regarding Dismissal or Compromise Should Be Adopted.**

The proposed revisions to Rule 23(e) add a requirement that courts approve the dismissal or compromise of a class action only after a hearing by the court. Further, the proposal makes clear that the current requirement of sending notice to class members of the dismissal or compromise of the action is an event that must precede such disposition.

I support these revisions with the caveat that the Draft Advisory Note should make equally clear that, in accordance with current practice, the requirements of a hearing and notice are not necessary when the purposes of Rule 23(e) are not implicated.

Rule 23(e) is intended to protect absent class members from the risk that the plaintiff class representatives may use the class action device to further their own interests to the detriment of the class. Thus, as courts have held:

Rule 23(e) does not require notice of precertification dismissal except where the court concludes that such notice is necessary for one or more of the following reasons: (1) to protect defendants by preventing plaintiffs from appending class allegations merely to obtain a more favorable settlement; (2) to protect the class from objectionable structural relief or depletion of funds available to pay class claim, e.g., through collusive settlement; (3) to protect the class from prejudice based on their reliance on the

filing or pendency of the action. Diaz v. Trust Territory of Pacific Islands, 876 F.2d 1401, 1408-09 (9th Cir. 1989).

Tepper v. Western Investment Real Estate Trust, 1993 U.S. Dist. LEXIS 2148 (N.D. Cal. February 23, 1993) at \*2.

Tepper involved a voluntary dismissal by stipulation pursuant to which no consideration was paid, the dismissal was without prejudice and no notice of the action had been disseminated. Notice in that context was held to be an unnecessary burden. For the same reasons, a court faced with similar facts should have the discretion to determine that it can enter a dismissal based on adequate submissions without the need for a hearing.

There are other circumstances in which the requirements of Rule 23(e) should not be imposed. For example, as one commentator has noted, when dismissal is involuntary, it "could not involve collusion or benefit the representative plaintiffs at the expense of the remaining class members, [and thus] the protection afforded by giving notice to the absentees is not required".

7B C. Wright & A. Miller, Federal Practice and Procedure; Civil, §1797 at 345 (1986). See also Laventhall v. General Dynamics Corp., 911 F.R.D. 208, 210 (E.D. Mo. 1981).

**V. Proposed Rule 23(c)(1) Regarding the Timing of a Class Certification Decision Should be Adopted.**

Proposed Rule 23(c)(1) changes the required time within which a certification decision must be made from "as soon as practicable after the commencement of an action brought as a class

action" to "when practicable" after such commencement. I support this proposal. The effect of this change will make it clear, to the extent there was some doubt, that a court may delay the certification decision until after its determination of a motion to dismiss or for summary judgment. This will conform to the practice by the overwhelming majority of the circuits.

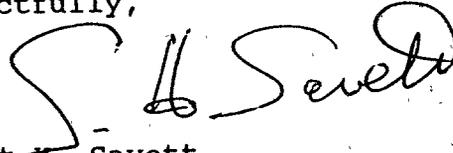
**VI. Rule 23(b)(3)(c) Regarding The Maturity of Related Litigation Should Be Adopted.**

Proposed Rule 23(b)(3)(c) adds "maturity" of related litigation as a factor to consider in determining certification. The Draft Note makes clear that this suggested additional consideration arises from experience in mass tort litigation involving "highly uncertain facts", particularly those relating to "medical device[s]" that "may not be fully understood for many years after the first injuries are claimed".

I support this amendment, but only with specific limitations. I believe that any application of this proposal outside the area of mass torts and the specific problem noted by the Advisory Committee may have unforeseen and adverse consequences in other areas of class litigation. While I believe that there is only a remote possibility that a court would deny certification under the revised rule in an action involving, for example, a novel and complicated fraud requiring expert testimony, I believe that the Advisory Note should expressly state that the rule is limited to claims where the element of causation is susceptible to empirical proof of a scientific nature.

I am pleased to discuss the above with the Committee as well as any other provision of the Proposed Rule.

Respectfully,

A handwritten signature in cursive script, appearing to read "Stuart H. Savett".

Stuart H. Savett  
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96-CV-050

November 7, 1996

Via Federal Express

Honorable Paul V. Neimeyer  
United States Circuit Judge  
101 West Lombard Street, Ste 910  
Baltimore, Maryland 21201

Professor Edward Cooper  
University of Michigan Law School  
333 Hutchins Hall  
625 South State Street  
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Re: Proposed Changes to Rule 23

Dear Judge Neimeyer and Professor Cooper:

I initially addressed the Advisory Committee in writing regarding proposed changes to Rule 23 on April 11, 1996 and by testimony on April 19, 1996. Since then a number of the proposed revisions to Rule 23 have been modified or substantially reduced in scope. Although I generally endorse the "minimal change" approach adopted by the Committee, issues remain that are of considerable concern to those of us who would like to see the class action procedure remain an effective and efficient procedure for groups of people who have been injured by improper conduct. Having represented clients in class action litigation for more than 30 years, I wish to convey my thoughts on those issues and on the impact the proposed changes would have on our judicial system's ability to provide remedies to persons injured by widespread wrongdoing.

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Other than technical amendments in 1987, no substantive amendments have been made to Rule 23 since 1966. It remains a question in my mind whether any changes to the Rule are required at this time. There is no empirical data showing the need for major changes. There certainly is no basis for the allegations that class certification creates irresistible pressures to settle; nor is there data showing that certification adds unjustified burdens to the judicial system when compared with the adjudication of multiple suits raising similar claims. There is simply no factual basis for deciding whether the alleged problems that purportedly motivate constriction of the class action mechanism of Rule 23 have any dimension beyond anecdotes about a few well publicized cases. On the contrary, when a comparison is made between the increase in the number of transactions that have occurred in our society since 1966, and the increase in the number of lawsuits during that period, it would appear that the litigation increase is modest.

In recent years there has been ongoing discussion of the appropriateness of class actions in dispersed mass tort cases. As the Committee has recognized, it is premature at this point to address those issues. Moreover, the proposed changes in Rule 23 are not limited to mass tort situations, but would also impact, among others, securities, antitrust, civil rights, consumer and environmental cases, in which few such issues arise.

To the extent that class actions are being filed in situations that are inappropriate for certification, several recent decisions underscore the ability of the courts to deny certification under the existing Rule. A procedural tool that has worked well and effectively for 30 years should not be changed just for the sake of change. Those thirty years of experience under Rule 23 have coincided with monumental shifts in substantive law, events and practices causing mass injuries, new developments in the legal profession and changes in social attitudes and notions of justice. Yet, the class device has managed to evolve throughout this period in the hands of intelligent and sensitive judges, and it is still evolving to meet changing needs. There is little to be gained and much to be lost by disrupting that process and the existing well-understood practices without solid and substantial justification.

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With that prelude, I will turn to my specific concerns.

The Proposed Changes to Rule 23(b)

The proposed revisions to Rule 23(b) include subparagraphs 23(b)(3)(A)-(C) and (F), which supplement and refocus the factors courts should consider in determining whether predominance and superiority exist for class action purposes. The new factors include the following:

- \* the practical ability of individual class members to pursue their claim without class certification (23(b)(3)(A));

- \* the class members' interest in maintaining or defending separate actions (23(b)(3)(B));

- \* the extent, nature and maturity of any related litigation involving class members (23(b)(3)(C)); and

- \* whether the probable relief to individual class members justifies the costs and burdens of class litigation (23(b)(3)(F)).

For a variety of reasons, these proposed revisions should not be adopted.

Subparagraph 23(b)(3)(F)

This proposed revision is perhaps the most insidious of all of the proposed changes and threatens to overturn the very reasons the class action mechanism was developed. For that reason, I'll address it first.

The language appears simple enough. The provision states:

(F) whether the probable relief to the individual class members justifies the costs and burdens of class litigation.

The first of the many problems with this proposed provision is its focus on the size of the individual claims as opposed to the likely recovery to the class as a whole. This turns one of the principal justifications for class actions on its head.

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Historically, the class action arose as a means of aggregating small to medium sized claims for damages into a unit that made it economically viable to seek legal redress against larger and well financed defendants. As the Supreme Court acknowledged in Deposit Guarantee National Bank v. Roper, 445 U.S. 326, 337 (1980):

[w]hen it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, [class members]...may be without an effective remedy..." unless a class action is available. (emphasis added)

Similarly, Judge Posner recently commented, the "most compelling" rationale for the class action device involves those instances in which "the individual suits are infeasible because the claim of each class member is tiny relative to the expense of the litigation." See In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299 (7th Cir. 1995). The shift in focus suggested in the proposed rule revision could deprive the small claimant of any means of recovery.

The proposal also shifts the focus of the court's inquiry from the defendants' conduct that gives rise to the claims and directs it to the amount of relief each individual plaintiff might receive. Under this analysis, even plaintiffs with strong claims on the merits may be denied access to the courthouse, merely because their probable individual recovery is small. Such an approach ignores deterrence and disgorgement of ill-gotten gains as legitimate purposes of class litigation. The message sent is that wrongdoers may lie, cheat and steal, often obtaining hundreds of millions of dollars of wrongful profit, with impunity, so long as the financial impact per victim is small. It also seriously damages the remedial character of the class action.

Thirdly, precisely because it ignores wrongdoing if each individual loss is small, the provision comes dangerously close to making substantive law under the guise of procedural rule-making. Congress establishes policies and creates enforceable rights concomitant with those policies. It is not the court's -- let alone the Advisory Committee's -- role to decide that some of those rights are unworthy of enforcement because the amounts to be recovered individually are "trivial" or

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because a court might have to take on additional work to manage the litigation.

Under proposed factor (F), courts must weigh the "probable" relief to individual class members against the "costs and burdens of class action proceedings". This would be a difficult task under any circumstances. When considered in the light of the reality of class action proceedings, however, the standard is completely unworkable. This is especially true in light of the fact that this evaluation must be made shortly after the complaint is filed when little is known. How is "probable relief" to be measured? Does it include some estimate of the likelihood of obtaining any relief? How is that to be determined without some early "sneak peek" at the merits of the action? How is that to be obtained without some level of pre-certification discovery -- again engendering costly delay and ancillary litigation. The pre-certification process should be facilitated, not protracted.

Finally, neither the proposed revision, nor the Advisory Committee Note define the parameters of the balance to be struck -- what amounts of individual relief are sufficient and how is its "probability" to be determined; what costs should be evaluated; what costs to whom and what costs are too high; what burdens are imposed and on whom -- the courts, the proposed class, the defendants; what burdens are so great as to justify denying certification?

Subparagraph 23(b)(3)(A)

This new provision allows courts to consider "the practical ability of the individual class members to pursue their claims without class certification" in assessing whether the class action is superior to individual ones. In the Advisory Committee's view, this inquiry would address a perceived "problem" or "troubling setting[]" that exists in classes comprised of many persons with small claims and a smaller subset of persons with relatively large claims.

As a threshold matter, the Advisory Committee Note describes a scope of application far narrower than the text of the rule itself. Moreover, neither the revision nor the Advisory Committee Note provides any guidance to assist courts in determining which persons have the "practical ability" to prosecute their claims on an individual basis. It is unclear, for example, whether the "practical ability" is the monetary value of a claim, the claimant's net worth, or some combination

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of both. Should an objective test be used? Is a survey of prospective class members required? Without further explanation and guidance, proposed subparagraph 23(b)(3)(A) poses more questions than it answers, more problems than it solves.

Moreover, there is no empirical or other evidence that the "problem" the provision is designed to address actually exists. There is no evidence that small claims held by class representatives are not as vigorously and effectively prosecuted as claims held by class members with larger claims. Nor is there evidence that persons with large claims would have fared better - monetarily or otherwise-- had they prosecuted their claims individually rather than as part of a class.

Even if the hypothetical "problem" does exist, the Federal Rules already contain effective mechanisms to address it. For instance, individuals with the "practical ability" to pursue their claims without class certification can opt out of the class under Rule 23(c)(2). Indeed, the fact that class members with large claims do not frequently opt out is evidence of their confidence in the way class actions are managed under the existing Rule 23. In addition, the court can fashion subclasses by claim size or appoint class representatives who, in the court's view, will advance and safeguard the rights of absent class members with coinciding claims and interests.

Subparagraph 23(b)(3)(B)

Subparagraph 23(b)(3)(B) would require courts to consider "class members' interests in maintaining or defending separate actions." This is a slight revision of current Rule 23(b)(3)(A), which permits courts to consider the "interests of members of the class in individually controlling the prosecution or defense of separate actions. The analysis follows that above of the new proposed subparagraph 23(b)(3)(A). The need for such a change has not been demonstrated and the issue is adequately addressed in the existing Rule.

Subparagraph 23(b)(3)(C)

This proposed revision authorizes courts to consider the "maturity" of related litigation. A determination to delay a decision on class certification in order to "better understand" the facts and law in a related case may unalterably prejudice the rights and claims of potential class members who are not participating in the related proceeding. For example, while the class certification decision is held in abeyance, defendants will

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undoubtedly argue that discovery should be stayed, or at most, be restricted to the named class representatives. Should the court agree, months, if not years could pass before non-representative class members are able to obtain discovery and prosecute their claims. The better practice would be to permit the litigants to proceed toward an adjudication of their rights, to certify the class -- assuming the prerequisites of Rule 23 are met -- and to decertify or modify the class if the facts and legal issues in the related case later warrant such change.

On a practical level, when, after the class ruling has been suspended, does the issue become ripe for consideration? Is the court required to monitor the related cases and decide sua sponte that the facts and legal issues have become sufficiently concrete to decide the class motion? And what happens if the related case is settled or becomes unduly protracted? The only purpose served by this proposal is to delay prosecution of the instant case and to tie up the resources of the court and the plaintiff for an indefinite period. The Committee should reject this provision.

Settlement Classes, paragraph 23(b)(4)

This provision does have merit. Settlement classes have proved to be useful and appropriate vehicles for achieving an efficient resolution of complex proceedings. In addition, they promote the strong judicial policy favoring settlements, particularly of class action suits. See In re Warner Communications Sec. Litig., 618 F.Supp. 735, 740 (S.D.N.Y. 1985), aff'd, 798 F.2d 35 (2nd Cir. 1986); Airline Stewards and Stewardesses Ass'n v. Trans World Airlines, 630 F.2d 1164, 1166-67 (7th Cir. 1980), aff'd, 455 U.S. 385 (1982).

The rationale behind this encouragement of settlements in class actions was recently reiterated in Weiss v. Mercedes-Benz of North America, Inc., 899 F.Supp. 1297 (D.N.J. 1995), aff'd, 66 F.3d 314 (3rd Cir. 1995). The court in Mercedes stated:

[W]hen the parties negotiate a settlement they have far greater control of their destiny than when a matter is submitted to a jury. Moreover, the time and expense that precedes the taking of such a risk can be staggering. This is especially true in complex commercial litigation.

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Id. at 1300-01. See also In re School Asbestos Litigation, 789 F.2d 996, 1009 (3rd Cir.), cert. denied, sub nom Celotex Corp. v. School District of Lancaster, 479 U.S. 915 (1986) ("settlements of class actions often result in savings for all concerned").

I remain concerned, however, about the potential use of settlement classes by defendants to "pick off" plaintiffs' counsel or auction settlements off to the lowest bidder as was attempted in the settlement negotiations leading up to Georgine v. Amchem Products, 83 F.3d 610 (3d Cir. 1996), cert. granted, \_\_\_ U.S. \_\_\_ (1996). This potential can be minimized in a number of ways, particularly through diligent court examination of the fairness of the settlement and scrutiny of its ethical underpinnings. Findings of fairness and adequacy by the Court should satisfy concerns over class member well being, much like in corporate law, where, in certain circumstances, findings of overall fairness can overcome transactions tainted by conflict of interest.

The court can also allow limited discovery to test the strength and weakness of asserted claims. Judicial oversight of negotiation process can eliminate any concerns of collusion. In addition, the court must ensure that notice of the settlement is comprehensive and comprehensible. Moreover, class members may still opt out if the settlement appears to be a bargain on terms too favorable to defendants or if the class member thinks the settlement is not in his best interest. Finally, the new explicit requirement in proposed Rule 23(e) that the court hold a hearing on all settlements goes far to eliminate the concerns currently raised on the debate on this provision.

Settlement classes serve important purposes in today's complex litigation. Even with the judicial scrutiny suggested above, the impact on judicial resources of overseeing a settlement class is nominal when compared with the requirements of litigation of complex class actions. On balance, if fairness and adequacy can be assured -- as they can through existing mechanisms as suggested -- and given the profound benefits to all parties, settlement classes are a strong and effective tool. This proposed revision should be adopted.

Notice of Dismissal, paragraph 23(3)

The Advisory Note to this proposed revision should be clarified to dispense with Rule 23(e)'s requirements in appropriate cases. Courts have previously held that notice under Rule 23(e) may be dispensed with in cases in which dismissal

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would not result in prejudice to absent class members. See e.g., Jones v. Caddo Parish School, 704 F.2d 206, 214 (5th Cir. 1983) (notice not required where the action was dismissed prior to class certification and rights of putative class members were not prejudiced); Gomez v. O'Connell, 1996 U.S. Dist. LEXIS 1285, \*23-\*24 (N.D. Ill. 1996); Hockert Pressman & Flohr Money Purchase Plan v. American President Companies, Ltd., 1995 U.S. Dist. LEXIS 17608 (N.D. Cal. 1995).

The Advisory Note indicates that the amendment is designed to "confirm" the current practice under Rule 23. To further that goal I suggest the following paragraph be added to the Note:

The amendment is not intended to restrict a court's ability to dispense with notice or hearing requirements in appropriate cases. See, e.g., Jones v. Caddo Parish School, 704 F.2d 206, 214 (5th Cir. 1983); Gomez v. O'Connell, 1996 U.S. Dist. LEXIS 1285 (N.D. Ill. 1996).

Interlocutory Appeals, paragraph 23(f)

I am also opposed to this proposed revision. Automatic appeals of class certification rulings would conflict with the longstanding federal policy against piecemeal appellate review. See Switzerland Cheese Ass'n v. E. Horne's Market, Inc., 384 U.S. 23 (1966). Although appellate review of class certification may be appropriate in rare and unusual cases, currently available devices for obtaining such review are adequate, making this amendment unnecessary and potentially mischievous. Appellate courts have increasingly exercised their discretion -- particularly in the mass tort arena -- to issue writs of mandamus directing district courts to decertify plaintiff classes. See, e.g., In re American Medical Sys., Inc., 75 F.3d 1069 (7th Cir. 1996); In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. ) cert. denied, 116 S. Ct. 184 (1995); In re Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990). Courts have also permitted interlocutory review of class certification rulings under 28 U.S.C. 1292(b). See, e.g., Valentino v. Carter-Wallace, Inc., \_\_\_ F.3d \_\_\_, 1996 U.S. App. LEXIS 26300 (9th Cir. Oct. 7, 1996); Andrews v. American Tel. & Tel. Co., \_\_\_ F.3d \_\_\_, 1996 U.S. App. LEXIS 24472 (6th Cir. Sept. 19, 1996); Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996); Watson v. Shell Oil Co., 979 F.2d 1014 (5th Cir. 1992). The availability of mandamus

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or interlocutory review thus renders the proposed amendment unnecessary.

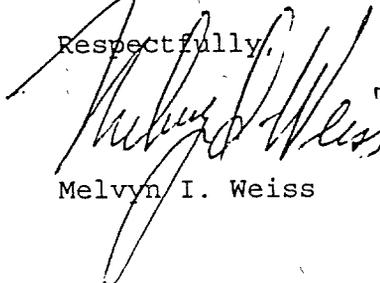
I am concerned that the adoption of this amendment would encourage routine interlocutory appeals by defendants whenever a class is certified or by plaintiffs whenever a class is not certified. This then would require briefing on both the appropriateness of the appeal and the merits of the certification, thereby driving up litigation costs to the litigants and taxing judicial resources. See Shelter Realty Corp. V. Allied Maintenance Corp., 574 F.2d 656, 657 n.1 (2d Cir. 1978). Given the current availability of appellate review in appropriate cases, the imposition of such costs upon litigants and the judicial system, along with the concomitant delays inevitably caused by appeals, would be extremely wasteful and potentially prejudicial to litigants.

I note, finally, that the proposed revision sets out no guidelines concerning when an appeal should be permitted, or when a stay of district court proceedings should be imposed. If this revision is approved, the Advisory Note should explicitly state that the grant of an appeal is limited to exceptional cases and stays of proceedings are discouraged.

The proposed revisions to Rule 23 are far from "neutral" in their impact. They significantly shift the balance of advantage to defendants and threaten the viability of class actions for small individual damages. Since no empirical justification has been put forward to justify changes in a procedure that has functioned effectively for 30 years, with the exception of the suggested revisions for settlement classes and dismissal notices, the Committee should not adopt these proposals.

Thank you for your time and consideration.

Respectfully,



Melvyn I. Weiss

**COMMENTS OF RICHARD A. LOCKRIDGE FOR THE  
DALLAS HEARING ON THE PROPOSED CHANGES TO RULE 23  
OF THE FEDERAL RULES OF CIVIL PROCEDURE**

My name is Richard A. Lockridge. I am a partner in the Schatz Paquin Lockridge Grindal & Holstein P.L.L.P. law firm. During the past eighteen years, my practice has been concentrated on complex commercial class action litigation. Although my firm and I have litigated primarily antitrust price-fixing and securities fraud cases, we have successfully prosecuted class actions in other areas as well. My comments today are drawn from my personal experience in the class action arena.

The proposed changes to Rule 23 stem from a recommendation from the Ad Hoc Committee on Asbestos Litigation that the Advisory Committee on Civil Rules study whether Rule 23 should be amended to accommodate mass tort litigation issues. Under the 1966 Amendment, mass tort cases were recognized by the Advisory Committee as "ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways." Despite this clear advisory comment, over the years mass tort cases have been certified - -and decertified. The proposed amendments appear to be aimed at identifying when certification of a mass tort should be considered appropriate.

Unfortunately, the proposed changes are not limited to certification of mass torts. Instead, the proposed changes would affect every class action suit. It is my opinion that the inherent difficulties of mass tort certification should be addressed in a different manner than the proposed overhaul of a system that, for the most part, in my experience, works. My

comments will focus on Rule 23(b)(3)(A), 23(b)(3)(F) and Rule 23(f).

**Rule 23(b)(3)(A): Practical Ability To Pursue Individual Claims**

This factor is aimed at those classes whose members have claims that "would support separate actions." Although the Report of the Advisory Committee on Civil Rules specifically identifies mass tort claims, the proposed rule contains no limiting language. Nor does the proposed language provide any guidance for what standard should be used to determine "practical ability." Is it the amount of the relief requested? Is it the interest of the claimant in pursuing the claim? In mass tort cases, is it the degree of injury? And, of particular concern to me, how does "practical ability" fit into the context of antitrust price-fixing and securities fraud cases?

In my experience, the size of the claims in both antitrust and securities cases ranges from very small to very large. Under the proposed rule, would one "very large" claim mean no class? How about ten? How about twenty "medium large" claims? Most important, what happens to the individuals and entities with "small" claims? Does the fact that large claims exist foreclose those with smaller claims from pursuing class certification?

The "practical ability" test strikes me as particularly unnecessary when, under the current Rule 23(b)(3), class members have the right to opt out and pursue their own claims. If the ultimate goal is to preserve claimant's rights to pursue their individual claims where the claims are large enough to justify individual suit, the present opt-out provisions already do so and no change is necessary. If the goal is to address the issue of possible large personal injury claims in mass torts, then I would suggest a specific rule for mass tort litigation, with guidance as to how to apply the rule.

### **Rule 23(b)(3)(F): Probable Relief vs. Costs and Burdens**

In contrast to proposed Rule 23(b)(3)(A), where the presence of large claims will defeat certification, under proposed Rule 23(b)(3)(F), small claims will defeat certification. The proposed cost/benefit analysis runs directly afoul of the bedrock of class litigation: the ability of individuals or business entities with relatively small claims to band together to seek redress. Without class actions, nearly all individuals and most small businesses could not afford or attempt the intimidating task of litigating complex antitrust or securities or other commercial cases involving widespread activity, multiple wrongdoers and large corporate defendants. It is the history of class actions to "take care of the smaller guy." Dolgow v. Anderson, 43 F.R.D. 472 , 485 (E.D.N.Y. 1968). For example, over the years, class actions have allowed victims of securities fraud a means to recover losses caused by large corporate entities, victims of consumer fraud a way to attack illegal and dishonest practices, victims of antitrust violations a procedure to recoup lost dollars and victims of discrimination a process to remedy unacceptable corporate behavior.

This ability has been acknowledged repeatedly as necessary to enforce the federal anti-trust and securities laws. Both the antitrust and securities laws specifically provide for private civil enforcement as well as public government enforcement. The proposed 23(b)(3)(F) undercuts this ability by limiting enforcement based on the size of the damage inflicted. In other words, the antitrust and securities laws forbid certain activities and provide private remedies for those injured by the illegal activities . The proposed 23(b)(3)(F), however, would allow, and perhaps even condone, the forbidden behavior -- unless or until damages exceed a certain amount. Thus, a wrong-doer could reap the

rewards of illegal activity as long as it was savvy enough to ensure that all individual injuries were minimal.

Proposed Rule 23(b)(3)(F) not only sets a threshold on an amount of relief but also commands that the relief must be "probable." In direct contrast, the current Rule 23 has always been considered a procedural rule with detailed evaluation of the merits to determine certification prohibited; the focus is on whether the case meets the requirements of Rule 23. Under the proposed rule, however, the focus will shift to the merits of the case. This will require completion of in-depth discovery prior to class certification to determine if recovery is likely or not. As the amount of damage and substantive issues of liability become more and more determinative of class certification, the procedural requirements will fade until Rule 23 as we know it no longer exists.

The purpose of 23(b)(3)(F) is not clear. Presumably, the aim is to avoid massive litigation where plaintiff and defense attorneys are well compensated at the expense of the class member's claims, i.e., useless coupons. It has been my experience that such recoveries are rare and any issues surrounding coupon settlements are readily solved under the court's authority to approve or disapprove a settlement. In my opinion, the cost of determining "probable relief" in every case far outweighs the benefit of preventing the rogue, unfair settlement.

#### **Rule 23(f): Interlocutory Appeals Encouraged**

Under the present rules, a class action certification decision can be reviewed in one of three ways: 1) under 28 U.S.C. § 1292(b); 2) under mandamus; or, 3) at the end of the case. Under these methods and present rules, review of an interlocutory class certification order is

relatively rare. The proposed rules evidences the committee's opinion that appeals of class certifications decisions should be more common in order to decrease complex litigation expenses. It is my opinion, however, that the proposed rule will only increase litigation expenses. The proposed 23(b)(3)(F) rule requires a finding of "probable relief." This means the merits of the case will be hashed out in the class certification motion and rehashed on appeal, only to return to the trial court to repeat the process. It seems more desirable to leave the appealability of class certification motions as it is in order to reserve interlocutory appeal to those cases that might warrant it.

In conclusion, I do not believe the proposed amendments assist in identifying when certification of a mass tort should be considered appropriate in any meaningful way. Instead, the proposed amendments seek to impose restrictions and create clouds in areas -- particularly antitrust and securities fraud -- where class certification functions best. It is my opinion that the amendments discussed above should not be passed. In the alternative, any action should at least be postponed until the Supreme Court has an opportunity to rule on the mass tort certification issues presented in Georgine v. Amchem Products, Inc., 83 F.3d 610 (3d Cir. 1996), cert. granted sub nom, Amchem Products, Inc. v. Windsor, 117 S. Ct. 379 (Nov. 1, 1996) (No. 90-270).

Thank you for the opportunity to share my concerns.

December 16, 1996

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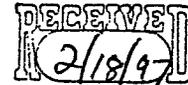
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96-CV-051

Supp

February 14, 1997

VIA TELECOPY (202) 273-1826

Mr. Peter G. McCabe  
Secretary of the Committee on Rules of  
Practice and Procedure  
Administrative Office of the U.S. Courts  
1 Columbus Circle, N.E.  
Washington, D.C. 20544

Re: Proposed Rule 23(b)(3)(F)

Dear Mr. McCabe:

On December 4, 1996, Richard Lockridge submitted written comments on the Committee's proposed Rule 23 changes, and testified at the Committee's Dallas hearings on December 16. We have additional comments on the Committee's proposed Rule 23(b)(3)(F).

We do not see any record having been presented to the Committee to demonstrate that any problem exists in this area that cannot be dealt with under the existing rule. For this reason, and for the reasons outlined in Mr. Lockridge's earlier comments, proposed Rule 23(b)(3)(F) should not be retained at all.

However, if any such proposal is to be considered, we strongly urge that the Committee adopt the language proposed by Professor John C. Coffee, Jr., in his written submission to the Committee, dated November 6, 1996. Professor Coffee proposed that, if the rule is to be retained at all, it might read:

"(F) whether the probable aggregate relief to all class members and the deterrent value of the action in assuring compliance with law justifies the costs and burdens of class litigation; or"

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Mr. Peter G. McCabe  
February 14, 1997  
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See Prof. Coffee's submission at pp. 2-3.

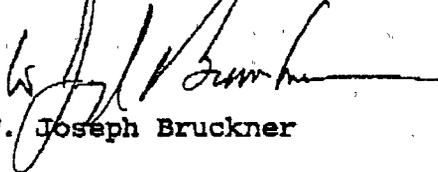
Unlike the current proposal, Professor Coffee's proposal at least provides:

- some level of symmetry when comparing probable relief to the costs and burdens of defense, and
- an acknowledgment of the long-recognized and well-established deterrent value of class actions in discouraging unlawful behavior.

Thank you for your consideration.

Sincerely,

LOCKRIDGE GRINDAL  
NAUEN & HOLSTEIN P.L.L.P.



W. Joseph Bruckner

WJB:bg  
cc: Mr. Richard A. Lockridge

224676-1

96-CV-052

**Statement Of Gerald J. Rodos, Esquire To November 22,  
1996 Public Hearing Of The Advisory Committee  
On Civil Rules On Proposed Amendments To Civil Rule 23**

Philadelphia, Pennsylvania

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### Statement of Gerald J. Rodos, Esquire

I am a partner in the Philadelphia law firm of Barrack, Rodos & Bacine, which for the past twenty years has been extensively involved in the litigation of class actions, both on the plaintiffs' and the defendants' side, with more concentration on the plaintiffs' side. My class action practice has mostly related to securities and antitrust cases. Accordingly, my testimony will relate to how I perceive the proposed changes to Rule 23 will affect these two areas. While I have views on how the changes proposed to Rule 23 may affect other types of class litigation, particularly in the mass tort field, I believe it most appropriate to confine my comments to the areas in which I have most experience -- securities and antitrust class actions.

One major problem that I find in the proposed revisions derives from how they came about. In March 1991 the Judicial Conference of the United States requested the Standing Committee on Rules of Practice and Procedure to study "whether Rule 23 of the Federal Rules of Civil Procedure should be amended to accommodate the demands of mass tort litigation." The May 17, 1996, Report of the Advisory Committee on Civil Rules reports that the proposed revisions result from the study begun in response to the Judicial Conference's March 1991 request, and concludes as follows: "The proposals address some of the issues that arise in contemporary mass tort litigation, and address as well some issues that arise in small-claims class litigation."

However, the amendments to the rules as proposed do not simply relate to mass tort litigation or small-claims class litigation. They are general rules and thus will be applicable to all class actions filed in the federal courts. While I have no doubt that small-

claims and mass tort litigations do present some special problems and issues which Rule 23 could be amended to respond to, I have grave doubt that there is need for major changes in how Rule 23 is applied in securities and antitrust class actions, and I believe that some of the proposed revisions will effect major changes. I believe that my opinion expressing doubt of the need for these changes in this area is supported by the study undertaken by the Federal Judicial Center at the request of the Advisory Committee to "provide systematic, empirical information about how Rule 23 operates." This study, published as T.E. Willging, L.L.P. Hooper, and R.J. Niemick, An Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules (1996) ("Federal Judicial Center Final Report"), states in its Conclusion, "[a]ddressing one of the advisory committee's fundamental questions," that there are:

"significant numbers of 'routine' class actions that represent relatively standard or 'easy' applications of Rule 23, especially in the securities and civil rights context. This finding suggests that there are well-established applications of Rule 23 that might be affected by a major restructuring of class action procedures."

Federal Judicial Center Final Report at 91.<sup>1</sup>

The Study found that significant additional research must be done before any clear picture of class action activity could be obtained, and ended by stating that these "calls

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<sup>1</sup> This Federal Judicial Center Final Report presents empirical data on all class actions terminated between July 1, 1992 and June 30, 1994 in four federal judicial districts: the Eastern District of Pennsylvania, the Southern District of Florida, the Northern District of Illinois and the Northern District of California.

for research suggest that there is much to be done before systematic data are available to put into perspective the anecdotes and generalizations that long had been driving the debate about class actions.” Federal Judicial Center Final Report at 92.

I submit that the proposed revisions set forth in Rule 23(b)(3)(F), 23(b)(3)(A) and Rule 23(f) will be quite harmful to securities and antitrust class actions and will cause enormous increase in time, effort and cost for the parties, the district courts and the courts of appeals, and should therefore be rejected. I believe that before any such significant revisions to Rule 23 are made, a more thorough research and study of class actions throughout the United States should be made as suggested by the Federal Judicial Center Final Report.<sup>2</sup>

#### **Rule 23(b)(3)(F)**

This proposal states that one of the matters pertinent to a finding of predominance is “whether the probable relief to individual class members justifies the costs and burdens of class litigation.” I submit that this proposed change should be rejected.

With all due respect to the drafters, this provision is directly contrary to the very raison d’etre of class actions, which is to allow individuals, whose own claims are so small that they could not be able to bring lawsuits, to join together so that their aggregate claims are large enough to give them access to the courthouse to recover for injuries suffered at the hands of wrongdoers. As the Supreme Court stated in Deposit Guaranty National

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<sup>2</sup> I support a number of the revisions in the proposed Rule, including Rule 23(b)(4) and Rule 23(c). However, I believe it is more helpful to the Committee to discuss those proposals which I believe create problems and should be rejected.

Bank v. Roper, 445 US 326, 339 (1980), "where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."<sup>3</sup>

Aside from this denigration of the purpose of the class action device, the new Rule will create many practical problems as the language of the proposed amendment and the Notes thereto are so vague and unclear as to assure that every class action motion in a securities and antitrust case will turn into a major battle over this issue.

I know from my experience in securities and antitrust class actions that defendants when they oppose class certification will raise every conceivable issue, as they rightly should in best representing their client. This provision will, quite frankly, give them a field day. First, there will be a major battle as to what the individual "probable relief" is. Then there will be a battle as to how that relief compares to the costs and burdens of class litigation.

There is no doubt in my mind that in securities cases the courts will be presented with affidavits of experts and statisticians to the effect that the average person purchases 100 shares or 200 shares of stock and thus since the stock in question fell, for example, by \$3.00 per share, the average individual loss is anywhere from \$300 to \$600.

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<sup>3</sup> Another relevant issue that is difficult to quantify is the deterrent effect of the class action device and its widespread use. My firm has represented public companies, and attorneys of my firm have been at meetings of directors where discussions have taken place to the effect that it was important to make certain disclosures because, inter alia, of the concern of being sued in a class action. What happens to this deterrent effect if the use of the class action device is significantly limited?

Plaintiffs will then counter with experts and statisticians of their own demonstrating that in fact the average number of shares purchased is higher and the average loss on the stock is more.

A major problem that will arise will be that the courts will be prematurely forced into an investigation of the damages issues. Even though the new proposed Rule eliminates the earlier suggestions that the merits of a case could be inquired into in connection with ruling on a class motion, this proposed revision means that the Court will have to look at the damages issue in order to determine what the "probable relief" is to individual class members. For instance, in a securities class action the plaintiff would contend that he or she purchased the relevant stock at \$20 per share and after the truth was disclosed, the stock fell to \$5.00, thus giving plaintiff a \$15 loss per share -- i.e., the probable relief. The defendants would contend that that is not the measure of the "probable relief," because there are many other reasons that caused the stock price to decline from \$20 to \$5, such as a general market decline, a decline of all comparable stocks in the particular industry, the announcement by the Federal Reserve of a rise in interest rates, etc. See Burger v. CPC International, Inc., 76 F.R.D. 183, 187-88 (SDNY 1977); In re Warner Communications Securities Litigation, 618 F.Supp. 735, 744-45 (SDNY 1985), aff'd, 798 F.2d 35 (2d Cir. 1986). Defendants would present to the district court affidavits and testimony of experts that the probable relief is not the \$15 suggested by plaintiff, but is actually \$1.50 per share. Plaintiff would, of course, respond with affidavits and experts of his or her own that the probable relief is the higher amount.

In an antitrust case, at the outset of the litigation a plaintiff may very well not have any information as to the amount of overcharge and thus be unable to conclude what the probable relief to individual class members might be, even if the industry involved has sales of hundreds of millions of dollars per year. Even if a plaintiff could contend that his or her illegal overcharge was 5% of the sales, the defendants certainly would contend and present expert testimony that the overcharge, if in fact there were any at all, was less than 1%. Again, there will be a major controversy to determine what the probable relief is.

Then, of course, even after some determination of the probable relief to individual members, there will be another battle as to whether this probable relief is big enough to warrant class certification. The proposed rule states that you must compare the probable relief to the costs and burden of class litigation. The Notes to the proposed change are silent as to what the "costs and burden of class litigation" are. Does this include an estimate of the out-of-pocket costs of the defendant corporation in a securities or antitrust case of producing and copying tens or hundreds of thousands or even millions of documents? Does it include an estimate of the counsel fees that the defendants will spend during the course of the litigation? And what should the appropriate relationship be between the relief to individual class members and the costs of the litigation? Clearly, even in the simplest of cases, defendants' out-of-pocket costs and attorneys fees will be many, many multiples of an average claimant's recovery. Even if the average claim is \$1,000, \$5,000 or \$10,000, does this mean that classes should no longer be certified in securities and antitrust cases? An argument can clearly be made that the average securities and antitrust class actions are complex and the Notes to the proposed rule state that "[h]igher [value of probable individual

relief] should be demanded if the legal issues are complex....” Accordingly, are we to say that an individual’s loss of \$500, \$1,000 or even \$5,000, due to a securities fraud, is not enough to have a class action certified? It can clearly be argued that securities class actions are quite “routine” as suggested by the Federal Judicial Center Final Report. But the proposed Rule change makes no reference to securities or antitrust cases being treated any differently than any other case, and the Notes similarly do not make any such statements.

I think the findings in the Federal Judicial Center Final Report are especially helpful in connection with this situation. Analyzing all class action terminations in the four district courts involved in the study, the Final Report found that the median level of individual recoveries range from \$315 to \$528 and the maximum awards range from \$1,505 to \$5,331 per class member. As the Final Report found at p. 7, “[w]ithout an aggregate procedure like the class action, the average recovery per class member or even the maximum recovery per class member seems unlikely to be enough to support individual actions in most, if not all, of the cases studied.” The Final Report also concluded that this “finding confirms that many cases satisfy an underlying purpose of Rule 23, which is to provide a mechanism for the collective litigation of relatively small claims that would not otherwise support costs-effective litigation.” Final Report page 90.

Unless the purpose of this proposed amendment to Rule 23 is to assure that the average case that is now being prosecuted in the federal courts as a class action should in the future no longer be certified to proceed on a class basis, then this proposed revision to Rule 23 should be rejected.

An alternative proposal would be to revise the Rule so that the aggregate relief be compared to the costs and burdens of a class action. If that were done, then the Rule would accomplish the purpose of removing truly small cases from federal class action consideration, but allow those cases to proceed as class actions where the defendants' unlawful activities have caused significant injuries over a large number of victims.

**Rule 23(b)(3)(A)**

This proposed change states that one matter pertinent to a finding of predominance is "the practical ability of individual class members to pursue their claims without class certification."

First of all, I believe that this proposal when looked at in connection with the proposal of Rule 23(b)(3)(F) is quite confusing. This proposal restricts certification of claims that are too large, while the proposed Rule 23(b)(3)(F) restricts certification of claims that are too small. If the proposed Rule 23(b)(3)(F) is adopted, you might have the situation where if the largest claims were kept within the class, there would be a satisfaction of Rule 23(b)(3)(F), but if under Rule 23(b)(3)(A) you eliminate these large claims from the class, then the remaining claims would not satisfy 23(b)(3)(F) and no class would be certified. Thus no one but the few largest claims would be able to file a lawsuit.

But another problem with this proposal is that the Rule is confusing the ability of large claimants to pursue their claims without class certification, and the interest of these claimants to do so. As the courts have held, even where the proposed class representative is a very large claimant, a class should still be certified because a class action "would achieve economies of time, effort and expense and promote uniformity of decision as to persons

similarly situated.” duPont Glove Forgan, Inc. v. American Telephone & T. Co., 69 F.R.D. 481, 489 (S.D.N.Y. 1975).

This proposal also can be seen to conflict with the recently enacted Private Securities Litigation Reform Act of 1995. In that Act, Congress declared that the class members with the largest claims are the ideal class representatives, and in fact, the Act creates a presumption that the largest claims should be the lead plaintiff in the litigation and direct the class action. But this proposed revision to the Rule can be read to mean that the courts should find that there is no predominance because the individual class plaintiffs could bring their claims without class certification.

#### **Rule 23(f)**

This proposal provides for interlocutory appeals of class certification rulings, applying a standard easier to satisfy than required by 28 U.S.C. §1292(b). This proposal should also be rejected.

As a practitioner who litigates class motions in securities and antitrust cases, I believe that this proposal is, first, unnecessary, and second, would result in an enormous increase in the cost of litigation in terms of money and time to counsel and the class, but also an enormous increase in the time and effort required not only by the courts of appeals, but by the district courts as well.

First, there is no need for this provision. The courts of appeals have used the writ of mandamus to review and reverse improperly certified actions. See, e.g., In re American Medical Sys., Inc., 75 F.3d 1069 (6th Cir. 1996); In re Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990). In addition, appeals courts have reviewed class certification rulings

under 28 U.S.C. §1292(b). See, e.g., Valentino v. Carter-Wallace, Inc., \_\_\_ F.3d \_\_\_, 1996; U.S. App. LEXIS 263006 (9th Cir., 1996); Castano v. American Tobacco Co., \_\_\_ 84 F.3d 734 (5th Cir. 1996). Thus it is clear that those class rulings which are not standard and routine issues can and are considered by the courts of appeals.

There is no support for the statement in the Notes to the proposed rule that more appeals would be helpful because “an order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potential ruinous liability.” In fact, the Federal Judicial Center study commissioned by the Advisory Committee explicitly concludes the opposite. The Study investigated this issue and stated that the “[a]necdotal evidence also led us to expect to find substantial evidence of ‘strike suits’ where filing a class action or certifying a class coerced settlement without regard to the merits of the claims.” The Final Report then rejected this proposition stating at page 90 that:

“Instead we found that although certified cases in the study settled at a higher rate than cases not certified as class actions, there were no objective indications that settlement was coerced by class certification. Rather, we found that settlements often appeared to be the combined product of a case surviving a motion to dismiss and/or a motion for summary judgment as well as being certified as a class action.”

The increased burden of appeals to the parties involved, particularly to class members, is obvious. Briefing would be required on the issue of whether the court of appeals

should accept the appeal and then, of course, if appeal is granted, extensive briefing and argument would be required in the court of appeals. And there is simply no reason to believe that a party who has fought the class issue through to decision in the district court would fail to file a petition for appeal, no matter how slight the chance is that the petition would be granted.

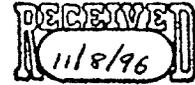
But in addition to the extra burden on the parties, and of course the court of appeals, I submit that there will be significantly more burden on the district courts in connection with class action motions in two respects.

First, if the defendant in a securities or antitrust class action is opposing a class action motion in the district court, I believe that defendant will now raise more issues before the district court in opposition to class on the chance that, if class is granted, the court of appeals will hear the issue. Since a party may not raise an issue before the court of appeals that was not raised below, this will force defendants to raise every conceivable issue in the district court; the plaintiff will be required to oppose every issue raised; and the court will be required to rule on every issue.

But I see a second area that I believe will create an enormously larger burden on the district court. As the Federal Judicial Center's Final Report points out at page 40 in its investigation of class actions in the four relevant district courts, "[i]n half of the 152 certified cases, defendants acquiesced in certification of a plaintiff class by either failing to oppose the motion, or sua sponte order for certification, or by stipulating to class certification." This comports with my experience in connection with securities class actions. I would estimate that in the last five years, of the securities cases we have litigated where a

class was certified, only about half required the district court to decide the issue on a contested motion. In the other half, generally the defendants have stipulated to class certification. This stipulation may occur after the filing of the class motion, after discovery has been taken by defendants of the plaintiffs, after defendants' brief on class certification has been filed, or after plaintiffs' reply brief has been filed. The reason that stipulation occurs so often is because the standards for class certification in securities cases have been established for many years and are quite clear. However, if defendants may appeal a class certification order, I believe that in many situations where stipulations are now entered into by the parties, defendants will decide to oppose the class action in the district court and then appeal to the circuit court. My feeling is that this would occur because most circuit court rulings on contested class certification issues in securities lawsuits -- i.e., reliance, sophistication, trading patterns, etc. -- were made anywhere from 10 to 15 years ago by the courts of appeals. The defendants may believe that while district courts will continue to follow these rulings as they have for many years, they may have a chance that the courts of appeals will distinguish or overturn their decisions from 10 - 15 years ago or may now have a different view of the propriety of class actions. Defense counsel might conclude that it certainly would not hurt to make an attempt to have the courts of appeals consider certain class certification issues that have arisen since that court of appeals last ruled on the issue or may be slightly different than previously ruled on. And, of course, the only way for a defendant to bring these issues before the court of appeals is to first oppose the class on these issues in the district court. I therefore believe that if this proposed revision is approved, the

number of cases in which counsel stipulate to a class in securities cases will decline substantially.



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November 7, 1996

Via Federal Express

Mr. Peter G. McCabe  
Secretary of the Committee of Rules of Practice and Procedure  
Administrative Office of the U.S. Courts  
1 Columbus Circle N.E.  
Washington, D.C. 20002

Re: November 22, 1996 Hearing on Proposed Amendments to Rule 23 of  
The Federal Rules of Civil Procedure

To The Advisory Committee on the Federal Rules of Civil Procedure:

Having spent most of my professional career litigating class action lawsuits, I welcome the opportunity to offer the following comments concerning the proposed revisions to Federal Rule of Civil Procedure 23.

Three of the four proposed rule changes cause me concern: proposed Rules 23(b)(3)(A), 23(b)(3)(F), and 23(F). The proposed Rule changes, in my opinion, would lead both to increased needless motion practice and to a diminution in the ability of individuals - particularly consumers - to obtain redress for commercial frauds.

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Proposed Rule 23(b)(3)(A) Is Unnecessary.

Courts already take into account situations where class certification is unnecessary because individual class members have significant claims.<sup>1</sup> The purported rationale for the proposed Rule is to ensure proper representation of all affected individuals and avoid "sweeping in" claimants who would prefer to litigate their claims individually. Yet, with but the rarest of exceptions, certified classes are opt-out classes and it hardly promotes judicial efficiency to discourage the resolution of lawsuits in a single proceeding.

In my opinion, the proposed Rule, if adopted, will simply expand pre-certification discovery and motion practice. A necessary factor in determining whether a particular individual would find it practicable to pursue his or her own claim without certification is deciding the extent of that individual's loss. Yet, experience has shown that the size and extent of damages can be the most disputed issue in class actions. To make certification dependent upon specific consideration of such a factor is to inject unnecessarily into the certification process issues going to the ultimate merits of a given case.

Proposed Rule 23(f) Is Also Unnecessary.

The ability to obtain interlocutory appellate review of class certification rulings already exists in several forms - *to wit*, writs of mandamus and permissive appellate certification

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<sup>1</sup> See, e.g., Stoudt v. E.F. Hutton & Co., Inc., 121 F.R.D. 36, 38 (S.D.N.Y. 1988); Zimmerman v. Thomson McKinnon Secs., Inc. [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,733 at 93,961 (S.D.N.Y. 1989).

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under 28 U.S.C. § 1292(b). In fact, some of the most significant class action decisions of the last several years have resulted from such interlocutory review procedures.<sup>2</sup> If adopted, Rule 23(f) will lead to the routine petitioning of every class certification decision. This can hardly promote judicial efficiency, but, rather, will lead to needless motion practice.

Rule 23(b)(3)(F) Is The Most Troublesome Of The Recommended Rule Changes.

As numerous commentators have already noted, this proposed Rule effectively turns the class action device on its head. Small claims that individually might not be worth litigating are one of the basic reasons, perhaps the most important, that class actions exist. As the Supreme Court wrote in Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985), "Class actions ... may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. For example, this lawsuit involves claims averaging about \$100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available."

In my judgment, there can be no question but that proposed Rule 23(b)(3)(F) will stifle the ability of defrauded individuals - particularly consumers - to bring suit. For example, I am presently in the process of settling a case against the on-line computer service, America Online, Inc. ("AOL"). AOL had a practice of adding fifteen seconds of billing time to each

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<sup>2</sup> See, e.g., Andrews v. American Tel. & Tel. Co., 95 F.3d 1014 (11th Cir. 1996); Valentino v. Carter-Wallace, Inc., 97 F.3d 1227 (9th Cir. 1996); In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995); In re Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990).

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subscriber's call and then rounding up the call times to the next minute. Thus, someone who was connected for 46 seconds to AOL was billed for two minutes of usage (or 260% more than his or her actual session time). Likewise, someone who was connected for one minute, 50 seconds, was billed for three minutes. Plaintiffs alleged that this was an undisclosed practice and contrary to what AOL subscribers understood to represent their agreement with AOL. Moreover, individual AOL subscribers had virtually no ability to discover the practice and challenge their billings. In short, AOL's actions constituted a fraudulent and deceptive business practice that affected numerous consumers. While the amounts that individual users overpaid were small, the cumulative sums paid in overcharges were in the millions of dollars.

Under proposed Rule 23(b)(3)(F), AOL would be able to argue that the case was not appropriate for class action treatment. Because the case was brought under the present Rule 23, however, that argument in defense of AOL's fraud was not available. Ultimately, AOL agreed to a settlement that will recompense millions of AOL subscribers for their overcharges either through free time (for present subscribers) or through a cash payment to class members who no longer subscribe to AOL. This, I submit, represents the right result.

A fundamental matter of justice is implicated by the proposed Rule change. Its adoption would mean that defendants who defraud numerous individuals of small amounts of money - rather than defrauding a smaller group of people of larger amounts of money - are going to be far more likely to retain their ill-gotten gains. No one could possibly deny that this is repugnant as a matter of justice.

The arguments that have been offered in support of the proposed rule are singularly unpersuasive. For example, it has been claimed that small suits permit plaintiffs' attorneys to act - somehow improperly - as private attorneys general. Yet, as a historical matter, class actions have long been recognized as a legitimate and necessary way to compensate many individuals for their unjustified losses.<sup>3</sup> And, more recently, this has been the function of the various deceptive trade practice statutes which have been adopted.<sup>4</sup> These statutes, which are designed to deter fraud, have often been utilized through class action cases to vindicate small claims that are singularly appropriate for such class treatment.

It has also been claimed that actions seeking redress for small claims are conducive to strike and nuisance suits. Several responses are in order.

First, the empirical evidence shows that there are relatively few such cases; indeed, just 9 out of 150 certified classes cited in the Minutes to the Advisory Committee Meetings involved individual recoveries of less than \$100.

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<sup>3</sup> Nearly 150 years ago, the Supreme Court stated that the purpose of class actions can be to "prevent the failure of justice ... [and ensure] that the interest of all will be properly protected and maintained." Smith v. Swormstedt, 57 U.S. 288, 303 (1853).

<sup>4</sup> See, e.g., Hernandez v. Monterey Village Assocs. Ltd. Partnership, 17 Conn. App. 421, 425, 553 A.2d 617 (1989) (policy behind Connecticut's statute is to "encourage litigants to act as private attorneys general and to bring actions for unfair or deceptive trade practices"); Cieri v. Leticia Query Realty, Inc., 80 Hawai'i 54, 61, 905 P.2d 29, 36 (1995) (similar for Hawai'i's act); Nalen v. Jenkins, 113 Idaho 79, 82, 741 P.2d 366, 369 (1987) (same for Idaho); Beslity v. Manhattan Honda, a Div. of Dah Chong Hong Trading Corp., 113 Misc. 2d 888, 450 N.Y.S.2d 278 (City Civ. Ct. 1982), rev'd on other grounds, 120 Misc. 2d 848, 467 N.Y.S.2d 471 (Sup. ct. 1983) (same for New York).

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Second, the courts can - and increasingly do - weed out meritless strike suits in which little of value is ultimately obtained for the plaintiff class.<sup>5</sup> It is hardly worthwhile for any lawyer to spend months or years litigating a case in which there is a significant likelihood that the settlement ultimately reached will not receive judicial approval.

Third, and most importantly, the ultimate question must be: what is the alternative? Should companies who defraud numerous individuals of small amounts of money be permitted to go scot-free? If governmental resources were sufficient to address the myriad frauds that are committed, there would be no need for private remedies. Yet, the practical reality is that governmental resources devoted to combating fraud are diminishing. For instance, the FTC, the federal government's primary defender of consumer rights, has had its enforcement staff significantly cut since 1990 and the same is true for many state regulators. A routine result in government actions against mass frauds these days is simply injunctive relief prohibiting the defendant from continuing to engage in its fraudulent practices in the future.<sup>6</sup> Such relief, however, leaves defrauded individuals - again, most often consumers - without restitution while the defendants retain possession of their ill-gotten gains.

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<sup>5</sup> See, e.g., In re Ford Bronco II Products Litig. (MDL 991 section "G"), 1995 U.S. Dist. LEXIS 12394 (E.D. La., Aug. 15, 1995) (rejecting such a settlement); Buchet v. ITT Consumer Fin. Corp., 845 F. Supp. 684 (D. Minn. 1994) (same).

<sup>6</sup> See, e.g., In re New Balance Athletic Shoe, Inc., FTC Docket No. C-3683 (Sept. 10, 1996) (price fixing claim); In re Home Shopping Network, Inc., et al., FTC Docket No. 9272 (Sept. 26, 1996) (deceptive sales practices); In re Precision Moulding Co., FTC Docket No. C-3682 (Sept. 3, 1996) (price-fixing).

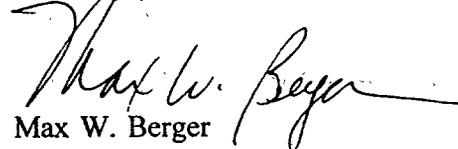
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In short, the words of the court in one of the seminal class action cases, a case involving consumer antitrust claims, are equally applicable here: "If this court were to adopt defendants' argument ... it would be tantamount to encouraging wrongdoers to commit great antitrust violations on many consumers in small amounts so as to raise the specter of unmanageability to defeat a class action." In re Sugar Indus. Antitrust Litig., 73 F.R.D. 322, 354 (E.D. Pa. 1976).

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Finally, it is worth noting that the last few years have witnessed the most dramatic advances in class action jurisprudence since the adoption of Rule 23. Abusive class action practices - such as settlements in which class members receive relief of little or no value while plaintiffs' attorneys receive large fees - have been rejected by the courts. My experience has shown me that the common law has a genius for coming up with solutions to problems of both substance and procedure. Rather than imposing constraints on the ability of claimants to receive redress of their wrongs, it appears to me far preferable to continue the current evolutionary development of class action jurisprudence without what I believe to be the unnecessary and deleterious constraints represented by the proposed Rule changes.

Sincerely yours,

  
Max W. Berger

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TESTIMONY OF THOMAS D. SUTTON  
BEFORE THE ADVISORY COMMITTEE ON THE  
FEDERAL RULES OF CIVIL PROCEDURE

I come before the Committee today with a somewhat unique perspective, having been both a litigator and a class representative in Rule 23 proceedings. During the first ten years after my 1984 graduation from the University of Pennsylvania Law School, I was a staff attorney for Legal Services Corporation grantees, including Community Legal Services of Philadelphia. Most notably, I helped to represent over 450,000 disabled children in the case of Sullivan v. Zebley, 110 S.Ct. 885 (1990), a Rule 23(b)(2) class action which resulted in the payment of over six billion dollars in past-due benefits under the Social Security Act.

More recently, I served as the named plaintiff representing a class of 1,350,000 Pennsylvania Blue Cross/Blue Shield subscribers in Sutton v. Medical Service Association of Pennsylvania, d/b/a Pennsylvania Blue Shield, et al., Civ. No. 92-4287 (E.D. Pa.). The settlement of that Rule 23(b)(3) class action resulted in significant monetary and injunctive relief which benefited class members and all future subscribers to defendants' services. In the words of United States District Judge Raymond J. Broderick, the settlement provided "class members' opportunity to recover 100% of their valid claims for Major Medical benefits for medical services rendered since October 1, 1989" and "substantial prospective improvements in

defendants' practices," including "immediate commitments from defendants to offer a single claim system, as well as improved notice to subscribers." Id., Memorandum of June 8, 1994, at 19.

I respectfully submit to this Committee that proposed subsection (F) to Rule 23(b)(3) would vitiate the salutary policies underlying class actions. The proposed subsection would make it extremely difficult, if not impossible, to maintain indisputably significant consumer class actions of the kind in which I was the class representative.

The proposed subsection asks district court judges to determine "whether the probable relief to individual class members justifies the costs and burdens of class litigation." Using my class action as an example, Judge Broderick likely would have been constrained to conclude that the benefits to individual class members like me, with damages of only a few hundred dollars, would not justify the "costs and burdens" of the proceeding. Indeed, as constructed by the drafters, it appears virtually impossible for a consumer class action to meet the standard imposed by subsection (F) for several reasons.

First, it seems likely that the prospective recovery of each individual class member would seldom, if ever, be larger than the aggregate "costs and burdens" of class litigation. If this is in fact what the drafters intend by the word "justifies," the outcome of this inquiry, notwithstanding the fact that it will often require extensive and protracted discovery and other proceedings on the issues of damages and costs, will usually be a

foregone conclusion. For instance, post-certification discovery in my case disclosed that my individual damages were only \$150. I can assure this Committee that for the poor and working-class clients I long represented (and, for that matter, for the lawyer struggling to live on a Community Legal Services salary, as I did for ten years), \$150 is not a trivial amount of money. However, a simple monetary comparison of that amount with the "costs and burdens" of virtually any class action would militate against certification under proposed subsection (F).

On the other hand, if the language of the proposed subsection was inartfully drafted and the Committee does not intend an "apples to oranges" comparison of individual damages with aggregate costs, it should at least make clear in the Committee Notes what level of individual benefit would constitute "justifi[cation]." The Federal Judicial Center's empirical study revealed that individual class member recoveries average \$315 to \$528, and the ABA Rule 23 Subcommittee's approval of subsection (F) was predicated on its understanding that "the objective is not to interfere with traditional class recoveries" in this range. However, while the draft Committee Notes seem to endorse "enforcement of valid claims for small amounts" in the "vital core" of said range, they also emphatically state that "[n]o particular dollar figure can be used as a threshold." I respectfully suggest that more explicit guidance from the Committee is needed in this area.

Had the proposed subsection and Committee Notes been in

effect during the pendency of my class action, it is obvious to me that the \$150 I personally had at stake might well have been deemed insufficient to "justify" class certification, particularly in light of defendants' erroneous initial contention that I had sustained no damages. Had the proposed subsection (F) been in effect, defendants' undoubtedly would have contested the issue of damages with respect to all unnamed class members, resulting in costly discovery and related proceedings. Had class certification been refused in those circumstances, highly significant monetary and injunctive relief would have been denied to over a million Pennsylvania citizens.

Second, the failure of most putative classes to meet the impossibly high standard imposed by subsection (F) would be tantamount to a finding of lack of superiority. This is clear from the Committee Notes themselves, which tell us flatly that "[i]f the probable relief to individual class members does not justify the costs and burdens of class litigation, a class action is not a superior means of efficient adjudication. The near certainty that few or no individual claims will be pursued for trivial relief does not require class certification" (emphasis added). The notes unambiguously instruct that courts that 1) if (as will almost always be the case) individual benefits do not justify aggregate costs and burdens, a finding of superiority is precluded and certification must be denied, and 2) a finding that individuals cannot practically pursue their claims under old subsection (A) must ultimately yield to the predictable finding

under the new subsection (F), which will effectively be dispositive of the issue of superiority and, in turn, certification.

In short, I believe that, as drafted, the proposed subsection (F) is very harmful to the interests of individuals whose rights can be vindicated only in the class action forum. If a comparison is to be made between benefits and costs, it should focus on aggregate relief to the entire class compared to the aggregate costs and burdens of the litigation. It is not appropriate to evaluate individual claims for relief against aggregate costs, and the predictable outcome of such an approach is far from balanced. In the alternative, the Committee should at least make clear that its concern is with trivial relief to individuals, and make explicit that individual recoveries of a hundred dollars or more are not trivial at all, but rather form the "vital core" of individual interests to be protected by Rule 23(b)(3). Finally, there should be explicit recognition by the Committee that it intends the "relief" to be weighed under proposed subsection (F) to include not only monetary damages, but also potential ancillary relief of an injunctive or declaratory nature. While monetary damages are certainly the primary focus in a (b)(3) class action, the kind of substantial changes in defendants' prospective practices which were brought about by the case in which I was the class representative should not be excluded from the equation.

As both litigant and litigator in the class action arena, I

urge this Committee to reconsider proposed subsection (F) and the notes accompanying it in order to address any perceived problems without thoroughly undermining the viability of consumer class actions. Thank you for your consideration of my views.

Statement of Eugene A. Spector Before the Advisory  
Committee on Civil Rules of the Judicial Conference  
Concerning Proposed Amendments to Rule 23

My name is Eugene A. Spector and I am a shareholder in the firm of Spector & Roseman, P.C., located in Philadelphia. I have been involved in the practice of complex securities and antitrust litigation since 1972, having represented both plaintiffs and defendants in class actions during that time. My experience in the field has led me to have certain concerns with the proposed amendments and whether they will detract from the ability of the litigants to achieve a "just, speedy and inexpensive determination" of complex actions that impact hundreds or thousands of injured parties.

There are a number of concerns which arise from the proposed amendments, including whether the interlocutory appeal mechanism provided for will foster delay in the resolution of class cases. However, that is not the area about which I wish to comment herein. Rather, I will focus my testimony on proposed amendments which I believe may impinge on the ability of the victims of fraud and other wrongdoing to obtain redress. Since class actions serve to improve corporate responsibility by acting as an important and necessary adjunct to government regulation of industries such as the securities industry, it is important that the proposed changes to Rule 23 not undermine or limit the ability of injured consumers to seek and obtain relief from wrongdoing.

I oppose an amendment to Rule 23 (b) (3) which would require a

determination by the court that the probable relief to individual class members justifies the costs and burdens of class litigation. The purpose of this new factor is to exclude class action treatment of small claims when the relief to individual class members is so slight that the costs of a class action are not "justified". Such a proposal would undermine the benefit of the class action device as a means of providing access to the courts for victims with small injuries and would detract from the deterrent value of class actions. Moreover, procedurally, the language of the amendment is unclear enough to suggest that an inquiry into the merits of the claim should be made at the class certification stage, which will create inefficiencies and delays in the resolution of class claims. Further, it sets forth no clear standard to limit its application, thereby creating the risk that it will be construed so as to overturn long standing precedent authorizing small claimant class actions. In short, it would allow the victims of fraud to go uncompensated so long as the perpetrator of the fraud stole only small amounts from each victim.

In addition, I oppose adding a consideration under Rule 23 (b) (3) regarding the practical ability of individual class members to pursue their claims without class certification. First, there is already consideration given to this factor. Secondly, adding this specific language would tend to exaggerate the importance of this issue in deciding whether to certify a class. When this section is considered in conjunction with the proposed Rule 23 (b) (3) (A), it appears that there is only a certain narrow band in which class

action treatment is appropriate. It is almost like the fairy tale Goldilocks and the Three Bears, since only the "just right" case, the one where the injured class members' individual claims are neither too large nor too small, will be permitted to proceed.

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

Under proposed Rule 23 (b) (3) (F), courts would be required to determine "whether the probable relief to individual class members justifies the costs and burdens of class litigation." This provision should be rejected for several reasons. First, it seems contrary to the very purpose of class actions which is to permit those with claims for damages which are dwarfed by the cost of litigation to obtain relief. Additionally, since the language of the proposal is ambiguous, it may lead to merits inquiries about whether any relief is probable, which is a remarkable change to the current jurisprudence of class actions. If a cost benefit analysis need be done at all in this context, it should be to compare the aggregate relief to be achieved with the cost of class action procedures, such as notice and administration.

The importance of the class action device as the only means for judicial relief when damages for individual claimants are small has long been recognized. See, Deposit Guaranty National Bank v. Roper, 445 U.S. 326, 339 (1980); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985). Yet despite this recognition of the need for class-wide litigation when the damages are small, the proposed amendment would permit a wrongdoer who inflicts only a small injury upon a large number of people to escape liability, regardless of

the aggregate size of the damages caused by the misconduct. Thus, it appears that the value of the class action as a deterrent is ignored or substantially discounted by this proposal. As noted in Newberg on Class Actions, Third Edition § 4.36 at 4-159: "Class actions were designed not only to compensate victimized members of groups who are similarly situated when this compensation is feasible, but also to deter violations of the law, especially when small individual claims are involved." (Citations omitted).

The proposed rule is also problematic because of its use of the term "probable relief." This phrase would provide counsel opposing certification with the ability to argue that the merits of the underlying claims should be considered on a certification motion since no relief is probable if the claims are without merit. Such an opportunity will be difficult, if not impossible for counsel opposing class not to take, even though the Minutes to the Advisory Committee insist that "'probable relief' in the (b) (3) context relates to damages".

Proposed Rule 23 (b) (3) (A)

Under proposed Rule 23 (b) (3) (A) courts would be required to determine "the practical ability of individual class members to pursue their claims without class certification". This rule seems to emphasize the consideration of the feasibility of individual, as opposed to class claims, proceeding where possible and seems unnecessary in light of the language of (b) (3) (B). First, courts already consider this factor in deciding class certification motions under the present Rule 23 (b) (3). More important,

emphasizing this factor and differentiating it from the interest of individual class members to maintain separate litigation, may undermine other considerations and concerns which support the use of the class action device. As set forth in the Advisory Committee Notes to the current Rule 23 (b) (3):

Subdivision (b) (3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.

Emphasizing feasibility tends to diminish the importance of these other factors. The amendment and the Note discussing it demand consideration of the practical ability to prosecute an individual action, separate from the consideration given to other factors, such as the interest shown by the class members in maintaining individual actions. If that means that those with claims large enough to justify prosecution of their claims individually should be carved out of the class, then settlement of the action becomes more difficult and the class action becomes less efficient. Also, in securities cases, such a result would seem to directly conflict with the terms of the Private Securities Litigation Reform Act of 1995 which provides that the class member suffering the largest loss is presumptively the most adequate plaintiff.

Lastly, the addition of both proposed Rule 23 (b) (3) (A) and Rule 23 (b) (3) (F) risks denial of the ability to achieve class-wide relief. The former restricts certification of claims that are too

large, while the latter restricts certification of claims that are too small. In a class where there is a wide range in the size of claims, stripping large claims from the class may result in the remaining claims being "too small" to warrant certification under proposed Rule 23 (b) (3) (F).

Accordingly, I urge the rejection of this proposal as unnecessary and likely to cause confusion and inconsistent results in a well-developed area of class litigation.

#### Conclusion

The committee should reject the amendments proposed by Rules 23(b) (3) (A) and (F) for the reasons set forth herein. The emphasis of these proposed amendments undermines the original purpose for which Rule 23 (b) (3) was conceived-- a procedural device to facilitate the enforcement of laws that prohibit behavior that involves small wrongs to a large number of people. Public policy concerns are served by assuring the availability of the class action to deter future wrongdoers and insuring their accountability to all those harmed by them.

OUTLINE OF STATEMENT OF EDWARD LABATON  
REGARDING PROPOSED REVISIONS TO RULE 23

I. Background Of Speaker

A. Partner in the firm of Goodkind Labaton Rudoff & Sucharow LLP.

B. Practicing in the area of corporate, commercial and securities class actions for over thirty years and active in bar association committees in the area of federal courts and civil procedure. Lecturer in numerous CLE programs relating, inter alia, to federal civil litigation and class action practice.

II. General Principles

A. Rule 23 has effectively served the purposes for which it was written:

- (i) judicial economy
- (ii) providing access to judicial relief for small claimants
- (iii) deterring violations of law and enhancing integrity of securities markets.

B. The concepts embodied in the rule -- such as typicality, adequacy, superiority -- are phrased in sufficiently general terms so that courts have been able to flexibly adapt them to the problems and particularities of litigation experience.

C. In the main, a convincing case has not been made for interruption of the organic development of class

action procedural law. The only basis for doing so is where it is unclear whether the rule permits a practice endorsed by a consensus of jurisdictions.

### III. "Probable Relief" Considerations

A. It would be a mistake to adopt a rule pursuant to which the "probable relief" to each individual class member must be sufficiently high to justify the aggregate "costs and burdens of class litigation".

B. One of the purposes of the class action device is to permit access to the courts on behalf of those with claims that are too small relative to the expense and complexity of the litigation necessary to obtain redress. Thus one of the factors demonstrating "superiority" is the large size of the ratio between high "costs and burdens of litigation" and small "probable relief". Perversely, under the proposed rule, the large size of that ratio would also be a factor demonstrating lack of superiority.

C. The proposed rule fails to take into account the deterrent effect of the class action device and the public policy served by such a deterrent.

D. The term "probable relief" arguably permits a merits consideration. Such a development would create a highly inefficient procedure likely to result in undue prejudice to at least one of the parties.

E. To the extent there is a concern that in a particular case the costs of class action procedures, such as notice, administration and distribution of recoveries may overwhelm the total amount that could be expected to be recovered so that a distribution is not economically feasible or rational, then it is those costs which should be measured against the aggregate requested relief.

IV. Feasibility of Individual Litigation Considerations

A. Class actions are primarily intended for those with small claims. However a rule compelling courts to deny certification if individual litigation is feasible, regardless of whether there is a strong interest in individual litigation, would sacrifice other values supporting use of the device. In particular, it would tax the resources of the courts and the parties as unnecessarily duplicative suits would proliferate. Inconsistent resolution of similar disputes may also abound.

B. Heterogenous classes, involving small and high damage class members, may be affected. To the extent the rule required redefining the class to exclude those with high damages, it will, again encourage duplicative litigation, render settlement of the class action more difficult, and strip the class of members most likely to

monitor the litigation for the benefit of the class and perhaps act as plaintiff representatives.

C. High damage claimants are the most motivated to follow the progress of the litigation and therefore are the best protected by the opt-out procedure.

D. The concerns of the Advisory Committee as to the possibility that those with high personal injury damage claims may be "swept in" to a class of those with low economic damage can best be addressed by focus upon provisions of Rule 23 relating to representation, particularly Rule 23(a), not superiority.

#### V. Settlement Classes

A. The proposed provision is helpful in conforming to general practice and supporting the goal of quickly and efficiently resolving disputes.

B. The provision does not sacrifice the due process rights of absent class members since the Rule 23(a) representational factors must still be satisfied.

C. The rule does not restrict the various methods by which courts can safeguard the rights of all class members, including members of futures classes, by such devices as steering committees, guardians ad litem, and extended opt-out rights.

## VI. Interlocutory Appeals

A. Class certification issues are for the most part routine.

B. In those rare instances where an appeal would be appropriate, courts have permitted them under § 1292(b) and by issuing writs of mandamus.

C. Given the lack of standards, the proposed rule would add a burdensome, unnecessary layer of litigation in many class actions.

D. There is no merit to leaving open the possibility of a stay of the action in the event an appeal is permitted.

## VII. Maturity Of Related Litigation

A. This is an important consideration with respect to certain types of mass tort actions. The Advisory Notes should expressly limit use of this consideration to those actions.

## VIII. Dismissal

A. The Advisory Notes should expressly state that a hearing and notice to class members are not necessary when the dismissal does not pose a risk of prejudice to class members. Examples include voluntary dismissal without

consideration and without prejudice and involuntary dismissal.

IX. Timing of Class Certified Decision

A. I agree that the certification decision should be changed from "as soon as practicable after commencement of the action" to "when practicable". This would conform with current procedure to defer such decisions until after dispositive motions are determined.

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## COMMENTS OF CLASS ACTION REPORTS ON PROPOSED REVISIONS TO RULE 23

### I. INTRODUCTION

*Class Action Reports* is a specialized legal periodical that has covered all aspects of class action litigation, state and federal, since 1972. We divide all of the cases into "substantive categories"—i.e., securities, antitrust, consumer, mass torts, civil rights, social welfare, etc. We provide an objective digest for each of those cases, including (1) what the case was about (e.g., the class definition and what the class was suing for), (2) the outcome or status of the case (e.g., class certification granted or denied, case dismissed, settlement), and (3) the legal rulings of the court on class certification issues. (See Exh. A.)

Editorially, *Class Action Reports* comments on whether the class action device is achieving its twin purposes of deterrence/social cost internalization of harmful conduct<sup>1</sup> and efficiently compensating class members for damages, either because of (1) the economic nonviability of small claims individual actions, or (2) the judicial/legal resource waste

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<sup>1</sup> The more eloquent articulations of the deterrence theory include Scott, "Two Models of the Civil Process," 27 *Stan. L. Rev.* 937 (1975); and Note, "The Cost-Internalization Case for Class Actions," 21 *Stan. L. Rev.* 383 (1969). No empirical studies have ever been done, and probably could never be properly designed, as to whether and to what extent class actions have *actually* deterred (or over-deterred) harmful conduct. Common sense tells us that there must be some deterrent effect. We just don't know what its magnitude is.

of repetitively litigating numerous common issues even on behalf of a class of millionaires who could all, if necessary, bring duplicative individual lawsuits.

In this latter regard, our studies show that in class actions, attorney fees and litigation expenses consume about 18-19% of aggregate class recoveries, with 81-82% of the class recoveries going to class members rather than "to the lawyers."<sup>2</sup> The economies of scale of the class action lawsuit, coupled with required judicial approval of class counsel's compensation, obviously makes the class action device a much better deal for the consumers of legal services than, e.g., the typical personal injury or other individual contingent fee case, in which plaintiffs' counsel typically charges 33-40% of the recovery, plus expenses.

In particular, though, *Class Action Reports* has spared no effort to expose abuses of the class action process perpetrated by class counsel, all of whom purport to be saviors of society, but some of whom are scoundrels after only their own profit. We have for years editorially railed against inadequate class settlements, where the settlement amount (out of which fees are paid) is simply not enough, relative to the apparent strength of the case.<sup>3</sup> A fairly recent variant of inadequate

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<sup>2</sup> These figures reflect a not yet published update of our study, "Common Fund Attorney Fees in Securities and Antitrust Class Actions", 13 *Class Action Rep.* 249 (1990), which then found that fees and expenses consumed only 14.8% of class recoveries paid out to class members. That percentage has since increased, due mainly to the shift from the lodestar/multiplier to the percentage method of awarding fees.

<sup>3</sup> It is widely acknowledged that this has been a difficult problem for district judges under Rule 23(e), because by rationalizing even a 1% of claimed damages settlement, the district court can rid its docket of a complex and time consuming case.  
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class settlements as to which *Class Action Reports* has been especially virulent in its criticisms relates to the very small number of so-called "coupon settlements", which have lately given class actions a deservedly bad name in the lay press, though most class settlements (well over 95%) are still in cash paid to class members. More about that later.

## II. THE PROPOSED RULE 23(B)(3)(F) "COST-BENEFIT" PROVISION

New proposed Rule 23(b)(3)(F) adds to the existing (b)(3) predominance criteria "whether the probable relief to individual class members justifies the costs and burdens of class litigation." Although various plaintiff lawyer and consumer groups vigorously oppose this provision, *Class Action Reports* certainly has no problem with cost-benefit analysis as an aspect of class certification. It already is. Under the "manageability" rubric of present Rule 23(b)(3)(D), courts *already* engage in cost-benefit analysis.<sup>4</sup> If this new language is to be included, it should be as an amendment to the manageability "superiority" criterion of Rule 23(b)(3)(D), which really has never belonged in "superiority", but should have been included as a predominance factor.

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The proposed amendments here do not address this or many other problems, the resolution of which could improve the class action process. The proposed revisions do amend Rule 23(e) to require a settlement approval hearing. Under existing practice, however, this already happens in 99.9% of the cases.

<sup>4</sup> See, e.g., *Blue Chip Stamps v. Superior Court*, 556 P.2d 755 (Cal. 1976), where even that then "liberal" class action court held that recoveries of 18 cents per person did not pass the cost-benefit test. Accord, *Maffei v. Alert Cable TV of North Carolina*, 342 S.E.2d 867, 871-872 (N.C. 1986) (29 cents recovery per class member would "not even cover the cost of postage and stationery").

Even by the 1970s, though, technology had allowed class counsel to cost-effectively distribute *by mail* sums as low as \$10 in cash to class members, with the total litigation costs (attorney fees, expenses, notice, and settlement administration) still consuming only a modest fraction of the total payout to class members.<sup>5</sup> The technology of distributing small

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<sup>5</sup> In 5 *Class Action Rep.* 4n.2 (1978), we noted the following illustrations:

In the *Antibiotics Antitrust Litigation* 885,000 damage checks [averaging about \$20] were mailed to ordinary consumers residing in six western states. ... In the *Arizona Bakery Products Litigation* 245,387 damage checks averaging \$9.60 were mailed to Arizona citizens, identified through tax records, who had been required only to state the sizes of their households and confirm their Arizona residencies during the class period. See 1976-2 Trade Cases ¶ 61,120 (D. Ariz.). In *In re Private Civil Treble Damage Actions Against Certain Snack Food Cos.*, No. 71-2007-R (C.D. Cal.), over 300,000 checks ... [were] distributed pursuant to the settlement of a class action alleging price fixing of snack foods. In *Gowdey v. Commonwealth Edison Co.*, 41 *Consumer Rep.* 553 (1976 Ill. Cir. Ct. Cook Co.), 95 percent of 2.4 million utility customers responded to the settlement notice in a case involving a negative option light bulb service costing each class member \$2.04 per year....

Later, in 10 *Class Action Rep.* 149, 165, 207 (1987) [footnotes omitted], we gave further illustrations:

We have from time to time previously grappled with the issue of the efficiency or cost-effectiveness of the truly small claim class action—cases where, for example, individual members of large consumer classes ultimately recover as little as \$10. The defense argument has been that such *de minimus* individual claims could not possibly be litigated on a cost-effective basis because attorney fees and other litigation expenses (including the claims administration costs themselves) would eclipse the \$10 or other small amount that would supposedly have gone to the average class member. We have previously noted a number of cases where attorney fees and litigation expenses in fact consumed only a small and very reasonable proportion of the individual class member's very small claim.

This reality continues. Just recently, in a vertical price fixing *parens patriae* case prosecuted by the attorneys general of 36 states and the District of Columbia, *In re Minolta Camera Products Antitrust Litigation*, Master File No. MCP 1 (D. Md. June 19, 1987), some 70,000 out of 340,000 purchasers of two different Minolta cameras were sent refund checks for \$16 and \$9, respectively, out of a settlement fund of \$4,644,940. The estimated attorney fees (\$130,000) and notice and claims administration costs (\$705,000), consumed only 22% of the total settlement fund. Another private class action settlement, *Troncelliti v. Minolta Corp.*, No. B-86-3848 (D. Md.), covered consumer purchasers in the other 14 states and business purchasers excluded from the "natural persons" eligible for inclusion in *parens patriae* actions. Private counsel

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in *Troncelliti* recovered roughly \$700,000 for the class, with attorney fees and expenses representing only 15% of that recovery....

Recent state court decisions have examined the issue of the economic efficiency of a class action. In *Weinberg v. Hertz Corp.* (Sup. Ct. N.Y. Co. Apr. 15, 1985), *rev'd*, 499 N.Y.S.2d 693, 695-697 (App. Div. 1986), *aff'd mem.*, 516 N.Y.S.2d 652 (N.Y. 1987), the trial court denied class certification on the basis of "economic impracticability", where the cost of identifying "several hundred thousand" class members for purposes of notice outweighed the average claim of \$31. The appellate court reversed in view of the "plainly inadequate substantiation for defendant's assertion that defining the class would cost \$30 million.... In accepting defendant's estimate of the \$31 average claim," the lower court "did not give adequate weight to the very point that impelled a class action here, namely, the unlikelihood of small claims being filed for what, cumulatively, might amount to overcharges in the million of dollars.... Indeed, the amount of the average claim for each member of the class is without real legal significance.... As a practical matter, a class action is not only a superior method of adjudication, but the only method available for determining the issues raised, for 'the damages that may have been sustained by any single [customer] ... will almost certainly be insufficient to justify the expenses inherent in any individual action, and the number of individuals involved is too large, and the possibility of effective communication between them too remote, to make practicable the traditional joinder of action.' "

A similar result was reached in *Kelly v. County of Allegheny*, 515 A.2d 48 (Pa. Super. Ct. 1986). There the trial court denied class certification on the general basis that plaintiffs failed to satisfy Pa. R. Civ. P. 1708(a)(7), which specifically mandates that in a class action for damages "the court shall consider ... whether it is likely that the amount which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action." The trial court denied class certification on the ground that the cost of litigating the case would outweigh the approximate average class member claim of \$13.61. The Pennsylvania Superior Court reversed and concluded that "a consideration of the costs of the lawsuit in relation to the amount individual members stand to recover leads to the conclusion that a class action is justified." The proper focus under the Rule at issue is not merely on the potential recovery itself, but whether the possible benefit to class members is "so small in relation to the expense and effort of administering the action that a class action would not be justified." Because "the costs of notice and locating the class members would be minimal", in that "all class members are present or former employees of the County", such expenses "would not consume the recovery."

[These are indicative of] a number of relatively recent "small claims" public and private class actions that have been litigated on a clearly cost-effective basis. See, e.g., *Commonwealth of Mass. v. First Nat'l Supermarkets, Inc.*, No. 85-3835-K (D. Mass. June 19, 1987) (*parens patriae* action involving alleged conspiracy on the part of grocers to eliminate double coupons; five food coupons totaling \$11.00 per person were mailed to approximately 243,000 consumers; defendant to bear ... administrative costs and attorney fees of \$75,000); *Joseph I. Lieberman, A.G. v. Waldbaum, Inc.*, No. H-87-263 (D. Conn. May 7, 1987) (action on behalf of consumers alleging that grocers conspired to eliminate double

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coupons and to fix the prices of turkeys and eggs; four food coupons, totaling \$9.00 per consumer, were mailed to ... 800,000 consumers; defendant to bear ... administrative costs and attorney fees of \$75,000); *Joseph I. Lieberman, A.G. v. Waldbaum, Inc.*, No. H-86-688 (D. Conn. Oct. 2, 1987) (action on behalf of consumers alleging that grocers conspired to eliminate double coupons; \$2.00 food coupons were mailed to ... 1,055,000 consumers; defendant to bear ... administrative costs and attorney fees of \$150,000); *Ohio Public Interest Campaign*, 546 F. Supp. 1 (N.D. Ohio 1982) (settlement of private class action involving grocery price-fixing; defendants mailed \$20,000,000 in Food Purchase Certificates, valued at \$1.00 each, to over 1,000,000 class members; attorneys' fees plus settlement costs totaled \$2,650,000); *State of Florida ex rel. Jim Smith, A.G. v. Cargo Gasoline Co.*, 1986 Trade Cases ¶ 66,928 (M.D. Fla. 1985) (*parens patriae* action involving gasoline price-fixing; \$42,312 set aside to cover the cost of administering the distribution of a \$1,050,000 settlement fund; attorney fees and costs of \$125,000; consumers to be reimbursed under a formula in which the number of gallons purchased from settling defendants would be multiplied by a "consumer overcharge allowance" (gallons purchased/ \$1,050,000), such allowance not to exceed 1.5 cents/gal.); *State of California v. Levi Strauss & Co.*, 224 Cal. Rptr. 605 (Cal. 1986) (*parens patriae* action involving jeans overcharges; \$9,300,000 settlement fund; 8.6 million individual notices were mailed, as well as an additional 1,500,000 made available at local post offices; approximately 1,400,000 claims were submitted, with an average individual recovery of \$2.60-\$3.00; settlement administration costs were estimated at between \$1,800,000 and \$2,200,000, plus attorney fees of \$1,200,000); *Belon v. GTE Sprint Communications Corp.*, No. 83 CH 10085 (Ill. Cir. Ct. Cook Co., notice published Wall St. J. Aug. 18, 1987, at 27) (nationwide settlement class of past and present subscribers of "Sprint" long distance telephone service from January 1, 1978 to December 31, 1985, alleging that they were charged for unanswered calls without having been notified that such charges would be imposed; benefit to class members estimated by defendant to total \$3,150,000, in the form of service credits and cash refunds; defendants to pay all administrative costs and expenses, including notice costs, along with attorneys' fees and expenses not to exceed \$1,120,000) (see also *Clothrigger, Inc. v. GTE Corp.* (Cal. Super. Ct. San Diego Co. Mar. 1985) (action on behalf of a certified class of California "Sprint" subscribers alleging identical claims)); ... *Feldman v. Quick Quality Restaurants, Inc.*, No. 4187/83 (N.Y. Sup. Ct. N.Y. Co. Nov. 21, 1983) (action alleging that Burger King restaurants owned by same franchisee imposed a 0.75% "energy cost" surcharge on all food sales over a six year period, disclosed by an unnoticeable 2" by 4" sign posted below the highly visible and illuminated menu, resulting in plaintiff being overcharged two cents on a chicken sandwich costing \$2.09 and the class being overcharged by \$990,000; defendant to distribute during six month period \$115,440 (plus \$12,500 attorney fees), representing 70% of the overcharge to the class, by issuance of coupons to customers redeemable for further purchase or as a reduction in the purchase price); *In re Arizona Dairy Products Litigation*, 1975-2 Trade Cases ¶ 60,395 (D. Ariz.) (class certification granted), No. 74-569 (D. Ariz. 1978) (\$4,075,000 settlement; mailing of 753,643 notices to potential subclass members resulted in 110,000 bad addresses and over 350,000 claims); *Hoover v. May Dept Stores Co.*, 378 N.E.2d 762 (Ill. App. 1978) (approximately 400,000 class members with claims averaging about \$20

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sums to class members has since dramatically improved, and in a computer/Internet based economy will surely improve exponentially in the future.

There are many cases, even now, in which class member recoveries of less than \$1 can be electronically distributed to class members at a cost of only a few cents. Take, for example, the many consumer credit/overcharge cases against banks/lending institutions, telephone companies, etc., where many (often most) class members still have ongoing accounts with the defendant. It may be that a given class member's damages are, say, 50 cents, but at a cost of two cents, that 50 cents can be automatically credited to the consumer's account with the defendant. If we suppose that there were two million such class members in that case, each suffering 50 cents in damages, for an aggregate class damage of \$1,000,000, less attorney fees and expenses of 20% (\$200,000), plus account crediting costs of \$10,000, each class member would efficiently recover 89.9% of his 50 cents damages. Though we discussed this scenario with Professor Cooper, who agreed, the Advisory Committee Note makes no such comment.

This is what happens when one looks at the *aggregate* class damage recovery potential, as contrasted with the language of the

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each from a fund of \$9,000,000; "[c]lass actions are particularly alluring in the area of consumer protection since ... often ... the situations presented are ones where individual litigation ... is not feasible, usually because the costs ... greatly exceed the value of the potential relief".

Obviously, we could give many more recent examples of how very small individual claims can be cost-effectively litigated, but the foregoing proves the point.

proposed revision—"probable relief to *individual* class members." The above hypothetical clearly represents a "cost-effective" class action. Yet the Advisory Committee Note magnifies the discombobulation by referring to where "*individual* relief is slight ..., the core justification of class enforcement fails." (Adv. Comm. Note at 50.) This is just not necessarily so. As shown above, there may be many \$1 or \$2 per class member cases that *are cost-effective in the aggregate*.

In fact, there are many worthwhile cases that can only be looked at in terms of *aggregate* class damages, because the consumer victims of the defendants' wrongdoing can never be identified or, even if they could be, will never be reached by mass media notice or, even if reached, will not take the time and trouble to submit an "individual" claim. Many defense-oriented proponents of this proposal think that is just fine. If there is a \$20 million aggregate class injury, and only \$2 million of individual claims come in, that is all that the guilty defendant should have to pay. As for the other unclaimed \$18 million, just let sleeping dogs lie. Such a philosophy is, however favorable to guilty defendants, completely at odds with the optimum deterrence theory of the class action device.

Of the many examples that could be given, let us note a number of cases presently in litigation involving adulterated juice products. See, e.g., *Gordon v. Boden*, 586 N.E.2d 461 (Ill. App. 1991). This is where, for example in the present case against Nestle Corp., its "Juicy Juice" product claimed on the label to be "pure" or 100% "juice", when it was not—a supplier had adulterated the juice with a cheaper fructose

additive. This is a minor thing, in that nobody died, but still consumers did not get what they paid for. (See UCC § 2-314(2)(f).) On the other hand, nobody knows who bought "Juicy Juice" in the grocery store. Such records simply do not exist (though they may well exist in 2010).

So the only remedy here is a "coupon settlement", whereby Nestle issues cents off coupons, at point of purchase, on future purchases of "Juicy Juice." And this gets us back to where we believe this whole 23(b)(3)(F) idea came from—the rank aversion to "coupon settlements" generally, with which we heartily agree. The problem with most "coupon settlements" is that no one ever knows the true net value to the class or cost to the defendant of the coupons. That is, how many of them will ever actually be *redeemed*—probably a very small percentage (in the single digits), despite the "estimates" of Coupon Professors hired by the settlement proponents to testify otherwise.

But in a case like "Juicy Juice", where coupons are the only practicable remedying solution, other than Nestle simply paying \$x million in cash into some *cy pres* charitable fund, the coupon redemption rate problem can be solved by having Nestle continue to issue the coupons until \$x million of them are actually redeemed by supermarket shoppers. In other coupon cases (though cash to class members is always preferable), there could be a market maker with an 800 number for class members to call to sell their coupons if they did not want to buy another of defendants' product. Seeing the public disrepute coupon settlement handwriting on the wall, plaintiffs' class counsel,

urged on by judges who reject coupon settlements,<sup>6</sup> are now moving in this direction.

This digression into the real purpose of the drafters to go after the handful of irresponsible coupon settlements, thereby saddling all small claims cash settlements with the already existent cost-benefit test, is only to illustrate that the test should not be what the *individual* class member recoveries might be, but what the *aggregate* class recovery might be in relation to the litigation costs. Indeed, under the “fluid recovery”/aggregate class damages/*cy pres* doctrines, there may be cases in which there is virtually *no* “individual recovery”, but the defendant pays \$x million into a “second best” fund that disgorges the defendant’s wrongfully gained revenues for deterrence purposes.<sup>7</sup>

In these sorts of otherwise cost-effective cases, the new Rule 23(b)(3)(F) will generate legions of litigation for decades. Every defense lawyer worth his salt will propose that the damages sought are really “de minimus”. Every plaintiffs’ class counsel will seek to inflate the class member damages. The law of unintentional consequences surely will apply here. In every case, there will be a new debate as to whether the claimed damages are too little per “individual” or too much. Class action

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<sup>6</sup> See, e.g., *Buchet v. ITT Consumer Fin. Corp.*, 845 F. Supp. 684 (D. Minn. 1994), 858 F. Supp. 944 (D. Minn. 1994) (finding coupon redemption rate of 0.1% in comparable case.)

<sup>7</sup> See, e.g., *Simer v. Rios*, 661 F.2d 655, 675-677 (7th Cir. 1981); *Gordon v. Boden*, 586 N.E.2d 461, 468 (Ill. App. 1991); *Bruno v. Superior Ct.*, 179 Cal. Rptr. 346 (App. 1981); N.J. Rule 4-32-2(c); cf. *Cicetski v. Sears, Roebuck & Co.*, 348 N.W.2d 685, 689-692 (Mich. App. 1984).

litigation is complex enough as it is. There is no need to add an additional layer upon it, as Rule 23(b)(3)(F) would do.

There is yet another problem with 23(b)(3)(F). That is the use of the term “*probable* relief.” That word “probable” *necessarily* invokes the *merits* of the case. There is just no way around it. Plaintiffs’ class counsel will always inflate the “probable relief” per individual class member. Defense counsel will do the opposite. We will have, in almost every case, an early preliminary battle on the merits of the case—what are the damages per individual class member. That will necessarily delve into the validity of causes of action and all other manner of things.

Rather than simplifying class actions, this will add another layer of litigation to an already unnecessarily complex process. Maybe, after another 20 years of precedent, the cost-benefit calculus will be finally sorted out. But there is no reason to believe that the sorting out process will leave us in any different situation than the manageability criterion already leaves us today. Meanwhile, the proposed Rule 23(b)(3)(A) criterion—“the practical ability of individual class members to pursue their claims without class certification”—will have an opposite ratcheting effect. The lawyer will for decades be debating whether “individual” class members’ claims are too small under (F) or too large under (A).

We emphasize that we *favor* cost-benefit analysis. But in light of the foregoing, and since cost-benefit analysis is already a part of manageability, maybe things should be left as they are. If there is to be a revision, however, it should focus on whether the *aggregate* damages

reasonably claimed by the class are such that attorney fees, litigation costs, and settlement/notice expenses would not consume an unreasonably high percentage of the class recovery.

### III. "PRACTICAL ABILITY" OF INDIVIDUAL LAWSUITS

Proposed Rule 23(b)(3)(A) would replace the present Rule 23(b)(3)(A) "individual control" superiority criterion with a test consisting of "the practical ability of individual class members to pursue their claims without class certification." This language was offered at the Hearings by Professor Thomas Rowe as a substitute for the previously proposed "necessity" language, in hopes that this revised language would preserve such class actions as *In re Ferdinand E. Marcos Human Rights Lit.*, 910 F. Supp. 1460 (D. Haw. 1995), wherein thousands of class members tortured, killed, or disappeared could have brought duplicative individual lawsuits instead of sharing in the \$1.966 billion class jury verdict.

Proposed Rule 23(b)(3)(A) is complete nonsense. It would encourage district judges to deny class certification where average or some class members' damages are high enough to make duplicative individual actions economically viable. Those class members with high damages can easily opt out, as under the present system, and file their own individual actions. The proposed Advisory Committee Note asserts that the opt-out right "does not fully protect these interests", but does not explain why, except for the feeble proposition that some of these

millionaire or million dollar damages class members may "have not yet retained individual counsel at the time of class notice."

There are many possible solutions to that problem, such as clearly written notices (of which there are few) explaining the right to opt out, extended opt out periods, double opt out periods (i.e., wait and see what happens and opt out later), and allowing late opt outs. However, even millionaires, or poor people with million dollar claims, are as equally entitled to the litigative efficiencies and cost savings of the class action device as those who sleep under the bridge. Proposed Rule 23(b)(3)(A), by allowing district judges to deny class certification because of the large sizes of some claims, would put these claimants at the mercy of lawyers who will charge them 40% or 50% of their individual recoveries, rather than 18% in a class action. Moreover, these people with very large claims are not likely to be idiots. They know how to opt out. We agree with the cases cited by NASCAT (at 10-11) that even millionaires, or persons with million dollar claims, are entitled to the economies of scale and litigation efficiencies of the class action device.<sup>8</sup>

#### IV. SETTLEMENT CLASSES

We agree with the proposed Rule 23(b)(4) settlement class provision, though not for the reasons that most commentators will state.

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<sup>8</sup> If the Advisory Committee Note suggests that certain very large damage claimants should be excluded from (b)(1) or (b)(2) classes, we note that the Supreme Court has granted *certiorari* on that issue in an Alabama case, plus the Supreme Court has granted *certiorari* on the *Georgine* asbestos class settlement.

Fortunately, the proposed language has been changed from a settlement that *would not* have achieved contested Rule 23 certification to one that *might not* have done so. But the reason for the Rule should be that the present practice leads to the following perverse incentives.

The purpose of proposed 23(b)(4) is to overturn (and stop the spread of) Judge Becker's decisions in *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996) (asbestos), and *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liability Lit.*, 56 F.3d 768, 797-804 (3d Cir. 1995) (allegedly defective trucks).<sup>9</sup> Both of those cases involved proposed mega-class settlements, which for a variety of reasons (*not* that they were "mega") should never have been approved as fair and adequate for the class under Rule 23(e)—e.g., in *Georgine* the settlement amount offered was not enough, or some groups within the total class were discriminatorily treated, or "futures" class members might be bound though never having been individually notified.<sup>10</sup> In *GM*, of course, (1) the class action never should have been brought because over 99% of the class members never experienced (or will) a side gas tank collision causing them *damage* (a small class limited to those actual property damage claims would have been proper), and (2) the \$1,000 "coupons" to be offered to class members would be worthless, because almost no one would use them.

This publication has vigorously criticized such inadequate class settlements for a quarter century, because the primary beneficiaries of

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<sup>9</sup>Accord, *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 954 (Tex. 1996).

<sup>10</sup>See generally Koniak, "Feasting While the Widow Weeps," 80 *Cornell L. Rev.* 1045 (1995).

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

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

compensatory functions of the class action device will be correspondingly diminished.

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

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

The second and more troubling scenario cuts the other way. In rejecting the *Georgine* settlement, Judge Becker almost flatly held that no large personal injury mass tort class actions could ever be certified. Rather than reaching the merits (or lack thereof) of the *Georgine* settlement itself (*certiorari* recently granted), Judge Becker cited such

completely erroneous asbestos decisions as *Yandle v. PPG Indus.*, 65 F.R.D. 566 (E.D. Tex. 1974), and *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990), for the proposition that such mass tort class actions can never satisfy the predominance requirement—and even repealing the Rule 23(c)(4)(A) provision that such claims can at least be certified for limited classwide issues. Nowhere mentioned were such well reasoned contrary decisions as *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649, 659-663 (E.D. Tex. 1990) (using classwide statistical sampling to put *Fibreboard* (same case) to rest); *In re Estate of Ferdinand Marcos Human Rights Litigation*, 910 F. Supp. 1460 (D. Haw. 1995) (9,541 class members executed, tortured, or disappeared recovered \$766 million); *Allen v. United States*, 588 F. Supp. 247, 416-419 (D. Utah 1984) (atomic fallout victims' multiparty action); *In re Copley Pharmaceutical, Inc. "Albuterol" Prods. Liability Lit.*, 161 F.R.D. 456 (D. Wyo. 1995) (adulterated prescription drugs), and many others. Thus, at least in the Third Circuit, whole classes of potentially meritorious class actions are now dead letters because Judge Becker decided to finesse the Rule 23(e) issue and reject the inadequate *Georgine* settlement on feigned Rule 23(b)(3) grounds.

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

devise some amendment to Rule 23(e) to make judges disapprove inadequate settlements under that provision. This is an issue that the Committee has not addressed, but it should.

#### IV. CONCLUSION

There are other matters which we will address by the time of the San Francisco meeting, such as appealability and deciding the merits prior to class certification. The foregoing are only our preliminary comments. After looking at what everyone else has to say, we will refine and augment those comments by the time of the San Francisco hearing.

Respectfully submitted,



Beverly C. Moore, Jr.  
Editor

**WRITTEN STATEMENT OF JOHN D. ALDOCK  
ON THE PROPOSED AMENDMENTS  
TO FEDERAL RULE OF CIVIL PROCEDURE 23**

January 3, 1997

I am pleased to have the opportunity to present my views with respect to the proposed amendments to the Federal Rules of Civil Procedure. My comments will be directed to proposed Rule 23(b)(4), which addresses the issue of settlement classes -- that is, classes that are certified solely for purposes of settlement rather than litigation.

As a lawyer in private practice, I have spent a great deal of time on the subject of settlement classes and the kinds of claims that can be resolved in such classes. Indeed, as national counsel for the Center for Claims Resolution, I was directly involved in negotiating the so-called Georgine settlement, and I am presently engaged in seeking its approval in the courts. In the first part of my statement below, I describe the true, adjudicated facts concerning that settlement. Those are the facts that you should bear in mind when you look at Georgine as one example in considering the wisdom of settlement classes -- and, as I discuss below, Georgine in fact is a compelling example of the virtues of settlement class actions.

But it is important for the Committee to recognize that the subject of settlement classes goes far beyond mass tort settlements like Georgine, and instead extends to many other kinds of matters, such as those involving securities, antitrust, and civil rights claims. Indeed, focusing on those kinds of cases -- which lack some of the evidently controversial elements of, and the overheated rhetoric directed at, the Georgine agreement -- makes it abundantly clear that settlement classes are an essential part of the judicial system and should be permitted.

Thus, after describing the actual facts of the Georgine agreement, I discuss the more general reasons why, in my view, settlement classes plainly the interests of both the parties to the case and the public generally. It seems clear to me that:

- Preventing courts from certifying classes solely for the purpose of settlement will unwisely impede or altogether prevent the settlement of multi-claimant disputes;
- The opponents of settlement classes greatly overstate the risks to absent class members presented by such classes; and
- Any theoretical risks of settlement classes pale in comparison to the structural failure of other available methods for resolving these kinds of multi-claimant disputes.

Of course, it has long been my understanding, and it is my strongly held view, that courts already are able to certify settlement classes under the current version of Rule 23, and that the Third Circuit's contrary ruling is incorrect. In fact, as the Committee is aware, my colleagues and I are litigating that issue before the Supreme Court this Term.<sup>1</sup> Nevertheless, given the Third Circuit's contrary interpretation and the opposition to settlement classes that has been expressed from some quarters, it is important to set the record straight both as to the merits of settlement classes generally and as to the facts concerning the Georgine agreement in particular.

#### PERSONAL BACKGROUND INFORMATION

The views expressed in this statement are my own. My views, however, are the product of extensive experience representing clients in connection with both the litigation of mass tort claims and their settlement.

Most directly relevant here, I presently am, and for years have been, national counsel for the CCR defendants, a group of 20 companies that are defendants in many

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1. Amchem Prods., Inc. v. Windsor, No. 96-270.

thousands of asbestos personal injury cases. In that capacity, as noted above, I was involved in negotiating the Georgine agreement, which is a class action settlement that consensually resolves, outside of the tort system, many present and most future claims against the CCR companies. As the Committee is aware, that settlement was approved in all respects by United States District Judge Lowell A. Reed, Jr.; the Third Circuit then ruled that the settlement must be voided because the Georgine class could not be certified for litigation; and the Supreme Court has granted certiorari specifically to decide whether, under the existing terms of Fed. R. Civ. P. 23, a court can take the existence of the parties' settlement into account in applying the standards for class certification. For the Committee's convenience, a copy of the merits brief that we recently filed with the Supreme Court is attached to this statement.

In addition to my work in connection with the Georgine settlement itself, I have had extensive experience with the issues raised by the litigation and settlement of asbestos cases, both individually and on a consolidated basis. I have also represented defendants in connection with other putative class actions, such as those asserting claims relating to alleged releases of radiation from nuclear weapons facilities.

#### **THE TRUE FACTS CONCERNING THE GEORGINE SETTLEMENT**

A significant part of the debate over settlement class actions has focused on the Georgine agreement. In certain respects, as I noted above, the focus on Georgine may tend to confuse rather than illuminate the debate over settlement classes, since the Georgine settlement of asbestos personal injury claims involves a number of issues that are not raised by routine settlement class situations. As such, the Committee for present purposes surely should also focus on the virtues of settlement classes in resolving other kinds of disputes, such as those raising routine securities, antitrust, and civil rights claims.

Moreover, a fair portion of the debate about Georgine has been premised on misunderstandings of the relevant facts. That is particularly unfortunate because, when its true facts are understood, Georgine provides a compelling example of the virtues of settlement class actions, particularly by comparison to other available means for resolving asbestos personal injury claims. Accordingly, it is worth focusing on the actual facts of Georgine.

At the outset, it's important to know that Judge Reed, following extensive discovery, held a five-week fairness hearing, in the form of a full-blown trial complete with cross-examination, addressing all of the issues raised by the Georgine settlement. He then issued an exhaustive decision containing some 300 detailed findings of fact and almost 100 conclusions of law. Georgine v. Amchem Prods., Inc., 157 F.R.D. 246 (E.D. Pa. 1994). None of those factual findings was overturned by the Third Circuit on appeal. Accordingly, those findings constitute the adjudicated facts concerning the Georgine settlement. Those findings both refuted the adverse "factual" assertions made about the settlement and rejected as ill-informed the opinions presented by some of the commentators who have criticized the Georgine agreement in particular and settlement classes in general.

1. The Background to the Settlement. The Georgine settlement class action arose out of the nation's asbestos litigation crisis. Hundreds of thousands of cases have been filed; some 150,000 cases are pending in federal and state courts today; and new cases continue to flood the courts at a staggering and even accelerating pace.<sup>2</sup> The Judicial Conference Ad Hoc Committee on Asbestos Litigation, which was appointed by Chief Justice Rehnquist to examine the asbestos litigation crisis, found in 1991 that "the

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2. In 1995 alone, over 50,000 new claims were filed against some asbestos defendants. See, e.g., SEC Form 8-K, Owens Corning Corp., June 20, 1996, at 4-5.

situation has reached critical dimensions and is getting worse" and summarized the nature of the problem as follows:

"dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether."

Report p. 3, quoted in In re Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415, 419 (J.P.M.L. 1991). Moreover, as courts have recognized, the "results of jury verdicts are capricious and uncertain" in asbestos cases – to the point where "[t]he asbestos litigation often resembles the casinos 60 miles east of Philadelphia, more than a courtroom procedure." In re School Asbestos Litig., 789 F.2d 996, 1001 (3d Cir. 1986) (citation omitted).<sup>3</sup>

In these circumstances, the parties to the asbestos litigation were repeatedly urged by courts and others to seek a global settlement. 157 F.R.D. at 265, 335; 771 F. Supp. at 421-22. After the Judicial Panel on Multidistrict Litigation ("MDL Panel") transferred all federal asbestos personal injury cases to the Eastern District of Pennsylvania for pretrial proceedings (771 F. Supp. 415), efforts to achieve such a settlement were undertaken by the leaders of the plaintiffs' asbestos bar and counsel for all of the major asbestos defendants (157 F.R.D. at 265-66). After those efforts deadlocked, the co-chairs of the plaintiffs' MDL Steering Committee and lawyers for the 20 CCR companies negotiated a 106-page settlement of all future claims against these companies.

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3. As Judge Reed found, the tort system's severe problems handling asbestos claims continue unabated today. 157 F.R.D. at 322.

2. The Georgine Settlement Negotiations. With respect to those negotiations, Judge Reed expressly found:

- The plaintiffs' attorneys with whom the CCR defendants negotiated – Ron Motley (and his partner Joe Rice) and Gene Locks – had already been appointed by Judge Weiner, following their election by the members of the plaintiffs' asbestos bar, as the co-chairs of the MDL Plaintiffs' Steering Committee. 157 F.R.D. at 266. These attorneys were "experienced, highly respected leaders of the plaintiffs' asbestos bar." 157 F.R.D. at 329; see also *id.* at 335.
- In that capacity, Messrs. Motley, Rice, and Locks led the global settlement negotiations with all defendants. After those negotiations deadlocked, the CCR defendants agreed to "continue" those negotiations without the other defendants. As Judge Reed recognized, the CCR defendants negotiated with Messrs. Motley, Rice, and Locks because only by negotiating with such prominent counsel would any resulting agreement have credibility with the courts and the rest of the plaintiffs' asbestos bar. *Id.* at 329-30.
- The class representatives were given access to confidential data concerning, among other things, the defendants' historical settlement averages, involving thousands of claims over a period of years. *Id.* at 267.
- In negotiating the settlement, the parties were able to draw upon a uniquely massive historical record of jury awards and settlements, as well as decades of discovery, medical evidence, and judicial review of the kinds of claims being advanced by the class. *Id.* at 267, 321-22.
- The actual negotiations were difficult, lengthy, and time-consuming, took another year on top of the global MDL negotiations that had already taken place, and were conducted entirely at "arm's-length." *Id.* at 266-68, 335. Virtually every provision was the subject of negotiation and changed significantly during the process. *Id.* at 267.

As occurs in many class action cases (including those that are initially certified for litigation), a number of objectors asserted that class counsel had a conflict of interest and had acted collusively. Judge Reed carefully considered each of the allegations and found them to be utterly without foundation either in fact or in law. In rejecting those allegations, Judge Reed found:

- That class counsel's simultaneous representation of persons with pending claims in the tort system and of the Georgine class members did not create any conflict of interest since, among other things, the various clients were not fighting over insufficient resources. 157 F.R.D. at 294-99. Judge Reed specifically credited and agreed with the expert opinions of Yale Law Professor Geoffrey Hazard and University of South Carolina Law Professor John Freeman on this point. Id.
- That the simultaneous settlement of class counsel's pending claims in the tort system was done in accordance with their historical settlement averages and did not constitute any kind of premium or pay-off for the Georgine agreement. 157 F.R.D. at 307-10. Judge Reed's conclusion that there was no evidence of collusion or improper conduct was strongly supported by the expert testimony at the fairness hearing of Georgetown Professor Sam Dash. Id. at 311.

In fact, at the very outset of the case, the settling parties had requested that the court appoint a special master to examine those agreements in order to dispel any suggestion of collusion, and the court had appointed University of Pennsylvania Professor Stephen Burbank to that role. Professor Burbank issued four reports expressly concluding that the agreements contained no premium and were not collusive. Id. at 307-08.

- That the contrary expert opinions offered by Professors Coffee, Koniak, and Cramton were not persuasive. With all due respect, the district court found, among other reasons for rejecting their views, that Professor Koniak "did not know" the actual facts (157 F.R.D. at 302-03, 305); that Professor Coffee's conclusions were based on "no credible evidence" and were "not supported by the record evidence" (id. at 306, 308-11); and that "the credible evidence does not support

[the] factual predicate" of Professor Cramton's testimony (*id.* at 296-97, 303).

3. The Terms of the Settlement. The settlement as finally negotiated covers all persons who have been occupationally exposed to asbestos but had not filed their own asbestos personal injury lawsuits before this case was filed. 157 F.R.D. at 319. The settlement adopts widely accepted medical criteria that qualify a class member for compensation if he or she contracts an asbestos-related cancer or breathing impairment (such as asbestosis). *Id.* at 268-76. Class members who meet those criteria receive immediate cash compensation that reflects the amounts historically paid by the defendants to resolve claims in the courts, that varies with the severity of the illness, and that takes account of all the factors that are considered in the tort system. *Id.* at 276-78. Claims for compensation will be resolved by a claims resolution system in far less time and with far lower costs than in the tort system. *Id.* at 278-80. The agreement will pay out up to \$1.3 billion to as many as 100,000 persons in the first 10 years alone. *Id.* at 334.<sup>4</sup>

The settlement provides another major benefit to persons who currently meet the medical criteria. In the tort system, virtually all (over 90% of) the claimants who sue for a breathing impairment such as asbestosis give full releases when they settle their claims, and hence have no recourse if they later develop cancer. *Id.* at 284. Under the settlement, by contrast, such persons may recover compensation for a breathing impairment and then, if cancer develops, recover additional compensation. *Id.*

Class members whose exposure to asbestos has not resulted in cancer or any breathing impairment receive a package of non-monetary benefits that, as the district court found, have "significant value." *Id.* at 291-92. Those benefits include (1) tolling of statutes

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4. Of course, the agreement only resolves class members' claims against the CCR defendants; class members remain free to sue other defendants in the tort system.

of limitations, such that such class members "will no longer be forced to file premature lawsuits or risk having their claims being time-barred"; (2) waiver of defenses to liability; (3) prompt payment of their claims if and when they get sick; (4) assurance that funds will be available to make those payments; and (5) the opportunity, after being compensated for a breathing impairment, to obtain further compensation if cancer later occurs. *Id.* at 292-93. By contrast, as the district court expressly found as a fact, the tort system typically gives such persons only "modest cash settlements" in exchange for giving up "all future rights by general releases." 157 F.R.D. at 291-92.

In rejecting the objectors' challenges to the fairness of the settlement, Judge Reed specifically found (among many other things) that:

- The medical criteria are fair and reasonable and, in particular, "will fairly include as eligible for compensation substantially all persons who have asbestos-related malignancies or other asbestos-related conditions involving demonstrable impairment." 157 F.R.D. at 270-76.
- The compensation values for the various kinds of diseases are fair and reasonable and, in particular, "are indeed a reasonable reflection of the CCR defendants' historical settlement averages from the tort system." 157 F.R.D. at 276-78.
- The agreed number of claims to be processed each year is fair and reasonable and, in particular, will "result in the CCR defendants paying more claims, at a faster rate, than they have ever paid in the past." 157 F.R.D. at 278-80.
- The settlement's package of benefits for non-impaired class members "has significant value" and is fair and reasonable in comparison to the limited compensation that such claimants receive in the tort system in exchange for complete releases of all future claims. 157 F.R.D. 291-93.

As Judge Reed also concluded, the settlement terms establish the kind of claims resolution system endorsed by the Ad Hoc Committee appointed by Chief Justice Rehnquist to study

the asbestos litigation crisis. *Id.* at 265, 335. The settlement has also been endorsed as fair and reasonable by the AFL-CIO and its Building and Construction Trades Department, which represent a substantial percentage of class members. *Id.* at 325.

It is worth quoting Judge Reed's closing discussion, both for its appraisal of the existing tort system and for the benefits of the settlement (157 F.R.D. at 335):

"The inadequate tort system has demonstrated that the lawyers are well paid for their services but the victims are not receiving speedy and reasonably inexpensive resolution of their claims. Rather, the victims' recoveries are delayed, excessively reduced by transaction costs and relegated to the impersonal group trials and mass consolidations. The sickest of the victims often go uncompensated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease. Indeed, these unimpaired victims have, in many states, been forced to assert their claims prematurely or risk giving up all rights to future compensation for any future lung cancer or mesothelioma. The plan which this Court approves today will correct that unfair result for the class members and the CCR defendants."

4. Other Issues Decided by the District Court. Two other issues that were contested in the district court were the court's subject-matter jurisdiction over non-impaired class members and the adequacy of the notice to the class.

First, in a lengthy and careful opinion, the district court ruled that it had subject matter jurisdiction over all class members. See 834 F. Supp. 1437 (E.D. Pa. 1993). In particular, the court found that the case presented a justiciable "case or controversy" within Article III of the Constitution, even though the parties had reached a proposed settlement of the class members' claims. The court also found that the class members whose exposure had not yet resulted in any impairing condition both had standing to sue and had

asserted claims that satisfied the "amount-in-controversy" requirement for diversity jurisdiction.

Second, in yet another lengthy and careful opinion, the court approved a plan to give notice to the class and held that the plan satisfied the class members' due process rights. See 158 F.R.D. 314 (E.D. Pa. 1993). That plan was implemented at a cost of over \$7 million and included hundreds of thousands of individual notices, a wide-ranging television and print campaign, and significant additional efforts by numerous unions to notify their members. See 157 F.R.D. at 311-14. All of the notices emphasized to recipients that they did not currently have to be sick in order to be class members. The district court also found as a fact that "after more than 20 years of extensive litigation, over 15 bankruptcies (many with extensive notice), and massive publicity about asbestos, persons who have had occupational exposure to asbestos are aware of that exposure." 158 F.R.D. at 334. In light of these facts, the elements of the notice, and the vast dissemination that it in fact received, the district court found that class members were afforded a reasonable opportunity to opt out of the class and pronounced itself "confident" that due process had been satisfied. 157 F.R.D. at 311-14, 332-36.

Having carefully examined and approved its jurisdiction, the notice to class members, class certification, and the fairness of the settlement, the district court enjoined class members from pursuing claims against the defendants outside of the settlement. See 876 F. Supp. 716 (E.D. Pa. 1994). The parties have proceeded to implement the settlement for the past two and a half years.

5. The Third Circuit's Decision. The court of appeals acknowledged the settlement to be "arguably a brilliant partial solution to the scourge of asbestos that has heretofore defied global management in any venue." The court also did not dispute any of the district court's factual findings.

Nevertheless, the Third Circuit appeals ruled that the district court had improperly certified the class and that the settlement therefore had to be invalidated. The basis for that decision was the court of appeals' unique view, first formulated in the GM Trucks case,<sup>5</sup> that the district court had to determine whether the criteria for class certification, as set out in Federal Rule of Civil Procedure 23, were "satisfied without taking into account the settlement, and as if the action were going to be litigated." Id. at 32-33. The court conceded that "the better policy" may be to take the settlement into account, but held that the language of Rule 23 does not permit a court to do so. Id. at 13, 33.

Applying its new interpretation of Rule 23, the Court of Appeals held that the class could not be certified for litigation of the asbestos personal injury claims being resolved in the settlement. Id. at 34-55. This meant, according to the court, that the class cannot be certified for the purpose of settling those claims either. For example, the court found that a classwide trial would be unmanageable given differences in exposure, causation, comparative fault, and types of damages, and because those differences would be exacerbated by choice of law concerns. Even though the settlement resolved all of those issues, the Third Circuit held that they still bar class certification.

6. The Pending Supreme Court Proceedings. After obtaining a stay from the Third Circuit pending Supreme Court review, the CCR members asked the Supreme Court to review the Third Circuit's conclusion that the district court must ignore the parties' settlement in applying the class certification criteria of Rule 23. On November 1, 1996, the Supreme Court granted our petition. Our brief on the merits, and the briefs of others groups supporting our position (including class counsel), were filed on December 16. The

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5. In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir.), cert denied, 116 S. Ct. 88 (1995).

respondents' briefs are due on January 15, 1997. Oral argument is scheduled for February 18, 1997.

**SETTLEMENT CLASS ACTIONS  
SERVE THE INTERESTS OF THE  
PARTIES, THE JUDICIARY, AND THE PUBLIC**

It is my strongly held judgment that a court should be able to take the parties' settlement into account and to certify a class solely for purposes of settlement, even though the same class might not be certified for purposes of litigation.<sup>6</sup> My reasons fall into three broad categories. First, settlement class actions promote settlement and indeed are the only way to fairly and efficiently resolve a wide variety of multi-claimant disputes. Second, the opponents of settlement class actions vastly overstate the risks of such proceedings to absent class members. Finally, the arguments against settlement classes also overlook the enormous structural shortcomings of the tort system's handling of these kinds of multi-claimant disputes.

**A. Settlement Class Actions Promote Settlement and are an Indispensable Tool for Resolving Numerous Kinds of Disputes**

It goes without saying that the Federal Rules should be designed to facilitate the settlement of disputes. The Supreme Court has recognized that "public policy wisely encourages settlements," which necessarily constitute are the means by which most disputes are resolved. McDermott, Inc. v. Amclyde, 114 S. Ct. 1461, 1468 (1994). That general policy preference for settlement is particularly strong in the class action context,<sup>7</sup> given that:

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6. As noted above, I believe that Rule 23 already permits a court to do so -- as every court to have considered this issue, other than the Third Circuit, has concluded.

7. See, e.g., Isby v. Bayh, 75 F.3d 1191, 1196 (7th Cir. 1996); In re Oil and Gas Litig., 967 F.2d 489, 493 (11th Cir. 1992); Class Plaintiffs v. City of Seattle, 955 F.2d (continued...)

- by simultaneously settling many cases, class settlements multiply the benefits of settlement;
- class settlements ensure uniform treatment of all class members; and
- class action cases are particularly difficult and expensive to litigate.

Settlement class actions -- that is, cases where the class is certified solely for purposes of settlement -- constitute one of the most important paths for achieving classwide settlements. A recent Federal Judicial Center study found that 84% of the cases in which a class was certified ended in settlement, and almost half of these cases -- 39% of all certified class actions -- involved classes certified for settlement purposes only.<sup>8</sup> Moreover, as shown at pages 22-25 of the attached merits brief that we recently filed in the Supreme Court, the simple fact is that scores of district courts have certified settlement classes after finding that the same class either definitely or likely could not have been certified for purposes of litigation. Those cases confirm that settlement classes presently are, and for 25 years have been, an important means of resolving multi-claimant disputes.

The Third Circuit's approach, by invalidating the courts' long-standing practice of certifying classes solely for purposes of settlement, would severely curtail the settlement of disputes in at least two respects. First, it would unwisely make it impossible to have classwide settlements not only of personal injury and other mass tort cases, but also of many securities, civil rights, and antitrust disputes. Second, it would make it much harder

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7. (...continued)  
1268, 1276 (9th Cir. 1992).

8. See Willging, Hooper & Niemic, An Empirical Analysis of Rule 23 to Address the Rulemaking Changes, 71 N.Y.U.L. Rev. 74, 112, 180 (1996).

for the parties to settle all other kinds of putative class actions. I will expand on each of these points briefly.

First, there are many kinds of cases that cannot meet the standards for classwide litigation, and that therefore no longer would be eligible for classwide settlements under the Third Circuit's rule.

This is true, for example, of many products liability and other mass tort cases. As a number of courts have recently held, mass tort cases cannot be certified for classwide litigation, given the large number of individualized issues and the variations among state laws. See, e.g., Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996) (decertifying class for litigation of alleged nicotine addiction claims); In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995) (decertifying class of hemophiliacs for litigation of HIV exposure claims); In re American Medical Systems, Inc., 75 F.3d 1069 (6th Cir. 1996) (decertifying class for litigation of penile implant claims); In re Electronics Pacing Systems, Inc., Accufix Atrial "J" Leads Prods. Liab. Litig., 168 F.R.D. 203 (S.D. Ohio 1996) (denying certification of litigation class); In re Norplant Contraceptive Prods. Liab. Litig., 1996 U.S. Dist. LEXIS 11768 (E.D. Tex. Aug. 5, 1996) (denying certification of litigation class).<sup>9</sup>

Accordingly, under the Third Circuit's rule, those kinds of cases will have to be resolved on an individual or small-group basis. That will lead to enormous burdens for the courts and the parties. Moreover, as I describe below, those alternatives often are in various other respects far worse for all concerned than is a classwide settlement. And where the classwide settlement is fair to members of the class -- as is undisputed in many cases,

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9. Likewise, the Third Circuit's decision in Georgine held that that class could not be certified for purposes of litigation.

or as the court may decide in other cases, such as Georgine -- then the inability of courts to accept such settlements plainly serves no valid interest.

In addition to products liability and other tort cases, many other kinds of cases -- such as those asserting securities, civil rights, and antitrust claims -- may not be amenable to classwide litigation. This is so because the damages issues are often too varied for litigation on a class-action basis. See, e.g., Manual for Complex Litigation (Third) § 33.36, at 342; § 33.52, at 349-55; Advisory Committee Note to Fed. R. Civ. P. 23(c)(4) (1966 Amendments); Officers for Justice v. Civil Service Comm'n, 688 F.2d 615, 621, 622, 633 (9th Cir. 1982). At present, parties often settle those cases on a classwide basis, with the settlement containing a formula for the calculation of agreed-upon damages. By preventing courts from certifying settlement classes in these cases (since they cannot be certified for purposes of full-blow litigation, the Third Circuit's rule would prevent the parties from entering into such settlements and would require that all of those cases instead be litigated on an individual basis.

That will result in enormous inefficiencies. Moreover, because many of these kinds of claims are too small on a per-person basis to justify individual litigation, the end result would be that many persons would be left without any remedy at all under the Third Circuit's rule. See, e.g., Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.").

Second, limiting settlement classes to cases in which the court has found that a litigation class could be certified will deter settlement in all other cases in which the defendant has any hope at all of defeating class certification.

In such cases, the defendant has a strong incentive not to consent to a finding that the class could be certified for litigation. Indeed, such a concession might prove devastating if the settlement were ultimately disapproved and the defendant were then left facing a certified litigation class, or if the class certification finding were later used as precedent in another class action case against the same defendant. Indeed, even after the district court made a finding that the class could be certified for litigation, the defendant might find it necessary to continue to litigate that issue through to the court of appeals, in order to avoid the precedential effect of that litigation class finding.

Thus, as the Manual for Complex Litigation (Third) recognizes, allowing courts to certify classes solely for purposes of settlement is essential because it "permit[s] defendants to settle while preserving the right to context [class certification] if the settlement is not approved." § 30.45, at 243. By requiring courts to make an express finding that the class could be certified for purposes of litigation, the Third Circuit's rule would destroy this essential procedural mechanism for fostering class action settlements.

#### **B. The Purported Risks of Settlement Classes are Overstated**

The opponents of settlement classes argue that such classes lack certain structural safeguards that are necessary to protect the interests of absent class members. In my view, those theoretical concerns are plainly overstated and are, in any event, fully addressed by the safeguards built into Rule 23(a)(4) and 23(e).

At the outset, it should be emphasized that the concerns that are being articulated now by the opponents of Rule 23(b)(4) were fully recognized many years ago; they do not represent either new insights or the product of changed circumstances. For example, both Judge Wisdom (for the Fifth Circuit) and Judge Friendly (for the Second Circuit) expressly noted the risks of collusion and unequal bargaining power that again today are being decried by the opponents of Rule 23(b)(4), and both of them concluded that those

concerns can be satisfactorily addressed without a broad-brush prohibition of settlement classes. See In re Beef Indus. Antitrust Litig., 607 F.2d 167, 173-74 (5th Cir. 1979); Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982); see also, e.g., Mars Steel Corp. v. Continental Ill. Nat'l Bank and Trust Co., 834 F.2d 677, 681 (7th Cir. 1987) (Posner, J.).

As the many cases since that time certifying settlement classes and approving fair settlements irrefutably confirm, Rule 23 contains ample structural protections for absent class members in settlement class cases. In such cases, the district court still is required to apply the class certification requirements in Rule 23(a) and (b). As such, there still needs to be sufficient commonality, typicality, and adequacy of representation to ensure that the interests of absent class members were properly advanced. Moreover, the court is obliged to scrutinize the fairness of the settlement pursuant to Rule 23(e).

For example, in the Georgine case, as I have described above, Judge Reed afforded the objectors extensive discovery and then held a five-week fairness hearing that focused in painstaking detail on every conceivable issue, including the substantive fairness of the settlement, the course of the negotiations, the allegations of collusion, and the adequacy of representation, and he only approved the settlement after making detailed factual findings (and legal conclusions) on all of those subjects. In light of those factual findings, it is plain that the Georgine settlement – which is made possible by the ability of courts to certify settlement classes – is strongly in the interests of class members (as well as the defendants, the judicial system, and the public generally).<sup>10</sup>

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10. It's also worth noting that the Third Circuit in the GM Trucks case, separate and apart from its ruling on class certification, found that the settlement was unfair to the class. Regardless of the correctness of that decision, it further shows that the Rule 23(e) fairness review is an adequate means for addressing the risk of unfair settlements in settlement class cases.

Opponents of Rule 23(b)(4) also argue that class counsel will lack adequate negotiating leverage to secure a fair classwide settlement unless it is clear that the class could be certified for purposes of litigation, but that is simply incorrect. First, that argument plainly is inapplicable in cases where certification of a litigation class is a realistic possibility; yet the Third Circuit's rule would bar settlement classes even in those cases, unless and until the court determined that the class in fact could be certified for litigation. Moreover, even where it appears that the class could not be certified for litigation, the fact that the defendant, if unwilling to settle, will face a large number of individual or small-group lawsuits will often give class counsel ample leverage to secure a fair settlement. In Georgine, for example, class counsel had ample negotiating leverage because the defendants' alternative to settlement was to face a continued onslaught of individual lawsuits with their attendant enormous transaction costs. Indeed, because classwide settlements enable defendants to sharply reduce transaction costs, to secure some measure of certainty as to their overall liability, and to focus their energies on business rather than on litigation, class counsel negotiating such settlements will often have ample bargaining leverage whether or not the class could be certified for purposes of litigation.

In fact, in a settlement class action, the court can protect class members, and class members can protect themselves, better than in a litigation class case. The court's ability to protect class members is enhanced because looking at the terms of the settlement adds to the pool of information available to the district court in making the class certification decision. For example, in a litigation class action, the court's ruling on adequacy of representation under Rule 23(a)(4) cannot be more than an educated guess as to how class counsel is going to perform. By contrast, in a settlement class case, the court has the results of that performance right in front of it, and hence "there [are] none of the imponderables that make the [certification] decision so difficult early in [the] litigation." East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 406 n.12 (1977). Indeed, as courts have observed, "[i]t is, ultimately, in the settlement terms that the class repre-

sentatives' judgment and the adequacy of their representation is either vindicated or found wanting." In re Corrugated Container Antitrust Litig., 643 F.2d 19, 212 (5th Cir. 1981). Moreover, "[s]ettlements and the events leading up to them add a great deal of information to the court's inquiry and will often expose diverging interest or common issues that were not evident or clear from the complaint." In re Asbestos Litigation, 90 F.3d 963, 975 (5th Cir. 1996).

The fact that the outcome of the case is known at the start also enables class members to protect their own interests far better than in a litigation class case. In a Rule 23(b)(3) litigation class action, class members must decide whether or not to opt out of the class before anything is known as to the outcome of the case. For all class members know, they may ultimately lose the case and wind up with nothing. In a settlement class action, by contrast, class members know up front what the proposed settlement terms are. If they don't like those terms -- or even if they simply don't know whether or not to like the terms -- all they have to do is to opt out of the class.<sup>11</sup>

As a final point, it is clear that the institutional concerns on behalf of the judiciary articulated by the Third Circuit in the GM Trucks opinion were misplaced. The GM Trucks court worried that sanctioning settlement classes "converts a federal court into a mediation forum for cases that belong elsewhere, usually in state court," thereby sapping the courts' "limited resources." 55 F.3d at 799. This is wrong in at least three respects. First, a large fraction of the mass tort, securities, antitrust, civil rights, and other cases that are amenable to the use of settlement classes are adjudicated in the federal courts; thus, the disputes at issue do not "belong elsewhere." Second, the promotion and implementation of settlement does not turn a court into a "mediation forum"; courts are already empowered

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11. Even in a (b)(1) or (b)(2) case, class members are informed of the proposed outcome of the case and, if they are not satisfied, can contest the fairness of the proposal.

and indeed instructed to facilitate the settlement of disputes. See, e.g., Fed. R. Civ. P. 16(a)(5); Fed. R. Civ. P. 16(c)(9). And third, settlement classes generate enormous efficiencies and thus protect the federal judiciary against the waste of its limited resources that flows from unnecessary and burdensome individualized litigation. In short, as one might suspect from the overwhelming judicial precedent in favor of settlement class actions, most judges have had little trouble concluding that such classes serve the institutional interests of the courts, as well as the interests of the parties.

**C. The Arguments Against Settlement Classes Ignore the Structural Failings of the Other Available Means for Resolving Various Kinds of Multi-Claimant Disputes**

The concerns about the supposed lack of perfect structural protections for absent class members in connection with settlement classes pale in comparison to the demonstrated structural failings of the tort system – which is the alternative to which the objectors' arguments would consign absent class members – in handling certain kinds of multi-claimant disputes.

Let's take the asbestos personal injury claims covered by the Georgine settlement as an example. As I noted above, the Judicial Conference Ad Hoc Committee on Asbestos Litigation appointed by Chief Justice Rehnquist found grave problems with the tort system's resolution of asbestos claims, and numerous courts and commentators have recognized those failings as well.<sup>12</sup> Based on the extensive fairness hearing testimony, Judge Reed made the following findings of fact concerning asbestos litigation:

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12. See, e.g., Edley & Weiler, Asbestos: A Multi-Billion-Dollar Crisis, 30 Harv. J. Legis. 383 (1993); Brickman, The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?, 13 Cardozo L. Rev. 1819 (1992); Schuck, The Worst Should Go First: Deferral Registries in Asbestos Litigation, 15 Harv. J.L. & Pub. Pol. 541 (1992).

- Delay – In the tort system, “claims are often resolved only after long delays” (157 F.R.D. at 322); for example, claims against the CCR defendants “have, on average, taken almost three years to resolve (*id.* at 279), and “delays in certain jurisdictions are much longer” (*id.* at 277 n.23). See also *id.* at 263.
- High Transaction Costs – In the tort system, “transaction costs . . . far outpace compensation to victims” (*id.* at 263), such that “victims receive only a fraction of the funds expended (*id.* at 322). Despite the full maturity of the litigation, plaintiffs’ attorneys’ fees continue to range from 33%-40%. *Id.* at 277 n.23, 285.
- Capricious Verdicts – There have been “legions of erratic verdicts in the tort system; mesothelioma victims would sometimes receive nothing while persons with no impairment would receive six and seven figure verdicts.” *Id.* at 263; see also *id.* at 322 (there “is much uncertainty as to liability and verdict results”).
- Lack of Future Protection – In the tort system, almost all plaintiffs who file lawsuits alleging non-malignant conditions give full releases that leave them with no recourse if they later develop cancer. *Id.* at 277 n.23, 284, 292. Moreover, under the tort system process, “many companies have gone bankrupt” (*id.* at 322), including some “previously considered to be immune from financial difficulties” (*id.* at 263), thereby threatening the availability of funds for persons who get sick in the future (*id.* at 292).

These kinds of failings have likewise been documented with respect to various other mass tort claims. See, e.g., Rehnquist, Welcoming Remarks: National Mass Tort Conference, 73 Tex. L. Rev. 1523, 1524 (1995) (tort system’s handling of mass torts marked by “expense, delay, . . . crowding of dockets, divergent decisions on identical factual questions, and sometimes the insolvency of the defendants who are being sued”); Schuck, Mass Torts: An Institutional Evolutionist Perspective, 80 Cornell L. Rev. 941, 941 (1995) (“Tort scholars have already arrived at a consensus as telling as it is rare: Although courts have demonstrated considerable resourcefulness in struggling with mass tort issues, the overall performance of the litigation system in this area has been remarkably poor.”).

The purported lack of perfect structural protections in settlement class actions also pales by comparison to the complete absence of structural protections in other tort system settlements. For example, the vast majority of asbestos personal injury cases in the tort system are resolved not through individual trials or settlements, but instead as part of group settlements of hundreds or even thousands of cases filed by the same plaintiffs' attorney.<sup>13</sup> In most such settlements, the plaintiffs' lawyer then unilaterally allocates the settlement sum among his many clients.<sup>14</sup> Throughout that process, there is a lack of the important structural protections for class members that Rule 23 guarantees in connection with settlement class actions:

- There is no judicial supervision of the amount of the group settlement.<sup>15</sup>
- There is no judicial supervision of the plaintiffs' lawyer's allocation of the settlement among the numerous claimants.<sup>16</sup>

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13. See, e.g., Jack B. Weinstein, Individual Justice in Mass Tort Litigation pp. 74-75 (1995); Hensler, A Glass Half Full, a Glass Half Empty, 73 Tex. L. Rev. 1587, 1609, 1612 (1995).

14. See, e.g., Weinstein at pp. 74-75; Menkel-Meadow, Ethics and the Settlements of Mass Torts: When the Rules Meet the Road, 80 Cornell L. Rev. 1159, 1181 (1995) ("Mass tort lawyers have long been settling 'inventories' of cases in which they settle for large amounts of 'fixed funds' and then allocate specific awards themselves to individual plaintiffs.") (citation omitted); see also Hensler, Resolving Mass Torts: Myths and Realities, 1989 U. Ill. L. Rev. 89, 102 ("In asbestos litigation, . . . [b]atch settlement sessions settle hundreds of cases in a single week, often using only crude categorization schemes and rules of thumb to determine levels of compensation.").

15. Moreover, individual claimants are "rarely, if ever, included in the settlement discussions" with the defendant. Hensler, Resolving Mass Toxic Torts: Myths and Realities, 1989 U. Ill. L. Rev. 89, 97.

16. Nor is it realistic to think that individual clients can refuse to accept the amount allocated by their counsel. See Weinstein p. 75 ("I have yet to see plaintiffs successfully  
(continued...)

- And there is no judicial review of the reasonableness of the fees kept by the plaintiffs' attorney.<sup>17</sup>

Indeed, the lack of structural protections and the individual claimants' lack of involvement is so severe that, in one recent situation, a plaintiffs' asbestos attorney simply misappropriated a group settlement payment of over \$1 million; his 900-odd clients never realized that they should have received those funds; and the misappropriation only came to light when another attorney later informed a disciplinary board.<sup>18</sup> As all of these facts show, settlement class actions in fact provide far more structural protections than are otherwise afforded to claimants in other tort system settlements.<sup>19</sup>

In short, settlement class actions provide relief to claimants (1) sooner, more efficiently, and more rationally, and (2) with far greater safeguards, than do the other forms of adjudication that the opponents claim to favor. As such, there plainly is no policy reason to throw away this option for consensually handling multiparty claims.

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16. (...continued)  
ignore their attorney's advice to settle an asbestos or DES case.").

17. For example, Judge Weinstein observed that "[a]n audit of the Baltimore asbestos cases," which were settled on a group basis, "might show a net fee on the order of thousands of dollars per hour." Weinstein p. 74 (citation omitted).

18. See In re Asbestos Prods. Liab. Litig. (MDL 875), Order of October 31, 1994 (E.D. Pa.).

19. Many of these systemic problems with group settlements have been recognized for torts other than asbestos. See, e.g., Challenge to Multi-Million Dollar Settlement Threatens Top Texas Law Firm, N.Y. Times, March 24, 1995, at A-13.

**CONCLUSION**

As the courts have long recognized, "[t]he hallmark of Rule 23 is the flexibility it affords to the courts to utilize the class device in a particular case to best serve the ends of justice for the affected parties and to promote judicial efficiencies." In re Beef Indus. Antitrust Litig., 607 F.2d at 177-78 (Wisdom, J.); accord Weinberger, 698 F.2d at 72 (Friendly, J.); In re A.H. Robins, 880 F.2d at 740. Allowing the courts to take account of the real world facts in front of them, and maximizing their flexibility to certify settlement classes even where litigation classes would not be manageable, is in line with the fundamental essence of Rule 23. The Third Circuit's categorical prohibition of settlement classes, by contrast, would throw out the baby with the bath water for no demonstrable reason.

\* \* \* \* \*

I appreciate the Committee's consideration of these comments, and I look forward to presenting my views to the Committee on January 17.

In the Supreme Court of the United States

OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC., ET AL.,  
Petitioners

v.

GEORGE WINDSOR, ET AL.,  
Respondents

On Writ of Certiorari to the  
United States Court of Appeals for the Third Circuit

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QUESTION PRESENTED

When the parties to a putative class action enter into a settlement, must the district court nevertheless pretend that every legal and factual issue in the case will be contested, and ignore the existence of the settlement, in determining whether class certification is appropriate under Federal Rule of Civil Procedure 23.

**PARTIES TO THE PROCEEDING AND  
RULE 29.6 STATEMENT**

The petitioners in this case are Amchem Products, Inc., A.P. Green Industries, Inc., Armstrong World Industries, Inc., Certainteed Corporation, C.E. Thurston & Sons, Inc., Dana Corporation, Ferodo America, Inc., Flexitallic, Inc., GAF Building Materials, Inc., I.U. North America, Inc., Maremont Corporation, Asbestos Claims Management Corporation, National Services Industries, Inc., Nosroc Corporation, Pfizer Inc., Quigley Company, Inc., Shook & Fletcher Insulation Company, T&N plc, Union Carbide Corporation, and United States Gypsum Company. The other parties to the proceeding and petitioners' parent companies and nonwholly owned subsidiaries are set forth at Pet. App. 292a-317a.

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## BRIEF FOR THE PETITIONERS

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-66a) is reported at 83 F.3d 610. The opinion and order of the district court granting the preliminary injunction (Pet. App. 67a-87a) are reported at 878 F. Supp. 716. The opinion and order of the district court approving the settlement and certifying the class (Pet. App. 88a-276a) are reported at 157 F.R.D. 246.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 277a-282a) was entered on May 10, 1996, and a timely petition for rehearing was denied on June 27, 1996 (Pet. App. 283a-288a). The petition for a writ of certiorari was filed on August 19, 1996, and was granted on November 1, 1996. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

### RULE INVOLVED

Pertinent provisions of Federal Rules of Civil Procedure 1 and 23 are set forth as an addendum to this brief.

### STATEMENT

This case involves the settlement of a nationwide class action encompassing hundreds of thousands of individual asbestos personal injury claims and more than one billion dollars in prospective settlement payments. The court below characterized the settlement as "arguably a brilliant partial solution to the scourge of asbestos that has heretofore defied global management in any venue." Pet. App. 18a.

The Third Circuit nonetheless vacated the settlement. It held that where the parties to a putative class action enter into a settlement, the court must pretend that the settlement does not exist and apply the class certification criteria of Federal Rule of Civil Procedure 23 "as if the case were going to be litigated." Pet. App. 19a. The district court thus must decide whether to certify a class in a hypothetical case, rather than in the case actually before it.

This peculiar approach is flatly inconsistent with the language, history, and purposes of Rule 23. The plain terms of the Rule focus the certification inquiry on the *actual* status of the proceeding. The history establishes that the Rule was meant to reject the very sort of abstract and impractical approach embraced by the court of appeals. And the clear purposes of the Rule — which was designed to advance interests of efficiency, economy, and fairness — will be frustrated by the decision below. It is hardly surprising, therefore, that the Third Circuit's approach has been rejected by every court of appeals to consider the question and by numerous district courts. The Third Circuit's rule, if endorsed by this Court, would require a radical change in long-settled class action practice, would make numerous beneficial class action settlements impossible, and would burden courts and litigants with a vast increase in litigation.

1. *Background and Settlement Negotiations.* This lawsuit and its settlement arose out of the nation's well-documented asbestos litigation crisis. Hundreds of thousands of cases have been filed; some 150,000 cases are pending in federal and state courts today; and new cases continue to flood the courts at a staggering and even accelerating pace (in 1995 alone, over 50,000 new claims were filed against some asbestos defendants). See SEC Form 8-K, Owens Corning Corp., June 20, 1996, at 4-5.

The Judicial Conference Ad Hoc Committee on Asbestos Litigation, appointed by Chief Justice Rehnquist, found in 1991 that "the situation has reached critical dimensions and is getting worse." It summarized the nature of the problem as follows:

[D]ockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

Report at 3, quoted in *In re Asbestos Prods. Liab. Litig.* (No. VJ), 771 F. Supp. 415, 419 (J.P.M.L. 1991).

The Judicial Conference Committee further concluded that "[t]he transaction costs associated with asbestos litigation are an unconscionable burden on the victims of asbestos disease," citing a RAND Corporation finding that, "of each asbestos litigation dollar, 61 cents is consumed in transaction costs \* \* \*. Only 39 cents were paid to the asbestos victims." Report at 13 (footnote omitted). These tremendous costs diminish the funds available to compensate future plaintiffs: "[u]nfairness results because of the excessive transaction costs and the finite resources available to pay meritorious claims. This situation demands immediate remedy." *Id.* at 14.

Moreover, as courts have recognized, the "[r]esults of jury verdicts are capricious and uncertain" in asbestos cases — to the point where "asbestos litigation often resembles the casinos 60 miles east of Philadelphia, more than a courtroom procedure." *In re School Asbestos Litig.*, 789 F.2d 996, 1001 (3d Cir.) (citation omitted), cert. denied, 479 U.S. 852 (1986). As the district court found, the tort system's severe problems in handling asbestos claims continue unabated today. Pet. App. 240a.

Against this background, the parties to the asbestos litigation were repeatedly urged by the federal judiciary and other concerned parties to seek an "all-encompassing" settlement. Pet. App. 111a, 270a-271a. In 1991, at the request of eight district judges, the Judicial Panel on Multidistrict Litigation ("MDL Panel") transferred all federal asbestos personal injury cases to the Eastern District of Pennsylvania for pretrial proceedings in hopes of fostering settlement of the "asbestos mess" (771 F. Supp. at 424). After that transfer, leaders of the plaintiffs' asbestos bar and counsel for all of the major asbestos defendants tried to achieve such a settlement (Pet. App. 113a).

When those efforts deadlocked, the twenty companies that are petitioners here decided to "continue the discussions" with

the co-chairs of the plaintiffs' MDL Steering Committee, who had been elected by the committee members and appointed by the district court (Pet. App. 113a, 115a). As the district court found, the defendant companies began negotiations with these counsel "based on their reputation and experience in the asbestos litigation," and because they "had and have the knowledge and credibility necessary to negotiate on behalf of future asbestos victims in any global settlement effort." *Id.* at 179a.

The negotiations themselves were "difficult, lengthy, and time-consuming," and "protracted and vigorous" (Pet. App. 116a, 118a), continuing for an entire year (*id.* at 115a). "The negotiations included a substantial exchange of information" between class counsel and the twenty defendant companies, including "confidential data" showing the defendants' historical settlement averages, claims numbers, and insurance resources. *Id.* at 116a-117a. "Virtually no provision" of the settlement "was not the subject of significant negotiation," and the settlement terms "changed substantially" during the negotiations. *Id.* at 116a. In the end, the negotiations produced a settlement that, the district court determined based on its detailed review of the process, was "the result of arm-length adversarial negotiations by extraordinarily competent and experienced attorneys." *Id.* at 271a; see generally *id.* at 109a-118a.

2. *The Terms of the Settlement.* The 106-page settlement as finally negotiated covers all persons who have been occupationally exposed to asbestos products supplied by petitioners but who had not filed their own asbestos personal injury lawsuits before this case was initiated, a class that includes hundreds of thousands of persons. Pet. App. 268a. The settlement establishes medical criteria that qualify a claimant for compensation if he or she develops an asbestos-related cancer or breathing impairment (such as asbestosis). *Id.* at 120a-136a. For people who meet those criteria, the settlement waives all defenses and provides immediate

monetary compensation that varies with the severity of the condition and tracks prior tort system settlements by the defendant companies. Pet. App. 136a-139a. Claims for compensation will be resolved by a claims resolution system in far less time than in the tort system, and with far lower transaction costs. *Id.* at 268a. In the first ten years alone, the settlement will pay out up to \$1.3 billion to as many as 100,000 class members. *Id.* at 269a.

There is another important benefit offered by the settlement to class members who meet the medical criteria for immediate compensation. In the tort system, over 90% of asbestos lawsuits settle with the plaintiff executing a "full" release, whereby the plaintiff "releases all claims for any future asbestos-related injury, including [any subsequently developed asbestos-related] cancer." Pet. App. 155a.<sup>1</sup> Under the settlement, by contrast, a claimant who, for example, receives compensation for asbestosis will receive additional compensation if and when cancer develops. *Ibid.* The district court found that this right to additional compensation is "of great benefit to class members." *Ibid.*

Class members who do not meet the medical criteria receive non-monetary benefits that, as the district court found, have "significant value." Pet. App. 174a. These benefits include (1) tolling the statute of limitations, such that class members "will no longer be forced to file premature lawsuits or risk their claims being time-barred"; (2) waiver of defenses to liability; (3) payment of their claims, if and when they become sick, pursuant to the settlement's compensation standards, which avoids "the uncertainties, long delays and high transaction costs [including attorneys' fees] of the tort

<sup>1</sup> In some States, moreover, a claimant who sues on a non-malignant claim may not subsequently sue for cancer. See, e.g., *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1136-1137 (5th Cir. 1985) (applying Texas law); *Joyce v. A.C. & S., Inc.*, 785 F.2d 1200, 1203-1205 (4th Cir. 1986) (applying Virginia law).

system"; (4) "some assurance that there will be funds available if and when they get sick," based on the finding that each defendant "has shown an ability to fund the payment of all qualifying claims" under the settlement; and (5) the right to additional compensation if cancer develops. *Id.* at 173a-174a. This package of benefits, the district court found, compares favorably to the tort system, "where non-impaired claimants usually settle their claims for small amounts and a full release of all claims for any future asbestos-related injury, including cancer." *Id.* at 175a.<sup>2</sup>

As the district court concluded, the settlement terms establish the kind of claims resolution system envisioned by the Ad Hoc Committee appointed by Chief Justice Rehnquist to study the asbestos litigation crisis. Pet. App. 112a, 270a. The settlement also has been endorsed as fair and reasonable by the AFL-CIO and its Building and Construction Trades Department, which represent a "substantial percentage" of class members. *Id.* at 247a. The AFL-CIO has a role in monitoring implementation of the settlement. *Id.* at 158a.

3. *Initial District Court Proceedings.* The complaint in this case, styled as a class action under Fed. R. Civ. P. 23(b)(3), asserted present causes of action for all class members. For those who had already manifested an asbestos-related disease (such as asbestosis or cancer), the complaint asserted various causes of action and sought money damages for that disease. For those who had been exposed to asbestos but who had not yet manifested any asbestos-related disease, the complaint asserted causes of action for medical monitoring,

<sup>2</sup> The non-impaired class members who receive these benefits fall into two groups: those whose asbestos exposure has resulted in cellular injuries that can be seen on chest x-rays, but have not resulted in physical impairment ("pleural" claimants), and those who have suffered cellular injuries that are not visible on x-rays ("exposure-only" claimants). See Pet. App. 127a-129a; *Carlough v. Amchem Prods.*, 834 F. Supp. 1437, 1454-1455 (E.D. Pa. 1993).

emotional distress, increased risk of cancer, and conspiracy, and sought both money damages and medical monitoring. *Id.* at 95a.<sup>3</sup>

The district court conditionally certified the class for settlement purposes only. Pet. App. 96a. Subsequently, the court approved a plan to give notice to the class. *Georgine v. Amchem Prods., Inc.*, 158 F.R.D. 314, 314-336 (E.D. Pa. 1994). Class members were informed of the terms of the settlement and were afforded an opportunity to opt out of the class. Pet. App. 218a-219a.

The district court also held that it had subject matter jurisdiction over the lawsuit (834 F. Supp. at 1445-1468). The court first rejected the objectors' claim that the non-impaired plaintiffs lacked the injury in fact required by Article III. *Id.* at 1446-1456. Relying on numerous precedents, it held that "exposure to a toxic substance constitutes sufficient injury in fact to give a plaintiff standing to sue in federal court" (*id.* at 1454 (footnote omitted)).<sup>4</sup> This is particularly true for persons

<sup>3</sup> Numerous States recognize these causes of actions. See, e.g., *Burns v. Jaquays Mining Corp.*, 752 P.2d 28 (Ariz. App. 1987) (medical surveillance); *Deisch v. Tillery*, 833 S.W.2d 760 (Ark. 1992) (emotional distress); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993) (fear and medical monitoring); *Meyerhoff v. Turner Constr. Co.*, 210 Mich. App. 491, 495 (1995) (medical monitoring); *Ayers v. Jackson Township*, 525 A.2d 287 (N.J. 1987) (medical monitoring); *Askey v. Occidental Chem. Corp.*, 477 N.Y.S.2d 242 (N.Y. App. Div. 1984) (medical monitoring); *Lavelle v. Owens-Corning Fiberglas Corp.*, 507 N.E.2d 476 (Ohio C.P. 1987) (emotional distress); *Simmons v. Philadelphia Asbestos Corp.*, 543 Pa. 664 (1996) (medical surveillance); *Hansen v. Mountain Fuel Supply*, 858 P.2d 970, 980 (Utah 1993) (medical monitoring).

<sup>4</sup> *Id.* at 1450-1456 (citing, e.g., *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 74 (1978); *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1434 (2d Cir. 1993), cert. denied, 510 U.S. 1140 (1994); *Helling v. McKinney*, 509 U.S.

exposed to asbestos, the court found, in view of the medical evidence that such exposure immediately produces physical harm to lung tissue. 834 F. Supp. at 1454-1455.<sup>5</sup>

The objectors further contended that non-impaired plaintiffs could not in good faith allege damages in excess of the \$50,000 jurisdictional amount. The district court disagreed, holding that "the kind of factual injuries alleged by the [non-impaired] plaintiffs—physical, monetary, and emotional injuries—plainly support a claim to more than \$50,000."<sup>6</sup>

<sup>5</sup> The district court also rejected the objectors' claim that this action fell outside Article III because it was a "feigned" or "collusive" suit. See 834 F. Supp. at 1462-1466. Citing numerous precedents, the court found that the plaintiffs and the defendants "are true adversaries" whose interests are "profoundly adverse to each other," and that the proposed settlement "represents a compromise of a genuine dispute." *Id.* at 1465. The court went on to hold that the case is not moot because the "proposed settlement \* \* \* is contingent on the approval of the court." *Ibid.*

<sup>6</sup> *Id.* at 1459, citing, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d at 1434; *In re A.H. Robins Co.*, 880 F.2d 709, 723-725 (4th Cir.), cert. denied, 493 U.S. 959 (1989); *In re Joint Asbestos Litig.*, 129 B.R. 710, 793-794 (E.D.N.Y. 1991), aff'd in pertinent part & vacated on other grounds, 982 F.2d 721, 734 (2d Cir. 1992), modified on other grounds, 993 F.2d 7 (1993). Some objectors renewed their claim of an insufficient amount in controversy, arguing that the testimony of the non-impaired named representatives renounced their claim to present compensation. The district court, however, found that these plaintiffs had simply testified "to the effect that they support the deferral of compensation to themselves and other non-impaired class members." Pet. App. 93a-94a n.2. The district court thus rejected the objectors'

Every aspect of the proposed settlement was sharply contested by the objectors. The district court permitted extensive pre-hearing discovery and held a five-week hearing on the fairness of the settlement; the propriety of class certification, including the adequacy of the representation of the class; and the other issues raised by the objectors.

Five months later, the district court issued a thorough decision, including more than 300 specific findings of fact (Pet. App. 103a-223a), rejecting the objectors' contentions and holding that (1) the requirements for class certification are met in light of the parties' settlement (*id.* at 223a-233a); (2) class counsel had no conflict of interest and provided vigorous representation of the entire class (*id.* at 249a-262a); and (3) the settlement is fair (*id.* at 115a-176a, 234a-248a). The court also reaffirmed its prior holdings that it had subject matter jurisdiction and that the notice to the class satisfied Rule 23 and due process (*id.* at 93a & n.2, 263a-267a).

4. *The Class Certification Determination.* Rule 23 establishes two sets of inquiries that a district court must undertake before certifying a class action. The first, contained in subsection (a), applies to all class actions and directs the court to assess whether "the class is so numerous that joinder of all members is impracticable"; "there are questions of law or fact common to the class"; "the claims or defenses of the representative parties are typical of the claims or defenses of the class"; and "the representative parties will fairly and adequately protect the interests of the class." The second set of inquiries, contained in subsection (b), varies depending upon the type of class being certified. Here, the class was certified under Rule 23(b)(3), which requires a court to find "that the

contention, stating that "the fact that a plaintiff settles his or her claim for less than the jurisdictional amount, or chooses to defer receipt of cash compensation, does not deprive a federal court of diversity jurisdiction." *Ibid.*

questions of law or fact common to the members of the class predominate over any questions affecting only individual members," and "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The district court found that each requirement was satisfied.

a. *Numerosity*. The court found that "[a]lthough the exact size of the class is unknown, it is undisputed that there are many tens of thousands of class members." Pet. App. 103a. "Given the size of the class," the district court concluded, "joinder of the class members' claims would be impracticable." *Id.* at 225a.

b. *Predominance of Common Questions*. The court concluded that the commonality element of Rule 23(a) and the predominance element of Rule 23(b)(3) were satisfied because

[t]he members of the class have all been exposed to asbestos products supplied by the defendants and all share an interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system. Whether the proposed settlement satisfies this interest and is otherwise a fair, reasonable and adequate compromise of the claims of the class is a predominant issue for purposes of Rule 23(b)(3).

Pet. App. 226a.

c. *Typicality of the Representative Plaintiffs' Claims*. The district court stated that "[A] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." Pet. App. 227a (citation omitted). In the settlement context, the typicality element "requires proof that the interests of the class representative and the class are commonly held for purposes of receiving similar or overlapping benefits from a settlement." *Ibid.* (citation omitted). Here, the court found

that "the representative plaintiffs hail from a variety of jurisdictions and represent a wide range of occupations, medical conditions, and exposure to the CCR defendants' [asbestos] products." Pet. App. 105a. The court also found that the class members share an interest in maximizing recovery for each medical condition. *Id.* at 230a-231a. It thus concluded that "the claims of the representative plaintiffs are typical of the claims of the class for purposes of Rule 23(a)." *Id.* at 227a.

d. *Superiority to Other Methods of Adjudication*. Based on its factual findings regarding the fairness of the settlement, the court concluded that "the proposed settlement will provide class members with fair compensation for their claims while reducing the delays and transaction costs endemic to the asbestos litigation process as it occurs presently in the tort system. Thus, for purposes of Rule 23(b)(3), the proposed class action settlement is superior to other available methods for the fair and efficient resolution of the asbestos-related personal injury claims of class members." Pet. App. 227a-228a (citation omitted).

e. *Adequacy of Representation*. In determining that the representative parties would "fairly and adequately protect the interests of the class" (Fed. R. Civ. P. 23(a)(4)), the district court considered several issues.

*Consistency of Interests*. The district court found that:

there is no antagonism of interest between persons in various categories, or between persons with and without currently manifest asbestos conditions. First, the assets of the defendants do not constitute a limited fund, and so Class Counsel was able to negotiate compensation schedules for varying diseases without competition between medical categories for the same dollars. Further, representative plaintiffs with no currently manifest asbestos condition, or with only non-impairing pleural changes, may in the future develop a condition in any one or more of the compensable medical categories. These

representative plaintiffs, through Class Counsel, therefore have a strong interest that recovery for *all* of the medical categories be maximized because they may have claims in any, or several categories.

Pet. App. 230a-231a (emphasis in original) (citations omitted). *Skill and Experience*. The district court found that class counsel were "unquestionably experienced, highly respected leaders of the plaintiffs' asbestos bar" (Pet. App. 258a) and were "extraordinarily competent" (*id.* at 271a). Indeed, the objectors admitted "that they were not challenging the qualifications or experience of Class Counsel." *Id.* at 258a.

*Alleged Conflict of Interest and Collusion*. Based on extensive factual findings, the district court rejected the objectors' argument that class counsel had a conflict of interest in representing the class because they also represented and negotiated settlements for non-class members who already had asbestos personal injury lawsuits on file in the courts. Pet. App. 179a-189a.

The court also rejected the objectors' contention that "the settlement in this class action was the product of collusion" (Pet. App. 204a) because class counsel allegedly received premium settlements in the pending non-class cases (so-called "inventory" settlements) in exchange for acquiescing in less favorable settlement terms for class members. Based on the evidence submitted at the hearing, including the report of a special master, the court found that the "inventory" settlements "were generally consistent with the historical settlement averages for comparable settlements with [defendants], were not inflated, did not include a premium paid to Class Counsel in exchange for the [class action] settlement, and were not the product of collusion" (*id.* at 213a). The district court likewise noted that petitioners entered into similar "inventory" settlements on comparable terms with numerous other plaintiffs' counsel *not* affiliated with class counsel. *Id.* at 182a.

5. *Notice*. The district court held that the notice provided to class members satisfied the requirements of Rule 23 and the Due Process Clause. Pet. App. 216a-223a, 263a-267a. The court-approved plan to provide notice of the settlement was implemented at a cost of over \$7 million and included hundreds of thousands of individual notices, a wide-ranging television and print campaign, and significant additional efforts by 35 international and national unions to notify their members. *Id.* at 218a-219a. Every notice emphasized that an individual did not currently have to be sick to be a class member. 158 F.R.D. at 333. In the end, the district court was "confident" that Rule 23 and due process requirements were satisfied because, as a result of this "extensive and expensive notice procedure," "over six million" individuals "received actual notice materials," and "millions more" were reached by the media campaign. Pet. App. 272a.<sup>7</sup>

6. *Fairness of the Settlement*. Pointing to the evidence adduced at the hearing, which included the 25-year record of asbestos litigation — "probably the most mature mass tort litigation in this country" (Pet. App. 115a) — the district court determined, based on detailed factual findings (*id.* at 115a-

7. The district court reaffirmed (Pet. App. 263a) its prior rejection (158 F.R.D. at 334-336) of the objectors' contention that exposure-only claimants could *never* be provided with constitutionally-adequate notice. The court found, among other facts, that "after more than 20 years of extensive litigation, over 15 bankruptcies (many with extensive notice), and massive publicity about asbestos, persons who have had occupational exposure to asbestos are aware of that exposure." *Id.* at 334. The district court then held that "the objectors' argument that notice cannot be provided as a matter of constitutional law is without foundation," citing a number of federal decisions that have "approved notice to classes including persons with unmanifested injuries." *Id.* at 335, 336, citing, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d at 1435; *In re Joint Asbestos Litig.*, 129 B.R. at 834-837.

176a), that each of the primary provisions of the settlement was "fair and reasonable to the class" (*id.* at 241a). Thus, the court found, among other facts, (1) that the settlement agreement's medical criteria will provide compensation to "substantially all [persons] with asbestos-related cancer or asbestos-related impairment" (*id.* at 125a); (2) that the compensation schedule is a "reasonable reflection of [petitioners'] historical settlement averages from the tort system," (*id.* at 139a); and (3) that the settlement provides non-impaired claimants with benefits of "significant value" (*id.* at 174a) — including the guarantee of compensation in the event they get sick — in exchange for their deferral of immediate cash compensation. *Ibid.*; see also pages 5-6, *supra*. The court concluded with this view of the benefits of the settlement balanced against the treatment of asbestos claims in the tort system (Pet. App. 270a):

The inadequate tort system has demonstrated that the lawyers are well paid for their services but the victims are not receiving speedy and reasonably inexpensive resolution of their claims. Rather, the victims' recoveries are delayed, excessively reduced by transaction costs and relegated to the impersonal group trials and mass consolidations. The sickest of victims often go uncompensated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease. Indeed, [these] unimpaired victims have, in many states, been forced to assert their claims prematurely or risk giving up all rights to future compensation for any future lung cancer or mesothelioma. The plan which this Court approves today will correct that unfair result for the class members and the \* \* \* defendants.

The court subsequently enjoined class members from pursuing claims against the defendants outside of the settlement. *Id.* at

67a-87a.<sup>8</sup> The parties have been operating under the settlement, processing and paying claims, for over two years.

7. *The Court of Appeals' Decision.* The objectors appealed the district court's preliminary injunction barring class members from instituting claims against petitioners. Their appeal did not challenge the district court's findings regarding the fairness of the settlement, but instead advanced a variety of constitutional contentions, including arguments based on due process, standing, and justiciability doctrines. The objectors also contended that the district court erred in granting the motion for class certification.

The court of appeals reversed, holding that the class certification violated Rule 23 and that the settlement therefore had to be invalidated. Pet. App. 57a-59a. The court of appeals did not overturn any of the factual findings underlying the district court's decision. Rather, the basis for the court of appeals' decision was its conclusion that the district court had to determine whether the criteria for class certification, as set out in Rule 23, were "satisfied without taking into account the settlement, and as if the action were going to be litigated." *Id.* at 39a. In so holding, the court relied and expanded upon its decision in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir.) ("*GM Trucks*"), cert. denied, 116 S. Ct. 88 (1995). The court conceded that "the better policy" may be to take the settlement into account, but held that "the current Rule 23 does not permit such an exception." *Id.* at 19a; accord *id.* at 39a. Applying its new interpretation of Rule 23, the court of appeals then held that the class could not be certified for settlement because it could not have been litigated on a class basis. *Id.* at 39a-57a.

<sup>8</sup> Because a third-party insurance claim remained pending, the district court's order took the form of a preliminary (rather than a permanent) injunction.

For example, the court of appeals concluded that the class does not satisfy Rule 23(b)(3)'s requirement that common questions of law or fact predominate over individual questions because class members had different types of exposure to asbestos and "[d]ifferences in amount of exposure and nexus between exposure and injury lead to disparate applications of legal rules, including matters of causation, comparative fault, and the types of damages available to each plaintiff"; moreover, "because we must apply an individualized choice of law analysis to each plaintiff's claims, the proliferation of disparate factual and legal issues is compounded exponentially." Pet. App. 41a (citation omitted). Thus, even though the settlement eliminated the possibility that *any* of these issues would be *tried*, the Third Circuit held that the class could not be certified because a hypothetical trial would be too cumbersome.

#### INTRODUCTION AND SUMMARY OF ARGUMENT

The Third Circuit held that "each of [Rule 23's] requirements must be satisfied without taking into account the settlement, and as if the action were going to be litigated." Pet. App. 39a. That approach makes certification turn on a wholly artificial inquiry — whether the requirements of Rule 23 would be satisfied in the imaginary circumstance that the case were litigated — and entirely disregards the actual situation presented to the district court. The Third Circuit's rule "require[s] a court to ignore important and relevant information that sits squarely in front of it when deciding whether to certify a settlement class." *In re Asbestos Litig.*, 90 F.3d 963, 975 (5th Cir. 1996).

The Third Circuit's novel interpretation of Rule 23, which conflicts with the uniform view of other courts, is wrong. Nothing in the Rule suggests that a court must ignore the existence of a settlement and apply the certification criteria to hypothetical litigation that assuredly *never* will occur. Nor does the Third Circuit identify any such language. To the contrary, the plain language of Rule 23(a) and (b) focuses on

real rather than hypothetical or abstract features of the case, and Rule 23(c)(1) expressly allows the district court to change its certification decision depending upon how the case *actually* develops.

The history of Rule 23 also makes clear that certification decisions must be based on the actual status of the case, including settlement. The drafters of the Rule expressly eschewed the kind of abstract, metaphysical approach taken by the court below, and instead adopted a functional and practical approach that — as both this Court and the Rules Advisory Committee observed — focuses on the "particular" facts of the case. In addition, the existence of a settlement is highly material to the purposes of each of the certification criteria set out in Rule 23.

The Third Circuit's approach, moreover, is flatly inconsistent with the principles used by the Court in construing the Federal Rules. Ignoring settlement violates the "background presumption" that a court must apply the Rules to the case actually before it, not to hypothetical controversies. The holding below also contravenes Rule 1's mandate that the Rules be construed to secure the "just, speedy, and inexpensive determination of every action." The Third Circuit's ruling would preclude many and discourage virtually all class settlements, would deprive many plaintiffs of any remedy, and would accentuate the worst problems of the tort system.

On a proper application of Rule 23 that gives due weight to the settlement in this case, the district court's certification of the class was correct — and the court of appeals did not hold otherwise. The predominant questions in this case, which concern the benefits of the settlement for persons injured through occupational exposure to asbestos, are common to all class members. The named representatives' claims are typical because all members of the class now have the same interest in achieving fair compensation for persons injured by exposure to asbestos. Class representation was adequate in light of the skill and experience of class counsel, the arms-length nature of

the negotiations, and the absence of any conflicting interests among members of the class. And it is patently clear that this class action is superior to myriad individual actions characterized by delay, crushing transaction costs, and inconsistent results.

#### ARGUMENT

### I. A DISTRICT COURT MUST CONSIDER THE ACTUAL FACTS OF THE CASE BEFORE IT — INCLUDING THE EXISTENCE OF A SETTLEMENT — IN APPLYING RULE 23'S CLASS CERTIFICATION CRITERIA.

Until the Third Circuit's 1995 decision in *GM Trucks*, the longstanding and consistent practice of the federal courts had been to take account of the fact of settlement in class certification decisions. As the Civil Rules Advisory Committee recently explained, that "is the law everywhere" other than the Third Circuit. Reporter's Draft Minutes, p. 198. Yet the court below offered no persuasive reason for its decision to abandon an eminently useful and manageable practice that has facilitated innumerable settlements on terms that courts have found to be fair to all class members. In fact, the Third Circuit's holding cannot be reconciled with the language, history, or purposes of Rule 23, nor with the principles that govern construction of all Federal Rules.

#### A. The Language Of Rule 23 Requires Consideration Of The Case Actually Before The Court, Not An Imaginary Litigation.

1. The language of Rule 23 is the starting point for construction of the Rule. See, e.g., *Business Guides, Inc. v. Chromatic Commun. Enterprises, Inc.*, 498 U.S. 533, 540-541 (1991); *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 123 (1989). But the court of appeals never identified any language in the Rule upon which its holding rests. Nor could it. Rule 23 makes clear that the certification inquiry must be directed to the *actual* status of the proceeding;

the Rule nowhere suggests that the existence of a settlement must be ignored, or that the district judge must apply the certification criteria to hypothetical litigation that assuredly never will occur.

Thus Rule 23(c)(1), which applies to all class actions, states that a class certification decision "may be conditional, and may be altered or amended before the decision on the merits." This provision expressly allows the district court to change its certification determination based on how the case *actually* develops. It can hardly be the case that, while developments that occur after the initial certification may be taken into account, developments (like settlement) that take place before certification may not be. Moreover, it would be most peculiar if some developments in the litigation could affect certification, but settlement — which is, after all, the most important and profound development bearing on the conduct of the litigation — could not. See generally *General Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982) ("[e]ven after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation" (emphasis added)).

Other parts of the text of Rule 23 also focus the inquiry on the actual state of the issues in the case at the time of the certification decision. Rule 23(a)(2), for example, requires the court to determine whether "there are questions of law or fact common to the class," not whether "there [would be] questions of law or fact common to the class [if every issue in the case were litigated]" (emphasis added). A district court thus may not find certification impermissible under this subsection because the plaintiffs *could* have (but declined to) advance claims that could not be litigated in a class setting. Rule 23(a)(3) similarly refers to the "claims or defenses of the representative parties" (emphasis added), which can only be read to refer to the claims or defenses that the representative parties are actually advancing in the case at the time of the certification decision. The language is not limited, as

respondents suggest it should be, to claims "alleged in the class complaint." Windsor Opp. 17 (emphasis added).

In fact, respondents' proposed reading of Rule 23 is nonsensical. The Federal Rules do not require detailed pleading (see Fed. R. Civ. P. 8); as a result, complaints and answers usually are general documents. They need not specify the elements that the plaintiff must establish to prevail on his or her claims, or how the plaintiff plans to prove those elements, or the details of the particular defenses that the defendant will advance in attempting to defeat those claims. The Court therefore has observed that the issues relevant to the certification decision "[s]ometimes \* \* \* are plain enough from the pleadings [, but] \* \* \* sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Falcon*, 457 U.S. at 160. As a case develops, moreover, the defendant may choose to abandon potential defenses, or the plaintiff may decide not to pursue particular claims. Under respondents' approach, the district court presumably would be barred from taking account of these developments in making the certification determination. There is no justification in the Rule's language for such a bizarre result. And there is no principled distinction between those events and a settlement.

Indeed, this Court has observed that the commonality and typicality requirements of Rule 23(a) "serve as guideposts for determining whether *under the particular circumstances* maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Falcon*, 457 U.S. at 157 n.13 (emphasis added). Needless to say, analysis of the "particular circumstances" of the case must involve consideration of whether the parties have settled.

The language of Rule 23(b)(3) — the provision of Rule 23(b) at issue in this case — also directs the court's attention to the *actual* features of the case before it. For example, Rule

23(b)(3) states that "matters pertinent to the [court's certification] findings include" such things as "the difficulties *likely to be encountered* in the management of a class action" (Rule 23(b)(3)(D) (emphasis added)) and "the extent and nature of any litigation \* \* \* *already commenced* by or against members of the class" (Rule 23(b)(3)(B) (emphasis added)). Likewise, the requirements that common issues "predominate" over individual questions and that the class action be "superior" to other methods for adjudicating the parties' controversy necessarily focus the court's inquiry on the actual circumstances of the case before it. Taken together, these factors "describe in practical and functional terms the occasions for maintaining class actions" (1 NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS § 1.10 at 1-26 (3d ed. 1992)), and require consideration both of the actual status of the case and of the *real* manageability problems that will be confronted by the district court — to which the fact of settlement is critical.

2. The court of appeals based its contrary conclusion "in large part on the fact that '[s]here is no language in the rule that can be read to authorize separate, liberalized criteria for settlement classes.'" Pet. App. 38a (quoting *GM Trucks*, 55 F.3d at 799).

But this statement misapprehends the issue. The fact that certification of a settlement class includes consideration of the settlement, and excludes consideration of issues the settlement has resolved, does not "liberalize" the certification inquiry. Instead — as required by the language of the Rule — it simply focuses the inquiry on the actual facts instead of on an imaginary case. As the leading commentator in this area has explained,

some courts, in approving class settlements \* \* \* have observed that the class might not have been certified were it not for the proposed class settlement. *This observation does not mean that Rule 23 criteria were not applied strictly in these circumstances.* On the contrary, these

district court can and should" look at terms of a settlement in front of it as part of its certification inquiry and that doing so "enhances the ability of [the] district courts to make informed certification decisions." *In re Asbestos Litig.*, 90 F.3d at 975. And the Fourth Circuit held: "If not a ground for certification per se, certainly settlement should be a factor, and an important factor, to be considered when determining certification." *In re A.H. Robins Co., Inc.*, 880 F.2d 709, 740 (4th Cir.), cert. denied, 493 U.S. 959 (1989).

In addition, district courts in the First, Second, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits have certified a settlement class after declining to certify a litigation class or expressing doubt whether a litigation class could be certified.<sup>10</sup> This overwhelming consensus in the

1539, 1543 (11th Cir. 1987).

<sup>10</sup> *In re First Commodity Corp. of Boston Customer Accounts Litig.*, 119 F.R.D. 301, 308-309 (D. Mass. 1987) (certifying a temporary settlement class and noting that although certifiability of a litigation class would have been a "competitive question" on the facts of the case, that "is an issue that the parties may properly seek to compromise and settle"); *In re Marine Midland Motor Vehicle Leasing Litig.*, 155 F.R.D. 416, 420, 426 (W.D.N.Y. 1994) (certifying settlement class while noting that Second Circuit had denied certification of a similar class for litigation purposes); *In re First Investors Corp. Sec. Litig.*, 1993 U.S. Dist. LEXIS 18044, at \*14 (S.D.N.Y. Dec. 22, 1993) (certifying class "for settlement purposes only" while noting that there was "no guarantee" that class could have been certified for trial); *Charelain v. Prudential-Bache Sec., Inc.*, 805 F. Supp. 209, 214 (S.D.N.Y. 1992) (same); *Smith v. Vista Org.*, 1991 U.S. Dist. LEXIS 10484, at \*24 (S.D.N.Y. July 29, 1991); *In re Cuisinart Food Processor Antitrust Litig.*, 1983-2 Trade Cases ¶ 65,680 at p. 69,472 (D. Conn. 1983) (certifying settlement class even though "plaintiffs' liaison counsel admitted \* \* \* the risk that a [litigation] class would not [have been] certified is a substantial one"); *Desimore v. Industrial Bio-Test Labs., Inc.*, 83 F.R.D. 615, 620 (S.D.N.Y. 1979) (certifying settlement class

tests were applied, and the observation that a different ruling might have resulted in the absence of the settlement offer refers to the fact that Rule 23 criteria would have been applied in a different context and thus may have led to a different result. Class action determinations are made in the context of all the circumstances of the case as it is then postured.

<sup>2</sup> NEWBERG ON CLASS ACTIONS, *supra*, § 11.27, at 11-54 to 11-55 (emphasis added).

<sup>3</sup> A judicial consensus on the proper interpretation of particular language is powerful evidence of the meaning of that language. See, e.g., *Owen v. Owen*, 500 U.S. 305, 310-312 (1991). Here, the six other courts of appeals that have addressed the issue all have concluded that the existence of a settlement should be taken into account in applying the Rule 23 criteria.<sup>9</sup> For example, the Fifth Circuit recently held that "a

<sup>9</sup> E.g., *White v. National Football League*, 41 F.3d 402, 408 (8th Cir. 1994) (finding adequate class representation based upon "the settlement itself"), cert. denied, 115 S. Ct. 2569 (1995); *Malchman v. Davis*, 761 F.2d 893, 900 (2d Cir. 1985), cert. denied, 475 U.S. 1143 (1986); *Weinberger v. Kendrick*, 698 F.2d 61, 72 (2d Cir. 1982) (Friendly, J.) (parties may "compromise \* \* \* class [action] issues" through use of classes certified for settlement purposes) (citation omitted), cert. denied, 464 U.S. 818 (1983); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 633 (9th Cir. 1982) (approving class certification "[f]or purposes of the consent decree," while professing "serious doubts \* \* \* whether all aspects of this cause could have been litigated to a conclusion entirely within the class action mode"), cert. denied, 459 U.S. 1217 (1983); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 211 (5th Cir. 1981); *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 178 (5th Cir. 1979) (Wisdom, J.) ("it is altogether proper and consistent for a court to certify a class for settlement purposes, while it might have had more difficulty reaching this determination in a different context") (citation omitted), cert. denied, 452 U.S. 905 (1981). See also *In re Dennis Greenman Secur. Litig.*, 829 F.2d

even though the court had "twice denied certification" of the class for litigation purposes and noting that "[w]here a trial to replace settlement, the chances are very slim that" the class could have been certified); *City of Detroit v. Grinnell Corp.*, 356 F. Supp. 1380, 1390 (S.D.N.Y. 1972) (certifying settlement class even though question of certifying a litigation class "is neither easy nor free from doubt"); aff'd in relevant part and rev'd in part, 495 F.2d 448 (2d Cir. 1974); *South Carolina Nat'l Bank v. Stone*, 749 F. Supp. 1419, 1428 (D.S.C. 1990); *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1390-91 (D. Md. 1983) (certifying settlement class even though court had twice denied certification of litigation class); *In re Chicken Antitrust Litig.*, 560 F. Supp. 957, 960-961 (N.D. Ga. 1980) (certifying nationwide settlement class and approving settlement despite "serious doubts" that class could have been certified for litigation), aff'd, 669 F.2d 228 (5th Cir. 1982); *In re Armored Car Antitrust Litig.*, 472 F. Supp. 1357, 1373 (N.D. Ga. 1979) (same), aff'd in part and rev'd in part on other grounds, 645 F.2d 488 (5th Cir. 1981); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 158-60 (S.D. Ohio 1992) (relying on existence of settlement in certifying nationwide settlement class in heart valve tort litigation and distinguishing case in which certification was denied on ground that it "dealt with a proposed class action for litigation"); *In re Dun & Bradstreet Credit Serv. Customer Litig.*, 130 F.R.D. 366, 369, 371 (S.D. Ohio 1990); *In re "Bendectin" Prods. Liab. Litig.*, 102 F.R.D. 239, 240 n.4, 241 (S.D. Ohio) (certifying nationwide settlement class after denying certification of litigation class), rev'd on other grounds, 749 F.2d 300, 305 n.10 (6th Cir. 1984) (noting but not reaching this issue); *Arenson v. Board of Trade*, 372 F. Supp. 1349, 1353-54 (N.D. Ill. 1974) (certifying settlement class even though, absent the settlement, "it is quite possible that the plaintiffs' class would not have been certified, causing the death of this \* \* \* litigation"); Consent Decree in Full Settlement of Civil Action, *Wells v. Bank of America*, Civ. No. 71-409 CBR, at 3 (N.D. Cal. 1974) (cited in *Developments in the Law - Class Actions*, 89 HARV. L. REV. 1318, 1560 & n.130 (1976)) (approving bank-wide class settlement of employment discrimination suit notwithstanding prior refusal to certify bank-wide class for litigation because of problems proving individualized harm and measuring

lower courts, acquiesced in by Congress and the Rules Committee for twenty-five years, by itself justifies rejection of the Third Circuit's approach. See, e.g., *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 731-733 (1975); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200-201 (1974); *Missouri v. Ross*, 299 U.S. 72, 75 (1936).<sup>11</sup>

damages); *In re Petro-Lewis Sec. Litig.*, 1984-85 Fed. Sec. L. Rep. ¶ 91,899, at p. 90,470 (D. Colo. 1984) (certifying settlement class even though "there is doubt whether this action could be certified for purposes other than settlement"); *In re Four Seasons Securities Laws Litig.*, 58 F.R.D. 19, 32, 39 (W.D. Okla. 1972) (certifying class for settlement purposes in securities class action and noting that reliance issue, if litigated, could have "hopelessly fragmented" the proposed class); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 311, 317 (N.D. Ga. 1993) (approving settlement of class certified for settlement purposes and noting that decertification might have been required if the action were litigated because, as the plaintiffs conceded, proof of damages by the class composed of millions of members would have been difficult); *Woodward v. NOR-AM Chem. Co.*, 1996 U.S. Dist. LEXIS 7372, at \*41 (S.D. Ala. May 23, 1996); *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1994) (relying on existence of settlement in certifying nationwide settlement class in breast implant tort litigation); *Sanders v. Robinson Humphrey/American Express, Inc.*, 1990 Fed. Sec. L. Rep. ¶ 95,315, at p. 96,492 (N.D. Ga. 1990) (certifying class "for purposes of settlement only" after denying certification of litigation class, see 634 F. Supp. 1048 (N.D. Ga. 1986)).

<sup>11</sup> Leading commentators agree that settlement must be considered in applying the Rule 23 criteria. For example, the principal treatise in the field states that "it is altogether proper \* \* \* for a court to certify a class for settlement purposes, while it might have had more difficulty reaching this determination in a different context" (2 NEWBERG ON CLASS ACTIONS, *supra*, § 11.27, at 11-55). That is because "[c]lass action determinations are made in the context of all the circumstances of the case as it is then postured." *Id.* at 11-54 to 11-55.

original). Addressing Rule 23(b)(3), for example, the Committee explained that certification is appropriate where "convenient and desirable depending upon the particular facts." *Id.* at 102 (emphasis added). The Committee added that courts, in resolving certification requests, should disregard "interests [that] may be theoretic rather than practical." *Id.* at 104 (emphasis added). In light of this history, commentators uniformly agree that the Rule 23 approach is "functional" and is to be applied "practically" and "pragmatically" based on the peculiar facts of each case. See, e.g., Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 40 (1967) (Rule 23(b)'s emphasis on the "practicable" requires courts "to weigh the particular circumstances of particular cases and decide concretely what will work \* \* \* in the individual situations"); 7A WRIGHT, MILLER, & KANE, *supra*, § 1778, at 528 ("the proper standard under Rule 23(b)(3) is a pragmatic one"); 1 NEWBERG ON CLASS ACTIONS, *supra*, § 1.10, at 1-26, 1-31. Thus, as Judge Wisdom wrote for the Fifth Circuit:

The hallmark of Rule 23 is the flexibility it affords to the courts to utilize the class device in a particular case to best serve the ends of justice for the affected parties and to promote judicial efficiencies. \* \* \* Accordingly, it is altogether proper and consistent for a court to certify a class for settlement purposes, while it might have had more difficulty reaching this determination in a different context.

*In re Beef Antitrust Litig.*, 607 F.2d at 177-178 (citation omitted).

The Third Circuit's rule, which applies the certification criteria to an abstract construct of hypothetical litigation while ignoring the real-world case before the court, resembles the pre-1966 class action procedures that Rule 23 was intended to eliminate. The amended Rule's focus on practicality — as well as the emphasis on the "particular facts" of the case — manifestly requires that the district court make the certification

#### B. The History Of Rule 23 Shows That District Courts May Not Ignore Settlements In Their Class Certification Decisions.

The history of Rule 23 also makes clear that class certification decisions should be based on the actual case before the district court, not a hypothetical litigation.

Representative suits in equity, the predecessors of the modern class action device codified in Rule 23, were developed as tools for convenient and efficient adjudication of repetitive claims; by avoiding a multiplicity of suits, the equitable class action device was thought to "save[] the parties from needless expense and vexation, economize[] the time of judges and jurymen, and free[] the dockets for the affairs of other litigants." Chafee, *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297, 1297 (1932). See 7A WRIGHT, MILLER, & KANE, FEDERAL PRACTICE & PROCEDURE, § 1751, at 7-8 (1986); 1 NEWBERG ON CLASS ACTIONS, *supra*, § 1.06, at 1-17. Despite the practicality of this purpose, however, under pre-1966 class action procedures the propriety of a class action was determined by looking to "the abstract nature of the rights involved." *Amendments to Rules of Civil Procedure, Rules Advisory Committee Notes to Amended Rule 23*, 39 F.R.D. 69, 98 (1966). That artificial and abstract analysis — which sought to categorize class actions as "true," "hybrid," or "spurious" — "proved obscure and uncertain" (*ibid.*), and it was replaced in 1966 by a rule that "substitute[s] functional tests for the conceptualisms that characterized practice under the former rule." 7A WRIGHT, MILLER, & KANE, *supra*, § 1753, at 42; see *Snyder v. Harris*, 394 U.S. 332, 343 (1969) (Fortas, J., dissenting) (observing that the 1966 amendments of Rule 23 "replaced the metaphysics of conceptual analysis \* \* \* by a pragmatic, workable definition of when class actions might be maintained").

The Advisory Committee accordingly stressed that "[t]he amended rule describes in more practical terms the occasions for maintaining class actions." 39 F.R.D. at 99 (emphasis in

decision in light of the actual status of the case, including a settlement. See 2 NEWBERG ON CLASS ACTIONS, *supra*, § 11.27, at 11-55.

**C. The Purposes Of The Specific Certification Criteria Require Consideration Of A Settlement.**

The purposes of, and interests served by, the pertinent specific requirements of Rule 23 confirm that, in adjudicating a certification motion, a district court should take the parties' settlement into account.

**Rule 23(a).** The policies that underlie Rule 23(a) plainly are advanced by taking settlement into account in conducting the certification inquiry. For example, when considering Rule 23(a)(4)'s adequacy of representation requirement in a contested class action, the district court's decision necessarily cannot be anything more than an educated guess; the court cannot wait to see how well class representatives and class counsel ultimately will perform because the certification decision must be made "[a]s soon as practicable after the commencement" of the action. Fed. R. Civ. P. 23(c)(1). In contrast, when certification of a settlement class is sought, the district court simultaneously has before it the motion for certification and the agreed-upon final result in the action. Once the case is settled, "there [are] none of the imponderables that make the [class-action] decision so difficult early in [the] litigation." *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 406 n.12 (1977) (bracketed material added by the Court) (citation omitted).

The district court therefore need not speculate about whether hypothetical, potential divergences of interest among class members might compromise the interests of the class during continued litigation that will never occur. Instead, the court can address the issue of adequate protection directly, by asking whether the settlement is fair and whether, during the settlement negotiations, the class representatives and class counsel "fairly and adequately protect[ed] the interests of the class." Fed. R. Civ. P. 23(a)(4). As the Fifth Circuit

explained, "[s]ettlements and the events leading up to them add a great deal of information to the court's inquiry and will often expose diverging interests or common issues that were not evident or clear from the complaint." *In re Asbestos*, 90 F.3d at 975.<sup>12</sup>

The courts of appeals accordingly have long understood that

[i]t is, ultimately, in the settlement terms that the class representatives' judgment and the adequacy of their representation is either vindicated or found wanting. If the terms themselves are fair, reasonable and adequate, the district court may fairly assume that they were negotiated by competent and adequate counsel; in such cases, whether another team of negotiators might have accomplished a better settlement is a matter equally comprised of conjecture and irrelevance.

*Corrugated Container*, 643 F.2d at 212. Accord *In re Asbestos*, 90 F.3d at 975, 980-982 (relying on the terms of the settlement to determine that no intra-class conflicts existed); *White v. National Football League*, 41 F.3d 402, 408 (8th Cir. 1994) ("adequacy of class representation \* \* \* is ultimately determined by the settlement itself"), cert. denied, 115 S. Ct. 2569 (1995). Hence, pretending that the case is going to be litigated not only adds nothing to the adequacy inquiry, but actually deprives it of the most probative evidence.<sup>13</sup>

<sup>12</sup> The existence of a settlement also eliminates the need to assess whether class counsel and the class representative have the resources, willingness, and experience to see the litigation through discovery, trial, and any appeals. No legitimate interest of any kind is advanced by requiring district courts to undertake this inquiry when, in fact, the action is being settled. See 2 NEWBERG ON CLASS ACTIONS, *supra*, § 11.28, at 11-59.

<sup>13</sup> For similar reasons, taking settlement into account advances the purposes of the commonality and typicality requirements of Rule

Rule 23(b)(3). Rule 23(b)(3) is designed for actions in which "the particular facts" make class certification "convenient and desirable" by, among other things, "achiev[ing] economies of time, effort, and expense." Advisory Committee Notes (1966 Amendment). Both the predominance and superiority requirements of Rule 23(b)(3) focus largely on avoidance of inefficiencies. A court must find that common questions predominate because "[i]t is only where this predominance exists that economies can be achieved by means of the class action device." Advisory Committee Notes (1966 Amendment). Otherwise, "an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried." *Ibid.* The superiority requirement similarly is concerned with identifying the method of adjudication that offers "greater practical advantages." *Ibid.*

Taking the fact of settlement into account directly advances these purposes. A settlement, of course, removes the danger that the proceeding will "degenerate into multiple lawsuits separately tried," just as it removes all other inefficiencies that could arise from continued litigation. And immediate relief for the class through a settlement surely may be superior to alternatives, such as individual litigations, even where that would not be true of an unmanageable litigated class action. See Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 835 (1985) (certification of settlement class in mass tort litigation is appropriate because it may "prove 'superior to other available methods' of adjudication).

Taking settlement into account likewise is important to the specific "matters" that the Rule expressly makes "pertinent to the [23(b)(3)] findings." Rule 23(b)(3)(A) — "the interest of

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23(a). Indeed, the Court has recognized that those factors "tend to merge with the adequacy-of-representation requirement." *General Tel. Co. v. Falcon*, 457 U.S. at 157 n.13.

members of the class in individually controlling the prosecution or defense of separate actions" — asks the district court to balance any potential loss of autonomy for class members (the value of which can often be "theoretic rather than practical," as the Advisory Committee cautioned) against the possible benefits of a class action. When the case is settled, the benefits are known, thus making the balancing inquiry far more concrete. Moreover, class members may opt out if they are dissatisfied with those benefits. See *In re Beef Industry Antitrust Litig.*, 607 F.2d at 175; *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 223 (5th Cir. 1981).

Consideration of settlement also advances the evident purpose of Rule 23(b)(3)(B), which directs the court to take into account "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class." When the parties have reached a settlement, class members' interest in further prosecuting any "already commenced" litigation will be substantially, if not wholly, eliminated. Finally, it would be senseless for a court to ignore settlement in applying Rule 23(b)(3)(C) and (D), which call the court's attention to "the desirability or undesirability of concentrating the litigation of the claims in the particular forum" and "the difficulties likely to be encountered in the management of a class action." Settlement creates immediate advantages for the class action forum and eliminates any case-management difficulties that might arise from continued litigation.

#### D. The Principles That Govern Construction Of The Federal Rules Require Courts To Take Settlement Into Account.

The decision below also conflicts with the principles applied by this Court in construing the Federal Rules.

1. Just last Term, this Court recognized that the Federal Rules are written against certain "background presumption[s]" and that a party urging a position inconsistent with one of those presumptions "bears the responsibility of identifying

some affirmative basis for concluding" that a particular Rule departs from that presumption. *United States v. Mezzanatto*, 115 S. Ct. 797, 803 (1995). The Court there held that the Federal Rules reflect a "presumption of waivability" that a party may overcome only with affirmative evidence. *Id.* at 802.

Here, the Third Circuit's rule runs afoul of the background presumption that a court applies the Federal Rules to the case actually before it, not to the case as the court imagines the parties *could* have litigated it. For example, this Court observed in *Mezzanatto* that courts routinely accept stipulations for the admission of otherwise inadmissible documents. 115 S. Ct. at 802. Yet the Federal Rules contain no express directive that courts must consider the parties' agreement instead of deciding whether to admit the evidence based upon objections the parties *might* have raised. Similarly, when parties agree not to raise substantive arguments, the court does not ignore that agreement and pretend that those issues remain in the case. See, e.g., *Waisome v. Port Authority of New York and New Jersey*, 948 F.2d 1370, 1374 (2d Cir. 1991).<sup>14</sup> Thus, respondents "bear[] the responsibility of identifying some affirmative basis for concluding" (115 S. Ct. at 803) that a district court applying the certification criteria in Rule 23 should ignore the parties' agreement.

Respondents cannot identify any "affirmative basis for [so] concluding." Indeed, the implications of the Third Circuit's holding that a district court may not consider the actual case before it are truly bizarre. Consider, for example, a class

<sup>14</sup> Of course, some sorts of stipulations are not binding on the courts. For example, parties may not stipulate to the resolution of legal issues, and in the class action context a settlement agreement is not effective without court approval. The question here, however, is whether a court must ignore a class action settlement that *satisfies* the fairness requirement.

action that is instituted against a defendant alleging a cause of action that allows proof of liability on a class-wide basis, but requires the plaintiff to prove causation and damages on an individualized basis, and permits recovery of both compensatory and punitive damages. The requirement of individualized proof of causation might pose a significant obstacle to certification of the case as a litigation class action. But suppose — prior to the district court's class certification decision — the class representatives and the defendant reach a fair agreement under which the defendant concedes causation, the plaintiff class waives its punitive damages claim, and the parties agree to a formula for the calculation of damages. The only issue remaining in the case would be the question of liability. Yet the Third Circuit would require the district court to ignore this extremely significant development, treat the case as if the partial settlement had not occurred, and deny certification because a hypothetical class that sought to litigate causation could not have been certified. There is no "basis" — affirmative or otherwise — in the Federal Rules for such a perverse result.

2. There is a second principle that is dispositive here: the Rules themselves state that they should "be construed and administered to secure the *just, speedy, and inexpensive determination of every action.*" Federal Rule of Civil Procedure 1 (emphasis added). Rule 1 establishes efficiency and fairness as the "touchstones" for interpreting the Rules. *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962).

The Third Circuit's construction of Rule 23 undeniably will frustrate both of these purposes. Indeed, that court itself acknowledged that it may be "better policy \* \* \* to take settlement into account" in the certification decision. Pet. App. 19a. But the court of appeals went astray in believing that its observation was irrelevant to the proper construction of Rule 23. In fact, under the mandate of Rule 1, Rule 23 *should* be applied in a manner that provides a "convenient and economical means for disposing of similar lawsuits," while

"protect[ing] the interests of absentees." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 (1980) (citations omitted). See *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974).

a. *Efficiency*. "[P]ublic policy wisely encourages settlements" because they are an efficient means of resolving litigation. *McDermott, Inc. v. Amclyde*, 114 S. Ct. 1461, 1468 (1994). Consequently, the Federal Rules encourage and give district courts expansive powers to facilitate settlement. For example, Rule 16(a)(5) expressly identifies "facilitating the settlement of the case" as a proper purpose for a pretrial conference. See also Fed. R. Civ. P. 16(c)(9) (district court may take appropriate action at pretrial conference with respect to "settlement"). The Rules Advisory Committee observed that "[s]ince it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible."

Rule 23, as applied everywhere but the Third Circuit, plainly promotes settlement. The Federal Judicial Center study found that 84% of the cases in which a class was certified ended in settlement; almost half of those settlements — 39% of all certified class actions — involved classes certified for settlement purposes only. Willging, Hooper & Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Changes*, 71 N.Y.U.L. Rev. 74, 112, 180 (1996). The Third Circuit rule, by contrast, would provide a significant deterrent to settlement in at least three ways.

*First*, the MANUAL FOR COMPLEX LITIGATION (THIRD) explains that decoupling class certification in the settlement context from class certification in the litigation context "permit[s] defendants to settle while preserving the right to contest [class certification] if the settlement is not approved." *Id.* § 30.45, at 243. Under the test established by the Third Circuit, on the other hand, the district court will *have to* determine that a case in which a settlement has been reached

could be *litigated* as a class action — and will have to make specific findings justifying that conclusion (Pet. App. 19a). If the settlement ultimately falls apart or is disapproved, the defendant will face a certified *litigation* class, having conceded — for present and future cases — what "is often the most significant decision rendered in these class action proceedings." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980).

Faced with that prospect, a rational defendant who holds any hope at all of defeating class certification will refuse to consider settlement until it loses that issue, which often does not occur until after the parties have litigated for many months (or years). And even after the certification issue is finally determined, a defendant might continue to refuse to settle so as to preserve its right to appellate review. This means that the Third Circuit's rule "may render it virtually impossible for the parties to compromise class issues and reach a proposed class settlement before a class certification." *In re Beef Antitrust Litig.*, 607 F.2d at 177-178 (quoting 3 NEWBERG ON CLASS ACTIONS § 5570c, at 476 (1977)).

Consequently, while the Third Circuit has said that it endorses the idea of a class for "settlement purposes" as a mechanism that "affords considerable economies to both the litigants and the judiciary" (*GM Trucks*, 55 F.3d at 794), it is simply not possible to reconcile the Third Circuit's ruling with the concept of a class for settlement purposes only.<sup>15</sup>

*Second*, the Third Circuit's approach would deter class action settlements in cases involving securities, civil rights, and antitrust claims. These settlements frequently extend to both

<sup>15</sup> Requiring the district court in every settlement case to determine whether the case could have been litigated also will impose significant additional burdens on the courts and the parties — such as the need to establish the manageability of litigating a case that in fact will never be tried.

liability and damages, establishing a formula for distribution of settlement proceeds to the plaintiff class.

But the damages issues in these cases may be too varied for litigation on a class-wide basis, and thus the criteria for certification as a litigation class would not be met. See MANUAL FOR COMPLEX LITIGATION (THIRD) § 33.36, at 342; § 33.52, at 349-355 (noting in the securities and civil rights contexts that class actions may be tried on specified issues, such as the defendants' respective liabilities, while leaving for subsequent individual trials other issues, such as damages and individual defenses); Fed. R. Civ. P. 23(c)(4) Advisory Committee Note ("in a fraud or similar case the action may retain its 'class' character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims").<sup>16</sup>

Under the Third Circuit's rule, these class-wide settlements as a practical matter would be impermissible. The parties would be allowed only to settle the issue of liability, with damages left for resolution in individual claims. But no defendant would enter into such an open-ended admission of

<sup>16</sup> See, e.g., *Officers for Justice*, 688 F.2d at 621, 622, 633 (approving settlement class after partial litigation of employment discrimination claims and suggesting that the class could not have been certified for litigation of damages); *Griffin v. Harris*, 83 F.R.D. 72, 74 (E.D. Pa. 1979) (decertifying a Title VII class action with respect to damages because "significant individual issues \* \* \* would have to be dealt with when determining the amount of damages each class member would be entitled to"); *In re Fine Paper Antitrust Litig.*, 82 F.R.D. 143, 154 (E.D. Pa. 1979) (certifying class in antitrust action but noting that "problems in proving damages" may preclude extension of certification to damages determinations), aff'd, 685 F.2d 810 (3d Cir. 1982), cert. denied, 459 U.S. 1156 (1983); *Butler v. Home Depot, Inc.*, 1996 WL 421436, \*5-\*6 (N.D. Cal. Jan. 25, 1996) (certifying Title VII class action as to liability but deferring class certification as to damages).

liability. Thus, settlements of this type likely would disappear under the Third Circuit's approach.

Third, the Third Circuit's interpretation would foreclose the use of class actions to settle mass tort cases, at a time when the number of tort filings in the federal courts is skyrocketing.<sup>17</sup> The great majority of courts have ruled that such cases cannot be certified for classwide litigation, given the myriad individualized injury, causation, damages, and choice-of-law issues that arise in trying such claims. See, e.g., *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 & n.23 (5th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297-1302 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995); *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1081 (6th Cir. 1996).

Under the Third Circuit's interpretation of Rule 23, these cases therefore cannot be certified for a classwide settlement either. The federal courts instead will be required to resolve those claims on a case-by-case basis. That result is sure to accentuate the worst aspects of the tort system: "expense, delay, \* \* \* crowding of dockets, divergent decisions on identical factual questions, and sometimes the insolvency of the defendants who are being sued." Rehnquist, *Welcoming Remarks: National Mass Tort Conference*, 73 Tex. L. Rev. 1523, 1524 (1995). Accord Edley & Weiler, *Asbestos: A Multi-Billion Dollar Crisis*, 30 HARV. J. LEGIS. 383, 392-397 (1993).

Asbestos litigation provides a case in point. As noted above (at pages 2-3), the Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation concluded that "[t]he transaction costs associated with asbestos litigation are an

<sup>17</sup> The Administrative Office of the United States Courts recently reported that "the number of personal injury/product liability cases filed nationwide climbed 125 percent from the 12-month period ending March 31, 1995, compared to the corresponding period in 1996." *The Third Branch* at 2 (July 1996).

unconscionable burden on the victims of asbestosis disease," and "[c]lass action proceedings have the advantages of promoting efficiency and consistency and prevent whipsawing by defendants of plaintiffs' claims as well as scrambles for the assets of limited funds." *Id.* at 13, 22. The Third Circuit rule, which effectively precludes such proceedings, thus eliminates an invaluable procedure for efficient resolution of one of the most burdensome elements of the federal courts' caseload.<sup>18</sup>

Although the court below recognized that the asbestos litigation problem previously had "defied global management in any venue" (Pet. App. 18a), it vacated a settlement that represents a unique opportunity to unburden the federal and state courts of the "scourge" of asbestos litigation. Unless the decision below is reversed, federal and state courts will be flooded with tens of thousands of new asbestos claims against petitioners. See *id.* at 108a (district court found new claims were filed against petitioners at the rate of 24,000 per year). There is over a two-year backlog of potential filings against petitioners built up over the period covered by the district court's injunction.

b. *Fairness.* Construing Rule 23 to bar consideration of the fact of settlement also frustrates the second goal specified in Rule 1 — the fair resolution of claims.

The Third Circuit's rule will deny relief to many plaintiffs. The large number of cases in which courts have taken account of a settlement in the certification decision, frequently expressing doubt whether the case could be litigated as a class action (see pages 22-25 & nn.9-10, *supra*),

<sup>18</sup> Indeed, the Third Circuit itself previously recognized that "increased use of settlement classes has proven extremely valuable for disposing of major and complex national and international class actions in a variety of substantive areas ranging from toxic torts (Agent Orange) and medical devices (Dalkon Shield, breast implant), to antitrust cases \* \* \*." *GM Trucks*, 55 F.3d at 778.

demonstrates that the Third Circuit rule would dramatically reduce the number of class action settlements in, among other kinds of cases, consumer class actions, civil rights suits, and antitrust claims. Numerous plaintiffs who would have been beneficiaries of a class-wide settlement but for the Third Circuit's rule will instead be relegated to the economically prohibitive option of pursuing their individual claims independently.

For many aggrieved persons (victims of consumer fraud are a classic example), this result will mean no relief at all because they will be unable to afford the costs of litigation. See *Deposit Guaranty Nat'l Bank*, 445 U.S. at 339 ("[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device"); accord *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985); *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99-100 n.11 (1981). Other aggrieved persons may be able to pursue their claims independently, only to find recovery impossible because the defendant has been bankrupted by large actual and punitive damages judgments awarded to prior claimants. See, e.g., *In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. 415, 420 (J.P.M.L. 1991); *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation*, at 29-30. In consequence, the Third Circuit's "ignore the settlement" approach may make it impossible for absent class members to obtain redress.<sup>19</sup>

<sup>19</sup> In addition, as we have explained (at page 28, *supra*), consideration of the fact of settlement in the certification inquiry helps to ensure that the interests of absent class members are adequately represented by making it unnecessary for the court to speculate about the future performance of the class representatives.

**E. The Third Circuit's Expressed Concerns About Fairness To Absent Class Members Provide No Justification For Its Ruling.**

The court of appeals was plainly wrong in its concern that consideration of the settlement will "erode" Rule 23's protections for absent class members. Pet. App. 36a-37a. Aside from its erroneous assumption that some "lower" certification standard would apply when settlement is taken into account (see *id.* at 37a), the court failed to explain how absent class members would be prejudiced. In fact, a district court that takes settlement into account is still obligated to conduct the certification inquiry specified in Rule 23. And no settlement may take effect unless the district court finds it fair under Rule 23(e). Basing the class certification decision on the case actually before the district court rather than a hypothetical construct therefore does not compromise any of the protections for absent class members. To the contrary, it is the Third Circuit's approach — which withholds from the district court valuable information bearing on the results obtained by the class representatives and on whether hypothetical conflicts have been avoided — that disadvantages the class.

The court of appeals also worried that class counsel would be pressured to enter into inequitable settlements. See *GM Trucks*, 55 F.3d at 796-797. But that risk, which is present in all types of class actions, is specifically addressed by the searching review of the fairness of settlements required by Rule 23(e). See, e.g., *Weinberger*, 698 F.2d at 73; *In re Beef Antitrust Litig.*, 607 F.2d at 173-174. Indeed, the possibility of abuse is demonstrably reduced in the settlement context. Unlike plaintiffs in litigated class actions, class members in settlement classes are aware of the terms of the proposed settlement prior to certification. They accordingly will be able to challenge both certification and the settlement and, in a Rule 23(b)(3) class (like this one), to opt out of the class altogether. See *In re Beef Antitrust Litig.*, 607 F.2d at 175; *In re Corrugated Container Antitrust Litig.*, 643 F.2d at 223.

The Third Circuit's rule over-reacts to hypothetical dangers by imposing what amounts to an across-the-board prohibition of settlement classes. Rule 23 is characterized not by broad categorical prohibitions, but by a well-placed confidence in the ability of district courts to decide, case-by-case, whether a particular class was fairly and adequately represented and whether a particular proposed settlement is fair. For more than 20 years, numerous district courts have been exercising that authority in the context of settlement classes (see pages 22-25, *supra*) with none of the ill effects imagined by the Third Circuit. To the contrary, numerous disputes have been resolved fairly and efficiently in a manner that has minimized the burden both on the courts and on the litigants. There is simply no basis in law, and no justification, for the dramatic change in class action practice that would result from the broad-brush, extra-textual limitation upon district courts' discretion invented by the Third Circuit. See *McDonald v. Chicago Milwaukee Corp.*, 565 F.2d 416, 422 (7th Cir. 1977) ("[p]er se rules often represent the abdication of judicial discretion rather than its informed exercise").

It is the Third Circuit's approach — and not, as the Third Circuit said, the settlement in this case — that is an inappropriate assumption of "legislative" (Pet. App. 20a) responsibilities by the judiciary.

**II. TAKING THE SETTLEMENT INTO ACCOUNT, IT IS MANIFEST THAT THE DISTRICT COURT'S DECISION TO CERTIFY THIS CLASS WAS CORRECT.**

The Third Circuit found class certification improper in this case because it believed that "the district court erred by relying in significant part on the presence of the settlement to satisfy the Rule 23(a) requirements of commonality, typicality, and adequacy of representation, and the Rule 23(b)(3) requirements of predominance and superiority." Pet. App. 39a; accord *id.* at 39a-40a. But if the Rule 23 inquiry may take settlement into account, certification here assuredly was not an "abuse[]

fairness of the settlement as a "common question" within the meaning of Rules 23(a)(2) and 23(b)(3). And no such justification is apparent. The Rule 23(e) inquiry into fairness is, as a matter of fact, the *only* question (other than class certification) before a district court that is presented with a class settlement. Focusing on that real world question is wholly consistent with the purpose of the predominance requirement, which is designed to "achieve economies of time, effort, and expense." Fed. R. Civ. P. 23(b)(3), Advisory Committee Note. See also *Califano v. Yamasaki*, 442 U.S. at 701, page 30, *supra*. That purpose surely is served by certifying a concededly manageable settlement class in which the court must determine only whether the settlement was fair.

2. *Typicality*. "[T]ypicality of claims in a settlement class context requires proof that the interests of the class representative and the class are commonly held for purposes of receiving similar or overlapping benefits from a settlement." 2 NEWBERG ON CLASS ACTIONS, *supra*, § 11.28, at 11-58. See *General Telephone Co. v. EEOC*, 446 U.S. 318, 330 (1980). Here, the interests of the class representatives are typical of those of all the claimants. The class representatives and other class members "share an interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system." Pet. App. 226a. All the claimants also share a common injury: occupational exposure to the asbestos products supplied by defendants. *Ibid*. See 1 NEWBERG ON CLASS ACTIONS, *supra*, § 3.13, at 3-76 ("[A] plaintiff's claim is typical if it arises from the same \* \* \* course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.") See also *Falcon*, 457 U.S. at 159 n.15.

Although the Third Circuit acknowledged that "the named plaintiffs include a fairly representative mix of futures and injured plaintiffs," it found that the representatives' claims

[of] discretion" (*Califano v. Yamasaki*, 442 U.S. 682, 703 (1979)), and the court of appeals did not hold otherwise.

1. *Predominance of common questions of law or fact*. When the settlement is taken into account, this case easily satisfies the Rule 23(b)(3) requirement that common questions of law or fact predominate over other questions affecting only individual class members.<sup>20</sup> The court of appeals' conclusion that the predominance requirement was not met turned entirely on its belief that litigation of the class would be unmanageable. See Pet. App. 40a-48a. But the disparate legal issues relating to liability, defenses, and damages that the Third Circuit thought might arise in litigation (see *id.* at 40a-42a) are irrelevant under the terms of the settlement. The defendants have waived all defenses. They also have obligated themselves to compensate all class members who demonstrate exposure to defendants' asbestos products and manifest an asbestos-related disease, applying a formula that takes into account the considerations that bear on recovery in the tort system. The legal and factual questions that remain therefore relate solely to the fairness of the settlement, as the district court concluded. Pet. App. 226a. See *In re Corrugated Container Antitrust Litig.*, 643 F.2d at 212; *Malchman v. Davis*, 761 F.2d 893, 900 (2d Cir. 1985), cert. denied, 475 U.S. 1143 (1986). See generally 2 NEWBERG ON CLASS ACTIONS, *supra*, § 11.28, at 11-58. Moreover, the fairness inquiry here raised questions that were common to the members of the class, including the fairness of the medical criteria and settlement payments, as well as the value of the benefits provided to class members in comparison to the uncertainties, long delays, and high transaction costs of the tort system.

The court of appeals offered no justification for its belief that it is "impermissible" (Pet. App. 40a n.12) to treat the

<sup>20</sup> It therefore also necessarily satisfies the Rule 23(a)(2) requirement that "there are questions of law or fact common to the class."

were atypical of the class claims because of "the underlying lack of commonality and attendant conflicts," including conflicts among the non-impaired plaintiffs themselves. Pet. App. 53a. But when the settlement is taken into account, it is evident that there is no lack of commonality.<sup>21</sup> The Third Circuit's related belief (*ibid.*) that "the futures plaintiffs share too little in common to generate a typical representative" because each may eventually manifest a different disease similarly fails to take into account the common interest of the presently non-impaired plaintiffs in settlement. At this moment, as the district court found (at Pet. App. 231a), *all of the non-impaired plaintiffs share precisely the same interest*: achieving adequate compensation for all plaintiffs who manifest any asbestos-related condition during the term of the settlement. That interest is unaffected by the differences in diseases the non-impaired plaintiffs might eventually manifest. *Ibid.*<sup>22</sup>

<sup>21</sup> This Court has observed that "[t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Falcon*, 457 U.S. at 157-158 n.13. "Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest." *Ibid.*

<sup>22</sup> The court of appeals did not set aside any of the district court's factual findings as clearly erroneous (see Fed. R. Civ. P. 52(a)). Yet the court of appeals' opinion contains statements that appear contrary to those findings. "If [the court of appeals] was of the view that the findings of the District Court were 'clearly erroneous' within the meaning of Rule 52(a), it could have set them aside on that basis. \* \* \* But it should not simply have made factual findings on its own." *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714

3. *Adequacy of Representation.* When the settlement is taken into account, it also is clear that the district court correctly concluded that the representative plaintiffs "fairly and adequately protect[ed] the interests of the class." Rule 23(a)(4).<sup>23</sup> The Third Circuit held that the named plaintiffs could not adequately represent the class because it believed there were "serious intra-class conflicts" between presently ill and non-impaired plaintiffs. Pet. App. 49a. It listed all the "potential conflicts" of interest (*id.* at 48a (emphasis added)) it thought *might* arise between the non-impaired and presently ill plaintiffs in negotiating a settlement, and concluded that "presently injured class representatives cannot adequately represent the futures plaintiffs' interests and vice versa." *Id.* at 50a-51a. Pursuant to its holding that each of the Rule 23 "requirements must be satisfied without taking into account the settlement" (*id.* at 39a), however, the court of appeals refused to determine whether any of these supposed hypothetical intra-class conflicts *actually* were reflected in the settlement agreement. *Id.* at 49a-51a. And it ignored the district court's determination, based on detailed factual findings, that there were no actual conflicts. *Id.* at 49a-51a; see pages 11-12, *supra*.

(1986).

<sup>23</sup> This inquiry contains two components: whether the interests of the named plaintiffs are sufficiently aligned with those of the class; and whether the class counsel are qualified and serve the interests of the entire class. See *Falcon*, 457 U.S. at 157-158 n.13. Respondents have never challenged the qualifications of class counsel and the court below noted that the objectors' allegations of collusion were resolved "in favor of class counsel largely on the basis of fact findings that the objectors have not challenged." Pet. App. 49a. It is therefore settled for present purposes that counsel adequately represented the class. Consequently, we address only the first component of the adequacy inquiry: whether the interests of the named plaintiffs are sufficiently aligned with those of the absentees.

determination is easy to make in cases involving "mature mass tort litigation" where "claim values can be established within a relatively narrow range of uncertainty." Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 949, 950 (1995). And that consideration has obvious relevance here, for the "leading example of mature mass tort litigation involves asbestos." *Id.* at 949.

On the other hand, the court of appeals worried that non-impaired plaintiffs might be disadvantaged unless the settlement reduced current payments to presently impaired plaintiffs so as to preserve potential future recoveries for non-impaired plaintiffs (Pet. App. 50a). The district court, however, found that there *in fact* were sufficient funds to compensate *all* claimants who eventually qualified for payment. *Id.* at 172a-173a. Moreover, the district court specifically concluded that the settlement gives non-impaired plaintiffs a package of benefits that have "significant value" and compares *favorably* to their current treatment in the tort system. See pages 5-6, *supra*; Pet. App. 174a. Accord *id.* at 173a-176a, 268a. Like an insurance policy, the settlement guarantees these class members adequate compensation in the event that they do manifest asbestos-related diseases. This "insurance" model is a particularly effective means of compensating persons whose injuries, such as exposure to a toxic substance, increase their risk of developing a disease in the future.

[T]he insurance model fully justifies class action settlements that trade fear of cancer and other risk-based mental distress claims for corresponding increases in scheduled payments to compensate for the accrued ultimate injury. Those who bear long-term risk but are fortunate enough never to suffer the ultimate injury benefit *more* from the trade because the insurance against such injury makes them better off than payments of damages for their mental distress.

These errors fatally tainted the Third Circuit's conclusion. In fact, this Court has noted the important role played by the Rule 23(e) fairness inquiry in ensuring that potential intra-class conflicts do not infect the settlement terms. See *Evans v. Jeff D.*, 475 U.S. 717, 738-739 (1986) (observing that Rule 23(e)'s requirement of "court approval of the terms of any settlement of a class action" is "wise[]" because it allows the court to determine whether "[t]he potential conflict among members of the class" has affected the terms of the settlement). Courts of appeals accordingly have long recognized that a court's determination that the terms of the settlement are fair presumptively establishes that the class received adequate representation. See page 29, *supra* (citing cases). Moreover, the fairness inquiry is in an important sense a better assurance of adequacy than is a determination made prior to litigation; the settlement terms offer *objective* evidence of the absence of intra-class conflicts of interest, while a before-the-fact determination necessarily is in large part speculative. See pages 28-29, *supra*.

Here, the hypothetical conflict of interest posited by the Third Circuit did not prevent the class representatives from achieving a settlement that is fair for every member of the class.<sup>24</sup> Viewing the case from the perspective of the presently impaired plaintiffs, the court of appeals was concerned that their interest in maximizing immediate payouts might be compromised by the non-impaired plaintiffs' interest in preserving funds for payment at a later date (Pet. App. 50a). The district court, however, found that *in fact* the payments to injured plaintiffs reflected "historical settlement averages from the tort system." *Id.* at 139a. That sort of

<sup>24</sup> In fact, as Professor Hazard testified and the district court specifically found, there was not even a hypothetical conflict between the presently impaired and non-impaired class members, given their common interest in securing a settlement that maximized recovery for each asbestos-related condition. Pet. App. 185a-186a, 230a-231a.

D. Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 N.Y.U.L. REV. 210, 245 (April-May 1996) (emphasis in original).

Finally, the Third Circuit's focus on hypothetical conflicts of interest obscured an overriding concern that all plaintiffs hold in common: achieving a *global* settlement. The Judicial Conference Ad Hoc Committee on Asbestos Litigation noted the "unconscionable burden" of crushing transaction costs and the extreme delay involved in trying cases in the tort system. The Committee accordingly found that "[c]lass action proceedings have the advantages of promoting efficiency and consistency and prevent whipsawing by defendants of plaintiffs' claims as well as scrambles for the assets of limited funds." *Id.* at 21-22. A class action also prevents lottery-like verdicts in which some plaintiffs receive nothing at all. Without a global settlement, all claimants would be relegated to the uncertainties and inequities of the tort system. And if it were not global, the district court found, petitioners would not enter into *any* class settlement. Pet. App. 179a-183a, 186a, 253a-254a. In these circumstances, the district court was correct in concluding that "there is no antagonism of interest" between class members (*id.* at 230a) and that the settlement is fair to all members of the class (*id.* at 115a-176a, 234a-248a).

4. *Superiority*. The Third Circuit's decision that a series of individual or state-wide suits would be superior to this class action was based primarily on its concern that "[c]onsidered as a litigation class, \* \* \* the difficulties likely to be encountered in the management of this [class] action are insurmountable." Pet. App. 54a.<sup>25</sup> But because class certification will entail a

<sup>25</sup>

The Third Circuit also based its decision that a class action was not a superior method of adjudicating these cases on its concern that notification of non-impaired plaintiffs might be inadequate. Pet. App. 56a-57a. It expressly declined to decide, however, "whether the Constitution or Rule 23 prohibits binding futures plaintiffs to a

settlement, rather than unmanageable litigation of the many tens of thousands of claims that comprise this "humongous" case (Pet. App. 42a), it is patently clear — especially in light of the district court's thorough fairness analysis — that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). See Pet. App. 227a-228a; see also *id.* at 106a-109a, 268a-271a. Given the undeniable benefits of class settlement in cases like this one, and the findings of the Judicial Conference Ad Hoc Committee, there can be no doubt that this particular class action is "a significantly improved method for delivering compensation to future victims of asbestos exposure" and "secures important gains for both sides." Edley & Weiler, *supra*, 30 HARV. J. LEGIS. at 405. It does so, moreover, in a setting where class members may opt out if they are dissatisfied. The superiority requirement therefore is amply satisfied.

## CONCLUSION

The judgment of the court of appeals should be reversed.

23(b)(3) opt-out class action" (Pet. App. 56a), and, as noted above, the district court carefully considered the notice issue and, based on the facts before it, was "confident" (*id.* at 272a) that all class members received fair notice. Moreover, the court of appeals' suggestion ignores the fact that the efficiency and fairness advantages of this settlement class action far outweigh any advantages of individual litigation.

Respectfully submitted.

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DECEMBER 1996

## Rule 1. Scope and Purpose of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

## Rule 23. Class Actions

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

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

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

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(1a)

may be altered or amended as may be desirable from time to time.

(e) **Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Statement of Alfred W. Cortese, Jr.  
On Proposed Amendments to Federal Rule of Civil Procedure 23  
Before the Committee on Rules of Practice and Procedure  
of the Judicial Conference of the United States

November 22, 1996  
Philadelphia, Pennsylvania

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I appreciate this opportunity to comment on the proposed amendments to Rule 23 and to convey the respect and admiration that my clients, colleagues and I have for the work of the rulemaking committees, and the superb professional staff that supports them. These comments are my own, but they have been shaped by active discussion of class action issues with clients, colleagues, judges and, even, opponents.

My primary purpose today will be to address a fundamental policy choice faced by the Committee in proposing these amendments. I believe that the amendments set the right tone and serve the right goals, but that they do not go far enough to achieve meaningful relief from the class action abuses the Committee set out to control. More must be done. That is not to say that the pending amendments should not go forward or that they are undesirable. To the contrary, they are an important and well-crafted start. Many have testified to that effect. But many also share my view that the amendments only begin to scratch the surface. I will not discuss the proposed amendments in detail now, but will submit further detailed comments before the end of the public comment period.

Since this Committee does not operate in a vacuum, I am sure there will be at least a moment of reflection about the impact on the rulemaking process of the Supreme Court's grant of certiorari in *Amchem Products v. Windsor* and *Adams v. Robertson*. I strongly urge you to go forward with public ventilation of the proposed amendments on the present schedule. You then will have developed a record on which to make a determination whether or not to vote out the

amendments at your April, 1997 meeting, in light of what the Supreme Court may or may not have decided at that time.

I am reasonably familiar with Amchem, having prepared and filed, along with Professor Arthur Miller, a brief on behalf of the National Association of Manufacturers as amicus curiae urging the Supreme Court to grant the Petition. I also filed an amicus brief in the Court of Appeals for the Third Circuit urging rehearing en banc. The fact that it was so difficult to achieve a consensus of N.A.M.'s members, even on the narrow issue of whether or not the Supreme Court should review the decision, caused me to consider different approaches to the problem. As the result of that experience, as well as other similar experiences working through the difficult policy issues presented by (b)(3) settlement classes, my attention focused on the default mechanism for entry of litigated class certification orders under Rule 23(c)(2).

The fundamental issue I raise today is whether a certification order should bind all members of a (b)(3) class unless they opt-out or whether it should bind only litigants who opt-in. Of course, the opt-in concept is not revolutionary or even innovative. It is an old idea which I respectfully suggest that the Committee reexamine for many reasons: the fundamental indeterminacy of the substantive law applied in Rule 23(b)(3) class actions; three decades of sorry experience with (b)(3) classes; the revolution in communications technology; the advent of lawyer advertising; and perhaps most important, recognition that the (b)(3) class action has been stretched so far beyond its intended and reasonable limits that it has become an instrument of injustice, which now inflicts enormous unintended, adverse consequences on plaintiffs, defendants, courts, and society as a whole.

A major criticism of pre-1966 opt-in classes was that courts permitted plaintiffs to opt-in after a judgment favorable to the class had been reached<sup>1</sup> -- they got the benefits without sharing the risks -- a manifestly unfair practice I am obviously not advocating. Against that background, which involves many other complexities not dealt with here, the rulemakers who drafted the 1966 version of Rule 23 naturally debated whether the new (b)(3) class they were creating should require opt-ins or opt-outs. The rulemakers chose the opt-out alternative. The original purpose of the (b)(3) class action was "to achieve economies of time, effort and expense" and to promote uniformity of decision "without sacrificing procedural fairness".<sup>2</sup> Another reason for choosing the "opt out" mechanism, later articulated by the Reporter, Professor Benjamin Kaplan, was to "tak[e] care of the smaller guy" who generally does not have much dealings with lawyers and legal formalities.<sup>3</sup> According to Judge Frankel, the 1966 Advisory Committee voted "that a non-response [to a class action notice] means inclusion rather than exclusion" because that position better protected the "smaller guy" who might have difficulty learning about the litigation and who might lack the financial and logistical wherewithal to opt-in. The experience of the last thirty years amply demonstrates that the rationale no longer justifies the rule.

Continuing attention has been paid to the "opt-in" concept since 1966. In 1972, a distinguished Committee of the American College of Trial Lawyers recommended a return to an "opt in" procedure for (b)(3) classes, observing:

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<sup>1</sup>*Union Carbide and Carbon Corp. v. Nisley*, 300 F.2d 561, 588 (10th Cir. 1962).

<sup>2</sup>*Advisory Committee Note*, 39 FRD 98, 102-3 (1966).

<sup>3</sup>Marvin E. Frankel, *Amended Rule 23 From A Judge's Point Of View*, *Antitrust L. J.* 295, 299 (August 19, 1966).

“In the Committee’s view, the current method for inclusion and exclusion of class members, “patterned after the highly successful procedures of the Book-of-the-Month Club” has created more serious problems than it purported to resolve. Contrary to the early predictions of the draftsmen that the “opt-out” provision was not a “violent change injurious to the defendant,” this section of the amended rule has resulted in the creation of vast, silent and indefinite classes which are only infrequently recognized as unmanageable and more commonly utilized to compel settlement by defendants as a form of “ransom to be paid for total peace.”[citations omitted]<sup>4</sup>

A survey that the Advisory Committee on Civil Rules conducted of federal judges and practitioners, contemporaneous with Congressional interest in class actions in the late 1970's, asked whether the survey participants would favor or disfavor “[r]eplace[ment of] the opt-out provision of 23(c)(2)(A), (B) with an opt-in requirement so that no one would be a member of a class who did not specifically request inclusion.”<sup>5</sup> Fully two thirds of the federal circuit and district court judges who responded indicated that they favored such a change, while 54% of all respondents favored the change. I might add that defense lawyers overwhelmingly approved of the change while plaintiff lawyers strongly opposed it. I suggest the concept for your reevaluation because I suspect that today support for such an approach would be surprisingly widespread.

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<sup>4</sup>American College of Trial Lawyers, Report and Recommendations of the Special Committee on Rule 23, approved by the Board of Regents, March 5, 1972 at 32. Because the American College’s prescient Report should be required reading for anyone interested in class actions, a copy is attached to this statement. It is truly “deja vu -- all over again”.

<sup>5</sup>*Responses to the Rule 23 Questionnaire of the Advisory Committee on Civil Rules, Part II, question 1 (May, 1977).*

The obvious advantage of the opt-in class is that it is much more likely to resemble a real law suit -- real claimants before the court asserting at least colorable legal claims. It can be quantified and evaluated with a fair degree of accuracy. As opt-in claims are received, an ever-increasing body of ascertainable, concrete facts will inform the decision-making of the litigants and the courts. Most important, return to an opt in default mechanism would alleviate most of the problems of management, administration, notice and settlement presented by "amorphous classes of anonymous, passive, members."<sup>6</sup>

There is inherent inequity to all litigants in a system that permits a class to be certified without any real contact between the claimant and the court or the lawyer. The class size alleged usually differs dramatically from the number of actual claims finally brought, but under the current Rule, the difference is rarely known before settlement or judgment is reached. Thus, opt-outs engender an enormously overstated universe of claims and, therefore, multiply the potential value of judgments and settlements by several orders of magnitude. An opt-in procedure, however, permits decisions to be based on accurate assessments of concrete, individually identifiable legal claims. It moves the lawsuit from the realm of abstraction into the real world, where fairness dictates it should be.

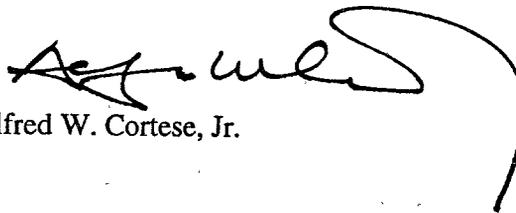
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<sup>6</sup>Statement on behalf of the National Association of Manufacturers and The Business Round Table, et al Hearings on Reform of Class Action Litigation Procedures, before the Subcomm. on Judicial Machinery of the Senate Comm on the Judiciary, 95th Cong., 2d Sess. 105 (1978).

The fine points of how the opt-in process would work need to be examined and articulated. It could be as simple as changing a few words in Rule 23(c)(2) and (3).<sup>7</sup> Such a change would complement and not replace the amendments already pending for public comment. Vigorous certification analysis and standards are essential even under an opt-in regime as is the availability of interlocutory appeal from a class certification decision.

The increased precision that the opt-in mechanism would provide moves the (b)(3) class action closer to the jurisprudential standards fundamental to Article III courts. It promotes live, concrete, injury-in-fact claims, thereby ensuring a live case and controversy and enhancing the quality of justice, while at the same time preserving the economies of scale class actions should have. Perhaps it is worth considering again.

Respectfully submitted,



Alfred W. Cortese, Jr.

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<sup>7</sup>For example, subsection (c) could be revised as follows:

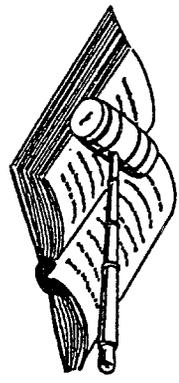
Fed. R. Civ. P. 23(c): ...

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will ~~ex~~include the member from in the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who ~~do not~~request ~~ex~~inclusion; and (C) any member who ~~does~~ requests ~~ex~~inclusion may, if the member desires, enter an appearance through counsel.

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

**American College  
of**

**Trial Lawyers**



**REPORT AND RECOMMENDATIONS  
of the  
SPECIAL COMMITTEE  
on  
RULE 23 of the FEDERAL RULES of  
CIVIL PROCEDURE**

Approved by the Board of Regents  
March 15, 1972

# American College of Trial Lawyers

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## REPORT AND RECOMMENDATIONS

of the

## SPECIAL COMMITTEE

ON

## RULE 23 OF THE

## FEDERAL RULES OF CIVIL PROCEDURE

On March 15, 1972, the report and recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure were approved by the Board of Regents of the American College of Trial Lawyers, and were ordered printed and disseminated among the Fellows of the College and other interested persons.

The Board of Regents also directed that the Committee be continued, and the Fellows are invited to submit their comments and suggestions to the Committee through the office of the College.

AMERICAN COLLEGE OF TRIAL LAWYERS  
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## Foreword

When Rule 23 was amended in 1966, it was the earnest hope of the draftsmen that the amended rule "would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."<sup>1</sup> At the same time, it was widely recognized that the impact of the amended rule could not be accurately measured, and that the rule was an experiment to be tested in the crucible of the courtroom.<sup>2</sup> Its virtues and vices were left to the later evaluation of judges and practitioners confronted with demands for relief by one or more class representatives on behalf of a substantial number of individuals "similarly situated." The proposed revision of Rule 23 contained in this study is a result of the ongoing evaluation forced by the draftsmen and the vital experience gained in five and one-half years of exposure to class actions brought under the amended rule.

The American College of Trial Lawyers Special Committee on Rule 23 began its work in August, 1971. The members of the Committee are experienced trial attorneys who practice in major centers of commercial litigation and are deeply concerned with the day-to-day impact of the fundamental issues raised by the current application of Rule 23.

The Committee sought and received the views of numerous members of the Bench and Bar in an attempt to identify the recurrent problems presented, as well as the benefits sought to be achieved by class actions. Subcommittees were appointed to study specific subdivisions of the rule, and to prepare research memoranda of their findings. The memoranda in support of their recommendations were submitted to, and debated by, the full Committee at a series of meetings held in November and December, 1971. In January of this year, Professor Faust F. Rossi of the Cornell University Law School, as reporter for the Committee, undertook the task of editing the voluminous materials prepared during the Committee's study of Rule 23.

The initial focus of the Committee's study was to determine whether the amended rule had achieved the major goals set forth by the draftsmen in 1966, and, in particular, whether it had resulted in judicial economy without abandoning traditional, procedural fairness. In that connection the Committee, with the cooperation of the Chief Judge of the United States District Court for the Southern District of New York, undertook a statistical study of all civil dockets in the Southern District of New York from July 1, 1966 to December

<sup>1</sup>Advisory Comm. Note, 39 F.R.D. 98, 102-03 (1966).

<sup>2</sup>See Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 52-53 (1965); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 Harv. L. Rev. 356, 375-400 (1967).

## II

1, 1971. After reviewing the 29,673 civil dockets in that period, the Committee concluded that the alarming rise in the number of class actions in the Southern District alone raised a substantial question as to whether judicial chaos, rather than judicial economy, was not the end product of the amended rule. Such a result was viewed by the Committee with particular concern since Chief Justice Burger had recently warned that the judicial system had reached a point of crisis.<sup>3</sup> Substantially contributing to that crisis is the overwhelming expansion of massive class actions which now threatens the effective functioning of the District Courts. As one beleaguered trial judge put it:<sup>4</sup>

... [U]nless prudence and caution are exercised soon by the Bench and Bar, the Class Action device can be transformed from a useful tool to an engine of destruction.

The entire thrust of the amended rule—to foster economy by consolidating numerous actions that would have been brought individually—seems in danger. In practice the rule has resulted in encouraging the commencement of many class actions which the framers of the rule never intended or foresaw.

Moreover, due to the inherently unmanageable nature of certain class actions, some courts have exhibited a tendency to overlook fundamental procedural and substantive rights of the party opposing the class in order to implement what are claimed to be the policies underlying the provisions of Rule 23. Thus the rule becomes workable only in those instances where traditional notions of equity and fairness have been temporarily abandoned. Therefore the Committee concluded that in five and one-half years of operation under amended Rule 23, its vices had proved more visible and tenacious than its virtues.

In light of the rule's failure to achieve its stated goals and, perhaps more importantly, because of the undesirable by-products which have developed during the course of the class action "experiment,"<sup>5</sup> the Committee proposes a revision of Rule 23. The revisions total six in number but may be said to fall into three major categories. In the first instance it is recommended that additional guidelines be provided to clarify the predominance of common questions of law or fact requirement for maintenance of class actions.

<sup>3</sup>Burger, *The State of the Judiciary—1970*, 56 A.B.A.J. 929 (1970).

<sup>4</sup>*Smith v. Beneficial Finance Co.*, Civil Nos. 860-71, 861-71, 862-71 (D.N.J. filed June 28, 1971) (oral opinion).

<sup>5</sup>Professor Milton Handler has described the present class action Rule as a form of "legalized blackmail" in that it utilizes the threat of unmanageable and expensive litigation to compel settlement. Handler, *The Shifts From Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 Colum. L. Rev. 1, 9 (1971).

## III

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Secondly, modification of the method for determining inclusion or exclusion of individual class members is urged. Finally, the Committee seeks changes to facilitate dismissal of the action in circumstances where the danger of collusion between the parties is nonexistent. The remaining revisions have been suggested in order to assist in implementing these major changes.

The revisions are designed as a further step toward the as yet unrealized goals of judicial economy and uniformity of result without the present sacrifice of procedural fairness. The experience of the second half-decade may ultimately dictate further study and change of the class action rule, but the compelling problems of the present should not be bequeathed as an unwanted legacy to future generations of the Bench and Bar.

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REVISED DRAFT OF RULE 23

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

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

(1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

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

(3) the court finds that the questions of law or fact common to the members of the class predominate over any question affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. [Common questions of law or fact shall not be deemed to predominate over questions affecting only individual members, if the court finds it likely that final determination of the action will require separate adjudications of the claims of numerous members of the class, unless the separate adjudications relate solely to the calculation of the amount of damage.] The matters pertinent to the findings include: (A) the interest of members of the class in individual controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action, [including the feasibility of giving adequate notice; (E) the likelihood that damages to be recovered by individual class members if judgment for the class is entered are so minimal as not to warrant the intervention of the court; (F) after a preliminary hearing or otherwise, the determination by the court that the probability of sustaining the claim or defense is minimal.]

(c) [Availability of Equitable Relief. In an action commenced pursuant to subdivision (b)(3), the court shall consider whether justice in the action would be more efficiently served by maintenance of the action as a class action pursuant to subdivision (b)(2) in lieu of subdivision (b)(3).]

(d) Determination by Order Whether Class Action to Be Maintained; Notice; Judgment; Actions Conducted Partially As Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained [and, in an action determined pursuant to (b)(3), shall find the facts specially and state separately its conclusions thereon.] An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances. [Individual notice [shall be given] to all members who can be identified through reasonable effort. The notice shall [in the discretion of the court] advise each member either that, (A) the court will exclude him from the class [unless by a specified date he requests to be included and if he so requests to be included he may, but need not, enter an appearance through his counsel; or (B) (i) that the court will include him in the class unless by a specified date he requests to be excluded from the class; and, (ii) that under this alternative each member who does not request exclusion shall file by a specified date a statement in the form therein prescribed of the loss or injury claimed by him; and (ii) that failure to file such statement as required will be grounds for the entry of judgment dismissing any claim that he may have. The notice shall further provide under either of the foregoing alternatives that the judgment, whether favorable or not, will be binding on all members included in the class.]

(3) [In any class action maintained under this rule, no judgment shall be entered in favor of a class or any member thereof for a sum of money or for the disposition of money or any other thing capable of delivery unless the judgment identifies by name and address each member

of the class who is entitled to recovery. Any other judgment entered in a class action shall comply with the following rules: (A) a judgment, in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. [(B)] a judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (d)(2) was directed, and who [have been included in the class], and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(e) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice may be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of the members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) [allowing reasonable discovery by the party opposing the class as against members of the class which may commence, for good cause shown, before a determination by the court as to whether the action is to be maintained as a class action; (6)] dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

[(f)] Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs [, except that if the dismissal is to be without prejudice or with prejudice to the class representative only, then such dismissal shall be ordered without notice thereof if there is a showing that no compensation in any form has passed directly or indirectly from the party opposing the class to the class representative or the class representative's attorney and that no promise to give any such compensation has been made.]

## PART II RATIONALE FOR REVISION

Rule 23 of the Federal Rules of Civil Procedure was extensively rewritten in 1966 to alleviate the many interpretative problems of its predecessor. The new rule has been successful in providing escape from conceptually defined categories and in supplying some guidelines for court management of the class action.

The amended rule permits class actions in three situations. Paragraph (b)(1) treats the class action which is necessary because separate suits could force the party opposing the class into incompatible positions or because litigation by one member of the group would, as a practical matter, be dispositive of the interests of the others. Paragraph (b)(2) permits class actions where the party opposing has acted or refused to act on grounds generally applicable to the class and is limited to instances of appropriate injunctive or declaratory relief with respect to the class as a whole. The most complicated and controversial portion of the 1966 revision is the (b)(3) action which is binding on all members of the class who do not specifically exclude themselves following notice of the action. By permitting money damages for a described but not necessarily identified class, Rule 23(b)(3) permits judgments of astronomical size for huge but indefinite groups. The utility and propriety of the (b)(1) and (b)(2) actions are beyond dispute. However, the (b)(3) class action, now almost six years old, is the subject of growing criticism.<sup>1</sup>

The language of Rule 23 supplies warning of possible difficulty. Its principal features combine to produce a potential for unmanageable litigation. The draftsmen of the rule armed the trial judge with a large measure of discretion to determine whether specific litigation should be permitted to proceed as a class action.<sup>2</sup> At the same time, the judgment in a (b)(3) class

<sup>1</sup>It has been described as a potential "engine of destruction", *Smith v. Bradford Finance Co.*, Civil Nos. 860-71, 861-71, 862-71 (D.N.J. filed June 28, 1971) (oral opinion); as "legalized blackmail", Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 Colum. L. Rev. 1, 9 (1971). Judge Lumbard, dissenting in *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 572 (2d Cir. 1968), labelled the controversy which had been sanctioned for class suit treatment as a "Frankenstein monster."

<sup>2</sup>Professor Cohn has noted in regard to Rule 23 that "the district judge, unhampered by traditional classifications, is given a large measure of discretion in balancing conflicting interests." Cohn, *The New Federal Rules of Civil Procedure*, 54 Geo. L. J. 1204, 1214 (1966). Justice Black dissented from adoption of the 1966 amendments and expressed the fear that the new rule does not afford sufficiently intelligible standards, and thus gives district judges power without bounds. Order of Feb. 28, 1966 (with amended rules), 388 U.S. 1031, 1032 (1966).

action, instead of covering class members who signify their desire to be included, embraces all class members who have not affirmatively indicated their desire to be excluded.<sup>3</sup> Additionally, the rule appears to permit a notice to class members which, though mandatory, may be informal.<sup>4</sup> Once commenced, the class action may be dismissed or settled only upon similar notice to all members in order to prevent collusion between class representatives and named parties opposing the class. Taken together, these features pose the risk of tying huge numbers of people into mass litigation through inaction after a costly notice procedure which may ultimately prove to be constitutionally inadequate; moreover, such litigation may be discontinued only with considerable difficulty.

The potential difficulties might have been avoided by cautious judicial interpretation of the rule. Predictions that "b(3) was well confined" and that there would not be "very many actions which the court permits to be maintained as (b)(3) class actions" have "proved quite ill-founded."<sup>5</sup> Admonitions that the rule "should be given a liberal rather than a restrictive interpretation"<sup>6</sup> and that "if there is to be an error made, let it be in favor and not against the maintenance of the class action,"<sup>7</sup> led Professor Wright to warn:

But if they encourage courts to allow maintenance of class actions in controversies that are unmanageable by this device, the rule may come into disrepute even for cases to which it is well suited.<sup>10</sup>

Moreover, in the early years of judicial interpretation, an additional justification for promotion of class actions developed. The original avowed twofold purpose of the (b)(3) action was "to achieve economies of time, effort and expense" and to promote uniformity of decision "without sacrificing procedural fairness."<sup>11</sup> Judicial opinions added a third, saying that the class

<sup>3</sup> Fed. R. Civ. P. 23(c)(2), (3).

<sup>4</sup> Rule 23(c) leaves the manner of notice to be worked out by the court.

<sup>5</sup> Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 Harv. L. Rev. 356, 395 (1967).

<sup>6</sup> Wright, *Recent Changes in the Federal Rules of Procedure*, 42 F.R.D. 557, 567 (1965).

<sup>7</sup> C. WRIGHT, LAW OF FEDERAL COURTS 312 (2d ed. 1970).

<sup>8</sup> *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 563 (2d Cir. 1968).

<sup>9</sup> *Espin v. Hirsch*, 402 F.2d 94, 99 (10th Cir. 1968); *Green v. Wolf Corp.*, 406 F.2d 291, 298 (2d Cir. 1968).

<sup>10</sup> C. WRIGHT, LAW OF FEDERAL COURTS 307 (2d ed. 1970).

<sup>11</sup> Advisory Comm. Note, 39 F.R.D. 98, 102-03 (1965).

action "provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation."<sup>12</sup> Little was made of the conflict between the goals of economy of judicial effort on the one hand and the desire to provide a forum for small claimants on the other.<sup>13</sup>

The conclusion of this Committee is that Rule 23, as written and as applied over the last half decade, has failed to achieve its purposes. We suggest that in the areas of judicial economy and fairness to the parties, the experienced results have been directly contrary to the intended purposes. The (1) (3) class suit has mandated heavy expenditures of judicial time, effort and expense. The expenditures have been sustained only by sacrificing procedural and substantive fairness to the party opposing the class. Nor does it appear that these burdens can in any sense be justified by the limited benefits accruing to class claimants.

#### A. THE JUDICIAL BURDEN: CAUSES AND EFFECT

In recent years the massive class action has become increasingly common. Complaints have been filed on behalf of all subscribers of business telephones in New York County,<sup>14</sup> all Master Charge credit card holders similarly situated,<sup>15</sup> all consumers of gasoline in a given state or states,<sup>16</sup> all homeowners in the United States,<sup>17</sup> and even all people in the United States.<sup>18</sup> There has been an unquestionably sharp increase in mass litigation. How did it happen that the original object of the rule—"to get at the cases where a class action promises important advantages of economy of effort"<sup>19</sup>—has been frustrated?

The most obvious answer is that so far the emphasis has not been on judicial economy but rather upon using Rule 23 as a device to open the federal

<sup>12</sup>*Eisen v. Carlisle & Jacquin*, 391 F.2d 555, 560 (2d Cir. 1968). See Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. Ind. & Com. L. Rev. 501 (1968).

<sup>13</sup>Withers, *Amended Rule 23: A Defendant's Point of View*, 10 B.C. Ind. & Com. L. Rev. 515 (1968).

<sup>14</sup>*United Equities Company v. New York Telephone Co.*, Civil No. 70-4379 (S.D.N.Y. 1971).

<sup>15</sup>*Rohrer v. Chemical Bank New York Trust Co.*, . . . . F. Supp. . . . . 40 U.S.L.W. 2541 (S.D.N.Y. 1972). The number of card holders in the class was estimated at 130,000.

<sup>16</sup>*Hawaii v. Standard Oil Co.*, 301 F. Supp. 982 (D. Hawaii 1969), *rev'd on other grounds*, 431 F.2d 1282 (9th Cir. 1970), *aff'd*, 40 U.S.L.W. 4246 (March 1, 1972); *City of Philadelphia v. American Oil Co.*, Civil No. 647-68 (D.N.J. 1968). The cases in this and the following two footnotes are cited in *Handler*, *supra* note 5, at 6 nn. 28-30.

<sup>17</sup>*Mangano v. American Standard Inc.*, Civil No. 69-861 (E.D. Pa. 1969).

<sup>18</sup>*Handy v. General Motors, Inc.*, Civil No. 69-1548-R. (C.D. Cal. 1969).

<sup>19</sup>Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 Harv. L. Rev. 356, 390 (1967).

courts to literally millions of small claimants.<sup>20</sup> This in turn has been chiefly made possible by two features in the language of the Rule which the Committee suggests are ripe for revision. These are the absence of more restrictive requirements as a condition to finding that common questions of law and fact predominate under (b) (3) and the "opt-out" feature of (c) (2) which make silent parties of all members of the class who fail to respond to notice.

#### (1) Misapplication of the Predominance Requirement

Rule 23(b) (3) requires, as a prerequisite to a class action, a court finding that the questions of law and fact common to the members of the class "predominate" over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. This "predominance" requirement, like many other requirements of the rule, is quite general and imprecise. Its proper application must necessarily depend upon the realization that its function is to guarantee judicial economy by reducing the number of suits that arise from a wrong common to many parties. A too liberal application of this requirement, without considering the limiting purpose of the rule, can easily transform any litigation into an unmanageable burden which will overwhelm judicial machinery and impose unfair and even coercive pressures upon the parties.

The ideal class action is one in which each member has a cause of action identical as to all factual and legal issues of liability and damage with that of his fellow class members. Even if theoretically possible, however, such a situation is practically nonexistent; and the question in any particular case is the extent to which the court will recognize the existence of individual questions affecting particular class members and still accept the common questions as predominating.

Even where there is a common wrong and therefore a common issue on liability, in practically all cases the damages suffered by different members of the class will tend to differ at least in amount. Where the damages are capable of mathematical or formula computation, the class action comes rather close to an ideal one and there is certainly no question of the lack of "predominance" of the common questions. Where, on the other hand, the damages are based upon individually applicable questions of law or fact, and the position of every member of the class is entirely different from that of every other member, it may be questionable whether there is a "predominance" of common questions under the rule. This, of course, depends upon the degree of variation, but in such a case there may well be a tendency for a court to

<sup>20</sup>Pomerantz, *New Development in Class Actions—Has Their Death Knell Been Sounded?* 25 Bus. Law. 1259 (1970).

relegate the problem of individual damage determination to the procedural device of split trials at some appropriate later time. Such a court, however, is simply closing its eyes to the fact that the purpose of the rule no longer applies in such a situation and it is entering into a procedural morass. Recognizing that the purpose of the rule is to promote judicial efficiency by reducing the number of suits arising from a common wrong, a better approach would be to recognize that in such a situation the common questions do not "predominate". At the present time, however, there would seem to be very few courts which would be expected to take this latter approach where only the damages vary.

Where, however, a court proceeds further to recognize "predominance" when there are individual questions not only on the issue of damages but on one or more of the controlling issues of liability, it is applying the class action rule where it was not intended to apply and is surely creating an unmanageable situation. In such a case the wrong is just not common to all class members. To recognize this fact is not to acknowledge a failure of justice or judicial administration. It is simply to recognize that the representative party who has the prerogative of defining the class has, for whatever reason, overreached himself in so doing. A court, however, need not and should not accept as unchangeable such an exercise of the representative party's prerogative. It should either refuse to accept the action as a class action or require the class to be redefined in such a way that the common questions do predominate.

The most fertile areas for misuse of the class action by reason of irresponsible class definition have proven to be the antitrust and the securities cases. An allegation of an antitrust conspiracy is highly attractive as a common nexus upon which to base a class action. The issue of liability, however, may well involve the further question of the particular impact of that conspiracy in the defined market.<sup>21</sup> Where this phase of liability determination depends upon individual questions not common to the defined class, the only accomplishment of the class action is to determine the conspiracy. All other determinations must necessarily be left for individual and separate treatment. In such a case there is really no common wrong to support a class action; and the reason there is no common wrong is that the representative class member has overreached himself in defining the class and the wrong.

Similarly, in securities litigation the questions most often involved are misrepresentation, reliance and damage. The first two questions comprise the issue of liability. Yet in the case where the circumstances of the misrepresentation are such that the question of reliance is necessarily an individual one to be separately decided with respect to each member of the class, there is simply

<sup>21</sup>15 U.S.C. § 15 (1970); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 488-89 (1968).

no common wrong and, therefore, no predominating common question. This again is usually due to an overreaching definition of the class and of the wrong by the representative class member.

In all such instances, a court in accepting an action as a class action is doing very little more than establishing a declaratory judgment procedure on the limited common question. It is necessarily leaving for some hopeful future solution, usually described as split trials but anticipated as settlement, the problems of trying the possibly vast number of individual cases that it has accepted upon the unilateral determination and insistence of the representative class member. However attractive any limited common nexus may be in such a situation, it clearly does not "predominate" so as to provide a fair and efficient adjudication of the controversy. It results in a creation and multiplication rather than a reduction of individual cases.

Unfortunately, many decisions show too little appreciation for these fundamental considerations. In antitrust class actions courts leap quickly to the conclusion that since the alleged violation of law question is common to all members of the class, the common question predominates and individual questions of impact or damage to business or property can await subsequent trials.<sup>22</sup> In securities class actions, a common misrepresentation is deemed to predominate over the separate issues of reliance and damage which are to be held for separate trials later.<sup>23</sup>

But how will the judicial machinery survive these individual trials and particularized fact determinations for each individual class member? Consider Professor Handler's summary of the full extent of this burden:

First, the court must determine the propriety of the class, define it, and identify its members. Then notice must be sent to all potential class members. The numerous inquiries engendered by the notice must be answered. The responses of members opting out must be processed. Once these administrative tasks are completed, the court must then oversee discovery on a gargantuan scale. Defendants will be entitled to transaction data from all class members. They may serve interrogatories or requests to admit, or they may take depositions. Furthermore, since the seventh amendment guarantees defendants a constitutional right to a jury trial with respect to each damage claim asserted, at some point there will have to be either a massive trial lasting for

<sup>22</sup>See, e.g., *Strigel v. Chicken Delight, Inc.*, 271 F. Supp. 722 (N.D. Calif. 1967); *Minnesota v. U.S. Steel*, 44 F.R.D. 559 (D. Minn. 1968).

<sup>23</sup>*Green v. Wolf*, 406 F.2d 291, 295 (2d Cir. 1968).

years or a multitude of mini-trials with a new jury having to be empaneled in each instance unless trial by jury is waived. True, the facts may permit the court to sever the issue of liability and thus postpone discovery and trial on damages; but if the case is to be litigated, this problem will have to be faced eventually and the load the court will have to carry will not be reduced by the delay.<sup>24</sup>

Consider a class of 100,000 shareholders as plaintiffs in a securities action. Even if discovery and trial or even just the administrative processing of each claim were to consume only one hour, it would require the consumption of 100,000 hours of judicial time. Assuming the luxury seldom enjoyed by most judges of an eight hour work day and five day work week, the class action would require fifty years to conclude. Thus when a court in a security case declares a case to be a class action because of the "predominance" of the issue of misrepresentation and then holds that the issues of reliance and damages will be tried later, that court is guilty of self delusion because the court fully recognizes it cannot give to the defendants the years of trial time necessary to present evidence on such issues.

## (2) Size and Indefiniteness of the Class

A further significant escalation of the litigation process results from the "opt-out" procedure for determining class members. Under Rule 23(c) (2) all members of a described (b) (3) class who do not "opt-out" in response to notice are bound by the results of the action. This provision represents a modification of what had, prior to the 1966 amendment, been characterized as the "spurious class action". The term "spurious class action" was used in former Rule 23 to describe something which was not a class action in any proper sense. Such actions were merely a form of permissive joinder since the class consisted solely of named parties. Thus, a pending "spurious class action" involved only those members of the class who had "opted-in" and a decision therein was generally held to bind only those members of the class who were before the court.<sup>25</sup>

The change in class action theory represented by amended Rule 23(b) (3) and (c) (2) was expected to be beneficial in that (1) *res judicata* effect would be achieved over a substantially greater percentage of class members<sup>26</sup> and

<sup>24</sup>Handler, *supra* note 5, at 7.

<sup>25</sup>Under cases such as *Union Carbide and Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1961), however, this rule was changing and nonparties were being allowed to intervene after a judgment favorable to the class had been recovered. See 3B Moore, *FEDERAL PRACTICE* § 23.55 at 1160 n. 39, for cases allowing such "one-way intervention."

<sup>26</sup>This advantage has been described as illusory at best. Leader, *Threshold Prerequisites to Securities Fraud Class Actions*, 48 Tex. L. Rev. 417, 424 (1970).

(2) the threat of significant numbers of actions in varied jurisdictions based on the same causes of action would be substantially reduced. The practical effect of the "opt-out" feature, especially its corollary—that all members of the class who do not respond to notice become silent parties whose interest and potential claims are unknown—has been the creation of untoward pressures on the operability of our judicial offices. What has been done, quite simply, is to induce a multitude of disinterested claimants to join the litigation at a time when federal courts already have more business than they can handle.

Another difficulty stems from indefiniteness of most classes due to the tendency of class members not to respond to notice of the pendency of an action. One of the more experienced class action attorneys, Abraham L. Pomerantz, has stated that "[e]ven where notice was mailed to each member of the class, experience shows that less than 1% of the class requests exclusion."<sup>27</sup> In *North Carolina v. Chas. Pfizer & Co.*,<sup>28</sup> notice was mailed to 2,000,000 class members. 12,000 responses were received, of which 90% were "opt-outs". Thus, only 0.6% of the class responded to notice.

An attorney considering the maintenance of a massive class action can be, therefore, reasonably sure few members of a class will respond to notice, much less "opt-out". He can, by describing a broad class, be assured of a large number of instant clients. Under damage theories of recent popularity,<sup>29</sup> and based on the simple fact that "cases [under amended Rule 23] which have gone through the crucible of a complete trial are not readily to be found",<sup>30</sup> the allegation of a broad class both increases the attorney's potential fee and enhances his bargaining position in settlement negotiations. Potential recovery of each individual in an alleged class may be small. But so long as the number of those wishing to assert such claims remains speculative, potential damages must be assessed on the assumption that most or all of the class who did not "opt-out" are interested in recovery.

<sup>27</sup>Pomerantz, *New Developments in Class Actions—Has Their Death Knell Been Sounded?* 25 Bus. Law. 1259, 1266 (1970).

<sup>28</sup>See *In Re Coordinated Prelit Proceedings in Antibiotic Antitrust Actions*, 5 Trade Reg. Rep. (1971 Trade Cas.) ¶73,699 at 90,909 (S.D.N.Y. May 5, 1971).

<sup>29</sup>Under a "fluid class recovery" the Court applies the unclaimed fund for damages in a manner calculated to reimburse members of the class indirectly (although the benefit may inure to those not technically members of the class). Thus, in *Bechtick v. Public Utilities Comm.*, 318 F.2d 187, 203 (D.C. Cir. 1963), overcharges by a public transit company were held not to be refundable directly to individual claimants, but a fund was created to be used by the appropriate Commission in a manner beneficial to public transit users generally. In the antibiotic antitrust case settlement, *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971), to the extent the fund created for the consumer class is not exhausted by filing of claims, the various states are claiming the remainder for use as the Court may direct.

<sup>30</sup>*Morris v. Burchard*, 51 F.R.D. 530, 536 (S.D.N.Y. 1971).

This in turn poses very substantial problems in management of the class action, especially regarding the mechanics of notice. The larger the class, the more difficult and costly the notice and the greater the temptation to dilute the 23(c)(2) requirement of "individual notice to all members who can be identified through reasonable effort."<sup>31</sup> Where the alleged class consists of tens of thousands the burden and cost of preparing and mailing notices, responding to inquiries, and tabulating returns would surely exhaust the budget of any district. As one court has announced,

Observation and long experience have taught us that the mere service of notice upon the hundreds who would be involved is far more likely to be the beginning, rather than the end, of frustrating complexities. Inquiries inevitably ensue, one upon another, which must be answered or ignored. To answer involves the Court in direct correspondence with prospective litigants in a pending case, a very questionable judicial undertaking.<sup>32</sup>

In any event the process may have to be repeated several times since 23(d)(2) sets forth circumstances in which additional notices to all class members may be desired. Moreover, as the size of the class increases the difficulty of notice, the more probable it becomes that expedient shortcuts such as selective notification or publication will prove constitutionally ineffective to bind the class members.<sup>33</sup>

<sup>31</sup>As exemplified by the recent decision on remand in *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253 (S.D.N.Y. 1971), the Rule 23(c)(2) requirement of notice in (b)(3) class actions has been diluted. Although recognizing that approximately 2 million class members were identifiable, the court required that individual notice be sent to the approximately 2,000 of them who had ten or more transactions during the pertinent period, and to another 5,000 class members selected at random. *Eisen, supra* at 267. This "selective notification" procedure seems to have been established to overcome the otherwise insurmountable barrier of "cost of notice" presented in this large class action involving an imprecisely defined class.

<sup>32</sup>*School District of Philadelphia v. Harper & Row Publishers, Inc.*, 267 F. Supp. 1001, 1005 (E.D.Pa. 1967).

<sup>33</sup>Compare the approach in *Eisen* described at note 31 *supra*, with the requirements of *Hansberry v. Lee*, 311 U.S. 32 (1940) and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Consider the language of Judge Goddard, specially concurring in *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1127 (5th Cir. 1969):

... when the problem [of sufficient notice] is multiplied many-fold, counsel, and at times the courts, are moving blithely ahead tacitly assuming all will be well for surely the plaintiff will win and manna will fall on all members of the class. It is not quite that easy.

### (3) Impact on Civil Dockets

The Committee, in an effort to measure the statistical effect of the (b)(3) action upon the litigation process, sought to discover the number of class actions brought under the rule, the number still pending and their impact on court dockets. Federal Courts in major cities and the Administrative Office of the Federal Courts in Washington, D.C. were contacted. No statistics were available. Accordingly the Committee was compelled to limit its study to one district and the Southern District of New York was selected. Since the Southern District kept no records on class suits until July 1971, and since examination of all complaints filed since 1966 was not feasible, the only alternative was to examine docket entries in all 29,673 cases brought since July 1966. This technique was not completely satisfactory since an entry designating the suit as a class action would not appear unless a motion relating to class action status had been made. Even with this limitation, the docket entries disclose the following picture of class action litigation:

Year	Filed	Still Pending
1966 (6 mos.)	90	48
1967	118	71
1968	214	137
1969	226	160
1970	281	208
1971	410	379
Totals	1339	1003

The figures indicate that since initiation of the amended rule, at least 1,339 class actions have been brought in the Southern District.<sup>34</sup> Almost four times as many were commenced in 1971 as were started in 1967, the first full year under the rule. Also of significance is the fact that of the class actions which were commenced in 1966, more than 53% were still pending five years later.

The docket entries naturally gave no indication of size of class or manageability of the actions. We do know however that included in the statistics is *Eisen v. Carlisle & Jacquelin*,<sup>35</sup> which is a striking example of the scope of the class action rule. In *Eisen*, plaintiffs brought a class action on behalf of persons who engaged in odd-lot transactions on the New York Stock

<sup>34</sup>Included in the figures are the 161 cases in the Southern District under the Multi-District Litigation Act and the Antibiotic Antitrust Action, itself a Multi-District case for which a separate docket is kept in the Southern District under a grant by the Ford Foundation and which involved 153 cases, 151 of which are class actions. Of the other Multi-District cases, 115 or more than 71% of the 161 cases are also Class Actions.

<sup>35</sup>52 F.R.D. 253 (S.D.N.Y. 1971).

Exchange between 1962 and 1966. Plaintiffs alleged that, pursuant to a conspiracy to monopolize odd-lot trading, defendant brokers charged an excessive differential to purchasers in odd-lot transactions. The District Court determined that approximately 6 million persons situated in every state of the United States and generally throughout the "non-communist countries" of the world were involved in such transactions during the relevant period. Of this number, approximately 2 million members of the class could be individually identified.

As might be expected, plaintiff was not required to bear the cost of mailing individual notices to the 2 million identifiable class members.<sup>36</sup> Sufficient notice of the pendency of *Eisen* was ultimately determined to be individual mailings to the approximately 2,000 members with 10 or more odd-lot transactions, to 5,000 others selected at random from the 2,000,000 identifiable class members, to all member firms of the New York Stock Exchange and to all commercial banks with "large trust departments". The remainder of the class would be notified by publication on one day in each of two consecutive months in *The Wall Street Journal*, *The New York Times*, *San Francisco Chronicle*, *San Francisco Examiner* and *Los Angeles Times*.

Finally, the court estimated potential gross damages at a minimum of \$22,000,000 (based on an arbitrarily selected 5% figure for the overcharge applied to average transactions during relevant period) and a minimum of \$60,000,000 (based on defendant's actual reduction of the differential in 1966). The eventual need for individual trials on damage claims was held to be unlikely since gross damages could be computed based on average transactions. To the extent that class members do not file proofs of claim exhausting a fund created to cover damages, the court anticipates the use of a "fluid class recovery."<sup>37</sup>

Since it is not unreasonable to expect at least 99% of the described class in *Eisen* to ignore notice of the pendency of the action, plaintiff's counsel, if the action is allowed to continue, will have acquired over 5,000,000 "silent" clients. Assuming only 1% of the 6,000,000 class members "opt-out", the Clerk of the Southern District of New York may have to process as many as 60,000 responses to notice. Many inquiries other than "opt-outs" may also be addressed to the Court and may require response. Defendants, therefore, must approach the question of litigation or settlement in terms of potential loss of between \$22 million and \$60 million. Assuming the minimum recovery, and that each claimant is an "average shareholder" engaging in odd-lot trans-

<sup>36</sup>52 F.R.D. at 269. Total cost of individual notice to all identified class members, publication and administration by the Court, was calculated to be approximately \$500,000.

<sup>37</sup>See note 29 *supra*.

actions, the recovery for each member of the class would be \$3.90.<sup>38</sup> The individual recovery would, of course, be even less since \$500,000 in costs of notice and administration (assuming liability is proven), plus a substantial attorney's fee, would be deducted therefrom. It was this case which Chief Judge Lumbard described as a "Frankenstein monster posing as a class action."<sup>39</sup>

It is clear that in *Eisen* the class involved 6 million claimants, and in several other Southern District suits the classes were each in excess of 1 million.<sup>40</sup> If a conservative estimate of 300,000 is used as the average class size for the 1,339 cases brought in the Southern District, then one must conclude that one federal district has been compelled to handle the claims of more than 400 million people, almost twice the population of the United States. If the past rate of increase in class action filings continues, it would be wise to ponder the admonition of Chief Justice Burger that "the federal court system is for a limited purpose and lawyers, the Congress and the public must examine carefully each demand they make on that system."<sup>41</sup>

## B. THE PROCEDURAL AND SUBSTANTIVE UNFAIRNESS

At this point one might appropriately ask—if Rule 23 as drafted and interpreted has produced such an escalation of cases and claimants, how have the federal courts survived? Why is it that postponed separate trials on issues of reliance or impact or damages never occur? The answer is simple but far from satisfactory.

The existence of a massive, unidentified class and the possibility of thousands of individual particularized fact hearings are spawned by the (b) (3) class action device. These same features usually leave defendants opposing the class no reasonable alternative other than settlement, regardless of the merits of the claims against them.

The effect on defendants of the existence of a large silent class of potential claimants is demonstrated by the fact that since 1966 no antitrust or

<sup>38</sup>The court's preliminary estimate of a 5% illegal overcharge on an average odd-lot differential of \$5.18 would entitle the average individual class member (who paid the differential on five transactions for a total odd-lot differential of \$25.90) to a recovery of approximately \$1.30. This amount would then presumably be troubled for a total recovery of \$3.90 for individual class members who paid the alleged illegal overcharge during the period from 1962 to 1966.

<sup>39</sup>*Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 572 (2d Cir. 1968) (Lumbard C.J. dissenting).

<sup>40</sup>See *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253 at 259 (S.D.N.Y. 1971).

<sup>41</sup>Burger, *The State of the Judiciary—1970*, 56 A.B.A.J. 929, 933 (1970).

securities class suit has yet proceeded through trial to an actual determination of damages.<sup>42</sup> Usually defendants must analyze litigation without really knowing how many of a described class will be interested in prosecuting their individual claims, and with the knowledge that courts must, and do, devise theories which will avoid individual trials. The possibility of separate trials on individual issues of impact or reliance or damage is unentertainable. Thus pressures to settle are generated by the undefined and potentially massive liabilities involved, as well as by the interest of the overburdened judiciary in disposing of threatened multiple litigation on some basis other than trial. The courts, thrust into the role of a protector of the public conscience at the expense of their judicial function, are being forced to relieve these pressures on the basis of practicality rather than sound legal theory. This leads to an abandonment of precedent and principle and results in unpredictable decisions.

Accordingly, at least some of the unmanageability problems of inappropriate class actions have been finessed by settlement. Dissatisfaction with this phenomenon has been appropriately expressed.

Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure—it is a form of legalized blackmail. If defendants who maintain their innocence have no practical alternative but to settle, they have been de facto deprived of their constitutional right to a trial on the merits. The distinctions between innocent and guilty defendants and between those whose violations have worked great injury and those who have done little if any harm become blurred, if not invisible. The only significant issue becomes the size of the ransom to be paid for total peace.<sup>43</sup>

The plight of defendants was fully exposed in the antibiotic drug cases.<sup>44</sup> The trial court, after approving the original 100 million dollar settlement, noted that plaintiffs' chances of recovery were slight. Judge Wyatt specifically assessed the merits of plaintiffs' class actions in these terms:

A careful study of those records leads to a conclusion that the chances of recovery in any of these cases are no better than 50-50 and probably should more realistically be

<sup>42</sup>*Morris v. Burchard*, 51 F.R.D. 530, 536 (S.D.N.Y. 1971).

<sup>43</sup>*Handler, supra*, note 5 at 9.

<sup>44</sup>*West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971).

called slight. The more significant reasons for this conclusion will be mentioned. . . .

After two exhaustive and lengthy investigations by two agencies of the government, there are no findings of any misconduct by any of the defendants which would show, even prima facie, a violation of the antitrust laws. The only findings of misconduct are those by the Commission that Pfizer and Cyanamid each in substance committed a fraud on the Patent Office; the Commission however, found that no conspiracy in this respect between Pfizer and Cyanamid had been proven. . . .

Not only is it uncertain that any plaintiff can secure a jury verdict. It is also uncertain whether judges or justices will find the evidence sufficient to support any such verdict.<sup>45</sup>

The rule has failed to fulfill its promise of achieving economy and decisional uniformity "without sacrificing procedural fairness."<sup>46</sup>

Even more significantly, there are judicial indications that the substantive law is being changed in order to implement the procedural provisions of Rule 23. Of course this should not happen. The Rules Enabling Act provides a clear prohibition on the effect given the Federal Rules of Civil Procedure:

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.<sup>47</sup>

The Supreme Court elaborated in *Snyder v. Harris*,<sup>48</sup> pointing out that Rule 23 cannot alter substantive legal requirements.

In practice, however, some courts appear willing to sacrifice substantive legal doctrine in order to facilitate implementation of the class action rule. Examples are available in both the antitrust and securities areas.

With respect to treble damage claims asserted under section 4 of the Clayton Act,<sup>49</sup> no claimant can recover unless he establishes that he has been

<sup>45</sup>314 F. Supp. at 741-743.

<sup>46</sup>Advisory Comm. Note, 39 F.R.D. 98, 102-03 (1966).

<sup>47</sup>28 U.S.C. § 2072 (1970).

<sup>48</sup>394 U.S. 332, 336 (1969).

<sup>49</sup>15 U.S.C. § 15 (1970) makes the treble damage suit available to any person who has been "injured in his business or property" by reason of anything forbidden in the anti-trust laws.

injured in his business or property and unless he proves the specific amount of that injury. The burden applies whether a claimant is an individual plaintiff or a member of a large class. In a horizontal price-fixing case, even if the class prevails on the common issue of existence of a conspiracy, each class member still must show that he purchased a product involved in and affected by that conspiracy, that the product he purchased was sold by defendant at a price which included an illegal overcharge and that the overcharge reached and was absorbed by him.<sup>50</sup> All this is clear. Yet, in the treble damage class suit, some courts seem to believe that if the antitrust violation is established, there should be a class recovery without the necessity for separate determinations on the other substantive elements of the plaintiffs' cause of action.<sup>51</sup> The emphasis shifts from an analysis of plaintiffs' claims to suggestions that, since defendant has apparently wronged some group, defendant should pay everyone included in the plaintiffs' class whether they were harmed or not. Whatever appeal the policy may have in terms of prohibiting the defendant from retaining the profits of wrongdoing, it constitutes a result clearly not contemplated by section 4 of the Clayton Act. In any event, the temptation to subvert substantive law comes in this instance not from policy concerns but rather from expediency. Dilution of substantive standards is one way to escape the procedural chaos which would flow from a determination that the suit may proceed as a class action.

Another example of the frustration of substantive principles lies in the securities class action cases involving SEC Rule 10(b)(5) where the elements of the claim were traditionally considered to be misrepresentation, reliance and damage. Since the advent of Rule 23, there has been a growing tendency to question the necessity of proving reliance. This development appears expedient in the class action context because, even after resolving the common issue of misrepresentation, it is frequently a practical impossibility for courts to try the separate issue of reliance for each class member.

The modification of substantive concepts is on occasion done quite openly. Consider the decision of *Fisher v. Wolfenbarger*.<sup>52</sup> The court held first that reliance was not necessary under 10(b)(5) stating that:

... it is not necessary for the plaintiffs to establish "reliance" in order to recover under the counts of the complaint based upon the Investment Company Act of 1940, SEC

<sup>50</sup>*Hanover Shoe Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Handler*, *supra* note 5, at 7.

<sup>51</sup>*In Re Coordinated Preliminary Proceedings in Antitrust Action*, 5 Trade Reg. Rep. (1971 Trade Cas.) ¶ 73,482 at 89,962 (S.D.N.Y. Feb. 7, 1971).

<sup>52</sup>*Fischer v. Wolfenbarger*, CCH Fed. Sec. L. Rep. ¶93,235 (W.D. Ky. Oct. 5, 1971).

Rule 10b-5 and the Securities Exchange Act of 1934, or the Securities Act of 1933. See *eg.*, *Ellis v. Carter*, 291 F.2d 270 at 272-274 (9th Cir. 1961); *Royal Air Properties, Inc. v. Smith*, 312 F.2d 210 at 212 (9th Cir. 1962); *Kahan v. Rosensiel*, 424 F.2d 161 (3d Cir. 1970), *cert. denied*, 398 U.S. 950 (1970); *Espin v. Hirsch*, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969).<sup>53</sup>

This, however, did not solve all the problems inherent in the court's determination to support existence of the class since plaintiffs had alleged common law fraud claims which were before the court as a matter of pendant jurisdiction. As to these there could be no question that reliance was a disputed element. Nevertheless, the court denied defendants' request for answers to interrogatories on this issue saying that Rule 23 did not intend that normal discovery procedures be followed because "if that were permitted, then the reason for the rule would fail."<sup>54</sup> Then the trial court went further. It pointed out that "proof of actual reliance by thousands of individuals would not be feasible."<sup>55</sup> It concluded that the most appropriate procedure would be to try the issue of reliance as to the class representatives only. Inasmuch as they were typical of the class, the rights of the class as to reliance would be governed by the findings of the jury with respect to the class representatives. The justification for this curtailment of defendants' substantive rights was frankly expressed:

It is the opinion of the Court that the foregoing more nearly comports with the letter and spirit of Rule 23 than the discovery procedures advocated by the defendant. . . .<sup>56</sup>

This technique for implementing "the letter and spirit of Rule 23" is blatant but effective. The Rule 23(b)(3) requirement that common questions of fact predominate over questions affecting only individual members can always be met if the individual issues are summarily removed from the controversy.

These Rule 23 pressures to impair both substance and procedure have recently received judicial recognition:

It cannot be lightly overlooked that as a class gets larger it may transform a litigation into a gigantic burden on the Court's resources beyond its capacity to manage or effect-

<sup>53</sup>*Id.* at 91,454.

<sup>54</sup>*Id.*

<sup>55</sup>*Id.*

<sup>56</sup>*Id.* at 91,455.

tively control. The practical possibility, then, is that the use of the procedural remedy of a class suit might provide an administrative need if not, incentive, to erode and impair observance of the substantive law requirements for compensable claims under the Securities Laws.

... The harrowing experience of administering a multiple of individual trials of individual claims, of reliance, for example, seems not yet to have been faced by any trial court which has declared a suit to be a class action. It is remarkable that cases which have gone through the crucible of a complete trial are not readily to be found although Rule 23, as amended, has been in existence for about four years.

... Class action, so instinct with benefits, is also fraught with mischievous effects, capable of overwhelming the judicial machinery and of imposing both unfair burdens and untoward pressures on the participants.<sup>87</sup>

What is even more disturbing is the effect that Rule 23(b)(3) has had upon the Standards of Ethics of the profession through the tacit acceptance by the courts of clear violations of the Code of Professional Responsibility. Passing by the question of solicitation and the manner in which the plaintiff's attorneys acquire their clients and directing our attention to DR 5-103(b) of the Code of Professional Responsibility, a lawyer is prohibited from advancing or guaranteeing financial assistance to his client, except that he may advance court costs provided the client remains ultimately liable for such expenses.

Where a lawyer brings a class action and his named client has an interest of only \$70, and the cost of notices and publication run into several thousand dollars, the courts know that the lawyers are not only advancing these funds, but if they are unsuccessful, it is an economic fact that the class representative's counsel will never attempt to collect those funds from his client. In fact, when requested, the courts have refused to permit the notices to members of the class to indicate that if the class is unsuccessful the members of the class will be liable for expenses.

A recent newspaper report quoted a prominent Philadelphia attorney as stating, in connection with class actions on behalf of a number of municipalities:

I personally initiated this action. I am going to be paid out of a fund I created; there would be no fee nor any benefits to the City if I didn't take this action.

<sup>87</sup>Morris v. Birchard, 51 F.R.D. 530, 535-36 (S.D.N.Y. 1971).

The article refers to the arrangement between the City and the attorney and states:

Under the agreement, [the lawyer] would have received no fee or expense payments if he lost the case. See, *Philadelphia Enquirer, Tuesday, February 1, 1972, page 1.*

Not only is such an agreement in clear violation of the Code of Professional Responsibility, but permitting situations to develop which have the same practical effect, i.e. lawyers paying the expenses without any realistic expectation of recovery in the event that the plaintiff is unsuccessful, is demeaning to the proper standards of the profession.

### C. THE LIMITED BENEFIT TO CLASS CLAIMANTS

Criticism of Rule 23 and the judicial burden it has imposed is frequently met by a dual response. Supporters of the rule may concede that economy of effort has not been achieved but will insist that the primary mission of the class action device lies in its *terrorum* effect. The class action, it is said, provides a salutary deterrent to antitrust and securities law violations. Moreover, it affords a vehicle for compensating the small claimant, typically a consumer, who presumably has suffered too small an injury to justify his bringing an individual action.

The Committee concludes that this rationale is insufficient when weighed against the burdens of the 23(b)(3) action. Moreover, the Committee believes that the proffered justification demonstrates an inaccurate understanding of the actual results obtained in class action litigation.

It goes without saying that to speak of the *terrorum* effect of the class action constitutes an admission that it foments litigation. The defendant will not escape punishment because Rule 23(b)(3) will ensure that defendant will be sued by many who ordinarily would not use the federal courts. Of course it is not clear that Congress considered or intended that the sanctions provided for in the antitrust and securities laws were to be augmented by utilization of Rule 23. To the contrary it has been said:

... if the flood-gates were opened to permit treble damage suits by every creditor, stockholder, employee, subcontractor, or supplier of goods and services that might be affected, the lure of a treble recovery, implemented by the availability of the class suit as facilitated by the amendment of Rule 23 F.R.C.P., would result in an over-skill, due to an enlargement of the private weapon to a caliber far exceeding that

contemplated by Congress. If the antitrust laws were precise and crystallized something might be said in favor of such an enormous expansion of potential treble damage liability, speculative as the damages might be. But the fact remains that because there are few "bright lines" in the area, even experts who have devoted their entire professional lives to the practice of antitrust law often find it impossible to advise a client with any degree of certainty whether his contemplated conduct will transgress lawful bounds.<sup>58</sup>

In any event, if deterrence is the object "it certainly could be achieved by fairer, more discriminating and administratively less onerous means."<sup>59</sup> If appropriate, let Congress provide more severe penalties for antitrust and securities law violations without sacrificing the integrity and efficiency of the courts. The cost in judicial time and consequent impairment of rights of other litigants appears too high a price to pay for deterrence which can be effected through alternative means.

A final question remains—to what extent does the class action actually benefit the small claimant? It has been suggested that the mission of amended Rule 23(b) (3) is "taking care of the smaller guy."<sup>60</sup> This expression of purpose does not conform to the realities of class action practice. The Committee's major concern centers upon the 23(b) (3) class action involving the large and indefinite class. In precisely this type of class action, almost nothing actually reaches the individual class members. It has been well put by Professor Milton Handler:

... the benefit that accrues to an individual class member is frequently negligible where his claim is small and where the class is very large. If the action is litigated, the non-assessable costs of responding to discovery and the like will substantially erode, if not exceed, any recovery. In the companion case to *Snyder v. Harris*, individual claims of class members were less than ten dollars. But even if there is a settlement and a fund is established, each claimant's share is likely to be minute. First, the costs of admini-

stration, including the costs of notifying a multitude of class members, will have to be met. Then, attorneys' fees—which may run as high as 25 percent of the fund—will be deducted. The realities of a class settlement are reflected by one non-antitrust suit brought last year on behalf of 460,000 lifetime members of the Playboy Club in California. Each member of the class recovered an \$8 chit redeemable over a two-year period. The attorneys' fees—modest by antitrust standards—came to \$275,000. It is obvious that in such a case it is the attorneys, not the class members, who are the true beneficiaries and the real parties in interest. This plain fact is even more apparent in large antitrust settlements where many millions of dollars in fees are at stake and where much of the court's time is typically taken up with disputes that are significant only in terms of how those fees are to be divided. Moreover, it is the small purchasers, the supposed beneficiaries of class actions, who must pay these fees and other costs. Not only are such expenses deducted from the settlement fund which represents the class's recovery, but, as part of the defendants' costs of doing business, they will ultimately be reflected in higher prices if the defendants are able to stay in business.<sup>61</sup>

*Eisen v. Carlisle & Jacquelin* is recognized as having given special impetus to the 23(b) (3) class action. The action was started in the Southern District Court of New York in 1966. To date, there are five reported opinions or decisions<sup>62</sup> although the merits of this litigation have not as yet been considered by any court. The District Court, upon remand by the United States Court of Appeals for the Second Circuit, has made a "gestimate" as to damages suffered by an average member of the "class" and has arrived at a figure of approximately \$1.30. As the action purports to be a treble damage action, the average recovery by the average odd-lot trader for the six years in question amounts to \$3.90. If the Court is accurate in its "gestimate", the answer as to the number of claims that would be filed if plaintiff wins is a simple one: for all practical purposes, none. This is so because the cost of producing the records, if available, and typing and filing the simplest proof of claim would amount to many times the amount of the recovery in

<sup>58</sup>*Caldron v. Enterprise v. United Artist Theatre Circuit*, ... F.2d ..., (2d Cir. 1972). 5 Trade Reg. Rep. (1972 Trade Cas.) ¶73,788, at 91,330.

<sup>59</sup>Handler, *supra* note 5 at 9.

<sup>60</sup>Report of conversation with Professor Kaplan contained in Frankel, *Amended Rule 23 From A Judge's Point Of View*, 32 Antitrust L. J. 295, 299 (1966).

<sup>61</sup>Handler, *supra* note 5 at 9-10.

<sup>62</sup>41 F.R.D. 147 (S.D.N.Y. 1966).

370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967).

391 F.2d 555 (2d Cir. 1968).

50 F.R.D. 471 (S.D.N.Y. 1970).

52 F.R.D. 253 (S.D.N.Y. 1971).

the average case. The District Court also estimated that the total amount of damages suffered by the "class" of six million is somewhere between \$22,000,000 and \$60,000,000. If attorneys for the "class" are successful and are awarded the usual percentage of the recovery, they will receive at least \$5,400,000 whereas each plaintiff in the "class", if he bothers to collect the records and file a proof of claim, will receive an average of \$3.90.

It is difficult to imagine a more unproductive result in what is assumed to be a civil litigation theoretically brought on behalf of a "class" to recover damages allegedly suffered by its members. To this analysis of the probable non-recovery of the *Eisen* class, Judge Lumbard added:

If the plaintiff, who has participated in some 47 transactions over a period of years, estimates his damages at only \$70, is it not evident that the overwhelming majority of all possible plaintiffs would expect at best to receive considerably less than \$70? And what is sufficiently interesting about the expectation of such a recovery, available if at all, only after several years of litigation, to lead us to suppose that any considerable number would bother to respond to the notice? Despite articles in the May 3, 1966 edition of The New York Times and the May 4, 1966 edition of The Wall Street Journal no one has joined *Eisen* in this action. See *Berger v. Purolator Products, Inc.*, 41 F.R.D. 542, 544 (S.D.N.Y. 1966). Obviously the only persons to gain from a class suit are not potential plaintiffs, but the attorneys who will represent them.<sup>68</sup>

Similarly, in *Neuman v. Stein*, CCH Fed. Sec. L. Rep. ¶93,316 (S.D. N.Y. Dec. 29, 1971), a shareholders' derivative action brought on behalf of the Dreyfus Fund, a hearing was recently held on a proposed stipulation of settlement. Under the terms of the settlement, which have been approved by the court, defendants would pay \$5,000,000 to the Fund, and plaintiffs' attorneys and others would apply to the court for allowances to be paid by the Fund out of the \$5,000,000. The attorneys for plaintiffs have indicated that they will apply for an allowance in the amount of \$1,250,000. This requested allowance should be contrasted to the miniscule potential recovery of the Dreyfus Fund shareholders.

There were about 185,000,000 Dreyfus Fund shares outstanding as of December 31, 1970. Thus, after deducting the \$1,250,000 fee from the \$5,000,000 settlement, the shareholders' allocable share of the recovery would amount to approximately \$0.02 per share. The total shareholders' recovery would actually be even less, since there would be allowances to other counsel.

*es/d.*, at 571, Lumbard, C.J., dissenting.

As Judge Lumbard stated in *Eisen*, it is obvious that "the only persons to gain from a class suit are not potential plaintiffs, but the attorneys who will represent them."

In short there appears to be no justification for the judicial burden imposed by the massive class actions which have been tolerated under the authorization of Rule 23(b)(3). The Committee believes the case for revision of the rule has been made.

### PART III

#### RECOMMENDATIONS AND COMMENTARY

##### A. PREDOMINANCE OF COMMON QUESTIONS

Rule 23(b)(3) revised as follows:

(b) (3) The court finds that the questions of law or fact common to the members of the class predominate over any question affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. [Common questions of law or fact shall not be deemed to predominate over questions affecting only individual members, if the court finds it likely that final determination of the action will require separate adjudications of the claims of numerous members of the class, unless the separate adjudications relate solely to the calculation of the amount of damage.] The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action, [including the feasibility of giving adequate notice; (E) the likelihood that damages to be recovered by individual class members if judgment for the class is entered are so minimal as not to warrant the intervention of the court; (F) after a preliminary hearing or otherwise, the determination by the court that the probability of sustaining the claim or defense is minimal.]

#### COMMENTARY

Justice Black's early warning that amended Rule 23 did not afford sufficiently intelligible standards, thus placing excessive discretionary powers in the hands of trial judges,<sup>1</sup> has proven increasingly prophetic. Courts have

<sup>1</sup>See Order of Feb. 28, 1966 (with amended rules), 383 U.S. 1031-1032 (1966) (Black, J., dissenting).

occasionally searched for more definitive standards of predominance,<sup>2</sup> but generally to no avail.<sup>3</sup> It is the Committee's view that additional standards for the determination of the propriety of a class action under subdivision (b) (3) would materially assist trial judges confronted with growing demands for the maintenance of vast and complex class actions.<sup>4</sup>

The Committee's first proposed revision would preclude a finding of predominance if the court finds that the claims of numerous class members require separate adjudications, other than the calculation of the amount of damage,<sup>5</sup> in order to reach a final determination of the action. Although courts have referred to separate trials on individual issues at a subsequent time in a class action as a "sensible device,"<sup>6</sup> such a device has not been tested in the crucible of the courtroom.<sup>7</sup>

The detrimental results of postponing a hard look at the predominance requirement by advocating later separate trials have been adequately cataloged elsewhere.<sup>8</sup> The Committee's proposed revision would require the court, early in the litigation and before the administrative burden of notice is assumed, to consider the "harrowing experience of administering a multitude of individual claims."<sup>9</sup> If the court recognizes that it could not cope with separate trials on one common issue, it follows that the court cannot cope with separate trials on a multitude of individual issues.

As additional guidelines in determining the predominance requirement, the Committee proposes that the court consider the feasibility of adequate notice, the damages likely to be recovered by individual class members if judgment for the class is entered and the probability of sustaining the claim or defense as shown by a preliminary hearing or otherwise. Although factors

<sup>2</sup>3B Moore, *Federal Practice*, §23.45, at 754 (2d ed. 1969).

<sup>3</sup>See, e.g., *Bernian v. New Hampshire Jockey Club, Inc.*, 292 F. Supp. 993, 999 (D.N.H. 1968).

<sup>4</sup>Handler, *The Shift From Substantive To Procedural Innovations In Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 Colum. L. Rev. 1, 6 (1971).

<sup>5</sup>*Frit v. Lessor Data Processing Equipment Corp.*, [1970-1971 Transfer Binder] CCH Fed. Sec. L. Rep. ¶93,163 (E.D.N.Y. Aug. 26, 1971) (damages computed under § 11 of the Securities Act of 1933).

<sup>6</sup>*Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969).

<sup>7</sup>See Handler *supra* note 4, at 8; *Morris v. Burchard*, 51 F.R.D. 530, 536 (S.D.N.Y. 1971).

<sup>8</sup>See Handler *supra* note 4, at 6 (unreasonable burden on the courts and unwarranted settlements); *Morris v. Burchard*, 51 F.R.D. 530, 535 (S.D.N.Y. 1971) (erosion of the substantive law requirements for compensable claims); 3B Moore, *supra* note 2 at 756 (distorted factual picture and prejudicial effect on evidentiary rulings).

<sup>9</sup>*Morris v. Burchard*, 51 F.R.D. 530, 536 (S.D.N.Y. 1971).

(A) to (D) of subdivision (b) (3) were not intended to be exhaustive,<sup>10</sup> it is the Committee's view that too little attention has been given to other important considerations, such as the feasibility of giving adequate notice to members of the class.

*Eisen v. Carlisle & Jacquelin*,<sup>11</sup> is an excellent example of an instance where early recognition of the sheer impossibility of adequate notice of class members would have provided a firm basis for dismissal of the action as a class action. Despite the rule's requirement of individual notice to reasonably identifiable class members and the language of the Court of Appeals in this regard,<sup>12</sup> the District Court has ordered that individual notice be sent to approximately 7,000 of the two million identifiable class members.<sup>13</sup> Such a procedure violates the explicit mandate of Rule 23(c) (2), raises serious due process issues<sup>14</sup> and leaves the *res judicata* effect of any class judgment in doubt with respect to the 1,993,000 identifiable class members who do not receive individual notice.

A further guideline proposed is whether the damages likely to be recovered by individual class members are so minimal as not to warrant the intervention of the court. Although it has been noted that class actions which primarily benefit the attorneys who initiate them should not go forward under Rule 23,<sup>15</sup> that the defrauded poor do not generally benefit monetarily in class actions<sup>16</sup> and that other, more efficient resolutions of controversies adjudicated as class actions exist,<sup>17</sup> the courts have not grappled with such considerations in determining the predominance requirement.<sup>18</sup> It is the Committee's view that the rule should be revised to clearly indicate that not every wrong

<sup>10</sup>Advisory Comm. Note, 39 F.R.D. 98, 104 (1966).

<sup>11</sup>52 F.R.D. 253 (S.D.N.Y. 1971).

<sup>12</sup>391 F.2d 555, 570 (2d Cir. 1968).

<sup>13</sup>*Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253, 267 (S.D.N.Y. 1971).

<sup>14</sup>See Honberger, *State Class Actions And The Federal Rule*, 71 Colum. L. Rev. 609, 638 ("Token performance flouts the law since the right to opt-out lies in with adequate notice").

<sup>15</sup>*Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 567 (2d Cir. 1968); Note, *Damages in Class Actions: Determination and Allocation*, 10 B.C. Ind. & Com. L. Rev. 615, 631 (1969).

<sup>16</sup>Travers & Landers, *The Consumer Class Action*, 18 Kan. L. Rev. 811, 835-6 (1970).

<sup>17</sup>Note, *supra* note 15 at 628.

<sup>18</sup>See, e.g., *Eisen*, where the Court's preliminary estimates of a 5% illegal overcharge on an average odd-lot differential of \$5.18 would entitle the average individual class member (who paid the differential on 5 transactions for a total odd-lot differential of \$25.90) to a recovery of approximately \$1.30. This amount would then presumably be trebled for a total recovery of \$3.90 for individual class members who had paid the alleged illegal overcharge during the period from 1962 to 1966.

committed in our society should be the subject of a class action.<sup>19</sup> As the Court of Appeals for the Third Circuit recently noted in holding the denial of a class action as an unappealable order:

If the public interest issue involved in the individual suit is so insignificant that neither a private nor a public attorney deems it worthy of pursuit, despite the availability of an award of attorneys' fees in the event of success, then the public interest issue may well be so insignificant that the redress of the nine-dollar wrong should from a policy viewpoint be left to the realm of private ordering. Our scarce federal judicial resources cannot be allocated on the vindication of every individual wrong however slight.<sup>20</sup>

Finally the Committee proposes that subdivision (b) (3) be revised to require the court in appropriate circumstances to determine whether the probability of sustaining the class claim or defense is so minimal that the action should not go forward under Rule 23. Such a procedure was adopted before a class determination under 23(b) (3) by Judge Weinstein, one of the draftsmen of the amended rule, in order to obtain a more detailed appraisal of the action without the cumbersome trappings of a class suit such as notice.<sup>21</sup> Judge Weinstein's decision, however, has met with mixed reviews.<sup>22</sup>

Although the final success of the class claim or defense cannot be predicted with absolute certitude, the preliminary hearing would permit the trial judge to obtain a reasonably thorough view of the merits before imposing the substantial burdens of Rule 23 upon the parties and the court. Yet the use of such a procedure has been held by one court as grounds for reversal.<sup>23</sup> Thus the Committee proposes this revision to end current conflict over the propriety of a preliminary hearing in a class action and to make available to the parties and the court a mechanism for avoidance of unwarranted class actions.<sup>24</sup>

<sup>19</sup>See Handler *supra* note 4 at 10-11.

<sup>20</sup>*Hackett v. General Host Corp.*, 5 Trade Reg. Rep. (1972 Trade Cases) ¶73, 800 at 91,393 (3d Cir. Jan. 15, 1972).

<sup>21</sup>*Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968), *reversed and remanded for the entry of findings of fact and conclusions of law*, 438 F.2d 825 (2d Cir. 1970).

<sup>22</sup>*Compare Miller v. Mackey International, Inc.*, CCH Fed. Sec. L. Rep. ¶93,282, at 91,604 (5th Cir. Nov. 23, 1971) and *Berland v. Mark*, 48 F.R.D. 121, 132 (S.D.N.Y. 1969) with *Milberg v. Western Pacific Railroad Co.*, 51 F.R.D. 280 (S.D.N.Y. 1970), *appeal dismissed*, 443 F.2d 1301 (2d Cir. 1971) and *Eisen v. Carlisle & Jaegerlin*, 52 F.R.D. 253, 271 (S.D.N.Y. 1971).

<sup>23</sup>*Miller v. Mackey International, Inc.*, CCH Fed. Sec. L. Rep. ¶93,282 at 91,604 n. 4 (5th Cir. Nov. 23, 1971).

<sup>24</sup>A preliminary hearing on the merits has been authorized by recent state class action legislation. *Cal. Civ. Code* §1781(c) (West Supp. 1971). *Cf. Mass. Gen. Laws Ann.*, ch. 93A, §9(2) (Supp. 1971) (preliminary hearing restricted to the question of adequacy of representation by the class representative).

## B. EQUITABLE RELIEF

New subdivision (c) of Rule 23 as follows:

(c) [Availability of Equitable Relief. In an action commenced pursuant to subdivision (b)(3), the court shall consider whether justice requires that the action be more efficiently served by maintenance of the action as a class action pursuant to subdivision (b)(2) in lieu of subdivision (b)(3).]

### COMMENTARY

Although subdivision (b) (2) of Rule 23 provides for the maintenance of a class action where injunctive or corresponding declaratory relief is appropriate, it is the view of the Committee that a substantial number of (b) (3) class actions are commenced and maintained despite the fact that equitable relief would more efficiently serve the interests of justice. In those (b) (3) actions where the damages likely to be recovered by individual class members are minimal and yet some important social function may be served if a class action is allowed, the court should be required to consider the alternatives available under subdivision (b) (2).

Since, unlike (b) (3) actions, notice to individual class members is not required in a (b) (2) action, the time and expense of administering the action could be greatly reduced without decreasing the efficacy of the result.<sup>1</sup> In short, defendants would often be required to alter their procedures resulting in far more significant benefits to individual class members in most instances than any minimal damage recoveries. The *Eisen* case is one example of a situation where, assuming the violations alleged are ultimately proven, equitable relief, *ie.*, prospective reduction of the odd-lot differential, would be infinitely preferable to needlessly protracted damage litigation. Moreover, the potential award of attorneys' fees in such cases under the rationale of *Mills v. Electric Auto-Lite*, 396 U.S. 375 (1970) should provide an adequate incentive to counsel for the class representatives.

Class actions actually designed to achieve social or economic reform rather than individual compensation are analogous to actions in the civil rights and related areas and should be treated similarly under subdivision (b) (2). Any other class action treatment needlessly burdens the parties and the court without achieving purposeful social goals or vindicating important individual rights.

<sup>1</sup>Kaplan, *A Preliminary Note*, 10 B.C. Ind. & Com. L. Rev. 497, 499 (1969) ("In singular cases great difficulty with the notice may suggest that no class action should be attempted; on the other hand it may suggest upon deeper thought that the action should preferably be typed as a (b) (1) or (b) (2) class action, the more conventional types, where opportunity to opt out is neither needed nor afforded.")

### C. FINDINGS OF FACT

Rule 23(c)(1) relettered Rule 23(d)(1) and revised as follows:

(d)(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained [and, in an action determined pursuant to (b)(3), shall find the facts specially and state separately its conclusions thereon.] An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

#### COMMENTARY

Recognizing that a class determination is of particular practical significance and that the opportunities for obtaining a seasonable review of that determination are extremely limited,<sup>1</sup> the Committee recommends adoption of language requiring the court to make specific findings in support of a class determination order.

Although it appears that the draftsmen of amended Rule 23 contemplated such findings both in the language of the rule<sup>2</sup> and in their notes,<sup>3</sup> the courts have been reluctant to enter findings on class determinations under Rule 23(b)(3).<sup>4</sup>

Due to the widespread growth in the use of the class action device, it is of vital importance, in the Committee's view, that the requirements of subdivision (b)(3) be carefully applied to the facts of an individual action before a class determination is made. It is equally important that the court be required to set forth the results of such an application of the (b)(3) standards in the form of findings of fact and conclusions of law.<sup>5</sup>

The proposed revision would be of assistance to the trial court, whose class action order may be altered or amended at any time before a decision

<sup>1</sup>E.g., the "death knell" exception of *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035 (1967), but see *Hackett v. General Host Corp.*, 5 Trade Reg. Rep. (1972 Trade Cas.) ¶ 73,800 at 91,388 (3rd Cir. Jan. 14, 1972).

<sup>2</sup>Fed. R. Cir. P. 23(b)(3) ("the court finds that the questions of law or fact . . . The matters pertinent to the findings include . . .") (emphasis added).

<sup>3</sup>Advisory Comm. Note, 39 F.R.D. 98, 103 (1966); see also Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 Harv. L. Rev. 356, 390 (1967).

<sup>4</sup>*Interpace Corp. v. City of Philadelphia*, 438 F.2d 401 (3rd Cir. 1971).

<sup>5</sup>Accordingly, the last sentence of Rule 52(a) of the Federal Rules of Civil Procedure should also be amended to read: "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except [under Rule 23 and] as provided in Rule 41(b)."

on the merits depending, *inter alia*, on whether the court's initial findings are supported by later developments. Moreover, the new requirement would also prove useful to appellate courts whose review of a class action determination, particularly in a complex factual context, would be both more efficient and meaningful if findings of fact and conclusions of law were required to be set forth by the lower courts.

The position taken by the Committee in this area is consistent with the view so eloquently expressed in dissent<sup>6</sup> by Judge Adams in *Interpace* and would represent a progressive development with benefits for all concerned.

### D. INCLUSION, EXCLUSION AND IDENTIFICATION OF CLASS MEMBERS

Rule 23(c)(2) and (3) relettered 23(d)(2) and (3) and revised as follows:

(d)(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances. [Individual notice shall be given] to all members who can be identified through reasonable effort. The notice shall [in the discretion of the court] advise each member either that, (A) the court will exclude him from the class [unless by a specified date he requests to be included and if he so requests to be included he may but need not enter an appearance through his counsel; or (B) (i) that the court will include him in the class unless by a specified date he requests to be excluded from the class; and, (ii) that under this alternative each member who does not request exclusion shall file by a specified date a statement in the form therein prescribed of the loss or injury claimed by him; and (iii) that failure to file such statement as required will be grounds for the entry of judgment dismissing any claim that he may have. The notice shall further provide under either of the foregoing alternatives that the judgment, whether favorable or not, will be binding on all members included in the class.]

(d)(3) [In any class action maintained under this rule, no judgment shall be entered in favor of a class or any member thereof for a sum of money or for the disposition of money or any other thing capable of delivery unless the judgment identifies by name and address each member of the class who is entitled to recovery. Any other judgment entered in a class action shall comply with the following rules: (A)]

<sup>6</sup>The possibilities under the Rule for extremely broad geographical, temporal and substantive actions make imperative a more stringent definition of 'class' and justify placing a greater responsibility on the trial court than existed prior to 1966." *Id.* at 406.

judgment, in an action maintained as a class action under (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. [(B)] a judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision [(d)] (2) was directed, and who have [been included in the class], and whom the court finds to be members of the class.

#### COMMENTARY

In the Committee's view, the current method for inclusion and exclusion of class members, "patterned" after the highly successful procedures of the Book-of-the-Month Club<sup>11</sup> has created more serious problems than it pur-ported to resolve. Contrary to the early predictions of the draftsmen that the "opt-out" provision was not a "violent change injurious to the defendant,"<sup>12</sup> this section of the amended rule has resulted in the creation of vast, silent and indefinite classes which are only infrequently recognized as unmanageable<sup>13</sup> and more commonly utilized to compel settlement by defendants as a form of "ransom to be paid for total peace."<sup>14</sup>

Thus the Committee proposes revisions of the "opt-out" procedure which would allow the court discretion in a (b) (3) action to either (1) require individuals to affirmatively "opt-in" by a specified date and thus become class members, or (2) allow individuals to become class members through their failure to request exclusion but require such class members to file a proof of claim by a specified date in order to benefit from any ultimate recovery.

The type of action involved, the potential size of the class, the ability to identify potential class members, the defendant's desire for a *res judicata*

<sup>11</sup>Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 44 (1967).

<sup>12</sup>See Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 Harv. L. Rev. 356, 397 (1967).

<sup>13</sup>*City of Philadelphia v. American Oil Co.*, 5 Trade Reg. Rep. (1971 Trade Cas.) ¶73,625 at 90,579 (D.N.J. July 13, 1971) (all consumers of gasoline in a three state area); *United Egg Producers v. Bauer*, 312 F. Supp. 319 (S.D.N.Y. 1971) (all consumers of eggs in the United States); *Hawaii v. Standard Oil Co. of Calif.*, 301 F. Supp. 982, 984, n. 3 (D. Hawaii 1969), *rev'd on other grounds*, 431 F.2d 1282 (9th Cir. 1970), *aff'd*, 40 U.S.L.W. 4276 (March 1, 1972) (all consumers of gasoline in Hawaii).

<sup>14</sup>Handler, *The Shift From Substantive To Procedural Innovations In Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 Colum. L. Rev. 1, 9 (1971).

effect<sup>5</sup> and the court's estimate of the most efficient and economical method of administering the action would undoubtedly provide a firm basis for deciding which procedure for inclusion and exclusion is to be utilized.

Under the present rule, some courts have barred<sup>6</sup> or dismissed with prejudice<sup>7</sup> the claims of class members who failed to file a proof of claim after receiving adequate notice of both the pendency of the action and the penalty<sup>8</sup> to be imposed for such failure. Other courts have required some affirmative response from class members, but with varying sanctions for failure to respond.<sup>9</sup> However, such procedures have been criticized as unwarranted amendments to Rule 23<sup>9</sup> and it is somewhat doubtful that the draftsmen of the amended rule intended to provide for affirmative response requirements.<sup>10</sup> Thus courts have also rejected "opt-in" or proof of claim requirements as "tedious" and "not necessitated by the rule."<sup>11</sup>

In order to eliminate the existing confusion in this area, the Committee recommends a revision of the rule which would permit the court to require some affirmative response by class members either as a condition precedent to class membership or as a subsequent requirement for ultimate recovery. Such a revision would assist the court in identifying an indefinite and poten-

<sup>5</sup>Due process requires adequate notice to those for whom the class representative stands in judgment. *Hansberry v. Lee*, 311 U.S. 32 (1940). In those cases where the court requires individuals to "opt-in" (e.g., where there is reason to believe that few, if any, individuals other than the class representative or his attorney have any interest in participating in the action) it is not suggested that failure to do so should result in barring of a later claim. The revision contained in (d) (2) (B) prevents such a result. However, where the court requires the filing of a proof of claim (e.g., where the individual class members can be identified and notified with reasonable effort), a class member, adequately notified, who fails to comply with the requirement will be barred from recovery.

<sup>6</sup>*Philadelphia Elec. Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452, 459 (E.D. Pa. 1968).

<sup>7</sup>*Harris v. Jones*, 41 F.R.D. 70, 74-75 (D. Utah 1966).

<sup>8</sup>Compare *Korn v. Franchard*, 50 F.R.D. 57 (S.D.N.Y. 1970) with *Minnesota v. United States Steel Corp.*, 44 F.R.D. 559 (D. Minn. 1968). See also: *Iowa v. Union Asphalt & Roadcuts Inc.*, 281 F. Supp. 391 (S.D. Iowa 1968); *British v. Glitsman*, Civ. No. 66-4301 (S.D.N.Y. Jan. 10, 1970).

<sup>9</sup>*Ward & Elliott, The Contents And Mechanics Of Rule 23 Notice*, 10 B.C. Ind. & Comm. L. Rev. 557, 567 (1969).

<sup>10</sup>See Kaplan *supra* note 2.

<sup>11</sup>*Berman v. Narragansett Racing Association*, 48 F.R.D. 333 (D.R.I. 1969). See also *In Re Coordinated Preliminary Proceedings in Antibiotic Antitrust Action*, 5 Trade Reg. Rep. (1971 Trade Cas.) ¶73, 482 at 89, 961 (S.D.N.Y. Feb. 17, 1971).

tally unmanageable class and would permit defendants to more knowledgeably assess their potential liability. Moreover, the *res judicata* effect of a class action judgment would continue under the revised rule in circumstances where it was desirable and consistent with due process requirements.

As a logical corollary of the revised inclusion and exclusion procedure, the Committee also recommends revision of the judgment identification procedure under subdivision (c) (3) (relettered as (d) (3)). The primary purpose of the "opt-in" and proof of claim revisions is to provide the court and the parties with a precise estimate of the scope of a (b) (3) litigation and its manageability by requiring some information from class members. Such information would provide the court with the names and addresses of those class members who are to participate in the litigation and any benefits accruing thereby. Thus fair distribution of any ultimate recovery is ensured and the *res judicata* effect of the judgment is clearly set forth. Moreover, the use of the "fluid" class recovery device would be curtailed by such a judgment identification procedure. The Committee believes that such a result is warranted since Rule 23 could not have been designed to modify substantive law requirements, *e.g.*, to convert a civil antitrust action into one for unjust enrichment.

#### E. DISCOVERY

Rule 23(d) (5) relettered 23(e) (5) and (6) and revised as follows:

- (e) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: . . .
- (5) [allowing reasonable discovery by the party opposing the class as against members of the class which may commence, for good cause shown, before a determination by the court as to whether the action is to be maintained as a class action;] (6) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

#### COMMENTARY

The concept of requiring absent class members to take some affirmative action as a prerequisite to obtaining relief is not inherently inconsistent with the rule's general policy of permitting such members to remain outside the principal action.<sup>1</sup> A number of courts have allowed controlled discovery as against absent members of the class in order to reveal the true scope of the litigation, reduce the trouble and expense of any subsequent notices and provide a basis for informed re-appraisal of the class action question under

23(c) (1).<sup>2</sup> Yet other courts have rejected such discovery efforts entirely,<sup>3</sup> or allowed very limited discovery without the normal sanctions for failure to comply.<sup>4</sup> The rationale for such decisions appears to be simply that absent class members should not be treated as parties plaintiff subject to normal discovery procedures because if that were permitted then the force of Rule 23 would be blunted.<sup>5</sup>

The Court of Appeals for the Seventh Circuit recently concluded:

Rule 23 does not speak of discovery from class members, but the spirit of the rule would seem to encompass such procedure. . . . If discovery from the absent member is necessary or helpful in the proper presentation and correct adjudication of the principal suit, we see no reason why it should not be allowed so long as adequate precautionary measures are taken to insure that the absent member is not misled or confused.<sup>6</sup>

The Committee supports this view and recommends inclusion of specific language incorporating it in the rule in order to end the present conflict and confusion<sup>7</sup> and achieve economies of time and expense without undue burden on class members.

#### F. DISMISSAL

Rule 23(e) relettered Rule 23(f) and revised as follows:

[[f]] Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class

<sup>1</sup>*Philadelphia Elec. Co. v. Anacosta American Brass Co.*, 43 F.R.D. 452 459 (E.D. Pa. 1969); *Minnesota v. United States Corp.*, 44 F.R.D. 559, 577-8 (D. Minn. 1968); *Harris v. Jones*, 41 F.R.D. 70, 74 & nn. 9 & 10 (D. Utah 1966).

<sup>2</sup>*Fischer v. Wolfenbarger*, CCH Fed. Sec. L. Rep. ¶93,235, p. 91,454 (W.D. Ky. Oct. 5, 1971); *cf. School District Of Philadelphia v. Harper & Row Publishers, Inc.*, 267 F. Supp. 1001, 1005 (E.D. Pa. 1967) (The court assumed defendants would have no fair opportunity to pursue pre-trial discovery against unidentified but described members of the class.).

<sup>3</sup>*Korn v. Franchard Corp.*, 50 F.R.D. 57, 60 (S.D.N.Y. 1970).

<sup>4</sup>See cases cited *supra* note 3.

<sup>5</sup>*Branman v. Midwestern United Life Insurance Co.*, . . . F.2d . . . , 15 FR Serv.2d 351, 356 (7th Cir. 1971).

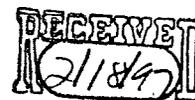
<sup>6</sup>See *Harris v. Jones*, 41 F.R.D. 70, 75 n.10 (D. Utah 1966). ("If Rule 23 does not contemplate and authorize such procedure [limited discovery against absent class members], it should be revised. I think it does already.")

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February 18, 1997

## Hand Delivery

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

Re: Supplementary Comments on August 1996 Proposed  
Amendments To Federal Rule of Civil Procedure 23

Dear Mr. McCabe:

We appreciate the opportunity to give you our views supporting the proposed amendments to Rule 23 of the Federal Rules of Civil Procedure, and to make additional reform recommendations that we urge the Committee to consider following action on the pending proposals.

## Introduction

The Committee already has spent several years examining the class action system and has recognized that Rule 23 should be amended to correct many of the Rule's untoward effects. We trust that the controversy generated by some of the amendments will not deter the Committee from moving forward at least with those amendments that have received the broadest support. The Committee can act on the current amendments in good conscience based on the thoughtful, exhaustive record it has created. Even the most modest Rule 23 reforms can have an impact if they signal district court judges to scrutinize class action claims more vigorously. Our sense of the commentary is that the amendments to Rule 23(b)(3)(A), (B), and (C), as well as the provision permitting interlocutory review, have the widest support. At a minimum, the Committee should send these amendments forward.

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**Comments on Pending Amendments**

All of the proposed amendments are, in fact, quite modest. At the same time, they could have a positive impact on class action jurisprudence because they advance certain bedrock principles of civil justice that should help anchor class action litigation more closely to our common law traditions. The amendments evidence the traditional preference for individual control over litigation, deference to the court's discretion as the neutral arbiter, and recognition of the limited jurisdiction of the federal courts. In practice, the amendments should help courts keep class action abuses in check.

**1. Subsection (b)(3)(A) - Practical Ability**

Revised subsection 23(b)(3)(A) would require the court to consider "the practical ability of individual class members to pursue their claims without class certification." This factor embraces the American tradition of individual adjudication of rights,<sup>1</sup> and recognizes that plaintiffs often lose control over their legal rights when made part of a representative class served by counsel to the class as a whole. As the Advisory Committee Note suggests, the revisions to this factor would militate against class certification when class members have claims substantial enough to be pursued on their own.

Both advocates for absent class members and class action defendants have called for greater protection for individual claimants who have claims that would stand on their own. Thus, there is broad support for this provision. Combining large individual claims with the small, marginal claims of most class members has a detrimental averaging effect -- it lowers the value of the highest claims while at the same time raising the value of marginal claims. Under these circumstances, the class action device actually promotes injustice instead of correcting it.

Although we support this amendment, we suggest some changes to the language of the draft Advisory Committee Note that accompanies it. Some discussion in the Note seems to be contradictory to the goals that underlie the amendment, and should be revised to eliminate the inconsistency. The Note actually encourages the use of class actions to enforce small claims that could not stand alone. Although enforcing small claims has been touted as one reason for having (b)(3) damages classes, that concern should not be relevant in the context of subsection (A), which should look only at the need to protect the individual claimant from the leveling effect of class status.

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<sup>1</sup>See *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (recognizing "deep-rooted historic tradition that everyone should have his own day in court", quoting Charles A. Wright et al., 18 FED. PRAC. & PRO. § 4449, at 417 (1981)).

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Another troublesome discussion in the Note suggests that it may be appropriate to split property damage claims from personal injury claims in order to try the property claims as a class and the injury claims on their own. Excessive splitting of claims can be just as damaging as excessive aggregation -- in both cases litigants lose their ability to present their cases in full, in context, without distortion. We recommend deleting both of these comments from the Note.

## **2. Subsection (b)(3)(B) - Interests In Maintaining Separate Action**

Wholly apart from the practical ability of class plaintiffs to prosecute actions on their own are the class plaintiffs' individual interests in maintaining separate actions. These interests might include selecting the forum, having control over the strategy and timing of the litigation, and choice of law issues, among many other interests that individual litigants must give up when litigation is conducted on behalf of a class. We support giving a heightened focus to these interests by splitting former subsection (A) into new (A) and (B), with (B) focused exclusively on the plaintiffs' interests. We note that this interest has always been part of the Rule 23(b)(3) class certification analysis, and thus does not inject wholly new considerations into the process -- it only heightens awareness of the importance of these interests.

The statement in the accompanying Note specifying that "[t]hese interests may require a finding that class adjudication is not superior because it is not as fair to class members, even though it may be more efficient for the judicial system in the sense that fewer judicial resources are required," offers great promise of meaningful change resulting from this amendment. Recognition and repudiation of instances in the past where the "efficiency" gains of class adjudication were allowed to prevail over the substantive fairness of class adjudication to individual litigants is an important step forward if abuse is to be curtailed.

## **3. Subsection (b)(3)(C) - Maturity of Claims**

Adding the concept of "maturity" to the (b)(3) certification factors is another important change that many commentators have recognized as a central concept that should be considered before deciding whether a class action should be certified. Maturity reflects experience with similar claims involving the same issues in individual litigation in other courts. Mature litigation has clearly defined issues. The evidence and proofs, particularly as to scientific evidence, are better developed and more widely available. Mature cases have a tendency toward consistent outcomes. According to the Advisory Committee Note, "class adjudication may . . . be inappropriate . . . if individual litigation continues to yield inconsistent results, or if individual litigation demonstrates that knowledge has not yet advanced far enough to support confident decisions on a class basis." In short, maturity may be shorthand for the experiences that will

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determine whether particular litigation will benefit from the efficiencies that Rule 23 class adjudication was designed to achieve.

#### 4. Subsection (b)(3)(F) - Cost-Benefit Analysis

Under proposed subsection (b)(3)(F), the court must consider "whether the probable relief to individual class members justifies the costs and burdens of class litigation." Inherent in this proposed restraint on class certification is recognition that the federal courts are courts of limited jurisdiction; high dollar threshold amounts in controversy have always been required for cases based on diversity jurisdiction precisely because the machinery of the federal courts should be reserved for matters of some significance to the individual litigants.

More to the point, this amendment recognizes and attempts to put brakes on the recent practice of class counsel aggregating thousands of class claims of only a few dollars each in order to obtain aggregated claims amounting to millions of dollars, on which class counsel's contingency fee, also in the millions of dollars, will be based. When the benefits to class counsel and the costs of adjudication grossly exceed the value of the relief to individual class members, the underlying rationale for class adjudication fails. Class member rights are subverted. By allowing courts to decide that some cases "just are not worth it," the proposed amendments should reduce opportunities for class counsel to reap undeserved rewards at the expense of the class simply by invoking the class action device.<sup>2</sup>

Opposition to the proposed cost-benefit factor has been raised, arguing that it derogates one of the principle purposes behind the class action rule, which is to permit aggregation of small claims that would not be maintained on their own. While Rule 23 class actions have served that purpose, the proposed cost-benefit analysis does not foreclose aggregation of small claims altogether and is not intended to trivialize small claim consumer litigation. Nonetheless, Rule 23 does not and should not have a substantive component or context that directs courts to favor particular types of litigation for class action status, and it is a usurpation of legislative policy-making authority for courts to use Rule 23 to that end. It is strictly a procedural device to facilitate the efficient resolution of claims in a single proceeding, and then only when common questions predominate and resort to a single proceeding is superior. The proposed amendment thus directs courts to focus on the value of the justice to be gained, to

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<sup>2</sup>See, e.g., Bradley A. Smith & Jeffrey N. Lindemann, *Legal Billing: Is the Meter Broken?* W. St. J., Jan. 27, 1997, § A, pg. 22; see also Edward Cooper, Reporter to the Advisory Committee on Civil Rules, U.S. Judicial Conference, Reporter's Commentary on Proposed Amendments to Federal Rule of Civil Procedure 23 (Apr. 1996) (on file at the Federal Judicial Center in Washington, D.C.); Minutes of the Nov. 1995 Meeting, Civil Rules Advisory Committee, U.S. Judicial Conference (Nov. 1995) (on file at the Federal Judicial Center in Washington, D.C.).

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ensure that the litigation would be of real benefit and interest to the actual members of the putative class, and that it could be managed efficiently and fairly through trial. Without drawing any bright lines or arbitrary financial rules, it leaves the ultimate decision to the discretion of the court, where it belongs.

Courts already have broad case management discretion. They routinely use their discretion to rule on motions to dismiss, evidentiary motions, motions for summary judgement, and nearly every other aspect of pretrial proceedings that shape the scope and direction of the litigation. Giving judges focused discretion to determine whether in particular cases there will be sufficient value to the individual plaintiffs to warrant the burdens of class litigation, as only one element of the class certification analysis, does not substantially change the role of the court, but merely gives some direction to the broad discretion courts already have in this area.

Some have suggested that the cost-benefit factor should be revised to expressly direct the court to consider the "deterrent" effect of maintaining the litigation as part of the cost-benefit analysis. However, that recommendation is not consistent with the underlying purpose of the Rule 23(b)(3) class, which is to provide a procedure for the efficient aggregation of claims for compensatory damages, as opposed to giving expression to social objectives not mandated by Congress. Such objectives already can be implemented through Rule 23(b)(1) and (2) classes, which are intended to provide predominantly equitable relief to achieve precisely delineated congressionally mandated objectives. In fact, injecting conduct-deterrence into Rule 23(b)(3) classes may be beyond the scope of the rulemaking authority. As one commentator noted, deterrence goals have a substantive impact.<sup>3</sup> The scope of the rulemaking authority is limited to procedural matters and does not extend to making substantive changes in law that have not been authorized by Congress.

While we strongly support the addition of a cost-benefit mechanism to the (b)(3) certification analysis, we recognize that in view of the strong opposition to it from some quarters, the Committee may be inclined to defer action on such a proposal until after the Supreme Court has addressed related issues. If the Committee is so inclined, we would suggest going forward with other amendments while continuing to consider some framework for a cost-benefit analysis in connection with further, more meaningful amendments to Rule 23.

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<sup>3</sup>George Rutherglen, *Better Late Than Never: Notice and Opt-Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. Rev. 258, 263 (1996).

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#### 5. Section (b)(4) - Settlement Classes

The creation of specific authority for a settlement class in new subsection 23(b)(4) is an effort on the part of the Advisory Committee to respond to a decision from the Third Circuit, holding that courts cannot certify classes for settlement purposes unless those same classes could be certified for trial.<sup>4</sup> Under the Third Circuit standard, most, if not all, of the mass tort settlements over the last twenty years would not have passed muster because experience has shown that mass tort cases are not, and indeed, cannot be tried as a class. There are too many disparate issues related to conflicts of law, the disparate nature of the injuries from claimant to claimant, the specific facts of causation, the variability of affirmative defenses, as well as other factors, that work against class resolution of mass tort claims. The same holds true for other types of damages claims for which Rule 23(b)(3) class status often is sought, such as consumer fraud actions. Since there is no realistic possibility of a fair trial, class certification serves as a wise pressuring the parties to settle. Although using the class action rule as a device to coerce settlement is unfair and should be discouraged, the ability to settle claims as a class at times may be the only viable alternative for resolving massive numbers of widely dispersed, disparate individual claims. In rare instances, the availability of class settlements can be an essential safety valve even though the same claims could not be certified for class adjudication. However, since the U.S. Supreme Court is expected to issue its opinion in *Georgine* in the near future, we recognize that the Advisory Committee may want to defer action on this amendment for further consideration in connection with other, more meaningful class action reform recommendations.

#### 6. Section (c) - Timing of Certification

Under the current version of Rule 23(c), courts are required to make the class certification determination "as soon as practicable after commencement of an action." The proposed amendment would provide for certification "when practicable." This change is consistent with and complementary to the Advisory Committee's recognition that the class action ripens and evolves with time. Often neither the courts nor the litigants can really understand what the litigation involves until it is mature. This fact of class action life often makes early consideration of class certification inappropriate. Because it is the certification determination that often creates the most unbearable pressure to settle, relaxation of the time for deciding certification should help relieve some of the pressure. We support this provision and note that it did not create a significant amount of controversy, which militates in favor of moving it forward.

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<sup>4</sup>Of course, the Supreme Court's decision in *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 379, granting cert. sub nom., *Georgine v. Amchem Products, Inc.* 83 F.3d 310 (3d Cir. 1996), will determine the Committee's action regarding the proposed amendment.

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**7. Section (e) - Hearings on Dismissal or Compromise**

The proposed amendment to section (e) would require the court to hold hearings regarding proposed settlements or dismissals of class claims. Although this generally is common practice, the Advisory Committee believed it was appropriate to emphasize that the courts have an important role - protecting the interests of absent class members - when there is a voluntary, consensual resolution of class claims. To the extent that the amendment is understood as codifying existing practice, it is unobjectionable. However, the amendment should not be understood or interpreted to require the court to remake the agreement struck by the parties simply because the court might not have reached the same conclusion.

**8. Section (f) - Interlocutory Appeal**

The amendment embodied in section (f) eliminates the requirement under 28 U.S.C. § 1292 that district courts must certify interlocutory appeals from the class certification determination in order to enable class litigants to obtain appellate review of the certification decision. Under the amendment, interlocutory appeal of a class certification determination may be granted at the discretion of the court of appeals, and district courts are permitted to offer their opinions on the advisability of appellate review. Unfortunately, the Advisory Committee Note states that "[p]ermission to appeal should be granted with restraint."

The need to expand the opportunity for appellate review of class certification decisions rests on several grounds. As a practical matter, erroneous class certification imposes irreparable injury unless remedied before the case proceeds further. Reviewing class certification decisions by writ of mandamus implicitly recognizes the irreparable nature of the injury from erroneous certification, and the lack of any other alternative for relief if immediate review is not provided.<sup>5</sup> The more traditional approach is to refuse to stretch the extraordinary writ of mandamus to cover interlocutory appeals of class certification decisions,<sup>6</sup> which inevitably results in a settlement of the class claims:

Requiring the recipient of an erroneous class certification decision to proceed to trial, or settle, as the current rule does, unfairly condemns the parties to incur the same financial costs and risks as if the class were properly certified. Wider availability of the discretionary

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<sup>5</sup>See, e.g., *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.), cert. denied, 116 S.Ct. 184 (1995).

<sup>6</sup>See, e.g., *In re Catawba Indian Tribe*, 973 F.2d 1133, 1136-38 (4th Cir. 1992); *In re School Asbestos Litig.*, 921 F.2d 1338, 1343 (3d Cir.), cert. denied, 111 S.Ct. 1623 (1990).

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appeal mechanism is important to the reduction of class action abuse. We strongly support this amendment and urge the Committee to move forward with it -- now. In addition, we respectfully suggest that references to granting appellate review with "restraint" be deleted from the Note due to their likely prescriptive effect.

### Additional Reform Recommendations

Although the pending revisions are a thoughtful and admittedly measured response to class action abuses, they do not go far enough to ensure significant, long-lasting relief. More must be done to restore the integrity of Rule 23(b)(3) damages classes and eliminate their use to extort "legalized blackmail."

#### Opt-In Default Mechanism

One possible reform that has been suggested by a variety of commentators since the 1966 revisions, is to return to the opt-in device that once characterized the Rule 23(b)(3) class. Changing the default mechanism for the class from binding all class members except those who opt out, to binding only those class members who opt-in, will eliminate some of the most objectionable problems with the current rule. The primary benefit would be to move class litigation from the abstract into the real world. A class of individuals who had affirmatively opted into the litigation could be counted and identified with precision. Their claims would be concrete and ascertainable. Discovery would be focused on actual people and real-world events.

An opt-in class would eliminate the *in terrorem* effect that the unknown segment of the class always has on the litigation -- it ups the stakes by injecting numerous unknowable elements into the litigation, such as the exact number of class members and the nature and extent of their claims. It is this difference between what is known about the actual class representatives and the absent members of the class, a difference that can translate into hundreds, thousands, or millions of latent claims, that creates the uncertainty and ambiguity responsible for pressuring defendants into accepting outrageous settlement demands that have enriched lawyers and have conferred minimal benefits on class members. Most important, the opt-out device has encouraged the creation of claims.

The difference between the known members of the class and the absent but potential class members, is what provides plaintiffs' class counsel with leverage to extract huge, unearned attorneys fees in return for resolving the alleged "claims" of the absentees at a purported "discount." In fact, this leveraging scheme at the expense of the absent class members has caused the greatest outcry from a large contingent of ordinarily pro-plaintiff commentators. Movement to an opt-in mechanism eliminates this problem altogether. It would relate attorneys'

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fees to the actual number of class plaintiffs who participated in the action, and would eliminate windfall gains at the expense of absent members of the class who have no interest in the litigation, and clearly no interest in seeing class counsel benefit at their unwitting expense.

In 1972, a distinguished Committee of the American College of Trial Lawyers recommended a return to an "opt in" procedure for (b)(3) classes, observing:

In the Committee's view, the current method for inclusion and exclusion of class members, "patterned after the highly successful procedures of the Book-of-the-Month Club" has created more serious problems than it purported to resolve. Contrary to the early predictions of the draftsmen that the "opt-out" provision was not a "violent change injurious to the defendant," this section of the amended rule has resulted in the creation of vast, silent and indefinite classes which are only infrequently recognized as unmanageable and more commonly utilized to compel settlement by defendants as a form of "ransom to be paid for total peace."<sup>7</sup>

A survey that the Advisory Committee on Civil Rules conducted of federal judges and practitioners, contemporaneous with Congressional interest in class actions in the late 1970's, asked whether the survey participants would favor or disfavor "[r]eplace[ment of] the opt-out provision of 23(c)(2)(A), (B) with an opt-in requirement so that no one would be a member of a class who did not specifically request inclusion."<sup>8</sup> Fully two thirds of the federal circuit and district court judges who responded indicated that they favored such a change, while 54% of all respondents favored the change.

The Advisory Committee should give the opt-in concept earnest consideration as part of its continuing efforts to achieve class action reform. Acceptance of an opt-in device for (b)(3) damages classes is likely to be wide spread, attractive to advocates for both plaintiffs and defendants. Just as important, however, the opt-in device presents a realistic opportunity to solve some of the most intractable problems that class action litigants now encounter.

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<sup>7</sup>American College of Trial Lawyers, *Report and Recommendations of the Special Committee on Rule 23*, at 32 (March 1972) (approved by the Board of Regents on March 5, 1972) (citations omitted).

<sup>8</sup>*Responses to the Rule 23 Questionnaire of the Advisory Committee on Civil Rules, Part II, question 1* (May, 1977) (on file at the Federal Judicial Center, Washington, D.C.).

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### Regulatory Deference

Another reform that would help reduce class action abuse would be to require the class certification decision to be deferred until after the conclusion of any federal regulatory action based on the conduct challenged in the litigation. When regulatory action is pending, a great deal of uncertainty still surrounds the underlying claims. The scientific or factual evidence may not yet be fully developed or analyzed. The availability or appropriateness of a particular remedy might be unknown. Experience has shown that once a class is certified under Rule 23(b)(3), the certification decision serves as a hammer that forces a settlement. Moving forward on the issue of class certification at the same time the regulatory action is pending creates serious risks of inconsistent results, premature findings not supported by fully developed evidence or science, and duplicative and overly harsh remedies. In the worst case scenario, the steamroller effect of class litigation could even force regulatory actions and findings that would never have been taken in the absence of the litigation. The disastrous breast implant controversy is an excellent but chilling example of the harm that can be done when premature class action litigation is allowed to affect the regulatory process.<sup>9</sup>

### Class-wide Proof

Another recommendation for change that we support is a finding, as part of the (b)(3) certification analysis, that the class claims can be resolved using class-wide proofs. This provision invites the court to consider the action from an evidentiary standpoint, and emphasizes that proof of increased efficiency is central to a finding that a class action is superior to other forms of joinder or aggregation. A number of federal courts have adopted similar requirements.<sup>10</sup> This finding should confirm that proceeding with the litigation as a class action will result in the efficiencies that class actions were intended to provide, and that due to those efficiencies, resolution of the action may be quicker and less costly.

### Conclusion

The proposed amendments to Rule 23 are well-reasoned, fair proposals that are likely to reduce class action abuse even if they would not eliminate it. Although the

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<sup>9</sup>See Marcia Angell, M.D., *SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREAST IMPLANT CASE* (W.W. Norton & Co. 1996).

<sup>10</sup>See, e.g., *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017-18 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 915 (1987); *McCarthy v. Kleindienst*, 741 F.2d 1406, 1413 n.8 (D.C. Cir. 1984); *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 321-22 (5th Cir. 1978).

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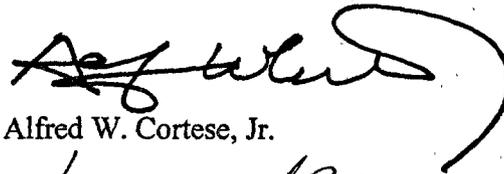
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controversial nature of some of the proposed amendments may give the Committee some pause about moving forward with the entire package, it is imperative for the Committee to take some action now to put at least some of the amendments into effect. Therefore, we urge the Committee to go forward, at a minimum, with the (A),(B), and (C) factors for the (b)(3) certification analysis and the provision permitting interlocutory appeals.

Even if the Committee sends some of these amendments forward for implementation, it should consider additional Rule 23 reforms in the immediate future. Specifically, the Committee should once again take up the cost-benefit analysis for (b)(3) actions. A decision from the Supreme Court regarding settlement classes may be available to instruct the Committee on Rule 23 amendments related to settlements. Changing Rule 23(b)(3) classes from opt-out to opt-in devices has significant potential to eliminate the most horrific tendencies of the current rule. Deferring class certification until after regulatory action has concluded will prevent premature certification decisions and inconsistent results, which currently force settlements in cases that otherwise could have been defended on the merits. Requiring class-wide proof will help demonstrate the superiority of the class action over other forms of litigation. These changes, coupled with those already proposed, should eliminate the most egregious class action abuses and inequities while at the same time preserving the procedural efficiencies that Rule 23 was intended to provide.

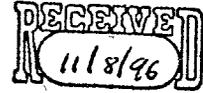
Sincerely yours,



Alfred W. Cortese, Jr.



Kathleen L. Blauer



**96-CV-064**

**Before the Committee on Rules of Practice and Procedures  
of the  
Judicial Conference of the United States**

**HEARINGS ON THE  
PROPOSED AMENDMENTS TO RULE 23**

**Written Remarks of Michael D. Donovan on Behalf of the National  
Association of Consumer Advocates and Others**

**Philadelphia, Pennsylvania  
November 22, 1996**

**WRITTEN REMARKS OF MICHAEL D. DONOVAN  
AND THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES  
RE: PROPOSED AMENDMENTS TO RULE 23  
OF THE FEDERAL RULES OF CIVIL PROCEDURE**

The following remarks are submitted on behalf of Michael D. Donovan individually and as the Vice Chair of the National Association of Consumer Advocates. A summary of Mr. Donovan's experience with respect to class actions under Rule 23 is attached to these remarks.

The National Association of Consumer Advocates ("NACA") is a not-for-profit organization of consumer lawyers, law professors, legal services attorneys and law students dedicated to the advocacy and advancement of consumer justice throughout the United States. Together with the National Consumer Law Center, NACA annually sponsors the National Consumer Rights Litigation Conference, which was held this past October in Washington, DC. A copy of NACA's Mission Statement and Tenets is attached to these remarks.

**POSITION -- The Amendments Should Not Be Approved**

These remarks are submitted to oppose vigorously the addition of subparagraph "(F)" to Rule 23(b)(3) in particular and to oppose generally any amendments to Rule 23 while the developing interpretive law has yet to address or conclusively resolve many of the issues sought to be resolved by the proposed amendments. In many respects, the proposed amendments are unnecessary, ambiguous, confusing and premature. If adopted, they will undoubtedly increase the costs and complexities of litigation and needlessly multiply the proceedings in thousands of cases. As other reviewers have observed, there also are substantial doubts about whether the amendments comply with the Rules Enabling Act. Instead of tailoring court procedures to the realities of federal practice to ensure fair, efficient and just access to the courts, the amendments

reflect a forced return to rigid, formalistic rules that will deprive the least powerful of our citizens of any meaningful access to the courts.

**The Private Benefits vs. Public Costs Test of Proposed  
Amendment "(F)" to Rule 23(b)(3) Will Obliterate  
the Purposes of Rule 23 and Deny Millions of Moderate to  
Low Income Consumers Access to the Courts**

With the advent of the state-sanctioned corporate form for conducting private business, our judicial system has long-held that extraordinary joinder or equitable procedures are appropriate to permit the efficient, economical and consistent resolution of virtually identical claims against a common defendant on behalf of many individuals. See General Tel Co. v. Falcon, 457 U.S. 147, 159 (1982); Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 363 (1921) (quoting Smith v. Swormstedt, 16 How. 288, 302 (1853)); see also Hansberry v. Lee, 311 U.S. 32, 41-43 (1940) (describing origins of common law class actions). Once the objections to non-municipal and non-religious corporate forms were overcome in the early nineteenth century, the courts quickly rejected the formalistic fictions that otherwise might have precluded joinder of unrelated parties having similar claims based on similar facts. Cf. Smith v. Swormstedt, 16 How. at 302. Whether denominated true class actions, spurious class actions, derivative actions or association actions, the consistent trend has been to recognize the reality of modern commercial and social relationships and to adapt judicial procedures to that reality. The fundamental goal of all of these developments has been to ensure as much access to the justice system as is necessary to maintain the principles of ordered liberty.

As in every competition for finite resources, however, there are forces that profit from denying individuals access to judicial forums. Some unscrupulous businesses -- nearly always in

the corporate form -- count on people either not discovering or not having the personal or financial wherewithal to challenge fraudulent, unfair or deceptive practices in the courts. Other businesses, interested in their own commercial litigation and disputes, view congested court dockets and precedents based on fairness rather than shortsighted microeconomics as impediments to commerce and capital formation. Still other interests see the issues in terms of politics and power, contending, in effect, that because they have worked so hard to become Goliaths they should not have to face any more than one David at a time. Unfortunately, the proponents of Amendment "(F)" to Rule 23(b)(3) appear to have agreed with these forces.

The so-called "just ain't worth it" amendment asks a court to weigh the amount of individual recovery against the general "costs and burdens" of the class action litigation. Seeking a "retrenchment" to some unidentified formalistic fiction against small claims, the amendment's sponsors contend as a matter of policy that "we should not establish a roving Rule 23 commission that authorizes class counsel to enforce the law against private wrongdoers." Request for Comment at 26. Both of these Goliath positions misapprehend the purposes and the benefits of Rule 23 as written. The equitable origins of the rule demonstrate that, just as many individuals may join together to pursue a common corporate enterprise, so too may victims of a common course of misconduct pool resources and risks to obtain judicial relief. This is a "central concept" of Rule 23.

The Supreme Court has long recognized that without Rule 23 claimants with small claims would be unable to obtain relief. In Deposit Guaranty National Bank v. Roper, 445 U.S. 326, 338 n.9 (1980), the Supreme Court stated:

A significant benefit to claimants who choose to litigate their individual claims in a class-action context is the prospect of reducing their costs of litigation, particularly attorney's fees, by

allocating such costs among all members of the class who benefit from any recovery. Typically, the attorney's fees of a named plaintiff proceeding without reliance on Rule 23 could exceed the value of the individual judgment in favor of any one plaintiff. Here the damages claimed by the two named plaintiffs totaled \$1,006.00. Such plaintiffs would be unlikely to obtain legal redress at an acceptable cost, unless counsel were motivated by the fee-spreading incentive and proceeded on a contingent-fee basis. This, of course, is a central concept of Rule 23.

Id. (Emphasis added).

To the same effect is Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), where the Court again noted that "Class actions ... may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. For example, because this lawsuit involves claims averaging about \$100 per plaintiff, most of the plaintiffs would have no realistic day in court if a class action were not available." Id. at 809.

The proposed language of amendment "(F)" not only contradicts the Supreme Court's own description of the "central concept of Rule 23," but also disregards the realities of modern commercial and consumer litigation. Congress itself has recognized these realities and has expressly affirmed the pooling of resources in small-claims consumer cases made possible by either common law or Rule 23 class actions. In the Magnuson-Moss Warranty Act (15 U.S.C. § 2310), for example, Congress referred approvingly to Rule 23 in the precise context of a small-claim class action. While Congress also precluded from federal court jurisdiction warranty class actions involving individual claims of under \$25 or aggregated claims of under the then-existing \$50,000 amount in controversy requirement of 28 U.S.C. § 1331, it simultaneously recognized that such federal claim consumer class actions could and would be litigated under the concurrent jurisdiction of the state courts. See Skelton v. General Motors Corp., 660 F.2d 311 (7th Cir.

1981), cert. denied, 456 U.S. 974 (1981); Feinstein v. Firestone Tire and Rubber Co., 535 F. Supp. 595 (S.D.N.Y. 1982). Thus, contrary to the arguments of some corporate lawyers (see Comments of Skadden, Arps, Slate, Meagher & Flom, 96 Civ. 014, June 14, 1996), Congress has expressly permitted the aggregation of small claims to achieve federal jurisdiction in some consumer statutes, but has taken a different approach in other consumer statutes.

For example, under the Truth-in-Lending Act, the Fair Debt Collection Practices Act and many other consumer laws, Congress has focused on limiting the aggregate statutory damages payable by a corporate defendant in class actions. See 15 U.S.C. § 1640(a)(2)(B) (limiting statutory damages in TILA cases to lesser of \$500,000 or 1% of violator's net worth); 15 U.S.C. § 1692k(b)(2) (applying similar statutory damages cap in unfair debt collection practices cases). In doing so, Congress recognized the indisputable reality that individual damages in such cases might range from mere pennies to thousands of dollars. Congress thus intended these laws, including the Magnuson-Moss Act, to work in conjunction with the established precedent and "central concept" of Rule 23. Indeed, Congress has counted on Rule 23 to provide access to the federal courts for numerous small claimants in financial services and similar litigation. In the interests of federalism, however, it has limited aggregation for federal jurisdiction of essentially state law warranty claims to cases involving more than \$25 per person, in excess of 100 victims, and exceeding \$50,000 in the aggregate. In other words, Congress itself has already considered and rejected the so-called "just ain't worth it" amendment for virtually all cases other than Magnuson-Moss warranty claims. Adoption of Amendment "(F)," therefore, would undermine the design and the purposes of many federal consumer protection statutes, requiring either a wholesale rewrite or years of judicial assimilation.

Commentators from the corporate bar have also argued, incorrectly, that Amendment “(F)” is similar in scope to the language of the Uniform Class Actions Act. But none of these commentators has quoted that Act’s exact language. Their oversight is not surprising because the Uniform Act does not support the contentions of the corporate bar.

Although Amendment “(F)” bears a slight resemblance to Section 3(a) of the Uniform Act, its actual language is far more ambiguous, broad and unhelpful. In contrast with the undefined “costs and burdens” language of Amendment “(F),” the Uniform Act refers to “the expense and effort of administering the action.” (Emphasis added). Courts that have considered the enacted state counterparts of this language have held that it focuses on the notice and distribution costs of the action. See Kelly v. County of Allegheny, 546 A.2d 608 (Pa. 1988) (addressing Pennsylvania class action rule, patterned after the Uniform Act, and holding that the focus is on class notice and identification of class members, not on general burdens to the parties or the courts). Unlike Amendment “(F),” the Uniform Act’s language does not require a comparison of the individual amounts likely to be recovered by the class members with the vague and virtually unlimited costs and burdens to the defense or to the judiciary evidently contemplated by the “costs and burdens” language.

If Amendment “(F)” is intended to be limited to notice and distribution expenses, as in the Uniform Act, then it and its commentary have been miswritten. Likewise, if Amendment “(F)” is intended to address the issue of aggregation of damages to obtain federal diversity jurisdiction, as some corporate lawyers have argued, then the Advisory Committee has taken on Constitutional powers reserved only to Congress under Article I. See 28 U.S.C. § 2072. The

aggregation issue should be resolved as a jurisdictional issue, not as an issue of procedure. See id.

All of these uncertainties as to the meaning and purposes of Amendment “(F)” simply prove that the proposed language will generate years of litigation and result in inconsistent procedures and standards throughout the federal judiciary. The courts will be clogged with group actions, multidistrict consolidations and joinders, removals and remands, and conflicting individual actions that will neither advance the goal of uniform procedures nor improve the efficiency or fairness of the justice system. Thus, Amendment “(F)” will do more harm than good.

Granted, consumer class actions, like any procedural device, may be abused. But protections against abuse already exist. Courts may and do refuse to allow classes to be certified where the potential recovery to each individual is nominal and when a distribution would consume such substantial time and expense that the class members are unlikely to receive any appreciable benefit. See e.g., Blue Chip Stamps v. Superior Court, 18 Cal. 3d 381, 386 (1976); City of San Jose v. Superior Court, 12 Cal. 3d 447, 459 (1974); Vasquez v. Superior Court, 4 Cal. 3d 800, 811 (1971). Further protections are found in the requirements that the class be “manageable” and that any settlement must be fair and reasonable to the class. Amendment “(F)” will not supplement these protections; it will simply destroy all consumer class actions.

Contrary to the persistent but contrived complaints about the coercive nature of class actions, most class actions are meritorious. Few can dispute that class actions generally deter corporate misconduct so that honest businesses can compete. As a result, class actions also foster the confidence that is so necessary for a capitalist economy to function. By ensuring both

accessibility and the intangible benefits of contractual trust required for efficient transactions, class actions provide concrete and specific deterrents to commercial abuses without the threat of broadened criminal enforcement or the need for expanded regulatory bureaucracies. Thus, while small claim class actions bear the same blemishes borne by all litigation, they should not be decapitated to cure some corporate perception of persistent dandruff. Such a cure is undoubtedly worse than the perceived disease.

For all of these reasons, the Advisory Committee should withdraw proposed Amendment “(F)” to Rule 23(b)(3).

### **The Amendment to Rule 23 to Allow Interlocutory Appeals on Certification is Unnecessary**

The impetus for proposed Rule 23(f) likewise appears to come from the corporate defense bar. The new subsection would permit a discretionary appeal of any decision granting or denying class certification. This proposed new rule will merely bring about increased delays and costs.

It is difficult to imagine a scenario where a defendant would not attempt to appeal an order granting class certification. It is also difficult to imagine a scenario where, if appeal is permitted, either the district court or the court of appeals would not stay the proceedings.

In contrast, the likelihood of a consumer appealing a denial and seeking a stay of proceedings is minimal. It is virtually certain, however, that if the consumer did appeal a denial of certification, the defendant would seek, and likely obtain, a stay pending the appeal. Therefore, the rule as written does little to advance a claimant's situation, but does provide significant dilatory opportunities for defendants.

The California state court approach is a variant on this theme. It is silent on the issue of a stay, but permits immediate appellate review only of the denial of class certification, since a denial effectively terminates the entire action as to the class, putting the class members out-of-court. Granting class certification is not such an order, and is only harmful to the defendant if the plaintiff prevails at trial and on appeal, both on certification issues and on the merits. See Stephen v. Enterprise Rent-A-Car, 235 Cal. App. 3d 806 (1991) and Rosack v. Volvo of America Corp., 131 Cal. App. 3d 741 (1988). Although corporate defendants may complain about the adverse publicity they say follows from class certification and class notice, that publicity is a due process requirement that should not be abated simply because an appeal is filed. Thus, the proposed amendment will do little to advance the "fairness" or "coercion" concern in class cases.

The California state court approach is a balanced approach that preserves the rights of both plaintiffs and defendants. Appeal should be discretionary and only allowed if certification is denied. Besides, 28 U.S.C. § 1292(b) already allows discretionary appeals of class certification decisions under the circumstances stated in that statute. Congress has spoken on this issue, and its decision as to appellate jurisdiction should not be overridden by a new rule of procedure. Proposed Rule 23(f) should be withdrawn accordingly.

## THE REALITIES OF CONSUMER LITIGATION

If time permits at the Hearing, we intend to introduce to the Committee two individuals who, in our opinion, reflect the all too common realities of consumer class action litigation.

The first introduction will be of Ms. Dorothy Sinclair, a Victim's Advocate at Senior Victim Services of Delaware County. Senior Victim Services assists senior citizens who are the victims of crime, consumer fraud or corporate negligence. In her experience, Ms. Sinclair has seen numerous examples of senior citizens victimized by unscrupulous home-improvement and financing scams, unfair insurance and investment sales practices, deceptive medical device advertising programs and sophisticated consumer rip-offs. Often these victims turn to understaffed and underfunded legal aid offices that can only refer them to the occasional pro bono lawyer who might help them on an individual basis. In all too many cases, nothing can be done at all because the amounts involved are too small, the senior citizens will not or have not filed for bankruptcy or the pressure and fear of litigation are just too overwhelming. In some cases, a class action is virtually the only avenue for any justice, particularly for the many senior citizens who survive on fixed incomes and depend on nearly every dime for their day to day well being.

The second introduction will be of Ms. Nora Watkins. Ms. Watkins, 76, lives with her mother, 99, in the City of Chester, Pennsylvania. Her small, three bedroom brownstone is in relative disrepair and she and her mother subsist on monthly social security checks supplemented by some minor income Ms. Watkins receives from part-time domestic work two or three days a week. Ms. Watkins' experience with corporate scams is all too common among our senior citizens.

In November 1993, three men visited Ms. Watkins' home while handing out fliers advertising home repairs and financing. The fliers stated in bold letters at the top "PUBLIC NOTICE." The men explained that they were with a government program that would help to fix-up homes in need of repair. Based on an estimated cost of \$2,000, Ms. Watkins (and her 99 year old mother) agreed to some home repairs consisting of five new windows, two new storm doors and interior painting.

The men returned a few days later with some complicated forms they said had to be signed for the work to begin. Confused about the purported government program, both Ms. Watkins and her mother signed a secondary mortgage loan contract to be held by a major, NYSE-listed finance company, for \$12,500 at a rate far above then-existing home equity loan rates. The contract misrepresented the work that had been performed, contradicted the earlier flier and obligated Ms. Watkins to pay monthly installments of nearly \$200 for the next fourteen (14) years. Later, the same three men entered into a similar transaction with Ms. Watkins' brother, also a senior citizen receiving social security and living in Chester.

Neither Ms. Watkins nor her brother ever received the home improvements they were promised. Contrary to Ms. Watkins' mortgage contract, a new roof was never installed, no storm doors were installed, only four of the five windows were installed and the interior walls were simply spray painted without any wall preparation or trim painting. Although Ms. Watkins was not satisfied and complained, she was still confronted with a monthly bill from the assigned lender.

As with her brother, the same scam was repeated with other senior citizens in other depressed areas of Pennsylvania, all using the same mortgage loan forms and the same, NYSE-listed lender.

Outside of a class action, Ms. Watkins has been unable to find legal counsel who will help her. She has paid her nearly \$200 payment, under great hardship, every month, knowing that she did not receive what she was told she would receive but fearful that she would lose her home if she stopped paying.

With the adoption of the proposed amendments to Rule 23, it is far from certain that any class action attorney would consider handling Ms. Watkins' case. Although the lender is still working in league with the salesmen, and profiting greatly from the misery and misfortune of others, under the proposed amendments it is very possible that a federal court would not certify the case as a class action. Since Ms. Watkins cannot afford to lose her home, and must continue with the onerous monthly payments, the prospects of substantial punitive damages are far from certain.

This set of facts is the reality in nearly all parts of urban America. The formalistic amendments to Rule 23 will permit that reality to persist and, indirectly, even encourage it for years to come. The amendments are wrong, unnecessary and biased against average citizens. They should not be adopted.

MICHAEL D. DONOVAN, a partner in the Haverford, Pennsylvania office of Chimicles, Jacobsen & Tikellis, is admitted to practice before the United States Supreme Court, the United States Courts of Appeals for the Second, Third, Eighth, Ninth and Tenth Circuits, the United States District Court for the Eastern District of Pennsylvania, the United States District Courts for the Southern and Eastern Districts of New York as well as the state courts of Pennsylvania and New York and the courts of Washington, D.C. He is a graduate of Vermont Law School (J.D. cum laude 1984) and Syracuse University (A.B. 1981). He was the Head Notes Editor and a staff member of the Vermont Law Review from 1982 through 1984. While on the Law Review, he authored Note, Zoning Variance Administration in Vermont, 8 Vt.L.Rev. 370 (1984). Following graduation from law school, Mr. Donovan was an attorney with the Securities and Exchange Commission in Washington, D.C., where he prosecuted numerous securities cases and enforcement matters, including injunctive and disciplinary actions against public companies, broker/dealers and accounting firms. Mr. Donovan has co-authored "The Overlooked Victims of the Thrift Crisis," Miami Review, Feb. 13, 1990 and "Conspiracy of Silence: Why S&L Regulators Can't Always Be Trusted," Legal Times, Feb. 5, 1990.

Mr. Donovan has served as co-lead counsel in the following securities class actions: Lines v. Marble Financial Corp., Nos. 90-23 and 90-100 (D. Vt. 1991)(settled for \$2 million together with substantial changes to the company's loan loss reserve procedures); Jones v. Amdura Corp., No. 90-F-167 (D. Colo. 1991) (action against directors settled for \$4,962,500 and against company after bankruptcy for \$1.2 million); In re Columbia Shareholders Litigation (Del. Ch. 1991)(merger case settled for \$2 per share increase in amount paid to shareholders); Rosen v. Fidelity Investments, [Current] Fed. Sec. L. Rep. ¶ 98,949 (E.D. Pa. Nov. 28, 1995) (opinion certifying class of mutual fund purchasers). In addition, Mr. Donovan has had a substantial role in the prosecution of the following cases, among others: In re Trustcorp Securities Litigation, No. 3:89-CV-7139 (N.D. Ohio 1990)(settled for \$5,600,000); Moskowitz v. Lopp, 128 F.R.D. 624 (E.D. Pa. 1989)(opinion certifying class of stock and option purchasers in fraud on the market and insider trading case); In re Hercules Corporation Securities Litigation, No. 90-442 (D. Del. 1992)(settled for \$17.25 million).

In the area of consumer justice, Mr. Donovan has argued in the United States Supreme Court in Smiley v. Citibank (South Dakota), N.A., No. 95-860, 116 S. Ct. 806 (argued Apr. 24, 1996) and obtained favorable appellate rulings from the New Jersey Supreme Court in Sherman v. Citibank (South Dakota), N.A., 668 A.2d 1036 (N.J. 1995) and Hunter v. Greenwood Trust Co., 668 A.2d 1067 (N.J. 1995) and from the Pennsylvania Superior Court in In re Citibank Credit Card Litigation, 653 A.2d 39 (Pa. Super. 1995) and Gadon v. Chase Manhattan Bank, N.A., 653 A.2d 43 (Pa. Super. 1995). Each of the cases challenged the authority of out-of-state banks to impose default charges on residents of states where such charges are prohibited. Mr. Donovan has also filed numerous friend of the court briefs concerning federal preemption of state consumer protection statutes. In this regard, Mr. Donovan has appeared as a panel speaker at the Pennsylvania Bar Institute's Banking Law Update, the Practicing Law Institute's Financial Services Litigation Forum, the Consumer Credit Regulation Forum of the New Jersey Bar Association, and the National Consumer Rights Litigation Conference sponsored by the National Consumer Law Center. More recently, Mr. Donovan has served as class counsel in several class actions challenging negative option billing practices by cable companies as well as cases challenging the

miscalculation of interest charged or paid by banks. In April 1996, he obtained a favorable appellate decision from the Appellate Division of the New Jersey Superior Court in Lemelledo v. Beneficial Finance Co., \_\_\_ A.2d \_\_\_ (N.J. App. Div. 1996), concerning loan and insurance packing. Mr. Donovan is a member of the American Bar Association (Litigation and Business Law Sections), the Pennsylvania Bar Association, the New York Bar Association, and the District of Columbia Bar Association. He is the Chair of the Consumer Law Subcommittee of the ABA Litigation Section's Class Actions and Derivative Suits Committee. He is also the Vice Chair of the National Association of Consumer Advocates and an active member of Trial Lawyers for Public Justice and Public Citizen.

# THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES

## Mission Statement

NACA's mission shall be to promote justice for all consumers by maintaining a forum for communication, networking, and information sharing among consumer advocates across the country and by serving as a voice for its members and consumers in the ongoing struggle to curb unfair and abusive business practices that affect consumers.

## Tenets

We believe that across the United States far too little legal assistance is provided to individuals who are most in need.

We believe that in our society there is generally very limited advocacy and limited voice for consumers when compared with the well-funded advocacy of groups whose interests may oppose those of consumers.

We believe that unfair and deceptive practices that abuse consumers are extremely widespread, and that some of the current threats to the interests of consumers (such as mandatory arbitration clauses in consumer contracts) are most pressing and fundamental.

We believe that for the free enterprise system to work it is essential that there be effective checks on competitive practices that are fraudulent and unfair, and that effective consumer advocacy is needed to provide such checks and to support honest competition.

We believe that many attorneys would like to work on behalf of individuals with compelling legal needs, but that often these attorneys have received very little personal and legal support, and have too few opportunities to earn money while doing this work.

We believe that many attorneys are rightly frustrated in the practice of law because they find that much legal work has no real social values, or is actually damaging to the interests of society as a whole.

We believe that opportunities exist for many attorneys to obtain reasonable income from work for consumers with compelling legal needs, and we desire to support attorneys who do this work.

We believe that consumer advocate attorneys can and should now be working on imaginative and constructive new ways to advocate consumer interests and prevent consumer harms from ever occurring, and that alternatives to lawsuits should be explored. Such efforts may include, for example, taking the lead in promoting open and constructive relations between consumers and businesses traditionally opposed to consumer interests, and facilitating legitimate and effective means of voluntary alternative dispute resolution.

We believe that openness is of fundamental importance in our economic system and society, and that business and government matters should be kept secret only for compelling reasons. By way of example, we intend to be open in the conduct of NACA affairs.

We strongly support the work for consumers that has been done by the National Consumer Law Center and other consumer groups over the past 25 years, and by legal services programs across the country, and we desire to support these groups and work with them in advocating consumer justice.

#2189

96-CV-66



**TESTIMONY OF NEW YORK STATE ATTORNEY GENERAL DENNIS C. VACCO  
ON PROPOSED AMENDMENTS TO RULE 23 OF THE FEDERAL RULES OF CIVIL  
PROCEDURE**

Let me begin by thanking the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States for its extensive efforts toward improvement of Rule 23 of the Federal Rules of Civil Procedure. In view of well-documented instances of class action abuse, the Committee's efforts to improve the class action device as a mode of redressing grievances are laudable. Instances abound of class actions settled on terms favorable to defendants where class members' interests are compromised by the very lawyers who receive substantial fee awards. We are concerned that two of the revisions proposed by the Committee -- (1) the addition of proposed factor (F) to the matters pertinent to a finding that a class action is maintainable under Rule 23(b)(3), and (2) the addition of a provision for certification of a settlement class under a new Rule 23 (b)(4) -- if implemented, would have consequences obviously unintended by the Committee that could actually exacerbate already existing abuses and thereby undermine the efficacy of the class action device.

Specifically, as discussed below, proposed factor (F) -- which requires consideration by the class action court of whether the probable relief to individual class members justifies the costs and burdens of class litigation -- could effectively eliminate the class action device as the only realistic avenue for the redress of wrongs inflicted upon consumers which, although small when viewed individually, are substantial when considered in the aggregate. Additionally, the proposed provision for certification of a special settlement

class that, for purposes of trial, might fail to satisfy the requirements of Rule 23(b)(3), would, in fact, increase the opportunities for collusion between defendants and class counsel, and for that reason, should either be rejected or, if maintained, be restricted in scope with substantial safeguards built in.

**I. Small Claims Litigation: Proposed Addition of Factor (F) to Matters Pertinent to Finding that Class Action is Maintainable Under Rule 23(b)(3)**

The proposed revision to Rule 23(b)(3) includes, inter alia, the following factor as pertinent to the findings that common questions of law or fact predominate and that a class action is superior to other methods of adjudication:

“(F) whether the probable relief to individual class members justifies the costs and burdens of class litigation;...”.

The Committee Note states that subparagraph (F) has been added “to effect a retrenchment in the use of class actions to aggregate trivial individual claims.” Yet the proposed revision ignores the fact that while the monetary value of certain consumer claims may seem insignificant when viewed individually, the economic injury that is occasioned upon large numbers of consumers under those circumstances can be quite substantial.

Proposed Rule 23(b)(3)(F) overlooks the importance of deterring wrongful conduct that may injure each consumer slightly, but nevertheless injures many consumers in the aggregate. Rule 23(b)(3) has a significant deterrent effect in the market and thus serves an

essential public function of protecting consumers from transgressions of law that result in small wrongs to large numbers of people. In a time of tight governmental budget constraints, the possibility of private consumer class actions serves as an important means of policing nationally based manufacturers and merchandisers from engaging in practices that result in economic harm to consumers on a grand scale. Thus, to adopt proposed Rule 23(b)(3)(F) would effect an unwarranted and inappropriate retrenchment in the enforcement of consumer protection laws, and would effectively condone violations of those laws by manufacturers and merchandisers where the individual economic harm from those violations does not exceed a certain level.

Proposed Rule 23(b)(3)(F) is also troubling because it contains no standards limiting its reach. Assuming that the elimination of "trivial" individual consumer claims were a worthy goal (which is highly questionable), the proposed amendment nevertheless fails to provide any guidance to a court in considering whether the value of probable individual relief outweighs the costs and burdens of class action proceedings.

## **II. Settlement Classes: Proposed Addition of Rule 23(b)(4)**

Proposed Rule 23(b)(4) adds a fourth type of action that may be maintained as a class action, provided that the requirements of subdivision (a) are met:

(4) the parties to a settlement request certification under subdivision

(b)(3) for purposes of settlement even though the requirements of

Subdivision (b)(3) might not be met for purposes of trial.

This proposal would codify the controversial practice by some federal circuit courts of appeals of certifying a class for settlement purposes even though the same class might not be certified for trial purposes. The proposal reflects the Committee's recognition that settlement often proves superior to litigation as a comprehensive solution to issues engendered by class actions. However, we are concerned that such settlements under new subdivision (b)(4) might come at a very high price to the fair administration of justice and the public's confidence in the judiciary. The proposed rule raises fundamental due process concerns relating to the guarantee of adequate representation for absent class members because the only lawyers who may qualify as class counsel under new subdivision (b)(4) are those who have succeeded in striking a deal with the defendant.

Critics and the popular press have already charged that the existence or at least the appearance of collusion between defendants and class counsel already has been carried to unfortunate extremes. For example, in *Hoffman et al. v. BancBoston Mortgage Corp. et al.*, Civ. No. CV-91-1880 (Cir. Ct., Mobile Cty., Ala. 1994). In *Hoffman*, the plaintiff class of mortgage holders serviced by BancBoston, alleged that BancBoston had overcharged them so that a surplus existed in each mortgage holder's escrow account. An Alabama court approved a settlement agreement in that case that actually left many class members suffering a net out-of-pocket loss, while the lawyers received a substantial fee funded out of the class members' escrow accounts! More recently, there has been a storm of criticism over a closed-door hearing conducted by a United States District Judge in New Jersey in connection with a proposed settlement of a class action suit against Prudential involving 10.7 million life

insurance policyholders nationwide. The settlement has been criticized as (a) unfairly favoring Prudential by making it difficult for policyholders, many of whom are elderly, to qualify for compensation; and (b) failing in large measure to provide true restitution to the class, while giving \$90 million in fees to class counsel. *See Paltrow, Judge Acts To Settle Prudential Class Action Courts: Controversial Ruling Which Would Affect 750,000 Policyholders In California, Was Made In A Secret Hearing*, LOS ANGELES TIMES, October 31, 1996 at D1; Quinn, *Insurance Scam Suits Don't Benefit All Victims*, ITHACA JOURNAL, November 19, 1996 at 6A .

We are concerned that new subdivision (b)(4) will only exacerbate the already existing abuses by changing the whole calculus of leverage in the negotiations between defendants and class counsel. The proposed amendment increases the opportunities for collusion between class counsel and defendants, with resulting substantial adverse impact on consumers. Rather than the best plaintiffs' lawyers being able to negotiate a favorable settlement for the class because the defendant fears opposing those lawyers at trial, class counsel in the new (b)(4) class actions might well be the lawyers most willing to join with the defendant to convince a court to approve a settlement of little benefit to the class but which provides attractive attorney's fees.

Such opportunities for collusion make it difficult for even the most well-intentioned courts to assess the fairness to class members of proposed settlements because the courts must necessarily rely upon the information provided by defendants and class counsel.

Under the current revision, courts are constrained only by the weak requirements of Rule 23(a) -- numerosity, common questions of law and fact, typicality of the representative's claims and adequate representation -- in certifying settlement classes. Never before have those factors been deemed sufficient by themselves to justify maintenance of a class action.

Allowing certification of settlement classes without subdivision (b)(3)'s limits or other limits in their stead, cannot ensure the careful scrutiny of (a) attorney incentives or (b) the fairness of the use of the class action device that certification demands in view of well-documented abuses.

To prevent such abuses, at a minimum, any amendment that provides for certification of a settlement class should limit the court's discretion to certify such settlement classes to those instances where the risks of abuse have been minimized and the potential benefits justify the risks that remain. The absence of any such limitations upon the court's discretion in proposed Rule 23(b)(4) requires the rejection of the proposed revision.

Moreover, additional protections must be built into any amendment of the rules which provide for certification of a settlement class. Absent class members must be provided with the right to opt out. Indeed, the proposed rule does not even expressly provide for opt out rights to the (b)(4) class members. While the right to opt out of a settlement class may alleviate some of our concerns with settlement classes, that right alone cannot adequately protect the average absent class member. Because of the common use of highly technical

language in class notices, consumers often do not understand the full import of the settlement terms or what specific action is required of them to avoid becoming part of the court proceeding. Thus, any amendment of the rules which provides for certification of a settlement class should include a requirement that clear and comprehensible notice of the settlement be provided to all class members. Such notice should include not only the essential terms of the proposed settlement in language understandable to the lay consumer, but also information as to how the settlement is to be distributed, what opt-out rights exist, the procedures for filing a claim or objecting, the amount of attorney's fees to be awarded, and the source of class counsel fees. Moreover, apart from the lack of complete or understandable information, opting out is often not a feasible safeguard because of the high costs involved in retaining separate counsel to pursue individual claims. Finally, a right of opt out does nothing for the consumer who wishes to be a part of the proceeding, but is unable to judge the adequacy of the representation provided by class counsel.

We wish to thank the Committee for the opportunity to testify on the proposed amendments, and we hope our comments will prove helpful.



STATEMENT OF WILLIAM T. COLEMAN, JR.,  
ON THE PROPOSED AMENDMENTS TO FED. R. CIV. P. 23  
BEFORE THE ADVISORY COMMITTEE ON CIVIL RULES,  
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES  
Philadelphia, Pennsylvania -- November 22, 1996

Thanks for the opportunity to appear today to discuss the proposed amendments to Rule 23.

I am here not only because I have occasionally practiced in the class action arena (on both the plaintiff's side and the defendant's side), but also because I can say "I was there when it all began." Or perhaps I should say "present at the creation,"<sup>1</sup> since Dean Acheson was the chair of this Advisory Committee at the time I served on it back in 1966, when the current version of Rule 23 came into being.

I hasten to add that I don't claim authorship of the rule, and even if I could, I would note Plato's admonition that the one person who does not know the meaning of the words of a poem is the author thereof.

I can say that in some respects, the 30-year old handiwork of the Advisory Committee has served the legal community and clients well. Particularly in the 1970s, civil rights actions brought under Rule 23(b)(2) against employers who simply refused to hire minority employees were often a laudable use of the class action device.

But sadly, the class action device created by the 1966 rulemaking has in most other respects been an unmitigated disaster -- especially Rule 23(b)(3). Although I admit to having some self-interest in the question, I don't think that this failure can be blamed on those of us who in 1966 occupied your seats. Instead, the responsibility lies with courts that have

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<sup>1</sup> See D. Acheson, Present at the Creation: My Years at the State Department (1970).

not adhered to the clear language of the Rule and the Committee Notes.

The language of Rule 23(b)(3) has been contorted and abused. I therefore heartily endorse the Advisory Committee's express desire to eliminate the increasingly serious abuses of the device.

Having said that, however, I respectfully submit that the changes proposed by this Committee do not go far enough. They hand the federal courts a thimble of water to excise a raging blaze.

Let me note just a few of my concerns, to be supplemented with written comments that I will file later.

My chief concern is that although some attorneys have used the device responsibly, Max Boot of the *Wall Street Journal* and other observers of our judicial process have amassed considerable evidence that too many practitioners are filing too many ill-conceived class actions for one purpose -- to make a quick buck. Their anecdotal research indicates that the following scenario is all too common:

- An attorney brings a complaint claiming that the defendant has caused loss to thousands of people by some action.
- The complaint is bare bones -- it is a formbook job, reflecting no thoughtful case preparation at all.
- Often before the complaint is even served, the attorney seeks publicity about his or lawsuit. The morning headline screams that Party X has done some supposedly horrible deed.

- Other attorneys copy the complaint and file the same action before another court.
  
- Then, one of the attorneys calls up Party X. "Even though I just sued you," he says, "I'm a nice guy. I'm very reasonable. I can make this whole problem disappear very cheaply. Just provide some very, very modest benefit to the proposed class members, pay me a basket of attorney's fees, and this painful chapter will be history."

This is not fiction. It happens all too often. And it is happening because the federal courts have not stated loudly enough and clearly enough that in light of basic due process principles, ethics considerations, and Rule 23's plain language, claims may be litigated on an aggregated basis only in very rare circumstances. As the Supreme Court noted in the Califano case, "the Rule 23 class-action device was designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."<sup>2</sup>

Fortunately, many defendants are flatly rejecting the thinly veiled extortion demands made by the attorneys who bring these class actions. But many defendants cannot risk the peril of such rectitude.

When a class action is filed -- even one that is downright frivolous, as many are -- a defendant with assets cannot ignore it. Typically, the purported claims are brought on behalf of so many people that the exposure is enormous. For example, if a class action were brought on behalf of the eight million owners of a particular product, and the claim is for \$1,000 in damages per class member, the exposure would be \$8 billion. And even if the likelihood of success were assessed at

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<sup>2</sup> Califano v. Yamasaki, 442 U.S. 682, 700-01 (1979).

a minuscule 2%, the exposure still would be \$160 million. And if there is the customary claim for punitive damages, the stakes are even greater.

No right-minded general counsel can turn a blind eye to that kind of financial risk. Thus, even where the claims involved are utterly without merit, Rule 23 hands counsel a fully loaded gun with which to press corporate defendants and individuals with deep pockets unfairly. In case after case, defendants are being forced into settlements driven not by what suits the best interests of the putative class members, but rather by what enhances the financial interests of class counsel.

These abuses must stop. As Judge Friendly wrote almost 25 years ago<sup>3</sup> and as the Seventh Circuit noted again recently in the Rhone-Poulenc case,<sup>4</sup> settlements induced by a small probability of an immense judgment in a class action are "blackmail settlements."

I offer several suggestions to achieve more responsible use of the class action device:

First, Rule 23 should be amended to provide that any complaint containing class allegations must be pleaded with particularity, as contemplated by Rule 9(b). An attorney who wishes unilaterally to undertake the representation of myriad unnamed plaintiffs and visit upon the courts and defendants the burdens of a class action should be obliged to lay out his or her case in some detail at the outset. A particularized pleading requirement may eliminate some of the thousands of class actions that are filed every year "on spec" -- that is, cases that are

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<sup>3</sup> Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973).

<sup>4</sup> In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1298 (7th Cir.) (Posner, J.), cert. denied, 116 S.Ct. 184 (1995).

filed after only minimal investigation in the hopes of striking it rich, possibly by forcing a defendant into an early settlement to avoid the burdens of discovery.

Second, in light of the severe burdens that class actions impose, Rule 23(b)(3) should be amended to make lawyers pay the price for filing ill-conceived class actions. The rule should provide that whenever a motion for class certification is denied in whole or in part, the district court should consider whether, under the circumstances, some or all of the costs (including attorneys' fees) incurred in opposing the motion should be levied upon the moving counsel. The approach now used in discovery matters should be followed: the moving counsel should be obliged to demonstrate that there was substantial justification for each element of the failed motion, along the lines of the "substantial justification" standard in Rule 26(g).

Third, Rule 23(b)(3) should be made even clearer by way of an amendment to include a "classwide proof" prerequisite for certifying any class under Rule 23(b)(3). When the 1966 Advisory Committee adopted the current version of the rule, it was envisioned that a (b)(3) class would be available only where the evidence applicable to all putative class members' claims would be virtually identical. For example, in its Note to this subsection, this Committee observed that

although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed.

Fed. R. Civ. P. 23(b)(3) Advisory Committee Note. Indeed, the Note further states that even

[a] 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways.

Id. (emphasis added).

In making these comments, a goal was to encourage district courts to consider carefully how a matter would actually be tried on a class basis if a matter were certified for class treatment. This analysis is absolutely necessary before class certification to ensure that the kinds of evidence that the named plaintiffs would present would actually prove the claims of all class members and refute all defenses. This need to ensure that a trial actually would provide a basis for deciding the claims of all class members is a critical due process consideration and has been stressed recently in the appellate decisions in the Castano,<sup>5</sup> Valentino,<sup>6</sup> and American Medical Systems<sup>7</sup> cases.

Let's write that point into the rule. The rule should specifically state that in order to obtain class certification, the movant must show that the evidence likely to admitted at trial regarding all elements of the claims asserted by the certified class will be substantially the same as to all class members. This is not a revolutionary change -- the Second,

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<sup>5</sup> Castano v. American Tobacco Co., 84 F.3d 734, 749 (5th Cir. 1996) (reversing class certification order because the trial court "did not . . . consider [] how a trial on the merits would be conducted").

<sup>6</sup> Valentino v. Carter-Wallace, Inc., 97 F.3d 1227 (9th Cir. Oct. 7, 1996) (reversing class certification, observing that "[t]here has been no showing by Plaintiffs of how the class trial could be conducted").

<sup>7</sup> In re American Medical Sys., Inc., 75 F.3d 1069, 1083-86 (6th Cir. 1996) (issuing writ of mandamus against class certification in product liability case where trial court, inter alia, failed to consider how a case would be tried on a class basis).

Fifth, and D.C. Circuits have suggested that such a requirement is already in Rule 23.<sup>8</sup>

Fourth, Rule 23(b)(3)'s superiority requirement should be clarified. Unfortunately, some counsel file class actions that simply piggy-back inquiries launched by federal or state agencies. For example, if the Consumer Product Safety Commission announces that it is examining the safety of a particular product, you can bet that the next day, multiple class actions will be filed on behalf of the product owners.

This is more than wasteful; the lawsuits often interfere with the administrative process and make a mockery of the class action device. For example, in one instance of which I am personally aware, a class action was filed that piggybacked on a pending investigation of certain motor vehicles by the National Highway Traffic Safety Administration. The defendant, based on its discussions with the federal agency, announced a recall of the vehicles. And even though the class action litigation never got off the ground and was not a catalyst for the recall, plaintiffs' counsel called and demanded that the defendant pay attorneys' fees at some percentage of the value of the recall. And even more astoundingly, when the defendant did not accede to this demand, plaintiffs' counsel filed a motion to enjoin the safety recall until the fee issue could be resolved! From my vantagepoint, the counsel showed little consideration for the

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<sup>8</sup> See Sheehan v. Purolator, Inc., 839 F.2d 99, 103-04 (2d Cir.) (upholding denial of class certification where district court concluded that the class claims were "not susceptible of class-wide proof"), cert. denied, 488 U.S. 891 (1988); Alabama v. Blue Bird Body Co., 573 F.2d 309, 321-22 (5th Cir. 1978) (noting that if the addition or deletion of certain class members from trial would "affect the substance or quality of evidence offered, the necessary common questions might not be present"); Walsh v. Ford Motor Co., 807 F.2d 1000, 1017-18 (D.C. Cir. 1986), cert. denied, 482 U.S. 915 (1987).

people they supposedly represented; attorneys' fees dictated everything.

To stop such abuse, Rule 23's superiority requirement should make clear that where the claims asserted could be resolved through federal or state administrative processes, class certification usually should be denied. The rule really says that now, but since some courts arguably have construed the rule differently, the point should be clarified.

Fifth, as this Committee has proposed, the "just ain't worth it" factor should be added to Rule 23(b)(3). However, the Committee's proposed Note to this amendment is off the mark in two respects. First, the Note suggests that the "costs, burdens, and coercive effects of class actions" can be justified by "the public values of enforcing legal norms." In short, the Notes suggest that a purpose of Rule 23 is to hand a private attorney general's badge to any counsel who wants it.

I respectfully submit that back in 1966, that was not an intended purpose of Rule 23(b)(3). If there is interest in deputizing all attorneys everywhere to enforce our laws, that's a matter that should be decided by Congress, not through the class action provisions in the Federal Rules of Civil Procedure. The courts' tolerance for this vigilante-style use of class actions is a root cause of the abuses that must be corrected.

Additionally, the Note also arguably suggests that leaving aside truly trivial claims, there is a sliding scale for obtaining class certification, depending on the size of a claim -- smaller claims are more certifiable than larger claims. This analysis is overly simplistic and wrong. In the class certification process, the size of the class members' individual claims may be an appropriate consideration in deciding whether class members may prefer to pursue their claims individually,

matters that are addressed by the proposed new subsections (b)(3)(A) and (B). But in other respects, claims cannot be considered more or less certifiable because of their size. Due process rights do not disappear when the size of a claim is small, particularly when the aggregate exposure to a defendant in a class action is usually enormous.

Finally, as this Committee has proposed, Rule 23 should be amended to allow for appellate review of class certification decisions. Let's face it. In a purported class action, the district court's call on whether a purported class should be certified is the whole ballgame. That call should be reviewable.

As I stated at the outset, I urge the Committee to be far more active in addressing class action abuse. Look again at what was intended in the first place when the current class regime was established in 1966. Unless class actions can be taken back to those basic principles, I respectfully submit that Rule 23(b)(3) should be repealed altogether, because as currently applied, it serves primarily to feather the nests of certain counsel, to give little or no redress to the public, and to deny the due process rights of many defendants.

RECEIVED  
1/7/97

TESTIMONY OF LEONARD B. SIMON REGARDING RULE 23  
BEFORE THE ADVISORY COMMITTEE  
ON THE FEDERAL RULES OF CIVIL PROCEDURE

96-CV-073

I. INTRODUCTION

I appreciate the opportunity to address the Committee. Because I know that the Committee has already heard numerous witnesses on both sides of each sub-issue, I will try to limit my remarks, not restating what others have said, but attempting to synthesize or to add something new to the debate where possible.

By way of introduction, I am a Managing Partner in the San Diego office of Milberg Weiss Bershad Hynes & Lerach. Before joining Milberg Weiss, I worked for over six years for Arnold & Porter in Washington D.C. I am a graduate of Duke University School of Law (1973) and clerked for the Hon. Irving Hill in the Central District of California.

In my 22 years of private practice, I have been involved almost exclusively in complex litigation, primarily representing defendants for the first one-third of my career and primarily representing plaintiffs for the last two-thirds. I have been involved in well over 100 class actions.

I have also been a faculty member on numerous ALI-ABA, PLI, and other continuing legal education programs, have lectured on securities class actions at Stanford Business School and UCLA Law School, and have testified before Congress twice. My first law review article, on the settlement of securities class actions, will appear in the next month or two.

Among my more significant cases are:

1. I was co-lead counsel in In re American Continental/ Lincoln Savings Securities Litigation, MDL 834, which went to trial and resulted in a jury verdict of over \$1 billion, and which has thus far resulted in cash recoveries totalling \$250 million on losses of approximately \$280 million.

2. I am co-lead counsel in In re Nasdaq Market-Makers Antitrust Litigation, MDL 1023, which is viewed by many as the largest private antitrust case of all time.

3. I was a member of the core group of attorneys who assisted lead counsel in the prosecution of In re Washington Public Power Supply System Securities Litigation, MDL 551, which settled during trial, and returned approximately \$700 million to investors.

Of course, my experience also includes numerous smaller to mid-sized class actions, and the defense of class actions. I have also handled many non-class actions, arbitrations, and a wide variety of other legal work.

By way of limitation, I should say that my experience is heavily concentrated in securities, antitrust and consumer cases. I have not been involved in any mass tort cases, and I claim no expertise in that area. Indeed, several of the proposals which I (and others) find objectionable appear to have been written with mass tort problems in mind, and do not work well (or address non-existent problems) in the areas of securities, antitrust, and consumer law. The Rule, of course, must govern all cases, and this is an unfortunate aspect of the proposed amendments.

Since the Lincoln Savings, Nasdaq, and WPPSS matters are so well known, it is easiest to illustrate my points through those

cases. Each of those cases, which are in my view classically proper uses of Rule 23, might well not be certified under the proposed revisions. Each case had (1) its share of small claimants, whose claims might not be viewed as meeting the cost/benefit analysis of proposed Rule 23(b)(3)(F), and (2) also its share of large claimants, which apparently would weigh against certification under proposed Rule 23(b)(3)(A). If these highly appealing cases are threatened by the proposed revisions, one can only imagine the harm which will be threatened to the average class action.

I also wish to focus the committee upon the added complexity and uncertainty which would be engendered by several of the proposals. As many witnesses have testified, several of the proposals are ambiguous, or at least subject to vastly different interpretations. Superimposing these vague changes upon a developed body of Rule 23 law will simply make certification of a class more time-consuming and costly. Every defense counsel worth his or her salt will argue that case law preceding these amendments is obsolete. Interlocutory appeals will be attempted with regularity. Stays will be demanded pending each interlocutory appeal. The net result will be more litigation on procedural points, greater delay before the merits are reached, and inconsistent and unpredictable certification decisions. With due respect, added delay and expense before the parties even focus upon whether there was any wrongdoing, and inconsistent and seemingly arbitrary decisions, are the sorts of things that bring our judicial system into public disfavor. Members of the classes I represent cannot fathom how it can take four, five, or six years to

resolve these cases, and a substantial reason is that the first year or two are taken up with procedural disputes about the "shape of the table." These proposals will only expand that non-productive part of the process, and in some cases, dash these class members' hope of any recovery.

I will elaborate upon each point.

II. RULE 23(b)(3)(F) -- SMALLER CLAIMS, COST BENEFIT ANALYSIS

So much has been said against this proposal that I will not repeat it at any length. The proposal is ambiguous, one-sided, seemingly compares apple to oranges, and is contrary to a central tenet of class action litigation -- the aggregation of numerous small claims, otherwise too small to litigate, in order to right a wrong, to disgorge unlawful profits, and/or to deter wrongdoing. Deposit Guaranty v. Roper, 445 U.S. 326, 337 (1980). If a car rental company is stealing \$2 on every rental, there is every reason in the world to allow a class action. Any other result would embolden it and its competitors to continue their conduct, and go even further.

Even if there is something wrong with a case which is likely to yield only \$2 per claimant -- and I am not sure what it is -- I have no doubt that this amendment would create uncertainties for virtually every class action in which I have been involved. How will the cost/benefit analysis come out for a Nasdaq Antitrust claim worth \$100? Is that \$100 worth a massive investment of time by Judge Sweet? And what about the legal costs and expenses of plaintiffs, or the defense costs? Classwide damages are several

billion dollars, but the proposed amendment does not provide any comfort that this is the relevant "benefit." The same argument could have been made in Lincoln Savings (many claims for several hundred dollars, some smaller, some larger) or even WPPSS (smallest denomination bond sold was \$5000). I am not suggesting that these cases would fail the test of proposed subsection (F), but only that (1) they might, which is unthinkable, (2) this issue will be litigated seriously in every case, and (3) other deserving class actions without equal appeal or with slightly smaller claims are likely to fail this test.

There are also enormous problems of proof. How does one determine the "cost" of the action to the judicial system? To the defendants? Is discovery permitted? Expert witnesses? The calculus is undefined and lends itself to speculation and arbitrariness.

At bottom, subsection (F) is a bad idea, poorly executed. If the Committee truly believes that cases which yield less than \$10, or \$5, or some other amount are not worthy of class certification, it should say so in simple and unmistakable prose. Otherwise, the court invites lengthy discourse and amateurish cost/benefit analysis in every case, without adequate guidance as to what is to be weighed against what, making class certification decisions unreasonably discretionary, varying from case to case without rhyme or reason.

### III. RULE 23(b)(3)(A) -- LARGER CLAIMS

Virtually every class action includes some large claimants who could, but often do not, opt out. It is very hard to fathom what

the Committee has in mind with this proposal. Should a class of 5000 small claimants be denied certification simply because the class also includes 100 large claimants? Surely not. Alternatively, does the rule mean that the large claimants should be eliminated from the class? If so, why? They can opt out if they choose, and they are the class members most likely to receive and read the opt out notice, to understand it, and to have the legal counsel and the resources sufficient to act upon it intelligently.

It is ironic to note that, whereas subsection (F) appears to be an attack on small claimants in class actions, subsection (A) seems to find fault with large claimants as well. A neutral reader might assume that the Committee simply does not like class actions.

It is also ironic that, whereas subsection (A) reads something negative into class members with large claims, the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995), creates a presumption that the plaintiff with the largest claim should be designated as lead plaintiff and should select class counsel. Congress, seeking to remedy some of the same so-called abuses which are the apparent target of these changes, apparently determined that large claimants were to be preferred in these cases, while the Committee appears to be forcing large claimants out of class actions.

It is very difficult to see any good coming from this proposed amendment. It may block some perfectly valid class actions, and at a minimum, will engender confusion, additional litigation issues, and uncertainty in an area of class action law as to which one hears very few complaints.

#### IV. INTERLOCUTORY APPEALS

As matters stand, appeal of class certification decisions is exceedingly difficult. Mandamus and §1292 are available in rare cases, but by and large, class certification decisions cannot be appealed. I have been on the losing end of several certification decisions, and although the inability to appeal is often quite frustrating, allowing a substantial number of interlocutory appeals would be even worse. Whatever words the Committee uses to try to limit the number of appeals, litigants and the courts will read this amendment as a signal that more interlocutory appeals should be entertained. And once a request for appeal has been made, a motion for stay will follow, asserting that massive discovery efforts will go for naught if the certification is reversed.

The net result will be that in a sizable number of class actions, particularly those which are large and important (and therefore may present purportedly unique issues as to manageability and the like) the already slow pace of such cases will be further elongated by an 18-24 month trip to the Court of Appeals, followed by a certiorari petition from the losing party.

#### V. UNCERTAINTY, DELAY, WASTE THROUGH AMBIGUOUS RULE CHANGES

Many will argue that Rule 23 works well and should not be changed. I agree, but I wish to make a narrower point here. Even if one accepts the view that Rule 23 needs fine-tuning, these proposed changes will do little good, but they will engender lengthy litigation and a great deal of uncertainty over the proper reading of Rule 23. By tinkering with language in an area with

well-developed case law, the Committee will permit counsel in each post-amendment case to argue that prior case law has been undermined by the language change. "Pre-amendment" case law will be discussed separately from "post-amendment" cases. Every case law concept regarding certification will be fair game for creative attorneys.

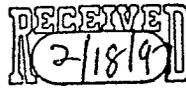
On this point, I believe that some cost/benefit analysis is useful. The cost of relitigating every Rule 23 issue and injecting so much uncertainty into certification far outweighs the modest "benefits" which these amendments might bring to Rule 23 jurisprudence.

Let me reiterate my central view that these changes are counterproductive and will accomplish no good. My additional point here is that the incidental harm they will do far outweighs even the claimed benefits.

#### VI. CONCLUSION

Rule 23 works pretty well. It is not perfect, but it is closer to perfect than many other areas of federal statute, rule, and case law. In securities and antitrust cases, with which I am most familiar, numerous classwide controversies are resolved efficiently and fairly under Rule 23. Rule 23 case law is fair, and constantly being refined. Indeed, the Supreme Court has taken up two cases this term which will guide future litigation, and may either eliminate or enhance the desirability of rule amendments. I would respectfully submit that the changes proposed for large claimants, small claimants, and interlocutory appeals are counterproductive and should not be enacted. In a worst case

analysis, they will block numerous valuable class actions; at a minimum they will engender confusion and delay.



96-CV-073  
Supp.

SUPPLEMENTAL TESTIMONY OF LEONARD B. SIMON  
REGARDING RULE 23  
BEFORE THE ADVISORY COMMITTEE  
ON THE FEDERAL RULES OF CIVIL PROCEDURE;  
SPECIFIC COMMENTS ON THE VICES OF OPT-INS

I appreciate the opportunity to address the Committee again. Because some Committee members and some witnesses have mentioned the possibility of changing the current opt-out rule to an opt-in rule, and have in particular suggested this as a purported solution to the "small claims" issue and the criticisms of proposed Rule 23(b)(3)(F), I will focus my attention on that issue.

My background and experience are set out in my prior submission. I have over 20 years of complex litigation experience, on both the plaintiff and the defense side.

When Rule 23 was amended substantially in 1966, a principal element of the new rule was adoption of the opt-out concept -- that all class members would be bound by a certified class action, save those who affirmatively excluded themselves from the action.

As Benjamin Kaplan, reporter to the Civil Committee that drafted the 1966 amendments, put it:

[R]equiring the individuals affirmatively to request inclusion in the lawsuit would result in freezing out of the claims of people -- especially small claims held by small people -- who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step. The moral justification for treating such people as null quantities is questionable. For them the class action serves something like the function of an administrative proceeding where scattered individual interests are represented by the Government. In the circumstances delineated in subdivision (b)(3), it seems fair for the silent to be considered as part of the class. Otherwise

the (b) (3) type would become a class action which was not that at all -- a prime point of discontent with the spurious action from which the Advisory Committee started its review of rule 23.<sup>1</sup>

Similarly, then Judge Frankel of the Southern District of New York recognized shortly after the adoption of the 1966 amendments that binding absent members to a judgment "actually promotes essential fairness and justice no less than the secondary goal of judicial efficiency."<sup>2</sup>

Since 1966, there have been a few proposals from time to time to require opt-ins, but none has drawn serious support or come close to adoption. For example, in 1972 the American College of Trial Lawyers suggested, among other things, that an opt-in procedure be adopted.<sup>3</sup> Similarly, in 1978, the Justice Department suggested that, as part of a completely new class action provision, an opt-in procedure be adopted.<sup>4</sup> Both of these proposals were met with substantial criticism and neither was adopted. The criticisms focused primarily upon the proposals' failure to advance or even take account of the fundamental purposes of class actions.

One of the several purposes underlying the creation of the class action as a procedural device was to allow small claimants to recover for their losses where individual actions would be

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<sup>1</sup> Benjamin Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure, 8 Harv. L. Rev. 356, 397-98 (1967).

<sup>2</sup> Marvin E. Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39, 45-46 (1967).

<sup>3</sup> American College of Trial Lawyers, Report and Recommendations of the Special Committee on Rule 23 of the Federal Rule of Civil Procedure at 2-3 (March 15, 1972).

<sup>4</sup> S. 3475, 95th Cong., 2d Sess. (1978) (legislative embodiment of the Justice Department proposals).

infeasible.<sup>5</sup> As the drafters of the original Rule and later commentators recognized, adoption of an opt-in requirement would prejudice small claimants. Small claimants, especially in consumer and securities actions, are often unsophisticated and unfamiliar with the legal system.<sup>6</sup> As a result, these potential claimants would often not take the affirmative step of opting in.<sup>7</sup> Therefore, an opt-in requirement would deny to many of these claimants any remedy for the wrongs committed against them.<sup>8</sup> To treat these people as null quantities, simply because their claims are small (though perhaps not to them) or because of their lack of familiarity with the legal system is of questionable moral justification.<sup>9</sup>

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<sup>5</sup> See Katz v. Carte Blanche Corp., 496 F.2d 747, 759 (3d Cir. 1974).

<sup>6</sup> One criticism of the proposal made by the American College of Trial Lawyers illustrated the impact small claimants' unfamiliarity could have on their ability to participate. The author noted that in one consumer class action before the District Court for the District of Columbia notice was sent to 114 individuals who were asked to fill out and return an opt-in form which bore both an opt-in and an opt-out box. Of the ninety one recipients who returned the form, 18 failed to check either box and one checked both. See Note, The Rule 23(b)(3) Class Action: An Empirical Study, 62 Geo. L.J. 1123, 1149 (1974).

<sup>7</sup> As the Supreme Court recognized, "[t]he plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually, nor would he affirmatively request inclusion in the class if such a request were required by the Constitution." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812-13 (1985).

<sup>8</sup> Committee on Federal Courts, Class Actions -- Recommendations Regarding Absent Class Members and Proposed Opt-in Requirements, 28 The Record 897, 905 (1973) ("An opt-in rule would artificially circumscribe the applicability of the Rule and would deprive those most in need of its benefits -- those unable to obtain competent counsel -- from securing those benefits.").

<sup>9</sup> Kaplan, supra, at 398 ("The moral justification of treating such people as null quantities is questionable.").

Criticisms of the proposals also focused on the prejudice they would impose upon defendants and the courts. Because only a small percentage of potential claimants might actually respond to notices advising them of their right to opt-in, few claims would be affected by a class judgment and the opt-in procedure would thereby deny defendants the substantial res judicata benefits of a class-wide judgment.<sup>10</sup> A related purpose underlying the adoption of 23(b)(3) in 1966, this one expressly stated, was the creation of judicial efficiency by resolving numerous related claims in one action.<sup>11</sup> Commentators and courts recognized that adoption of the proposed opt-in procedures would frustrate that purpose as well, since the failure of claimants to act affirmatively to opt in would inevitably result in smaller classes and numerous later actions pursuing the same claims.<sup>12</sup>

Nothing has changed since those proposals were rejected, and we believe there are very good reasons why we have maintained an opt-out regime. The benefits of class treatment are maximized when the claims of all, or nearly all, class members are resolved in one trial (or one settlement). Conversely, the economies of scale are lost or watered down when substantial portions of the potential

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<sup>10</sup> Kaplan, supra n.4, at 397.

<sup>11</sup> Advisory Committee's Notes on Proposed Rules of Civil Procedure, 39 F.R.D. 69, 102-03 (1966) ("Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated . . . ."); see also Shutts, 472 U.S. at 814.

<sup>12</sup> Patricia L. Wells, Note, Reforming Federal Class Action Procedure: An Analysis of the Justice Department Proposal, 16 Harv. J. on Legis. 543, 571 (1979); see also Kleiner v. First Nat'l Bank, 751 F.2d 1193, 1202 n.19 (11th Cir. 1985).

class are excluded by their failure to act upon (or timely receive, or understand) a class notice.

Even if one assumed that every class member received, read and understood the class notice, opt-ins would present a problem, as multiple decisions not to opt in would leave many class members free to pursue their own cases, multiplying the proceedings and sacrificing efficiency. But that sacrifice is multiplied many fold, and combined with serious unfairness, when one considers the plight of those who fail to learn of or recognize the opportunity to opt in.

I have no doubt that many class members will miss their opportunity to opt-in. Although no one has direct experience with opt ins, we can gain insight into the problem by looking at the nearly parallel experience with claim forms in resolved class actions. In the typical class action which is resolved with a payment to the class, class members receive:

- (a) a notice of pendency;
- (b) a notice of settlement or judgment (and often multiple notices of partial settlements); and
- (c) a claim form.

On each occasion, publication notice is employed, as well as the obligatory first-class mailed notice.

Nevertheless, in virtually every class action, sizable numbers of persons come forward days, weeks or months after the deadline for claims, complaining that they did not receive or did not understand the notice and wanted to file a late claim. Most of these late claimants seem sincere and present sympathetic stories. Sometimes they can be accommodated because checks have not been cut.

In an opt in regime, however, similarly situated people would -- after missing only one notice -- be out of luck. Defendants would take the position, with considerable force, that the time to opt-in had passed and the dimensions of the case were set. Leaving aside cases of trivial lateness -- one or two days -- these late opt-ins would likely be rejected. A class member who missed the notice entirely but heard about a subsequent settlement or judgment would surely be excluded on the basis that he was seeking "one-way intervention," something the 1966 amendments were designed to prevent.

If sizable numbers of class members miss three or more notices under the current system, one can expect even larger numbers to miss their one opportunity to opt in under a new system. Courts will be inundated with unhappy excluded class members.

Finally, I wish to comment on the lack of relationship between opt ins and proposed Rule 23(b)(3)(F). The problem of small claims cannot be cured any better by an opt in than it could by the heavily criticized proposed subsection (F). Simply put, the question whether claims below \$10, or some other amount, are "worth it," is entirely separate from the question of opt ins versus opt outs. Indeed, if the small claims are "worth it," asking for opt ins is least defensible in this context, as notice is less likely to get through on the first try,<sup>13</sup> and persons with small claims are less likely to take the trouble to opt in in the face of a

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<sup>13</sup> Classes with very small claims are likely to be consumers of inexpensive goods or other persons not contained on any up to date mailing list, and thus are the type of classes which require multiple mailings and wide publication, media coverage, and the passage of time before most class members can be expected to respond.

legalistic notice and claims form. If there is a problem with small claims -- and I am not convinced there is -- an opt in requirement is not the solution.

In closing, I would urge the Committee to tread cautiously in this area. Wise men and women created the opt out regime in 1966, and wise men and women have refused to change that element over the intervening three decades. Indeed, proposals to institute an opt-in regime have not come close to passage. Those decisions were made carefully and correctly, and should not be tossed aside over some unsupported concern that there are too many "small claims."

#2074



Statement of Michael Caddell  
On the Proposed Amendments to Federal Rule of Civil Procedure 23  
Before the Committee on Rules of Practice and Procedure  
of the Judicial Conference of the United States

January 17, 1997  
San Francisco, California

96-CV-076

I appreciate the opportunity to appear before this Committee to comment on the proposed amendments to Federal Rule of Civil Procedure 23.

Over the past four years, I have represented plaintiffs in numerous class actions in both federal and state court. Among those class actions, I served as lead counsel and co-lead counsel in *Beeman, et al. v. Shell, et al.*, Cause No. 93-047363, in the 164th Judicial District Court of Harris County, TX, and *Cox, et al. v. Shell, et al.*, Civil Action No. 18,844, in the Chancery Court of Obion County, Tenn., two of the polybutylene class actions which all together settled for \$950 million exclusive of attorneys' fees. The polybutylene settlement is the largest property damage class action settlement to date, and it might not have been possible if settlement classes had not been available.

My testimony will focus on two aspects of the proposed changes to Rule 23: settlement classes (proposed Rule 23(b)(4)) and balancing individual recoveries with the costs and burdens to the system (proposed Rule 23(b)(3)(F)). Although I support

the amendment which guarantees the continued use of settlement classes, I fear that the proposed cost/benefit provision will lead to undesirable results, as I explain below.

#### **Proposed Rule 23(b)(4)**

The proposed Rule 23(b)(4), which would permit certification of a class for settlement purposes, is designed to resolve the disagreement among Circuit courts as to whether a class that is not certifiable for trial purposes could be certified for settlement purposes.<sup>1</sup> This provision would be a positive step toward assuring the continued use of settlement classes. At the same time, the rule as it is proposed minimizes the potential for abuse of settlement classes by placing several important limitations on their use. First, anyone proceeding under subdivision (b)(4) would have to meet the requirements of numerosity, commonality, typicality, and adequacy of representation, which are set forth under Rule 23(a). Second, if a class action is only maintainable under 23(b)(1) or 23(b)(2), the provisions of (b)(4) are not available in the event of settlement. Third, as the proposed rule is written, the parties must already have reached settlement to apply the provisions of (b)(4). By limiting the availability of this device to parties that have entered into settlement, a court would not be able to pressure a reluctant defendant into a settlement where the case would otherwise be

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<sup>1</sup> See *Weinberger v. Kendrick*, 698 F.2d 61, 72-73 (2d Cir. 1982) and *In re Asbestos Litigation*, 90 F.3d 963, 975 (5th Cir. 1996) for cases adopting the practice reflected in the new settlement class provision. But see *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996) and *In re General Motors Corp. Pick-Up Truck Fuel Tank Litigation*, 55 F.3d 768 (3d Cir. 1995) for cases holding that a class cannot be certified for settlement purposes unless the same class would be certified for trial purposes.

uncertifiable. Finally, the proposed Rule 23(e) requires that the court hold a hearing on all proposed settlements. Therefore, the court would have the opportunity to review the fairness of the settlement, and the class members would be notified so they may opt-out of the settlement.

Subdivision (b)(4) makes clear that different factors affect the settlement and litigation of class claims or defenses and that implementation of the factors which control certification of a (b)(3) class must be applied from the perspective of settlement, not trial. For example, problems with choice-of-law or individual causation can be avoided by settlement. Moreover, litigation which would require resort to many courts or involve other manageability problems could be handled by a single court for settlement purposes. Finally, settlement may be superior to litigation for devising comprehensive solutions to large-scale problems that are not easily resolved by traditional adversary litigation.

If the Third Circuit view expressed in *In re General Motors Corp. Pick-Up Truck Fuel Tank Litigation* and *Georgine* (see footnote 1, *supra*) becomes widely accepted, settlement of class claims which do not meet the certification requirements of Rule 23 would become unavailable to certain class actions. The only way to resolve such large scale and varied claims would be on a case by case basis, thereby eliminating the judicial efficiency and fairness associated with aggregating claims through the class action device. Because many individual claimants would find the cost of litigating their

claims prohibitive, those claimants would not file suit; consequently, without settlement classes, some legitimate claims might not get relief. Therefore, it is important that subdivision (b)(4) be added to Rule 23 to resolve any disagreement over settlement classes in favor of their continued use, without the imposition of the (b)(3) requirements where the case could be resolved without going to trial.

One of the most frequently expressed fears associated with this amendment is that it will potentially encourage collusive settlements. However, as discussed above, Rule 23 requires a hearing and notice to class members before a settlement may be approved. By giving *heightened* scrutiny to the *adequacy* of a settlement that involves a settlement class, courts are in a position to minimize the potential for collusive settlements. Courts must take their role as overseer seriously to insure the fairness of the settlement to both class members and parties alike.

#### **Proposed Rule 23(b)(3)(F)**

While the proposed rule for settlement classes will improve the class action device as a means to resolve legitimate claims, the cost/benefit provision proposed in Rule 23(b)(3)(F) will detract from the class action device by preventing numerous small but legitimate claims from being heard. One of the principal purposes of the class action is to aggregate claims that could not be brought individually. Given the cost of litigation, there will always be worthwhile but small claims that are too costly to bring. Where

numerous small but similar claims exist, the class action device provides an equitable and efficient means of asserting those claims.

A second role of the class action is to provide an incentive to plaintiffs, who individually have little to gain from bringing their claims, to collectively spend more money prosecuting their individually small but meritorious claims. For example, the defendant opposing a single plaintiff with a small claim, which the defendant knows could later be brought by other potential plaintiffs, has a greater financial incentive to win that lawsuit than the plaintiff with the small claim has to prosecute it. If the defendant loses that lawsuit, the res judicata effect could be costly when later claimants with the same claim come forward. Alternatively, if the defendant wins the first case, other potential plaintiffs will be deterred from filing suit. By combining plaintiffs with similar claims into one action, the stakes for those plaintiffs will be elevated to a level more near that of the defendant(s).

The probable effect of the proposed cost/benefit provision would be to undermine the roles of the class action. First, the provision comes into direct conflict with the function Rule 23 plays in deterring behavior that is costly to the public but injures each individual slightly. Under proposed 23(b)(3)(F), wrongs that are too small to be handled as either individual claims or a class action would become acceptable practice even though the law says otherwise. The message that is conveyed by this new provision is that it is acceptable under the law to steal a little from a lot of people,

which cannot be the right message. Finally, no other rule of law requires the utility of the claim to the individual plaintiff to be weighed against the cost of bringing the action. Given the role of the class action to enable small claims, which would not otherwise be heard, to be brought in the aggregate, this proposed balancing requirement would not only be a novel practice, but it would also frustrate one of the central purposes of Rule 23 -- to level the playing field between small individual claimants and defendants.

Again, thank you for the opportunity to share my views on the proposed changes to Rule 23.



**TESTIMONY BEFORE THE ADVISORY COMMITTEE ON CIVIL RULES  
CONCERNING THE PROPOSED AMENDMENTS TO FED. R. CIV. P. 23**

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**I. Settlement Classes**

The Committee has proposed adding the following section regarding settlement classes to Fed. R. Civ. P. 23 (new language is underlined):

**(b) Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . . (4) the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial.

We support this proposal, which explicitly authorizes courts to consider the existence of a settlement in deciding whether the Rule 23(b)(3) requirements are met.

There is now a consensus among the federal Courts of Appeals that product liability cases generally are not suitable for class treatment for litigation purposes. In the last 18 months alone, five circuit courts have decertified product liability class actions. The Seventh Circuit started the trend with *In the Matter of Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995), in which the court granted mandamus and decertified a class of plaintiffs who alleged injuries from HIV-infected blood factor concentrate used to treat hemophilia. In the next Court of Appeals decision that addressed certification of product liability classes, *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1089 (6th Cir. 1996), we successfully argued on behalf of AMS that the Sixth Circuit should grant mandamus and decertify a class of plaintiffs who alleged

injuries by AMS penile prostheses. In its opinion the court went a step beyond the holding of *Rhone-Poulenc* and stated that there is “a national trend to deny class certification in drug or medical product liability/personal injury cases.” Three different circuit courts since then have relied heavily upon *In re AMS* in decertifying various classes of product liability plaintiffs. *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (decertifying class of nicotine-addicted plaintiffs); *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996), *cert. granted sub nom. Amchem Products, Inc. v. George Windsor*, 1996 WL 480936 (Nov. 1, 1996) (decertifying class of plaintiffs alleging injury from asbestos); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996) (decertifying a class of plaintiffs alleging injury from Felbatol, a drug used for the treatment of epilepsy). Consequently, unless the courts are permitted to consider the existence of a settlement in deciding whether the Rule 23 criteria are satisfied, settlement classes in products liability cases will become a dead letter and their substantial benefits will not be realized.

Every circuit to consider the issue, except the Third, has held that the existence of a settlement may be taken into account in determining whether the requirements of Rule 23(b)(3) are satisfied. *See, e.g., In re A.H. Robins Co.*, 880 F.2d 709, 740 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989) (“certainly settlement should be a factor, and an important factor, to be considered when determining certification”), *aff’g*, 85 B.R. 373, 378 (E.D. Va. 1988) (“the requirements of Rule 23 may be more easily satisfied in the settlement context than in the more complex litigation context”); *In re Dennis Greenman Securities Lit.*, 829 F.2d 1539, 1543 (11th Cir. 1987) (“In reviewing settlement certifications, a special standard has been employed.”); *Officers for Justice v. Civil Service Comm’n of City and County of San Francisco*, 688 F.2d 615,

633 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983) ("certification issues raised by class action litigation that is resolved short of a decision on the merits must be viewed in a different light"); *In re Beef Industry Antitrust Lit.*, 607 F.2d 167, 178 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981) ("it is altogether proper and consistent for a court to certify a class for settlement purposes, while it might have had more difficulty reaching this determination in a different context"). The Fifth Circuit recently reiterated that rule in approving a class settlement of asbestos cases. *In re Asbestos Lit. (Flanagan v. Ahearn)*, 90 F.3d 963 (5th Cir. July 26, 1996).

There are several reasons why certification of a settlement class might be proper even if certification of a litigation class would not be.

First, settlement avoids the need to try uncommon issues, making it more likely that common issues will predominate and eliminating concerns that a class trial might be unmanageable. *See, e.g., A.H. Robins*, 85 B.R. at 379 (settlement "eliminates, as a practical matter, uncommon or atypical individual issues" and, therefore, "eliminates obstacles frequently present in tort actions where plaintiffs seek to certify a class"); *In re First Commodity Corp. of Boston Consumer Accounts Lit.*, 119 F.R.D. 301, 307 (D. Mass. 1987) ("common questions may predominate and justify a class if the case is settled, [even if] the standards of Rule 23(b)(3) may not be met if the case must be tried").

Second, public policy favors the settlement of disputes; the consensual resolution of hundreds or thousands of claims on terms that are fair to class members is vastly superior to litigating each individual case on the merits. *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 154 (S.D. Ohio 1992) ("Courts have encouraged the settlements of lawsuits, particularly class actions"); 2

Newberg & Conte, *Newberg on Class Actions*, §11.41, at 11-85 (courts supervising class action settlements are heeding the public policy in favor of settlement).

Third, settlement classes contain a procedural protection to class members not available in litigation classes: in settlement classes, class members can decide whether to participate in the class, knowing the terms of the final judgment. *In re Beef*, 607 F.2d at 175 (agreeing with law review commentaries that costs associated with settlement classes are “offset by the advantage of being able to opt out with knowledge of the benefits of remaining in the class”) (citations omitted); *Weinberger v. Kendrick*, 698 F.2d 61, 72 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983).

Finally, as stated by the Fifth Circuit in its recent decision in *Flanagan*, 90 F.3d at 975: “[S]ettlements and the events leading up to them add a great deal of information to the court’s inquiry and will often expose diverging interests or common issues that were not evident or clear from the complaint.”

Standing alone against this authority are two Third Circuit decisions written by Judge Becker. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995); *Georgine*, 83 F.3d 610. In *Georgine*, the Third Circuit stated that because the 23(b)(3) requirements protect the same interests of fairness and efficiency as the 23(a) requirements, and because “[t]here is no language in [Rule 23] that can be read to authorize separate, liberalized criteria for settlement classes,” the requirements of Rule 23 must be applied “as if the case were going to be litigated. . . . Strict application of the [Rule 23] criteria is mandated, even when the parties have reached a proposed settlement.” *Id.* at 624-25. Applying the Rule 23 criteria to the litigation context, the court found, *inter alia*, that plaintiffs

resided in many different states, and that because the “states have different rules governing the whole range of issues raised by the plaintiffs’ claims,” uncommon issues predominated over common ones. *Id.* at 627, 630. The result is not surprising -- this factor alone, if the existence of a settlement is not taken into account in the certification analysis, will almost always militate against certification of a class. The court went on to say that even if “the better policy” might favor including settlement as a factor in a class determination, and even if a proposed settlement is “arguably a brilliant solution” to a “scourge” of litigation, a court is powerless to consider the existence of the settlement as a factor in class certification because “reform must come from the policy-makers, not the courts.” *Id.* at 634.

Nothing in Rule 23 prohibits consideration of a settlement in determining whether the requirements of the rule are satisfied. Contrary to the Third Circuit’s conclusion, allowing courts to take settlement into account would not result in “different” or “more liberal” criteria for settlement classes, but would only authorize the court to apply the current criteria to the actual case before it -- which will not be tried and from which class members, knowing the final result, can exclude themselves -- rather than to a hypothetical case where the court presupposes that individual issues will have to be tried.

The Third Circuit recognized, both in *Georgine* and *General Motors*, that settlement classes can have significant benefits by, among other things, fairly compensating claimants for the value of their claims without the enormous time, expense and delay of litigating hundreds or thousands of individual claims and by relieving the courts from the burden of trying such claims. *General Motors*, 55 F.3d at 784. The Third Circuit rule, however, would effectively put an end to settlement classes, at least in the product liability context. No defendant

would agree to a settlement class if, by doing so, it subjected itself to automatic class certification for litigation purposes if the settlement were ultimately rejected as unfair. Yet, this is the practical consequence of the Third Circuit's rule: if settlement is not a factor in the class action equation, then by agreeing to a class settlement the defendant automatically agrees that the class can be certified for litigation purposes, too. Moreover, because most courts have held that class certification *for litigation purposes* is inappropriate in product liability/personal injury cases, the Third Circuit's rule sets an impossible standard for *settlement* classes and effectively forecloses any attempt short of bankruptcy to resolve product liability litigation globally.

The Third Circuit opines that class members will be subjected to inadequate representation or collusive settlements if a settlement is allowed to be considered in the class certification decision. But neither the proposed rule, nor any case to our knowledge, has suggested that the Rule 23 (a) requirements of adequate representation or commonality among class members should be abandoned in settlement class actions. All that the rule proposes, and all that the cases hold, is that the existence of settlement can influence whether common issues *predominate* over individual issues, and whether a class action is *superior* to other methods for resolving the controversy.

In addition, the settlement class procedure has several built-in protections for individual class members. First, as with all class settlements, the court must determine that it is not the product of collusion. *Bowling*, 143 F.R.D. at 15; *Stotts v. Memphis Fire Dep't*, 679 F.2d 541 (6th Cir. 1982), *rev'd on other grounds*, 467 U.S. 561 (1984); *Cohen v. Resolution Trust Corp.*, 61 F.3d 725, 728 (9th Cir. 1995); *Leverso v. Southtrust Bank of Al., Nat. Assn.*, 18 F.3d 1527, 1530 (11th Cir. 1994). Second, most courts subject settlements reached before

certification to heightened scrutiny for fairness. *Id.* at 152; *Weinberger*, 698 F.2d at 73; *Mars Steel v. Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 684 (7th Cir. 1987); *Bowling*, 143 F.R.D. at 151-52. If a noncollusive settlement can pass such scrutiny, there is no good reason to discourage it.

Moreover, settlement before certification enables a class member to make a more informed choice about whether to participate in the action or to opt out. In a class action certified for litigation purposes, a class member must decide whether to participate in the action without knowing the outcome of the lawsuit. If the class representatives then lose their case, or settle on terms unsatisfactory to an individual class member, that class member will nonetheless be bound by the unfavorable judgment or settlement. In a settlement class, on the other hand, the class member knows the end result -- the terms of the settlement -- *before* he or she has to decide whether to participate. *See Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1177 (9th Cir. 1977) (the "opportunity to opt out after knowing the terms of a proposed settlement is unusual in the class action context and serves to protect the interests of class members"); *In re Mid-Atlantic Toyota Antitrust Lit.*, 564 F. Supp. 1379, 1389 (D. Md. 1983) (a settlement class "clearly establishes the financial benefits of participating in a class settlement and hence provides the putative class members with a more informed choice for opting in or out of the class"); *Weinberger*, 698 F.2d at 72; *In re Beef Industry*, 607 F.2d at 175.

Our personal experiences with class actions demonstrate the wisdom of permitting settlement to be considered in determining whether the Rule 23 criteria are satisfied. In the Shiley heart valve litigation, the company was barraged with hundreds of lawsuits brought by people whose artificial valves were functioning normally but who nonetheless were seeking

damages for alleged anxiety that their valves might fail in the future. Other than the tremendous time and expense involved in defending the claims, these working valve claims were by and large meritless. Shiley has won summary judgment in 34 cases in 14 jurisdictions, including appellate victories in the United States Court of Appeals for the Third, Fourth, Eighth and Ninth Circuits; the Alabama Supreme Court; the Missouri Court of Appeals; and the Wisconsin Court of Appeals. As those courts recognized, allowing plaintiffs to assert a cause of action for damages based on alleged anxiety about the possibility that a normally functioning medical product might fail is undesirable as a matter of public policy, because the potential liability exposure "would discourage companies from developing extremely important medical devices, which would not be in society's best interests." *Behnke v. Shiley, Inc.*, 1992 Prod. Liab. Rep. (CCH) ¶ 13,236 at 40,751 (Wis. App.), *review denied*, 491 N.W.2d 768 (Wis. 1992).

Only one state, California, permitted a working valve claim to survive summary judgment; however, even there the California Court of Appeal dismissed all claims except intentional fraud. Accordingly, to obtain recovery a plaintiff would face the substantial obstacle of proving not merely negligence, but intent to defraud, actual reliance, and injury in fact -- including proof that absent the alleged fraud he or she would have received an artificial heart valve with fewer overall risks. Moreover, the California Supreme Court and Court of Appeal held that non-Californians could not sue Shiley in California, thus assuring that most class members could not take advantage of California's unique rule. *Stangvik v. Shiley Inc.*, 819 P.2d 14 (Cal. 1991); *Shiley Inc. v. Superior Court (Carey)*, No. G018428 (Cal. App. May 24, 1996).

Against this backdrop, Pfizer and Shiley were sued by heart valve recipients in two putative class actions in California and Ohio. After defeating certification for litigation

purposes, *Mehornay v. Pfizer Inc*, 1991 U.S. Dist. LEXIS 16560 (C.D. Cal. 1991), Pfizer and Shiley successfully negotiated a class action settlement in the second class action. *Bowling*, 143 F.R.D. 141. Such a settlement made sense from the perspective of the class members, the judiciary and the defendants. From the class members' standpoint, the settlement provided substantial benefits to class members who were likely to win nothing in individual litigation, while providing the opportunity to opt out to those who preferred to take the risk of litigation. In addition, the class settlement was structured to confer benefits that were not obtainable either through individual or class litigation. For example, it included a fund for research to develop and implement methods to diagnose implanted valves that have a higher risk of fracture, under the auspices of a panel of medical experts.

From the judiciary's standpoint, the settlement obviated the need to litigate the viability of working valve claims over and over in every single state including California, where the viability of such a claim had not yet been subjected to state Supreme Court review.

And from the defendants' perspective, the class settlement provided an opportunity to put an end to a costly and time-consuming litigation, where almost all of plaintiffs' cases lacked merit. (Incidentally, this could only be accomplished in the context of a product no longer on the market. Because class membership must be determined as of the date of the notice, people who receive or are exposed to a product after the date of the notice cannot be bound by the class judgment, as they will have had no opportunity to decide whether to participate or opt out. For products still on the market, a class settlement will, instead of globally resolving litigation against a company, only spur another class action after more product is distributed.)

None of this could have been accomplished, however, if settlement could not permissibly have been considered in determining whether a class action was properly certifiable. If approval of a litigation class were a prerequisite to certification of a settlement class, the risk of facing a *litigation* class of 50,000 claims if the settlement ultimately were disapproved would have made it very difficult for Pfizer and Shiley to agree to a class action settlement. Moreover, given the difficulty in satisfying the predominance and superiority requirements when a product liability action has to be tried, it is at least debatable whether the class settlement could have been approved for litigation purposes, and indeed one court had already refused to do so. In short, unless the fact of settlement could be taken into account for class certification purposes, there might have been no global resolution of the Shiley heart valve litigation; class members would still be struggling, futilely in most instances, to obtain some recovery; and defendants and the courts would still be swamped with these cases.

Similar public policy concerns are implicated in the resolution of other types of product liability cases. In cases involving asbestos exposure, where it takes years to get to trial because of the enormous backlog of cases, a class settlement can provide a claimant with the option of fair and speedy compensation without taking away his or her ultimate right to bring a lawsuit. *See, e.g., Flanagan*, 90 F.3d 963. In environmental contamination cases, a class settlement can provide funds for medical monitoring to detect any onset of disease or for epidemiological studies to determine whether certain groups of people are at greater risk. *See, e.g., In re Fernald Lit.*, No. C-1-85-149 at 22 (S.D. Ohio Sept. 29, 1989).<sup>1</sup> Such class-wide

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<sup>1</sup> While *Fernald* was certified for litigation purposes, it is doubtful whether, under today's  
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benefits often could not be realized through lump-sum payments to class members through a damage award or a settlement of an individual lawsuit.

## II. Interlocutory Appeals

The Committee has proposed adding the following section regarding interlocutory appeals to Fed. R. Civ. P. 23 (new language is underlined):

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

We endorse this proposed amendment. For any case brought as a putative class action, the grant or denial of class certification will be one the most significant decisions in the case. For the plaintiffs, denial of class certification can effectively end the litigation. As several Courts of Appeal observed before the Supreme Court prohibited the appeal of class certification orders under the collateral order doctrine in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470 (1978), the denial of class certification may result in the plaintiff's abandonment of litigation if, because of the amount in controversy and the complexity of the case, the claim cannot be litigated economically on an individual basis. See, e.g., *Hartmann v. Scott*, 488 F.2d 1215, 1220 (8th Cir. 1973) ("Where the effect of a district court's order, if not reviewed, is the death knell of the action, review should be allowed") (quoting *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119, 121 (2nd Cir. 1966), cert. denied, 386 U.S. 1035 (1967)); *Ott v. Speedwriting Pub. Co.*, 518 F.2d

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case law, it could be certified for purposes other than settlement.

1143 (6th Cir. 1975). Thus, although denial of class certification could be the “death knell” of many individual actions, *Coopers* has foreclosed the possibility of appealing such class certification orders collaterally, and accordingly there often is no meaningful opportunity to seek appellate review of those decisions.

The class certification decision is equally important to defendants. The economic pressure resulting from the aggregation of hundreds or thousands of claims in one action makes it virtually impossible in most cases for the defendant to responsibly risk a jury trial in order ultimately to test the validity of class certification on appeal. As several Courts of Appeals have observed, where the defendant’s exposure is so large that the existence of the company, or at least the existence of a product line, is threatened by a single adverse jury verdict, the company is forced to settle even if its defenses are strong and the likelihood of an adverse verdict remote. *Rhone-Poulenc*, 51 F.3d at 1298 (“[Defendants] may not wish to roll these dice. . . . They will be under intense pressure to settle”); *Castano*, 84 F.3d at 746 (“class certification creates insurmountable pressure on defendants to settle”); *In re AMS*, 75 F.3d at 1087 n.19 (stating that the court was “not unsympathetic” to the reasoning of *Rhone-Poulenc*).

The lack of appellate review affects the judiciary as well as the litigants. In the absence of appellate decisions, district courts are left without adequate guidance as to the appropriate standards to use in deciding whether to certify particular types of cases as class actions. This lack of guidance leaves too much to the particular district judge’s philosophical view toward class actions. Moreover, because class certification is reviewed under an abuse of discretion standard, *Valentino*, 97 F.3d at 1233-34, it is extremely difficult to obtain mandamus review of class certification orders. See *In re AMS*, 75 F.3d at 1074 (“class certification is

generally not the kind of subject matter for which mandamus relief is available"). Coupled with the fact that a district judge can thwart a permissive appeal by denying leave under 28 U.S.C. § 1292(b), class certification orders often are not subject to appellate scrutiny.

Having more appellate guidance on class certification issues will promote more uniform standards in determining class certification. In addition, promoting uniformity will discourage the practice of the same plaintiff's counsel filing class actions in multiple jurisdictions in the hope of obtaining a favorably disposed judge in at least one case. *See In re AMS*, 75 F.3d at 1088 n.22 ("We are also troubled by the appearance of the same counsel in the several pending class actions, which raises an obvious concern that counsel may be forum-shopping").

**A. Product Liability Cases**

Our experiences in the AMS penile prosthesis product liability litigation illustrate the need to create a vehicle for appellate review. Despite substantial district court authority that product liability class actions in general, and drug and medical device cases in particular, usually are unsuitable for class action treatment, the district judge stated on the record in our case that he believed that drug and medical device cases should routinely be certified as class actions. *In re AMS*, 75 F.3d at 1087 n.20 ("neither this individual, nor any other individual, could afford to take on the American Medical System [sic]. You'd beat him to death. You have more money, more manpower, more time and everything"). Reflecting this view, the district judge had certified three other class actions in drug and medical device cases. *See id.* at 1089. Continuing this trend, the same district judge certified a class in the AMS case, which the Sixth Circuit ultimately reversed on mandamus review. *In re AMS*, 75 F.3d 1069. It was, however, fortuitous

that the case presented a mandamus-worthy issue. Indeed, in reversing, the Court of Appeals emphasized that it would not have taken the case simply to review the correctness of the lower court's decision, but felt compelled to act because the district judge had disregarded the procedures and substantive requirements of Rule 23. *Id.* at 1088. Had the district court followed appropriate procedures, it is probable that its class certification -- which the Court of Appeals later found to be "clear error" -- might not have been reviewed.

Moreover, because there would be no way to prevent a new class action from being certified every two or three years as more penile prostheses were implanted, AMS likely would have been forced to stop marketing these devices. This would hurt people who depend on penile prostheses, which often provide the only effective treatment for men who are impotent due to disease or trauma. In addition, even if AMS did not withdraw penile prostheses from the market, given today's medical malpractice environment many urologists probably would have stopped prescribing them once the class notice was disseminated and patients began to bombard their physicians with questions about why their device is subject to a class action lawsuit. In a class trial, there is a risk (however remote) that a jury will find *every* penile prosthesis ever implanted to be defective. Consequently, the class action places physicians at risk that they can be sued for malpractice by *every* one of their patients, either individually or in a class action. Very few physicians would undertake that risk.

Litigants should not be forced to risk these enormous consequences -- which are at least as serious as those flowing from the grant or denial of an injunction -- without some opportunity for meaningful appellate review. For these reasons, we support Proposed Rule 23(f),

which provides for discretionary, interlocutory review of orders granting or denying class certification.

#### **B. Antitrust Cases**

The need for discretionary, interlocutory review of class certification orders is also apparent in the context of antitrust cases. Indeed, because federal law requires that all antitrust damage awards are automatically trebled, the risk that an unjustified class certification order will compel defendants to settle in order to avoid the possibility of a huge judgment is even greater in an antitrust case than in other cases.

Some courts have found that class certification is almost always appropriate in antitrust cases. These courts rely on a line of cases suggesting that common questions often predominate in Sherman Act price-fixing conspiracy cases. *See, e.g., In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1039 (N.D. Miss. 1993) ("as a rule of thumb, a price fixing antitrust conspiracy model is generally regarded as well suited for class treatment"); *T.R. Coleman v. Cannon Oil Co.*, 141 F.R.D. 516, 525 (M.D. Ala. 1992) ("common questions exist in the mere fact of an allegation of conspiracy"). However, other federal courts have recognized that class certification is inappropriate in antitrust cases where there is a significant disparity in the impact of the alleged conduct upon individual plaintiffs -- with some plaintiffs having suffered no damage at all. *See, e.g., Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 327-28 (5th Cir. 1978) (denying certification because individualized issues of fact of injury would predominate); *Windham v. American Brands, Inc.*, 565 F.2d 59, 66 (4th Cir. 1977) ("[t]he gravamen of the complaint [in a private antitrust action] is not the conspiracy; the crux of the action is injury, individual injury. While a case may present a common question of violation, the issues of injury

and damage remain the critical issues in such a case and are always strictly individualized." (footnote omitted)), *cert. denied*, 435 U.S. 968 (1978). "Fact of damage" is an element of liability in a Sherman Act conspiracy claim; if it cannot be proven on a class-wide basis, then the class should not be certified. In addition, if the amount of damages incurred by plaintiffs cannot be proven on a class-wide basis, certification is inappropriate.

Discretionary interlocutory appeal of class certification orders in antitrust cases will militate against the risk that district courts will grant motions for certification based on considerations (such as pressuring the parties to settle) that are unrelated to the proper legal standards upon which such motions should be decided.

### C. Suggested Changes

As indicated, we support the proposed Rule 23(f). We would, however, amend or clarify the proposed rule in two respects. First, we would state, either in the text of Rule 26(f) or in the Advisory Committee Note, that if the Court of Appeals accepts a class certification decision for review, all class action proceedings in the district court, including dissemination of the class notice and class discovery, should be stayed pending appeal unless the Court of Appeals orders to the contrary. As noted, the dissemination of a class notice is itself likely to have irreparable consequences, damaging a defendant's reputation and interfering with a company's relationship with class members, who are usually the defendants' customers, suppliers or employees. In addition, class action discovery is likely to be extraordinarily burdensome in comparison to individual discovery. The courts should be sure that an action will, in fact, proceed as a class action before a defendant is made to suffer the adverse publicity and burden of a class action.

Second, we would amend the proposed rule to provide that an application to the Court of Appeals for permission to appeal be made within 14 days of the grant or denial of class certification rather than ten, and that the respondent's time to reply be 14 days rather than seven. These proposed changes are suggested in order to avoid confusion about whether the time periods should be computed according to the Federal Rules of Civil Procedure or the Federal Rules of Appellate Procedure. Fed. R. Civ. P. 6(a) provides that "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation." Fed. R. App. P. 26(a), on the other hand, provides that "[w]hen the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded." Therefore, the proposed 10-day period to seek permission to appeal -- and the proposed 7-day period to respond to the application -- excludes Saturdays, Sundays and holidays if computed under the Rules of Civil Procedure but not if computed under the Rules of Appellate Procedure. To avoid needless litigation about whether the civil or appellate rules govern we would extend both time periods to 14 days. The deadlines would then be the same no matter which set of rules was used to compute time. (In the alternative, the Advisory Committee Notes should specify which rules apply. It appears that, as presently drafted, the civil rules govern the 10-day period to seek leave to appeal, as that requirement is specified in Proposed Civil Rule 26(f), whereas the reply time is governed by the appellate rules, as that requirement is specified in Proposed Appellate Rule 5(b)(2). If this is what the Committee intends, it should so state.)

**Statement Concerning the Proposed Amendments to Rule 23**  
Professors Samuel Issacharoff, Douglas Laycock, and Charles Silver  
University of Texas School of Law  
Dallas, Texas  
December 16, 1996

We respectfully submit these comments in opposition to proposed Rule 23(b)(4) and Rule 23(b)(3)(F).

**Proposed Rule 23(b)(4) Should Be Rejected Because It Weakens Rule 23's Critical  
Due Process Protections**

We are here to add our objections to those articulated by prior witnesses in the Philadelphia hearing, such as Professors John C. Coffee, Jr., Roger C. Cramton, Susan Koniak, and John Leubsdorf, as well as public interest groups such as Trial Lawyers for Public Justice and Public Citizen. We will be brief so as not to unnecessarily retread points made previously.

We draw upon our own experiences to conclude that the concerns expressed by the objectors are all too real, and far too serious to be disregarded in the drafting process. One of us, Professor Issacharoff, litigated class actions for several years, continues to consult regularly with lawyers on both sides of class actions, and as an academic, studies the way lawyers and litigants respond to the incentives created by procedural rules. Another of us, Professor Laycock, was a junior lawyer in a class action practice in the 1970s, and has written about selected features of class actions and their due process implications over the years. The third author, Professor Silver, studies and writes about class actions and attorneys' fees, regularly consults with lawyers on both sides of class actions, and writes and testifies as an expert witness on matters of professional responsibility.

Each of us can attest from experience as well as theory that significant pressures exist to subordinate the interests of class members to other concerns when class actions settle and that many lawyers, judges, and class representatives succumb to these pressures. The sources of pressure include competing or parallel class litigation, which enable defendants to auction the right to settle a class to the plaintiff's attorney who is the lowest bidder, and defective fee arrangements, especially the much-criticized lodestar method, which discourages plaintiffs' attorneys from maximizing the value of class members' claims.

This Committee has heard conflicting contentions about whether class action settlements are commonly subject to collusive negotiations. The most recent empirical study suggests that collusion may be less widespread than many people believe. Federal Judicial Center, *An Empirical Study of Class Actions in Four Federal District Courts*:

Statement of Professors Issacharoff, Laycock & Silver

*Final Report to the Advisory Committee on Civil Rules 106-107* (Draft, January 17, 1996) (discussing class actions involving trivial relief to class members). Although this finding is comforting, any fair-minded reader must admit that the Federal Judicial Center study is far from conclusive on this point. Other studies and a considerable body of anecdotal evidence suggest that the danger of inadequate representation is real. See, e.g., William T. Carleton, Michael S. Weisbach and Elliott J. Weiss, *Securities Class Action Lawsuits: A Descriptive Study*, 38 ARIZONA LAW REVIEW 491, 507 Table 9 (1996) (finding that the mean securities class action settled for approximately 26 cents on the dollar of estimated loss incurred); *In Camera*, 16 CLASS ACTION REPORTS 3:250 (May-June 1993) (stating that "[a] most disturbing trend toward 'coupon' settlements has recently accelerated" and discussing cases); *In Camera*, 16 CLASS ACTION REPORTS 4:244 (July-August 1993) (criticizing the airline antitrust coupon settlement, now universally conceded to be a fiasco).

Moreover, the theory that accounts for the danger of inadequate representation is coherent and easy to explain. It is that certain players, mainly class counsel and settling defendants, can profit at the expense of others, the absent plaintiffs, by settling their claims for less than their worth. If the case cannot be tried and if there are competing class representatives, it will often be the case that a plaintiff's attorney can profit *only* by settling the class claims for less than they are worth. In view of the threat to class members' rights, this Committee should reject amendments to Rule 23 that would make it easier for named plaintiffs, class counsel, defendants, or judges to subordinate the interests of the class.

By saying that pressures exist to subordinate class members' interests to other concerns, we mean neither to suggest that plaintiffs' attorneys consciously collude with defendants nor to impugn the character of judges, class representatives, or other persons involved in class action settlements. Inadequate representation does not require conscious collusion which, in our experience, rarely occurs. It simply requires relevant decision makers to agree to settlements that undervalue absent plaintiffs' claims. Our point is just that inadequate settlements can easily occur, and often do occur, because the incentives are right to produce them. Although most plaintiffs' attorneys honestly think they are maximizing the value of class members' claims when they propose settlements to judges for approval, often they are undervaluing those claims because they are operating under inappropriate incentives.

Concern to ensure due process is and has always been the hallmark of class action jurisprudence. Ordinarily, due process permits only a person actually joined and served as a party (or in privity with such a person) to be bound by a judgment. Class actions are an exception to this rule. All members of a class are bound by a judgment on a theory of virtual or vicarious representation. Because class actions deprive plaintiffs of their individual day in court, class actions have been permitted only when

## On Proposed Amendments to Rule 23

rigorous due process protections are met. Only then can there be sufficient assurance that absent plaintiffs will be adequately represented before their legal rights are extinguished. Thus, in modern Rule 23, the requirements of commonality, typicality, and adequacy of representation in Rule 23(a), as well as the predominance and superiority requirements of Rule 23(b)(3), all protect the due process interests of absent class members, as do the requirements of notice, opt-out rights, and judicial review of settlements.

Protection of the rights of absent class members is at the heart of the claim of class actions to the mantle of procedural justice. In a typical case for settlement, the parties to a dispute are contractually resolving the issues before them in the first instance, and seeking a measure of finality as against others only secondarily. In class action settlements, by contrast, the issue of finality as against any future claims by absent class members is the core of the settlement. The most significant current concerns arise where the claims of absent class members are sold off to benefit an inventory of claims by individuals with prior relations to class counsel or, more commonly, to benefit plaintiffs' counsel incommensurately to the benefit realized by the class. Any reform of Rule 23 must be measured by the protections afforded against these twin threats to the rights and interests of the absent class members. Measured by this standard, the Proposed Rule fails.

Proposed Rule 23(b)(4) would weaken the protections currently enjoyed by absent class members under Rule 23(b), and perhaps under Rule 23(a) as well. This Committee should consider weakening the procedural protections class members enjoy only to meet a compelling need or to cure a glaring problem in class action procedure. If, however, the current controversies in class action practice turn on the risks posed to absent class members in collusive settlements, as we and other objectors have submitted to this Committee, then this Committee should be especially reluctant to consider a proposal, like Proposed Rule 23(b)(4), that would weaken protections in settlement.

Proposed Rule 23(b)(4) would permit a lawsuit to settle as a class even though the same lawsuit could not be tried as class, creating a category of what we will call "settlement-only" classes. The problem with settlement-only classes is that the impossibility of trying the lawsuit as a class action alters the settlement dynamic fundamentally, and for the worse insofar as class members are concerned. The threat that causes a defendant to pay real money in settlement of a case—any case—is the threat of taking the case to trial. In settlement-only classes, this threat is missing. Without it, defendants will settle only to avoid greater losses to plaintiffs who have viable individual lawsuits. Thus do settlement-only classes pose a threat to the very people they ostensibly exist to protect. Moreover, this Committee should take note that the threat of a "reverse auction" is greatest in the case of settlement classes. Particularly in light of the privileged position that pre-packaged settlements would hold under the

Statement of Professors Issacharoff, Laycock & Silver

language of the Proposed Rule, there is every reason to be concerned that defendants faced with potential class litigation will use the settlement device to reach agreement with whichever set of plaintiffs' lawyers will secure the lowest return to the class.

On the other hand, the rules should not be interpreted to make settlement impossible. It would be inappropriate, as a condition of settlement, to force defendants to stipulate to the propriety of class certification when, for example, the defendants might wish to preserve their opposition to certification should the district court not approve the proposed settlement, or when there are parallel class actions in other states in which courts might assign some estoppel effect to the certification of a prior settlement class. Allowing a district court some latitude to consider the parties' conditional stipulation permits an orderly settlement in circumstances in which no advantage is gained from further litigation.

Such conditional stipulations may be necessary to enable settlement, but they raise many of the same dangers as the Proposed Rule. As we have said, settlements that undervalue the claims of the class are part of our experience; they are happening without Rule 23(b)(4). Rule 23(b)(4) does nothing to address these dangers. It does not improve the procedures for scrutinizing settlements; it does not even identify the danger of collusive settlement as a factor judges should consider. Instead of addressing these very real problems, the Proposed Rule may aggravate them. It officially blesses, in the text of the rule, settlement classes that class counsel, defense counsel, and the court all agree could not possibly be tried. The signal that the Proposed Rule sends, whether intentionally or not, is to encourage and extend the very source of abuse that rule changes should be seeking to monitor and control.

We recognize that settlement should be encouraged, and that many defendants will refuse to settle if they must concede the certifiability of class actions at trial. The difficulty lies in finding an acceptable half-way house, one that protects class members from sell-outs while enabling settlements to occur. Our point is only that Proposed Rule 23(b)(4) is not an appropriate compromise. It facilitates settlements, even though settlement rates for class actions are as high as those for non-class lawsuits, and it does so by reducing due process protections that are already inadequate.

If there were a pressing need to encourage class action settlements, the decision to propose the rule might be understandable. But there is no such need. The Federal Judicial Study shows that class actions and non-class lawsuits settle in similar percentages. Class actions have longer life-spans and consume more of judges' time, but when one considers that class actions involve higher dollar amounts, more complex legal issues, and larger numbers of claims than individual lawsuits, there is little doubt that class actions offer more "bang for the buck."

## On Proposed Amendments to Rule 23

If there is a pressing need, it is to discourage inadequate settlements. While this Committee is well aware of such high-profile "future claimant" settlement class actions as *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), *cert. granted*, and *In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996), many other examples of questionable settlements in federal court class actions can be found. The most outrageous instance may be the infamous coupon settlement of the airline antitrust case, *In re Domestic Air Transportation Antitrust Litigation*, 148 F.R.D. 297 (N.D. Ga. 1993). Even the lawyers who negotiated that settlement now concede it was a bad deal, worth considerably less to consumers than suggested by estimates they presented to the trial court. See Karen Schwartz, *Airline Antitrust Coupons Disappoint Consumers*, Austin American-Statesman, Nov. 10, 1996, p. K1 (attributing to Pitts Carr, an attorney who negotiated the settlement, the admission that if he could do the settlement over again, he would do it differently). As a general matter, economic analysis shows that the actual value to consumers and the actual cost to defendants of coupon settlements typically are small fractions of the value and cost estimates made in settlement documents and fee petitions. Severin Borenstein, *Settling for Coupons: Discount Contracts as Compensation and Punishment in Antitrust Lawsuits*, 39 JOURNAL OF LAW & ECONOMICS 379 (1996).

Cash settlements can also raise questions. The famous attempt to settle a breast implant class, preliminarily approved by the trial judge, failed when far more claimants than expected filed claims. The Johns-Manville settlement also ran short of money. Questions have also been raised about limited-fund class action settlements that allow shareholders to keep a considerable portion of a company's value. If there is a pressing need to reform the class action, it is a need to encourage lawyers to maximize the value of class members' claims and to provide judges better criteria in light of which to evaluate proposed settlements.

Proposed Rule 23(b)(4) addresses neither need. It may make matters worse by encouraging the principal source of collusion between defendants and class counsel and making such collusion more difficult to attack. The Proposed Rule also circumvents the process of accumulated case experience by which competing concerns of efficient settlement versus guarantees of individual rights might be assessed. Coming so quickly on the heels of major decisions such as *Georgine* and *Ahearn*, and in anticipation of pending Supreme Court review, the Proposed Rule is not only ill-considered, it is decidedly premature. The Committee should therefore reject proposed Rule 23(b)(4).

**Proposed Rule 23(b)(3)(F) Should Be Rejected Because It Would Prevent the Class Action Mechanism from Fulfilling One of Its Central Purposes**

One of the central purposes of the modern class action is to provide an aggregative device that allows for the group litigation of claims that could not justify individual prosecution. Because of the costs attendant to litigation, it is a fact of life that some claims, no matter how meritorious, simply will not be brought if the costs must be borne by an individual claimant. The class action allows for small claims to be aggregated without the overwhelming transaction costs associated with the individual-by-individual contracts necessary for permissive joinder. As such, a class action is not only a tremendously efficient procedure for prosecuting small claims, it also serves an important equitable function in allowing many relatively small value legal claims to be asserted at all.

The class action also levels the playing field between plaintiffs and defendants so as to allow adjudication on the merits. Take for example a toxic exposure that is alleged to cause \$1,000 worth of harm to each of 1,000 property owners. Even assuming that such an individual claim could be brought to trial for that value, it is unlikely that any property owner would ever stake more than \$1,000 on the prosecution of his or her claim. In all likelihood, no property owner would spend nearly that much given the limited amount likely to be recovered. A defendant, on the other hand, faced with the first legal claim arising from the accident, would be prepared to spend significantly more than \$1,000 to defeat the first claim. Because a loss to a plaintiff in the first case might establish the defendant's liability, thereby generating a total exposure of \$1,000,000, a defendant would rationally choose to spend many times the value of an individual claim in seeking to forestall other potential plaintiffs from filing suit. By aggregating the claims of all plaintiffs, the class action allows the question of liability to be heard on a more or less even playing field.

Proposed Rule 23(b)(3)(F) undermines both of these important features of class actions. By holding the certification decision to the vague command of "whether the probable relief to individual class members justifies the costs and burdens of class litigation," it redirects the class action inquiry away from the collective and back to the individual claimant. In so doing, the Proposed Rule imposes obstacles to small-claims class actions without any justification from current class action practice. Even a cursory review of the Federal Judicial Center study on class action reveals a robust judicial willingness to entertain dispositive motions to dismiss and motions for summary judgment in the class action context. The Proposed Rule points a poorly crafted weapon at the small claims class action without any compelling evidence that the present rules are inadequate to address problems of frivolous or vexatious litigation.

## On Proposed Amendments to Rule 23

We are also deeply concerned by the substantive implications of the Proposed Rule. There is a strong effort in American society to deregulate many of the oversight functions of government and to leave greater enforcement of social norms to market mechanisms. Part of the deregulatory environment must be the availability of courts to provide legal redress *ex post* in order to compensate for the consequences of the lack of oversight *ex ante*. By putting the vitality of small-claims class actions at risk, the Proposed Rule effectively guts substantive protections against consumer fraud and other small stakes, mass impact harms. The consequence is that institutional actors capable of perpetrating such wrongs on large numbers of individuals will be left undeterred. By removing the procedural protection of the class action, the Proposed Rule unintentionally invites small-scale but large-impact harms to individual citizens.

While Proposed Rule 23(b)(4) at least addresses a subject of legitimate and ongoing concern, we cannot escape the conclusion that Proposed Rule 23(b)(3)(B) is ill-conceived from top to bottom.

Statement of D. Dudley Oldham  
on behalf of  
Lawyers for Civil Justice  
On Proposed Amendments to Federal Rule of Civil Procedure 23  
Before the Committee on Rules of Practice and Procedure  
of the Judicial Conference of the United States

December 16, 1996  
Dallas, Texas

I appreciate the opportunity to appear in support of proposed amendments to Rule 23. I commend the Committee's actions to move forward the draft revisions for public comment and to enlist the input of practitioners into the decision making process, especially on such a sensitive and complex area of law. My remarks today reflect my own experience as a partner in the firm of Fulbright and Jaworski in Houston, Texas as well as the input I have received from members of Lawyers for Civil Justice, a national coalition of the three leading defense bar organizations and numerous Fortune 500 corporations of which I currently serve as President. Although my remarks today will focus primarily on problems associated with Rule 23(b)(3), I plan to offer more extensive comments on other of the specific proposed revisions before the end of the public comment period.

Inherent in the proposed revisions to Rule 23 is the acknowledgement that Rule 23 has fallen short in achieving the desired goals as originally envisioned when the Rule was first enacted in 1966. Those goals, of achieving economies of time, effort and expense, and promoting uniformity of decision "...without sacrificing procedural fairness or bringing about other undesirable results" were not realized as early as 1972, according to a 1972 study of the American College of Trial Lawyers. In fact, the College study questioned whether "judicial chaos rather than judicial economy, was not the end product of the amended rule" and concluded that Rule 23 "becomes workable only in those instances where traditional notions of equity and fairness have been temporarily abandoned."

As more and more courts have made increasing innovative use of the class action process, the classes created have made the risk of litigation unacceptable to many defendant corporations regardless of the claims' merits. This growing threat, posed by a burgeoning mass tort industry, is attributable to the more liberal use of class action Rule 23—circumstances which were understandably unforeseen in 1966. Although the class action tool can serve many legitimate judicial objectives, the mass tort phenomenon cries out for a careful reevaluation of the intended goals of Rule 23. Such an evaluation might justify both more innovative mechanisms for addressing aggregate claims as well as more clearly defining the parameters of Rule 23. Comprehensive reform, although a formidable task, would certainly encourage more innovative solutions needed to address the most egregious abuses of the class action device. We commend the Advisory Committee for its efforts to move revisions to Rule 23 in the

right direction. It is to that end that we respectfully recommend further careful study and evaluation of the complex issues involved in the class action process.

Having stated at the outset that comprehensive reform is worthy of at least more careful consideration, I confine my comments to proposed revisions to Rule 23(b)(3) since in my view, this segment of the rule addresses the heart of the problem described above. The proposed revisions, although encouraging, do not go far enough to eliminate many of the most problematic applications of the class action device. Most important, I believe that disparate mass tort litigation should not be permitted at all under (b)(3). However some tort actions, stemming from single accidents or incidents, fixed in time, where common elements of proof predominate, are more likely to realize the benefits that Rule 23 was meant to provide.

What the (b)(3) proposed revisions offer is greater clarity for interposing the class action device and the restatement if not the reemphasis of certain bedrock principles on which the extraordinary class action device should rest. First, the (b)(3)(A) reformulation properly notes that class actions are not appropriate when individual claims can stand alone. The comfort provided by embracing this American tradition suggests a preference for individual action when claims are substantial enough to be pursued individually. Emphasis of the preference for individual action is helpful to guide the courts.

Second, (b)(3)(B) appropriately recognizes the individual's interests in pursuing a separate action since it allows him or her to maintain control over all aspects of litigation strategy. Since class action status prevents claimants from controlling their own litigation, class action efficiency often compromises fairness to individual litigants.

Third, further guideposts are provided by including (b)(3)(C) maturity factors in the courts evaluation of related litigation. Since mature litigation more generally yields consistent results, the Committee Notes correctly deduce that if individual litigation continues to yield inconsistent results or if analysis demonstrates that knowledge has not yet advanced far enough to support confident decisions on a class basis, then class adjudication is not appropriate for that litigation.

Finally, it is particularly noteworthy that the cost benefit analysis in (b)(3)(F) offers a plan for curtailing the practice of aggregating claims where individually only minimal dollars are at stake. I am encouraged that courts might be more inclined to carefully reflect on the disadvantages of certifying classes where the results would simply indicate very minimal worth. In many instances, the value of recovery to the individual class member is so negligible that it fails to offset the associated cost imposed on the defendants and the judicial system. Those types of claims only enrich the few counsel whose fees are based on the total aggregation with little or no benefit to the individual class member.

Overall, the revisions to Rule 23(b)(3) offer modest yet meaningful improvements for managing class actions. I am encouraged that the Committee work is also raising broader questions regarding what themes are appropriate for future consideration. In light of the failure of Rule 23 to achieve the stated goals as well as the difficulties which have arisen contrary to the intended purpose of the rule, a reassessment of Rule 23 factors is certainly appropriate.

Thank you for the opportunity to comment on this limited aspect of the proposed amendments to Rule 23. The work of the Committee in addressing revisions in this complex area and in affording interested parties an opportunity for public comment on the proposed revisions is much appreciated.

Very truly yours,



D. Dudley Oldham

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96-CV-085

December 3, 1996

\*LICENSED ONLY IN IL AND MO

**VIA FEDERAL EXPRESS**

Federal Rules Advisory Committee  
c/o Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure of the  
Judicial Conference of the United States  
Administrative Office of United States Courts  
Washington, D.C. 20544

Re: Proposed Amendments to Federal Rule of Civil Procedure 23

To the Members of the Committee:

I write to urge this Committee to reject proposed Rule 23(b)(4), regarding certification of so-called "settlement class actions."

I believe I have a unique perspective to offer this Committee. Since founding the law firm of Baron & Budd, P.C. in 1977, I have exclusively devoted my practice to representing people who have suffered injuries following occupational or environmental exposures to toxic substances. Baron & Budd represents injured victims in communities polluted by lead, groundwater contamination, radiation, and industrial waste dumps, as well as representing workers who suffer from diseases caused by their workplace exposures to asbestos. But over the last four years, well over half of my time and energy has been devoted to representing objecting class members in two infamous nationwide "settlement class actions" involving future asbestos victims: *Georgine v. Amchem Prods. Inc.*, 83 F.3d 610 (3d Cir. 1996), *cert. granted sub nom. Amchem Prods., Inc. v. Windsor*, 65 U.S.L.W. 3333 (Nov. 1, 1996); and *In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996), *cert. pet. not yet on file*. Based on my experience litigating these cases, as well as time spent representing objectors to a class settlement involving future personal injury claims arising from arsenic exposures in Bryan, Texas, I have become firmly convinced that settlement classes constitute the single greatest existing threat to the due process rights of tort victims unfortunate enough to be harmed in large numbers.

During my 25-year career representing personal injury plaintiffs, I have on many occasions devoted significant amounts of time and resources to protect the rights of victims from legislative efforts by corporate America to shield itself from tort liability. For the most part, such proposals

for "tort reform" are subject to public record, and legislators remain accountable to the voting populace for whatever changes in victims' rights that they enact. While that system is far from perfect, it does ensure that victims and consumers can have a voice in any lawmaking that will affect their rights. This right to participate in the legislative process stands in sharp contrast to the veil of silence and ignorance cloaked around absent class members during "settlement class" negotiations. For corporate defendants long hungry for a way to cap their liabilities, backroom settlement class negotiations have rendered legislative tort reform efforts an obsolete means to that end. For unlike the legislative process, defendants are in complete control during the negotiation of a settlement for a class action that cannot be litigated.

Proposed Rule 23(b)(4) would effectively sanction unilateral efforts at tort reform by corporate defendants. In the context of settlement class negotiations, absent class members have no unconflicted advocate to champion their rights, and they therefore have no voice in a process that redefines or eliminates those rights just as much as any piece of legislation. By now this Committee has heard numerous critics of proposed Rule 23(b)(4), including both academics and public interest groups, explain that it would encourage class counsel and defendants to engage in collusive negotiations. I will not belabor that point, except to emphasize how critical it must be to this Committee's consideration. The dynamics compelling class counsel to sell out absent class members when the case cannot be litigated are overwhelming, and the incentives to settle at any price cloud the judgment of even the most well-meaning and experienced plaintiffs' attorneys.

Rule 23(b)(4) grossly exacerbates the class action "agency" problem by apparently collapsing the court's inquiry into adequacy of representation under Rule 23(a) into the settlement fairness inquiry contemplated by Rule 23(e). In other words, as a few courts have (wrongly) said, "the proof is in the pudding" —if the terms of the settlement are fair, then the representation of absent class members was necessarily adequate. But quite to the contrary, post hoc review of a settlement's terms by a court can *never* substitute for zealous, unconflicted representation by the actual negotiators. As the Seventh Circuit has said:

No one can tell whether a compromise found to be "fair" might not have been "fairer" had the negotiating [attorney] possessed better information or been animated by undivided loyalty to the cause of the class. The court can reject a settlement that is inadequate; it cannot undertake the partisan task of bargaining for better terms. *The integrity of the negotiating process is, therefore, important.*

*In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1125 n.24 (7th Cir. 1979). Further, a settlement fairness hearing provides grossly inadequate assurance that the court has full information from which to assess fairness, since both class counsel and the defendant have every incentive to hide any flaws in their deal. Without any mechanisms in Rule 23 to provide for both discovery of information relevant to settlement fairness *and* fees for objectors, the sporadic and often uninfluential presence of objectors does little to compensate for the court's lack of information. Finally, not unlike class counsel's interest in fees, a court's interest in clearing its dockets can and does cloud the judgment of otherwise fair-minded judges.

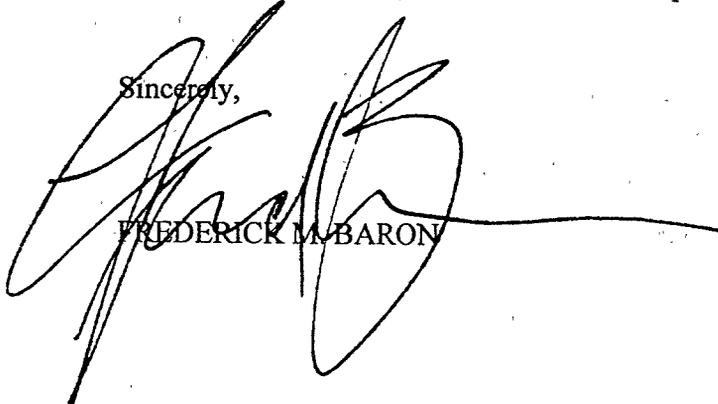
**Comments of Frederick M. Baron, Esq.**  
**Page 3**

Finally, I want the Committee to be fully aware that Rule 23(b)(4) will encourage the use of settlement class actions to resolve future tort claims. Although the draft minutes from the April 18-19, 1996 meeting of the Committee disclaim any effort to sanction "future claimant" classes, the effect of 23(b)(4) will be to permit future claims cases unless the Constitution forbids it. Indeed, the draft notes suggest that perhaps the "most important" reason supporting the new rule is that "settlement may prove far superior to litigation in devising comprehensive solutions to large-scale problems that defy ready disposition by traditional adversary litigation." But unless a mass tort involves a single accident (e.g., the Hyatt Skywalk disaster or an airplane crash), any "comprehensive solution" must necessarily encompass future claimants. And all the agency problems that make Rule 23(b)(4) a bad idea for *present* claimants make it all the worse for *future* victims, who cannot receive meaningful notice, and who in any event lack adequate information from which to assess the effect of any settlement on their non-existent claims.

While I strongly believe that such future claimant classes *do* violate the Constitution, and I hope that the Supreme Court will agree, there is no guarantee that the Court will even reach that issue in *Georgine* or any other pending case. This Committee should not promulgate a rule that would permit such an outrageous deprivation of due process if the Supreme Court remains silent.

Rule 23 has already been abused at the expense of thousands of victims. This Committee should do anything *but* encourage such abuses with a rule that makes them easier to accomplish.

Sincerely,



FREDERICK M. BARON

**STATEMENT OF JOHN H. BEISNER  
ON THE PROPOSED AMENDMENTS TO FED. R. CIV. P. 23  
BEFORE THE ADVISORY COMMITTEE ON CIVIL RULES,  
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES  
Dallas, Texas -- December 16, 1996**

I appreciate the opportunity to appear before this Committee to address possible amendments to Fed. R. Civ. P. 23.

For the past 16 years, much of my legal practice in the Washington office of O'Melveny & Myers has been devoted to the defense of purported class actions. During that time, I have been involved in the defense of over 150 purported class actions filed in the federal and state courts of over 26 states. The subject matter of those cases has been diverse -- consumer fraud cases, product liability actions, discrimination suits, securities actions, and insurance-related matters.

In recent years, my class action defense practice has been growing rapidly. I wish I could tell you that this is attributable to something I was doing right. But in reality, that growth is due to the avalanche of class action lawsuits being filed against corporations in both federal and state courts.

Although this avalanche has kept me and other class action lawyers busy, I cannot say that working on these cases is always a gratifying experience. When Professor Cooper and others at the University of Michigan Law School taught me about the litigation process some years ago, I looked forward to being part of a system that confronts and resolves real disputes between real people with efficiency and fairness. Instead, what I see day in and day out in the class action arena is a charade that has little to do with the interests of those in whose name the lawsuits are brought. In most instances, the lawsuits do not stem from real disputes and they do not involve real people. Instead, they are lawyer-created productions.

For example, as a law student, I was taught that class actions are brought by aggrieved persons who wish to protect the rights of other, similarly aggrieved persons. But the reality is that, in most cases, purported class actions are concocted by enterprising counsel motivated by profit. In many of my cases, the named plaintiff is not somebody who came in off the street to seek redress. Instead, the named plaintiff is an employee, relative or friend of the attorney who brought the lawsuit.

I was taught that class actions are designed to obtain redress for real injuries suffered by real people. But more often than not, they are mere business ventures of the counsel asserting the claims. On countless occasions, I have heard purported class counsel in open court brazenly refer to their co-counsel as "stakeholders" in a purported class action and ask judges to create oversized "plaintiffs' steering committees" to ensure that each "investor" in the litigation can protect his or her stake in the enterprise.

I was taught that class actions are a mechanism for litigating disputes that unnamed class members would bring themselves if they had the wherewithal to do so. But here again, my personal experience has been different. I have been involved in a number of class actions that settled, whereupon notice went out to the class inviting comments about the proposed settlement. Although one might have expected class members to either praise the settlement or complain that it should have been more generous, the responses often express indignation over the fact that a lawsuit was brought in the first place. The mailbags are full of comments like the following:

*You lawyers are nuts! This lawsuit is a bunch of  
hooley! I'm not mad at the defendant. Who authorized  
anybody to sue in my name? I don't want any part of*

*this lawsuit -- how do I get out of it? This is just a scam to make all you lawyers rich. Lawsuits like these are what's wrong with the legal system. I know who's really paying for all of this -- ME!*

Of course, notwithstanding comments like these, most putative class members will take whatever benefits are provided by a settlement, viewing it as a windfall. But in increasing numbers, settlement class members are sufficiently bothered by all of this that they opt out of the settlement -- not because they intend to seek greater benefits through an individual lawsuit, but because they view the premise of the class action as utterly without merit and perceive (correctly) that it simply imposes another tax on business for the benefit of lawyers and to the detriment of consumers.

Knowing what I now know about class actions, I was disturbed by some of the statements made at the hearing in Philadelphia last month, in which the speakers suggested that the main problem with Rule 23 (and the reason why class actions are under the microscope right now) is adverse publicity being caused by settlements that inordinantly benefit lawyers, but do not provide adequate benefits to class members. I have grown even more concerned about where this amendment process is heading as I hear commenters construe the proposed amendments to Rule 23 as basically designed to correct supposed problems with settlements.<sup>1</sup>

I respectfully submit that these commenters are missing the real issue. The real problem with the class action device is not settlements. It is instead the fact that too many federal

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<sup>1</sup> See, e.g., Bryant, *An Open Invitation to Class Action Abuse*, ABA Litigation News, Nov. 1996, at 4 (contending that the "Advisory Committee's primary proposal [is to] allow[] cases to be settled as class actions that won't be litigated as class actions").

district courts have taken an "anything goes" attitude toward class certification. That attitude encourages entrepreneurial counsel to keep filing increasingly absurd actions that can be brought to a merciful conclusion only through increasingly absurd settlements. In short, those who believe that the problem is bad class action settlements are merely looking at symptoms; they are ignoring the cause of those symptoms.

The real problem here is that the judicial system increasingly allows litigants to bring and pursue meritless class actions whose stakes are so high that defendants have no choice but to accede to the extortionate demands of those who bring them. (And since these lawsuits invariably are brought by and for lawyers, it is not surprising that the benefits of the settlements invariably go to those same lawyers.) More specifically, the problem is that some courts, when considering class certification motions, are paying mere lip service to the most basic prerequisite of a class action -- commonality.

The linchpin of Rule 23 is, of course, the notion of "common questions." Some authorities hold that if a lawsuit presents even one common question, the Rule 23(a)(2) commonality requirement is satisfied.<sup>2</sup> And if, in a particular lawsuit, common questions predominate over individual ones, the action is said to satisfy a key requirement of Rule 23(b)(3). But many trial courts have lost their way by misinterpreting what constitutes a common question.

Let me use an example to illustrate the analytical trap into which some courts have fallen. Imagine a proposed class action seeking monetary relief on behalf of all persons in the State of Texas who have been injured in accidents involving

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<sup>2</sup> See, e.g., Jenkins v. Raymark Indus. Inc., 782 F.2d 468, 472 (5th Cir. 1986) (commenting that the "threshold of commonality is not high").

Federal Express trucks during the year 1996. It would not be difficult for the advocate of class treatment to identify a long list of so-called "common questions:"

- Did Federal Express owe the plaintiff due care in the operation of its vehicle?
- Was Federal Express negligent in the operation of its vehicle?
- If so, was Federal Express' negligence in the operation of its vehicle the cause of an accident involving plaintiff's vehicle?
- Did Federal Express violate any applicable law in the operation of its vehicle?

To be sure, these are "common questions" because the jury must ask these questions as part of analyzing each class member's claim. And it wouldn't be hard to come up with more such "common questions." But is the lawsuit I just described a good candidate for class treatment? Obviously not. Why? Because even though these and other questions may be common to all class members, the evidence that would be presented in order to influence the jury's answers to these questions would vary from class member to class member.

Yes, determining that Federal Express was negligent in the operation of the vehicle is a prerequisite to proving each class member's claim, but separate evidence would have to be presented concerning the conduct of each Federal Express driver in each accident at issue. With respect to each accident, there would be different facts, different witnesses, and different physical evidence. That being the case, it would be virtually

impossible to litigate every traffic accident that occurred during the year in a single trial before a single jury.

Unfortunately, many trial courts (at both the federal and state level), fail to come to grips with this point when they rule on class certification motions. Instead, if the party moving for class treatment cobbles together a list of so-called "common questions," these courts rotely hold that the commonality and predominance requirements are met, without considering the more important issue whether those questions can be answered with respect to the class as a whole based on the presentation of a single body of evidence that applies with equal force to each and every class member. As a result, many class actions are certified that bear more resemblance to my Federal Express hypothetical than to what the drafters of Rule 23 envisioned would be the prototypical class action.

Not all courts are making this mistake. For example, although the Texas state court system is not generally thought of as a conservative jurisdiction when it comes to class actions, several Texas state courts have acknowledged that the "common question" concept is really a misnomer. As those courts have noted, the relevant class certification inquiry is not whether a case involves common questions, but whether, based on the likely proofs presented by both sides at trial, a jury could reasonably be expected to give the same answer to these common questions with respect to the claims of all class members.<sup>3</sup> In short, the

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<sup>3</sup> For example, in Wente v. Georgia-Pacific Corp., 712 S.W.2d 253, 257 (Tex. App. -- Austin 1986, no writ), an intermediate Texas appellate court noted that the commonality requirement for class certification cannot be satisfied by urging that the same liability question be asked on behalf of each putative class member. Instead, the commonality test inquires whether "questions which when answered as to one class member are answered as to all class members." Id. at 256 (citing Amoco Prod. Corp. v. Hardy, 628 S.W.2d 813, 816 (Tex. App. -- Corpus Christi 1981, writ disp'd) and RSR Corp. v. Hayes, 673 S.W.2d 928 (Tex. App. -- Dallas 1984, writ disp'd) (emphasis in original).

courts should not be asking whether a jury would be presented with common questions, but whether the jury could plausibly give common answers.

What I am raising here is not a semantic side show. It is a bedrock due process issue. When a trial court certifies a class, it is declaring that a jury can legitimately give a simultaneous, across-the-board answer to a common question (e.g., is the defendant liable as to all members of a purported class?). An order granting class treatment is (or should be) tantamount to a finding that a jury can reach a single verdict that properly applies to all class members. Either the class defendant is liable to all members of the class, or it is liable to no class members.

If a court fails to conduct this kind of inquiry correctly, it is setting in motion a lawsuit that will inevitably deny the due process rights of one side or the other. If it allows a Federal Express-type lawsuit to proceed as a class action, it is authorizing a trial at the end of which a jury may well conclude that the defendant is liable to some class members, but not others. But because the court has ordered the jury to return nothing other than a single verdict in favor of or against the class as a whole, the jury is forced to give the same answer as to all class claims.

The jury may, in that event, return a verdict in favor of the defendant and against the class (even though the jury actually believed that some class members should prevail). If this occurs, the due process rights of those class members who should have prevailed are denied.

Conversely, the jury may return an across-the-board verdict in favor of the class (even though the jury actually felt that the defendant should have prevailed as to some parties). In

that event, certain class members will get a unwarranted windfall at the defendant's expense.

Class action trials like these inevitably violate somebody's due process rights. Either the parties are deprived of their right to place before courts individualized evidence concerning the claims of individual class members, or juries are deprived of the ability to render verdicts differentiating among the claims of individual class members. The only way to avoid this intolerable outcome is for courts confronting the class certification question to consider carefully the variations in the relevant evidence that would be presented in support of, and in opposition to, individual class member's claims. If they do not, there is a significant risk that named plaintiffs whose claims may be strongest may be advanced to mask the relative weakness of other class member's claims.

I can assure you that many practitioners wrongly seek to capitalize on this risk. On occasion, in arguing class certification motions, I have pointed out that the variations in the individual proof pertinent to different putative class members' claims should preclude class certification. In response, I invariably hear the following argument: "Defendant's counsel doesn't understand class actions. The whole idea of a class action is to avoid the need to prove each class member's claim. All I have to do is prove the named plaintiffs' claims. If they win, everybody in the class wins."

Of course, the argument that "if the named plaintiffs win, all class members should win" holds water only if the evidence relevant to the elements of the named plaintiffs' individual claims is the same as the evidence that would be presented with respect to each and every class member if their claims were adjudicated in hundreds or thousands of separate trials. If a court certifies a class action where this is not

the case, Rule 23 then has the effect of changing substantive law, absolving parties of the burden of proving each element of their claims. Indeed, allowing claims to be tried to a "yes-or-no" liability verdict as to all class members without ever confirming that the evidence presented actually applies to and proves all class members most assuredly "alters substantive rights."<sup>4</sup> "Such enlargement or modification of substantive . . . rights by procedural devices is clearly prohibited by the Enabling Act that authorizes the Supreme Court to promulgate the Federal Rules of Civil Procedure."<sup>5</sup>

Presumably, that was not the intent of the Rule 23 framers. Unfortunately, however, trial courts today too frequently certify classes without considering how a case actually would be tried on a class basis and how the variability of the evidence among the putative class members would render such a trial a mockery of justice.

If there is any doubt about that point, consider that within the last ten months, four of our federal courts of appeal have gone to extraordinary lengths to bring this problem to the attention of the district courts, and to remind them of the importance of a rigorous assessment of the question whether the case can be tried fairly on a classwide basis.

In the Castano case, the Fifth Circuit reversed an order certifying a class in that tobacco addiction case because the trial court "did not . . . consider [] how a trial on the merits would be conducted" and did not take account of the fact

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<sup>4</sup> In re Hotel Telephone Charges, 500 F.2d 86, 90 (9th Cir. 1974) (citing Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973)).

<sup>5</sup> Id.

that the proof involved in the individual class members claims would differ.<sup>6</sup>

In the American Medical Systems case, the Sixth Circuit issued a writ of mandamus reversing certification of a class of persons who alleged injuries attributable to allegedly defective penile implants.<sup>7</sup> The court did so based primarily on its observation that the court had failed to consider how the case could be tried on a class basis, particularly where there were multiple different types of penile implants at issue that would necessarily involve differing evidence.<sup>8</sup>

Although the Georgine decision out of the Third Circuit is most frequently cited for its debatable views on settlement classes, it is most noteworthy for its unhesitating rejection of class certification order stemming from a process in which the trial court failed to consider how the matter would be tried and therefore failed to recognize that the class "was a hodgepodge of factually as well as legally different plaintiffs" whose claims could not be tried *en masse*.<sup>9</sup>

And most recently, the Eleventh Circuit, in the Andrews case, found that a trial court had abused its discretion by

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<sup>6</sup> Castano v. American Tobacco Co., 84 F.3d 734, 749 (5th Cir. 1996).

<sup>7</sup> In re American Medical Sys., Inc., 75 F.3d 1069, 1083-86 (6th Cir. 1996).

<sup>8</sup> Id. at 1082 ("[W]e know from the amended complaint that each plaintiff used a different model, and each experienced a distinct difficulty . . . . These allegations fail to establish a claim typical to each other, let alone a class.").

<sup>9</sup> Georgine v. Amchem Prods., Inc., 83 F.2d 610, 632 (3d Cir. 1996), cert. granted, 65 U.S.L.W. 3333 (U.S. Nov. 1, 1996) (No. 96-270).

certifying classes.<sup>10</sup> The appellate court, in the context of allegations that several telephone companies had fraudulently imposed certain telephone calling charges, found that the trial court had not adequately considered how the case would be tried and the variations in the proof that would be involved in that process.

These four very recent appellate decisions -- and several others from earlier years<sup>11</sup> -- are a clarion call to this Advisory Committee that repairs to Rule 23 are needed to ensure that all district courts nationwide adhere to these fundamental principles. Something must be done to make parties and trial courts more attentive to the need -- before any class is certified -- to determine whether the plaintiffs' and defendant's likely evidentiary showings will actually speak simultaneously to the claims of all class members. If the evidence of either side is not primarily a uniform, across-the-board showing, the use of the class device would either be wholly unmanageable or fundamentally unfair. Either the proceeding will sink under the weight of individualized proof on a variety of issues, or class members effectively will be excused from proving all elements of their claims. Neither result is consistent with fundamental due process principles or the purposes of the class action device.

With that in mind, I join several other commenters in urging that Rule 23(b)(3) be amended to include an explicit classwide proof requirement -- that is, an additional finding that must be made before any (b)(3) class may be certified:

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<sup>10</sup> Andrews v. American Tel. & Tel. Co., 95 F.3d 1014, 1024-25 (11th Cir. 1996).

<sup>11</sup> See, e.g., Walsh v. Ford Motor Co., 807 F.2d 1000 (D.C. Cir. 1986) (vacating order certifying class on grounds that, inter alia, trial court had failed to consider how varied the proof of liability would vary among class members), cert. denied, 482 U.S. 915 (1987).

(b) **Class Actions Maintainable.** An action may be maintainable as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

\* \* \* \*

(3) the court finds (i) that the questions of law or fact common to the members of the class predominate over any questions affecting only individual class members, (ii) that the evidence likely to be admitted at trial regarding the elements of the claims for which certification is sought is substantially the same as to all class members, and (iii) that a class is superior to other available methods for the fair and efficient adjudication of the controversy. . . .

Under this approach, the purported class representatives would have the burden of demonstrating to the court that they have a means of proving simultaneously the claims of all purported class members by the use of the same proof.

This "classwide proof" requirement is not made from whole cloth. Indeed, the origins of the concept lie in several venerable class action opinions. Back in 1972, a federal district court in Florida noted that

[w]hile the particular merits of plaintiffs' claims are not an issue to be considered upon a class motion under Rule 23 . . . , an analysis of the issues and the nature of proof which will be required at trial is directly relevant to a determination of whether the matters in dispute are principally individual in nature or are susceptible to proof equally applicable to all class members.<sup>12</sup>

Then, several years later, the concept surfaced in the Fifth Circuit's Blue Bird Body Co. decision, where it was noted that if the addition or deletion of certain class members from trial would "affect the substance or quantity of evidence

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<sup>12</sup> Abercrombie v. Lum's Inc., 345 F. Supp. 387, 390 (S.D. Fla. 1972).

offered, the necessary common questions might not be present."<sup>13</sup> Since that time, other federal courts have suggested that a classwide proof requirement is at least implied by Rule 23.<sup>14</sup>

These courts have made clear that the "classwide proof" inquiry is not an attempt to require class proponents to actually prove their case at the class certification stage.<sup>15</sup> Instead, the inquiry is an effort (a) to ensure that the class device is not used to allow individual class members to escape the same burden of proving their claims that would exist if their claims were being litigated individually, and (b) to ensure that trial courts consider fully how a case would be tried if it were afforded class treatment.

For all of these reasons, I urge the Advisory Committee to recommend amending Rule 23(b)(3) to adopt the "classwide proof" requirement set forth above.

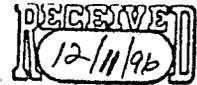
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<sup>13</sup> Alabama v. Blue Bird Body Co., 573 F.2d 309, 321-22 (5th Cir. 1978).

<sup>14</sup> See Sheehan v. Purolator, Inc., 839 F.2d 99, 103-04 (2d Cir.) (upholding denial of class certification where district court concluded that the class claims were "not susceptible of class-wide proof"), cert. denied, 488 U.S. 891 (1988); Walsh v. Ford Motor Co., 807 F.2d 1000, 1017-18 (D.C. Cir. 1986), cert. denied, 482 U.S. 915 (1987); Walsh v. Ford Motor Co., 130 F.R.D. 260, 269 (D.D.C. 1990) ("In order to show that issues of fact are common to the proposed class litigation under Rule 23, the plaintiffs must show that the substance of the evidence is substantially the same for all class members."), appeal dismissed, 945 F.2d 1188 (D.C. Cir. 1991).

<sup>15</sup> See, e.g., Walsh, 807 F.2d at 1017-18 (noting that "[c]lass action proponents may not be called upon to prove their case in order to obtain class certification").

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December 11, 1996

Via Federal Express  
and Fax [202-273-1826]

Peter G. McCabe  
Secretary of the Committee on Rules  
of Practice & Procedure  
Administrative Office of the  
U.S. Courts  
One Columbus Circle, N.E.  
Washington, D.C. 20544

Attention: Mark Shapiro

Re: **Hearings on Proposed Amendments to:  
Federal Rules of Civil Procedure/Rule 23 (Class Actions)  
Comments of Clint Krislov on Proposed changes to Rule 23**

Dear Mr. McCabe:

I write in regard to the proposed changes to Rule 23. I believe many of these changes are the wrong way to correct the perceived class action problem. Many of the changes are wrong because they attempt to resolve substantive, constitutional or jurisdictional issues by modifying the rules of civil procedure. These changes, if they are to come at all, should, and perhaps must, be made by the Court or Congress, respectively. I do believe, however, that most of the problems addressed by the proposed changes can be better corrected by revisions to the rules which will make real the necessary scrutiny of class action settlements. First, I shall explain our unique vantage point and then describe what we believe this Committee can do to achieve real improvements to the class action process.

We are a small law firm. We focus exclusively on class and derivative actions in matters dealing with governmental pension funding, health care benefits, consumer protection, securities and government corruption.

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We typically represent plaintiffs in the pursuit of governmental entities and corporations who cheat their employees, retirees, customers and taxpayers. On occasion, we have represented defendants. In addition, we have often intervened as objectors to unfair settlements in cases other than our own, employing our best efforts to apply critical scrutiny and block unfair settlement, thereby forcing improvements.<sup>1</sup>

As objectors, we intervened in the two asbestos mega-settlements: the Georgine/Amchem litigation in Philadelphia and the Fibreboard litigation in Tyler, Texas. To protect the interests of longshoremen nationwide, in both cases we asserted that the settlements had inadvertently created the risk that all the longshoremen in the class would forfeit their benefit rights under the federal Longshoremen and Harbor Workers Compensation Act. In fact, the United States Department of Labor actually intervened behind us in support of our objections. Eventually, Fibreboard parties implemented our cure. Judge Parker endorsed our involvement as having creatively cured a problem that might otherwise have rendered that settlement unapprovable. Ahearn v. Fibreboard, Opinion of Parker, J., July 27, 1995.

As plaintiffs' counsel, we were co-lead in pursuing General Mills for selling oat cereals containing an unapproved pesticide. Amidst a decidedly "anti-coupon" environment, we were able to obtain a coupon settlement which guaranteed and produced a real \$10 million benefit for consumers; focused public opinion on the issue of food safety; and helped change the procedures for pesticide application which will prevent a recurrence.

In pension and taxpayer derivative cases, we have taken on the most powerful governmental office holders and entities. In approximately 13 years, I have obtained some \$80 million in recovery for the five (5) City Pension Funds from the City of Chicago's investment of pension tax levies -- and keeping the earnings for itself. Ryan v. Chicago, 148 Ill. App. 3d 638, 499 N.E.2d 517 (Ill. App. 1986) and 274 Ill. App. 3d 913, 654 (N.E.2d 483) (See App. 1995). We then fought the City's retaliatory cutback of healthcare benefits to retirees. See City v. Korshak, 206 Ill. App. 3d 968, 565 N.E.2d 68 (Ill. App. 1996).

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<sup>1</sup>In the Prudential-Bache Energy-Income L.P. Securities Litigation (MDL 888), we uncovered and forced the disclosure of the Locke-Purcell report which documented core corruption at Prudential Securities, blocked an inadequate rollup settlement of securities fraud claims, forced an auction which produced \$500 million for investors and helped to produce an improved \$120 million settlement contribution from Prudential. See In re Prudential-Bache Energy Income Partnerships Sec. Lit., 815 F.Supp. 177 (ED La 1993). Based on what we learned in that case, we launched the global civil RICO case, which has resulted in an additional \$110 million recovery for defrauded investors. See In re Prudential Securities L.P. Lit., 163 FRD 200 (SDNY 1995).

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While it is true that this public interest/private attorney general practice is highly entrepreneurial, it poses unique and extraordinary risks not often recognized. After I brought home an initial cash judgment of \$19 million after six years of self-funded litigation, the trustees of the benefitted Pension funds entered the case purely for the purpose of capturing the recovery and driving me out (a hostile takeover, of sorts), with no fee whatsoever. So, rather than realizing the benefits of doing well by doing good, we often face a very different scenario, one in which the hunter becomes the hunted. Ryan v. Chicago, Cook Co. Cir. Ct. 83 CH 390, Dec. 14, 1992, Opinion of Curry, Chief Judge Chancery Division, subtitled by the court: "A Mugging of the Good Samaritan."

Somewhat uniquely, we have also sporadically defended against class actions -- where we viewed the case as lacking merit.

Consequently, I believe we bring a unique viewpoint to your hearings, that of counsel having served in all roles of counsel in these cases: for plaintiffs, objectors -- and defendants.

**Our viewpoint** is that you should not spend your time in making rules to change the availability of the class action process for resolution of mass-tort and futures claims, non-opt-out settlements and the legality of settlement classes and cases.

These three issues are really substantive determinations of due process, which the Supreme Court is already considering and will resolve in the Georgine/Amchem (96-270) and Adams (No. 95-1873) cases. Most of the changes that you are considering will have to be rewritten to reflect whatever the Supreme Court decides on these issues in those cases during this term.

Your time can be best spent in developing rules which make the process more honest, fair, manageable and straightforward. In short: if you have a desire to amend Rule 23, you should focus on how to make it work better for its purposes -- rather than for those bent on either expanding or contracting the availability of remedies.

This Committee can be most effective in addressing specific issues by amending Rule 23(e) in two respects: 1) to detail a bonafide settlement evaluation process similar to the present certification process and (2) to acknowledge objectors as parties to the litigation in an effort to resolve the current split over the "appealability" of settlement decisions by persons who have not formally intervened by separate motion.<sup>2</sup>

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<sup>2</sup>Two additional pressing issues in this practice, which are worth considering, will be addressed in our January presentation in San Francisco: (i) establishing a means by which to coordinate cases across federal/state and geographic boundaries and (ii) reining in the current

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These are issues which pose real procedural pitfalls by which justice is thwarted for no good purpose.

**The Committee's Focus:**

A. The Committee's desire to deal with substantive liability and recovery issues, rather than process.

The federal rules are, after all, rules of procedure.

While the proposal describes its intention to delineate between mass tort cases (e.g., asbestos, hemophiliac blood, cigarettes, etc.) and small amount identical damage cases, it does so by identifying the former as unsuitable for class treatment and encouraging the dismissal of the latter as not worthy of the court's time.

We do not believe that either approach, suggesting a substantive outcome, is an appropriate use of the Committee's rule-making process. The issue of whether mass-tort/large-damage personal injury suits should be tried or settled as class actions binding on smitten future claimants (with or without permitted opt-outs) is a substantive due process issue that has been evolving ever since Rhone Poulenc and Castano, and is likely to be resolved by the Supreme Court shortly in Georgine and Adams under tests of due process under the Constitution, rather than the rule-making process.

Similarly, it is equally inappropriate to engraft the suggestion to the courts that a merits-benefits weighing ought to be added to the rules since this will be viewed to hold most small amount mass claim class actions as dismissable, *de minimis* matters.

Either way, the tilt suggested by the proposed rule change is an inappropriate attempt to tilt in an outcome determinative direction, rather than an effort to find ways to improve the efficacy and fairness of the process.

In other words, these choices are not yours to make and some will be decided soon by the Court anyway.

B. Procedural Issues.

There are two procedural issues that do need to be addressed and are appropriately within this

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defendant strategy of contorting diversity jurisdiction and federal preemption to federalize small claims which do meet the jurisdictional amount.

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Committee's scope, one detailing the settlement approval process (similar to the Rule 23(a) and (b) road map itemization of the certification process) to require and detail a full analysis of the fairness of the settlement's terms and adequacy of the representation of the class, and the other defining objectors and other class members as parties with standing to appeal from the court's determination.

1. The importance of court scrutiny of the Class Criteria in determining whether to approve settlement.

The most important issue in any settlement approval is a bona fide scrutiny of the settlement's fairness and the adequacy in which the class has been represented. It is my view that all of the due process issues presented in Georgine and Adams can and should be determined by establishing procedures under Rule 23(e), detailing how the settlement approval process is to be conducted. I believe that the purpose of the court's scrutiny of (i) the fairness of terms and (b) the adequacy of representation is intended precisely to determine whether due process has been met. The current criticism of class action settlements -- cents for the class, millions for counsel -- is really that the class has not been adequately represented, i.e. that plaintiff counsel's representation was inadequate because she agreed to a settlement that delivers, binds and impairs some or all class members to an unfair recovery -- in exchange for the assurance of a fee, sometimes a large fee.

There is something to this critique, but not for the reasons generally ascribed. The fact is that it is the defendants in these cases who have and exert tremendous leverage in determining how, where and with whom, and the terms under which a settlement will occur.

In a typical mass fraud case, whether consumer, securities or environmental, some twelve to forty cases will be filed in various locales in both federal and state courts.

For the cases filed in or removed to the federal courts, the MDL process works well -- except for the predilection to send the cases to a forum usually most convenient for the defendant. Except for aircraft disasters (which are usually sent to a district near the crash scene), securities, consumer and antitrust cases are typically sent to the defendant's resident district or (for securities cases) to the Southern District of New York. Ignoring the "home court" advantage for New York or "home state" counsel, the problem is that there is no systemic device by which to coordinate the sister state courts with each other or with the federal court.

The result is not a Gullied-like problem for the defendant. Rather, it provides the unfortunately perfect structure for a "Dutch auction" by which the defendant shops the deal around among the cases, playing on the competing plaintiffs counsel in an effort to determine who will take the lowest "clearing price" settlement package.

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The leverage here is real and powerful. From experience, I can attest from experience the settlement is a vastly more secure and remunerative position than is the counsel who stands as an objector with the strongest of challenges. I know because I've been in both positions. Typically, proposing a settlement by class counsel prevails. Objectors' counsel are routinely rebuffed, denied and dispatched without a sou. Even where objectors' counsel has shown massive flaws and produced vast improvement to the settlement, the courts favor original counsel and allocate the lion's share of the fee to them, leaving only a small portion, often without enhancement to objectors' counsel. Thus while objectors like us, who seek to improve a settlement, take on massive risk and produce important results, they are rarely welcomed or rewarded for their efforts.

This situation creates ridiculous displays in which a sellout settlement is approved in one state's courts (often in the defendants' locale) wiping out all claims, including all federal and state claims, while other litigants -- actively pursuing the similar claims in consumers' "home" states -- are pre-empted.

This problem can be remedied by working on Rule 23(e)'s settlement provisions to encourage, perhaps require, the inclusion of the views of all counsel, including objectors' and competing parallel case counsel as well.

Thus, the problem is not that plaintiffs' counsel is dishonest or nonaggressive. Rather, it is that the leverage is almost completely on the side of the defendant: the judge wants to dispose of the case, and objectors' counsel are rarely encouraged or welcome. There needs to be implemented a means to coordinate all the litigation and claims before one court, one in which (i) the defendant is not in control and in which all counsel must be coordinated, and (ii) the Rule 23(e) settlement procedures should be detailed so that all views are encouraged and considered in the same way that certification procedures are laid out in the road map of Rule 23(a)'s Prerequisites and 23(b)'s Category Classification scheme.

2. Objectors' Standing To appeal approval of settlements.

The settlement provisions of Rule 23(e) should explicitly provide for objectors and declare that all objectors who appear in the district court are to be considered parties to the action, thereby recognizing the reality of the circumstances.

Perhaps the dumbest rule "or trap" for the unwary is that an objector who appears in the approval hearing, but has not formally intervened under Rule 24, is not a party to the proceedings, cannot appeal, and cannot intervene in the appellate court. Incredibly, there is a split among the Circuits as to whether an objector who has objected, but not formally intervened, has standing to appeal the approval of a settlement. Under the majority rule (present in the 5th, 6th, 8th and 11th

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Circuits), a party who did not formally intervene below has no standing to appeal the settlement approval -- even if the person actively participated as an objector.<sup>3</sup> Applying this rule, the Fifth Circuit has at least twice summarily dismissed appeals presenting substantial challenges to class action settlements, solely because the sole appealing objector did not formally move to intervene.

The trap here is that the usual Rule 23(e) settlement notice advises of the opportunity to object, but not the need to intervene. If intervention is granted, the person will be a party and thus able to appeal the settlement's approval. If intervention is denied, there has been a final decision ending the party's involvement and starting the clock on his right to appeal. The person must then immediately pursue a full appeal on the intervention issue. At best, he might be permitted to assert this challenge simultaneously with his appellate assertion of objections to the settlement. At semi-worst, he may win intervention only after the settlement has become final. If he does what many do — actively participates in the fairness hearing by presenting his objections without a formal motion to intervene — his appeal of the settlement's approval will be dismissed without any consideration of the merits. The only challenge to the settlement is excised via the most purely technical trap door and meritorious objections never receive the consideration of the Appellate courts. This in turn stifles the law on both the role of objectors and the requirements for settlement to be worthy of approval.

The minority view, that any class member may appeal an approval order (even if they were not involved in the district court) has not proved to be too flexible nor chaos-producing in any way. See e.g. Carlough v. Amchem Prods. Inc., 5 F.3d 707, 713-14 (3d Cir. 1993).

The middle ground Seventh Circuit rule, from Research Corp v. Asgrow Seed Co., 425 F.2d 1059, 1060 (7th Cir. 1970), that any objector who participated in the proceedings below is thereby a party able to appeal, is perhaps the best rule. The Appellate Court has the benefit of the lower Court's evaluation of the objection. This can prove especially helpful where the objection turns on disputed facts of which the lower court had first-hand knowledge. But, this rule also does not impose an unfair trap on a class member who asserts his right to object.

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<sup>3</sup>Walker v. City of Mesquite, 858 F.2d 1071, 1074 (5th Cir. 1988); Shults v. Champion Int'l Corp., 35 F.3d 1056 (6th Cir. 1994); Croyden Assa. v. Alleco, 969 F.2d 675, 679-81 (8th Cir. 1992); Guthrie v. Evans, 815 F.2d 626, 628-9 (11th Cir. 1987).

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Peter G. McCabe  
December 11, 1996  
Page 8

Accordingly, I ask the Committee to stick to the procedure issues that are needed to make the rules actually work, and leave to others the substantive policy decisions on how to limit or expand recoveries.

Very truly yours,

Handwritten signature of Clinton A. Krislov in cursive, with the initials 'RS' written to the right of the signature.

Clinton A. Krislov

CAK/ro

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KRISLOV & ASSOCIATES, LTD.  
*Attorneys at Law*

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January 15, 1997

Via Federal Express  
and Fax (202)273-1826

96-CV-088

Peter G. McCabe  
Secretary of the Committee on Rules  
of Practice & Procedure  
Administrative Office of the  
U.S. Courts  
One Columbus Circle, N.E.  
Washington, D.C. 20544  
Attention: Mark Shapiro

Re: Rule 23, Class Action Rules Project

Dear Mr. McCabe:

In supplement to my Dallas appearances and testimony, I offer the following as a suggested proposal for a new Rule 23(g) roadmap for settlement fairness hearings to address the issues presented in my previous submission:

**23(g) Settlement Fairness Hearing Procedure**

In determining whether to approve a settlement of a class action, the court should use the following procedures and such others as are necessary to assure that class claims are compromised only on a truly fair, adequate and reasonable basis with full real scrutiny with input from all available viewpoints:

a. Preliminary Examination By The Court.

1. The proposed settlement shall be in writing and shall state the terms of the settlement. At minimum it shall state and describe in plain language understandable in lay persons terms:

(i) the nature of claims that are asserted in the litigation, and the claims being compromised,

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Peter G. McCabe  
January 15, 1997  
Page 2

(ii) the nature and amount of benefits to be received by the class members, (a) in the aggregate and individually, (b) cash, equitable, present and future. [This would be a major improvement over the decision in Torrisi v. Tucson Elec. Power Co., 8 F.3d 1370 (9th Cir. 1993) which seems to require disclosure of only the aggregate paid by the defendant, even though it may not disclose how much class members can look forward to.]

(iii) the terms under which the benefits are made available (e.g. by claim fund, coupons, automatic distribution), for both monetary and non-monetary benefits.

(iv) the manner in which the benefits may be obtained and

(v) any procedures for resolution of disputes over such claims, any agreement on attorneys fees, as to amount source how and when distributed.

2. Preliminary approval hearing.

The court shall hold a preliminary approval hearing to determine whether the settlement is within the range of approvable fairness, based upon the parties' representation to the court. Input from any other interested parties may be permitted on this issue. If the court shall preliminarily approve the settlement as within that range, the court shall issue summary findings of fact and conclusions of law on which its decision is based, and then shall order issuance of notice to all class members and set a hearing for final settlement approval. The court may receive the submission of objectors and their counsel at this stage but need not yet affirmatively seek them out.

b. Content and manner of notice. The notice shall be sent by the best available means to assure its delivery to all class members, and, as well, to counsel in other known litigation pending in other jurisdictions which relate to the facts of the settling litigation, and shall describe in plain language at least the following:

1. The parties to the litigation.
2. The nature of the litigation, a description of the claims and the stage of the litigation.
3. The terms of the proposed settlement - both monetary and nonmonetary, the amounts that will be available or distributed to the class in the aggregate and individually, along with a description of the attorneys fees to be sought and their impact on settlement benefits both aggregate and individually. to extent that specific individual amounts are not available, they should nonetheless be calculated to the extent or proportions to which they are determinable.

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Peter G. McCabe

January 15, 1997

Page 3

4. A description of the manner in which the settlement was arrived at.
5. Identification of the attorneys involved and who to contact with questions regarding the settlement.
6. Description of the right to opt out or object including both the manner and date.

c. Hearing on Final Approval.

1. The court shall set a hearing for final approval. Absent exigent circumstances, class members should be afforded no less than 45 days in which to evaluate the settlement proposed in order to act or opt out. Although the fairness hearing is not intended as a trial of the case on the merits, it shall be conducted as a bona fide test of the settlement's terms and its fairness to all affected members of the class and all subclasses, as well.

2. Counsel in parallel proceedings. At that hearing there shall be invited as well all counsel involved in all known parallel litigation from other jurisdictions, both state and federal, to advise the court of their views of the settlement.

3. Objectors.

(i) Class members who present objections shall be considered parties to the litigation without requiring separate intervention under Rule 24. (This resolves the Circuit split over objector standing referred to in my December 11, 1996 letter in favor of objector standing.)

(ii) The court in its discretion, may grant limited discovery and counsel organization to the objectors in pursuit of actually testing the fairness of the settlement in a speedy and efficient manner and they shall be provided access to all discovery exchanged between the settling counsel.

(iii) Objectors counsel shall be considered additional ancillary class counsel for purposes of the litigation and shall be authorized and encouraged to designate an organization of objectors counsel to present the objectors' case on behalf of class members.

(iv) Objectors counsel may be entitled to fees for their contribution to the

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Peter G. McCabe

January 15, 1997

Page 4

litigation for the class' benefits, including testing the settlement and for contributing to any improvement in the settlement. The standards for determining their fee shall be the same as those used for plaintiffs counsel.

Very truly yours,

A handwritten signature in black ink, appearing to read 'CAK', with a long horizontal line extending to the right.

Clinton A. Krislov

CAK/mm

f:\cases\krislov\politics\rule 23\mccabe letter-rule 23 project\1/15/97.5\mm

**STATEMENT OF PATRICK E. MALONEY  
ON BEHALF OF  
DEFENSE RESEARCH INSTITUTE  
ON PROPOSED AMENDMENTS TO FEDERAL RULE  
OF CIVIL PROCEDURE 23  
BEFORE THE COMMITTEE ON RULES OF  
PRACTICE AND PROCEDURE OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES**

**December 16, 1996  
Dallas, Texas**

STATEMENT OF PATRICK E. MALONEY

As President of Defense Research Institute, a national non-profit association with membership of over 20,000 civil defense lawyers and over 350 corporations, I appreciate the opportunity of providing comments to you today on behalf of our organization.

At the outset, I would like to express our appreciation to the Advisory Committee on Civil Rules for its more than four years of work on proposed amendments to Rule 23. We especially appreciate your participation in many conferences and institutes attended by hundreds of practicing lawyers, representatives of Congress, state and federal judges and law professors. Your open and candid discussion and recognition that public comment is an essential part of the rules formulation process are especially gratifying to those of us who live with civil procedural rules on a daily basis in representation of a broad variety of clients.

I would like to confine most of my comments today to Rule 23(b)(3), dealing with the factors courts should consider when ruling on class certification. We anticipate filing a more extensive written statement on behalf of Defense Research Institute before expiration of the public comment period.

We think the modest improvements proposed to the procedural rules governing class actions offer hope for curtailing some of the most egregious abuses of the class action device. We believe the amendments to Rule 23(b)(3), reformulating the factors a court should consider in determining whether to certify a class action

for trial, will help solve many of the difficult problems associated with class action litigation. These modest, incremental changes should moderate the rapid, recent expansion in the number and scope of class actions.

We agree with the Advisory Committee that, in its present form, Rule 23 is inefficient and burdensome because it often leads to the litigation of lawsuits that are not justified by the time and money required to prosecute them. Just as importantly, Rule 23 is often unfair to both plaintiffs and defendants. It can interfere with the legitimate interest individual claimants have in prosecuting their own lawsuits. At the same time, the rule can create unfair pressures for defendants to settle weak or meritless claims.

In its present form, Rule 23 sometimes leads to the litigation of claims that should never be litigated. Many class actions cost far more in attorney's fees and court resources than they produce in benefits to the class members. The present system sometimes actually creates incentives for this type of litigation. We believe there should be encouragement to trial courts to weigh the potential gains of the class action against its certain cost. Some argue that small-claims class actions are necessary to encourage compliance with law through private enforcement in the public interest. But the motives that drive class action attempts at enforcement may not coincide with the public interest. Without doubt, courts, the public and other litigants pay a price when

judicial resources are devoted to class actions. Courts should be required to consider whether there is some benefit that justifies private enforcement, but also whether there are less expensive and more efficient methods of law enforcement. Congressional intent regarding private enforcement is occasionally, but rarely, expressed in statutes providing for attorney's fees and treble damages.

We also agree with the Committee's efforts to encourage courts to reflect carefully on the advantages of individual litigation before rushing to certify classes that include claims that would support separate actions. Class adjudication may not be fair to individual litigants even when it is most efficient for the judicial system.

A continuing area of concern is the issue of whether or not Rule 23 was intended for resolution of mass torts. We wish the Advisory Committee would announce affirmatively that dispersed mass torts are not appropriate for resolution under the rubric of Rule 23(b)(3).

We believe that Rule 23 can have a demoralizing effect on plaintiffs who wish to pursue claims individually. In mass tort actions in particular, plaintiffs may have large claims for personal injuries they have suffered. Substantial time and expense may be involved in resisting efforts to have them drafted into class actions, or to exclude themselves from class actions to which they belatedly learn they belong. Current Rule 23 often permits

distant courts and attorneys to deprive them of the personal control of their claims which they deserve.

Rule 23 is often fundamentally unfair to class action defendants in its present form. Class actions can enable plaintiffs' attorneys to leverage weak claims into potent threats. A defendant may be content to litigate many weak claims individually, but when these claims are aggregated, they can represent a threat our judicial system was never intended to create. Defendants are thus often coerced into settlement.

Class certification of immature or novel claims presents similar problems. It is difficult to gauge the risks posed by a new theory of liability or a new claim that a particular product causes a previously unexpected and unintended injury. When multiple claims have no track record before juries, it is difficult for counsel and defendant to evaluate the chances of a successful defense. Compounding the risk, the plaintiffs in these cases often claim serious injuries and permanent disabilities. Consequently, when a class claim involves an immature or novel theory and large potential damages, the battle may be over after the class certification hearing. If the class is certified, the question often becomes simply how much the defendant must pay to settle the class action.

In addition to the certification factors, another serious issue is the current absence of any effective means to obtain an interlocutory appeal of class certification rulings. Although

there are some existing exceptions, litigants must usually wait until final judgment to appeal a trial court order certifying a class. However, the certification order often ends the litigation as a practical matter. Understandably, defendants are often reluctant to defend a large class action through a final, and potentially astronomical, judgment merely in the hope that the appellate court disagrees with the district court about the suitability of the class for certification. All class action litigants need a method to obtain timely and meaningful review of class certification orders. The Advisory Committee's recommendations concerning permissive interlocutory appeals should provide substantial relief in this regard.

We recognize that the Advisory Committee has been presented with many diverse and contradictory proposals over a several year period and has received the considered views of many thoughtful persons before development of the current proposed amendments. The process has been deliberative, open, and comprehensive. We respect the conclusion of the Advisory Committee and we concur that the recommended modest, incremental changes should moderate the rapid, recent expansion in the number and scope of class actions.

While the currently proposed amendments focus on some of the most troublesome aspects of class action law, we think more procedural reform is needed. For example, more strict pleading requirements and evidentiary standards should help trial courts in their determination of certification issues. We look forward to

participation in the Advisory Committee's continuing examination of these important class action rules.

Thank you again for permitting me to present these views today.

**SUPPLEMENTAL STATEMENT OF  
DEFENSE RESEARCH INSTITUTE  
ON PROPOSED AMENDMENTS TO FEDERAL RULE  
OF CIVIL PROCEDURE 23  
BEFORE THE COMMITTEE ON RULES OF  
PRACTICE AND PROCEDURE OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES**

**February 14, 1997**

SUPPLEMENTAL STATEMENT OF DEFENSE RESEARCH INSTITUTE

This supplemental statement of Defense Research Institute is submitted for consideration by the Advisory Committee on Civil Rules in addition to the statement which was submitted in connection with the testimony of its president, Patrick E. Maloney, at the hearing conducted in Dallas, Texas on December 16, 1996.

Based upon our understanding of testimony at the three public hearings and written comments submitted during the period for public comment in regard to proposed amendments to Rule 23, it appears that the only substantial objections to the proposed amendments relate to proposed Rule 23(b)(3)(F), prescribing a benefit/cost analysis, and proposed Rule 23(b)(4), dealing with settlement classes. If the Advisory Committee concludes that it would be inappropriate to proceed with a recommendation for implementation of these two proposed amendments, DRI strongly recommends proceeding with recommending all remaining proposed amendments. We think the remaining modest proposed improvements offer hope for curtailing some of the most pressing problems of the class action device. These modest, incremental changes should help moderate the rapid, recent expansion in the number and scope of class actions.

Proceeding in this manner would eliminate the serious problems relating to the current absence of any effective means to obtain an interlocutory appeal of class certification rulings. Although there are some existing exceptions, litigants must usually wait

until final judgment to appeal a trial court order certifying a class. However, the certification order often ends the litigation as a practical matter. Understandably, defendants are often reluctant to defend a large class action through a final, and potentially astronomical, judgment merely in the hope that the appellate court disagrees with the district court about the suitability of the class for certification. All class action litigants need a method to obtain timely and meaningful review of class certification orders. The Advisory Committee's recommendations concerning permissive interlocutory appeals should provide substantial relief in this regard.

We also agree with many of those providing testimony at the public hearings to the effect that among the most pressing problems facing our nation's civil justice system relate to handling of class actions in some of our state court systems. While any addition to the burgeoning case load of our federal courts may well not appeal to most members of the federal judiciary, it certainly appears that some type relief, through procedural rule amendment or federal legislation, is appropriate.

We continue to be of the opinion that Rule 23, in its present form, sometimes leads to the litigation of claims that should never be litigated. Many class actions cost far more in attorney's fees and court resources than they produce in benefits to the class members. The present system sometimes actually creates incentives

for this type of litigation. We believe there should be encouragement to trial courts to weigh the potential gains of the class action against its certain cost. Some argue that small-claims class actions are necessary to encourage compliance with law through private enforcement in the public interest. But the motives that drive class action attempts at enforcement may not coincide with the public interest. Without doubt, courts, the public and other litigants pay a price when judicial resources are devoted to class actions. Courts should be required to consider whether there is some benefit that justifies private enforcement, but also whether there are less expensive and more efficient methods of law enforcement. Congressional intent regarding private enforcement is occasionally, but rarely, expressed in statutes providing for attorney's fees and treble damages.

Finally, a continuing area of concern is the issue of whether or not Rule 23 was intended for resolution of mass torts. We wish the Advisory Committee would announce affirmatively that dispersed mass torts are not appropriate for resolution under the rubric of Rule 23(b)(3).

While the currently proposed amendments focus on some of the most troublesome aspects of class action law, we continue to think more procedural reform is needed. For example, more strict pleading requirements and evidentiary standards should help trial courts in their determination of certification issues. We

sincerely appreciate the opportunity of participating with the Advisory Committee in the rules formulation process. We look forward to participation in the Advisory Committee's continuing examination of these important class action rules.

Respectfully submitted,

DEFENSE RESEARCH INSTITUTE

By Robert L. Fanter  
Robert L. Fanter  
President

RECEIVED  
12/6/96

96-CV-091

**STATEMENT OF G. LUKE ASHLEY  
TO THE COMMITTEE ON RULES OF PRACTICE AND  
PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES**

I wish to thank the Committee for the opportunity to present my views on the proposed amendments to Fed. R. Civ. P. 23(b)(3). I am cognizant of the seriousness of class action reform issues, and the importance of thorough and careful consideration of any proposed changes to the current rule. I also appreciate the amount of time and effort that committee members and others have already invested in this project.

My background and experience is that of a trial lawyer with an appellate bent. In the past several years, class action proceedings have occupied an increasing portion of my time. I have front-line experience in class action proceedings of various types, including securities, consumer, and mass tort cases.

Since March 1991, I have served as lead appellate counsel in what is generally known as the Cimino Proceeding. That matter has been the subject of intensive scrutiny in the legal literature, including the report issued by Chief Justice Rehnquist's Ad Hoc Committee on Asbestos Litigation, and University of Texas Professor Linda Mullinex's new mass torts casebook. It involves a radical procedure that Judge Robert M. Parker utilized to dispose of 2,298 cases pending in the Eastern District of Texas. He utilized a phased trial procedure with a common issues trial of 10 individual cases, and damages hearings for 160 "sample" plaintiffs. Judge Parker then extrapolated the results of the 160 trials to the cases of the remaining cases, giving each the average jury award in the claimed disease category. The lowest average

compensatory damages award for an individual case was \$542,000. A multiplier was also used to compute punitive damages. See *Cimino v. Raymark Industries*, 751 F.Supp. 649 (E.D. Tex. 1990). The trial plan is now on appeal to the United States Court of Appeals for the Fifth Circuit.

My specific comments are as follows: I support the proposed addition of subdivision (f). In the class action context, the Cimino Proceeding, if not unique, is exceedingly rare. Outside of the settlement context, class action proceedings almost never proceed to a final judgment that is subject to appellate court review. The explicit authorization for discretionary interlocutory appellate review is a desirable improvement.

I do not oppose the other proposed changes. The addition of subdivision (b)(4) properly makes clear that, in proper circumstances a party can waive objections to the structure of a proposed (b)(3) proceeding in the settlement context, when the same party could insist on strict compliance with all class action requirements and defeat class certification outside that context. It appears to me that the other changes will have a modest substantive impact at most.

My concerns are with some of the commentary. I strongly object to the suggestions that these changes will allow courts greater leeway in certifying classes in mass tort cases. Those comments are unwarranted, and should be eliminated. I will attempt to explain why.

There is an unavoidable constitutional difficulty in using (b)(3) class certification in the mass tort context, particularly where punitive damages are in issue. It is obviously impossible

to utilize only one jury to determine all issues necessary to fashion a judgment or judgments in a mass tort proceeding of any size. There is, however, a constitutional limitation on separation of issues essential to judgment in an individual class member's case for trial before different juries. Unless the (b)(3) proceeding can be structured so as to proceed to judgment on the claims of the absent class members without violating this constitutional limitation, it cannot produce valid, enforceable judgments. Under those circumstances, the individual issues must necessarily predominate, and the (b)(3) proceeding cannot be superior to other methods for adjudicating those claims.

The first key to understanding this issue in the mass tort context lies in the term "questions of ... fact common to the members of the class...." A substantial body of Texas case law holds that a "question ... of fact common to the members of the class exists not when the question is a determinative one as to each class member's claim, but rather when the answer for one class member (*i.e.*, one class representative) determines the answer for the claims of the other class members. *Wente v. Georgia Pacific Corp.*, 712 S.W.2d 253, 257 (Tex. App. -- Austin, no writ); *RSR Corp. v. Hays*, 673 S.W.2d 92B, 931-33 (Tex., App. -- Dallas 1984, writ *dism'd*); *Amoro Prod. Co. v. Handy*, 628 S.W.2d 613 (Tex. App. -- Corpus Christi 1981, writ *dism'd*). The Texas class action rule is identical to the current federal rule, and Texas courts are guided by federal law in class certification issues.

In the mass tort context, there are uniquely individual issues essential to each proposed class member's claim. Causation and damages are obvious examples. A jury's answer to the question of whether a defendant's product caused a particular class representative's disease or

condition cannot answer the question of whether the same product caused harm to an absent class member, or another class representative. A jury's answer to the question of what amount of money would compensate the particular class representative for his or her disease or condition in no way answers the same question as to an absent class member or another class representative. While the same jury questions must be answered in each class member's individual case, they cannot be "true common jury questions" for Rule 23(b)(3) purposes.

In some mass tort contexts, product defect might be a true common jury question. Where the product defect claimed is failure to warn, however, the situation is problematic. In Texas and most other jurisdictions, a failure to warn claim depends on the state of knowledge at the time of manufacture, *i. e.*, what the defendant knew or should have known, and reasonably should have warned about at that time. That obviously can change over time. A jury's answer to the question of what a manufacturer of a product knew or should have known and done in 1950 may not answer the question of what that same manufacturer knew or should have known and done in 1960 or 1970. Yet in a latent disease situation, one particular class representative may be claiming harm from exposure to product manufactured in 1950, while other members base their claims on exposure to product manufactured at other times. Again, the questions are the same, but in at least some situations they are not true common jury questions for Rule 23(b)(3) purposes.

The second key is that any court considering (b)(3) class certification *must* consider what will be necessary to proceed to judgment on the claims of the proposed class members in assessing predominance and superiority. If a (b)(3) proceeding can be structured to provide the

answers to one or more significant true common jury questions, *and* all remaining individual jury questions answered without violating the constitution or otherwise injecting reversible error, class certification may be appropriate. The judgment or judgments ultimately produced would be valid and enforceable. If, however, there is no feasible way to structure a (b)(3) proceeding to produce judgments on the claims of the absent class members that do not contain reversible error, the individual issues necessarily predominate, a (b)(3) proceeding cannot be superior to another method of adjudication, and class certification is inappropriate. While a trial judge certainly should have discretion to certify or not certify a class, it is an abuse of discretion for a trial judge to certify a class where that inevitably injects incurable reversible error into the proceeding.

In any proposed (b)(3) proceeding where there are one or more individual jury questions that are essential to any judgment on the claims of absent class members, there must be an analysis of whether the proceeding can be structured to avoid constitutional limitations on separation of issues for trial. Chief Judge Posner's discussion in *In re: Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir., cert. denied, 115 S.Ct. 184 (1995)) outlines the *Gasoline Products* doctrine. In that mandamus proceeding, the underlying case involved claims of hemophiliacs for infection with the AIDS virus from contaminated blood. In reviewing and reversing the trial plan and the class certification order, Chief Judge Posner stated:

Bifurcation and even finer divisions of lawsuits into separate trials are authorized in federal district court.... And the decision to employ the procedure is reviewed deferentially.... However, as we have been at pains to stress recently, the district judge must carve at the joint.... Of particular relevance here, the judge must not divide issues between separate trials in such a way that the same issue is reexamined by different juries. The problem is not inherent in bifurcation. It does not arise when the same jury tries the successive phases of the litigation. But most of the

separate 'cases' that compose this class action will be tried after the initial trial in the Northern District of Illinois in different courts, scattered throughout the country. The right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have jurable issues determined by the first jury empaneled to hear them (provided there are no errors warranting a new trial), and not reexamined by another finder of fact. This would be obvious if the second finder of fact were a judge.... But it is equally true if it is another jury. *Gasoline Products Co. v. Champlin Refining Co.*, 283 U. S. 494, 500, 51 S.Ct. 513, 515, 75 L.Ed. 1188 (1931); *McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 305 (5th Cir. 1993); *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978).

51 F.3d at 1302-03 (other citations omitted).

In the mass tort context, where punitive damages are at issue, the *Gasoline Products* doctrine becomes very significant. The jury questions of liability for actual and punitive damages and the jury questions of amount of punitive and compensatory damages are inextricably intertwined because they necessarily depend upon a jury assessment of the same evidence. A jury answering the question of what amount to award as punitive damages must consider and evaluate the same evidence about the conduct of the defendant that a jury answering the question of whether the defendant negligently or knowingly failed to warn of the product hazards that were known or knowable at the time of manufacture. In Texas, and I believe in most if not all other jurisdictions, the jury awarding punitive damages to an individual class member must assess the defendant's conduct in relation to that person, and any punitive damages awarded must bear a reasonable relationship to the individual compensatory damages award. It seems clear that these issues cannot be separated for trial before different juries without violating the Seventh Amendment. It seems equally clear that a single jury cannot feasibly hear and determine all issues in any sizeable mass tort proceeding.

The proposed amendments cannot and do not purport to solve this problem in the mass tort context. The suggestions in the commentary that class certification in mass tort context would now be more appropriate are totally unwarranted and should be eliminated.

In the past, some courts, determined to avoid consideration of the merits of the class members' claims and beguiled by case law language about the preliminary nature of a class certification decision, have avoided anything except superficial consideration of how to structure the proposed (b)(3) proceeding to ultimately produce a judgment or judgments on the claims of absent class members. I support the proposed addition of subparagraph (f) to subdivision (b)(3) in the hope that it will lead courts making or reviewing class certification decisions to do so. That would lead to a more rational and principled predominance and superiority analysis. If it is impossible through the class action proceeding to produce judgments on the claims of the individual class members that do not contain reversible error, certainly the probable relief to individual class members cannot justify the costs and burdens of class litigation.

I appreciate very much the opportunity to express these views.

## SUMMARY OF RECENT CLASS ACTION EXPERIENCE

1. *Cimino v. Pittsburgh Corning Corporation*, Nos. 93-4452 through 93-4611 pending before the United States Court of Appeals for the Fifth Circuit. I am serving as lead appellate counsel for Appellant Pittsburgh Corning Corporation in the class action/consolidation. The Cimino Proceeding has been the subject of intensive scrutiny in the legal literature, including the report issued by Chief Justice Rehnquist's Ad Hoc Committee on Asbestos Litigation, and University of Texas Professor Linda Mullinex's new mass torts casebook. It involves a radical procedure that Judge Robert M. Parker utilized to dispose of 2,298 cases pending in the Eastern District of Texas. He utilized a phased trial procedure with a common issues trial of 10 individual cases, and damages hearings for 160 "sample" plaintiffs. Judge Parker then extrapolated the results of the 160 trials to the cases of the remaining cases, giving each the average blind jury award in the claimed disease category. The lowest average jury award was \$542,000. A multiplier was also used to compute punitive damages. See *Cimino v. Raymark Industries*, 751 F.Supp. 649 (E.D. Tex. 1990).

2. Other class actions for Pittsburgh Corning Corporation:

a. *Bailey/Abernathy v. Pittsburgh Corning Corporation*, Cause Nos. A-92-0967-C and A-92-0961-C; pending in the 128th District Court of Orange County, Texas. In this proceeding Plaintiffs sought certification of a class of more than 4,400 plaintiffs from Alabama. After a class certification hearing held in August 1995, and full briefing, Judge Clark denied class certification.

b. I am also generally assisting Pittsburgh Corning Corporation in mass consolidation and/or class action proceedings currently pending in a number of other Texas jurisdictions, including Brazoria, Galveston, Jefferson, and Morris Counties.

3. ***Southwestern Bell Mobile Systems.***

a. ***Esquivel v. Southwestern Bell Mobile Systems***, No. 10,090, in the 229th District Court of Starr County, Texas. In this proceeding, Plaintiffs seek certification of a class of Texas cellular mobile service consumers challenging a contractual provision for an early termination fee. Precertification hearing discovery is currently ongoing.

b. ***Frendlich v. Southwestern Bell Mobile Systems***, No. 05-95-01755, pending before the Court of Appeals for the Fifth District of Texas at Dallas. I serve as lead appellate counsel for SBMS. The trial court certified a class of Texas cellular mobile service consumers challenging SBMS' implementation of the billing procedure change that "unbundled" the interconnection component from its general airtime usage charge. The trial court granted summary judgment in favor of SBMS, and the class plaintiffs have appealed. The case has been briefed, but not argued.

c. ***Sommerman v. Southwestern Bell Mobile Systems, Inc.***, No. 3-96CV1129-J, pending in the United States District Court for the Northern District of Texas, Dallas Division. This recently filed action seeks certification of a class of cellular mobile service consumers challenging SBMS' "rounding up" procedure whereby the customer pays the per minute airtime usage charge for any portion of a minute used.

4. ***Texaco Inc. and Related Entities.***

a. ***Garrett/Adair v. Texaco Refining & Marketing Inc.***, No. D152441, pending in the 136th District Court of Jefferson County, Texas. I have responsibility for class action issues in this case. Plaintiffs seek certification of a class of property owners adjacent to current or former service station sites that have experienced leaks from underground storage tanks.

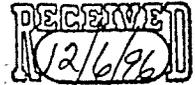
b. *Rivera v. Texaco, et al.*, No. M-95-269, pending in the United States District Court for the Southern District of Texas, McAllen Division. This case is similar to *Adair/Garrett*, but the pleadings seek certification of a national class of owners of properties adjacent to service stations with leaking underground storage tanks.

c. **Crude Oil Royalty Litigation.** I am assisting Texaco Inc. on class action issues in mass claim litigation filed against Texaco Inc. and other major oil companies. Plaintiffs seek class certification of the claims in a dispute over royalty and tax payments under leases on state owned lands. This case already has gone up to the Supreme Court of Texas in a mandamus filing.

**5. Other Relevant Experience.**

a. Principally because of my involvement in the *Cimino* litigation, I regularly confer with involved counsel concerning the developments in the *Castano v. American Tobacco Company*, *Georgine v. Amchem Products*, and *Ahearn v. Fibreboard Corporation* cases. *Castano* is the national class action proceeding against the cigarette manufacturers that resulted in a major recent opinion from the Fifth Circuit. *Georgine* is a Third Circuit class action case involving a mass settlement of current and future asbestos claims. It recently resulted in a major opinion from the Third Circuit. *Ahearn* is another major asbestos class action proceeding pending decision by the Fifth Circuit.

b. I have also participated in class action proceedings in a major "vanishing premium" case in Judge Merrill Hartman's court, and the *Weatherford Roofing* class action in Judge Frank Andrews' court here in Dallas.



Statement of  
Bartlett H. McGuire<sup>1</sup>  
to the  
Advisory Committee on Civil Rules

96-CV-092

December 6, 1996

The Advisory Committee's proposals to amend Rule 23 are excellent. Three of the proposals would be particularly helpful:

1. Proposed Rule 23(b)(4) would provide that settlement classes need not meet the Rule 23(b)(3) criteria. In complex cases, the parties can sometimes develop creative settlement structures to resolve issues that would be horrific to try. I do not see the logic (or the policy benefits) of a blanket provision mandating the rejection of settlements in cases where individual issues would predominate at trial, or the manageability problems at trial would be intractable. Yet in *Georgine*, the Third Circuit read Rule 23(b)(3) as imposing such a mandate. The fundamental question -- whether the settlement was fair and adequate -- was never addressed.

The Fifth Circuit, in *In re Asbestos Litigation*, refused to follow *Georgine*. The Advisory Committee's proposal would resolve the dispute in favor of the Fifth Circuit. The Committee is on the right side of this issue and should stick to its guns.

2. Proposed Rule 23(f) would permit interlocutory appeals from class action rulings, at the discretion of the appellate courts. Class action rulings are so important to both sides, and have such a dramatic impact on the course of proceedings (including the settlement dynamics), that an appellate safety valve makes great sense. That safety valve will be particularly important as the courts try to implement the changes to Rule 23 that the Advisory Committee is proposing.<sup>2</sup>

<sup>1</sup>Visiting Professor, Northwestern School of Law (Lewis & Clark College); Senior Counsel, Davis Polk & Wardwell.

<sup>2</sup>The Advisory Committee on Civil Rules might consider, or recommend to the Advisory Committee on Appellate Rules, one addition to the proposal for appellate review: a provision that responses to petitions for such review should be filed only upon request of the appellate courts. Such a provision, modeled on FED. R. APP. P. 40 (involving petitions for rehearing) could save significant time and expense in any case where the court of appeals is willing to dismiss the petition without hearing from the opposing side.

3. In Rule 23(b)(3)(C), the Committee has listed the maturity of related litigation as a factor to be considered in the analysis of superiority. That is a real step forward. A case is considered mature "if through previous cases . . . plaintiffs' contentions have been shown to have merit." MANUAL FOR COMPLEX LITIGATION, THIRD at 322 n.1057 (1995). By focusing on maturity, the courts will be able to avoid premature certification of mass tort claims before the evidence of liability has been developed. In addition, the courts will have a sound basis for denying certification in cases like *Rhone-Poulenc*, where defendants had won 12 of the 13 reported judgments. Where the decisions have begun to coalesce in favor of plaintiffs, however, the proposed rule will favor class certification.

#### Preliminary Assessments of the Merits

In one respect, the Advisory Committee's proposed changes to Rule 23 do not go far enough. The proposals -- including Rule 23(b)(3)(C) -- would empower the District Courts, in certain situations, to assess the merits as part of the class action analysis.<sup>3</sup> My suggestion is to authorize consideration of the merits in connection with *any* decision under 23(b)(3).

That suggestion is based, in part, on recent legal research demonstrating that the courts already consider the merits with surprising frequency. Court decisions have incorporated preliminary assessments of the merits into rulings on the numerosity, commonality, typicality and adequacy requirements of Rule 23(a), the superiority and predominance requirements of Rule 23(b)(3), and the limited fund analysis that is mandated by Rule 23(b)(1)(B).<sup>4</sup>

These decisions run counter to the Supreme Court's statement, in *Eisen v. Carlisle & Jacquelin*, that Rule 23 gives the courts no authority to conduct preliminary inquiries into the merits. *Eisen* was flawed in its reasoning, has been undermined by later Supreme Court holdings, and would be further undermined by some of the

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<sup>3</sup>These proposed changes are discussed in Appendix A.

<sup>4</sup>The legal research is summarized in my article entitled *The Death Knell for Eisen: Why the Class Action Analysis Should include an Assessment of the Merits*. The article, a draft of which was circulated to Advisory Committee members, has now been published at 168 F.R.D. 366 (1996). The article includes a detailed analysis of the points discussed in this statement, as well as proposed language for the amendment to Rule 23(b)(3) that I am suggesting.

changes proposed by the Advisory Committee. Nevertheless, *Eisen* retains considerable vitality, is briefed in almost every case, and has created confusion and splits in authority among the courts.

My suggestion is to give *Eisen* a decent burial by amending Rule 23. Specifically, the rule should permit consideration of the merits as part of the analysis of superiority. Such an amendment would have several important benefits:

- It would clarify the law, resolve disagreements among the courts, and save the time now wasted on briefing, arguing and deciding the *Eisen* issue.

- It would address the concern that class action settlements are often unrelated, or only marginally related, to the merits of the claims. This concern has been expressed by courts, by commentators, and by the Advisory Committee (in its notes to proposed Rule 23(b)(3) and in its minutes).

Some commentators have addressed this concern indirectly, by proposing changes in the manner of compensating class action attorneys. A more direct approach -- allowing the courts to consider the merits in their class action rulings -- would be far more effective:

- (i) Strong claims should be certified more frequently, and would be settled for amounts that more closely reflect the strength of the claims. Supported by rulings that there are substantial bases for the claims, plaintiffs' lawyers would be able to resist cheap settlements; lawyers for unnamed class members would be well-positioned to challenge such settlements; and courts would be unlikely to approve them.

- (ii) Marginal claims would be certified less frequently. As a result, defendants would less frequently face the pressures to settle that result from the certification of weak claims. Those pressures can lead to settlements that are overly generous and unrelated to the merits of the claims.

- (iii) The net effect -- larger settlements in fewer class actions -- might be a wash or might favor plaintiffs. The

important point, however, is that the distribution of settlement funds would be altered, with deserving plaintiffs receiving more money and undeserving plaintiffs receiving less.

#### Possible Downsides of Preliminary Assessments

Committee members have expressed two principal concerns about preliminary assessments of the merits:

I. *The preliminary assessment process could be expensive and time-consuming.* In almost all circumstances, however, information about the merits will be useful rather than wasted. For example, it can help to shape the settlement negotiations; it can be used in preparation for a classwide trial (or a trial of the opt-out claims) if a class is certified; and it can be used by individual plaintiffs if class action treatment is denied. Perhaps more important, the cost of a preliminary assessment is likely to be small compared to the cost of paying too much (or, from plaintiffs' point of view, receiving too little) in a classwide settlement that bears little relation to the merits.

II. *Preliminary assessments could affect future proceedings in the case and could have real-world implications as well.* These consequences would of course be troubling if the preliminary assessments were ill-founded. But the risk of ill-founded assessments can be minimized by procedural safeguards akin to those developed for other proceedings involving preliminary reviews of the merits (e.g., Rule 65 hearings).

The risk is in any event outweighed by the benefits of the preliminary assessments. Litigants can use the assessments in shaping their strategies, including their settlement strategies. Securities analysts, auditors and other third parties can use the assessments in evaluating the financial condition of companies that are involved in class action litigation. In a world where almost all class actions settle, and where accurate information about pending litigation is hard to obtain, educated assessments of the merits should be welcomed rather than feared.

Another concern, expressed by at least one Committee member, is that a proposal to permit preliminary assessments would attract opposition from members of the bar. I believe that much of the

opposition -- if it materialized -- could be deflected by pointing out the benefits of such assessments, the extent to which the courts are already undertaking such assessments (despite *Eisen*), and the problems created by the coexistence of decisions following *Eisen* and decisions refusing to apply it. Some lawyers might still express concerns -- just as they have expressed concerns about proposed Rule 23(b)(4). It is my hope, however, that the expression of such concerns will not discourage the Advisory Committee from supporting changes that would materially improve Rule 23.

### Why Resurrect This Issue Now?

The Advisory Committee spent considerable time discussing preliminary assessments of the merits. It declined to publish for comment a proposal that would expressly permit such assessments. Nevertheless, there are substantial reasons for resurrecting the issue now.

1. *New information.* In recent appellate decisions like *Rhone-Poulenc*, *Castano* and *In re Asbestos Litigation*, the courts have disregarded or circumvented the *Eisen* rule. This has given an appellate imprimatur to what many district courts were already doing. Where the courts repeatedly find exceptions to a general rule, it is time to reconsider that rule.<sup>5</sup>

2. *Implications of the Committee's Proposals.* The proposals discussed in Appendix A would foster assessments of the merits in many (but not all) class action proceedings. Having come so far, the Committee should take the final step of adopting a uniform and logically consistent approach, by permitting preliminary assessments as part of the superiority analysis in all 23(b)(3) actions.

3. *Policy considerations.* There is a tendency, recognized by lawyers on both sides of the aisle, for many class actions to settle on terms that bear little relationship to the merits. The problem is ripe for solution. The next revision to Rule 23 is unlikely to occur for a decade or more. The Advisory Committee should address the problem now, rather than deferring the solution until the 21st century.

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<sup>5</sup>A comprehensive analysis of what the courts are doing is now available. See note 4 above. No such analysis was available during the Advisory Committee's deliberations.

## Appendix A

Changes Proposed by the Advisory Committee that  
Would Foster Preliminary Assessments of the Merits

1. Consideration of "maturity," under proposed Rule 23(b)(3)(C), would involve consideration of the merits. A case is considered mature "if through previous cases . . . plaintiffs' contentions have been shown to have merit." MANUAL FOR COMPLEX LITIGATION, THIRD at 322 n.1057 (1995).
2. Consideration of the "*probable relief* to individual class members," under proposed Rule 23(b)(3)(F), could involve an assessment of the merits in small-claim cases and even, as the Advisory Committee notes suggest, in some cases where "individually significant relief is likely to be demanded . . . ."
3. Rule 23(c)(1) requires that the class action ruling be made "[a]s soon as practicable" after commencement of the action. The Supreme Court argued, in *Eisen*, that preliminary hearings on the merits would contravene Rule 23(c)(1) because they would delay the class action ruling. That argument would be vitiated by the Advisory Committee's proposal to substitute the words "[w]hen practicable" for "[a]s soon as practicable."
4. The proposed amendment to Rule 23(c)(1) would also encourage the "useful practice" of ruling on motions for summary judgment prior to the class certification decision. See 1996 ADVISORY COMM. DRAFT, NOTE TO PROPOSED FED.R.CIV.P. 23(c)(1). Such rulings often impact the class action ruling, or dictate its result.
5. Proposed Rule 23(b)(4) would encourage "settlement classes" by permitting them to be certified even if they would not meet all the requirements of Rule 23(b)(3). In cases involving settlement classes, the class action determination is an integral part of the proposed settlement. That determination is made under Rule 23(e) on the basis of a detailed review of the merits. Thus, a rule that fosters settlement classes will foster, to the same extent, judicial assessments of the merits.

**STATEMENT OF JOHN W. MARTIN, JR.  
GENERAL COUNSEL, FORD MOTOR COMPANY,  
TO THE ADVISORY COMMITTEE ON CIVIL RULES  
CONCERNING PROPOSED AMENDMENTS TO FED. R. CIV. P. 23**

(December 16, 1996)

I thank the Advisory Committee for this opportunity to speak today in favor of the proposed amendments to Rule 23, and to suggest some additional revisions that, in my view, should be made to the class action rule.

Let me begin by sharing with you Ford Motor Company's recent experience with class actions. I think it is typical of what other automakers (and, indeed, other manufacturers of consumer products) have faced.

In the thirty years since Rule 23 was enacted, putative class action lawsuits against Ford have increased from a trickle to a flood. As recently as 1992, we had only a small handful of class actions pending at any given time. In 1991, for example, three putative class action lawsuits were filed against the Company. Since 1993, however, the floodgates have opened and Ford has been served with an increasing number of class actions in each subsequent year. At the end of 1995, for example, over 50 were pending against the Company.

The collective threat to the Company posed by these lawsuits has also increased dramatically in the 1990s, both in terms of the number of vehicles at issue, and the amounts sought. By way of example, earlier this year a single lawsuit was filed against Ford purportedly on behalf of more than 23 million vehicle owners (or

almost 9 percent of the population of the United States).<sup>1</sup> Lawsuits of this size are unprecedented in the history of Ford Motor Company.

Not surprisingly, the amounts collectively demanded by plaintiffs in these actions have skyrocketed in the last several years. It is no longer unusual for Ford to be served with a class action lawsuit seeking damages in the neighborhood of a billion dollars.

Virtually all of these lawsuits are "lawyers' cases." By that I mean they do not stem from real concerns by real consumers about their vehicles. Instead, the ideas for these lawsuits come from the lawyers' themselves and from their allies in the motor vehicle critic community. Typically, the named plaintiffs neither know nor care much about the matters of which they supposedly are complaining. The unnamed class members invariably have even less interest in the case; they haven't experienced the alleged defect and, by and large, are satisfied customers. To be blunt, the real purpose of the lawsuit is to make money -- not for consumers, but for the lawyers who brought the suit.

In my view, these events have occurred because the class action device is out of balance. Lawyers are filing class actions in unprecedented numbers because the process is tipped in favor of certifying classes in order to promote easy disposition

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<sup>1</sup> The estimated population of the United States as of August 11, 1995 was 263,081,710. See 1996 Information Please Almanac, p. 288.

of cases and settlement *en masse*. "Easy" class certification provides plaintiffs' lawyers with the leverage to force settlements without regard to a full consideration of the rights of all parties. Simply stated, Rule 23 is being used improperly because it is too easily accessible.

As I think an impartial observer would agree, most of the class action lawsuits brought against Ford are utterly without merit. Usually, the defect allegations made in the suit are simply wrong. What is trumpeted as a systemic "defect" usually turns out to be either (1) the fact that a given component part may eventually wear out, or (2) a complaint that the vehicle lacks a feature that theoretically would be desirable.

And even if the vehicles at issue arguably have experienced a problem, there usually is no legal basis for the claim -- the warranties that came with the vehicles long since expired, and so the plaintiff tries to circumvent those warranties by asserting claims sounding in tort. For example, these lawsuits typically allege that certain unidentified vehicle "advertisements" were tantamount to a fraudulent misrepresentation that the vehicle would forever operate perfectly. The strategy, of course, is to keep the allegations vague and then launch broad-based discovery in the hope that either (1) the Company will settle to avoid the cost and disruption of discovery, or (2) some "smoking gun" document will turn up.

A few examples will illustrate the kinds of frivolous class action lawsuits that product manufacturers like Ford face every day:

-- One recent lawsuit against Ford alleged that every Ford vehicle made during a particular era was "defective" because the sun-visor sticker that tells passengers to wear their seat belts was not printed in orange and did not explain, in sufficiently graphic detail, what injuries an unbelted passenger might suffer from a collision. This lawsuit eventually foundered on the fact that the named plaintiffs couldn't explain how they had been injured. The court was troubled by the prospect of a group of plaintiffs saying, in essence, "we are bringing this lawsuit because we recognize the importance of wearing seat belts, but we want monetary damages because we are afraid we might someday forget to wear our seat belt because Ford's sticker isn't orange."

-- Another lawsuit was filed by a doctor who had purchased a luxury vehicle equipped with a car phone that had a voice-activated dialing feature. Essentially, the system allows one to begin and end a telephone call by giving oral instructions to the telephone. The doctor's grievance was that occasionally, if background noise from the radio or from traffic got too high, he had to push a button to turn the phone on or off. Based on this, he brought a putative class action lawsuit against the Company on behalf of all owners of vehicles equipped with these

telephones. It later turned out that he had brought the lawsuit as a class action because he was unhappy with other aspects of his vehicle and wanted to obtain negotiating leverage against the Company.

Although they perhaps make for good war stories, these examples demonstrate that there is something seriously wrong with the class action device as it exists today. Obviously, many lawyers think that even far-fetched lawsuits like these are worth bringing, because they may result in a payoff at the end of the day.

Like other frequent targets of class actions, we at Ford have asked ourselves "why is this happening?" In my view, there are several answers:

- First, as various states in recent years have enacted tort reform measures, many personal injury lawyers are looking for other easy ways to make a living. Filing a class action against a deep pocket is one such way.
- Second, the 1995 amendments to the federal securities laws have encouraged some lawyers who formerly specialized in securities fraud class actions to shift to consumer product class actions.
- Third, the well-publicized settlements of various putative class actions in the early 1990s (which resulted in multi-million dollar fee awards) have

created a lottery mentality. Many lawyers now believe that if they file a sufficient number of class action lawsuits, some fraction of them will settle early, thus generating lucrative attorneys' fees for relatively little work.

- Fourth, some courts have taken a lackadaisical approach to the consideration of class certification motions. They have certified proposed class actions without carefully considering whether the allegations asserted can realistically be tried on a classwide basis consistent with basic principles of due process. Thus, every knowledgeable class action lawyer now understands that even the most complicated and ill-conceived lawsuit has a chance of being certified.

Any general counsel of a corporate defendant served with a putative class action lawsuit has to consider whether to settle the case, even though the allegation may be completely lacking in merit. Recognizing that a company's stockholders and its employees all have a stake in avoiding financial catastrophe, a general counsel weighing the "fight or settle" decision must consider, among other things,

- how much money would be spent in attorneys' fees pursuing a litigation victory;

- the extent to which continued litigation would disrupt the Company's day-to-day activities;
- the extent to which a highly publicized airing of inflammatory allegations would damage the company's valuable reputation for producing safe, high-quality products;
- the risk that plaintiffs' claims, however weak, might survive a motion to dismiss, a motion for summary judgment, or a motion to deny class certification;
- the risk that a jury will ignore the law, the facts, and common sense and award plaintiffs substantial damages simply because the defendant is an out-of-state corporation with deep pockets.

Notwithstanding the above, Ford Motor Company has decided that, in virtually all instances, it will vigorously defend itself against class action lawsuits that it believes to be without merit. While, in the short term, the costs of litigating a case almost always exceed the costs of settling it, current trends in class action litigation leave companies like Ford little choice but to resist these lawsuits, notwithstanding the potential for an unwarranted result in any given case. Of course, standing on principle requires years of perseverance, requires a high tolerance for risk, and is very expensive to the company, to the court system and, ultimately, to the consumers.

Let me give you an example of what it sometimes takes to successfully defend against a meritless class action. In 1981, Ford was served with a putative class action lawsuit asserting the baseless allegation that the automatic transmissions in certain Ford vehicles are "defective" because, in rare instances, the vehicle can move into "reverse" if the owner does not completely engage the transmission in the "park" position. Ford vigorously contested the lawsuit. The district court initially certified a class (then the largest ever certified by a federal district court).<sup>2</sup> Ford appealed, and the certification ruling was reversed by the Court of Appeals.<sup>3</sup> On remand, the district court denied class certification and ultimately dismissed the complaint.<sup>4</sup> Now, sixteen years later and after numerous published rulings by the district court and several trips to appellate courts, Walsh v. Ford Motor Company remains on the docket for the sole purpose of determining the amount of sanctions and costs to be imposed on plaintiffs' counsel for his vexatious litigation tactics.

Walsh was, from Day One, a terrible candidate for class treatment. It should have been dismissed at the outset. It certainly never should have been certified. But, unfortunately, the district court in that case initially did what too many other courts have done -- allowed the "every litigant deserves his day in court" mentality to override the rigorous application of Rule 12 and Rule 23. Although I take some comfort in the fact that Ford's persistence in the Walsh litigation helped make

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<sup>2</sup> See Walsh v. Ford Motor Co., 106 F.R.D. 378 (D.D.C. 1985).

<sup>3</sup> See Walsh v. Ford Motor Co., 807 F.2d 1000 (D.C. Cir. 1986), cert. denied, 482 U.S. 915 (1987).

<sup>4</sup> See Walsh v. Ford Motor Co., 130 F.R.D. 260 (D.D.C. 1990), appeal dismissed, 945 F.2d 1188 (D.C. Cir. 1991).

some good class action law, the cost was very high. In the end, tens of thousands of hours and tens of millions of dollars of court and attorney time was wasted on an exercise that had no legitimate public purpose.

I am here today to say that the class action device, as currently applied in the real world, is broken. Through carelessness and inattention, the federal courts have allowed Rule 23 to be transformed from a procedural device that promotes judicial efficiency into a weapon for blackmailing deep-pocket defendants.

Unless Rule 23 is fixed, there will be many more Walsh's in the years to come. The days when courts can casually certify class actions, confident in the belief that defendants will do them a favor and settle, are over. Instead, defendants like Ford are today holding plaintiffs' feet to the fire -- insisting that they demonstrate that their claims have a legal basis, challenging them to show that their lawsuits are worthy candidates under Rule 23 for class treatment, appealing ill-advised class certification orders, and defending class action lawsuits before juries where necessary. Some defendants are even striking back at those who cross ethical lines in their pursuit of these lawsuits. All of this, of course, imposes further burdens on an already clogged federal court system.

This Advisory Committee, and the Standing Committee to which it will report, has an historic opportunity to correct what has become an unjust situation. If the Committee acts boldly, it can rid the system of the ill-advised, time-consuming, and

abusive class action lawsuits that have become all too commonplace, so that the courts can once again focus their attention on real disputes between real people. On the other hand, if the Committee settles for half-measures or shies away from doing anything at all, the problem will grow even worse, and will then be even more difficult to solve.

With that in mind, let me say that I whole-heartedly endorse the proposed amendments to Rule 23 now before this Committee. Of particular importance, in my view, is the proposed addition of Rule 23(f), which would facilitate interlocutory appellate review of orders granting or denying class certification motions. In my opinion, this provision will encourage district courts to be more rigorous in making class certification decisions. The prospect of immediate appellate oversight also will discourage the all-too-common practice of granting (or threatening to grant) class certification motions simply as a means of pushing defendants into a settlement.

The recent decisions of the Third Circuit in Georgine,<sup>5</sup> the Fifth Circuit in Castano,<sup>6</sup> the Sixth Circuit in American Medical Systems,<sup>7</sup> the Seventh Circuit in Rhone-Poulenc,<sup>8</sup> the Ninth Circuit in Valentino,<sup>9</sup> and, of course, the earlier decision of

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<sup>5</sup> Georgine v. Anchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996).

<sup>6</sup> Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996).

<sup>7</sup> In re American Medical Sys., Inc., 75 F.3d 1069 (6th Cir. 1996).

<sup>8</sup> In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir.) (Posner, J.), cert. denied, 116 S.Ct. 184 (1995).

<sup>9</sup> Valentino v. Carter-Wallace, Inc., 97 F.3d 1227 (9th Cir. 1996).

the D.C. Circuit in Walsh, have been a much-needed breath of fresh air. In different ways and to varying degrees, they have reminded district courts of the importance of taking the requirements of Rule 23 seriously. Just as a healthy dose of accountability has caused many corporations in the 1990s to improve their ways of doing business, increasing the ability of litigants to challenge ill-conceived class certification rulings (of whatever outcome) in the Courts of Appeal can do much to bring common sense and predictability back to class action litigation.

If the Committee decides to recommend the adoption of proposed Rule 23(f), I would suggest that the language in the Advisory Committee notes purporting to direct the Courts of Appeal to grant interlocutory review "with restraint" be removed. Likewise, the language in the notes discouraging stays of trial proceedings while class certification orders are on appeal should be removed. These provisions undermine the laudable goal of the proposed amendment.

The Courts of Appeal surely are capable of determining whether and when to exercise their right to hear an interlocutory appeal of a class certification order. If the district courts in a given Circuit generally are making faithful applications of Rule 23, there should be little need to conduct reviews under this new rule. But if departures from Rule 23 are occurring more frequently in the Circuit, appellate review is certainly appropriate. In any event, this Committee should not, through its notes, attempt to tilt the scale either against or for review.

The Committee also ought not inject into the Notes a bias against granting stays of trial court proceedings while a class certification order is on appeal. If either the trial court or the appellate court believe that considerations of fairness and efficiency would be well-served by a stay, then a stay should be granted. If a Court of Appeals accepts review of a class certification decision because it feels inclined to reverse it, then it should enjoy unfettered discretion to stay the case. In any event, the Committee Notes should not attempt to prejudge the issue.

Although the package of proposed changes to Rule 23 currently before this Committee is a step in the right direction, it is only a small step. The amendments now on the table would, if adopted, do little to address the abuses of the class action device I have described. Large numbers of meritless class actions would still be filed, defendants would still be under enormous pressure to settle, and the federal courts would still have to resolve those lawsuits that defendants refuse to settle.

As I said a moment ago, this Committee has the opportunity to solve this problem once and for all. It should seize that opportunity by endorsing additional changes to Rule 23 that will, in my opinion, more effectively balance this area of the law. I would like to suggest two ideas in particular that, I believe, would effectively address the heart of the problem we presently face.

First, Rule 23 should be amended to explicitly adopt a "classwide proof" requirement for (b)(3) class actions seeking primarily monetary relief. The Rule itself should direct district courts to grant certification only if it finds that --

"the evidence likely to be admitted at trial regarding all elements of the claims asserted by the certified class is substantially the same as to all class members."

The "classwide proof" requirement is not new. As the Georgine, Castano and American Medical Systems decisions all recognize, it lies at the heart of the commonality, typicality and predominance requirements.<sup>10</sup> These three requirements each in their own way ask the following basic question: "Would it be both fair to the various parties and judicially appropriate to consolidate the claims of many different plaintiffs for adjudication in a single trial?" To answer this question in the affirmative, the facts that determine the success or failure of the proposed class members' individual claims must be essentially the same from class member to class member.

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<sup>10</sup> See Georgine, 83 F.3d at 626, 627 (3d Cir. 1996) (declaring class certification inappropriate where "class members' claims vary widely in character," noting that "factual differences translate into significant legal differences"); Castano, 84 F.3d at 744-45 (5th Cir. 1996) (criticizing grant of class certification where district court had failed to assess how the matter would proceed at trial, noting that "a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the [class] certification issues"); American Medical Systems, 75 F.3d at 1084-85 (6th Cir. 1996) (finding class certification inappropriate as to product liability claims when "the products are different, each plaintiff has a unique complaint, and each receives different information and assurances from his treating physician").

If the evidence upon which individual class members' claims succeed or fail varies from claimant to claimant, then certifying the case for class treatment can only lead to one of two results -- either (1) a class trial that is unfair to the defendant and many class members, or (2) an unmanageable litigation that ultimately collapses of its own weight.

Let me address the first possibility first. It is unfair to hold a defendant liable to all class members (including those who demonstrably have no valid claim) simply because the named plaintiffs present individualized evidence showing that they are entitled to relief. Conversely, it is unfair to enter judgment against all class members (including those who might have valid claims) simply because the named plaintiffs' individual evidentiary showings are weak.

A simple example will illustrate this due process problem. Suppose three named plaintiffs bring a putative class action on behalf of 1 million vehicle owners based on a claim of fraudulent misrepresentation:

- Plaintiff One testifies in deposition that his fraud claim is based on the argument that he heard the manufacturer's advertising slogan before he bought his car, and interpreted that slogan as meaning his car would never wear out.

-- Plaintiff Two testifies that, when she bought her car, a dealer sales agent told her "this car will operate without any problem for 50,000 miles." She assertedly relied on this statement and now believes the manufacturer committed fraud because her car experienced a problem.

-- Plaintiff Three testifies that he did not rely on any advertising or other statements by the manufacturer in buying his vehicle.

Clearly, the putative class is not presenting a single, uniform body of evidence in support of a classwide claim for fraud. Even among the three named plaintiffs, the evidence differs in potentially dispositive ways. It would violate the defendant's due process rights to be found liable for fraud to the entire class simply because the jury is sympathetic to one of the named plaintiffs' stories. And it also would be inappropriate to enter a binding judgment against one million absentee plaintiffs simply because the named plaintiff's individual stories are deemed unpersuasive.

If the trial court concludes (as it must) that individual class members must be allowed to tell their own unique stories and that the defendant must be allowed to assert separate defenses against each class member, the second outcome I described a moment ago inevitably occurs -- the case becomes unmanageable and collapses. It is instructive that, although a fair number of nationwide product liability class actions have been certified over the years, very few have actually gone to trial.

Instead, they invariably are either decertified or settle once the parties (and the Court) realize that they cannot, as a practical matter, be tried.

Several courts have articulated this point using the "classwide proof" term I mentioned a moment ago.<sup>11</sup> Where an examination of the named plaintiffs' individual allegations demonstrate that each named plaintiff's claim will rise or fall based on facts unique to that litigant, these courts have refused to certify those claims for class treatment on the grounds that "classwide proof" is lacking.

Unfortunately, some district courts have failed to give any serious consideration to the proof that would be presented at trial, taking refuge instead in vague assertions that "bifurcated" proceedings or other procedural gimmicks can be considered at a later date. As a result, lawsuits have been certified that can, as a practical matter, never be tried in a manner that respects the due process rights of the defendant and the unnamed class members.

In order to clarify the basic inquiry that underlies the commonality, typicality, and predominance requirements, and to ensure that all district courts across the country are obliged to take these requirements seriously, the "classwide proof" standard should be explicitly included in Rule 23 itself.

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<sup>11</sup> See Walsh v. Ford Motor Co., 807 F.2d 1000, 1017-18 (D.C. Cir. 1986), cert. denied, 482 U.S. 915 (1987); McCarthy v. Kleindienst, 741 F.2d 1406, 1413 n.8 (D.C. Cir. 1984); Alabama v. Blue Bird Body Co., 573 F.2d 309, 321-22 (5th Cir. 1978).

The second reform I would suggest is that Rule 23 be amended to provide that any complaint containing class allegations be pleaded with particularity pursuant to Rule 9(b). In other words, a plaintiff who files a class action complaint should be required to spell out with specificity the factual and legal basis for his or her claims, so that the district court can better assess from the outset whether the lawsuit is a good candidate for class treatment.

At the moment, it is far too easy for a plaintiff to file a class action complaint that advances mere boilerplate allegations, and then hide behind "liberal pleading rules" to insulate his case from dismissal pursuant to a Rule 12 motion. The result is that virtually anyone can, with only a token investment of time and thought in a case, impose massive litigation burdens and financial risk on a defendant. As a practical matter, there is no way for the defendant to terminate the lawsuit short of trial, unless it agrees to a settlement.

Given the extraordinary burden and financial risks the mere filing of a putative class action can impose upon a defendant, and given the clear record of abusive conduct in the class action arena, I believe that those who bring class action lawsuits should be required, at the outset of the litigation, to spell out their allegations with the same level of particularity that we currently apply to allegations of fraud.

Applying Rule 9(b) to class actions will help separate the wheat from the chaff. Litigants who have a real and legitimate grievance against a defendant should

have no difficulty setting forth the who, what, when, where and how's in their complaint. Furthermore, requiring legitimate class action plaintiffs to describe their allegations in detail will save everyone a lot of time -- the defendant will be better able to respond to the complaint on its merits and the court will be better able to assess whether the lawsuit is a good candidate for class treatment.

Once again, I thank the Committee for its attention. My fervent hope is that, with all the time and intellectual energy this Committee is devoting to the issue before it, the end result will be a series of reforms of which we can all be proud.

STATEMENT

JOHN L. HILL, JR.  
Hearing - December 16, 1996

My name is John L. Hill, Jr. and I am a practicing attorney with Liddell, Sapp, Zivley, Hill & LaBoon of Houston, Texas. I have previously served the State of Texas as Secretary of State, Attorney General, and Chief Justice of the Texas Supreme Court. I am head of the Litigation Section at Liddell, Sapp.

My comments will be directed largely at appellate matters as they relate to class-actions and which these amendments would impact.

(1) Appellate Review – It is proposed that Rule 23 be amended to provide that a court of appeals may, in its discretion, hear appeals from district court orders granting or denying motions for class certification. No certification for appeal by the district court would be required.

-- Although some appellate courts recently have shown a greater willingness to review orders granting class certification, such review remains a rare event. When class certification is granted, a defendant may obtain appellate review only through a mandamus petition or by certification under 28 U.S.C. § 1292(b).

-- If adopted, the proposed rule change should encourage district courts to be more rigorous in making class certification decisions. This change will also discourage the practice of granting (or threatening) class certification as a tool to leverage

settlements.

-- The proposed Notes to this amendment are disappointing to the extent that they state that permission to appeal "should be granted with restraint." The Notes also discourage orders staying trial court proceedings while a class certification order is on appeal.

(2) Settlement Classes -- The proposed Rule 23(b)(4) would permit certification of classes for settlement purposes, even though the settlement class might not satisfy the requirements of Rule 23(b)(3) if the matter were to be tried on a class basis.

-- For years, federal courts have certified classes for settlement purposes without inquiring whether the settlement class satisfies the requirements of Rule 23. In such cases, the defendant typically indicated that if the matter were settled, it would agree to view the matter as a class action and would decline to make its arguments opposing class certification. The court then would determine whether the proposed settlement regarding the class claims should be approved, focusing largely on the question whether the settlement would be fair to the putative class members. Notice was then sent to the putative class members, and they were allowed to make their own judgments about whether they should "opt out" of the proposed settlement. If they did not "opt out" and the settlement were approved, they automatically would receive the benefits of the proposed settlement in exchange for the extinguishment of their individual class claims.

Recently, this practice has been called into question by the U.S. Court of Appeals for the Third Circuit. In reviewing two class settlements, the court ruled that Rule 23 did not authorize certification of settlement classes that did not strictly comply with the same Rule 23 class certification requirements applied to claims in a litigation mode.<sup>1</sup>

So far, only the Third Circuit has endorsed this view. In a decision rendered a few months ago, the Fifth Circuit roundly rejected the Third Circuit position, holding that certification of settlement classes was authorized.<sup>2</sup> Presumably on the basis of this split, the U.S. Supreme Court granted a petition for writ of certiorari in the Third Circuit case and will now review the question.

The proposed modification would permit settlement classes upon a showing that Rule 23(a) requirements are satisfied and upon a showing that the Rule 23(b)(3) predominance and superiority requirements are satisfied, when viewed from a settlement (as opposed to litigation) perspective.

The proposed Notes stress that such settlement class certification is available only

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<sup>1</sup> In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.2d 768 (3d Cir.), cert. Denied, 116 S. Ct. 88 (1995); Georgine v. AmChem Prods., Inc. 83 F.3d 610 (3d Windsor, 1996 U.S. LEXIS 6586 (Nov. 1, 1996).

<sup>2</sup> In re Asbestos Litig., 90 F.3d 963, 975 (5th Cir. 1996).

where the parties have reached a proposed settlement; it is not available as a device to force parties toward settlement. Further, the proposed Notes stress that district courts should exert greater vigilance over the notice that is sent to putative class members to ensure that full, accurate information about proposed settlements is being disseminated.

-- Several considerations favor the proposed amendment (or some form thereof):

- First, if the Third Circuit view is not overruled by the proposed amendment and becomes widely adopted, defendants wishing to settle matters on a class basis would face the additional hurdle of having to show not only that the settlement is fair to the proposed settlement class members, but that the proposed settlement class would satisfy all of the usual Rule 23 class certification requirements as if the matter were proceeding to trial. Indeed, defendants wishing to use the class device to achieve peace regarding somewhat varied individual claims could not do so. Case-by-case resolution would be required for controversies like the breast implant cases, the Agent Orange litigation, drug reaction matters, and asbestosis claims.
- Second, by having to stipulate (if not argue) that a proposed settlement class satisfies Rule 23 requirements under the Third Circuit view, a settling defendant faces the risk that if a proposed settlement is not approved, it will have waived its arguments against the action being tried

on a class basis. In other words, if a proposed settlement were rejected by the trial court (an increasingly common phenomenon), the defendant would be required either (a) to increase the settlement value to a level acceptable to the court or (b) to proceed with the litigation on a class basis (with no ability to argue that the case does not satisfy Rule 23 requirements).

- Third, to ensure that a settlement is approved given the risks outlined above), settlements could become more expensive. In short, to make sure that settlements are not rejected, defendants will feel pressure to offer more benefits.
- Fourth, if the Third Circuit view prevails, "futures" settlements will be prohibited. In such settlements, a defendant resolves claims that have not yet arisen or matured (e.g., claims of persons who have been exposed to asbestos but who do not presently manifest any asbestosis symptoms). Under such settlements, benefits are provided to or reserved for persons who only later become eligible claimants.
- Fifth, if trial courts "stretch" to approve class action settlements (which some will be inclined to do), they will establish precedents applicable to contested class certification motions that will lower the threshold for affording class treatment. Thus, litigated class certifications could become more frequent.

-- It remains to be seen how the Advisory Committee will approach the question whether Rule 23(b)(4) is necessary to address the settlement class issue now that the Supreme Court will be considering whether the current version of Rule 23 permits certification of classes for settlement purposes only. Although the Court is expected to hear argument on the question during the first quarter of 1997, its ruling will not come until after the Advisory Committee's public comment period on the proposed Rule 23(b)(4) has closed.

#1813

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96-CV-095

November 12, 1996

VIA FACSIMILE

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

Re: Public Hearing on Proposed Amendments to Class Action Rule 23,  
Federal Rules of Civil Procedure  
Philadelphia, Pennsylvania, November 22, 1996

Dear Mr. McCabe:

I respectfully refer you to the letter dated October 22, 1996, directed to you and referenced as above by Robert S. Campbell, Jr., Chairman, American College of Trial Lawyers Committee on Federal Rules of Civil Procedure. In that letter, Bob Campbell designates me as the member of the American College of Trial Lawyers Committee who will appear at the public hearing on November 22.

In response to Bob's letter to you, you wrote me a letter dated October 24, 1996, stating that you have arranged for me to testify in behalf of the American College of Trial Lawyers at the November 22 public hearing in Philadelphia. You then state that the Advisory Committee on the Federal Rules of Civil Procedure request that a copy of my statement be received by your office no later than Friday, November 8, 1996 (today), and it will then be circulated to the Committee members before the hearing.

Since receiving your letter of October 24, 1996, I have had numerous interchanges with the Chairman of the American College of Trial Lawyers Committee and others on the Committee in preparation for my appearance before the Advisory Committee.

On November 5, 1996, I received a memorandum from John K. Rabiej setting forth further details regarding the public hearing on November 22, including two lists of

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Peter G. McCabe, Esquire, Secretary  
Page 2

witnesses, the first to be heard between 10:00 a.m. and 1:00 p.m. and the second to be heard between 2:15 p.m. and 5:30 p.m. I am listed as number 15 of 17 on the morning list, with the admonition by Mr. Rabiej that the order of witnesses testifying in each session is in the discretion of the Chair and that I may be called at any time during my designated morning session.

At this juncture, Chairman Robert S. Campbell, Jr. and others on the Board of the American College of Trial Lawyers Federal Civil Procedure Committee have concluded that a number of matters raised by the Advisory Committee's proposed amendment to Rule 23 require further consideration, and the College Committee intends to submit its complete recommendations and position, both written and oral, to the Standing Committee on the Rules of Practice and Procedure at its scheduled hearing in San Francisco on January 17, 1997. However, there is one aspect of the Advisory Committee's proposed revisions of Rule 23 that the College Committee strongly supports, and that is the provision on interlocutory appeal from an order on class certification under proposed Rule 23(f). I am authorized to and will address that issue in this letter and further orally at the November 22, 1996, public hearing.

Proposed Federal Rule of Civil Procedure 23(f). Proposed Rule 23(f) authorizes for the first time, a discretionary interlocutory appeal to the court of appeals from a district court order granting or denying class certification. At present, an interlocutory appeal from an order granting or denying class certification is subject to 28 U.S.C. § 1292(b), which requires a written opinion of the trial judge that the order involves controlling issues of law, that there is substantial ground for difference of opinion and that an immediate appeal may materially advance the litigation. Given the complexity and dynamics of typical class action procedure, appellate review of class certification by the trial court is, as a matter of pragmatic fact, a genuine remedy only if the appeal is taken at or shortly after certification.

The proposed Rule 23(f) would permit discretionary interlocutory appeal outside of and without the potentially limiting requirements of 28 U.S.C. § 1292(b). The authority for the Supreme Court to adopt proposed Rule 23(f) should not be in doubt viewed in light of 28 U.S.C. § 1292(e). The trial court ruling on class certification is so pivotal to the development and destiny of a case, that if there is a genuine question of law as to the order granting or denying certification, an aggrieved party should have the right to petition the court of appeals for interlocutory review at or shortly after the time of the order.

It appears to our Committee that the discretion of the court of appeals is certainly as broad as it would be under 28 U.S.C. § 1292(b) and may involve unsettled or novel questions of law or other considerations, in addition to the issues under § 1292(b) review.

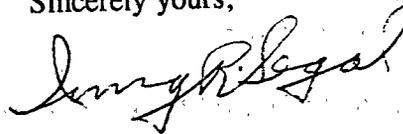
Peter G. McCabe, Esquire, Secretary  
Page 3

It is our Committee's understanding that the 10-day period for filing a petition for interlocutory appeal under proposed Rule 23(f) would be governed by Federal Appellate Rule 5. That rule, itself, is proposed to be amended and is the subject of current public hearing and comment. As proposed F.R.A.P. 5 is drafted, the proposed Rule 23(f) should fit within the time frame set out in proposed F.R.A.P. 5(a)(2).

In summary, the American College Federal Rules of Civil Procedure Committee strongly supports the adoption by the Judicial Conference and the Supreme Court of the proposed amendment to Rule 23 subsection (f) as substantially assisting in the resolution of the fundamental question of class action certification in Rule 23 proceedings.

In behalf of the Federal Rules of Civil Procedure Committee, I will be prepared to supplement this written statement at your November 22, 1996, hearing.

Sincerely yours,

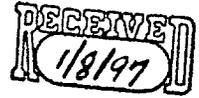


Irving R. Segal  
Member, American College of Trial Lawyers  
Federal Rules of Civil Procedure Committee

cc: Honorable Alicemarie H. Stotler  
John K. Rabiej  
Robert S. Campbell, Jr.

American College of Trial Lawyers

National Headquarters  
8001 Irvine Center Drive, Suite 960  
Irvine, California 92618



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Please direct reply  
to: R.S. Campbell, Jr  
Telephone: 801-537-5555  
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Committee Chair  
for: Federal Rules of  
Civil Procedure

January 4, 1997

BY COURIER EXPRESS

Standing Committee on Rules of Practice  
and Procedure of the Judicial Conference  
of the United States  
Thurgood Marshall Federal Judiciary Building  
Washington, D.C. 20544

Attn: Honorable Alicemarie H. Stotler, Chair  
Mr. Peter G. McCabe, Secretary

Re: Comments of the Federal Rules of Civil Procedure  
Committee of the American College of Trial Lawyers  
on Proposed Amendments to Federal Rule of Civil  
Procedure 23.

San Francisco Hearing, January 17, 1997

To the Standing Committee:

As Chair of the Federal Rules of Civil Procedure Committee of the American College of Trial Lawyers ("College Committee"), I submit the College Committee's recommendations, comments and statement of position on the proposed amendments to Federal Rule of Civil Procedure 23 which is now before your Committee for public comment and hearing.

I. Composition of College Committee.

The College Committee is constituted of 29 experienced trial lawyers from all parts of the United States who are appointed because of their demonstrated specialization in and knowledge of federal civil practice and procedure.

Many members of the Committee have practices which are national in scope and entail appearances before numerous federal district courts throughout the Nation. Most have spent years as

members of federal district and/or state bar committees engaged in the analysis and drafting of civil rules of practice and procedure. It is a Committee comprised of lawyers whose practices are plaintiff as well as defendant oriented in class action litigation and in general.

The College Committee expresses the views and positions of the Committee and does not speak per se, unless indicated otherwise, for the Regents of the American College of Trial Lawyers.

**II. Present and Past Work of College Committee on Proposed Amendments to Rule 23.**

The College Committee has, over many years, devoted a great deal of attention and time to the analysis and issues associated with Rule 23. Since 1991, it has followed closely and participated in virtually every meeting of the Advisory Committee, first under the chair of Chief Judge Sam C. Pointer of Alabama, and more recently under the chair of Fifth Circuit Court of Appeals Judge Patrick E. Higginbotham, regarding the perceived difficulties and failings in present Rule 23. We have also gone to the expense of attending special meetings on the suitability of Rule 23 in mass tort litigation in Dallas and New York City in the Spring of 1995 and, upon request, have submitted several analyses and statements to the Advisory Committee on earlier, working drafts of possible amendments to Rule 23.

With respect to the proposed Rule 23 amendments now before the Standing Committee, the College Committee has met for what amounts to a full day of discussions, debate, and analysis on December 16-17, 1996 in Dallas. The positions taken and comments made in this Statement and at the subsequent public hearing on January 17, 1997, in San Francisco should be weighed in light of this Committee's previous work.

**III. Proposed Amendments to Rule 23 Which the College Committee Supports.**

For ease of reference, the proposed amendment to Rule 23 is set out herein as a preface to the Committee discussion of the Rule.

**1. Proposed 23(b)(A)-(C).**

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

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

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

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

The College Committee supports the addition of new 23(b)(3)(A) as adding an important element to the consideration of a (b)(3) class certification by the district court not found in the present Rule. Subparagraph (A) does not tilt the certification process in favor of either the plaintiff or the defendant. The defined standard in the proposed subparagraph of "practical ability" is also reasonably certain and useful.

As to proposed 23(b)(3)(C), the College Committee believes that the addition of the word "maturity" strengthens the present Rule and does not discourage (b)(3) certification where it is otherwise appropriate. Indeed, for the reasons set out in the proposed Advisory Committee Note, where non-class litigation is

already underway and trial is imminent, the district court should consider the question of whether class certification would impair or assist developing cases.

2. Proposed Rule 23(c) and (e).

(c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

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

\* \* \* \* \*

(e) DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without hearing and the approval of the court, and after notice of the proposed dismissal or compromise shall be has been given to all members of the class in such manner as the court directs.

We are supportive of these amendments for the principal reasons set forth in the Advisory Committee's Note to the proposed amendments. In particular, proposed 23(e) makes it not only clear but required that a class action shall not be resolved or settled without a hearing before the Court in which the issues supporting or opposing a dismissal or compromise of a class action must be aired. In the first place, it is customary practice to hold a hearing. In the second place, often notices of the settlement or compromise of class litigation is confusing and difficult to comprehend to members of the class, as well as to the lay public. The requisite of a public hearing gives substantial reassurance that confusion and ambiguity associated with the case and the proposed dismissal or settlement is clarified for all concerned.

3. Proposed Rule 23(f).

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

The College Committee has already submitted a statement to the Standing Committee recommending and supporting the adoption of subparagraph (f). That statement dated November 12, 1996, presented by Committee member Irving R. Segal, Esq., of Philadelphia, and annexed hereto as Attachment 1, sets forth the bases of our Committee's position on proposed 23(f), viz., the complex dynamics of class action practice is such that a plaintiff or defendant may not be able to secure appellate review of an order granting or denying class action certification unless review is sought at the moment the certification order is entered. The petition for interlocutory review is discretionary with the court of appeals.

We would only add one further thought on proposed 23(f) to that already submitted. The proposal does not provide any greater comfort to a defendant than it does to a plaintiff in class action practice. Either plaintiffs or defendants may well require interlocutory review of an adverse district court decision on class certification before proceeding at great expense and lapse of time to litigate the case to a point in which appellate review of the certification question is either immaterial or simply overwhelmed by the complexities of the certification ruling.

IV. Proposed Amendments to Rule 23 Which the College Committee Does Not Support.

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

(F) whether the probable relief to individual class members justifies the costs and burdens of class litigation;

The College Committee opposes subparagraph (F) for the essential reasons that (i) it does not contain reasonable standards to guide its application, (ii) it may require the district court to take a premature but prejudicial look or "peek" at the merits of the case in determining "probable relief," (iii) it may invite the district court to disregard a large volume of cases and case law relating to certification of so-called "small claim class actions," and (iv) it potentially misconceives the importance of small claim class actions.

As to reason (i), a rule of procedure should stake out the boundaries of a rule so that the district court and the parties are not left with an unlimited playing field in each ad hoc case. Proposed subparagraph (F) provides no clue as to what "probable relief" or the extent to which "costs and burdens" must be shown to obtain class certification.

As to reason (ii), our Committee has consistently opposed suggested amendments to 23(b)(3) which would permit the district court to preliminarily review the merits of the case in determining class action certification. An incipient "peek" at the merits in determining "probable relief" would most likely be done in a non-evidentiary setting, certainly in advance of discovery and trial, and probably would result in the court forming a preconceived view of the case on its merits while determining only the preliminary question of class certification. Such a proposal would, we submit, raise Due Process of Law issues.

As to reason (iii), the concerns which the Advisory Committee is justifiably attempting to address by proposed Rule 23(b)(3)(F) are, in the judgment of the College Committee, reasonably housed in the present concepts of superiority, manageability, and frivolous litigation. The case law is reasonably well developed in this area.

As to reason (iv), we recognize that there may have been past abuses in certain class actions in which the recovery for individual plaintiffs in the class has been relatively nominal while the class attorneys' fees have been very substantial. We are concerned

January 4, 1997

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that the attempt at a cure for such class action abuses could lead to the elimination of class action relief in entire fields of commerce where class action remedy is the only viable procedure to arrest significant social wrongdoing of a defendant or class of defendants.

Our Committee is of the further view that there is potential tension between proposed subparagraph 23(b)(3)(A) and proposed subparagraph (F). Proposed subparagraph (A) would permit aggregation of smaller claims if a class action were a superior method vis-a-vis other available methods to efficiently resolve the dispute. Proposed subparagraph (F) could be construed to amend subparagraph (A) by allowing smaller, aggregated claims only if "the costs and burdens" of the class action justify the claim.

Our Committee is of the conclusion that the potential social benefits of small claim class action outweigh the potential detriments, and that if the district courts will take hold of and properly use the existent tools in Rule 23, there are ample devices at present to deal with the abuses of class action litigation, including the award of only nominal or no fees to abusive plaintiff class action lawyers.

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

(4) the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial.

Simply stated, this new proposed addition to Rule 23 would permit the certification of a (b)(3) class action for settlement purposes, even though 23(b)(3) requirements have not been met for purposes of trial. As stated in the Committee note, the proposal is to resolve the "newly apparent disagreement" between the Third Circuit's decision in Georgine v. Amchem Products, Inc., 83 F.3d 610 (3rd Cir. 1996), cert. granted, 65 U.S.L.W. 3352 (U.S. 11/7/96) and decisions of other Circuits in Weinberger v. Kendrick, 698 F.2d 61, 72-73 (2nd Cir. 1982) and In re: Beef Industry Antitrust Litigation, 607 F.2d 167, 170-171, 173-178 (5th Cir. 1979).

In the last 60 days, the Supreme Court has granted a writ of certiorari to possibly resolve the inter-circuit conflict. While that development does not necessarily dictate that the rule-making process should be stayed in abeyance of a decision in Georgine, it does mean that the Supreme Court may well resolve the circuit conflict, thus removing that as a basis for a new procedural rule.

In addition, several members of the Committee are concerned that proposed 23(b)(4) would constitute creation of substantive law and in doing so, violate the Rules Enabling Act.

There may be arguments of efficiency and economy of disposition of cases to be made in favor of proposed Rule 23(b)(4), but the potential for abuse of the provision is substantial. For example, settlement classes could be created in a variety of instances where the benefits to class members were very small, yet the fees to class counsel were very large. There is the possibility of collusion between class counsel and defense counsel to agree to a settlement that may not adequately compensate the class members. A class settlement may be approved by the court as part of an almost natural incentive to clear the court docket of time-consuming litigation. There are a variety of issues raised by the settlement of "future" claims in a settlement class where rights are resolved before potential members know that they are part of a class action. There are frequently issues of the adequacy of notice on opt-out provisions. The proposed amendment could lead to "pre-packaged settlements" sponsored by defendants' attorneys and pre-selected plaintiff attorneys and then presented to a court, selected by counsel which the lawyers believe will be sympathetic to the settlement. That court could, in turn, approve the settlement to avoid further cases being added to the court's docket.

These and other issues arise, in part, because when a pre-packaged class action settlement is presented for court approval, the process is missing an essential component of our judicial system -- namely, an adversary to point out the difficulties and shortcomings of the settlement.

We are also concerned about the lack of standards or criteria in Rule 23 to guide a district judge in evaluating a proposed settlement. Under the proposed amendment, there are no 23(b)(3) limitations on the subject matter of the class action which could be approved by the district court.

**V. Conclusion.**

The College Committee is aware of the considerable work undertaken by the Advisory Committee in its exhaustive consideration of potential amendments to Rule 23 class action practice that would answer public concern about the abuses, real and apparent, in class action practice during the past decade.

If there is a "cottage industry" of class actions and a pre-selected class action bar throughout the Country, the resulting abuses must be and we believe can be, for the most part, curbed within Rule 23 as it presently stands.

In a nutshell, it is our considered judgment that all of the proposed amendments to Rule 23 should be adopted and implemented except proposed subparagraph (F) to Rule 23(b)(3) and the proposed Rule 23(b)(4).

This written Statement of position of the College Committee will be supplemented by an oral statement to be presented at the Standing Committee's January 17, 1997 hearing in San Francisco, California.

Sincerely,



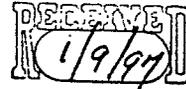
ROBERT S. CAMPBELL, JR., Chair  
One Utah Center  
201 South Main 13th Floor  
Salt Lake City, Utah 84111

jcm

enclosure

Members of the College Committee:

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Burck Bailey, Esq., Oklahoma City, OK	Edward P. Leibensperger, Esq., Boston, MA
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David J. Beck, Esq., Houston, TX	Daniel O. Mahoney, Esq., Boston, MA
Mark A. Belnick, Esq., New York, NY	Barbara W. Mather, Esq., Philadelphia, PA
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	John W. Vardaman, Esq., Washington, DC



STATEMENT OF ELIZABETH CABRASER ON PROPOSED AMENDMENTS  
TO FED. R. CIV. P. 23

96-CV-097

As an attorney representing consumers, investors, and victims of mass torts, and as a student of the Federal Rules, I wish to thank the Committee for the opportunity to participate in these hearings on the proposed amendments to Rule 23. The focus of this statement is on the following proposed additions to Rule 23: (1) proposed revised subsection 23(b)(3)(C) ("maturity"); (2) proposed new subsection 23(b)(3)(F) (the "cost/benefit" factor); (3) proposed new subsection 23(b)(4) (settlement classes); and (4) proposed new subsection 23(f) (interlocutory appeals).

To assess the efficacy of each of these four proposals, I submit that their intent and effect should be measured against the mandate of Fed. R. Civ. P. 1. We must ask: Are they designed to be construed and administered, synergistically with the Rules on pleadings, motions, discovery, summary adjudication, and trials to "secure the just, speedy, and inexpensive determination of every action? Will these proposals even-handedly promote the policy of the Federal Rules of Civil Procedure?" In short, are they true to the spirit of the Rules? With respect to these necessary questions, my chief concern is that the proposed "cost/benefit" and "maturity" amendments to Rule 23(b)(3) may be perceived and exploited as permission to erect arbitrary procedural barriers that deny consumers access to the courts and insulate corporate interests from public accountability, regardless of the merits of class challenges to corporate conduct and policies.

I support proposed 23(b)(4) as a salutary and clarifying amendment. My concern is that the sincere quest for enhanced due process that has inspired academic objections to 23(b)(4) would, if successful, impair the ability of class actions to deliver due process in the measure that matters most to class members: compensation, redress and vindication in their lifetimes. Justice -- even perfect justice -- delayed is still justice denied; the denial of speedy justice in the pursuit of due process is perhaps the most cruel and cynical denial of all.

I share the academic skepticism toward the equally paradoxical corporate policy, that advocates class actions always for settlement and never for trial. This must be respected as a legitimate expression of self-interest -- just not too much. But neither should the essential goal of integrity of process thwart the ability of corporations to save themselves from the oblivion of bankruptcy when they decide, in good faith, to resolve the claims against them. Proposed Rule 23(b)(4) is a fair and practical provision that codifies the prevailing practice on settlement classes. It provides referential framework and authority, and encourages the evolution of existing procedures to accommodate and balance the contending interests of plaintiffs and defendants, settlement proponents and objectors; promote the courts' institutional imperative of integrity of process; and to facilitate the fiduciary role of the court as guardian of class interests.

Finally, it is essential that the trial courts retain, under an amended Rule 23, the broad authority they now enjoy in construing and administering this and the other Federal Rules, including the discretion to determine, free of automatic appellate review, whether and when the burdens and requirements of Rule 23 have been met, and how the class treatment of common claims or issues will function within the management plan for the case. Proposed Rule 23(f), if not deleted, should be limited or clarified to avoid the cost, delay, complication, and backlog that will result inevitably from a routine allowance of interlocutory appeal from inherently provisional and managerial class certification orders.

Having been on the firing line as a class action advocate, and having learned a few lessons in the school of hard knocks in which class counsel are perennially enrolled, I recognize that distrust and disappointment on the part of the judiciary has had some part in the promotion of the four proposed amendments this statement addresses. So, too, has the sheer scope and breadth of the tort litigation brought in recent years before the federal courts for management and resolution under the class action mechanism. While this trend has sparked enthusiastic activism by some courts, it has provoked the passive resentment or active resistance of others. In the physics of complex litigation, every class action has an equal and opposite reaction. Nonetheless, this dynamic balance -- this uneasy equilibrium -- is alive and well under the

current version of Rule 23 and, and is the best evidence of the Rule's efficacy and resilience.

Testing the following proposals against the command and challenge of Rule 1, I respectfully suggest that with certain amendments to the language of the provisions themselves and/or the pertinent Committee Notes, three of these proposals, 23(b)(3)(C), 23(b)(4), and 23(f), can meet the threshold test of preserving the present utility of Rule 23 in delivering speedy and inexpensive justice to those aggrieved when neither they nor the civil justice system can afford individual adjudication of their claims. Moreover, if applied in the spirit of the Rules, these amendments may even improve the federal courts' admirable record of delivery of civil justice to victims of mass wrongs.

The fourth proposal, 23(b)(3)(f), however, cannot be reconciled with the Federal Rules and has no place in them.

**I. Proposed Rule 23(b)(3)(C): The "Maturity" Factor**

Recent judicial invocation of the concept of the "immature tort" has lead to denial or reversal of class treatment in the mass tort arena; see, e.g., Castano v. American Tobacco Co., 160 F.R.D. 544 (E.D. La. 1995), reversed, 84 F.3d 734 (5th Cir. 1996); In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir.) cert. denied, \_\_\_ U.S. \_\_\_, 116 S. Ct. 184 (1995). The maturity doctrine abjures early class treatment in favor of a "consensus or maturing of judgment," achieved through numerous individual trials, thereby preventing any one jury -- even a class jury -- from holding "the fate of an industry in the palm of its hand." 51 F.3d at 1300.

Despite the implicit preference of the Federal Rules, expressed in 23(a)(2) and 23(c)(4)(A), for the consistency and finality of common (class) adjudication of common issue, maturity advocates urge that the common trial, in the words of Rhone-Poulenc, 51 F.3d at 1300, "need not be tolerated when the alternative exists of submitting an issue to multiple juries constituting in the aggregate a much larger and more diverse sample of decision-makers." Id.

Accord, Castano 84 F.3d at 747-750. This shift from preference to intolerance may have much to commend it for sheer shock value. It has certainly gotten the attention of formerly complacent class advocates, and the applause of corporations who have been its chief beneficiaries. There are, however, two problems with its literal inclusion as a class certification factor, even as presently explained in the draft Committee Notes.

First, other than the above-referenced appellate decisions and the law review articles upon whom they in turn rely, there is no body of empirical evidence upon which the onset of "maturity" can be calculated or quantified. How many trials? How many months or years? What are the benchmarks or indicia of maturity? There is no data that can lead to a precise or reliable evaluation of "maturity," either in the absolute or relativistically, by either the trial court or any reviewing court. Rhone-Poulenc's maturity analysis was a merits assessment in thin disguise; an assessment, as others have since noted, that proved to be a poor predictor of that litigation's ultimate settlement value, as a class action, to *both* sides.<sup>1/</sup>

Second, there is no objective or scientific support for the fundamental premise of the maturity doctrine that multiple juries will reach a more accurate or just result than would a single jury, if presented with all relevant evidence and properly instructed in the applicable laws. Certainly the fate of a company or an industry compels great care in the design and structure of a civil trial. Were the single jury, however, considered unworthy of making the final determination of other issues of equal or greater import, such as the life or liberty of a citizen in the criminal context, we would have seen movement for multiple juries in such areas as well.

Nowhere but in the mass tort arena has the multiple jury/maturity concept gained any legitimacy. We must therefore be skeptical of its apparently unique appeal in the tort arena, and ask whether it is not an attempt, however subliminal, to stack the deck in favor of the

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<sup>1/</sup>The litigation decertified in Rhone-Poulenc has now been re-certified, as a settlement class, to effectuate a \$600 million settlement that has received widespread support from the class.

corporate litigant with the greater assets and the longer life span; that is, to sanction and encourage tactics that multiply the very costs, expenses, and delays that the Federal Rules are designed to discourage, or at least to neutralize. Concepts, however flexible at their outset, have a tendency to become arbitrary and brittle in application. The rote invocation of "maturity" as a factor for certification by the trial courts may consign future litigants to a strategic war by attrition: that same war against which all the other Federal Rules are arrayed.

We should not worry, overmuch, about the prospect of a corporation unfairly consigned to utter ruin by a single runaway class action jury.<sup>2/</sup> Most corporations can afford, and do retain, the very best counsel in their defense. Corporate defendants do not have the burden of proof in civil trials, and in most jurisdictions the burden of proof that plaintiffs must meet before punitive damages may be imposed is that of proof by clear and convincing evidence, not by a mere preponderance. A greater risk of immaturity is that of plaintiffs and counsel who rush to certification, and to the class trial, ill-prepared to meet their burden, holding the fate of an entire *class* in the palm of their hand. In this sense, maturity is subsumed in the requirement of adequate representation. The maturity of the presentation of claims and issues to the trial court, and the ability of the class claims to be well and fairly tried, is presently examined within current 23(b)(3)'s predominance factor.

Maturity, in its present, implicit form, or as an additional express superiority factor, may or may not require the prior experience of one or more individual trials. In many

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<sup>2/</sup>The largest class action judgment to date, the \$5 billion class judgment in the Exxon Valdez litigation, has not (or more accurately, will not, if and when it is eventually paid) impair the financial vitality of the Exxon Corp. No one can begrudge the victims of Marcos' reign of terror their nearly \$3 billion classwide judgment, obtained through a trifurcated class trial structure described in In Re Marcos Human Rights Litigation, 910 F. Supp. 1460 (D. Hawaii 1995) and affirmed recently by the Ninth Circuit sub. nom. Hilao v. Estate of Marcos, \_\_\_\_\_ F.3d \_\_\_\_\_, 1996 U.S. App. LEXIS 32974 (9th Cir. 1996). It was not the \$4.255 billion class action settlement in In Re Silicone Gel Breast Implants Products Liability Litigation, MDL 926, that precipitated the Dow Corning bankruptcy: the stated reason for that company's initiation of voluntary Chapter 11 proceedings was its continued exposure to *individual* claims outside that non-mandatory settlement class. Dow Corning itself has now proposed a common-issues trial, of sorts, in its plan of reorganization.

cases such experience will prove quite useful, especially if it is the experience of the court asked to consider class treatment. Thus, the court before whom the class action is pending may wish to conduct bellwether trials, or minitrials, before the final decision on class certification is made. Judge Schell of the Eastern District of Texas has taken this approach in In re Norplant Contraceptive Products Liability Litigation, MDL No.1038. What must be avoided, if the term "maturity" is included in Rule 23, is any suggestion that class treatment may be utilized only as an "end game", or last resort. As plaintiffs' advocates we understand, even in our frustration, the reluctance of the federal courts to solve, through class certification, problems they are not yet sure exist. See Castano, 84 F.3d at 747-750.<sup>3/</sup> But neither are we willing to relive what has become the nightmare of the asbestos litigation, in which the class action solution was repeatedly deferred, in the face of mounting bankruptcies and backlogs, until the class action settlements that have begun to characterize asbestos litigation in the 90's became, themselves, mere piecemeal solutions.

Accordingly, I respectfully suggest that any inclusion of the term "maturity" in new 23(b)(3)(C) occur in such context as: **"the extent, nature, and maturity of the claims and issues as presented for class treatment in the action, or in any related litigation involving class members."** In addition, or in the alternative, the Committee Notes should include a comment that maturity does not necessarily entail or require any, or any particular number of, prior adjudications or verdicts, but that maturity relates primarily to the ability of the litigants to

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<sup>3/</sup>In the wake of the Fifth Circuit's reversal of the Castano plaintiffs' all-or-nothing nationwide class approach to the claims of addicted smokers, the Castano group proceeded to file statewide class actions, which are pending in federal or state courts in nearly 20 jurisdictions. In each case, a single state's law will apply to the class claims, avoiding the complicating factor of litigating state-based tort claims on a nationwide basis, a factor that was invoked, together with "immaturity", as the grounds for certification reversal in Castano. The process of certification and trial in these state-wide actions constitute the process of maturation of the Castano addiction tort, but, in the absence of any accepted benchmark or measure of "maturity", cannot answer categorically the question: if maturity is a prerequisite to class treatment, at what point does tort litigation reach maturity? There is no answer, since the "immature tort" is an immature concept. It is thus not an appropriate concept to add to the Rule 23(b)(3) factors that are intended to guide trial courts, at least not without a qualifying explanation in the Rule language itself, or in the Committee Notes.

present and articulate the claims and issues of the litigation with such sufficient clarity and experience as to enable the court to determine whether to certify a class and how to structure the class trial of common issues in an informed manner.

## II. Proposed New Subsection 23(b)(3)(F) (the "cost/benefit" factor)

The costs and burdens of class litigation on class action defendants, class action plaintiffs' counsel, and the courts themselves are real and substantial. Class actions, litigated and managed correctly, are complex and challenging. The stakes are high. The unique fiduciary role of the courts as guardians of the rights and interests of class members means that judges cannot rely entirely on the clash of adversaries to reveal the truth or ensure integrity of process. Any change in the Rules that simplifies the tasks of trial courts is thus to be encouraged. This provision, however, as well-intentioned as it is, will only complicate the class certification decision-making process and compromise the fundamental policy behind Rule 23 itself. In practice, proposed 23(b)(3)(F) would tempt overburdened courts to deny certification without completing an analysis of all other relevant factors, and would, in practice, advance only one goal: that of defendants who wish that class actions, as an effective enforcement and deterrence mechanism, would simply go away.

By their very definition, class actions exist because the claims of class members, as individuals, do not justify the costs and burdens of individual litigation.<sup>4</sup> The aggregation of claims, and the resulting economies of scale, render class actions (if managed correctly) inherently cost-effective. Most experienced "complex" litigators will, in moments of candor, admit that complex litigation, including and especially class actions, are in practice often simpler than their non-complex counterparts, because of the special rules and proceedings that are

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<sup>4</sup>As Judge Schwarzer has noted, "the original purpose of the 1966 Rule primarily was to enable litigation of numerous related small claims, such as those commonly found in consumer, securities, and antitrust actions." The "salient characteristics of these kinds of class actions" include "individual claims [that] are generally too small to permit plaintiffs to prosecute them individually." Schwarzer, "Structuring Multiclaime Litigation: Should Rule 23 Be Revised?" 94 Mich. L. Rev. 1250, 1255 (1996).

invoked, because of the opportunity and expectation that counsel will participate actively with the Court in devising case management plans and solutions, because of the assistance of guidebooks such as the Manual for Complex Litigation 3d (Federal Judicial Center 1995) and because complex litigation is, of necessity and by its very nature, oriented toward achieving a cost-effective and comprehensive solution.

Plaintiffs' counsel are familiar with the Catch-22 argument invariably advanced in opposition to the certification of every case: the individual claims are either too small to warrant the attention and resources of the court and/or the claims are so large that the individuals should be able, and thus ought to be required, to litigate them individually. This is also known as the Goldilocks syndrome: the claims are always too big, too small, but never "just right" for class treatment.<sup>2/</sup> Such arguments are, predictably, unhelpful to any court attempting to make a fair and rational class certification decision. Introduction of the so-called cost/benefit factor would only compound this problem.

A class action prosecuted (or defended) ineptly can provide real management headaches. There are indeed cases, purporting to be class actions, that should never have been so brought. But the size of the individual recovery involved in these cases is rarely, if ever, a substantial factor in the problems caused, to the bench and bar, by such class actions.

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<sup>2/</sup>A variant of this paradox is the view that plaintiffs are only entitled to class treatment when they flood the court with similar individual claims, bringing the system to a halt. This view stands class action policy on its head by requiring plaintiffs to create the very problem class treatment was originally designed to avoid. Insistence on a cost/benefit analysis in every case will further undermine the prophylactic value of Rule 23. The Rule has had, and should retain, its dual purpose: to adjudicate collectively those claims that litigants cannot afford to litigate individually as well as those claims the justice system cannot afford to handle individually. Rule 23, at its best, enforces a social contract in the realm of civil litigation: litigants surrender the right to sue at will, regardless of the impact of such suits on the resources of the system and on the access of others; in exchange, they gain the ability to benefit from group action where none or few could feasibly sue alone. Are value judgments being made by courts under the current superiority factors? Certainly. Are these decisions always made as we would make them? Certainly not. But the factors that inform such judgments are currently in equipoise; the addition of new 23(b)(3)(C) would throw them out of balance.

If what we are really talking about here is the situation in which the fees of class counsel are disproportionate to the relief obtained for the class -- a situation which, for all its perceived pervasiveness, is nonetheless rare<sup>6/</sup> -- the solution lies not in adding another factor to the 23(b)(3) evaluation, but in invoking the courts' inherent authority and utilizing the court approval provisions of Rule 23(e) to enforce fundamental proportionality between the benefit to the class and the remuneration of its counsel. There is no dearth of jurisprudence or practical guidance on this point.<sup>7/</sup>

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<sup>6/</sup>Federal fees jurisprudence mandates that the aggregate class fee bear a proportional relationship with, and constitute only a reasonable percentage of, the aggregate class benefit. The aggregate class fee will, by definition, greatly exceed the average individual class member's benefit, precisely because of the class action's role in prosecuting claims for which the cost of individual representation would be prohibitive. High-value personal injury claims can still be brought under a "standard" contingent arrangement, in which the individual lawyer receives a third or so of the recovery of her individual client. Class actions mirror this proportional relationship, with the class in the role of collective client, by restricting aggregate attorneys' fees, in most cases, to a third (usually less) of the class recovery. Moreover, this percentage scales down as the aggregate class recovery increases. As observed in In Re Domestic Air Transportation Antitrust Litigation, 148 F.R.D. 297 (N.D. Ga. 1993), "in megafund cases where extraordinarily large class recoveries . . . are recovered, courts most stringently weigh the economics of scale inherent in class actions in fixing an appropriate percent recovery for reasonable fees. . . . Accordingly, fees in the range of 6-10% and even lower are common in this large scale context. 148 F.R.D. at 351. Finally, as to settlements whose benefits are distributed in non-cash form to the class, prevailing jurisprudence, exemplified by the General Motors decision and Domestic Air, 148 F.R.D. at 348-354, require non-cash benefits to be translated into a dollar equivalent to determine the economic value upon which the percentage fee is based. In the second General Motors settlement, the transferability of the certificates and the existence of a secondary market enabled the trial court to find that the settlement had an "overall estimated minimum cash value . . . in excess of \$583 million." The aggregate attorneys' fee awarded to all counsel, including class counsel and former objectors who participated in effectuating the second settlement, totaled approximately \$26 million, 4% of the minimum cash value of the settlement. White v. General Motors, No. 42,865 (18th Jud. Dist. Ct., La. 12/19/96).

<sup>7/</sup>See Hirsch & Sheehey, Awarding Attorneys' Fees and Managing Fee Litigation, Federal Judicial Center (1994); Manual for Complex Litigation 3d, §§ 24.1, et seq.; Hensley v. Eckerhart, 461 U.S. 424, 425 n.11 (1983); In re Air Crash Disaster at Florida Everglades, 549 F.2d 1006 (5th Cir. 1977) (inherent powers of court in complex litigation); Camden I Condominium Ass'n, Inc. v. Dunkle, 946 F.2d 768 (11th Cir. 1991) (multi-factor analysis for setting reasonable percentage of recovery fees); Court Awarded Attorneys' Fees, Report of the Third Circuit Task Force, 108 F.R.D. 237 (1985) (Iodestar vs. percentage); Swedish Hosp. Corp. v. Shalala, 1 F.3d 161 (D.C. Cir. 1993) (percentage methodology); In re Continental Ill. Sec. Litigation, 962 F.2d 566 (7th Cir. 1992) (market value of services); Paul Johnson, (continued...)

The class action is the best -- indeed the only -- solution devised in Anglo-American jurisprudence over the past thousand years to address the recurring problem of group fraud and group injury. The societal need for this solution grows, not lessens, with time as, despite our collective best efforts, individual litigation becomes increasingly complex, expensive and beyond the reach of the average citizen. Over 50 years ago, in an article promoting the class action as the only cost-effective means to implement group remedies for group injuries, Kalven & Rosenfield, Function of Class Suit, 8 U. Chi. L. Rev. 684, 686 (1941) stated:

*Modern society seems increasingly to expose men to . . . group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all. This result is not only unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of the sanctions which underlie much contemporary law. The problem of fashioning an effective and inclusive group remedy is thus a major one.*

Kalven and Rosenfield were speaking specifically of shareholders, and the need for an effective procedural device to realize the democratic rights inherent in stock ownership. Shareholders, at least, had certain statutory rights by virtue of stock ownership, corporate governance principles and the federal securities statutes.<sup>27</sup> As the courts and commentators increasingly recognized, consumers had none at all. As the California Supreme Court noted in its landmark decision, Vasquez v. Superior Court, 4 Cal. 3d 800, 94 Cal. Rptr. 796, 800-801

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<sup>27</sup>(...continued)

Alston & Hunt v. Grauly, 886 F.2d 268 (9th Cir. 1989) (percentage basis); Brown v. Phillips Petroleum Co., 838 F.2d 451 (10th Cir. 1988) (same).

<sup>28</sup>Ironically, in 1996, the rights of individual shareholders to assert securities fraud claims were restricted with the enactment of the Private Securities Litigation Reform Act, which expressly prefers institutional investors and holders of large blocks of stock as the presumptively most adequate investor representatives. While perhaps economically best suited to do so, these entities and individuals have been, historically, the least likely to initiate shareholder or investor actions against corporate issuers, public offerings underwriters, or investment brokers.

(1971):

*What was noteworthy in the milieu three decades ago for stockholders is of far greater significance today for consumers. Not only have the means of communication improved and the sophistication of promotional and selling techniques sharpened in the intervening years, but consumers as a category are generally in a less favorable position than stockholders to secure legal redress for wrongs committed against them. For these reasons, the desirability of consumers suing as a class for fraud or other improper conduct by predatory sellers has been the topic of much thoughtful analysis in recent years. . . .*

*Protection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society. . . . The alternatives of multiple litigation (joinder, intervention, consolidation, the test case) do not sufficiently protect the consumer's rights because these devices 'presuppose a group of economically powerful parties who are obviously able and willing to take care of their own interests individually through individual suits or individual decisions about joinder or intervention.' [Citation omitted.]*

*Frequently numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all. Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct. A class action by consumers produces several salutary byproducts, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims. The benefits to the parties and the courts would, in many circumstances, be substantial.*

As Vasquez warned us, we cannot utilize the dollar value of the individual class member's claim as the sole or determined calculus for the efficacy of a class action. To do so ensures that many frauds will go unredressed, that the deterrent effect of the civil justice system

will be compromised, and that unjust enrichment will no longer describe a basis for remedy, but a predictably successful means of doing business. Market forces and competition may lower prices and improve products, but they alone cannot guarantee product safety, fair consumer practices, full corporate disclosure, freedom from discrimination, or environmental protection.

I would respectfully urge that 23(b)(3)(F) not be added, in any form, to the existing Rule. The other 23(b)(3) factors, whether in their current form or as amended by the pending proposals, effectively address the issues the courts should consider in assessing the equitable and practical considerations of class treatment.

### **III. Proposed New Subsection 23(b)(4) (Settlement Class Certification)**

From the supposedly typical defendant's standpoint, class actions as a powerful trial tool are to be feared, while class actions as a powerful settlement device are to be favored. This seeming contradiction has drawn the fascinated scrutiny of distrustful academics, certain that collusion must be at the root of the startling transformation of a class action from one prosecuted and defended tooth and nail, to one in which the adversaries "link arms" to proffer a jointly proposed solution. In all other areas of litigation, the courts and commentators have exalted and enforced arbitration, mediation, and other forms of alternative dispute resolution. The ethical counsel's duties as advisor, and as litigator, now include the duties to explore settlement, both before and after an action is commenced; to avoid litigation wherever possible; and to resolve litigation whenever feasible. Only in the class action context does conduct universally encouraged and admired become, somehow, suspect. Class action settlements receive more judicial, litigant, and public scrutiny than any others. In the class action context it is *least* likely that a compromise of claims connotes a compromise of ethics.<sup>2/</sup>

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<sup>2/</sup>As Professor Carrie Menkel-Meadow observed in "Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)," 83 Geo. L. J. 2663 (1995), settlement is not necessarily unprincipled compromise, settlements may promote the use or creation of "precedent" as much as, or more than, adversary adjudications, not every aspect of the negotiations or considerations that lead to settlements belong in the public domain, settlements (even class action  
(continued...)

This unique suspicion is a recent one, and has developed, probably by coincidence, contemporaneously with the growing favor enjoyed by alternative dispute resolution and settlements in other areas. Courts have, in practice, pursuant to Rule 23(e), long settled cases brought as class actions, prior to the completion of the formal certification process by certifying these cases pursuant to the parties' stipulation, as settlement-purpose class actions. Similarly, in most circuits, it was long recognized that the requirements for certification could be satisfied, in different ways, in the settlement context, and that it was not incongruous that parties irrevocably opposed to each other on the certifiability of the case for trial could agree on class treatment for settlement. In "Settlement of Mass Tort Class Actions: Order Out of Chaos," 80 Cornell L. Rev. 837 (1995), Judge Schwarzer submits that

*Any resolution of mass tort litigation should seek to accomplish four objectives:*

- 1) *A fair determination -- whether by agreement or adjudication -- of liability and damages;*
- 2) *Reasonable assurance that parties entitled to compensation will be able to collect it;*
- 3) *Minimum adverse impact on enterprises and the related economy consistent with achieving deterrence of objectionable conduct; and*
- 4) *Minimum transaction costs.*

Id.

But for the two recent decisions of a single circuit, there would be little doubt that settlement classes are fully appropriate, and may properly be certified, under Rule 23 as currently written. Only one of the recent decisions, the Georgine decision, squarely states as its proposition that a class to be certifiable for settlement purposes must be capable of certification

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<sup>2</sup>(...continued)

settlements) cannot and should not be completely public, and settlements often provide greater, not lesser, possibilities for just results than the all-or-nothing adjudication of summary judgment or trial.

for full trial. Georgine v. Amchem Products, Inc., 83 F.3d 610 (3d Cir.), cert. granted sub nom, Amchem Products, Inc. v. Windsor, \_\_\_ U.S. \_\_\_, S.Ct. \_\_\_ (1996). The prior decision, In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768 (3d Cir.), cert. denied sub nom, General Motors Corp. v. French, \_\_\_ U.S. \_\_\_, 116 S.Ct. 88 (1995), criticized the trial court for not making detailed Rule 23 findings in its settlement-purposes certification of a case which, in the Third Circuit's view, could well have been certified, in whole or in part, for purposes of trial. 55 F.3d at 817-18. An improved version of the class action settlement the Third Circuit rejected, addressing each of its concerns, was ultimately approved in subsequent proceedings in another court.<sup>10/</sup> In connection with both General Motors settlements, in both courts, class certification issues had been briefed, but not determined for purposes of trial when the settlements were reached. In Georgine, by contrast, the "case" itself was not filed until its settlement had been reached.<sup>11/</sup>

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<sup>10/</sup>For a procedural account of the aftermath of the Third Circuit decision, see In re: General Motors Corporation Pickup Truck Fuel Tank Products Liability Litigation, \_\_\_ F. Supp. \_\_\_, 1996 U.S. Dist. LEXIS 17510 (E.D. Pa. 01/25/96).

<sup>11/</sup>As one of the plaintiffs' class counsel, I was involved in the negotiation and approval process for both General Motors settlements. The negotiations that led to the second settlement involved the participation, included the input, and earned the support, of those objectors to the initial settlement who had expressed legitimate safety and public interest concerns. Despite the belief of its proponents that the second settlement satisfied all of the alleged deficiencies of the initial settlement and fully merited approval in any court, the settlement was presented for approval in Louisiana state court proceedings in which a statewide litigation class had previously been certified. The White court made numerosity, commonality, typicality, adequacy, predominance and superiority findings under La. Code Civ. P. arts. 591-597 in the context of nationwide settlement class certification.

The General Motors and Georgine Opinions' insistence on trial-purposes certification, as to which the defendant (not unpredictably) was unwilling to stipulate, would have consigned the certification issue to years of litigation before any settlement could be presented, thus eliminating much of its economic benefit to the class. We considered it contrary to the best interests of our class (most of whom had no contacts with the Third Circuit) to delay and diminish the certain economic benefits of a settlement with which the overwhelming majority of class members concurred (and that over 300 named plaintiffs actively supported) in favor of the delay and uncertainty inherent in a formalistic certification exercise which no other courts require. A uniform procedural rule would eliminate such tension or conflict among jurisdictions on the basic criteria for settlement classes. Such uniformity would not promote "collusion"; to the contrary, it would enhance the procedural protections of the class.

There is thus a vital distinction, not always noted or appreciated, between the class action filed and prosecuted for trial purposes that is settled before trial and the completion of adversary certification proceedings, and the settlement-purposes class action, which is filed solely to effectuate a preexisting settlement agreement. It is here, I believe, that the addition of 23(b)(4) has its true utility, by assuring that a full Rule 23(a)(1)-(4) assessment will be made of every class presented for settlement purposes.

What is most important, from the standpoint of integrity of process in the conduct and resolution of a class action, is the ability of the trial court to determine, from the presentations of counsel, whether the proposed settlement promotes the best interests of the class as a whole. This assessment is bound up not only with the theoretical merits of the plaintiffs' claims (the point at which the critique of objectors, most often inexperienced in the practical realities of prosecuting class actions, frequently begins and ends) but in the practical prospects for the transformation of allegations to compelling proof at trial. In other words, the relevant arguments for and against class certification must be fully presented to the court, whether for purposes of certifying a trial class, or of approving a settlement class.

Rule 23(b)(4) simply recognizes that what is highly relevant for trial purposes (e.g. potential variations in state laws as affecting predominance) may be hardly relevant in a settlement context. Conversely, matters of immediate practical concern in the settlement context (e.g. plans of allocation and distribution of class benefits) may matter little at the point of certification of common liability issues for a "Phase I" trial. Moreover, it is most frequently the case, as it was in the General Motors litigation, that a settlement is reached after the class certification discovery has been conducted and the briefing exercise is begun. The court thus has the benefit of this discovery and briefing, originally conducted for litigation purposes, in determining the propriety of class certification in the settlement context.

The criteria for certification of a settlement-purposes class and the criteria for judicial approval of a proposed class action settlement inevitably converge. Most courts have

articulated standards for the latter, which continue to retain their utility. See, e.g., Cotton v. Hinton, 559 F.2d 1326 (5th Cir. 1977) (Title VII); Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975) (securities); Grunin v. Int'l House of Pancakes, 513 F.2d 114 (8th Cir.), cert. denied, 423 U.S. 864 (1975) (antitrust); Gottlieb v. Wiles, 11 F.3d 1004 (10th Cir. 1993) (securities); Bowling v. Pfizer, Inc., 143 F.R.D. 141 (S.D. Ohio 1992), appeal dismissed without opinion, 995 F.2d 1066 (6th Cir. 1993) (products liability). The existing jurisprudence on settlement class certification contains guidelines that may profitably be included, either in the Rule itself; or, more practically, in the Committee Notes. These factors, in addition to the now-familiar factors that the various circuits have articulated to assess the fairness, adequacy, and reasonableness of class action settlements under Rule 23(e), should include: (1) the extent to which class certification-related discovery and briefing has been conducted and presented to the court prior to settlement; (2) the ability of class counsel to present or articulate a structure for the class trial of common issues in the absence of settlement; and (3) the experience and success of class counsel in the certification, litigation, trial, and settlement of other class actions.

This Committee is considering a proposed amendment to Rule 23(e) which facilitates the application of these well-established standards. For that reason, I suggest that the guidelines developed and proposed as additions to 23(e) by Judge Schwarzer, modified in minor respects as follows to eliminate duplication with existing Rule 23(a)(1)-(4) requirements, be included as non-exclusive guidelines in the Committee Notes to 23(b)(4) and/or 23(e):

- 1) **Whether the class definition is appropriate and fair for settlement purposes, taking into account among other things whether it is consistent with the purpose for which the class is certified, whether it may be overinclusive, and whether division into subclasses may be necessary or advisable;**
- 2) **Whether persons with similar claims will receive similar treatment, taking into account any differences in treatment between present and future claimants;**
- 3) **Whether notice to members of the class is adequate, taking into account the ability of persons to understand**

the notice and its significance to them;

- 4) Whether opt-out rights are necessary and appropriate, and if so, whether the means of opt-out provided is adequate to fairly protect the interests of class members;
- 5) Whether provisions for attorneys' fees are reasonable, taking into account the value and amount of services rendered, the results obtained, and the risks assumed;
- 6) Whether the certification of a settlement class will have significant effects on parties in other actions pending in state or federal courts;
- 7) Whether the certification of a settlement class will have significant effects on potential claims of class members for injury or loss arising out of the same or related occurrences but excluded from the settlement;
- 8) Whether the compensation for loss and damage and/or the equitable relief provided for the settlement class is within the range of reason, taking into account the balance of costs to defendant and benefits to class members; and
- 9) Whether the claims process under the settlement is likely to be fair and equitable in its operation.<sup>12/</sup>

No set of criteria for the evaluation of settlement-purposes classes should overemphasize formal discovery as an indicator of the parties' development of the case and ability to evaluate its strengths and weaknesses. Formal discovery, as this Committee knows all too well, has become a high art, and its ultimate goal, the production of relevant documentation and information, has, in the hands of many of its practitioners, become a prospect to be avoided rather than a goal to be met. The process of discovery, as practiced in modern civil litigation, is all too frequently a meaningless make-work project. Moreover, the request for additional

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<sup>12/</sup>See Schwarzer, 80 Cornell L. Rev. at 843.

discovery has become a tool in the hands of objectors inexperienced in the realities of complex litigation, a spanner in the works inserted to delay and distract the settlement approval process as a means of extracting tribute as the price of passage.<sup>13/</sup> I have had the extremely frustrating experience of conducting extensive discovery in one case, the General Motors litigation, and having that process acknowledged by a conscientious trial court familiar with the case, only to have the incorrect and unsubstantiated accusations of objectors enshrined in an appellate decision. On remand, discovery that had previously been conducted was, unnecessarily, conducted again, all to "make" a record that had already been made. Obviously, the only result of this process was increased expense and delay for both sides. Judge Hill in Cotton v. Hinton, twenty years ago, said it best:

*It is true that very little formal discovery was conducted and that there is no voluminous record in this case. However, the lack of such does not compel the conclusion that insufficient discovery was conducted.*

*At the outset, we consider this an appropriate occasion to express*

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<sup>13/</sup>Class action counsel have seen, in recent years, the rise of the self-styled "professional objector," typically an attorney with no experience in class action litigation, and no desire to gain any by undertaking the commitment, costs, and risks of actual prosecution. Such objectors emerge, predictably, at the settlement approval stage, utilizing the leverage of an objection and a potential appeal to extract some consideration, usually an attorneys' fee, as the price of settlement implementation. Such objections are inherently adverse to the economic interests of the class as a whole and the institutional interests of the courts, and any procedures or presumptions which endorse or incentivize such activities should be avoided. Not all objectors fall into this category, to be sure. Most objections from class members themselves are sincere and forthright; not infrequently, they offer constructive suggestions that enable pending settlements to be improved. Public interest and safety advocates have, in some cases, proved similarly beneficial to the approval process, although in extraordinary cases such as Georgine there may be a fundamental ideological division that, despite scrupulous adherence to the requests of the approval process and the conventions of civility, transcends the possibility of compromise or reconciliation. Professional objectors do not have such loyalty to the process to commend them. All too often, they have dispensed with such inconvenient notions as standing or an existing attorney-client relationship with a class member. A recent incident in the Northern District of California required court commencement of disciplinary proceedings against one such objecting counsel. The danger of any settlement approval process that moves too far in the direction of deference to objectors at the expense of the majority of the class is that it encourages the dangerous (and erroneous) perception, on behalf of professional objectors, that they are above the rules. This view is far more inimical to the integrity of the settlement approval process than any of the purported shortcomings of specific settlements such objectors decry.

*our concern over the common belief held by many litigators that a great amount of formal discovery must be conducted in every case. Often has this Court reviewed records of cases which attest to this commonly held fallacy. We have often seen cases which were "over discovered." In addition to wasting the time of this Court, the parties and their attorneys, it often adds to the financial burden of litigation and may often serve as a vehicle to harass a party. Discovery in its most efficient utilization should be totally extra-judicial. The Court should rarely be required to intervene. Being an extra judicial process, informality in the discovery of information is desired. It is too often forgotten that a conference with or telephone call to opposing counsel may often achieve the results sought by formal discovery.*

559 F.2d at 1332.

Most trial court judges are as familiar, if not more so, as those in Judge Hill's day with respect to the development of the cases before them. This familiarity, and the accountability of counsel to the trial court, continue to support the Cotton v. Hinton thesis that "the scope of the discovery to be conducted in each case" -- whether for purposes of class action trial or class action settlement -- "rests with the sound discretion of the trial judge." 559 F.2d at 1333. The reality of modern complex litigation is that plaintiffs' counsel know their case before they file it. Much of the information and documentation used in the litigation and at trial comes not through the formal discovery process (because it is too costly and time-consuming, and because plaintiffs' attorneys do not get paid by the hour to conduct meaningless discovery exercises that yield little relevant information) but through independent investigations and informal exchanges. While the amount of relevant information the parties possess regarding their case is indeed highly relevant to the evaluation of a proposed settlement, the quantity of formal discovery that has been propounded in the case is not.

Another practice that should end is the perceived necessity of plaintiffs' counsel, in connection with settlement approval, to belittle the prospects or magnify the shortcomings of their cases in order to justify a settlement. Bad cases are not the only cases that do — or

should — settle. A good case need not be disparaged in order to promote its fair settlement. No case should be brought that cannot be tried, if necessary and settled, if possible. Before filing a class action, plaintiffs' counsel should (and usually do) give equal consideration to the organization of the case for trial, and its prospects for settlement. Knowing where one is going, before one files a suit, involves knowing the terms on which it could fairly settle, as much, if not more, than knowing the manner in which it is to be tried. The insistence of one circuit that classes not be certified for settlement purposes unless they could have been certified for trial reflects only one half of this equation. A class action brought that cannot settle, albeit one capable of a theoretical trial, is more wasteful of the resources of the courts and of the time, money, and hopes of the litigants, than a case that could not be tried as a class action but could fairly be settled as one. The civil justice system is, or ought to be, about the resolution of disputes. It should make no difference, theoretically, whether a class action is resolved through settlement or through trial. Either mode of adjudication is equally valid. When the settlement mode produces recovery to class members, resolution to the defendants, and the finality of a court decree without the time, costs, inconsistencies of judgment, and uncertainties of outcome which characterize litigated class actions, it is a resolution not to be grudgingly tolerated, but to be actively pursued and judicially preferred. The addition of 23(b)(4) is fit acknowledgment of the validity and value, to the system as well as the litigants, of the settlement class.

Typically, in Rule 23(b)(3) class actions, it is 23(b)(3) itself that serves as the focal point of the parties' opposing views, and the certification factors set forth in Rule 23(b)(3)(A)-(D) will have received exhaustive treatment in the class briefs. That these factors must be satisfied, and can only be satisfied, in the same way for settlement purposes as they would have been for trial, gives credence to an artificial construct — accepted nowhere else in litigation — that the parties, once they have joined battle, cannot reconcile and resolve their differences. Surely they can, and surely they must be encouraged to do so, even — and especially — in class actions. Proposed Rule 23(b)(4) expressly recognizes this fact, embodies this policy, and ensure that full presentation will be made by the parties, and full consideration will be given by the court, to all relevant class certification factors, in a specific settlement

context, before effectuating a settlement by certifying a settlement class.

Those critical of settlement classes in general, and of proposed 23(b)(4) in particular, fear that the recognition of settlement classes (which has in fact long since occurred and become an established fact of class action practice) somehow creates lowest common denominator settlements, and will promote collusion between defendants seeking to settle cheap, and class counsel willing to do so. There is no empirical evidence that this occurs with any regularity. Citation to cases such as General Motors and Georgine, prove, if anything, the opposite: proposed settlements that are vigorously criticized (rightly or wrongly) are likely to be disapproved or reversed, and re-done. Some commentators predict the phenomenon of the traveling, or portable, settlement. We have a dual federal/state court system, a doctrine of federalism, and different federal circuits who not infrequently disagree on procedural points -- including settlement class issues. None of this is ominous, and a Rule 23 subsection that expressly recognizes — and hence regulates — the certification of classes for settlement purposes can only reduce the problematic aspects of this reality as evolving jurisprudence establishes precedent that improves by enhancing the uniformity, predictability and quality of the settlement approval process.

The present Committee Notes to subdivision (b)(4) are particularly illuminating on the factors that may justify settlement class certification, notwithstanding problems that might complicate or preclude trial-purposes certification. The comments on enhanced scrutiny and increased protection to class members place parties and courts on notice of the specific purposes and rationale for (b)(4) certification in a useful way. The emphasis on the role of class notice in a settlement approval procedure is especially apt. The final sentence of the Note, however, again sounds the "maturity" theme, without providing specific guidance to the courts; I would respectfully suggest it be deleted or clarified.

#### IV. Proposed New Subsection 23(f) (Interlocutory Appeals)

While I appreciate the Committee Note to subdivision (f), and its confident admonition that "permission to appeal should be granted with restraint," I am extremely doubtful that either this, or the other *caveats* in the Note to this section, will prevent the loser in every class certification decision from invoking 23(f). In an adversary system, every available procedural avenue will be exploited. It is difficult to imagine the circumstances under which counsel for a defendant against whom a class has been certified could successfully persuade her client to forego the interlocutory appeal provided by 23(f). Similarly, it will take a daring and activist trial judge to resist the temptation to grant or impose a stay of proceedings pending appellate review.

While appeals may be handled expeditiously in some circuits, in other circuits, due to caseload and other factors, appellate proceedings are predictably protracted. Appeals to the Ninth Circuit, for example, not infrequently take several years to resolve. Halting a class action for months or years to obtain interlocutory review of what is essentially a provisional case management ruling runs counter to the spirit and purpose of the Federal Rules. If, as would be likely under 23(f), the interlocutory appeal process became a routine inevitability (despite the Committee Note's admonitions to the contrary), the caseload of the appellate courts will be increased unnecessarily. Courts of appeal will be faced, frequently, with rulings that do not truly require review. The time spent by an appellate court and its personnel in familiarizing themselves sufficiently with the district court record to attain the same level of familiarity and expertise that the trial court possessed when it rendered its class certification ruling presents an unprecedented opportunity to increase, rather than increase, the waste, cost, and delay of the proceedings.

Recent experience with trial courts' willingness to certify their class certification decisions for interlocutory review under 28 U.S.C. § 1292(e); and/or the willingness of the circuit courts to grant petitions for writ of mandate, as demonstrated in, *inter alia*, Castano

(certified for an interlocutory appeal)<sup>14/</sup> and Rhone-Poulenc (writ petition granted), demonstrate that those class certification decisions that do involve novel or controversial determinations, or constitute potential departures from the mainstream of class action jurisprudence, do obtain prompt appellate review under existing procedures.

Proposed 23(f) seems aimed at mass tort actions; surely it is unnecessary in substantive areas such as civil rights, employment discrimination, securities fraud, and antitrust violations, in which the standards for class certification are well established.<sup>15/</sup> Unfortunately, no such restriction appears in either the proposed Rule itself or in the Committee Notes. At a very minimum, there should be some express restriction of the interlocutory appeal procedure described in 23(f) to classes not brought under other federal statutes, *e.g.*, to "mass tort" or "consumer fraud" classes brought in the federal courts on state law-based claims. It is in this area that class action law is least settled, most dynamic and volatile, and most amenable to interlocutory review.

### **Conclusion**

Rule 23, as written, is a procedural protocol. In theory, it is a tool of social policy. Its increasingly effective deployment as a powerful strategic weapon has engendered efforts to restrict its availability in the very cases where it is needed most. Plaintiffs' advocates

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<sup>14/</sup>See Castano v. American Tobacco Co., 162 F.R.D. 112 (E.D. La. 1995).

<sup>15/</sup>Indeed, in the area of federal securities litigation, legislation drafted and enacted independently of this Committee has succeeded in superimposing delays in the class certification process, and restrictions on discovery, that operate independently of — and arguably at odds with — the class action and discovery provisions of the Federal Rules. The provisions of this legislation, *see, e.g.*, 15 U.S.C. § 77z-1(a), (b), require the court to select "lead plaintiffs" prior to, and independently of, the Rule 23 certification process; and to stay discovery, including early disclosures of information otherwise required under Fed. R. Civ. P. 26(a)(1), pending determination of motions to dismiss. To add the interlocutory appeal of class certification decisions to the defendants' arsenal of delay and deferral tactics would further undermine the ability of shareholders and investors to obtain timely relief in cases of securities fraud.

battle jealously to keep the Rule in its present form, comfortable in their presumed familiarity with the Rule, and their purported knowledge of its powers. Defendants' advocates want such a weapon for themselves (hence their support for the settlement class), but if and when they cannot have this weapon, they would prefer to see it destroyed. As contending adversaries locked in battle over the Rule, we forget that it belongs to neither side, as an entitlement, a prize, a trophy, or a weapon. It is, as a creature of equity, a procedural birthright of the People,<sup>16/</sup> the ultimate beneficiaries of the Federal Rules. It is entrusted to the courts as its enforcers, and these guardians deserve a well-designed, balanced Rule that they can use, to the benefit of the litigants and the system, in every case that justifies collective treatment. Thus our separate agendas must fall before the imperative of procedural fairness and substantive justice.

We who prosecute, defend, try, and settle cases as class actions are or should be united, despite our adversity, by an overarching loyalty, as officers of the court, to the Rule as well as to our clients. For the most part, from what I have seen, the comments and suggestions offered by those active in this amendment process have indeed been offered in this spirit. So, too, are these suggestions offered, in the hope and confidence that all amendments that endure to achieve implementation will embody the spirit, promote the effectiveness, and improve the operation of Rule 23 for all.

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<sup>16/</sup>For purposes of the Federal Rules the author grudgingly acknowledges that corporations are People, too.

#2070



STATEMENT OF LEWIS H. GOLDFARB  
ASSISTANT GENERAL COUNSEL, CHRYSLER CORPORATION  
TO THE ADVISORY COMMITTEE ON CIVIL RULES  
ON PROPOSED AMENDMENTS TO FED. R. CIV. P. 23

JANUARY 17, 1997 - SAN FRANCISCO, CALIFORNIA

96-CV-09

I appreciate the opportunity to comment in support of the proposed amendments to Rule 23. I would also like to commend the rulemaking committee and its staff for the exceptional quality of the work that has gone into these proposals.

My purpose today is to share Chrysler's experience in defending class action lawsuits and to demonstrate why the reforms proposed by the Committee, and several other changes, are critically needed at this time. Let me state at the outset that any changes to class action law and procedure that permit the courts to dismiss frivolous claims and wrongfully certified classes before they can be used as coercive devices would be beneficial. By this standard, most of the reforms proposed by the Committee should be promulgated.

In our view, the misuse of Rule 23, and its progeny on the state level, has corrupted the legal profession and made many courts throughout the country unwitting accomplices to the process. The law of unintended consequences could not be more starkly demonstrated than with the way this civil procedure has been abused. Rule 23 was intended by its framers to promote judicial economy and uniformity and to provide small claimants with a means of access to the courts. Instead, it has become a battering ram for

nationwide cartels of self-serving lawyers to shake down large corporations for multi-million dollar legal fees in order to secure cents-off coupons or comparable trinkets for unknowing clients.

Unless the courts are given more authority to rein in these abuses of our judicial system, the class action bar will make the corporate raiders of the 80s look tame by comparison.

This is not to condemn all class actions. Many of them serve an important public purpose, provide fair redress for injured consumers and allow for the awarding of reasonable attorneys' fees consistent with these benefits. Others begin as legitimate class actions then get side-tracked by jurisdictional disputes among lawyers seeking only to increase their legal fees at the expense of their supposed clients.

I would like to briefly review our experience in dealing with frivolous class actions, which comprise roughly two-thirds of the class actions we face, and explain how the proposed revisions would remedy some of the problems. I will also suggest some additional reforms.

### **LAWYERS WITHOUT CLIENTS**

Many of the class actions we face are generated by lawyers who have no client at the time they conceive the lawsuit. These are lawyers who scour the Federal Register,

agency dockets or the newspapers searching for articles about consumer products or government investigations. Once they have identified a product that fits a theory, they find a friend, relative or paralegal in their office and offer that person a reward for agreeing to serve as the named plaintiff in a class action. Then they file the class action, often in some backwater state court where they know the judge well, and wait until the time is right to approach defendant's counsel with an offer the defendants cannot refuse.

In our industry, class actions often follow a government investigation or product recall, notwithstanding the fact that owners have already been given redress or the government has found no basis for any action. Based on the pretext that owners are entitled to a little something extra, class action counsel will approach us with the following:

Here's the deal. We know that the court in which this case is filed will certify this as a class action. We also have an expert who has studied your recall. If you're willing to sign an agreement with some bells and whistles that a judge will believe gives some benefit to consumers, such as coupons, and pay a nice legal fee, our expert will bless what you did, the judge will approve the settlement and you will get *res judicata* as to all owners of these products. On the other hand, if you refuse to settle, this same expert will condemn what you did. We will have a certified class, it'll go to trial and you'll be facing exponential damages when the court rules against you.

### **BUYING RES JUDICATA**

This tactic puts a corporate defendant on the horns of a dilemma. It is tempting to strike a deal and give the lawyers a couple million dollars in exchange for resolving the future claims of hundreds of thousands of consumers, regardless of how frivolous we know

they are. We also know, however, that the more you feed this monster, the greater its appetite grows. Succumbing to this temptation also infuriates our customers when they learn that they've been used by the class action lawyers.

This is why there is so much controversy over the issue of settlement classes. A company may benefit in the short run by spending a few million dollars for *res judicata*, but know that such conduct only encourages more unfounded, frivolous class actions. Chrysler firmly believes that settlement classes should also have to meet all of the requisites of Rule 23. Because that issue is pending before the Supreme Court, however, we believe this Committee should take no action on the settlement class changes that have been proposed.

#### **CLASS ACTIONS, INCORPORATED**

Lest anyone try to assert that the class action bar is motivated by a desire to protect the interests of consumers, I have attached to this statement a document that provides a rare glimpse into the inner workings of the class action industry. It is a copy of the minutes of one of the monthly meetings of the so-called CLC Committee, a nationwide syndicate of the wealthiest, most "successful" class action lawyers in the country. (Names have been deleted from this copy.)

The minutes review the status of potential or pending class actions in 23 industries throughout the country. It is not quite what you would expect from members of a learned

profession dedicated to protecting the interests of their clients. To the contrary, clients are merely a necessary ingredient of the production process, to be acquired or bartered as the need arises. Indeed, the Committee appears to be nothing more than a syndicate of competitors joining together to divide up the market, discuss reasonable attorneys fees, take punitive action against non-members and share information on litigation or forum selection strategies.

This is but one example of how Rule 23 has impacted the legal profession. If nothing else, the existence of the "CLC Committee" and its dubious activities should provide overwhelming proof of the importance of the work of your Committee and others who are seeking to bring the class action mechanism back to its proper and intended uses.

### **ETHICAL QUESTIONS**

The lure of easy money available to those who join the class action industry has become so irresistible as to cause many lawyers to lose sight of the Code of Professional Responsibility. Last year Chrysler had to take legal action against two lawyers who had been part of the legal team at a large firm defending Chrysler in class action lawsuits. They left the firm and then filed a class action against Chrysler. We sued claiming that, by doing so, they breached their professional and ethical obligations to their former client.

These two lawyers filed an incredible 41 class action lawsuits within one year of hanging out their shingle, six of them on behalf of one of their fathers, also a lawyer.

Within a year, these lawyers were describing themselves in the local press and elsewhere as "prominent class action lawyers" with a "national reputation".

The practice of these lawyers demonstrates that neither experience, nor even clients in some cases, are required to join the class action fraternity. For example, these lawyers sued (1) on behalf of all residents of their state who lost money in riverboat casinos based on a 50 year old statute that had been superseded by constitutional amendment, (2) on behalf of all Confederate War Bond holders in the state, (3) with one of their fathers as the named plaintiff, on behalf of all recipients of unrequested faxes, based on an obscure Federal statute that provides for attorneys' fees for such cases, (4) on behalf of all residents of an inner city area against a major retailer for failing to locate an outlet in their neighborhood, and so on. Each of these lawyers reportedly netted more than \$1 million their second year in practice.

It is not only the less experienced lawyers who seem to forget that the ethics rules apply to them. Last year Chrysler had to file motions for sanctions against several prominent class action lawyers who failed to verify that they had a client before filing a class action. Even more incredible, these same lawyers continued to prosecute the class action after learning that their putative named plaintiff had testified under oath that she never wanted a class action filed on her behalf.

When challenged in court as to how he could file an amended complaint and a class action certification motion after learning of the plaintiff's sworn statement opposing her role in the class action, one of the lawyers made this astounding assertion: "I could not abandon my duties to the class [no class had been certified] or for that matter to Ms. Cowden without further direction from her."

### **GIANT SUCKING SOUND**

In 1992, Ross Perot coined the term "Giant Sucking Sound to the South" to describe what he believed would be the mass migration of jobs from the United States to Mexico if NAFTA became law. In 1996, the phrase more aptly describes the sudden, massive shift of class action lawsuits from the Federal Courts to local courts in certain states that have become class action havens. One possible explanation for this rush to the state courts is that the Federal Courts have seen too many abuses of Rule 23 and are beginning to apply its standards as originally intended. Georgine v. Amchem Prod., Inc., 83 F.3d 610 (3rd Cir. 1996) and Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996) are two recent examples of the proper application of Rule 23 to fulfill its original intent.

A more insidious but equally plausible explanation lies in the willingness of many of these local judges to engage in what has become the most egregious miscarriage of justice yet to taint the class action process -- the *ex parte* certification of the class. In one celebrated case, a judge in Coosa County, Alabama certified a class action against most of the major oil companies on behalf of all property owners whose property adjoins any one

of the 270,000 underground storage tanks in the nation -- **before the defendants had even been served with the complaint!**

The fact that a purported nationwide class action may already be pending in Federal Court cannot overcome the temptation to file a duplicative class action and immediately seek an *ex parte* class certification before one of these friendly local judges, many of whom see it as their civic duty to certify a nationwide class in their small county. One judge in a sparsely populated Alabama county reportedly has certified more than 100 nationwide class actions, many *ex parte*, and many on behalf of residents of northern states who are recruited to serve as named plaintiffs solely to defeat diversity and removal.

Although probably beyond the reach of this Committee's jurisdiction, one class action reform that must be enacted is to limit the reach of any state's courts to the citizens of that state. The Supreme Court in Gore v. BMW has hinted that this may already be the law but it is still worth codifying.

### **REFORM PROPOSALS**

Having discussed some of the abuses we've confronted in defending class actions, I will comment briefly on how some of the proposed reforms will remedy them.

**Cost Benefit Analysis - Section 23(b)(3)(F)**

Permitting the courts to examine "whether the probable relief to individual class members justifies the costs and burdens of class litigation" will inhibit the prosecution of those cases in which the alleged injury is highly theoretical or de minimus and whose only beneficiaries are the lawyers.

The most common form of injury alleged in these cases is the "diminished value" of the product due to the alleged defect (even if it has been repaired or found not to exist). Since no injury exists at the time of the lawsuit, the filing of these cases is usually accompanied by a press conference denouncing the company and its product, all in an effort to fulfill the prophecy alleged in the complaint -- the reduced value of the product. Encouraging the courts to evaluate such sham injury allegations and deny class certification where the injury is fictitious or insignificant will cause the class action bar to give pause before pursuing such class actions.

**Interlocutory Appeal - Section 23(f)**

A District Court's decision to certify a class often determines the outcome of the case -- very few defendants can afford the risk, however small, of trying a class action. It is critical, therefore, that such a significant ruling by a trial court be reviewable by an appeals court without the need for certification by the district court. Proposed Section 23(f) would accomplish this by authorizing the Court of Appeals, in its discretion, to review a district court order granting or denying class action certification.

This reform is too important for the Committee to qualify by suggesting in the commentary that such appeals "should be granted with restraint". Appeals courts will have little difficulty knowing when a class certification ruling must be reviewed. They should not be discouraged from doing so.

**Maturity Factor - Section 23(b)(3)(C); Practical Ability 23(b)(3)(A); Maintaining Separate Claims 23(b)(3)(B)**

These sections would permit the court: (1) to defer class certification until there has been substantial experience with "any related litigation involving class members"; (2) require the court to consider "the practical ability of individual class members to pursue their claims without class certification"; and (3) consider the "class members interests in maintaining or defending separate actions". These proposals would also reduce the incidence of frivolous class actions by encouraging the courts to await the processing of individual claims of a similar nature before testing out novel recovery theories in the class action context where the interests of the real parties to the actions would be better served by individual actions. They should be adopted.

We would also propose that the Committee consider expanding subsection (C) to authorize the court to defer class certification pending the outcome of government enforcement actions that are seeking similar relief for class members. As noted earlier, the class action bar will often file a class action upon learning of a government investigation, then demand huge attorneys fees for relief equal to what the government is

seeking. Permitting the courts to consider the pendency of government enforcement action as a basis to defer certification would effectively discourage such duplicative litigation that benefits no one but the lawyers.

Alternatively, we would propose that the Committee consider adopting an amendment that codifies the doctrine of "primary jurisdiction". E.g., Walsh v. Ford Motor Co., 130 F.R.D. 260 (D.D.C. 1990). Specifically, Rule 23 should be amended to provide that a court shall stay a class action if the matter(s) at issue are pending before an administrative agency that has authority to grant complete relief to the putative class members.

Subsections (A) and (B) are closely related to (C) and together give judges some guidance in determining whether putative classes should be certified. The maturing of individual cases should supply the experience that will determine the basis on which courts can decide whether under (A) putative class members can pursue their claims without class certification and whether under (B) there is sufficient interest in maintaining separate actions.

### **ADDITIONAL REFORMS**

There are two reform proposals not included among the Committee's recommendations that must be given serious consideration in any effort at class action

reform. Both of these proposals would help reduce the coercive impact that accompanies the mere filing of an action alleging a nationwide class.

### **Limited State Court Jurisdiction**

As noted earlier, the growing resistance of the Federal Courts to the prosecution of frivolous class actions has caused a measurable shift in the filing of these cases from the Federal to State jurisdictions. This shift has been enhanced by the willingness of many state judges to disregard the requirements of Rule 23 and grant class action status even on an *ex parte* basis. This trend will likely accelerate with the enactment of the reforms proposed by this Committee. As is obvious, all of these reforms will be for naught if the state courts remain a haven for the abuse of the class action process.

One way to reduce the incentive for state court filings is to limit the jurisdiction of the state courts to class members within the state. While such a reform may be outside the authority of the Committee, and as noted earlier may be unnecessary in light of the Supreme Court ruling in Gore v. BMW, this Committee should consider addressing this issue in the notes and recommending confirming Federal legislation to that effect.

### **Opt-in Classes**

Most of the abuses documented in this testimony and that of many of the other witnesses would be alleviated if Rule 23 were changed to provide for an "opt-in" requirement rather than the "opt-out" provision in the current rule. There is no system of

jurisprudence in existence today that allows a lawyer to sue a company on behalf of hundreds of thousands or even millions of people who neither know about nor would choose to participate in such a lawsuit. The only reason these suits are allowed to continue is because of the absurd presumption in Rule 23 that all members of the alleged class would choose to participate unless they affirmatively act to opt out. It is this unbridled power in the hands of a few irresponsible, self-serving lawyers that has caused the class action horror stories that have been so well documented in these proceedings. Requiring the class to be comprised only of those who opt-in to the lawsuit would go a long way toward eliminating the frivolous cases and transform the others into real law suits-- those involving real claimants asserting at least colorable legal claims.

Imposing an opt-in requirement would also reduce the membership of the class action bar. It would require that lawyers have real clients truly interested in pursuing a cause of action before the case could be filed. Since only those who are harmed by the alleged conduct would choose to opt-in it would do away with all *res judicata* and settlement class issues. Most importantly it would eliminate the coercive element inherent in Rule 23 that allows lawyers to file strike suits against corporate defendants based on untested legal theories supposedly on behalf of thousands of unknowing, uninterested citizens.

While there are other issues raised by opt-in classes that would have to be addressed, such as the accuracy of solicitations to potential class members, implementing

this reform would be the most effective measure to return Rule 23 to its legitimate and intended purposes.

The reforms proposed by this Committee represent a giant step in taking back Rule 23 from those who have exploited the Rule for personal gain at the expense of consumers and other small claimants whom the rule was intended to benefit. Chrysler believes that the Committee has been presented with more than sufficient justification to recommend the final adoption of these reforms.

MEMORANDUM

September 21, 1995

TO: CLC Committee Members  
FROM: [REDACTED]  
RE: Report on September 18, 1995 CLC Meeting - Seattle, Washington

1. CLC NETWORK. Due to expert negotiating skills, the monthly cost of CLC access to its own network has been reduced from \$995.00 to \$9.95. There does not seem to be need to review the cost by someone from [REDACTED]

2. POLYETHYLENE

California. An opposition to [REDACTED] request for a separate class to be excluded from the Tennessee national class will be filed through [REDACTED]. The brief will be coordinated with [REDACTED]. It should incorporate the reasons why a separate California class is inappropriate in addition to arguments specifically relating to the inappropriateness of [REDACTED] as class counsel. Emphasis is also being placed on establishing the legal appropriateness of the Tennessee action. Additionally, efforts will be made to secure an affidavit from [REDACTED] in support of the terms of the settlement that will give the court the ability, if it denies a separate California certification, to also express a judgment as to the fairness of the Tennessee settlement. All of that work must be completed and ready to be filed by FRIDAY, SEPTEMBER 22, 1995. The hearing scheduled for MONDAY, SEPTEMBER 25, 1995 will be attended by a representative of [REDACTED] and representatives from the [REDACTED] action.

Alabama. In light of recent events concerning the attempt to obtain a separate California class certification and the sanctions in Alabama, it seemed appropriate to investigate the filing (through [REDACTED]) of a request before [REDACTED] to reconsider the adequacy of [REDACTED] as class counsel in Alabama. [REDACTED] should advise [REDACTED] of the relevant facts and [REDACTED] should circulate a brief to [REDACTED] no later than MONDAY, OCTOBER 2, 1995.

Tennessee. There needs to be a meeting with respect to preparation for the fairness hearing on NOVEMBER 8, 1995. The meeting scheduled for Washington, D.C. or Houston, Texas on Thursday, September 21 was canceled. A new meeting date should be established no later than FRIDAY, OCTOBER 6, 1995.

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2. LOUISIANA PACIFIC. All terms except the monetary sum were agreed upon. [REDACTED] will prepare an initial draft of the settlement agreement once an agreement is reached with Louisiana Pacific on a settlement sum. That agreement is scheduled to be approved by the Board of Directors, at its September 1995 meeting.

3. CARPETS. A possible settlement agreement with Sunrise was distributed. No further action is warranted until such time as additional defendants can be named.

4. COMPACT DISCS. An amended complaint is being prepared by [REDACTED]. [REDACTED] will speak to [REDACTED] concerning possible interest by some of [REDACTED] large retail clients.

5. CORN SWEETENERS

MDI Panel. Papers have been filed which seek to consolidate all Corn Sweetener litigation in a single jurisdiction. Plaintiff papers request such consolidation in either Minnesota or Philadelphia. Defendants oppose a single consolidation and instead have requested three separate jurisdictions.

Lysine. [REDACTED] is to review the lysine market to determine whether or not it may be significant purchases by indirect purchasers. [REDACTED] is also to turn the attention of economists to reviewing the evidence of collusion and impact on lysine. That information, to be developed by September 30, 1995, will be forwarded to [REDACTED] for use with his direct purchasing clients, who have expressed an interest in pursuing claims.

6. EXPLOSIVES. We were advised that [REDACTED] will be filing a case in St. Louis. A Preliminary Order No. 1 should be entered with an organizational structure. It was recommended that [REDACTED] should be named as co-counsel. That should be done by **MONDAY, SEPTEMBER 25, 1995**.

7. HARDBOARD/MASONITE. A complaint has been filed through [REDACTED] against Georgia Pacific alleging both product defect and conspiracy. [REDACTED] is to review the complaint to determine whether additional defendants need to be added. If so, [REDACTED] is to prepare, in conjunction with [REDACTED] memorandum to consolidate. That should be done by **MONDAY, OCTOBER 2, 1995**. The firms assigned to the case are [REDACTED].

8. SPRINT PROPERTY TAKING. The firms assigned to the case are [REDACTED] is to review the complaint. The complaint is to be filed by **MONDAY, OCTOBER 2, 1995**. [REDACTED] shall prepare a motion for class certification. [REDACTED] shall prepare an opposition to an expected motion to dismiss. Drafts of the class certification brief shall be circulated by **MONDAY, OCTOBER 16, 1995**. Drafts of the opposition to the motion to dismiss shall be circulated by **TUESDAY, OCTOBER 31, 1995**.
9. ERIE. A complaint shall be filed by **MONDAY, OCTOBER 2, 1995** at confirmation from [REDACTED]. If [REDACTED] is unable to secure confirmation, then the case should be switched to [REDACTED].
10. EQUITABLE LIFE. Under review by [REDACTED].
11. DOUBLE JEOPARDY. [REDACTED] and [REDACTED] will provide a recommendation by **MONDAY, OCTOBER 2, 1995**, as to whether to proceed, where to proceed and when to proceed.
12. WORDPERFECT. Being coordinated by [REDACTED].
13. PRESCRIPTION DRUGS. [REDACTED] were assigned to have a complaint on file by **MONDAY, OCTOBER 2, 1995**. Drafts of the complaint should be circulated by [REDACTED] no later than **WEDNESDAY, SEPTEMBER 27, 1995**.
14. PESTICIDES. Under review by [REDACTED].
15. SCHWABE. No interest. The case is being removed from the agenda.
16. INSIDE WIRING. [REDACTED] was authorized to expend up to \$7,500 to print the Tennessee case on disc. The first case should be filed in the Eastern District of Virginia by **MONDAY, OCTOBER 16, 1995**. [REDACTED] is to review the situation in California, [REDACTED] is to review the situation in the Northeast, and [REDACTED] is to review the situation in the Midwest. All reports should be completed and circulated by **MONDAY, OCTOBER 16, 1995**.
17. AUTO GLASS. [REDACTED] were requested to meet with [REDACTED] to review the status of the case and identify a date for the filing.
18. CELLULAR ROUND UP. [REDACTED] is to circulate a memorandum concerning the case by **MONDAY, SEPTEMBER 25, 1995**.

19. INSURANCE STACKING. A recommendation is to be made by **MONDAY, OCTOBER 16, 1995** by [REDACTED]

20. SMOKELESS TOBACCO. No interest. The case is being removed from the agenda.

21. DIRECTORS AND OFFICERS LIABILITY POLICIES. There is no interest in this matter. [REDACTED] is to contact [REDACTED] and explain in detail why the matter does not make sense.

22. FORCED PLACE INSURANCE. [REDACTED] were assigned to investigate the claim. A meeting in Jackson, Mississippi with other interested counsel interested in the same matter was held on September 20th. If feasible, a complaint is to be filed by **MONDAY, OCTOBER 16, 1995**.

23. NEW MEMBER. [REDACTED] will request [REDACTED] to send his \$10,000 cost assessment to [REDACTED]

24. NEXT MEETING. **MONDAY, NOVEMBER 13, 1995** in Knoxville, Tennessee.

#2114



96-CV-119

January 7, 1997

**STATEMENT OF JEFFREY J. GREENBAUM  
TO THE ADVISORY COMMITTEE ON CIVIL RULES  
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES  
CONCERNING PROPOSED CHANGES TO RULE 23  
OF THE FEDERAL RULES OF CIVIL PROCEDURE**

**SAN FRANCISCO, CALIFORNIA - JANUARY 17, 1996**

Although Mr. Greenbaum co-chairs the Rule 23 Subcommittee of the Class Actions and Derivative Suits Committee of the American Bar Association Section of Litigation, the views expressed here are his own.<sup>1</sup> These views were formed through the deliberative process that is described below. However, the views stated are not necessarily those of the American Bar Association ("ABA") or its Section of Litigation, and no authorization has been given to express the views of those entities.

**I. Conclusions**

I generally support the seven proposed revisions to Rule 23 as likely to have a positive impact on class action practice. This position is summarized below followed by a more detailed discussion:

**i. Permissive Interlocutory Appeals, Proposed Rule 23(f)**

This provision provides for a discretionary interlocutory appeal of the class certification decision and is modeled after a 1985 ABA Section of Litigation recommendation. The proposal protects against unreasonable delay by requiring applications to be made within ten days and provides for no stay of the action unless otherwise ordered.

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<sup>1</sup> Mr. Greenbaum is also a member of the law firm of Sills Cummis Zuckerman Radin Tischman Epstein & Gross, in Newark, New Jersey. These affiliates are listed for identification purposes only and not to express the views of these entities.

I support this provision as a substantial improvement over current practice and a positive step towards achieving fundamental fairness. I object to language in the proposed note that attempts to limit the availability of such appeals and make other technical comments to improve the proposal.

ii. **Settlement Classes -- Proposed Rule 23(b)(4)**

Designed to reverse two recent Third Circuit cases prohibiting the fact of settlement to be considered in applying Rule 23 standards, this change recognizes the useful nature of settlement classes for Rule 23(b)(3) claims, but proceeds cautiously to limit possible abuses of the settlement class device. I support this provision as a good compromise that allows the continued use of this device while reducing the potential for abuse.

iii. **Dismissal or Compromise -- Adding the Hearing Requirement to Rule 23(e)**

This proposal makes explicit a requirement that has evolved to be current practice in most courts -- the holding of a hearing to approve a settlement. I support this change as an important protection against collusive settlements, particularly in light of the introduction of the provision expressly allowing for settlement classes for (b)(3) claims. I believe, however, that the proposed Rule does not properly consider voluntary or consensual dismissals prior to class certification where the court can adequately protect absent potential class members without the need for notice to the proposed class and a hearing on the proposed dismissal.

iv. **Factor (F) -- Balancing Individual Recoveries with the Costs and Burdens to the System**

This proposal adds an additional consideration for (b)(3) claims -- examining whether probable relief to individual class members justifies the cost and burdens of class litigation. Designed to effect a retrenchment for class actions when relief to individual class members might fairly be characterized as trivial, this change seeks to respond to public criticism of certain settlements which undermines confidence in the judicial system and use of the class action device. I support efforts to eliminate the potential for abuse of class actions, and personally support the proposed change. However I should note that I am aware of many strongly felt contrary views. I also believe that the revision should not be used to fragment claims by eliminating from a class definition those with claims below a certain dollar threshold.

v. **The Need for Class Certification and Viability of Individual Claims -- Proposed Rule 23(b)(3)(A) and (B)**

Adding additional factors for consideration of (b)(3) classes, these factors focus on the size of individual claims in determining their viability without certification and the individual interest of class members in maintaining their own actions. I am generally supportive of these changes, when applied in the mass tort context, but am concerned that the full implications in the non-tort context may not be fully realized. These concerns may be addressed by additions to the Advisory Committee note.

vi. **Maturity -- Proposed Rule 23(b)(3)(C)**

I support the proposed change directing courts to consider the "maturity" of related litigation and also the expanded concept discussed in the proposed Advisory Committee note of considering the maturity of the science relating to dispersed mass tort claims. I believe, however, that the latter concept, addressed only in the note, should also be incorporated in the text of the Rule.

vii. **Timing of Certification**

I support the proposed amendment requiring a certification decision "when practicable" as opposed to "as soon as practicable" after the action has been brought. This change conforms to current practice when courts many times consider summary judgment motions and motions to dismiss before deciding whether to certify a class.

II. **Background**

As stated above, although the views I express are not necessarily those of the ABA or its Section of Litigation, my personal views, which I do express, have been greatly influenced by the deliberative process that took place within those entities.

In July 1991, the ABA Section of Litigation created the Rule 23 Subcommittee of the Class Actions and Derivative Suits Committee to examine and comment upon a May 1991 draft of the Advisory Committee on Civil Rules of proposed revisions to Rule 23 of the Federal Rules of Civil Procedure. The Subcommittee prepared a preliminary report dated October 16, 1991, and since that time has closely monitored the work of the Advisory Committee.

The Subcommittee currently consists of approximately 70 members and includes practitioners experienced in representing plaintiffs and defendants in class actions,

lawyers with particular public interest perspectives, and several academicians. On May 14, 1996, immediately after the Advisory Committee's formal action to transmit proposed changes to the Standing Committee, the Class Actions and Derivative Suits Committee conducted an all-day national workshop on the proposed changes to Rule 23. Approximately 35 attorneys attended the workshop, representing all regions of the United States and attorneys experienced in representing plaintiffs, defendants, public interest groups and academicians. The workshop included presentations on the proposed changes, analyses of the changes from both the plaintiffs' and defendants' perspective, break out sessions to study the proposed changes, and reports to the entire group to reach a consensus. The feedback from this workshop was invaluable in gaining insight into the views of class action practitioners on these proposed changes.

The Rule 23 Subcommittee prepared a detailed report. While the report was principally the written product of a drafting subcommittee,<sup>2</sup> it was widely circulated and commented upon by the Rule 23 Subcommittee and the Class Actions and Derivative Suits Committee, which has over 600 members. The report was considered by the Council for the Section of Litigation, which is the governing body for a group of approximately 60,000 members. The Council's views largely accorded with the drafting subcommittee's views, except with respect to Factor (F). The Council expressed the strong view that the court should consider the deterrent effect of accumulating small recoveries to avoid a large windfall to wrongdoers.

This Statement closely parallels the written product of the drafting subcommittee and the report of the Council, except as to Factor (F). Nevertheless, I present this statement solely as my individual views.

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<sup>2</sup> The drafting subcommittee consisted of the attorneys listed below. Their affiliations are listed for identification purposes only: Jeffrey J. Greenbaum, Esq. (Co-Chair), Sills Cummis Zuckerman Radin Tischman Epstein & Gross, P.A., Newark, NJ; Lewis H. Lazarus, Esq. (Co-Chair), Morris James Hitchens & Williams, Wilmington, DE; Kathleen L. Blaner, Esq., Pepper Hamilton & Scheetz, Washington, D.C.; David A.P. Brower, Esq., Wolf Haldenstein Adler Freeman & Hertz LLP, New York, NY; Randy L. Decker, Esq., Vice President - Senior Counsel, ITT Consumer Financial Information, Minneapolis, MN; Douglas W. Holly, Esq., Streich Lang, Phoenix, AZ; R. Bruce McNew, Esq., Taylor Gruver & McNew, P.A., Greenville, DE; Sharon Maier, Esq., Milberg Weiss Bershad Hynes & Lerach LLP, San Diego, CA; Terry Rose Saunders, Esq., Law Offices of Terry Rose Saunders, Chicago, IL; Charles Wachter, Esq., Fowler White Gillen Boggs Villoreal & Banker, P.A., Tampa, FL.

### III. Discussion

#### A. Permissive Interlocutory Appeals -- Proposed Rule 23(f)

This provision, which provides for a discretionary interlocutory appeal of an order granting or denying class action certification, is essentially the same as originally proposed by the ABA Section of Litigation in the Flegal Report.<sup>3</sup> The provision has appeared, essentially unchanged, in every draft considered by the Advisory Committee since May 1991 and appears to be the least controversial of all the proposed revisions. I believe it is a substantial improvement over current practice.

The class certification decision is often determinative not only of the future course of the litigation but, in certain instances, its actual outcome. As noted in 1985 in the Flegal Report, if certification is denied, named plaintiffs are faced with the burden of incurring expenses grossly disproportionate to the potential individual recovery in order to secure appellate review. Conversely, from the defendant's perspective, when faced with an erroneous grant of certification, even defendants sued for potentially weak claims may face "potentially ruinous liability and may be forced to settle a case rather than run the economic risk of trial in order to secure review of the certification ruling." Flegal Report, 110 F.R.D. at 211.

Since 1985, with the expansion by the courts of the use of the class action device to deal with the problems of dispersed mass tort litigation, the pressure on a defendant to settle even potentially weak claims in the face of potentially ruinous recovery is even greater;<sup>4</sup> a mechanism for interlocutory appellate review of the critical class certification

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<sup>3</sup> In October 1981, the ABA Section of Litigation appointed a special committee on class action improvements. The committee, comprised of attorneys and several federal judges with broad experience in major class action litigation, began studying possible improvements to Rule 23. In July 1985, the ABA House of Delegates authorized the Section of Litigation to transmit the "Report and Recommendations of the Special Committee on Class Action Improvements", known as the Flegal Report for its reporter, Frank F. Flegal, Esquire, to the Advisory Committee on Civil Rules, without either approving or disapproving the recommendations in the report. The Flegal Report, along with the formal action of the ABA House of Delegates, was published in the Federal Rules Decisions, 110 F.R.D. 192 (1986).

<sup>4</sup> As the court stated in Castano v. American Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996):

(continued...)

determination is an important step to achieve fundamental fairness. Current practice permits such review only by satisfying the requirements of 28 U.S.C. § 1292(b),<sup>5</sup> or the extremely rigorous requirements for mandamus. An appeal cannot be taken under § 1292(b) if the district judge whose decision is challenged does not provide the required certification. Moreover, there are many who believe that utilizing the mandamus procedure to review class certification decisions stretches that procedure beyond the scope for which it was originally intended.

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<sup>4</sup>(...continued)

In the context of mass tort class actions, certification dramatically affects the stakes for defendants. Class certification magnifies and strengthens the number of unmeritorious claims. ...

In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle whereas individual trials would not. (Citation omitted.) The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low.

See also In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1297-98 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995).

<sup>5</sup> The text of 28 U.S.C. § 1292(b), providing for interlocutory appeals, provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

The proposed change also establishes an appropriate balance by creating an important procedural right without unnecessarily exposing the system to unreasonable delay through routine meritless applications. Applications must be made promptly (within 10 days), and hopefully will be decided promptly by the court of appeals. Moreover, there is no stay of the action unless otherwise ordered by the district court or court of appeals.

In the Rule 23 Subcommittee's preliminary report in 1991, it expressed concern over the proposed provision's lack of standards to guide practitioners and appellate courts. The references in the draft Advisory Committee note to some of the standards in 28 U.S.C. § 1292(b) address some of these concerns. However, I am concerned about language in the draft note that may restrict and undercut important aspects of the proposed rule change.

First, language in the proposed note that interlocutory appeals will be granted "with restraint" and that the provision represents only a modest expansion of the opportunities for appeal, while possibly designed to convince a burdened appellate judiciary that it will not be flooded with additional frivolous appeals, may serve to undercut an important procedural provision.

Also, the language that permission "almost always will be denied" when certification decisions turn on case specific matters is unnecessarily restrictive. Because of the nature of the class certification standards, the class determination will almost always involve case specific issues. A court of appeals may well be convinced that as a result of an erroneous application of case specific facts, the district court made an erroneous class certification decision that would result in a substantial injustice to a party and would be virtually unreviewable unless promptly corrected. Courts should not be discouraged from acting to achieve substantial justice in such situations.

Similarly, the proposed note's language encouraging district courts to express their opinions on the appropriateness of an interlocutory appeal appears to reintroduce unnecessarily the often insurmountable certification provision of 28 U.S.C. § 1292(b), which the proposed revision wisely eliminates.

Finally, from a technical standpoint, the short time period to apply for an interlocutory appeal under proposed Rule 23(f) may cause problems for practitioners when they believe that the trial judge may have overlooked a controlling fact or point of law that led to an erroneous result. In that unusual circumstance, the attorney should be encouraged to return to the district judge for reconsideration, rather than be forced to file a prompt application to the court of appeals under Rule 23(f) within 10 days. Accordingly, the provision should be altered to provide for the 10 days to run from the order granting or denying class action certification or denying reconsideration of such a determination.

**B. Settlement Classes -- Proposed Rule 23(b)(4)**

Through the introduction of a new section (b)(4), this change recognizes the useful nature of settlement classes for Rule 23(b)(3) claims, but proceeds cautiously to limit possible abuses of the settlement class device. I believe that this provision is a good compromise that allows the continued use of this device, despite recent adverse decisions, while reducing the potential for abuse.

Courts and practitioners have found the settlement class device useful and have used it with increasing frequency. However, recent cases in the Third Circuit have called the practice into question. In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768 (3d Cir.), cert. denied, 116 S. Ct. 88 (1995) (fact that case would be settled and not proceed to trial would not relieve plaintiff from satisfying all Rule 23(a) requirements for class certification as if case were to proceed to trial); Georgiñe v. Amchem Products, 83 F.3d 610 (3d Cir.), cert. granted, 117 S.Ct. 379 (November 1, 1996) (fact of settlement could not be used in considering whether the (b)(3) factors of predominance and superiority were satisfied).<sup>6</sup> These two decisions require parties settling as a class to meet all the Rule 23(a) and (b) requirements for class certification as if the case were proceeding to trial. Problems of manageability, for example, stemming from choice of law problems that the court would not face in administering a settlement, would still preclude class certification under these recent Third Circuit decisions.

In contrast, the proposed rule permits a court to consider the fact of settlement when determining whether the requirements of predominance and superiority are satisfied, but limits the applicability of new (b)(4) to certification under (b)(3). The fundamental Rule 23(a) requirements of numerosity, commonality, typicality and adequacy of representation would still be applicable, just as if the cases were proceeding to trial. The proposed settlement provisions of (b)(4) would not apply to settlements under Rule 23(b)(1) or Rule 23 (b)(2). The Rule limits the special consideration of settlement to situations where the parties already have reached settlement, appropriately preventing the district court from using this new rule as a device to "encourage" a reluctant defendant to settle claims that otherwise would not be certified.

The use of settlement classes has been criticized for creating potential for collusive settlements. This potential can be minimized through an examination by the court

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<sup>6</sup> But see In Re Asbestos Litigation, 90 F.3d 963, 975 (5th Cir. 1996):

Most circuits to decide the issue have held that courts should consider the settlement in determining whether Rule 23 prerequisites are satisfied. [Citations omitted.]

of the fairness of the settlement and by requirements that members of the class receive notice of the settlement and have the right to opt-out, and, through the new explicit requirement in proposed Rule 23(e), that the court hold a hearing on all proposed settlements.

One commentator has stressed the importance of the right to opt-out of a settlement class and posited that the proposal does not presently provide for the right to opt-out of (b)(4) classes.<sup>7</sup> I believe that such right would exist under the current proposed draft, which simply adds an additional category to consider for claims for certification under Rule 23(b)(3), and was clearly intended to retain the opt-out right. Nevertheless, Rule 23(c)(2) and (c)(3) could easily be amended to confirm the opt-out right for (b)(4) classes by additionally referring to subdivision (b)(4) whenever those rules refer to an action maintained under subdivision (b)(3). I also believe the draft note could be clarified to elaborate on how the court is expected to apply the (b)(3) factors of predominance and superiority in the settlement context and to highlight that particular care should be given to defining the scope of class membership.

**C. Dismissal or Compromise -- Adding the Hearing Requirement to Rule 23(e)**

By making explicit a requirement that has evolved to be current practice in most courts -- the holding of a hearing to determine whether the court should approve a settlement -- I believe that the proposed rule stresses an important protection to help prevent collusive settlements. The express mandate is particularly important in light of the introduction of the new proposed subdivision (b)(4) allowing settlement classes for (b)(3) claims.

I believe, however, that the proposed rule was drafted with only a settlement or voluntary dismissal of a previously certified class in mind and does not sufficiently focus upon a voluntary or consensual dismissal prior to class certification. While notice to the class, the right to opt-out and hearing before the court to approve a settlement should be afforded with respect to all settlements, I believe that pre-certification notice to a proposed class and a court hearing are not necessary for the court to approve a voluntary or consensual dismissal under Rule 23(e). With respect to pre-certification dismissal, the court can usually require sufficient assurances to protect against collusion. In these circumstances, the expense and delay of notice to a proposed class and a court hearing are not justified. The proposed rule should be amended to make this distinction.

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<sup>7</sup> J. Coffee, Class Action "Reform": Advisory Committee Bombshell, New York Law Journal, p.1, col.1 (May 21, 1996).

**D. Factor (F) -- Balancing Individual Recoveries with the Costs and Burdens to the System**

I understand that the proposed addition of subparagraph (F), examining whether probable relief to individual class members justifies the costs and burdens of class litigation, is intended to effect a retrenchment for class actions where the relief to individual class members could fairly be characterized as trivial. The Advisory Committee perceives that the current rules have led to some settlements where the low recovery to individual class members did not justify the cost and burdens of the litigation to the system as a whole. A related concern is that attorneys' fees in such cases are sometimes substantial, and publicity concerning such settlements undermines confidence in the judicial system and the use of the class action device.

I recognize that there has been much public criticism of recent settlements in which class members were to receive nominal recoveries or coupons of dubious value, while substantial fee awards were sought by counsel. Such criticism and the perceived abuses reflected in such cases can undermine respect for the integrity of the judicial system as a whole and for practicing lawyers in particular. I support this effort to eliminate the continuing potential for such abuses which lower the public's perception of the practicing bar.

I am aware, however, that the Advisory Committee's approach has been the subject of controversy. For example, the drafting committee of the Rule 23 Subcommittee could not reach a consensus on this issue alone.

Critics of the proposed change have argued that the cost/benefit analysis may substantially abridge plaintiffs' rights and close the courthouse doors to small claims, thereby defeating one of the primary purposes of class actions -- enabling small claims that could not be brought as individual actions to be aggregated in a single action to effectuate relief. Thus, the Council for the Section of Litigation believed that the provision should be modified to require judicial consideration of the litigation's probable deterrent value. A related concern is that this cost/benefit analysis will destroy the deterrent effect and public benefit of class litigation, when a large number of people claim small individual amounts that may total, in the aggregate, millions of dollars of potential windfall to an alleged miscreant. Finally, some lawyers believe that the language of the current draft may encourage district courts to "take a peek at the merits" before plaintiffs have been afforded the opportunity to take discovery. Some view this as an asset of the proposal and others as a fault.

While the proposed rule change has its critics, I and others have supported it as a balanced approach to a serious problem. For example, a consumer class action involving individual class members who can recover only a few dollars of interest

recalculations raises the serious question of whether the system should be put through the burden of litigating those claims on a class basis. Nor should the objective of such litigation be to generate a pool of dollars for the payment of attorneys' fees to plaintiff's counsel. As the Advisory Committee note indicates, the objective is not to interfere with traditional class recoveries, which currently average between \$315 to \$528 per class member. The Advisory Committee believes that, if the relief is truly trivial when compared with the costs and burdens of the litigation to the system, the class action device is simply not an efficient method of adjudication. Moreover, supporters argue that a civil procedural rule should be aimed at facilitating the efficient resolution of civil claims, particularly when Congress has at its disposal means of achieving deterrence through attorneys' fees statutes and other means.

In addition, as a separate matter, I believe that the language of this proposed revision should not be used to fragment claims by eliminating from the definition of a class, otherwise certified, all claimants below a certain dollar threshold. While I do not believe this is the intent of the proposal, expanded language in the Advisory Committee note could eliminate this possible ambiguity.

**E. The Need for Class Certification and Viability of Individual Claims -- Proposed Rule 23(b)(3)(A) and (B)**

These proposed changes, introducing a new factor (A) and altering the old (A) as the new (B), add additional factors to consider in the court's determination under (b)(3) as to whether the class action is superior to other methods of adjudication. These factors focus on the size of individual claims in determining their viability without class certification, either as individual actions or through other means of aggregation, and the individual interests of the class members in maintaining their own actions.

These changes appear to have been developed to control the expanding use of the class action device to accomplish aggregation of mass tort claims. To the extent they are designed to protect individual plaintiffs with substantial individual claims from having others control their destiny without their participation, I believe the proposed changes are helpful to achieve fairness and protect the rights of individual claimants. I am concerned, however, that the full implications of these changes in the non-tort context may not be fully realized.

For example, these changes should not be read to permit the fragmentation of claims that might previously have been certified as a single class to eliminate those claimants from the class, through the class definition, that may be considered too big or, under proposed subdivision (F), too small. Thus, in a securities class action that otherwise would meet all the requirements of Rule 23, these changes should not be read to require a court to eliminate from the proposed class those at both ends of the class whose individual claims

may be considered too large or too small. I believe the Advisory note should be amended to confirm that this is not the intended effect of these provisions.

**F. Maturity -- Proposed Rule 23(b)(3)(C)**

I support the proposed change in the language of Rule 23(b)(3)(C), directing courts to consider the "maturity" of related litigation, and also the expanded concept discussed in the proposed Advisory Committee note of considering the maturity of dispersed mass tort claims in the court system. I believe, however, that the proposed note may go beyond the text of the proposed rule change and that accordingly, the text of the rule should be revised to include both concepts.

The proposed rule change limits itself to a consideration of the "maturity" of "related litigation involving class members." I agree that it is wise to avoid interfering with the progress of related litigation that may be well advanced toward trial and judgment. In cases involving dispersed mass torts in particular, the courts may be faced with individual actions with substantial damages progressing toward trial and courts may not want to interfere with those actions.

The proposed Advisory Committee note, however, refers to the broader concept of the maturity of the science supporting certain dispersed mass tort claims. The note refers to the courts gaining experience through completed litigation of several individual claims to determine whether confidence can be had in a class determination. I support this additional concept of taking a cautious view toward class certification when the science supporting claims of dispersed mass injury has not sufficiently developed and remains "immature." Practitioners have noted that better adjudication will follow from deferring class litigation until the science concerning the alleged injury from a particular medical product or device has developed. That concept, however, may presently be beyond the scope of the proposed rule change and should be included in the text of the rule change itself.

**G. Timing of Certification**

I support the proposed amendment requiring a certification decision "[w]hen practicable" as opposed to "[a]s soon as practicable" after the action has been brought. This change simply conforms the rule to current practice. For example, courts often consider summary judgment motions and motions to dismiss before deciding whether to certify a class. Practitioners and judges have found this sequence of events to be efficient and a rule specifically validating that practice is appropriate.

IV. Conclusion

After 30 years of Rule 23 experience, the Advisory Committee has engaged in a rigorous examination of the class action rule. I believe the Advisory Committee has acted in a responsible and cautious manner in approaching these issues. With the adoption of the suggestions made in this Statement, I believe that the proposed revisions should have a positive impact on class action practice.

Jeffrey J. Greenbaum

#2115

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1/13/97  
96-CV-122

WRITTEN STATEMENT

William A. Montgomery, Vice President and General Counsel  
State Farm Insurance Companies

Comments On Proposed Amendments To  
Federal Rule of Civil Procedure 23  
Before the Advisory Committee On Civil Rules,  
Committee on Rules of Practice And Procedure  
Of The Judicial Conference Of The United States  
January 17, 1997 - San Francisco, California

I. Introduction

My name is William A. Montgomery, and I am Vice President and General Counsel of State Farm Insurance Companies. I support the proposed changes to Rule 23 that have been published for comment, and especially the proposed addition of Factor F to Rule 23(b)(3). However, I am proffering some modifications to the language of the Rule and the accompanying notes.

State Farm is the largest writer of auto and homeowner's insurance in the United States, is among the leading writers of life insurance, and has tens of millions of policyholders. The parent company is organized as a mutual, and so is owned by its policyholders. State Farm probably conducts billions of transactions with its policyholders and claimants every year. The Company's size and the national scope of its business has made it a target of plaintiffs' lawyers alleging proposed class actions on a grand scale, with the inevitable accompanying allegations of staggering collective damages assertedly suffered by the proposed class.

As has been reported by other corporate witnesses in regard to their companies, the filing of asserted class actions against State Farm is on the rise. A mere handful of alleged class actions were pending against the Company in the early 1990's, but at present more than 50 are pending. Most of these cases complain of one practice or another which is said to affect a broad group of State Farm policyholders, usually involving relatively small amounts per claim. We dub them "consumer class actions."

While a number of these purported class actions have been filed in state courts, most states' class action rules are virtually identical to Federal Rule 23. Moreover, increasing numbers of consumer class actions are pending in the federal courts because they satisfy federal jurisdictional requirements through aggregate punitive damages claims, supplemental jurisdiction, or both.

Recent experience in facing -- and resolving -- such lawsuits demonstrates that changes to Rule 23 are needed. The new proposed Factor F, which permits courts to weigh the probable relief to individual class members against the costs and burdens of class litigation, constructively addresses the drain presently placed on defendants and the judicial system in consumer

class actions that have been touted -- mistakenly, in my opinion -- as admirable examples of the benefits of Rule 23 litigation.

In consumer class actions, even when the Company has believed the plaintiffs' claims were highly questionable, which is most often the case, State Farm from time to time has been constrained to settle. The unpredictability of trial in the face of the claimed aggregate damages, as well as the cost of defense, ordinarily make litigating to the end an imprudent alternative. The class action device provides disproportionate leverage in favor of the plaintiffs' attorney, which is why almost no class actions ever get tried.

On the other hand, small claims class action settlements yield no monetary value to most members of the class. Parties negotiating a settlement typically estimate the size of the class and the potential aggregate value of the settlement to class members. On the surface, if one looks only at the potential value of the settlement consideration made available to the settlement class, the resolution of these cases may appear to provide meaningful recoveries for class members. Likewise, the plaintiff attorney fee awards when measured as a percentage of that same "estimated value" of the settlement may not appear to be unreasonable. In reality, however - notwithstanding extensive individual and published notice - the funds made available to the class largely go uncollected.

Even more troubling, when viewed in terms of the actual recovery that ultimately is collected by the class, the court-approved attorney fee awards in these cases can be far out of proportion with traditional norms. Typically, attorney fee awards are made before the claim administration process begins, so no one knows for certain how many class members will come forward. I am aware that the Federal Judicial Center's recent study did not contain similar findings, but the Center's study appeared to review attorney fee awards in comparison to settlement consideration available to the class, and did not capture or consider information about actual payouts to class members.<sup>1</sup> ("A large number of cases in the study used a claims procedure to distribute the proceeds of a settlement fund to class members. Only those class members who filed claims shared in the benefits of the settlement...Unfortunately, the parties generally did not report the number of claims received. Thus our data on claims received are too incomplete to present." Judicial Center Study, pp. 75-76). Consequently, the Center's figures on the average return to class members, and their analysis of whether payments to plaintiffs' counsel are excessive, contribute little of value to this aspect of the fee award analysis.

The comments of class members requesting exclusion from lawsuits raise further questions as to whether Rule 23 is being abused in the context of consumer class actions. For example, in cases where State Farm's practices in handling claims for repair of vehicles were questioned, we received requests for exclusion with comments including the following:

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<sup>1</sup>Federal Judicial Center, *An Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules (Draft, January 17, 1996)* hereinafter "Judicial Center Study", pp. 16, 75-76, 94.

I do not wish to participate in this lawsuit because I feel that State Farm was always fair to me . . . I have no complaint against State Farm for the way in which they handled my claims.

I have been well-satisfied with all the repair work that has been done on my cars over the past 17 years.

Had my car repaired during the term specified and 100% satisfied with State Farm.

Be it understood that I have no pending claims against State Farm Ins. Co. I got complete satisfaction when I was insured with State Farm.

Some of the class members were more forceful in their objections:

I intend to make no claims as the State Farm guarantee [on parts repairs] is better . . . What a goof off way to take everyone's time and money for nothing.

This is frivolous and an unconscionable waste of my premium dollars. Sanctions should be imposed on the bloodsucking parasites.

Not every arguable mistake, misjudgment, or misdeed needs to or should be resolved through litigation in general, much less through class action litigation in particular. The judicial system already entertains individual claims of small value, for those who choose to assert them, through expedited and streamlined procedures of local small claims courts. Moreover, there are other avenues of common relief which may be much more efficient, such as action by regulatory or other law enforcement authorities, or prompt voluntary action by the alleged wrongdoer. The availability of such alternatives should be relevant to the class certification issue, and the courts should be encouraged to deny class treatment for small consumer claims where such other methods can be used to address whatever mistake or improper conduct a defendant is alleged to have committed.

## II. The Advisory Committee's Proposals

### A. The "Just Ain't Worth It" Factor -- Proposed 23(b)(3)(F)

Factor F, which requires consideration of whether the "probable relief to individual class members justifies the costs and burdens of class litigation,"<sup>2</sup> addresses some of the unique problems consumer class actions pose. While the commentary occasionally strays, I understand that

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<sup>2</sup>Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Civil, and Criminal Procedure, Request For Comment, (hereinafter "Preliminary Draft"), August, 1996, p.42.

the Advisory Committee has determined that the central purpose of Factor F is to "focus on the individual claims being aggregated", a purpose with which I agree. Preliminary Draft p. 25 (Minutes of the April 18-19, 1996 Advisory Committee meeting (the "Minutes")). I recommend that certain parts of the Rule and Commentary be modified or supplemented to clarify and reinforce this underlying purpose and intent of Factor F.

**1. Proposed Revision to General Commentary to Rule 23(b)(3)**

The general introduction in the draft Note accompanying the proposed changes to Rule 23(b)(3) includes a statement that the Advisory Committee views class actions permitting the litigation of "valid small claims for small amounts" as a "vital core" of Rule 23(b)(3) litigation:

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

Preliminary Draft, p. 46.

I believe this apotheosis of small claims class actions ignores reality, and that the Federal Judiciary Center's study is wholly inadequate support for the Advisory Committee's characterization. As I understand the scope of the study, the Center reviewed the results of class action litigation resolved during a two-year period in four different District Courts. Judicial Center Study, p. 6. From that narrow sample, the Center reviewed settled actions, and calculated the mean recovery figure by "starting with the gross settlement amount, deducting expenses, attorneys' fees, and any separate awards to the named class representatives, and dividing that net settlement amount *by the number of notices sent to class members.*" Judicial Center Study, p. 16, n. 31 (emphasis supplied). The Center acknowledged that many class settlements involve a claims procedure, that only those who filed claims would receive payments, and that information as to claims received was incomplete. Judicial Center Study, pp. 75-76. Consequently, the Center did not determine what actual payouts were made to the class members after notice was sent.<sup>3</sup>

I therefore recommend that the quoted language be deleted altogether.

Alternatively, if the basic passage is to be retained, the word "valid" should be deleted. In referencing "valid" small claims, the Advisory Committee's note could be read to suggest that it is appropriate to take an initial "peek at the merits," as some have put it, when determining

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<sup>3</sup>Such information is available when the Court's record contains reports detailing settlement administration results.

whether a class should be certified. But inquiry into the merits at this stage of litigation is a notion that the Advisory Committee has considered and rejected.

In addition, the citation to the "findings" of median individual class-member recovery figures from the Federal Judicial Center's study are not appropriate here. Mention of the \$315 and \$528 figures could be viewed as acceptance that individual claims in this range should be considered per se certifiable under Factor F -- a blanket statement that the Advisory Committee presumably did not intend to make, given the later commentary to Factor F itself.

## 2. Proposed Revision to Commentary to Rule 23(b)(3)(F)

The discussion of Factor F in the draft Note appropriately recognizes that not every possible aggregation of small claims is proper for certification under Rule 23, and that the cases inappropriate for class treatment can be identified without any significant preliminary discovery and without consideration of the merits. Information the courts are encouraged to consider under Factor F include the complexity of legal issues or proceedings that likely will be involved in the case, the likely cost of providing notice to class members, and the probable costs involved in administering and distributing any ultimate award to class members. The commentary should also encourage the court to consider such matters as whether the defendant or any regulatory agency had received a substantial number of individual complaints challenging the practice at issue, whether the defendant has already undertaken curative steps, and what relationship, if any, the named plaintiffs have with their counsel -- class actions in which there is little true interest sometimes are filed with the employees and/or relatives of the plaintiffs' counsel as named class representatives. I suggest that the Note be modified as follows:

The value of probable individual relief must be weighed against the costs and burdens of the class-action proceedings. No particular dollar figure can be used as a threshold. Factors the court should consider include whether a smaller figure is appropriate if issues of liability can be quickly resolved without protracted discovery or trial proceedings, the costs of class notice are low, and the costs of administering and distributing the award likewise are low. Higher figures should be demanded if the legal issues are complex or complex proceedings will be required to resolve the merits, whether identification of the class members and notice will prove costly, and whether distribution of the award will be expensive, whether the defendant or any regulatory or law enforcement agency has received a substantial number of individual complaints challenging the practice at issue, whether the defendant has voluntarily undertaken curative steps, and what relationship, if any, the named plaintiffs may have with their counsel. It will be difficult to measure these matters at the commencement of an action. The opportunity to decertify later should not weaken this threshold inquiry ....

Preliminary Draft, p. 50 (proposed modifications added).

The draft Note also properly has cautioned that no bright-line threshold can be set to measure whether the amount of requested recovery to individual class members is sufficient to merit proceeding with class litigation. Nevertheless, there is a passage in the commentary that could be interpreted as so limiting that it virtually writes the Factor out of the Rule:

Subparagraph (F) has been added to subdivision (b)(3) to effect a retrenchment in the use of class actions to aggregate *trivial* individual claims. If the probable relief to individual class members does not justify the costs and burdens of class litigation, a class action is not a superior means of efficient adjudication. *The near certainty that few or no individual claims will be pursued for trivial relief does not require class certification.* (Emphasis added).

Preliminary Draft, p. 50

While I agree with the italicized sentence, it should be deleted from the Note, and "small" should be substituted for "trivial" in the second line. The sentence could be read to suggest that Factor F will preclude class certification only in the rare circumstance where lack of class member interest, and only trivial relief, are "near certainties." Use of "trivial", a value-laden word, would undercut the weighing process the court is being asked to undertake.

Another troubling portion of the draft Note suggests that the court weigh the public values that might be served if a particular class action is certified:

The prospect of significant benefit to class members combines with the public values of enforcing legal norms to justify the costs, burdens, and coercive effects of class actions that otherwise satisfy Rule 23 requirements.

Preliminary Draft, p. 50.

During its deliberations on the proposed changes to Rule 23, however, the Advisory Committee considered and rejected a proposed factor providing that the court determine "whether the public interest in - and the private benefits of - the probable relief to individual class members justify the burdens of the litigation." The Minutes note that this factor was modified to eliminate "any explicit reference to public interest" and to weigh instead "whether the probable relief to individual class members justifies the costs and burdens of class litigation." The Minutes explain this change as a reflection that:

The origin of the probable relief factor lies in concern that Rule 23(b)(3) is an aggregation device that, separate from the special concerns reflected in (b)(1) and (b)(2) class actions, should focus on the individual claims being aggregated. The traditional focus and justification for individual private litigation is individual remedial benefit. Most private wrongs go without

redress. Class treatment can provide meaningful redress for wrongs that otherwise would not be righted, and the value of the individual relief can be important. But class actions should not stray far from this source of legitimacy. Public enforcement concerns should enter primarily when Congress creates explicit private enforcement procedures. As the note to one of the drafts articulated this view, "we should not establish a roving Rule 23 commission that authorizes class counsel to enforce the law against private wrongdoers." Focus should hold steady on the objective cash value and subjective intrinsic value of the relief available to actual class members.

Preliminary Draft, pp. 25-26.

The Advisory Committee's decision against including an evaluation of "public values" was correct. To reflect this focus of Factor F on individual claims for relief more accurately, the Note should be revised to provide as follows:

~~The prospect of significant benefit to class members combines with the public values of enforcing legal norms to justify~~ must be weighed against the costs, burdens, and coercive effects of class actions ~~that otherwise satisfy in determining whether a particular set of claims satisfies~~ Rule 23 requirements.

**3. The Commentary Should Not Be Revised To Include Consideration of Deterrence Value in the Factor F Determination.**

A closely related issue that has been raised during the Advisory Committee's deliberations and testimony regarding the proposed Rule changes is whether a court's weighing of the potential benefits of a particular asserted class action under Factor F should incorporate the concepts of "corrective justice" or deterrent value of small claims class actions. Such concepts should not be included for the reasons set forth above. Moreover, any such requirement would improperly encourage the courts to make some evaluation of the merits of the case.

The Minutes explain the Advisory Committee's decision not to include any broad deterrence concepts in the Rule or the Note: "Any other view would put courts in the position of weighing the public importance of different statutory policies, and perhaps the relative importance of 'minor' or 'technical' violations as compared to flagrant or intentional violations." Preliminary Draft, p. 26. I agree with the views expressed by another witness as to the redundancy and hindrance class actions can be to the efforts of real law enforcement agencies. See Statement of John L. Hill, December 17, 1996, at pp.3-4.

I also agree with Judge Hill and with William T. Coleman that inclusion of the deterrence concept is beyond the scope of the judiciary's authority under the Rules Enabling Act.

Rule 23 was not intended as a vehicle to promote the prosecution of class actions by self-appointed "champions" of the public interest.

4. **Factor F and the Draft Commentary Properly Weigh the Costs and Benefits of Class Litigation Against the Probable Value of Individual Claims.**

Several commentators who object to Factor F as drafted have argued that if it is adopted, the court should be encouraged to weigh the likely costs of the litigation against the aggregate claimed damages of the class. Focusing on "aggregate" relief to the class would contradict the valid proposition that "Rule 23(b)(3) is an aggregation device that . . . should focus on the individual claims being aggregated." Preliminary Draft, p. 25.

As my earlier comments make clear, if the court merely looks to the aggregate claimed damages, it will ignore the level of interest of most of the proposed class, and consequently may grossly overestimate the actual benefit of a class action to a large proportion of the individual class members. Such a result would be inconsistent with what the Advisory Committee has said is the underlying purpose of Factor F.

**B. Factor A and Alternative Avenues of Relief**

Another change proposed by the Advisory Committee is the addition of Factor A to Rule 23(b)(3), instructing the court to consider "the practical ability of individual class members to pursue their claims without class certification." Preliminary Draft, pp. 41-42. This factor points against class certification when an individual plaintiff has a damages claim large enough to permit him to pursue independent litigation. However, this factor should also expressly recognize, both within the Rule and the accompanying Note, that class certification may not be desirable where individual class members can pursue relief through alternative mechanisms. For example, where governmental regulators have at their disposal a heavy arsenal of remedies to redress wrongdoing, the interests of putative class members -- particularly those with relatively small claims -- may be much better served by pursuing relief through administrative proceedings. Moreover, courts should take into account situations where a class action defendant has made voluntary efforts to cure an alleged wrong before certifying a class whose stated goal is simply to achieve what already has been accomplished. Where defendants take pre-suit curative action, or undertake voluntary remedial action after a brief grace period following the filing of the suit, the courts should consider whether any need for certifying the class has been obviated. Thus, the rule should be modified to read:

- (A) the practical ability of individual class members to pursue their claims or otherwise obtain relief without class certification;

In addition, the Note should be modified as follows:

The focus on the practical ability of individual class members to pursue their claims without class certification can either encourage or discourage class certification. This factor discourages - but does not forbid - class certification when individual class members can practicably pursue individual actions, when they can obtain relief through administrative proceedings, when a regulatory or other law enforcement inquiry into the matters underlying the complaint already is underway, or when a defendant has agreed to take voluntary remedial action. If individual class members cannot practicably pursue individual actions or otherwise obtain relief, on the other hand, this factor encourages class certification.

Preliminary Draft, pp. 47-48 (proposed modifications reflected).

### C. Appellate Review

An increased opportunity for appellate review of orders granting or denying a motion for class certification would be an advance over the present requirement that class certifications cannot be reviewed without the district court first agreeing to such an appeal.

However, the draft Note accompanying the proposed amendment of Rule 23(f) should be modified to make it clear that this change is intended as a material expansion of the availability of appellate review of certification decisions, and to provide for an automatic stay of proceedings while the appeal is pending:

~~Permission to appeal should be granted with restraint. The Federal Judicial Center study supports the view that many suits with class action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings. Yet Several concerns justify expansion of present opportunities to appeal . . . These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.~~

~~The expansion of appeal opportunities effected by subdivision (f) is modest: Court of appeals discretion . . .~~

~~The 10-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings . . . Permission to appeal should not will stay trial court proceedings.~~

Preliminary Draft, pp. 55-56 (proposed modifications reflected)

#### **D. Settlement Classes**

The proposed Rule 23(b)(4) would clarify the law regarding settlement class actions by specifically authorizing certification of a settlement class even if that class would not meet Rule 23's requirements for certification of a trial class. The Advisory Committee has explained that this proposal permits certification of a settlement class only where the requirements of Rule 23(a) have been met, and where the parties have agreed to settle. The revision is not to be used as a device to force parties to settle; instead, it is a recognition that the "manageability" criterion of Rule 23(b) preventing certification of unwieldy litigation classes should not stand as a barrier to certification of a settlement class that, by its very nature, will not be tried.

For the same reasons advanced by other supporters of this change, we believe that it is important affirmatively to recognize the propriety of certifying classes for purposes of settlement that would have been unmanageable as a litigation class.

#### **III. Conclusion**

If the class action device is to play a constructive role in today's litigation environment, substantial changes to Rule 23 are necessary to address the problems with current class action practice. While the pending proposals will not be a total cure, I encourage the Advisory Committee to move forward with its proposed changes to Rule 23, with the modifications I have suggested.

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2/18/97  
State Farm Insurance Companies



96-CV-122

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February 14, 1997

Peter G. McCabe  
Administrative Office of the Court  
Rules Committee  
One Columbus Circle, N.E., Suite #4-170  
Washington, D.C. 20002

Dear Mr. McCabe:

I am enclosing the supplemental written statement of William A. Montgomery, Vice-President and General Counsel of the State Farm Insurance Companies, concerning proposed amendments to Federal Rule of Civil Procedure 23. This statement supplements Mr. Montgomery's January 13, 1997 written statement and his January 17, 1997 oral testimony before the Advisory Committee on Civil Rules in San Francisco.

Sincerely,

*Alan D. Maness*

Alan D. Maness  
Federal Affairs Director and Counsel

Enclosure

cc: Thomas E. Willging

## SUPPLEMENTAL WRITTEN STATEMENT

William A. Montgomery, Vice President and General Counsel  
State Farm Insurance Companies

Supplemental Comments on Proposed Amendments to  
Federal Rule of Civil Procedure 23  
Before the Advisory Committee on Civil Rules,  
Committee on Rules of Practice and Procedure  
of The Judicial Conference of The United States

I appreciate this opportunity, on behalf of State Farm, to supplement my previous testimony to the Advisory Committee supporting the proposed changes to Rule 23, and Proposed Rule 23 (b)(3)(F) in particular.<sup>1</sup> As I testified previously, most consumer class actions are of very little interest to the individual consumers on whose behalf they purportedly are brought. My report of State Farm's experience that many of these asserted consumer class suits are simply "lawyers' cases" was echoed time and again by the testimony of other corporate representatives at the San Francisco hearing, including Messrs. James Johnson (Proctor & Gamble), Stewart Baird (Wells Fargo), James Roethe (Bank of America), John Martin (Ford), Lou Goldfarb (Chrysler), and Nicholas Wittner (Nissan).

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<sup>1</sup>While Subparagraph (F) has been labeled the "just ain't worth it" factor, as my comments both here and previously indicate, I believe that it should also address a related, but somewhat different problem in class action law. Specifically, Factor F should allow denial of certification in those small-claims consumer class actions where there is very little interest among putative class members. As the hearing record shows, that is the situation in most such cases. In my view, a better nickname would be the "just ain't no interest" factor.

The absence of interest among putative class members is fundamentally important to the Advisory Committee's consideration of Proposed Factor F, given the Committee's proper recognition that some class litigation imposes too great a toll on the judicial system and is not justified in view of the level of potential relief actually available to individual class members. Where there is so little interest in a case by the very consumers on whose behalf it is purportedly brought, a class action just should not be certified.

I have received a copy of the January 22, 1997 memorandum from Mr. Thomas E. Willging of the Federal Judicial Center, in which he takes issue with certain conclusions I drew in my previous written statement. In response, let me first say that I concur that the Federal Judicial Center's study of class actions is a valuable resource for the current class action dialogue. The Study, however, clearly does not refute the fact that there is very little interest among putative class members in most consumer class actions, and that in such cases plaintiffs' attorneys' fee awards are often disproportionately high. For example, the Study comments as follows:

A large number of the cases in the study used a claims procedure to distribute the proceeds of a settlement fund to class members. Only those class members who filed claims shared in the benefits of the settlement, but all class members--as defined in the class certification order--who did not affirmatively opt out were bound by the judgment. Unfortunately, the parties generally did not report the number of claims received; thus, our data on claims received are too incomplete to present.

Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules, Federal Judicial Center (1996) (hereafter the "Study"), p. 55.

I continue to maintain that the Center's findings are not inconsistent with the fact that small-claim consumer class actions often result in little or no benefit to most class members. The Study provides data and makes findings as to the "average recovery per class member" in the settlement of a certain group of class actions across four districts (Study, pp. 13, 112-13 at Figures 1 through 3). The only settlements included in these analyses were so-called "distribution cases" where the aggregate monetary benefit conferred on the class could readily be calculated and a pro rata distribution method was ordinarily used (Study, p. 68 and n. 244, pp. 146-49 at Figures 67 through 70). This group included 44 securities class actions and only 18 other class action settlements (Study, pp. 112-13, Figures 1 through 3, and see pp. 146-49 at Figures 67 through 70 (where the total number of "distribution cases" varies slightly from Figures 1 through 3)). The value of including securities class actions has been much diminished by Congress' enactment of the Private Securities Litigation Reform Act of 1995, which - in recognizing and seeking partially to solve the very problem I am highlighting - provided that attorneys' fees awarded to class counsel "shall not exceed a reasonable percentage of the amount of any damages . . . actually paid to class members." (15 U.S.C. § 77z-1(6) (emphasis added)). Moreover, the Center omitted from the calculation of "average payouts" a number of cases where the settlement relief included monetary benefits that could not easily be valued, such as coupons and procedures for filing claims to obtain partial rebates or credits (Study, p. 68 and n. 244, pp. 112 at Figures 1 through 3, pp. 184-86 at Tables 46, 47).

The Study and Mr. Willging's memorandum note that the amount of actual individual payouts in the class actions studied was generally determined by the gross amount of

the settlement distributed on a pro rata basis to those who submitted claims. There may be a place for such pro rata distributions in certain settings. But in a small-stakes consumer class action, the potential aggregate amount of a settlement is typically quite large, while individual settlement payments even to those few class members who come forward to make claims generally are small. In the consumer class action context, use of pro rata distributions would result in enormous windfall awards to a small number of claiming plaintiffs; and this pro rata distribution method is accordingly not used in settlements of such cases. Consequently, pro rata distribution does not address the problem of nominal interest in small-stakes consumer class actions, nor does it provide a sound basis for continued certification of such class actions. For all of these reasons, I do not believe that the findings of the Study provide meaningful information regarding the principal Factor F issues I have addressed.

In my previous testimony I urged that Rule 23(b)(3) should also make explicit that a court should not expend its limited resources on class treatment if there are other mechanisms by which the claimants may obtain relief. While this principle has been recognized in other contexts, courts typically have not considered available non-judicial methods of addressing the controversy in determining whether to certify a class. An exception is Berley v. Dreyfus & Co., 43 F.R.D. 397 (S.D.N.Y. 1967), which involved sales of unregistered stock and the defendant's offer to refund its customers' purchase price. Some purchasers nevertheless brought an alleged class action under Rule 23(b)(3). The Court considered the defendant's refund offer and reasoned that, while the refund was "not quite" another method for adjudication,

subparagraph (b)(3) read as a whole reflects a broad policy of economy in the use of society's difference-settling machinery. One method of achieving economy is to avoid creating lawsuits where none previously existed. This is in part why 'the extent and nature of any litigation . . . already commenced' is pertinent to the required finding. If a class of interested litigants is not already in existence the court should not go out of its way to create one without good reason.

43 F.R.D. at 398-99. This public policy concern finds illustrations in other settings as well. For example, the Magnuson-Moss Act provides for a "reasonable opportunity to cure" defects as a prerequisite to bringing a claim under the Act, 15 U.S.C. §2310, while similar concepts of allowing a party seasonably to cure problems permeate the Uniform Commercial Code. See, e.g., U.C.C. §2-607.

Some have suggested that the Committee consider, as an alternative to Factor F, adoption of an "opt in" form of class action to address cases where individual class members' claimed relief is small and their interest in the litigation is low. In my view, further reforms to Factor F could better address the problem of the many consumer class actions in which the putative class has little interest in the litigation. One worthwhile approach would be to introduce an interest level requirement like that contained in the Magnuson-Moss Act, which provides that a claim shall not be cognizable under the Act "if the action is brought as a class action, and the number of named plaintiffs is less than one hundred." 15 U.S.C. §2310(d)(3). Factor F could be strengthened by an explicit requirement that the class proponents demonstrate that substantial numbers of the putative class actually want actively to pursue the asserted claims. If a class action complaint could not be brought without a substantial number of class representatives, there would

be less risk of the litigation being purely a "lawyers' case," and there would be a stronger justification for burdening the judicial system with class litigation that satisfied this requirement.

To accomplish this purpose, Proposed Factor F could be modified as follows:

- (F) Whether a substantial number of individuals seek actively to pursue claims on behalf of the proposed class, and whether the probable relief to individual class members justifies the costs and burdens of class litigation; . . .

The accompanying Note could then be modified by inserting the following text as the second paragraph:

Rule 23 is not intended as a vehicle for pursuit of claims in which class members in fact have little or no interest. The first portion of Factor F is intended to avoid the certification of such class action lawsuits by requiring an initial demonstration that a substantial number of individuals seek actively to participate in the litigation on behalf of the proposed class. An appropriate reference for the Court in determining the sufficiency of plaintiffs' showing would be Section 2310(d)(3) of the Magnuson Moss Act, which provides that a claim is not cognizable if it is brought as a class action and has fewer than 100 named plaintiffs. This requirement will help address the recent increase in the filing of "lawyer-driven" class actions.

My suggestions here run counter to those who have argued to the Advisory Committee that Factor F should acknowledge the purported deterrent value of small claims class actions. Indeed, in the few weeks since I testified before the Committee, the American Bar Association has objected to Factor F unless it should include a requirement that the court consider the deterrent effect of accumulating small recoveries. Nevertheless, I once again urge the Advisory Committee to disregard deterrence as a reason for class certification.

The class action device is not intended broadly to expand or modify substantive rights by creating an open invitation for self-appointed "champions" of public interest to pursue their goals through class litigation. In my view, like those expressed by others (Judge John T. Hill, William T. Coleman), modifying Rule 23 to incorporate a deterrent effect concept would contravene the constraints imposed by the Rules Enabling Act. Under the Act, the Supreme Court has the power "to prescribe general rules of practice and procedure" in the federal courts, but may not create rules that "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(a), (b). Since the Supreme Court's decision in Sibbach v. Wilson & Co., Inc., 312 U.S. 1 (1940), it has been recognized that the Supreme Court's promulgation of rules must be confined to matters affecting the judicial process, and must not reach out in an attempt to affect the conduct of individuals or entities outside the procedural litigation context. Deterrence by its very definition looks past procedure and instead seeks to modify -- or prohibit -- class action defendants' future conduct. Incorporating a deterrence criterion into Factor F or any other portion of Rule 23 plainly would cross the boundary set by the Rules Enabling Act.

For all of these reasons, and the reasons I previously articulated to the Committee, I urge the Committee to recommend the adoption of Factor F and the other proposed changes to Rule 23(b) with the modifications and suggested amended commentary set forth here and in my earlier written statement and testimony.

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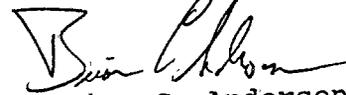
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Re: Proposed Amendments to Fed. R. Civ. P. 23

Dear Mr. McCabe:

Enclosed is my prepared statement regarding the  
proposed amendments to Fed. R. Civ. P. 23 for the January 17,  
1997 hearing of the Advisory Committee on Civil Rules in San  
Francisco.

Sincerely,

  
Brian C. Anderson

Encl.

**STATEMENT OF BRIAN C. ANDERSON  
ON THE PROPOSED AMENDMENTS TO FED. R. CIV. P. 23  
BEFORE THE ADVISORY COMMITTEE ON CIVIL RULES,  
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES  
San Francisco, California -- January 17, 1997**

Thank you for the opportunity to appear before this Committee to address possible amendments to Fed. R. Civ. P. 23.

My practice at the Washington office of O'Melveny & Myers involves the defense of complex litigation in state and federal courts around the country. In recent years, most of the lawsuits I have defended have been styled as class actions. During my career, I have participated in over 50 purported class actions in the state and federal courts of 19 different states. Most of these have been product liability cases -- lawsuits seeking economic damages stemming from allegations that a class of consumers purchased defective products. I also have been involved in employee benefits and prisoners' rights class actions.

Although some of these lawsuits arguably stem from legitimate grievances as to which a colorable legal claim may have existed, the large majority of the cases in which I have been involved have not sought real justice on behalf of real people. Instead, these actions have been created by lawyers for the sole purpose of making money. The discovery process has invariably revealed that the named plaintiffs in whose name the lawsuit was brought have relatively little knowledge of, or interest in, the claims advanced. Further, the named plaintiffs have usually come into the case at the suggestion of the lawyers, rather than the other way around.

It is regrettable that my clients and the courts must respond to so many lawsuits that, absent the economic interests of lawyers, probably would not have been brought. The time and money the companies spent defending those cases could have been better used elsewhere -- developing new and better products, reducing the price of those products, hiring more employees, or improving the shareholders' return

on investment. In the end, the legitimate interests of the public have not been well-served by these lawsuits.

Many of these putative class action lawsuits are not well thought-out by the lawyers who file them. I have read hundreds of class action complaints over the years and find myself seeing the same boilerplate language over and over again. There seems to be a canned "fill-in-the-blank" class action complaint floating around among the plaintiffs' bar, into which one inserts (a) the names and identifying information about the parties, and (b) some bare-bones allegations about the wrongful acts in which the defendant purportedly engaged. The legal claims, however, are often the same and, indeed, are described in virtually the same words from complaint to complaint. Also, the allegations concerning why the case deserves class treatment are invariably boilerplate, with only minimal effort made to link the factual allegations of the particular case to the requirements of Rule 23.

Although I am not here to argue against the use of word-processors, the lack of careful thought that so often underlies class action lawsuits is a troublesome phenomenon. Those who file class actions are, as a matter of law, deemed to have fiduciary responsibilities toward those whom they seek to represent from the first day their case is filed.<sup>1</sup> Accordingly, putative class actions (even those that have not been certified) cannot be dismissed "without the approval of the court," which may be given only after the court conducts a hearing under Fed. R. Civ. P. 23(e) to consider, *inter alia*, the need to provide notice to the members of the putative class.<sup>2</sup> Consequently, it is more difficult to pull the plug on an ill-advised putative class action than it is on other kinds of lawsuits. This, combined with the fact that the aggregate nature of the claims makes the stakes exceedingly high, inevitably puts the defendant in the

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<sup>1</sup> See Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 549-50 (1949).

<sup>2</sup> See Fed. R. Civ. P. 23(e); Diaz v. Trust Territory of Pacific Islands, 876 F.2d 1401, 1408-09 (9th Cir. 1989).

uncomfortable position of having to either (a) settle the lawsuit even though it lacks merit or (b) litigate the lawsuit and accept all the risks that come with that decision.

This explains why we have seen so many class action settlements that seem to reward the plaintiffs' lawyers handsomely and provide only nominal value to the putative class members. Unless and until trial court judges step up to the plate and both dismiss putative class action claims that lack merit and deny class status to cases that cannot reasonably be tried on a classwide basis, we will continue to see the kinds of settlements that bring public ridicule upon the legal profession.

With this experience in mind, I come today to endorse the proposed package of amendments to Rule 23. To be sure, they will not prevent all of the abuses of the class action device I have witnessed. Achieving that goal would require this Committee to take more aggressive steps than those currently on the table. For example, the Rule could be amended to require all complaints containing class action allegations to be pleaded with particularity -- a reform that has been suggested by, among others, my colleague William T. Coleman, Jr. Nevertheless, the amendments now before the Committee are, in my opinion, at least a modest step in the right direction.

In my view, the most important proposed amendment is Rule 23(f), which would authorize interlocutory appellate review of orders granting or denying class certification motions at the sole discretion of the U.S. Court of Appeals. A major problem class action litigants (both proponents and opponents) currently face is the "Russian Roulette" character of the class certification contest in the trial courts. Class certification decisions are all over the board, and skilled counsel can find a precedent for almost any proposition. Indeed, even in cases that are virtually identical, one can find decisions by some judges certifying a class and decisions by other judges holding that the class action requirements are not met.

For example, those who ask trial courts to certify class actions seeking economic damages with respect to allegedly defective motor vehicles almost always cite Joseph v. General Motors Corp., 109 F.R.D. 635 (D. Colo. 1986). There, a U.S. district court judge certified a Colorado class of current and former owners of 1981 Cadillacs equipped with an allegedly defective engine. The trial court concluded that claims for breach of express warranty, breach of implied warranty, strict liability, and negligence could be brought on a classwide basis. This conclusion was reached on the basis of a liberal interpretation of the Rule 23 requirements, which brushed aside General Motors' argument that a class trial would be unworkable because various aspects of the putative class members' claims would succeed or fail based on individualized evidence.

Joseph was just one of over twenty putative class action lawsuits filed around the country in the mid-1980s with respect to this same Cadillac defect allegation. In more than half of those cases, class certification motions were denied. For example, the district court judge in Lebovitz v. General Motors Corp., Civ. A. No. 82-0612 (W.D. Penn. Nov. 2, 1982) heard essentially the same arguments as were raised in Joseph. That court, however, refused to certify a class action on the grounds that "[t]he determination of which automobiles, if any, failed to meet a minimally acceptable standard of quality would require inquiry into the performance and service history of each automobile . . . . Obviously, such issues can only be addressed on a vehicle-by-vehicle basis, and the resolution of such issues with respect to one particular vehicle would not resolve those issues with respect to any other automobile." (Slip Op. at 5.)

The Joseph and Lebovitz decisions are virtually impossible to reconcile. Two different judges applied the same class certification rule to essentially the same record, yet reached opposite conclusions. Any experienced automobile class action lawyer knows about these two decisions, and understands their lesson: class action litigation is a crapshoot.

The class action bar needs an effective mechanism to reduce this unpredictability among the district courts. Currently, there is a perception among class action lawyers that virtually any putative class action has at least some chance of being certified. This encourages the filing of ill-conceived "long-shot" class actions, and forces defendants to seriously consider settling even those putative class actions that, objectively speaking, should fail.

The appellate process serves to both correct erroneous rulings in individual cases and promote clarity and uniformity in the handling of future cases. Currently, however, it is almost impossible to obtain appellate review on an interlocutory basis of federal district court orders granting or denying class certification motions.

To the extent that class certification orders do receive appellate review, it usually comes pursuant to 28 U.S.C. § 1291, after a final judgment has been rendered. But few litigants are in a position to endure a full trial before challenging what they view as an erroneous class certification ruling. Chief Judge Posner's recent observation about the practical inability of class action defendants to appeal orders certifying class actions is correct. See In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir.), cert. denied, 116 S.Ct. 184 (1995). The certification of a class action can create such a huge financial threat to the defendant against whom a class has been certified that the defendant comes under immense pressure to enter into what Judge Friendly has called a "blackmail settlement" before trial. Id. at 1298 (quoting Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973)). A defendant simply cannot take the risk of enduring a classwide trial, possibly being hit with a massive adverse judgment, and staking its financial future on the hope that the Court of Appeals will eventually reverse the class certification ruling.

The same is true on the other side of the fence. A plaintiffs' lawyer who has failed to persuade the district court to grant his class certification motion has little

financial incentive to try his case as an individual action, hoping that the Court of Appeals will eventually reverse the denial of class treatment, thus allowing him to go through the whole process again on behalf of a class.

In short, deferring appellate review of a possibly erroneous class certification decision until after trial is not a realistic option for most litigants. As a result, the district court's ruling usually is dispositive, and leads directly to either a pro-plaintiff or pro-defendant settlement.

Under current law, there are only two ways for a litigant to obtain appellate review of a district court's class certification order before trial: (1) an interlocutory review under 28 U.S.C. § 1292(b), or (2) a writ of mandamus. But each of these routes has intentionally been made difficult, with the result that attempts to obtain pre-trial review of class certification decisions rarely succeed.

A party who invokes the Section 1292(b) route must first persuade the district court judge who just ruled against him that his/her class certification order (1) involves a "controlling question of law," (2) offers "substantial ground for difference of opinion" as to its correctness, and (3) if immediately appealed would "materially advance the ultimate termination of the litigation." *Id.* Even if the party persuades the district court to certify the order for interlocutory appeal, it must then hope the Court of Appeals will accept the appeal.

As a practical matter, this tactic rarely succeeds. In earlier hearings of this Committee, some commenters who oppose proposed Rule 23(f) suggested that interlocutory appellate review of class certification rulings already is readily available. These assertions were not supported by any hard data. Therefore, I searched the LEXIS database to see how many U.S. Court of Appeals decisions I could find over the last ten years that reflected interlocutory review of class certification decisions. I do not represent that my search techniques were foolproof; decisions do not always

fall into neat categories and it is possible that some decisions were not written in such a way as to be captured by my LEXIS searches. Nevertheless, the decisions one would expect to find (such as Rhone-Poulenc, Castano, etc.) were pulled up by my search and I am reasonably confident that my methodology gives an accurate picture of the frequency with which the kinds of reviews we are considering occur.

My LEXIS search found only 15 decisions since January 1, 1987 in which a U.S. Court of Appeals reviewed the propriety of a district court's class certification order pursuant to 28 U.S.C. § 1292(b). Attachment A to my testimony is a chart identifying these cases. I invite others to scrutinize this list and add any decisions I may have missed. Nevertheless, I think all would agree that fifteen decisions over a ten-year period is a small number, indicating that few class certification orders receive review pursuant to the Section 1292(b) device.

Of course, one important limitation in the availability of the Section 1292(b) device is that the district court must certify the class certification order for interlocutory review. The only way the Court of Appeals presently can, in its sole discretion, review a class certification ruling is to grant a petition filed pursuant to the All Writs Act, 28 U.S.C. § 1651, seeking a writ of mandamus that directs the district court to rescind its class certification order. By design, this is an extraordinary mechanism. To succeed, the litigant must persuade the Court of Appeals (1) that the challenged class certification order would not be effectively reviewable at the end of the case, and (2) that the class certification order "so far exceed[s] the proper bounds of judicial discretion as to be legitimately considered usurpative in character, or in violation of a clear and indisputable legal right, or, at the very least, patently erroneous." Rhone-Poulenc, 51 F.3d at 1295.

Perhaps because this is such a difficult standard to meet, few litigants have even attempted the mandamus route. I found only eleven instances over the last ten years in which a litigant even filed a petition for writ of mandamus with respect

to a class certification order. A list of the published decisions responding to such petitions is attached hereto at Attachment B. (Again, I would invite others to review this list and supplement it if necessary.)

Of these petitions, I found only **three** that succeeded. In other words, the U.S. Courts of Appeals have reviewed the propriety of a class certification order pursuant to the mandamus device only three times in the last ten years: (1) In re Temple, 851 F.2d 1269 (11th Cir. 1988); (2) In re Rhone-Poulenc Rorer Corp., 61 F.3d 1293 (7th Cir.); and (3) In re American Medical Systems, 75 F.3d 1069 (6th Cir. 1996). In each instance, the Circuit Court reversed an order granting class certification.

These were clearly exceptions to the rule. More typical was the decision of the Third Circuit in In re School Asbestos Litig., 921 F.2d 1338 (1990), in which the court emphasized the drastic nature of the mandamus remedy, noted the ability of a litigant to seek interlocutory review under Section 1292(b), and concluded that "we will not employ mandamus in this case to circumvent" that mode of appeal. Id. at 1342.

Thus, by my count, there have been only **18** occasions over the last decade in which a federal Court of Appeals has issued a published decision reviewing the propriety of a district court's class certification order on an interlocutory basis. Yet, according to the current edition of Newberg on Class Actions, there have been nearly 900 class certification rulings in the federal courts since January 1, 1987.<sup>3</sup> Thus, the rate of interlocutory appellate review of class certification decisions has been less than **2 percent**.

Proposed Rule 23(f) provides a needed mechanism to open the doors of the U.S. Courts of Appeal to class action litigants on both sides of the fence. I want to emphasize that both proponents of class actions and opponents of class actions

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<sup>3</sup> See 6 Herbert B. Newberg & Alba Conte, Newberg on Class Actions, Checklist 1 (1992 and 1996 Supp.) (this number includes settlement classes).

would benefit from this rule. The assertion by some commenters that facilitating interlocutory review would only help defendants is not borne out by the evidence. Indeed, **three** of the Section 1292(b) appeals and **four** of the mandamus petitions on my list were filed by putative class plaintiffs seeking to reverse orders denying class certification.

In short, proposed Rule 23(f) would allow the Courts of Appeal to identify those class certification rulings that present issues worthy of appellate review and accept those rulings on an interlocutory basis. I therefore strongly recommend the adoption of the proposed rule.

That said, I would urge the Committee to delete the language in the Advisory Committee notes that purports to instruct the Courts of Appeal to grant permission to appeal "with restraint" and only "when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation." Similarly, the recommendation that permission to appeal be denied "when the certification decision turns on case-specific matters of fact and district court discretion" should be dropped. It is premature for this Committee to instruct the Courts of Appeal, at the outset of this proposed new era of enhanced appellate opportunity, as to when they should and should not entertain appeals. Instead, the different Courts of Appeal should be free to examine requests for interlocutory appeal on a case-by-case basis, and exercise their jurisdiction as they think appropriate.

I also would like to speak today in favor of including within the Advisory Committee notes to proposed Rule 23(b)(3) a discussion of the "classwide proof" requirement. Several commenters have asked the Committee to amend Rule 23(b)(3) itself to direct district courts to grant certification only if it finds that "*the evidence likely to be admitted at trial regarding the elements of the claims for which certification is sought is substantially the same as to all class members.*" This proposal seeks to

incorporate within the text of Rule 23 the fundamental message of the Courts of Appeal in four recent landmark decisions -- Castano, American Medical Systems, Georgine and Andrews. The message of these decisions is that district courts need to closely examine the evidence that would be presented with respect to the proposed class claims to determine whether it uniformly applies to the class or, instead, is individualized.

In Castano, the Fifth Circuit reversed an order certifying a class because the trial court "did not . . . consider [] how a trial on the merits would be conducted" and did not take account of the fact that the proof involved in the individual class members claims would differ.<sup>4</sup>

In American Medical Systems, the Sixth Circuit issued a writ of mandamus reversing certification of a class of persons who alleged injuries attributable to allegedly defective penile implants.<sup>5</sup> The court concluded that the district court had failed to consider how the case could be tried on a class basis, particularly given the fact that there were several types of penile implants at issue, whose defectiveness could only be proven through the use of different evidence.<sup>6</sup>

In Georgine, the Third Circuit rejected a class certification order stemming from a process in which the trial court failed to consider how the matter would be tried and therefore failed to recognize that the class "was a hodgepodge of

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<sup>4</sup> Castano v. American Tobacco Co., 84 F.3d 734, 749 (5th Cir. 1996).

<sup>5</sup> In re American Medical Sys., Inc., 75 F.3d 1069, 1083-86 (6th Cir. 1996).

<sup>6</sup> Id. at 1082 ("[W]e know from the amended complaint that each plaintiff used a different model, and each experienced a distinct difficulty . . . . These allegations fail to establish a claim typical to each other, let alone a class.").

factually as well as legally different plaintiffs" whose claims could not be tried *en masse*.<sup>7</sup>

In Andrews, the Eleventh Circuit found that a trial court had abused its discretion by certifying classes without adequately considered how the case would be tried and the variations in the proof that would necessarily be presented.<sup>8</sup>

These four recent appellate decisions, plus several others from earlier years,<sup>9</sup> serve to remind the district courts of the importance of carefully examining, in the context of class certification motions, whether the plaintiffs' and defendant's proposed evidentiary showings will speak simultaneously to the claims of all class members. If they do not, the case is not a good candidate for class treatment.

As I indicated a moment ago, several commenters have suggested that Rule 23(b)(3) be amended to explicitly incorporate the "classwide proof" requirement. In response, some Committee members have expressed reluctance to change the rule in this manner, perhaps in the belief that this requirement so obviously is incorporated within the commonality, typicality and predominance requirements that no additional statement is necessary.

Although some Committee members may view the "classwide proof" requirement as reflecting settled law, not all district courts (and certainly not all practitioners) appear ready to embrace this concept. Although I certainly hope that the recent series of appellate decisions encouraging more rigorous scrutiny of class

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<sup>7</sup> Georgine v. Amchem Prods., Inc., 83 F.2d 610, 632 (3d Cir. 1996), cert. granted, 117 S. Ct. 379 (1996).

<sup>8</sup> Andrews v. American Tel. & Tel. Co., 95 F.3d 1014, 1024-25 (11th Cir. 1996).

<sup>9</sup> See, e.g., Walsh v. Ford Motor Co., 807 F.2d 1000 (D.C. Cir. 1986) (vacating order certifying class on grounds that, *inter alia*, trial court had failed to consider how varied the proof of liability would vary among class members), cert. denied, 482 U.S. 915 (1987).

action candidates will move all district courts toward the "classwide proof" test, I am not convinced that it will anytime soon. First, not all Circuit courts have spoken to this issue, and so it is not clear that the standard enunciated in American Medical Systems and the other cases will be repeated with equal vigor in all courts. Second, there are enough published class certification decisions out there that take a loose approach to the class certification inquiry that the long-term applicability of these decisions to new class certification debates is unclear; clever counsel may well persuade individual trial court judges that American Medical Systems and similar decisions should be confined to their facts.

Therefore, should the Committee conclude not to include the classwide proof requirement within the text of Rule 23(b)(3) itself, I propose that it at least be included in the Advisory Committee notes that accompany the new amendments to that Rule. The discussion of the proposed "maturity" factor within Rule 23(b)(3) strikes me as an appropriate place to mention the classwide proof requirement.

The proposed new Factor (C) within Rule 23(b)(3) directs the district courts to consider, *inter alia*, "the extent, nature, and maturity of any related litigation involving class members." The currently proposed notes declare that examining the "maturity" of the claims asserted allows a court evaluating the feasibility of class treatment to take into consideration "experience gained in completed litigation of several individual claims." Perhaps the most important question for the court to ask, when looking at other trials of the claims proffered for class treatment, is whether the evidence that was admitted at trial regarding the elements of those claims was highly individualized (in which case class treatment is inappropriate) or, conversely, would be applicable to all members of the class sought to be certified (in which case class treatment may be warranted).

Therefore, I would propose adding to the Advisory Committee notes discussing new Factor (C) the sentence identified in italics:

The more important change authorizes consideration of the "maturity" of related litigation. In one dimension, maturity can reflect the need to avoid interfering with the progress of related litigation already well advanced toward trial and judgment. When multiple claims arise out of dispersed events, however, maturity also reflects the need to support class adjudication by experience gained in completed litigation of several individual claims. If the results of individual litigation begin to converge, class adjudication may seem appropriate. Class adjudication may continue to be inappropriate, however, if individual litigation continues to yield inconsistent results, or if individual litigation demonstrates that knowledge has not yet advanced far enough to support confident decision on a class basis. In addition, if experience litigating similar claims on an individual basis demonstrates that the evidence likely to be admitted at a proposed class trial regarding the elements of the claims for which certification is sought is not substantially the same as to all class members, class certification would not be appropriate. Conversely, if such experience shows that classwide proof of the elements of the claims can be presented, then class certification may be warranted.

Again, I thank the Committee for this opportunity to discuss the class action device.

INTERLOCUTORY APPEALS OF CLASS CERTIFICATION RULINGS, 1987 - 1996

Case	Proposed Class	Appeal by		Class Certif.		Denials of Certif.		Issues
		Plf.	Def.	Aff'd	Rev'd	Aff'd	Rev'd	
1. <i>Andrews v. AT&amp;T Co.</i> , 95 F.3d 1014 (11th Cir. 1996)	900-number program users		✓		✓			Manageability
2. <i>Bohannon v. Georgia Farm Bureau Mut. Ins. Co.</i> , 847 F.2d 740 (11th Cir. 1988)	Purchasers of no-fault insurance policies		✓		vacated			Individualized analysis required to determine coverage
3. <i>Castano v. The American Tobacco Co.</i> , 84 F.3d 734 (5th Cir. 1996)	Nicotine-dependent claimants		✓		✓			Commonality
4. <i>Central Wesleyan College v. W.R. Grace &amp; Co.</i> , 6 F.3d 177 (4th Cir. 1993)	Colleges and universities with asbestos in buildings		✓	✓				Adequacy of class representative, commonality, manageability
5. <i>Eddleman v. Jefferson County, Ky.</i> , 1996 U.S. App. LEXIS 25298 (6th Cir. 1996)	Arrestees for minor offenses subjected to strip searches		✓	✓				Differences in severity of facts, delay in seeking class certification
6. <i>Forbush v. J.C. Penney Co., Inc. Pension Plan</i> , 994 F.2d 1101 (5th Cir. 1993)	Members of four pension plans	✓					✓	Standards for (b)(2) class
7. <i>Griffin v. Dugger</i> , 823 F.2d 1476 (11th Cir. 1987), cert. denied, 486 U.S. 1005 (1988)	Employees/applicants to Florida Dept. of Corrections		✓				vacated	Standing and adequacy of class representative; application of <i>General Tel. Co. v. Falcon</i>
8. <i>Henson v. East Lincoln Township</i> , 814 F.2d 410 (7th Cir. 1987), cert. dismissed, 506 U.S. 1042 (1993)	Local welfare departments						✓	Requirements for certification of defendant class under 23(b)(2)
9. <i>Hudson v. Delta Air Lines, Inc.</i> , 90 F.3d 451 (11th Cir. 1996)	Delta retirees injured by alleged ERISA violations		✓				✓	Commonality, typicality

Case	Proposed Class	Appeal by		Class Certif.		Denials of Certif.		Issues
		Plif.	Def.	Aff'd	Rev'd	Aff'd	Rev'd	
10. <i>Kirkpatrick v. J.C. Bradford &amp; Co.</i> , 827 F.2d 718 (11th Cir. 1987), cert. denied, 485 U.S. 959 (1988)	Limited partners in investment fund	✓					✓	Adequacy of class representative; improper consideration of merits of federal claims
11. <i>Larkin v. Pullman-Standard Div., Pullman, Inc.</i> , 854 F.2d 1549 (11th Cir. 1988), vacated, 493 U.S. 929 (1989)	Employees alleging racial discrimination		✓	✓				Standing of named plaintiffs
12. <i>Stott v. Haworth</i> , 916 F.2d 134 (4th Cir. 1990)	Government employees alleging adverse action based on political affiliation		✓		✓			Commonality
13. <i>Tucker v. Phyfer</i> , 819 F.2d 1030 (11th Cir. 1987)	Juvenile prison inmates	✓					✓	Standing of named plaintiff throughout litigation
14. <i>Valentino v. Carter-Wallace, Inc.</i> , 97 F.3d 1227 (9th Cir. 1996)	Individuals injured by epilepsy drug		✓			✓		Commonality, superiority
15. <i>Watson v. Shell Oil Co.</i> , 979 F.2d 1014 (5th Cir. 1992)	Persons injured in explosion at Norco, La. refinery (18,000 plaintiffs)		✓	✓				Amount in controversy, numerosity of subclass, commonality, superiority

## MANDAMUS PETITIONS SEEKING REVIEW OF CLASS CERTIFICATION RULINGS, 1987 - 1996

Case	Proposed Class	Petition by		Mandamus Granted		Mandamus Denied		Issues/Comments
		Ptlf.	Def.	Class Decertified	Class Certified	Certification Sought	Decertification Sought	
1. <i>In re Allied Signal, Inc.</i> , 915 F.2d 190 (6th Cir. 1990)	Ohio asbestos plaintiffs		✓				see note	Mandamus sought regarding "ad hoc national coordinating committee" and procedures for considering class certification motions
2. <i>In re American Med. Sys., Inc.</i> , 75 F.3d 1069 (6th Cir. 1996)	Penile prosthesis implantees		✓	✓				Multiple errors
3. <i>Beasley v. Romer</i> , 1995 U.S. App. LEXIS 32704 (10th Cir. Nov. 24, 1995)	Not specified	✓					✓	Appeal dismissed on jurisdictional grounds
4. <i>In re Breast Implant Litig.</i> , 1992 U.S. App. LEXIS 16257 (6th Cir. May 22, 1992)	Not specified; challenged by intervenor-plaintiffs	✓					✓	Mandamus not warranted
5. <i>Butler v. Fields</i> , 1995 U.S. App. LEXIS 149 (10th Cir. Jan. 6, 1995)	Oklahoma prison inmates	✓					see note	Pro se plaintiff appealing dismissal of claims and moving for class certification and mandamus
6. <i>In re Catawba Indian Tribe of S.C.</i> , 973 F.2d 1133 (4th Cir. 1992)	Occupants of disputed land ((b)(1)(B) class)	✓					✓	Mandamus not warranted
7. <i>In re Datapoint Corp.</i> , 1996 U.S. App. LEXIS 31119 (Fed. Cir. 1996)	Manufacturers, vendors and users of products infringing petitioner's patents	✓					✓	Mandamus not warranted (writ sought in order to require district court to consider motion for certification denied as premature)

Case	Proposed Class	Petition by		Mandamus Granted		Mandamus Denied		Issues/Comments
		Ptff.	Def.	Class Decertified	Class Certified	Certification Sought	Decertification Sought	
8. <i>In re NLO, Inc.</i> , 5 F.3d 154 (6th Cir. 1993)	Employees of radium processing facility exposed to radioactive materials		✓				✓	Mandamus not warranted
9. <i>In re Rhone-Poulenc Rorer Corp.</i> , 61 F.3d 1293 (7th Cir), cert. denied, 116 S. Ct. 184 (1995)	Hemophiliacs who contracted AIDS from products manufactured by defendants		✓	✓				Irreparable harm, differences in state law, manner of dividing issues for trial risked inconsistent jury findings
10. <i>In re School Asbestos Litig.</i> , 921 F.2d 1338 (3d Cir. 1990)	School districts nationwide with asbestos-in-buildings claims		✓				✓	Under 3d Circuit precedent, mandamus not appropriate for review of class certification
11. <i>In re Temple</i> , 851 F.2d 1269 (11th Cir. 1988)	(b)(1)(B) class for asbestos-related injuries	✓		✓				Lack of adversarial proceedings leading to finding of limited fund; propriety of finding commonality as to future claims

#2052

**MCCUTCHEN**  
MCCUTCHEN, DOYLE, BROWN & ENERSEN, LLP

RECEIVED  
1/14/97

96-CV-128

ENCLOSURE MEMO

FEDERAL EXPRESS

Date: January 13, 1997

Direct: (415) 393-2082  
dpickett@mdbe.com

To: Peter G. McCabe  
Secretary  
Committee on Rules of Practice and Procedures  
Administrative Office of the United States Courts  
One Columbus Circle, N.E.  
Washington, DC 20544

From: Donn P. Pickett

Re: Hearings on Proposed Rule 23 Amendments

Enclosed: Enclosed is my statement for Friday's hearing on proposed Rule amendments.

ATTORNEYS AT LAW

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<http://www.mccutchen.com>

San Francisco  
Los Angeles  
San Jose  
Walnut Creek

Palo Alto  
Washington, D.C.  
Taipei

**Statement of Donn P. Pickett**  
McCutchen, Doyle, Brown & Enersen  
On Proposed Amendments to Federal Rule of Civil Procedure 23  
Before the Committee on Rules of Practice and Procedure  
of the Judicial Conference of the United States

January 17, 1997  
San Francisco, California

I want to thank the Committee for the opportunity to speak on the proposed amendments to Rule 23 and commend its members for the product of their hard work. I appear in support of each proposed amendment, but wish to limit my comments to some overall observations on the evolution of class actions and some specific thoughts regarding, first, proposed amendments 23(b)(3)(A) and (F) and, second, 23(c) and (f).

My statement is based on my experience at McCutchen, Doyle, Brown & Enersen -- specifically, over 20 years of litigation, primarily in antitrust and securities cases, including a number of antitrust and securities class actions. My comments in particular reflect some substantial, recent experience I have had representing the Eastman Kodak Company in a number of class actions in various jurisdictions around the country.

The creation of Rule 23(b)(3) classes involved an attempt to balance two fundamental interests: On the one hand, the concept was designed to create incentives and procedures which would permit and encourage the collective enforcement of relatively small legal claims which would be difficult, if not impossible, to pursue

individually. On the other hand, the class action device was not intended to distort the traditional function of the judicial system in resolving concrete disputes between actual litigants.

The history of class actions over the past 30 years reveals a significant number of instances in which, in practice, this balance has not worked. Through abuse of class action procedures, counsel have been able to exceed and transgress the traditional role of the judicial system. As a result, reform of Rule 23 is necessary to define more tightly the role of and limitations on class actions. In my view the proposed amendments help achieve that goal.

Additional limitations are necessary because the current rule does not react to the principal cause of class action abuse: the absence of *accountability* -- or to put it another way, the absence of the natural limitations on advocacy which clients bring to litigation. None of the 1966 framers of Rule 23 would have predicted the explosion of (b)(3) actions, in both number and kind. Most plaintiffs' class action attorneys have plenty of integrity and rightly pursue class claims. But, by definition, plaintiffs' counsel have a built-in conflict between the prospect of fees (often in the range of 30% or more of a settlement) and individual class members' recovery of damages. Moreover, fee awards based on time and effort create a disincentive to the most efficient prosecution of claims. In the end, plaintiffs' attorneys, not individual plaintiffs, necessarily control the

litigation -- from its filing, through its prosecution, to its resolution. Additional safeguards are necessary to curb those motivated by the inevitable conflicts.

The proposed amendments are designed to prevent a good deal of the abuse of the class action procedures. They recognize, in my view, the limitations of private litigation. All injustices cannot -- and should not -- be rectified. All litigation cannot -- and should not -- be pursued. Most class actions are justified and well-intentioned; but many, filed without regard to the limitations of our judicial system, result in serious costs to our social, economic and justice systems: Class actions in which individual class members receive nominal recoveries and the attorneys millions of dollars are not beneficial to society.<sup>1</sup> Class actions in which class members with million dollar individual claims would not pursue their claims but for a class action are not beneficial. Class actions which exponentially multiply potential damages to defendants, especially where there is no realistic alternative to settlement, have serious detriments as well. The proposed amendments react to these abuses and provide guidance to the courts who will wrestle with these trends and issues in the decades to come.

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<sup>1</sup> In *R&D Business Systems, et al. v. Xerox Corp.* (E.D. Tex), I unsuccessfully opposed a class action settlement which netted almost \$35 million for plaintiffs' lawyers (for a little over one year's work) and only coupons for the class members. Not only did class members receive no cash, the coupons were restricted to purchases of Xerox equipment (not service) despite the fact the two groups certified in the class were (1) those who purchased Xerox equipment and (2) those who purchased Xerox service.

The Committee's proposals reflect a thoughtful, measured response to the use and abuse of Rule 23 since it was expanded in 1966. They will certainly aid courts, attorneys and litigants in correcting some of the class action problems that have arisen and should be adopted. However, I would hope that the Committee could take another look at Rule 23 and suggest some further reforms, particularly with respect to the issue of whether unnamed class members should be required to opt into a class, which would be the single most significant way to bring accountability back to the class action. The simple, but meaningful change of converting all Rule 23(b)(3) classes from opt-out to opt-in so that a certification order binds only those putative class members who choose affirmatively to enter the action (for example by amending Rule 23(c)(2), will promote the resolution of real disputes between live parties, restore accountability and eliminate many of the existing abuses of the class action mechanism.

Now to some of the Committee's specific proposals. First, I want to comment on proposed amendments 23(b)(3)(A) and (F). I've read criticism that the standards are too vague or that they create the Goldilocks problem of finding the class action that is not too hot, not too cold, but just right. Neither criticism survives under scrutiny. It is the nature of Federal Rules that they provide general guidelines to be applied in individual cases. Proposed subparagraph (A) provides a clear general admonition that discourages, but does not forbid, certification when individual plaintiffs

can as a practical matter pursue their claims individually -- and there is less reason than ever in this litigious society to believe individual claims will not be pursued.<sup>2</sup> Proposed subparagraph (F) gives judges focused discretion to determine whether in particular cases there is sufficient value to individual plaintiff's claims to warrant the burdens of class litigation. How much more guidance should or could be given? The vector forces set in play by these two subparagraphs are more than enough to supply the necessary restraints to the bar and guidance to the Courts.

Nor is there any sin in suggesting that class actions -- to be a superior method of fair and efficient adjudication -- should be in the middle range between aggregation of million dollar claims and aggregation of trivial claims. Both limitations are rational, responding to differing concerns. This proposal guides, but does not shackle, the determination of superiority in individual cases.

My final comment concerns the interplay between proposed paragraph (c) and paragraph (f), both of which I support. The "[a]s soon as" standard in existing (c) too

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<sup>2</sup> For example, in a class action in which I currently represent Kodak, *Kopies, Inc. v. Eastman Kodak Co.*, No. C 94 0524 (N.D. Cal.), the class of all end users of Kodak copiers since December, 1989 includes several Fortune 500 class members, whose individual damages were allegedly in the millions of dollars each. None had chosen to pursue its claims even though it was clearly practicable to do so.

often pressures the District Court into a premature consideration of the superiority factors. In addition, it tends to ease the burden on plaintiffs to authorize court reliance on assumptions regarding superiority rather than evidence. For example, in *Kopies, Inc. v. Eastman Kodak Co.*, No. C 94 0524 (N.D. Cal.), former Judge Caulfield certified a billion dollar class based on representations by plaintiffs that they would be able to create a viable damage methodology which could measure both common impact and individual damages, despite her stated reservation that the task "will not be as simple as plaintiffs contend." Yet for purposes of certifications, the court "assume[d] that the plaintiffs' allegations are true." Now, two and one-half years later, that plaintiffs have revealed an actual damage methodology, Kodak is in the process of preparing a decertification motion to demonstrate the falsity of plaintiffs' allegations. Yet reliance on a subsequent motion to decertify after the evidence is gathered is by no means an adequate safeguard. Rather, the District Court should not have the "as soon as" gun to its head and decide certification when the evidence about the relevant factors is ripe.

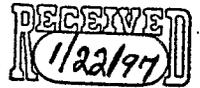
With the timing of new paragraph (c) in place, and the class certification decision made on a full record, it makes all the more sense to allow the paragraph (f) discretionary interlocutory appeals. If the District Court makes the certification issue on a full record, the Court of Appeals, when it takes an appeal, will be able to make a more meaningful decision. The interlocutory appeals will have the additional benefits of providing potential guidance to an unsuccessful plaintiff whose individual claims are not

worth pursuing, giving recourse to a defendant facing a certified class with potential billion dollar damages, and creating more law in a crucial area of jurisprudence. The current reliance on mandamus provides none of those benefits. The criticisms that the appellate courts will be overloaded or that delays will ensue do not come close to overriding these benefits and, in any event, are minimized by the discretionary nature of the appeal. In fact, my only criticism of the proposal is that the current Committee notes unduly include a prediction that "Permission almost always will be denied when the certification decision turns on case-specific matters of fact and district court discretion." The truth is that certification decisions often turn on factual issues and, despite the inherent discretion underlying Rule 23, interlocutory appellate decisions in those cases will often be helpful to settle law or resolve huge claims. The current notes will result in arguments -- or even appellate decisions -- denying review in those cases. The discretion of the Courts of Appeals should remain unfettered by perceived restrictions found in this Committee note.

# 2056



Bank of America



96-CV-134

January 16, 1997

Bank of America NT&SA  
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Peter G. McCabe, Secretary  
Committee on Rules of Practice  
and Procedure  
Administrative Office of the  
United States Court  
1 Columbus Circle, N.E.  
Washington, D.C. 20544

Dear Mr. McCabe:

I enclose the testimony I intend to give tomorrow in San Francisco.

Very truly yours,

A handwritten signature in cursive script that reads 'James N. Roethel, Esq.'.

James N. Roethel  
Executive Vice President  
and General Counsel

Enclosure  
JNR/kf/155966

STATEMENT OF JAMES N. ROETHE  
EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL  
BANK OF AMERICA

January 16, 1997

Introduction

I wish to thank the Committee for the opportunity to present Bank of America's views on the proposed amendments to Rule 23. While I now hold the title of General Counsel of Bank of America, my background is as a commercial litigator--first as an associate and partner of the firm of Pillsbury, Madison & Sutro from 1971 to 1992, and then as Director of Litigation for the Bank for the last four years. In these roles, I have had extensive experience with the operation of Rule 23 in the real world.

-- The real world where a threatened large exposure--even on weak theories of liability--force rational corporations to spend substantial sums of money to settle class actions that often result in small or even de minimis awards to class members but large fees to their attorneys.

-- The real world where such settlements impose a hidden and massive tax on the average consumer who, eventually, must pay for them in price increases--in the Bank's case, higher fees for such things as checking accounts and higher interest for credit.

The real world is also a place where a good plaintiffs' lawyer knows that if he/she can just get a class certified and avoid summary judgment, a good payday for them is just around the

corner without a bothersome client standing in the way of a settlement.

These kinds of settlements were not the intended result of Rule 23. Nonetheless, as was well stated by the 5th Circuit in Castano v. American Tobacco Co., history teaches that:

- ... (C)lass certification magnifies and strengthens the number of unmeritorious claims...
- (The) aggregation of claims also makes it more likely that a defendant will be found liable and results in significantly higher damage awards.
- (Thus), class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low.

**Proposal For A New "Commonality of Evidence" Requirement in Rule 23(b)(3)**

In the Bank's view, courts' willingness over the years to certify classes has expanded well beyond the original intent behind enacting Rule 23. The frequent mass filings of certain "similar" cases (including mass tort cases originally thought not to be susceptible to class treatment) have too often resulted in court decisions containing unfortunate language expanding the use of the class mechanism on grounds that seem derived as much from the need to control crowded court dockets as from a reasoned analysis of the original intent of Rule 23. The result is many more class actions today than in the past.

Thus, for example, at year end 1993 there were 37 class actions pending against Bank of America for which legal fees (both external and internal) of \$10.2 million had been spent. At year end 1996, there were 65 class actions either pending, or which had been disposed of during the year, for which fees in excess of \$18.5 million had been spent. And once a class is certified, the pressures on the judge at trial to eliminate the requirement for individualized proof establishing each element of a cause of action with respect to each class member, is often overwhelming. That is clearly an unintended result of Rule 23 and unfair to defendants.

The Bank believes that some of the changes proposed by the Committee make modest improvements to deal with this problem. It would be better, however, if additional changes were made to make clear that the question of whether common issues of fact predominate over individual issues involves not only the question of whether a skilled plaintiffs' lawyer can state general, theoretical issues common to class members, but whether trial of the claims will require proof of substantially similar facts in the real world of an actual trial.

For this reason, the Bank supports the proposal that John Beisner of the O'Melveny & Meyers firm and John Martin, General Counsel of Ford Motor Company, made before the Committee at its recent hearings in Dallas. That proposal would expand the Rule 23(b)(3) requirements that (i) questions of law or fact common to the members of the class must predominate over questions affecting only individual members and (ii) a class action is superior to other available methods for the fair and efficient adjudication of the controversy, by specifically adding a requirement that:

- (iii) the evidence likely to be admitted at trial regarding the elements of the claims for which certification is sought is substantially the same as to all of the class members.

Let me explain with an example how this "common evidence" requirement would work.

Suppose a complaint alleges that the Bank's trust department purchased a real estate investment for thousands of personal trust accounts. The complaint alleges that the investment was speculative and the result of negligence. The appraised value of the real property underlying the investment has gone up modestly and the long-range prospects of the investments are good, but there is little present liquidity for selling the investment and the income generated to date has been scant. Plaintiffs assert that the matter should be handled as a class action, claiming that "common issues" predominated -- issues such as:

- (1) whether the Bank breached its duty of due care to trust beneficiaries by purchasing the investments? and,
- (2) whether the level of income obtained was adequate?

In the present environment, notwithstanding some of the recent helpful cases in the circuit courts, a court could well concentrate on the purported "commonality" of the "issues" raised by plaintiff to certify a class. In fact, such a case should not be tried as a class action under the original intent of Rule 23 as distinctly individualized proof would be required to address the primary issue in the case--the suitability of the investment for each individual trust. Among other things, individualized proof would be required to show the size of each trusts' assets, each trustors' particular investment objectives, the percent of

total trust assets in each trust represented by the challenged investment, the likely liquidation date of the trust assets, whether particular trust beneficiaries had the right, and in fact exercised the right, to direct the investment in question., etc. A "common evidence" requirement in Rule 23(b)(3) would help enforce that intent.

In short, in order to determine liability at trial, the evidence necessary to prove each individual claim would overwhelm evidence presented on the so-called common issues--i.e., the fact of the investment and its offering price and current value, all of which could likely be agreed to by stipulation. We believe that the focus on a motion for class certification has to be on the practicalities of how the evidence will come in at trial, if Rule 23's primary goal of bringing efficiency to the trial process is to be achieved.

In those cases where there are common questions that can be resolved together, but where at trial the evidence with respect to individual issues will predominate, coordination or use of multi-district proceedings is the proper procedural tool for efficiently managing the cases, not class certification.

**Balancing Probable Relief To Individual Class Members Against the Costs And Burdens of Class Litigation--a De minimis Rule**

The Bank strongly supports the new section (b)(3)(F), but is concerned that the Committee's proposed "Note" will limit the value of this amendment to cases involving only a few dollars recovery to individual defendants. Plaintiffs' counsel who have appeared before this Committee have argued that this new section should be rejected because of the beneficial deterrent effects of large awards or settlements which only modestly compensate individual class members. I would respond first by saying that a legislative intent to foster deterrence is simply not to be found

in the legislative history of Rule 23. The Committee's recognition of deterrence as a factor which can support class certification would involve the Committee in a legislative function which is improper under the Rules Enabling Act.

More importantly, years of actual experience has shown rather conclusively that most plaintiff's lawyers (not all) bring class actions not for deterrence purposes but rather to line their own pocketbooks. How else can one explain class action settlements where virtually all, or most, of the monetary benefit goes to the class attorneys rather than to the class members.

The Committee Note on the proposed amendments to Subdivision (b)(3) (at page 46) states that the median individual class recovery reported by a Federal Judicial Center study ranged from \$315 to \$528. Any practitioner in this area knows that many class actions result in far lower payments to class members. I personally have received settlement checks as part of class settlements that have been for pennies or just a few dollars. The cost to issue those checks must surely have exceeded the amounts I received. As counsel for a number of different defendants including Bank of America, I have also been party to class settlements where class members got small amounts (\$100 or less per class member) while class counsel received millions of dollars representing more than half of the total net payments from my clients. I agreed to those settlements for the very practical reason that I believed they were in the best interests of my client after giving consideration to the huge cost to prepare and try such a case (if certified as a class) and the large risk-weighted exposure to my client even where the probability of successfully defending the case on the merits seemed high. And the courts routinely approve these settlements when confronted by a settlement agreement concurred in by all parties to the action and a chance to remove a large, complex case from their docket.

Plaintiffs' counsel counter with the additional argument that Rule 23 and similar state statutes were specifically designed to address the situation where each individual class member's stake in a case is too low to justify bringing the action except in a representative capacity. They speculate that wrongdoers will receive windfalls and injured parties will not be compensated for a wrong. Once again, experience suggests that under the system as it is now applied, "injured parties" are not being compensated adequately. Rather, it is their attorneys who receive the bulk of class settlements. The cost and burden of class actions to industry, the courts and consumers generally (in the form of higher prices), would seem clearly to outweigh the benefits to putative class members where the amount they stand to collect in an action does not exceed some threshold amount.

Bank of America would thus recommend that the Committee go further than it has and amend proposed Section F of Rule 23(b)(3) to set a specific dollar limit--say \$100 per typical individual class member--below which maintenance of a class action would not be permitted.

In my experience many, if not most, of the arguably meritorious (many more are not meritorious) putative class actions I have seen filed that involve potential individual recoveries of amounts under \$100 per class member are the result of "systems errors" or "honest mistakes" rather than intentional conduct or fraud. I have also seen a number of situations where "systems errors" or "honest mistakes" have resulted in customers receiving a benefit which, of course, never gets repaid to the company. There is thus no strong policy reason precluding a bright line "de minimis" rule. And where actual fraud can be proved, there are mechanisms in the civil, criminal justice and regulatory arenas to punish the wrongdoers and even to obtain restitution and other forms of equitable relief to compensate injured members of the public.

The Bank also believes that the objections of plaintiffs counsel that proposed section F would require an impractical early determination of the merits in connection with a calculation of probable relief ignores the fact that courts generally consider the merits already in connection with predominance and superiority issues.

#### Interlocutory Appeals

Bank of America concurs in the Committee's proposal to permit discretionary interlocutory appeals of Rule 23 class certification motions but urges the Committee to remove from its proposed "Note" the commentary suggesting that such discretionary reviews be undertaken "with restraint." We would also urge the removal of the comments discouraging stays of trial proceedings pending such reviews. (Specifically, BofA recommends removal of the first two sentences of the last paragraph on page 55, and the last sentence of the first paragraph on page 56, of the Committee Note contained in the Preliminary Draft of Proposal Amendments dated August 1996.)

As was noted in the testimony in Dallas of John Martin, Ford's General Counsel, the Courts of Appeals are capable of determining whether to hear a matter. And since in many cases class certification itself forces a business to pay a large settlement rather than face the cost and exposure presented by even the most marginal class action, permitting an interlocutory appeal of a certification order may be the only way to avoid an unjust result.

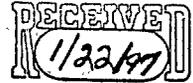
#### Settlement Classes

The Committee has proposed that settlement classes be permitted even where all of the Rule 23 requirements for certification of a class for discovery and trial may not exist. The issue of "settlement classes" is currently before the Supreme Court in the case of Georgine v. Amchem Products, Inc. Whether legislation on the subject will be necessary following the Supreme Court's decision in that case is an open issue. However, if settlement classes different from fully certified classes are to be permitted, the differences should be clearly set forth in the Rules so that defendants who voluntarily seek to settle and stipulate to a conditional settlement class for purposes of seeking court approval of the settlement, will not be prevented or prejudiced in any way if settlement falls apart or is not approved by the Court. At a minimum Rule 23, or the commentary, should contain explicit language giving either party the right to withdraw from a stipulation concerning the formation of a settlement class and to thereafter contest class certification to the fullest extent and without facing any adverse presumptions.

4150414.WP/JNR:sld

#2054

Procter & Gamble



JAMES J. JOHNSON  
Senior Vice President and General Counsel

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Fax: (513) 983-2024

96-CV-135

January 15, 1997

Secretary,  
Committee on Rules of Practice and Procedure  
Administrative Office of the U. S. Courts  
Washington, D. C. 20544

Dear Sir:

Attached is my Statement on proposed amendments to the Federal Rules of Civil Procedure, Rule 23 for the January 17, 1997 hearing to be held in San Francisco, California.

Copies of the Statement have been sent directly to the members of the Civil Rules Advisory Committee.

Sincerely,

James J. Johnson

Attachment

cc: (w/encl.): Civil Rules Advisory Committee

STATEMENT OF JAMES J. JOHNSON  
SENIOR VICE PRESIDENT AND GENERAL COUNSEL  
THE PROCTER & GAMBLE COMPANY  
REGARDING PROPOSED AMENDMENTS TO  
FEDERAL RULE OF CIVIL PROCEDURE 23  
CLASS ACTIONS

Before the Committee on Rules of Practice and Procedure  
Judicial Conference of the United States  
San Francisco, California  
January 17, 1997

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I appreciate this opportunity to appear before the Committee to describe some of Procter & Gamble's class action litigation experience, and to make some observations about why class action reform is so essential to consumer products companies like P&G. The proposed amendments to Rule 23 are important, indeed critical, reforms and should be adopted. However, additional reforms are also needed, and I hope to be able to make a case for them here today. In particular, I urge the Committee to amend Rule 23 so that class action procedures will be available only to those members of a putative class who opt in to the action.

We are one of the largest consumer goods manufacturers in the United States. The company markets more than 300 brands to nearly five billion consumers in over 140 countries. More than 95% of U.S. households have Procter & Gamble products on hand. We spend approximately \$1.3 billion dollars on R&D each year, and are the largest advertiser in the U.S. Like all manufacturers, many legal issues are associated with the sale and use of our products. The two main categories I want to discuss as they relate to class actions are: (1) advertising and labeling issues -- the supportability of performance claims -- and (2) product liability issues.

There are elaborate legal mechanisms in place outside of class action litigation that are designed to resolve these legal issues. I believe it is important to understand them, in a general way, because they put the need and appropriateness of class action lawsuits, an extraordinary procedure, in proper context. I want to focus particularly on the mechanisms in the advertising/labeling area because that's where we devote considerable resources.

About 50% of our product volume is regulated by the FDA, from pharmaceuticals, to cosmetics, to foods, to over-the counter products like Crest toothpaste. In many cases what we say on the label, and indirectly in advertising, must be approved by the FDA or follow FDA guidelines. As for labels for other products, and for advertising generally, there is an elaborate system to deal with actual disputes. The principal disputes are among competitors, as competitors in the marketplace closely monitor other competitors' claims. For obvious reasons, no manufacturer will permit a competitor to make performance comparisons that cannot be supported. Competitors are aggressive and well financed adversaries with high economic stakes in accurate advertising.

These disputes come in the form of private and governmental legal and regulatory actions. Last year Procter & Gamble brought, or was involved in, 20 such challenges. In many cases these disputes are resolved without litigation or arbitration, based on a voluntary exchange of supporting information.

Layered on top of this are occasional challenges by state Attorneys General or by the FTC, and even challenges by the television networks who share legal responsibility for ads and who have in-house staff reviewing claim support by advertisers.

In cases where an individual consumer may be personally disappointed in the performance of our product, P &G has a "no questions asked" refund policy with an 800-line number on the package. We typically give about 1½ million dollars worth of returns, or coupons for another product, every year.

Based on my 23 years experience, I can say that the multi-level, elaborate system in place works. This is not an area of law crying out for additional multiple levels of dispute resolution.

With that background, let me turn now to two of our many class action experiences. These are on opposite ends of the spectrum, sort of "bookends" to the issue. On the one hand is a typical case in the advertising/labeling area where the legal issues were narrow, the alleged individual damages were minor, but the potentially affected class was huge. At the other end is a case where the legal and factual issues were extremely complex, and the potential individual damages could be large.

First, the advertising/labeling issue. Attached as Exhibit No. 1 is a letter dated December 14, 1882, from a Procter & Gamble chemist to the state of New York

responding to a challenge to our current trademark, the claim that Ivory soap is “99 44/100 Pure.”® The claim appeared in an advertisement using the trademark in an 1882 edition of the *New York Independent*, a newspaper. The New York authorities accepted an independent chemical analysis that the product was in fact “99 44/100%” pure soap and dropped the challenge. The phrase was subsequently registered as a trademark.

Why was it that Ivory was 99 44/100%, and not 100% pure? Because the manufacturing processes 110 years ago usually introduced some minor impurities that were not part of the chemical reaction to make soap. Today’s sophisticated manufacturing methods ensure that there are virtually no unintended impurities. We could claim today that Ivory soap is 100% pure. But why would we? The phrase “99 44/100% Pure”® is a strong trademark that has been positively associated with our Ivory brand for 114 years. I doubt that there is anyone in this room today who has not heard the phrase, “99 44/100% Pure.”® But, believe it or not, the same claim ultimately led to a class action lawsuit in 1993 in Illinois.

The Soap Cases. In March of 1993, consumer fraud class actions alleging deceptive advertising and labeling of soap products were brought in Illinois state court against the ten leading soap manufacturers in the U.S. The alleged class covered all U.S. consumers of soap products, potentially hundreds of millions of people. P &G was the sole defendant in three cases. All alleged deceptive advertising and labeling. The principal case alleged that Ivory bar soap was not “99 44/100% Pure”® as claimed on the labeling and advertising. The other two actions,

one against Ivory liquid soap, and a third against Safeguard liquid soap, alleged these detergent-containing products simply were not "soap" -- that is, an alkali-fatty acid compound, that your great grandparents made from lard.

Setting aside the fact that most people call a bar of soap . . . a bar of soap, the Food and Drug Administration guidelines specifically state that all of these products may be identified as "soap," thereby precluding these silly claims as a matter of law. And the attack on the "99 44/100% Pure"® advertising also was legally baseless. But our product's century-old reputation was purposefully put at risk with an immediate press release by the plaintiff's lawyers.

The sole named case "plaintiff" was a paralegal working in the office of counsel for the class, who had purchased all the products on two trips to the market just before the cases were filed. In the nationwide class action against P&G, Plaintiffs requested relief in the form of refund of costs, punitive damages, attorneys' fees and corrective advertising and labeling.

Because Illinois practice permitted consideration of the merits before class certification, P&G promptly filed a motion for Summary Judgment in December of 1993. Summary Judgment was granted in January 1995, as to liquid Ivory on the "soap" claim based on the FDA regulation. Plaintiffs voluntarily dismissed the similar case against liquid Safeguard in March of 1995. Finally, to avoid the possibility of continuing adverse publicity involving our "99 44/100% Pure"® trademark, where our defenses were factual, P&G settled the Ivory bar soap case in

November 1995, for a nominal amount. We were not going to take even a minimal risk of another news article reporting the challenge to the purity of our Ivory product.

The net cost to us to defend these actions was about \$500,000 in attorneys' fees and settlement costs plus hundreds of hours of time for internal lawyers and business people.<sup>1</sup> And a bar of soap is still a bar of soap, and Ivory is still "99 44/100% Pure."<sup>®</sup>

The Rely Cases. Now let me turn to the other bookend -- the product liability claims against our Rely tampon products. This example is particularly instructive because a decision on class certification was delayed (ultimately to be denied) and, fortuitously, the litigation proceeded as individual cases in the meantime. It demonstrates why individualized claims should not be tried as class actions.

The story begins in the mid 1970s when P&G scientists developed a revolutionary new absorbent product for use in tampons made from cross-linked cellulose fibers. This material provided high levels of absorbency. It was extensively safety-tested in both the laboratory and in clinical tests of in-use conditions. Safety data and test protocols were shared with the FDA.

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<sup>1</sup>P&G reviewed tens of thousands of documents to produce the roughly 8,000 that were responsive to plaintiffs' broad discovery requests. We spent months negotiating a Protective Order. Ultimately, plaintiffs' counsel selected twenty documents for copying.

In 1980, studies were published describing a possible new disease called Toxic Shock Syndrome, first recognized in children. In its worst manifestation, it could result in high and uncontrollable fevers, rash, and lowered blood pressure, potentially leading to death. The indications of this disease were not at all clear. In addition, there was no obvious causation. The disease occurred in men, women, children and the elderly.

A 1980 Centers for Disease Control study suggested that there was an above-expected incidence of TSS in menstruating women, and a later study suggested that Rely tampon users might have a statistically higher incidence level. An expert team of outside scientists P&G brought in to review the data could find no theoretical or practical reason why Rely would be associated with TSS and concluded that the statistical analysis had included such a tiny base size that it was meaningless. Nevertheless, on September 22, 1980, the Company voluntarily concluded that it would withdraw Rely from the marketplace given the totally unknown cause of TSS, and advised FDA of that decision immediately thereafter.

Three days later a class action was filed against P&G in the Northern District of California on behalf of all women who had ever used Rely. To put this in perspective, in the years 1979-80, over 1 billion individual Rely tampons had been sold in the U.S. Given the size of the potential class and the fact that the characteristics of the disease itself were undefined, i.e., it may be as simple as a fever, the potential exposure to Procter & Gamble in such a class action lawsuit was

staggering. On a humorous note, we even had a claim from a woman alleging that her dog contracted TSS after consuming a Rely tampon.

Before the decision on class certification, however, about 800 individual product liability lawsuits were filed against P&G. P&G went to trial on several of these. The first occurred in March of 1982, in *Lampshire v. Procter & Gamble* in Colorado federal district court. Although there was a partial verdict for the plaintiff, the jury awarded her zero damages. In the second trial, *Kehm v. Procter & Gamble*, an Iowa federal court jury found for the deceased plaintiff and awarded \$300,000. These cases established that each claimant presented significantly different factual issues that were not amenable to resolution as a class.

Consequently, on December 8, 1982, the federal court in California denied the motion for class certification. Finally, in 1984, in *Dunlap v. Procter & Gamble*, P&G won a complete defense verdict in federal court in St. Louis, Missouri.

Denial of class certification and the actual trials with different facts and very different outcomes made it possible to resolve all the remaining claims based on their individual merits. If the class had been certified, P&G would have been forced to negotiate a settlement based on the millions of women who had used Rely at one time or another and who had experienced any of a large number of symptoms, instead of settling individually with several hundreds of claimants who raised specific claims, had sustained some specific injuries, and were prepared to go through trial.

Although our costs of resolving all the Rely litigation in the early 1980s were high, these same cases brought in today's out-of-control class action environment might impose crushing liability on the Company.

### Conclusions

Here are my conclusions based on these two cases and other class action lawsuits we've been involved with. First, in practice, class actions have moved from being a rule of procedure to being a rule of substance. By that I mean class certification, depending on the definition of the class and the claims at issue, can be outcome-determinative. For example, there are over 250 million individual consumers of bar soap in the U.S. Would anyone here go to trial, even on one issue, with a class like that? If the court in San Francisco had early on certified a class consisting of all women who had used Rely and who had experienced any symptoms from fever to unexplained death, we likely would have been forced to settle en masse. Class action cases are almost never tried. What that tells us about the rule is that it has become outcome-determinative.

Second, class actions are being abused. There is no longer any legitimate question about this in my view. They have become a highly profitable business. Concerns over whether anyone has actually been hurt, or whether there is an actual cause and effect relationship between a product and an injury, are swept aside in the drive to force a settlement covering the largest possible class.

Third, class action procedures actually create lawsuits. Many people frame the issues about whether a class action is appropriate in terms of promoting more efficient resolution of litigation. But the class action vehicle itself creates lawsuits, and plaintiffs where none would have existed. Ordinary litigation has a kind of internal system of checks and balances. Extraordinary litigation, such as a class action, should be a device of last resort precisely because class action dynamics throw the inherent litigation checks and balances out the window.

Class action issues can be minor, even trivial. The class is broadly defined and potential plaintiffs have to take affirmative action to opt out of the class. In a great many cases individual class members have very little, if any, connection to the lawsuit. It's tried with a few real plaintiffs and lots of experts. I call this -- "litigation from the comfort of your own home." Further, decisions are too frequently based on "averages" -- average causation, average damages, average legal rights and defenses -- arrived at by expert testimony instead of proof of the merits of each individual claim. In short, class actions turn the normal system of litigation checks and balances on its head.

## Recommendations

For these reasons, we support the proposed amendments being considered by this Committee, particularly those made to the certification criteria for Rule 23(b)(3) classes. The proposed (b)(3) amendments incorporate a number of the factors that, in our experience, may help ensure that this extraordinary procedure is only used when it is absolutely necessary.

For example, in the Ivory soap case, state practice permitted us to proceed to the merits by motion for summary judgment before the class certification decision was made. This approach is suggested by the proposed amendment to Rule 23 (c)(1) which directs courts to certify cases "when practicable" rather than "as soon as practicable" and the amendment to Rule 23(b)(3)(C), which would direct courts to consider "the extent, nature, and maturity of any related litigation involving class members." Had we reached the class certification decision, proposed factor (F), "whether the probable relief to individual class members justifies the costs and burdens of class litigation," would have quickly honed in on the fact that the Ivory litigation had weak legal claims and speculative damages, layered on top of an already elaborate system of claims review and challenges. Perhaps factor (F) would have made it possible to have the class claims dismissed even sooner, before significant costs were incurred.

The Rely litigation experience confirms that factors 23(b)(3)(A), (B) and (C) are particularly important in litigation presenting many individual claims. The individuals who claimed real injury from TSS had a strong interest in litigating the

merits of their individual actions. In fact, individual claimants who had sustained significant injuries from TSS would have been prejudiced if their claims had been lumped in with those of other claimants.

At the time the Rely class certification decision was made, the litigation was nearing maturity -- two trials had been completed and other cases were at the trial stage. We knew that the key factual and legal issues were not suited for resolution in the aggregate because they were highly individualized issues. Evaluating the maturity of the litigation adds a valuable consideration to the certification analysis, as our real world experience proves.

We also believe that the amendment to subsection 23(f), which gives appellate courts broader discretion to hear interlocutory appeals from class certification decisions is a necessary check on determinations by the trial courts of the predominance of common issues and the superiority of the class action device over the panoply of remedies already available for the protection of consumers.

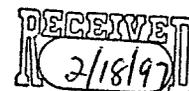
We take no position on section (b)(4), the settlement class provision, preferring to wait for guidance from the U.S. Supreme Court in *Amchem Products v. Windsor*.

### More Reforms Are Needed.

While the steps the rulemaking committees have taken so far are encouraging, we believe more needs to be done to curb class action abuse. Warranty, consumer fraud and product tort cases involve a multiplicity of individual issues of fact and law that make them impossible to try fairly in the aggregate, particularly as class actions.

An important reform this Committee should consider would be a return to the pre-1966 opt-in procedure for Rule 23(b)(3) damages classes. A class action that requires interested plaintiffs to opt-in has characteristics that are more like the checks and balances present in standard litigation. Requiring putative class members to affirmatively assert their interest in participating in the litigation moves class actions from the shadow world of the abstract to the concrete, where every plaintiff can be identified and all claims can be properly delineated. Defendants can more accurately define their potential liability and respond directly to the specific allegations made. We believe that an opt-in mechanism for all Rule 23(b)(3) class actions would help provide an even playing field for both plaintiffs and defendants. Just as important, it will help reduce, if not eliminate, the creation of frivolous claims that threaten to result in churning huge attorneys fees based on representation of an abstract, unknowable class of thousands, hundreds of thousands, or millions of claimants.

# Procter & Gamble



JAMES J. JOHNSON  
Senior Vice President and General Counsel

96-CV-135

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Supp  
February 13, 1997

Mr. Peter McCabe  
Secretary  
Committee on Rules of Practice and Procedure  
Administrative Office of the U.S. Courts  
Washington, D.C. 20544

Dear Mr. McCabe:

As the public comment period closes, I want to emphasize two points from my January 17, 1977 testimony on behalf of Procter & Gamble, points which, I know, were echoed in the comments made by many others.

First, class actions under Rule 23 were not intended to, and cannot, fairly resolve claims which raise individualized issues of fact and law. The proposed amendments can work if they are truly applied to keep these cases outside the class action rubric. Second, the rulemaking committees must move beyond the controversies surrounding some of the proposed amendments and start the reform process without delay -- at least as to the non-controversial amendments, such as the codification of class certification standards in Rule 23(b)(3)(A), (B) and (C), and the provision permitting interlocutory appeals from class certification rulings.

Along the way from 1966 to the present, the defining characteristics of Rule 23(b)(3) class actions were abandoned. In the beginning, common questions of law and fact had to clearly predominate; classes were not certified if they did not. Indeed, the 1966 Committee Note warned against (b)(3) class action status for cases where individualized proofs were required, and even admonished that certain types of cases, such as "mass torts," were not appropriate for certification under the new rule.

Unfortunately, courts moved away from these principles. The result has been a proliferation of (b)(3) damages class actions.

*Procter & Gamble*

Mr. Peter McCabe  
February 13, 1997  
Page 2

Abuse of the device for the benefit of class counsel is on the rise. And achieving a just result has become less and less important, so long as the aggregation of cases moves them quickly through the courthouse.

The advertising claims that Procter & Gamble has faced as class actions involve highly individualistic questions of fact that cannot be resolved fairly on a class basis. The claims turn on issues such as individual reliance, deception, intent, and interpretation, which all go to the unique state of mind of each individual at the time an advertisement was communicated, and at the time the product was purchased. Efforts to resolve these claims on a class basis obscure crucial factual differences and make it impossible to respond with individualized affirmative defenses.

The class action rule needs to keep these types of cases from being brought as a class action in the first instance, and when they do slip in, should make their dismissal quick and simple. The Committee needs to do more to address these concerns with amendments to Rule 23.

Although more relief is needed than what the Committee's modest amendments provide, the amendments that have been subject to public comment should still go forward. We strongly urge the Committee to take those steps that can be taken now, such as promulgation of those amendments to Rule 23 that can be considered non-controversial. The amendments to the Rule 23(b)(3) certification factors, (A), (B) and (C), effectively codify existing practice in the district courts. There is no good reason for holding these changes back.

Also, the amendment permitting interlocutory appeal from class certification decisions will be very helpful in those cases where the class action device exerts its greatest pressure -- where a class has been certified. As I said in my testimony, such decisions can often be outcome determinative for the case. There should be an immediate right to appeal.

*Procter & Gamble*

Mr. Peter McCabe  
February 13, 1997  
Page 3

The Committee can defer action on the more controversial provisions, and take them up later, at the same time that it considers new recommendations made during the comment period, such as the proposal for opt-in classes.

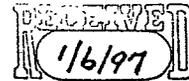
We appreciate the Committee's hard work on this difficult issue. We hope we conveyed the urgent need for class action reform.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul J. Linn". The signature is written in a cursive style with a large, looping initial "P".

mic  
mccabe.doc

#2060



THE  
**ALEXANDER LAW FIRM**

RICHARD ALEXANDER, AMANDA HAWES WILLIAM M. AUDET [OF COUNSEL], MICHAEL MCSHANE  
JONATHAN PENDLETON, ANN SAPONARA, MICHAEL ALEXANDER [OHIO] & TYLER SHAW

REPRESENTING CONSUMERS AND SMALL BUSINESSES INDIVIDUALLY AND IN CLASS ACTIONS IN  
NEGLIGENCE, TOXIC CHEMICAL, DEFECTIVE PRODUCT, MASS ACCIDENT, ENVIRONMENTAL AND FRAUD CASES

January 17, 1997

96-CV-140

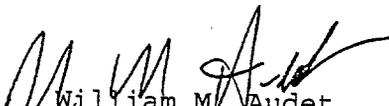
Peter G. McCabe, Esq.  
Committee on Rules of Practice and  
Procedures of the Judicial Conference  
of the United States

Proposed Amendments to Rule 23  
January 17, 1997 public hearing

Dear Mr. McCabe:

Enclosed is an outline of my testimony for the January 17,  
1997, public hearing in San Francisco, California, on the  
Proposed Amendments to Rule 23 of the Federal Rules of Civil  
Procedures.

Very truly yours,

  
William M. Audet

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STATEMENT OF WILLIAM M. AUDET  
ON THE PROPOSED AMENDMENTS TO RULE 23 OF  
THE FEDERAL RULES OF CIVIL PROCEDURE  
BEFORE THE MEMBERS OF THE ADVISORY COMMITTEE ON THE  
FEDERAL RULES OF CIVIL PROCEDURE

Presented at the Ceremonial Courtroom, Nineteenth Floor,  
United States District Court for the  
Northern District of California,  
450 Golden Gate, San Francisco, California.

January 17, 1997

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I thank the Honorable members of the Committee for the opportunity extended to myself as well as to the esteemed witnesses who have appeared before this Committee.

I am currently "Of Counsel" at The Alexander Law Firm. The Firm has limited its practice to representing individuals and small businesses in complex, civil, personal injury cases and in class actions relating to mass tort, product defect, environmental and securities fraud cases. The Firm currently participates in federal and state cases throughout the United States, including, California, Georgia, Alabama, North Carolina, New Mexico, and Tennessee. By way of personal background, I had the honor of serving as a Law Clerk to the Ninth Circuit Court of Appeal and clerking for the Honorable Fern M. Smith, currently the Chair of the Advisory Committee's Evidence Rules, as well as clerking for the Honorable Alfonso J. Zirpoli. Prior to becoming "Of Counsel" at the Alexander firm, I was an equity partner at the firm of Lieff, Cabraser, Heimann & Bernstein, of which Elizabeth Cabraser is a founding member.

My comments are similar to those stated by others who have appeared before this Honorable Committee. Nonetheless, given the importance of these issues, I believe the comments bear repeating.

It is my view that, notwithstanding criticisms of certain settlements during the last few years, the Rules in the system work. The federal courts have, through the appellant process, an excellent method to ensure that the letter and the spirit of Rule 23 jurisprudence is followed by the district courts. Furthermore, in every class action in which I have appeared before any Federal Judge the Court had thoroughly reviewed the record, pleadings and evidence submitted in support of a request for class certification and/or settlement. In short, to use an over-quoted phrase, "If it ain't broke, don't fix it."

With the above said, I will limit my comments to four issues:

First, the proposed amendments would allow for interlocutory appeal of class certification decisions. See Rule 23(f). Such proposal, in my view, would essentially invite further delay on the ultimate resolution of the case. I am unaware of any legitimate rationale for singling out Rule 23 determinations for immediate appellate attention. Indeed, such an expansion of the appellate workload will only further delay the resolution of other more pressing matters already before the Appellate Court. One could argue that other types of cases and/or other aspects of the federal rules which have been subject to recent criticism

should also allow for immediate interlocutory appeals. For example, no one suggests that motions to dismiss in securities cases be subject to interlocutory appeals, notwithstanding recent criticism of securities cases.

Both from my perspective as a former judicial clerk, and as a practitioner, the current mechanism for interlocutory review found in § 1292 already allows for immediate review of rulings which are at odds with the law of the particular Circuit. Indeed, I have been involved in cases in which the judge granted class certification but, because of the Court's uncertainty with its ruling, readily agreed to certify the matter for immediate appellate review. The current case law provides sufficient guidance on the appropriateness of immediate appellate review -- the proposed amendment simply invites further delay and needlessly burdens the appellate court.

Second, the proposed amendment regarding "maturity" and "when practicable" contained in Rule 23(b)(3)(c) and 23(c) would further delay the Court's class certification decision. It is my experience that, notwithstanding the mandate for determination of the action as a class action to be "as soon as practicable," such a decision is usually not made until between six months to one year of when the case is initially filed. One important aspect of the Rule is to promote early notification to class members of the pendency of the case. Until notice is approved by the Court, class members rely on information available to the public generally, as well as through less-informed sources.

Thus, typically after a case is filed and received some media attention, the class members are left completely in the dark until they receive the official Court-approved notice. Until they receive the Court-approved notice, they are usually unsure of their rights and unclear where they should go with their questions regarding their case.

In my view, if the rules are changed, the class certification decision should be made sooner rather than later. (Indeed, as an aside, some local rules interpret "as soon as practicable" to require the Court to rule on the certification motion within six months or less.) In my day-to-day practice, I see the need for early involvement by the Court in the process, particularly where notice to the class is one of the main sources of information provided to the class members.

The Committee Notes on the inclusion of the term "maturity" of related litigation makes it clear that the status of other cases should be a factor in determining whether to certify a class. If the mandate under this proposal is to allow individual cases to be adjudicated, in whole or part, before the Court certifies a class, I sincerely believe that courts would be inundated with individual claims and class members would be left in the dark for two years and more before they receive any notification of the pendency of the class action.

Furthermore, I think it is unfair and inappropriate to assume that absent class members should take a "back seat" to individual litigation, particularly where, as in most cases,

class members do not have the resources to pursue individual claims. Thus, I oppose the proposed changes to Rule 23(b)(3) and Rule 23(c)(1).

Third, the proposed amendments would require the District Court to weigh the "probable relief" to members of the Class against the "costs and burdens" of class litigation. See Rule 23(b)(3)(f). This proposal opens a Pandora's box of problems. Under Rule 23 jurisprudence, the likelihood of success on the "merits" of a particular class is not to be a determining factor in the Court's decision to grant or deny certification. Nonetheless, in reality, the courts do in fact consider the "merits" of the litigation as part of their decision-making process. Where appropriate, a number of courts require that the parties brief the "merits" of the case through a Rule 12(b)(6) Motion to Dismiss. Furthermore, I have yet to face an opposition to class certification brief filed by a defendant which did not discuss, at length, the merits (or lack thereof) of the case.

The current proposal, however, would require the plaintiff to essentially prove his or her case before undertaking extensive discovery in the case, effectively turning a motion for class certification under Rule 23 into a motion for summary judgment under Rule 56. Indeed, this provision, in and of itself, could be the death knell for a number of cases which obviously have merit, but, because the discovery is essentially in the hands of the defendants, the case could not be "proved" sufficiently to satisfy the proposed Rule. I am particularly troubled with the

term "probable." This phrase appears to place an unfair evidentiary burden on plaintiffs prior to discovery. This notion is completely at odds with the liberal pleading requirements of the Federal Rules, and places Rule 23 plaintiffs at an obvious litigation disadvantage.

Fourth, and perhaps most troubling, are the Committee Notes and other comments regarding new subsection 23(b)(3)(f) and the consideration of monetary value of class members' claims. Beyond the clear invitation to delve in to the merits of the plaintiffs' claims, the Committee Notes explicitly suggest that a valuation on the absent class members' claims should be made and weighed against the "burdens" of proceeding as a class action. The purpose of Rule 23 is to allow similar claims -- regardless of individual monetary value -- to proceed in one forum. Absent application of this basic principle to class action cases, the courts would be required to deny access to claimants with claims less than \$200. While the Committee Notes specifically indicate that a threshold dollar amount does not exist, there is no question that the Rules, as currently proposed, suggest that those with claims of a few hundred dollars or less should not be certified. Obviously, the message will be that if you have defrauded a few victims of a lot of money, you will probably be sued, but that, as long as you defraud a lot people of a little money you will be able to go scott free and not have to return any of the sums.

In my view, we may as well simply abolish Rule 23, because

for the great majority of cases I work on, this is the end result.

As I pointed out at the beginning of my comments, I do not believe the current Rules require the radical modifications proposed by the Committee. The hurdles a practitioner like myself must overcome to ensure that injured consumers and victims of fraud receive their day in Court are enormous. While I recognize that some refinements could be made to certain aspects of the Rules to respond to criticism of recent settlements, the proposed Rules essentially close the door of courts to an entire segment of the population. I am personally concerned that the proposed Rules will create an unlevel playing field and ultimately allow companies and individuals to completely avoid liability for wrongful conduct. The class action rules currently in place have, in my humble opinion, ensured that automobiles and other consumer goods sold in this country are the safest in the world, required medical companies and others who distribute goods in the stream of commerce to check and double-check the safety of their products, closed down illegal pyramid schemes, ensured that products were priced competitively, protected small and unsophisticated investors and provided citizens of the United States with access to the resources of the federal courts. If the proposed rules are adopted, I fear that the federal courts will ultimately be the exclusive domain of businesses and the wealthy.

Thank you.

#2067



96-CV-141

TESTIMONY OF JOSEPH GOLDBERG  
BEFORE THE ADVISORY COMMITTEE ON THE  
FEDERAL RULES OF CIVIL PROCEDURE

Mr. Chairman and members of the Advisory Committee, my name is Joseph Goldberg, and I appreciate this opportunity to make comments on the proposed revisions to Rule 23 of the Federal Rules of Civil Procedure. First, let me briefly describe my background. I have been an attorney for twenty-nine years, presently in private practice in Albuquerque, New Mexico. My practice is limited solely to litigation, the overwhelming majority of which is often referred to as complex commercial litigation. The majority of my practice is devoted to representing plaintiffs in class actions, mostly antitrust class actions. I have been in full-time private practice for ten years, and during that time I have been involved in several dozen class actions. I am presently one of the lead counsel in the *Commercial Explosives* price-fixing class actions, consolidated in the District of Utah; I am also lead counsel in *Lawrence v. Philip Morris*, a securities class action, pending in the Eastern District of New York. I was one of the lead counsel in the *Specialty Steel* price-fixing class action in Houston and I was one of four trial counsel in the *Catfish* price-fixing class action in Mississippi.

I received my undergraduate education at Trinity College in Hartford Connecticut and my legal education at Boston College Law School, where I was editor-in-chief of one of the law reviews. After law school, I clerked for the Honorable M. Joseph Blumenfeld of the United States District Court in Connecticut. I then embarked on a 19-year career as a full-time teacher in law schools, first at the University of North Dakota for two years and then 17 years at the University of New Mexico, during the last several of which I also served as general counsel to

the University. I am a member of the American Law Institute, an adviser to the ALI's Restatement (Third) of the Law of Agency and a member of the New Mexico and Connecticut bars.

Needless to say, I (like most) come to the question of revisions to Rule 23 with an existing set of beliefs, based on my experience and values. Those beliefs include

- ***Rule 23 serves an important and valuable purpose.*** In a society like ours with a complicated and sophisticated marketplace, there must be a mechanism whereby relatively large numbers of relatively small claims arising from a single event or series of events can be resolved effectively and efficiently. In this regard, class action litigation serves the same societal interests as other private litigation: providing compensation for injuries and socializing behavior.
- ***On the whole, Rule 23 works reasonably well.*** While class action cases, by their very nature, are large and complicated, it is my experience that they are litigated quickly and efficiently for their size, complexity and the importance of their consequences. This is not surprising, as they tend to attract lawyers on both sides who are competent and experienced and have the interest and resources to devote to move the case along to a successful resolution. Few class actions, in my experience, languish on the lawyers' desktops or escape the critical attention of the judges.
- ***Rule 23 law is highly evolved.*** There are a large number of judges who have a good working familiarity with the mechanics and operation of the Rule. There is a well-developed and coherent body of case law which undergirds and effectively guides the operation of the Rule. As a consequence, there is a remarkable consistency, in my experience, in the application of the Rule. The classes which should not be certified, on the whole, are not. The classes which should be certified, overwhelmingly, are certified. This consistency, and the predictability which goes along with it, have important consequences: (1) they tend to forestall frivolous or inappropriate cases from being filed; (2) they promote settlement; (3) they tend to encourage good results; and (4) they foster respect for the law.

By this late date and late hour, you have certainly heard virtually anything and everything that can be said about the proposed changes and I doubt that I will add much that you haven't heard. Notwithstanding, I will forge ahead. I wish to make one general point and then address

three of the proposed amendments, proposed Rule 23(b)(3)(A); proposed Rule 23(b)(3)(F); and proposed Rule 23(f), all of which I believe are unnecessary and unwise.

The general point that I want to make is that changes in Rule 23—particularly because of the existing well-developed and predictable law undergirding the Rule—inevitably (and for at least a medium-range period) will cause class actions to be more contentious, prolonged, complicated and costly. I am sure that is not the intention of those proposing the changes; nor do I think that anyone believes that these consequences are desirable. In calculating, then, whether to make changes, these unintended consequences need to be factored into the equation.

#### **Proposed Rule 23(b)(3)(F)**

This proposed change would add an additional factor influencing class certification determinations and would require courts to determine whether the probable relief to individual class members justifies the costs and burdens of the litigation as a whole. I think that this proposed revision is unwise for at least three reasons:

*First*, I believe that it is unnecessary. Apparently, the purpose of the proposed change is to "weed out" class actions that are trivial, whatever that means. The problem here is that the "triviality" concern is, at the very least, overstated. My belief is based on my experience and my experience is reinforced by the Federal Judicial Center's 1996 Empirical Study. The 1996 Study found that there was no evidence that cases with "nominal" recoveries were a problem. While there may be occasional cases which all or most would agree are sufficiently trivial so that they should not be brought, it seems to me that their incidence is not so great as

to warrant disrupting the settled law; and, equally important, it seem likely to me that revision simply will not eliminate these anomalous cases.

*Second*, I believe that the mechanism the new Rule 23(b)(3)(F) proposes—comparing relief to individual class members to the "costs and burdens" of the class proceedings—is an inappropriate mechanism for weeding out the truly trivial cases. The proposed inquiry will very likely show in many—perhaps most—class actions that the *aggregate* costs (and "burdens") of the class proceeding will always be significantly larger than probable recovery to individual class members. Surely, it cannot be the intendment of the proposed changes to allow for the denial of *most* class actions. Yet, the proposed language and comments are of little help in guiding judges in making more refined decisions. I think that the comparison proposed is simply the wrong one to make to "weed out" the "trivial" cases, even if there were a real problem that needed to be addressed.

*Finally*, the proposed comparison will almost certainly and necessarily complicate and prolong the class certification determination and enormously increase its costs, both to the parties and to the courts. It will inevitably infuse substantial merits inquiry into the class certification decision, in direct conflict not only with the ruling in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), but also with the excellent policies underlying that ruling. I cannot imagine that plaintiffs will want the class action determination to be so complicated and encumbered, and I cannot imagine that defendants will welcome extensive "merits" discovery at the pre-class certification stage of the proceedings.

### **Proposed Rule 23(b)(3)(A)**

Like proposed Rule 23(b)(3)(F), I think that proposed Rule 23(b)(3)(A) is addressing a nonproblem. If the concern is that in some instances, somehow it is inappropriate to join "large" claims with "small" ones, it seems to me that the decision should be made by the large claimants and not by the judge. The large claimants already have an effective ability to exercise that decision under the current Rule 23, by opting out. Experience has shown that these large claimants are aware of their choice, have the ability to exercise that choice and do so effectively. To the extent that in the occasional case there is a need for the judge to "sculpt" the class definition to account for some large claimants, the judge already has that power under the existing Rule. Nothing in the existing Rule 23 requires the judge to certify the class as requested. Indeed, the Rule and its case law make clear that the judge can and should play an active role in defining the class. There simply is no need for this proposed change.

### **Proposed Rule 23(f)**

The present law makes interlocutory appeals of class certification determinations very difficult, although not impossible. Section 1292 review and mandamus are already available. I have been involved in cases where both have been sought, including recently a ten-month mandamus proceeding in the Second Circuit, which resulted, after extensive briefing in the court of appeals, in mandamus review being denied. Two points are worthy of note: (1) the difficulty of interlocutory appeal applies to both plaintiffs and defendants—I have had class certifications denied and have been frustrated by my inability to have immediate review; and (2) notwithstanding the difficulty of interlocutory review, the courts (it seems with increasing

frequency more recently) have engaged in interlocutory review, using both the section 1292 and mandamus mechanisms.

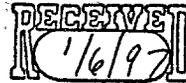
The proposed changes, in both intent and effect, will significantly increase the number of appeals sought and the number taken. I suspect that the effect will be greater than the intended result. In any event, the result will be significantly increased costs to class action determinations and significant delay in the courts. It is likely that these determinations, which now are encouraged to be made on a streamlined basis, will become a factor in "clogging" the courts, both trial and appellate.

The effect of interlocutory appeal is unclear. Under existing law, interlocutory appeal does not automatically stay proceedings in the trial court. The uncertainty, delay and costs associated with this proposed change far outweigh any limited benefit.

Finally, the proposed change may have the unintended effect of distorting the case law on class certification. The existing case law is largely (although certainly not exclusively) developed in the district courts arising over a vast array of cases and decided often by judges with considerable and immediate experience in administering class actions. In encouraging more interlocutory appeals (which is the ineluctable purpose and effect of this proposed change), the necessary effect will be to shift significantly the balance of the case law development. Much more of that case law will now be developed at the appellate level and will be developed primarily through the most egregious cases and by judges with less immediate experience in administering classes.

These problems, in my view, strongly suggest that proposed Rule 23(f) should not be adopted.

Again, thank you very much for the opportunity to express my views on these important matters.



96-CV-141

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January 6, 1997

Via Facsimile

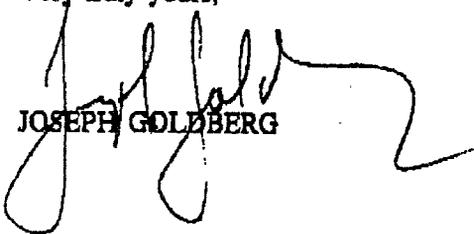
Peter McCabe  
Committee on Rules of Practice and Procedures  
Administrative Office of the U.S. Courts  
Washington, D.C. 20544

Re: Rule 23 Proceedings in San Francisco

Dear Mr. McCabe:

This is a request on my part to testify at the January 17, 1997, hearing of the Advisory Committee Rule 23 panel in San Francisco. Please confirm whether or not I will be able to be heard.

Very truly yours,

  
JOSEPH GOLDBERG

JG:rmh  
cc: Jonathan Cuneo, Esq.  
Arthur Kaplan, Esq.

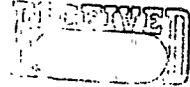
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96-CV-142



STEVE W. BERMAN

January 14, 1997

(206) 224-9320 DIRECT LINE  
(206) 623-1290 DIRECT FAX

VIA FACSIMILE AND FEDERAL EXPRESS

Mr. Peter McCabe  
Committee on Rules of Practice & Procedures  
Administrative Office of the U.S. Courts  
One Columbus Circle, Room 4-170  
Washington, D.C. 20544

Re: Public Hearing on Rule 23

Dear Mr. McCabe:

Enclosed are my written comments on Rule 23. My partner Clyde Platt will testify in my place as I have been ordered to a hearing in Chicago.

Sincerely,

Steve W. Berman

SWB:krs  
Enclosure

January 14, 1997

**STATEMENT OF STEVE W. BERMAN**

**TO**

**THE ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE**

I am a principal in the Seattle law firm of Hagens & Berman, P.S. For the last fifteen years, my practice has focused on representing plaintiffs in class actions. I have acted as court-appointed class counsel in numerous class actions involving securities, antitrust, products liability and consumer protection claims. I have litigated such cases not only in the Northwest, but throughout the country. Some of the cases I have been involved in are among the largest class actions in this country's history. (In re WPPSS Securities Litigation; In re Exxon Valdez Oil Spill Litigation; In re Louisiana Pacific Siding Litigation.)

I would like to comment on two provisions in the proposed amendments to Rule 23: the proposal that courts consider whether the probable relief to individual class members justifies the costs and burdens of class litigation; and the proposed specific authorization of settlement classes.

**Proposed Rule 23(b)(3)(F) - Probable Relief to Individual Class Members**

Proposed Rule 23(b)(3)(F) provides that in determining whether class certification is appropriate under 23(b)(3), the court consider "whether the probable relief to individual class members justifies the costs and burdens of class litigation." This provision is the most dangerous amendment proposed by the Committee and I strongly oppose it. Not only will it undermine the basic purpose of Rule 23, but its lack of standards will cloud the certification process in virtually every case.

Let me first address the inconsistency with the purpose behind Rule 23. Historically, the fundamental purpose behind the class action device was to aggregate small and medium-sized claims that would not warrant prosecution on an individual basis. This purpose is even more important today than it was in 1966 when Rule 23 was originally adopted. Our nation has continued the trend toward becoming a mass consumer society. Economically powerful corporations can, often with only a few keystrokes on a computer, wrong consumers by implementing misleading billing practices or calculating fees improperly. These practices may have only a small monetary impact on individual consumers -- indeed the loss to any individual may be "trivial" in the opinion of some -- but reap millions of dollars in ill-gotten gains to the wrongdoer. The class action remains a vital device for vindicating small and medium-sized claims, as well as for deterring wrongdoing and effectuating disgorgement of ill-gotten gains.

Some of the class actions in which I have been involved illustrate the importance of preserving the class action device as a means of aggregating small and medium-sized claims:

- The Health Care Co-Payment Cases. Many health care plans require the insured to "copay" 20% of the charges billed by medical providers. Some insurers negotiated discounts with providers, but nevertheless charged their insureds 20% of the undiscounted amount in violation of the plan and ERISA. As a result, thousands of consumers paid more than 20% of their health care bill. These practices have reaped millions to insurers, although insureds with small medical bills may have only been overcharged in small amounts. This practice was concealed for years until a class action I filed against Blue Cross of Washington brought this practice to light. The amounts consumers have lost averages in the hundreds of dollars for the typical

consumer, but can amount to ten million or more in improper gains for an insurer in just one city. Under the proposal, certification would be in doubt despite the fact we have obtained summary judgment in favor of consumers in every state where the issue was litigated. No individual consumer could afford to litigate on an individual basis. In the aggregate, almost \$100 million has been recovered as a result of these actions and insurers either now disclose the practice or have stopped it.

- The Telephone Round-Up Cases. Many contracts for wireless telephone service provide that users will be billed from the time of consumer presses the "send" button to the time "end" is pressed. In violation of their contracts, some wireless providers actually round-up charges to the next full minute. In other words, cellular users pay for time they did not use. If a call lasts one minute and one second, a consumer is billed for two minutes and the amount of airtime he is charged with is two minutes. On a per minute basis, the impact can be profound because the charges for some of the services (for example, on some airplane telephones) can be several dollars per minute and calculation of airtime in this fashion is used to add up the "airtime" allocated in a given plan. In the aggregate, these overcharges run into the tens of millions. Yet, an individual phone user may have very small damages if he/she has not made many calls. No individual consumer would litigate on an individual basis. The litigation will result in disclosure of the practice and recovery of over \$100 million. Again, under the proposal certification would be doubtful.
- The Credit Card Interest Cases. Some credit card contracts provide that interest charges will be calculated in a specific manner; for example, some provide that there

will be a 30-day grace period before interest is charged. Some banks have violated those contracts, as well as the Truth in Lending Act, by calculating the interest in an amount different than represented; for example by shaving a few days off the grace period. This practice can produce millions in improper interest charges, yet only small overcharges to some consumers. Again, I believe no consumer would take on a major banking institution on an individual basis.

These types of schemes are conceived precisely because the sums are large in the aggregate and the wrongdoer hopes that the individual impact will be so small that no consumer will challenge the practice. Government enforcement agencies are already overburdened, leaving much of the responsibility for consumer protection with private attorneys general in the class action bar. If subparagraph (F) of Rule 23(b)(3) renders small claims inappropriate for class certification, many consumer frauds will be insulated from legal challenge by private attorneys general and such practices will proliferate.

I am also concerned that the lack of standards in subparagraph (F) will severely compromise the class certification process.

First, subparagraph (F) would require the court to deny certification where the "probable relief to individual class members" does not "justify the benefits and burdens of class litigation." The Note states that this subparagraph was designed to deny certification where individual claims are for "trivial relief." Neither the subparagraph nor the Note, however, provide any standards for determining when the claims of class members are too small to warrant class certification. In the absence of specific standards, every proposed class action will be challenged on the grounds that the size of the probable payments to individual class members does not justify the burden of class litigation.

A related problem in subparagraph (F) is that it is not clear whether the court must consider only the probable relief “to individual class members” or may also consider the aggregate potential damages to the entire class. Many class actions, particularly in the consumer area, involve small individual claims that aggregate into the tens of millions. Many other class actions, such as in the securities and products liability areas, involve a mix of small claims and larger claims. Defendants will argue that the subparagraph requires the court to focus only on individual class members and not on the class as a whole.

Second, subparagraph (F) appears to focus the inquiry on the relief to individual class members, rather than on the wrong perpetrated by the defendant. It fails to address whether the court may consider deterrence of future wrongdoing or disgorgement of ill-gotten gains in the certification decision. Yet, as noted, these considerations are important policy reasons for allowing the aggregation of small claims in a class action.

Third, the use of the term “probable relief” in subparagraph (F) may invite an inquiry into the merits at the class certification stage, which could open the door to extensive pre-certification discovery. Pre-certification merits discovery will only delay the certification decision, which should be made early in a case.

Fourth, subparagraph (F) would require the courts to balance the probable individual relief against the “costs and burdens of class litigation.” The subparagraph does not specify what costs and burdens are to be considered. Nor does it provide any guidance to courts how the balancing should be made. For example, if a class action has potential aggregate damages of \$100 million, the legal fees and costs for plaintiffs and defendants could easily run into the millions. Subparagraph (F) provides no standards for how a court should balance such costs against a probable average individual claim of \$500.

In all but the rarest of cases, the parties' legal fees and costs dwarf the probable recovery of most individual class members. One exception are securities cases in which certain large investors, usually institutional investors, have sizable damage claims. Except for such exceptional situations, however, the costs and burdens will virtually always outweigh an individual class members' claim.

Finally, I believe that subparagraph (F) will, if adopted, become the vehicle by which defendants will challenge certification of virtually every case. Defendants will attempt to use subparagraph (F) in conjunction with the proposed new subparagraph (A) to defeat certification of all cases in which the claims of individual class members vary in size, such as in the typical securities case. On the one hand, defendants will argue that under subparagraph (A) the claims of class members with large claims should not be certified because those claims could support individual litigation. On the other hand, they will argue under subparagraph (F) that the small claims should not be certified.

The net effect of these problems will be widely inconsistent certification decisions that vary according to each individual courts' subjective belief about which claims are too trivial to be allowed to proceed. Yet there is absolutely no empirical evidence to suggest that the courts are being clogged with class actions asserting "trivial" claims for relief, which might arguably warrant the change proposed in subparagraph (F). Therefore, I urge the Committee to reject subparagraph (F). At a minimum, the subparagraph or the Note should be revised to include meaningful standards to guide the court's discretion.

### Proposed Rule 23(b)(4) - Settlement Classes

Proposed Rule 23(b)(4) would allow certification of (b)(3) classes for settlement purposes “even though the requirements of subdivision (b)(3) might not be met for purposes of trial.” I support this amendment.

I believe that settlement classes can serve a legitimate function by aiding in the resolution of complex cases that would otherwise tax judicial resources. As long as the courts provide meaningful review of the process leading to settlement and the terms of the settlement, settlement classes can be an extremely useful tool.

It is important to note that cases in which settlement classes are certified are not necessarily cases in which a class could not be certified for trial. Indeed, every case in which I have requested certification of a settlement class was one in which I believed we had at least a reasonable, if not likely chance of obtaining class certification for trial. Relaxing the requirements for certification of a settlement class allows the courts and the parties to focus on the fairness of the settlement, rather than expending the enormous resources on conducting a “full blown” class certification hearing in a case where the parties have agreed to a negotiated resolution.

Much of the criticism of settlement classes centers around the potential for collusion between plaintiffs’ and defendants’ counsel. Indeed, I share the concern that defense lawyers may attempt to “shop around” until they find a plaintiffs’ lawyer willing to settle on their terms. I do not believe, however, that this concern should lead to an across-the-board rejection of the concept of a settlement class. Abuses such as plaintiffs’ lawyer -- shopping can be prevented by (i) judicial scrutiny of the process by which the settlement was reached, including the role of counsel negotiating the settlement and the extent to which they conducted themselves as

fiduciaries of the class, (ii) judicial oversight of the settlement negotiation process by uses of a settlement master, and (iii) intensive judicial scrutiny of the fairness of all aspects of the settlement to all class members.

A recent example of such scrutiny is the settlement of a consumer class involving defective siding manufactured by Louisiana-Pacific Corporation. In that case, involving over 700,000 homeowners from 50 states, the Court certified a settlement class. As a result, thousands of consumers will be receiving a settlement that in many cases exceeds what they would be entitled to obtain under their applicable state law. Rather than attempting to answer the question of certification if no settlement had occurred, the Court focused on two issues (1) is the settlement fair to an individual homeowner if he or she had pursued their own case, in other words, is the recovery fair, (2) was the settlement the result of a collusion. In this inquiry, U.S. District Judge Robert E. Jones, properly protected the class without focusing on a hypothetical question -- could this case be certified if it were going to trial or if certification was contested. This, I suggest, is the proper procedure.

There has also been concern expressed about settlement classes that release "futures" claim, *i.e.*, claims that have not yet arisen at the time of the settlement. I am also concerned about settlements that purport to release the claims of future claimants without protecting those claimants' due process rights. But again, I do not believe that this concern warrants a complete rejection of the settlement class concept.

Settlement of futures claims can serve an important function. Such settlements can provide a defendant with total peace from an enormously complex array of litigation, which threaten the defendant's viability as a going concern, while at the same time insuring that future claimants will have the ability to recover for their damages. Meaningful judicial scrutiny of the

protections contained in the settlement for future claimants can protect against class action settlements that attempt to "sell out" a futures class. There are a variety of innovative techniques that have been used to protect future claimants, such as (i) future opt-out periods, (ii) court-appointed counsel to represent subclasses of future claimants in settlement negotiations and at fairness hearings, and (iii) establishing a process for future administrative determinations of payments to future claimants.

For these reasons, I support the amendment allowing settlement classes. I believe that the courts should be left with the discretion to review a settlement for inappropriate collusion and to fashion appropriate safeguards to protect future claimants in class action settlements.

**STATEMENT OF CHARLES F. PREUSS ON PROPOSED AMENDMENTS TO  
FEDERAL RULE OF CIVIL PROCEDURE 23 BEFORE THE COMMITTEE ON  
RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE  
OF THE UNITED STATES**

**January 17, 1997**

**San Francisco, California**

Thank you for the opportunity to speak in support of the proposed revisions to Rule 23(b)(3). My remarks reflect my participation in the evaluation of these amendments by the International Association of Defense Counsel, of which I am currently President-Elect, as well as my personal experience gathered over more than twenty years in the defense of medical products liability actions.

In the medical products arena, individualized inquiry into the issues of medical causation and product labeling are its defining features. Can the medical product in question cause a specific health effect? Did it cause such effect in the particular plaintiff? Did the product labeling warn of the specific health effect and, if so, was such warning adequate? These questions shape the uniqueness of each case.

Earlier in my career, class treatment of medical products cases was rarely sought and virtually never granted. In recent years, however, class certification in this area has been pursued with increasing frequency and intensity despite the statement in the 1966 Advisory Committee Notes that Rule 23(b)(3) is not intended for the resolution of mass torts. My adversaries in these cases are no longer colleagues sophisticated in the handling of medical products liability litigation but rather class action specialists. Obtaining class certification has become an end in itself. Form has prevailed over substance, as companies faced with the prospect of *res judicata* and catastrophic financial loss, cannot afford to risk a trial on the merits regardless of the meritorious nature of the defense.

Judges, ever mindful of their busy dockets, have fallen victim to the apparent simplicity of using the class action device to dispose of what they perceive will be an onslaught of new cases on their calendars. This disturbing pattern has fostered more class actions and led to the precipitous erosion of the intended purpose of Rule 23(b)(3).

No mass tort litigation better illustrates how the uncontrolled threat of class certification has, at least up to the present, completely overshadowed the inquiry into the merits of the claims than the breast implant litigation. One manufacturer has been brought to its knees and is in bankruptcy. The three other main manufacturers have been forced to expend untold millions of dollars defending claims which are unsubstantiated by medical science as attested to by the epidemiologic studies of many of the most prestigious medical institutions in our country.

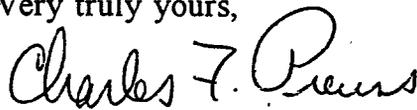
There is no question that class actions can and should play an important role in protecting the environment, the public health and safety and real consumers with genuine injuries. But there has been clear abuse in the use of the class action device in recent years which calls for redress. Whether these proposed amendments are the ultimate answer to restoring Rule 23(b)(3) to its intended purpose remains to be seen, but they clearly represent a necessary and positive step in this direction.

The revisions to 23(b)(3)(A), (B) and (C) articulate a preference for individual actions when an individual's claims are significant enough to be pursued on their own. Permitting an individual to control his or her own case and allowing the case to develop sufficiently before deciding the issue of class certification will better ensure consistency and enhance predictability in the process. Consideration of costs and benefits of class litigation and providing for

immediate appellate review of the trial court's certification decision will benefit plaintiffs, defendants and the court system alike.

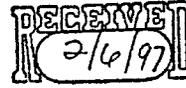
I applaud the considerable effort of this Committee and its willingness to receive our input on these proposed changes to Rule 23(b)(3) which I fully support. Thank you.

Very truly yours,

A handwritten signature in cursive script that reads "Charles F. Preuss". The signature is written in black ink and is positioned to the right of the typed name.

Charles F. Preuss

#2210



96-CV-158



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January 16, 1997

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Hon. Paul Niemeyer, United States Court of Appeals for the Fourth Circuit  
Chair, Advisory Committee on Civil Rules  
Administrative Office of the United States Courts  
Washington, D.C., 20544

Re: Proposed Amendments to Civil Rule 23

Dear Judge Niemeyer and Advisory Committee Members:

The class action has become an "opportunity for a kind of legalized blackmail."<sup>1</sup> The courts have described class actions as "judicial blackmail"<sup>2</sup> and inducements to "blackmail settlements."<sup>3</sup> "It has become a racket - that is the simple truth of it," according to John Frank.<sup>4</sup> And he is right. "The use has gone miles beyond what was anticipated."<sup>5</sup>

"Humongous" classes that "cannot conceivably satisfy Rule 23" are filed in "improper" attempts to involve "the judiciary in the crafting of legislative solutions to vexing social problems."<sup>6</sup> Frivolous cases and settlements for nominal relief for the class but huge fees for class counsel have sullied the reputation of the legal system and brought the profession into disrepute.<sup>7</sup>

<sup>1</sup> *In re GMC Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3<sup>rd</sup> Cir. 1995)(hereafter, "Pick-up Trucks").

<sup>2</sup> *Castano v. The American Tobacco Company*, 84 F.3d 734, 746 (5<sup>th</sup> Cir. 1996).

<sup>3</sup> *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7<sup>th</sup> Cir. 1995).

<sup>4</sup> "Class Actions Get Attacked From All Sides," *The Wall Street Journal* (April 19, 1996)

<sup>5</sup> *Id.*

<sup>6</sup> *Georgine v. Amchem Prod.*, 83 F.3d 610, at 632, 634, 616 (3<sup>rd</sup> Cir. 1996).

<sup>7</sup> "Objecting to Class-Action Pacts Can be Lucrative for Attorneys," *The Wall Street Journal* (Jan. 10, 1997); "Taken for a Ride," *The Wall Street Journal* (Oct. 23, 1996); "A Texas-Sized Class Action Fraud," *The Wall Street Journal* (May 22, 1996); "Judges Rebel Against Mass Tort Excesses," *The Wall Street Journal* (April 3, 1996); "Stop Appeasing the Class Action Monster," *The Wall Street Journal* (May 8, 1996); "The Plaintiff's Bar Targets Tobacco Companies," *The Wall Street Journal* (March 29, 1996); "Public Interest Law Group Fights Some Class Settlements as Unfair," *The Wall Street Journal* (August 17, 1995); "Suits Over Plastic Pipe Finally Bring Relief, Especially for Lawyers," *The Wall Street Journal* (November 20, 1995); "Money for Nothing," *American Lawyer* (January/February, 1996); "Fatal Litigation," *Fortune* (October 16, 1995); "Math of a Class Action Suit: 'Winning' \$2.19 Costs \$91.33," *New York Times* (Nov. 21, 1995);

The drafters of Rule 23 never intended any of this. Indeed, they admonished against the misuse of Rule 23, especially in mass tort cases.<sup>8</sup>

It is time to stop the abuses. The proposed amendments to Rule 23 will help and we support them. But they do not go far enough. Below, we explain why the amendments will help and what else the Committee ought to do.

### 1. Subsection (B)(3)(F)

Currently, there is no efficient mechanism for disposing of frivolous litigation or class actions where the relief would be trivial. Subsection (B)(3)(F) is a step in the right direction to avert frivolous and trivial litigation or hasten its dismissal.

However, the language of subsection (B)(3)(F) should be imbedded in subdivision (B)(3) itself. In other words, there ought to be a required finding that the probable relief justifies the burdens. As proposed, it is only one of the "matters pertinent to the findings" required in (B)(3).

We urge the Committee to revise (B)(3) this way:

"(B) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(3) the court finds that the question of law or fact common to the members of the class predominate over any questions affecting only individual members; that a class action is superior to other available methods for the fair and efficient adjudication of the controversy; **and that the probable relief to individual class members justifies the costs and burdens of class litigation.** The matters pertinent to the findings include:"

[Revised text in bold.]

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<sup>8</sup> The 1966 Advisory Committee cautioned that a class action ordinarily is not appropriate for a mass accident, much less for a "dispersed mass tort," which did not even exist back then: "A mass accident resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried." Fed. R. Civ. P. 23 Advisory Committee Notes..

In our judgment, this threshold requirement that “the probable relief to individuals justifies the costs and burdens” is absolutely essential to address the problem of protracted litigation involving frivolous and trivial cases.

These cases are a big problem for us and the entire automobile industry.<sup>9</sup> We see them routinely when we announce product recalls or service campaigns. These class actions serve no purpose other than to enrich the plaintiff’s lawyer through a “blackmail settlement”<sup>10</sup> and accompanying large attorney fee award.

For example, we announced a safety campaign to replace seat belt buckles in some of our models. A plastic part could break and cause the buckle either not to latch or not to unlatch. Takata, a supplier, manufactured the buckles. The day after a newspaper article reported the campaign, we received a class action seeking compensatory damages for diminution in value of the vehicles. The named plaintiff, who was related to the plaintiff’s lawyer’s firm, drove a model not subject to the campaign. Moreover, the buckles in his car were manufactured by a wholly different supplier, not Takata, and had a different design and used different materials.

This hastily drafted Complaint was filed in a “race to the courthouse” to beat other class actions, without even a cursory examination of the plaintiff’s car (which would have revealed the name of the buckle supplier stamped right on the center of the buckle).

There was and is no diminution in value of those models – the replacement of the buckles fixed the problem. There also was no “deterrent effect” of the class action – the manufacturer had already announced that it would repair the buckles at no cost.

Notwithstanding the lack of a Takata buckle or any actual injury to the putative class, the case dragged on for months, running up legal expenses. It was finally dismissed, but

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<sup>9</sup> “Feeding Frenzy: Lawyers Feast on Publicity over NHTSA Investigations,” *Automotive News* (August 28, 1995).

<sup>10</sup> The Third Circuit described it aptly: “Another problem is that class actions create the opportunity for a kind of legalized blackmail: a greedy and unscrupulous plaintiff might use the threat of a large class action, which can be costly to the defendant, to extract a settlement far in excess of the individual claims’ actual worth. Because absentees are not parties to the action in any real sense, and probably would not have brought their claims individually, see *Mars Steel v. Continental Illinois National Bank & Trust*, 834 F.2d 677, 678 (7<sup>th</sup> Cir. 1987), attorneys or plaintiffs can abuse the suit nominally brought in the absentees’ names. As one court has noted, ‘this fundamental departure from the traditional pattern in Anglo-American litigation generates a host of problems . . .’.” *Pick-up Trucks* at 784.

another case elsewhere, one that makes the same diminution in value claim, still lingers. (At least that one involves a Takata buckle.)<sup>11</sup>

Subsection (B)(4) likely would prevent such frivolous cases in the first place or, if they are filed, would provide an efficient, effective means to dismiss them.<sup>12</sup> Otherwise, these cases will continue to burden the judiciary and drain resources from the defendants.<sup>13</sup>

## 2. (B)(3)(A)

We support the Advisory Committee note that discourages class certification when individual claimants can practicably pursue individual claims. This avoids the ethical problem that results from the "strong" claims increasing the value of the "weak" ones and the "weak" claims decreasing the recovery for strong claims in a class settlement.<sup>14</sup> In addition, tort claims are ordinarily unsuited for class treatment anyway and a class action for cases that can stand alone is neither superior nor efficient.<sup>15</sup>

## 3. 23(F)

We also support discretionary appeals. The current mechanisms of review are either too limited or too late, and are a big part of the "blackmail settlements" problem. We urge the Committee to adopt 23(F).

We also ask the Committee, however, to delete the text in its Advisory Committee Note that "Permission to appeal should be granted with restraint. The Federal Judicial Center study supports the view that many suits with class action allegations present familiar and

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<sup>11</sup> Regrettably, these are not isolated illustrations of abuse. To the contrary, there is a pattern of these cases. We have even had cases seeking recall and damages for diminution in value notwithstanding that the National Highway Traffic Safety Administration thoroughly investigated (at the specific request of the plaintiff's lawyer), and unequivocally rejected the plaintiff's defect claim.

<sup>12</sup> These non-certified class action cases consume more than 11 times more judicial hours than do average civil actions. Cases filed as class actions also take two to three times the median time from filing to disposition. And 63% of these cases never end up certified. See "Empirical Study of Class Actions in Four Federal District Courts, Final Report to the Advisory Committee on Rules," Federal Judicial Center (1996).

<sup>13</sup> Courts have confirmed the propriety of the "benefits and burdens" approach: "[Courts] must also keep in mind 'the accompanying dangers of injustice or of the limited scope within which these suits serve beneficial purposes....[Trial] courts [must] carefully weigh respective benefits and burdens....[and] allow maintenance of the class action only where substantial benefits accrue to both litigants and the courts.'" *Osborne v. Subaru of America, Inc.*, 198 Cal. App. 3d 646, 653 (1988).

<sup>14</sup> See, e.g., *Pick-up Trucks; Georgine*, *supra*.

<sup>15</sup> See McNeil & Fancsali, "Mass Torts and Class Actions: Facing Increased Scrutiny," 167 F.R.D. 483 (1996). See also, *Rhone-Poulenc-Rorer* at 1299.

almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings." (Lines 400 - 404) Also, the Committee should delete the sentence on lines 426-428 that: "Permission almost always will be denied when the certification decision turns on case-specific matters of fact and district court discretion." This language ignores the perniciousness and abuses peculiar to certification rulings and the benefits that would result from greater opportunities for appellate review.<sup>16</sup>

Rule 23(F) would encourage district courts to be more rigorous in making class certification rulings. Moreover, it would lead to better defined guidelines by the appellate courts for when a class action should or should not be certified. Last, it would discourage the use of class certification as a tool for "blackmail settlements."

It is no secret that class certification usually is "the ball game":

In the context of mass tort class action, certification dramatically affects the stakes for defendants. Class certification magnifies and strengthens the number of unmeritorious claims. Aggregation of claims also makes it more likely that a defendant will be found liable and results in significantly higher damage awards.

In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial black mail.<sup>17</sup>(Citations omitted.)

Although there is a right to appeal the class certification once the trial is over, in most cases it is a right in theory, not practice. Defendants confronted with even a small risk of losing a trial, but where losing means ruin, ordinarily will "not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle."<sup>18</sup> The Seventh Circuit summed it up best: "The reason that an appeal will come too late to provide

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<sup>16</sup> These deletions are also recommended in the *Report Concerning Proposed Changes to Rule 23 of the Federal Rules of Civil Procedure*, which was prepared by the ABA Section of Litigation Class Actions & Derivative Suits Rule 23 Subcommittee. See ABA Class Actions & Derivative Suits Newsletter, Vol. 6, No. 4 (Fall, 1996).

<sup>17</sup> *Castano* at 746.

<sup>18</sup> *Rhone-Poulenc-Rore* at 1297.

effective relief for these defendants is the sheer magnitude of the risk to which the class action, in contrast to the individual actions pending or likely, exposes them.”<sup>19</sup>

#### 4. More “Adventuresome Proposals”

Judge Higginbotham, in his letter to the Committee on Rules of Practice and Procedure, described the proposed amendments as “useful improvements” and explained that the Advisory Committee “put aside” some “more adventuresome proposals.”<sup>20</sup>

We encourage the Committee to consider additional proposals, including some that are “more adventuresome”:

- Reaffirm the 1966 Advisory Committee’s Note that cautioned against the use of class actions in mass torts. The Note should reflect that this is the mainstream judicial view: “Most federal courts...refuse to permit the use of the class action device in mass-tort cases, even asbestos cases.”<sup>21</sup>
- Provide that federal agencies have primary and exclusive jurisdiction over “recall claims.” In other words, class actions seeking recalls would not be permitted if there is a government agency responsible for regulating the product and authorized to order recalls of defect products.
- Adopt the suggestions of Secretary Coleman (heightened pleading standards; attorney fee awards to the party successfully opposing a class certification motion; “classwide proof” requirements; primary and exclusive jurisdiction regarding recalls (see above)).<sup>22</sup>
- Replace the “opt-out” provision of Rule 23(B)(3) with an “opt-in” requirement, as suggested by Alfred W. Cortese, Jr.<sup>23</sup> This would be a simple and elegant solution to the ethical and practical problems inherent in current 23(B)(3) litigation.

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<sup>19</sup> *Id.*

<sup>20</sup> June 10, 1996 Memorandum to The Committee on Rules of Practice and Procedure from Patrick E. Higginbotham, Chair, Civil Rules Advisory Committee, at 3.

<sup>21</sup> *Rhone-Poulenc-Rorer* at 1303.

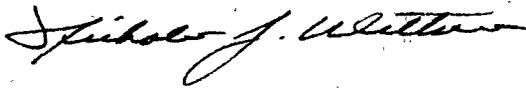
<sup>22</sup> Statement of William T. Coleman, Jr., on the Proposed Amendments to Fed. R. Civ. P. 23 Before the Advisory Committee on Civil Rules, November 22, 1996.

<sup>23</sup> Statement of Alfred W. Cortese, Jr., on Proposed Amendments to Federal Rule of Civil Procedure 23, Nov. 22, 1996, at 5.

Hon. Paul Niemeyer, United States Court of Appeals for the Fourth Circuit  
January 16, 1997  
Page 7

We applaud the Advisory Committee for seeking to curb the abuses of current class action practice and appreciate the opportunity to present the views of our Legal Department.

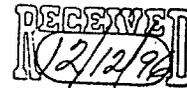
Very truly yours,



Nicholas J. Wittner  
Assistant General Counsel  
Nissan North America  
Legal Department

NJW/njw

Attachment



STATEMENT OF HENRY B. ALSOBROOK, JR.  
AS A PAST PRESIDENT OF  
THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL  
ON PROPOSED AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 23  
BEFORE THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

96-CV-103

December 16, 1996

Dallas, Texas

I would like to begin by expressing my appreciation to the Committee for allowing me to appear before you today as a past president of the International Association of Defense Counsel. The International Association of Defense Counsel is an organization of trial lawyers, corporate and insurance counsel who devote their practice to the defense of civil litigation. Since class actions are becoming and have become more prevalent in the defense of civil litigation, I welcome the opportunity to be here today to support the changes that you are proposing to Rule 23.

My remarks will primarily focus on Rule 23(b)(3).

At the outset, allow me to express my appreciation to the Committee for the fine work that it has undertaken, as evidenced by the proposed Amendments to Rule 23. I feel that these Amendments will go a long way toward codifying and making more uniform the law on class action certification and to some extent the deterrence of forum shopping. Certainly, if the district court adheres to the proposed Amendments, then the practice of forum shopping should be eliminated.

I also submit that the Amendments will clarify and better define exactly what is a class action and stem the abuse of using Rule 23 as a vehicle to propel a single cause of action into

expensive and protracted litigation involving thousands of hours in production of documents, depositions, and motion practice.

I commend the Committee for the inclusion of Subparagraph (A) which emphasizes the traditional right of an individual to control their litigation. This fundamental right should be championed by the district courts, as they have championed other individual rights. By recognizing that a class action is not appropriate when individual claims can stand alone, the Committee has honed in on a fundamental flaw in current class action certification.

Similarly, in Subparagraph (B), the Committee reinforces the right of the individual to control their own litigation. As pointed out in the 1966 Advisory Committee Notes, Rule 23(b) (3) is not intended for the resolution of mass torts. The Committee has rightfully recognized that a class action may not be fair to individual litigants even though it may be more friendly to the judicial system. Class action efficiency should not be equated with fairness.

I wholeheartedly agree with the Amendments to Subparagraph (C) in that they recognize that class actions should not be certified if there is pending mature litigation. Certainly this will go a long way toward avoiding duplicity in discovery, document production and all of the expenses in connection therewith. Again, I commend the Committee for its recognition of individual litigation as a consideration in class certification.

I feel that the addition of Paragraph (f) is a step forward in judicial administration. It will allow appeals promptly upon granting or denying class certification without the necessity of waiting until after the case has been tried when it would be too late to be helpful. I also feel that the appeal, even though it be discretionary, will certainly relieve the pressure on defendants to be forced into a settlement because of the granting

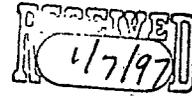
of class action certification. I would, however, urge that the appeal not be discretionary.

In closing, my I reiterate my deep appreciation for allowing me to make this presentation today. In summation, I commend the Committee for taking this difficult task and I hope that this will be just the first step toward the recognition of additional needed Amendments to Rule 23.

#2076

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FACSIMILE (703) 525-7057

3 January 1997

By Messenger

96-CV-106

Peter G. McCabe, Secretary  
Committee on Rules of Practice and Procedures  
Judicial Conference of the United States  
Washington, DC 20544

RE: Public Hearing on January 17, 1997, on Proposed Amendments to Rule 23  
of the Federal Rules of Civil Procedure

Dear Mr. McCabe:

Thank you for the opportunity to comment on the Advisory Committee's proposals. I am General Counsel of a state government relations firm in Arlington, Virginia, among whose clients are a number of health care, consumer products, chemical and drug companies involved in class action litigation, all of whom welcome efforts to limit appropriately class action practice. Previously, I was General Counsel of a large consumer products company with significant litigation exposure. I am also a member of the usual defense bar organizations. I do not, however, speak for any client or organization; my views are derived from evaluating the experience and opinions of others.

After reading most of the submissions filed with the Advisory Committee and listening to the presentations at the Dallas Hearing in December, there are two points about "Change 1" needing emphasis, in my view. My comments will be brief and conclusory.

First, while there is dispute about the value of 23(b)(3)(F) - "Change 1C" - this would at least require courts to consider the "costs and burdens" of class litigation, which is not now the case. This would be consistent with much of the broad case management discretion now vested in the Federal Courts, and would not foreclose appropriate aggregation of smaller, "public policy" claims much talked about by opponents of the change. The Advisory Committee, however, needs to clarify whether the Court of Appeals should review a decision to certify de novo, or merely as an abuse of discretion; I certainly agree with having a straightforward appeals process, interlocutory in nature; but it should also encompass a stay of proceedings pending appeal.

Further, to encourage rather than discourage Appellate review, the language in the Advisory Committee Notes suggesting that interlocutory review be granted "with restraint" needs to be removed; in addition, the language "discouraging" stays of trial proceedings while class certification is pending on appeal should be removed.

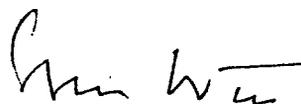
Second, the Advisory Committee must return to an analysis of the original purposes of Rule 23. The current proposals to modify the 23(b)(3) factors are welcome, if cautious, steps in the right direction; but the Advisory Committee needs to focus on the reality expressed by several witnesses in Dallas, that Rule 23 should not apply at all to disparate mass torts, those needing multiple trials on causation, damages, and other facts. The devil here is not simply whether there are common questions to be considered, but rather the necessity for separate trials on the evidence

necessary to answer these questions. Here, apparently, the MDL procedures work better.

I look forward to the opportunity to elaborate on these two points in San Francisco on January 17, 1997.

With appreciation for the committed hard work of all members of the Committee,  
I am,

Yours sincerely,

A handwritten signature in black ink, appearing to read "Sam Witt", with a horizontal line extending from the end of the name.

Samuel B. Witt, III

SBWIII:meh



WRITTEN STATEMENT OF

RICHARD B. WENTZ

96-CV-109

ON BEHALF OF THE  
MORTGAGE BANKERS ASSOCIATION OF AMERICA

I am Richard B. Wentz, Senior Vice President and Assistant General Counsel of Countrywide Funding Corporation, one of the largest originators and servicers of residential mortgages in the United States. I was recently appointed Chairman of a special Subcommittee on Class Action Reform created by the Legal Issues Committee of the Mortgage Bankers Association of America ("MBAA"). The MBAA is the leading trade organization in the mortgage banking industry, representing lenders who originated over \$350 billion in residential mortgages in 1996. I am here on behalf of the MBAA to express the MBAA's support of the proposed Amendments to Rule 23 of the Federal Rules of Civil Procedure and to urge the Committee to make further reforms to the Federal Rules of Civil Procedure governing class actions.

The mortgage banking industry, as well as the consumer finance industry in general, has been plagued in recent years by numerous lawsuits brought as class actions in both state and federal courts. Virtually every company across the country which originates or services residential mortgages has been faced with actual or threatened class action lawsuits. In the opinion of the mortgage banking industry, most of these lawsuits have been frivolous or hypertechnical in nature, and have served to benefit the attorneys who bring the suits much more than the class members themselves.

For instance, over the last few years, many mortgage banking companies were charged in class action lawsuits with violating the federal Truth-in-Lending Act (TILA) arising out of the decision of the Eleventh Circuit Court of Appeals in *Rodash v. AIB Mortgage Co.* In *Rodash*, the Court rescinded a mortgage loan and ordered the lender to return thousands of dollars to the borrower because certain expenses for courier services were not classified as "finance charges" as that term is defined in TILA. The *Rodash* decision spawned class action litigation against many, if not most, of the mortgage banking companies in the country, threatening each company with financial ruin if successful. Congress, seeing the inequity in the *Rodash* decision, wisely amended TILA to dampen that wave of class action litigation. We can provide numerous similar examples throughout the mortgage banking industry in which the class action mechanism has been misused.

For these reasons, the MBAA supports the reforms proposed by the Advisory Committee on Civil Rules. The most important innovation in the proposed amendments, from the MBAA's perspective, is the addition of a new subsection, Rule 23(b)(3)(F) which would require the court to consider "whether the probable relief to individual class members justifies the costs and burdens of class litigation" before

certifying a class. The experience in the mortgage banking industry has shown that class members recover little, if any, benefit from class action litigation, and that the costs to the mortgage banking company and to the court system as a whole far exceeds such benefits. Such litigation is also incredibly burdensome to the industry and to the courts, taking away valuable time and resources that could be better spent elsewhere. The reforms embodied in subsection 23(b)(3)(F) would help reduce the proliferation of such small-claim cases and reserve judicial resources for the case where class action relief is more appropriate.

The MBAA also supports the amendment to section (c)(1) of Rule 23 which would require courts to determine class certification "when practicable" instead of "as soon as practicable" which is the present standard. This improvement will allow courts to dispose of many meritless cases before the parties have expended huge sums on class-related discovery. This amendment will improve judicial efficiency and reduce litigation costs for the mortgage banking industry.

The MBAA also supports the addition of new subsection (f) to Rule 23 to permit interlocutory appeals of class certification orders at the discretion of the Court of Appeals. In much class action litigation, the case realistically will be won or lost at the class certification stage. Enabling the parties to take interlocutory appeals of orders granting and denying class certification will permit the parties to secure appellate review of such orders in appropriate cases without risking an adverse judgment after trial or having to settle to avoid such an outcome. This amendment will also foster the development of a body of class certification authority which will create greater certainty in cases in the future. However, the MBAA urges the Advisory Committee to remove the comment from the Notes to the proposed amendment that suggests that "permission to appeal should be granted with restraint." The MBAA believes that the appellate courts should not be discouraged from taking appeals in appropriate cases and that judicious use of the appeals mechanism will foster judicial efficiency and reduce litigation expenses in the long run.

In addition to the amendments proposed by the Committee, the MBAA urges the Committee to consider the following additional reforms and amendments to further improve the judicial process:

- Add a provision to Rule 23(d) that would expressly permit a court to stay discovery bearing on class certification or other class-wide issues during the pendency of motions to dismiss or motions for summary judgment based on the adequacy of the pleadings. A stay in these circumstances would avoid substantial discovery costs and potential invasion of borrower privacy in the event the court determines that the plaintiff's claim is, as a matter of law, without merit.
- Amend Rule 23(e) to clarify that a suit filed as a class action may be dismissed by the parties without court approval at any time prior to

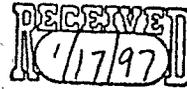
class certification. Where the defendant is able to demonstrate to the plaintiff's counsel that the lawsuit is not well founded, requiring court approval of a dismissal is needless and wasteful. Allowing plaintiffs to dismiss without court approval will not prejudice any other person so long as no class has been certified.

- Add a new subsection to Rule 23(c) to prohibit class representatives from receiving bonus payments. Class representatives would be limited to receiving a pro rata share of any class recovery. This provision is incorporated in the Securities Reform Act of 1996 and should apply generally, not just to the Securities industry. This provision would enhance the independence of class representatives and keep them focused on the interests of the class rather than their own pecuniary interests.
- Amend Rule 23(c)(2) to require plaintiffs to bear the initial costs of class notification, subject to the court's power to include these expenses as part of the costs awarded to prevailing parties at the conclusion of the case. A defendant should not be forced to pay these costs before any finding of liability.

Thank you for this opportunity to present the views of the Mortgage Bankers Association of America in support of the proposed amendments and in support of further reforms to Federal Rule of Civil Procedure 23. If any members of the Committees have any questions or would like further input from the MBAA, please contact me at (818) 304-5823.

Dated: January 17, 1997

#2093



96-CV-110

STATEMENT OF JAMES R. SUTTERFIELD  
ON BEHALF OF  
THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL  
ON PROPOSED AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 23  
BEFORE THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

January 17, 1997

San Francisco, California

Let me begin by expressing my appreciation to this committee for allowing me to appear before you today on behalf of the International Association of Defense Counsel. The International Association of Defense Counsel is an organization of trial lawyers, corporate and insurance counsel who devote their practice to the defense of civil litigation. Since class actions have become so prevalent in the defense of litigation, the International Association of Defense Counsel now has a standing committee devoted specifically to class actions and multi-party litigation and I appear before you today in my capacity as the chair of that committee for the purpose of expressing to you the views of the International Association of Defense Counsel and its membership. We welcome the opportunity to appear here today to support the changes that you are proposing to Rule 23.

While we believe the proposed revisions do not go far enough to curb the abuses that have become prevalent in class action practice, we believe they represent movement in the right direction and are pleased to state that the International Association of Defense Counsel supports the entirety of the proposed revisions.

Although the revisions consist of changes to a number of the parts which make up Rule 23, our association considered them, and I would like to discuss them, in three main groupings.

The proposed revisions to Rule 23(b)(3), consisting of proposed Rule 23(b)(3)(A), 23(b)(3)(C), and 23(b)(3)(F), concern proposed amendments which would reformulate the factors a court should consider in determining whether to certify a class for trial under Rule 23(b)(3). Addressing proposed Rule 23(b)(3)(A) first, providing that a court should consider the practical ability of individual class members to pursue their claims without class certification, we believe this revision will afford a trial court the ability to entertain small, but important claims of value, not so much to the individual claimants who stand to gain little monetary remuneration, but to society as a whole. We believe the current layers of local, state and federal regulation, more efficient today than in 1966, should be

considered by the court as a threshold question to the use of Rule 23 at all, and in most instances there will be little societal need for marauding private attorneys general scouring the countryside to right perceived, or real, wrongs, because the regulators can do it more efficiently and with less valueless cost. For example, is returning \$10.00 in overcharges to a million consumers of insurance or utilities worth the fifteen million or more, including litigation costs, which will then have to be passed on to consumers in the form of increased premium or utility rates in order to pay for it, when regulatory action can curb the abuse targeted? The litigation and transaction costs, adding no value, ultimately cost society more than the abuse. As a caveat, our support of new Rule 23(b)(3)(A) is conditioned on the enactment of new Rule 23(b)(3)(F) discussed hereafter.

Proposed new Rule 23(b)(3)(C), recognizes that class actions should not be certified if there is pending mature litigation. While we support this proposal, we believe it is somewhat ambiguous and clarifying language should be added either to the subsection itself or the Committee Notes, to clarify the meaning of "mature litigation." It has been suggested that "mature litigation" could mean (1) theories of injury, negligence and recovery which have not progressed to the stage where predictable results can be anticipated, for example, the "Breast Implant Litigation;" (2) matters wherein a new and competing suit for class certification is filed by different representatives during the course of an existing action; or (3) a new action filed against a different party arising out of a different occurrence, but claiming the same injury to the same class, as with successive chemical releases over the same geographic area prompting the same claims of respiratory injury. Our association would prefer that the definition of "mature litigation" cover all three of these areas in order to curtail duplication of discovery, document production and the expenses and delay associated therewith, without harm to justice.

The last portion of this aspect, proposed new Rule 23(b)(3)(F) requiring the trial court to consider "whether the probable relief to individual class members justifies the costs and burdens of class litigation," provides necessary balance to proposed Rule 23(b)(3)(A). Used properly and as intended, this revision can be a very helpful tool in retarding the practice of class counsel aggregating thousands of questionable class claims, of limited and dubious value each, in order to obtain aggregated claims amounting to millions of dollars on which class counsel's contingency fees, also in the millions of dollars, will be based. Although some courts have demonstrated their view that they already have this ability to "separate the chaff from the wheat," other judges have not shared this view. We believe the proposed revision will give judges a mandate to use focused discretion in determining whether a particular case has sufficient value to individual claimants to warrant the burdens of class litigation. From the standpoint of those of us who defend class litigation, and our clients who are defendants in these cases, we believe this is the single most important revision of those proposed. Further, we are quite concerned that the rejection of this proposed revision could be interpreted by some as a mandate to not perform a cost-benefit analysis in such cases, thereby creating a very

real set-back to the defense community as well as the courts' ability to maintain a manageable docket.

The creation of a new section (f) (Rule 23(f)) allowing a court of appeal discretion to permit an appeal from a certification or denial of certification order, presents a very real improvement in judicial administration and affords the litigants more certainty in whether to invest their assets in the prosecution, defense or settlement of litigation. It will allow, in appropriate cases, a prompt determination of whether to go forward in extremely expensive litigation. Neither plaintiffs nor defendants are served when they are required to wait until the trial is over for a determination of whether the trial has been in vain. Neither defendants, nor the consumers of their products, benefit from being forced into settling a bad case because the expense of litigation or the uncertainty of its outcome compel the payment of tribute. Granted when appropriate, the appeal of a certification order and an ultimate decision that class actions are not proper in the context presented will also over time give relief to the courts by abating at least to some extent the number of class actions filed with the goal not of ultimate victory but rather of economic gain by settlement once a certification order is obtained.

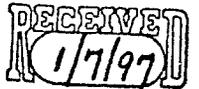
New subsection 23(b)(4) would recognize the establishment of classes solely for the purpose of settlement. We are all cognizant that the Third Circuit, in Georgine, took the view that present Rule 23 does not allow a class action to be formed purely for purposes of settlement, while other circuits, for example the Fifth Circuit in the In Re: Fiberboard litigation, has taken the opposite view. As the Supreme Court has scheduled argument in Georgine, it may be that no revision in this regard is required. However, we believe that whether by amendment of the rule or by action of the Supreme Court, the practical ability to conclude mass litigation by settlement class is important for the courts as well as the litigants and we support the proposed revision. Virtually every state has a parallel class action statute and there has been no shortage of state judges willing to entertain and grant certification of settlement classes. Without a mechanism for disposing of these claims on a national basis, the litigants are faced with duplicative litigation in a number of jurisdictions. In supporting this revision, we are mindful of the view that it represents a dramatic departure from the goal of the original drafters of Rule 23. However, we are more concerned about the practical effect of the rule as it has been interpreted by the courts. We are also mindful of the view that the revision may prompt the filing of more frivolous cases in the hope that they can get 'settlement certification.' and once status is granted, should there be no settlement, the likelihood would be greater that the class will be certified for trial. Although this point is of grave concern, we believe that the revision offers a proper safeguard since it provides that it is a pre-requisite to the formation of a settlement class that a settlement be effected.

Accordingly, the International Association of Defense Counsel supports, as a package, the revisions to Rule 23. We believe they provide a much needed balance to

the competing interests and provide guidance to trial courts in dealing with these "litigation monsters." Upon enactment of these proposed revisions, the "winners" will be the litigants on both sides, as well as the court system, while the only losers will be the lawyers who profit from prosecuting and defending these cases. Our profession requires that we consider the interests of our clients over those of ourselves and this proposal affords the legal community the opportunity to observe what we were all taught in our ethics classes in law school.

In closing, I again thank the Committee for the opportunity of appearing here today to present the views of the 2,500 members of the International Association of Defense Counsel, and I commend you for undertaking this very difficult, but sorely needed, task.

#2110



Statement Concerning The Proposed Amendments  
To Federal Rule of Civil Procedure 23

Professor Arthur R. Miller  
Harvard University  
January 17, 1997

96-CV-111

I appreciate the opportunity to address the Advisory Committee and your consideration of these remarks. I understand that this is the third in a series of meetings this Fall and Winter to address the proposed changes to Federal Rule 23. Because the Committee already has heard numerous witnesses and received many written statements, I will limit my comments to three aspects of the revision I think deserve special comment and refrain from addressing matters not covered by the Committee's proposal.

Having observed the current debate surrounding the proposed changes to Rule 23 for many months now, I am struck by the familiarity of the colloquy. Much of the discussion today resounds the discussion in 1979, when the profession also was embroiled in a debate over the merits and demerits of the class action. For instance, among the reasons currently cited in support of the proposed changes are the following:

[W]idespread abuse of the rule by lawyers and litigants on both sides of the "v.", including unprofessional practices relating to attorneys fees, "sweetheart" settlement deals, dilatory motion practices, harassing discovery, and misrepresentations to judges. Finally, some have questioned the wisdom of imposing the burdens of class actions on an already overtaxed federal judiciary. They assert that many Rule 23 cases are unmanageable and inordinately protracted by opposing counsel, creating a certain millstone or dinosaur

character that diverts federal judges from matters more worthy of their energies.

Yet, despite the attention that has been riveted on rule 23, we have precious little empirical evidence as to how it actually has been functioning, in terms of either its alleged benefits or supposed blasphemies.

Yet, those comments were made in a law review article published in 1979, just after I became the Reporter of this Committee, although it actually was penned before. Arthur R. Miller, Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem," 92 Harv. L. Rev. 664, 665-66 (1979),

Perhaps some of the technical procedural issues have changed, but those words are just as applicable today as they were when I wrote them 18 years ago. As was true then, much of the debate today focuses on particular events in individual cases that seem to have metamorphosed into cosmic anecdotes. Those anecdotes have been repeated so often among members of bench and bar (as well as the media) that they have created the impression that class action practice is beset with evils for both plaintiffs and defendants, rather than a remarkably useful and efficient tool that has worked well for over thirty years in innumerable cases. The difficulty for rulemakers -- and those interested in constructive dialogue -- both in 1979 and now -- is that the evidence is only anecdotal. In fact, the little empiric evidence that does exist suggests that the purported "problems"

are less widespread than the anecdotes indicate.<sup>1</sup> The Federal Judicial Center study commissioned by this Committee stated:

We did not find any patterns of situations where (b) (3) actions produced nominal class benefits in relation to attorneys' fees. Nor did we find any (b) (2) cases that appeared to result in clearly trivial injunctive relief accompanied by high fees.<sup>2</sup>

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. . . The absence of such nominal recoveries in the four districts suggests that the anecdotal cases on which the discussion was based . . . may represent earlier cases at the bottom of the range of class action recoveries.<sup>3</sup>

The study shows that when trivial cases are filed, they almost always are dismissed or class certification is denied. Id. at 90. Finally, the study demonstrates that a class action case takes approximately the same amount of time to reach resolution as its more traditional cousin -- two-party litigation. Id.

In light of these findings, what then is behind the current perceived need for changes and amendments to Rule 23? In my opinion, the driving force is the same today as it was in 1979 a struggle to deal with changes in contemporary society, emerging, complex substantive law, and mass phenomena that have little to do with the procedural parameters of Rule 23 and really cannot be "solved" by manipulating the text of that rule.

Returning to my 1979 article:

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<sup>1</sup> Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules, 1996.

<sup>2</sup> Id. at 11.

<sup>3</sup> Id. at 90.

It is important in understanding the class action debate to realize that the "big case" phenomenon transcends the class action. The "big case" is an inevitable by-product of the mass character of contemporary American society and the complexity of today's substantive regulations. It is a problem that would confront us whether or not rule 23 existed. Indeed, it is becoming increasingly obvious that the traditional notion of civil litigation as merely bilateral private dispute resolution is outmoded. Since our conception of the roles of judges and advocates is based on this traditional view, the ferocious attack on class actions may reflect anxiety over the growing challenge to the model's immutability.

Of Frankenstein Monsters, 92 Harv. L. Rev. at 668.

I believe now, as I did then, that Rule 23 is being used as a convenient scapegoat for grievances against our civil litigation system and philosophical, demographical, economic, product manufacturing and marketing trends in our society whose roots lie far deeper than the procedural aspects of practice under that rule. Yet precipitate or excessive rule making action that might have a satisfying short-term effect on practice or deter access to the courts may prove extremely deleterious indeed, in the longer run.

The "culprit" in this instance, as noted in the responses and commentary on the proposed revisions before the Committee, is the dispersed mass tort case, a natural consequence of our society's growing reliance on science and technology. How can our civil justice system deal with these instances of widespread damage, often involving latent injuries that may not be revealed for decades -- logically, efficiently and, most of all, fairly? The obvious -- and honest -- answer is that we do not know the

answer yet. We still have too little experience with these cases.<sup>4</sup> Two things are clear, however.

First, to blame the class action procedure for the increased burdens associated with new patterns of complex litigation is both inappropriate and misdirected. These multi-party, multi-claim, and often unwieldy cases are a result of forces set in motion by our increasingly complex society, new substantive rights created by Congress, and well-intentioned attempts by our courts and legal system to accommodate these developments. The issues posed by contemporary multi-party, multi-claim litigation will remain, whether these large cases are consolidated under Section 1407 of the Judicial Code, become huge aggregated litigation in the traditional two-party format or proceed as complex class actions. To focus merely on the procedural vehicle is myopic. As the American Law Institute concluded in its Complex Litigation: Statutory Recommendations and Analysis (1994), which I served as Reporter, the problem far transcends rulemaking (and the rulemaking power).

Second, although these cases, by their mere size, raise problems and test the resiliency of our judicial system, the

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<sup>4</sup> This Committee itself has acknowledged that extensive revisions to Rule 23 to address problems of managing mass tort litigation would be premature given the "continuing and rapid development of practice in this area." See Advisory Committee Notes at 5. Indeed, Chairman Niemeyer, in his recent presentation in Tucson, Arizona, noted that most of the tools necessary to address mass tort class actions are beyond the scope of rulemaking authority. Hon. Paul V. Niemeyer, Remarks to Institute of Law & Economic Policy, University of Arizona, December 14, 1996.

problems are not intractable, insurmountable -- or even nearly so. The basic operation of the procedural rule, and its ability to accommodate changes in social conditions and substantive law, ultimately depend on the ingenuity of district judges working cooperatively with counsel to manage complicated lawsuits in a creative fashion. Imaginative judicial management by federal judges willing to control, shape, and expedite these cases can go far towards achieving the objectives of the class action. It was precisely those professional skills that rationalized, civilized, and, to a significant degree, unified class action practice and resolved many of the issues that generated the debate that was raging in the 1970's at the time of my Frankenstein Monsters piece.

On that basis, in my judgment, the vast majority of the proposed revisions are unnecessary and, some, even dangerous. Rather than simplifying or expediting the class action process, they are likely to create a cornucopia of ancillary litigation in an attempt to fix things that "ain't broke," or unduly constrict practice, not only in the dispersed mass tort context, but in a wide array of other substantive areas, such as antitrust, civil rights, securities or consumer law. Admittedly abuses continue to exist on both sides of the "v." Existing mechanisms, intelligently and flexibly employed, however, are sufficient to address these unfortunate activities as has been true of some of their unpleasant predecessors. The exception is the proposal recognizing the utility of settlement classes in resolving

complex cases that otherwise would continue to clog courts and drain judicial resources, either as class or multiple individual actions.

Against that backdrop, I would like to comment on three of the proposed revisions to the rule.

Rule 23(b)(3) - New Factors To Be Considered For Certification

The proposed revisions to this subdivision refocus the list of factors courts should consider in determining whether sufficient predominance and superiority exist to justify certification of a class. Unfortunately, this new focus is skewed toward denying certification, in spite of nearly thirty years of jurisprudence in which certification has been strongly favored and without any demonstration as to why the subject should not remain a matter of judicial discretion. These new factors are misdirected, unnecessary, internally inconsistent, and one of them, Rule 23(b)(3)(F), is, frankly, downright pernicious.

Proposed Rule 23(b)(3)(A) suggests that class certification may not be appropriate if some individual class members have the practical ability to pursue their claims without class certification. The relevant inquiry, however, is not whether class members have the practical ability to pursue their own claims, but rather, whether or not class members have an interest in or desire to litigate individually.<sup>5</sup> If they do, the existing

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<sup>5</sup> This concept is captured in part in proposed Rule 23(b)(3)(B), which requires courts to consider the class members' interest in maintaining or defending separate actions. That

provisions of Rule 23 allow them to opt out and pursue their own claims. If, however, class members elect to proceed by means of a class action, it would be improper to deny them the opportunity to do so on the basis that some class members are capable of proceeding individually. Moreover, it is illogical and counterproductive to deny the system the benefits of group adjudication.

Additionally disturbing are the vague and ambiguous nature of both the proposed revision and the Advisory Committee's Draft Note. Neither the provision, nor the Note provide any assistance to courts in applying the new rule. What are the parameters of "practical ability?" Is it solely the size of the claim, the claimant's net worth or his ability to retain counsel, his level of education? How are those with such "practical ability" to pursue individual claims to be distinguished from other willing and interested class members? Will it be necessary to take discovery on this issue, and, if so, what is the scope of that discovery to be? Without guidelines, this proposed new factor raises more problems than it answers, and will only serve to burden the litigation with undue cost and delay on matters unrelated to the merits of the case.

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proposed revision, however, is unnecessary. Current Rule 23(b)(3)(A) already permits courts to consider a class member's interest in individually controlling the prosecution or defense of separate actions. Thus, the issue already is addressed adequately in the existing rule. Moreover, proposed Rule 23(b)(3)(A) appears to cut against certification, even when the provisions of the revised subdivision (B) would support certification.

I am particularly concerned with the myriad problems inherent in proposed Rule 23(b)(3)(F). This so-called "just ain't worth it" proposal asks the court to weigh the probable amount of individual recovery against the aggregate costs and burdens of class action litigation. How can it possibly be equitable to attempt to balance the total costs to defendants and the court against the amount of probable individual relief to class members? Why should the law's long and proud traditions of requiring wrongdoers to disgorge ill-gotten gains or answer in damages for their misconduct be rejected or impaired by depriving it of a powerful procedural vehicle for situations in which no other economically viable mechanism is available? The proposed test completely ignores the most important functions served by Rule 23 -- a class action is frequently the best, if not the only, means of internalizing to the wrongdoer the true cost of his misconduct. Rather, the proposal shifts the focus from the importance of rectifying the defendants' alleged misconduct that gives rise to the claims and their ill-gotten gains and redirects it to the amount of individual relief to the injured parties.

This approach also has wide-ranging substantive implications. It is Congress who establishes policies and creates enforceable rights concomitant with those policies. It is not the role of the courts or the rulemakers to decide that some of the rights established by federal and state substantive law are unworthy of enforcement because the amounts to be recovered by each individual class member may be small. Indeed,

the Rules Enabling Act, 28 U.S.C. §2072, expressly forbids the Supreme Court from promulgating rules that abridge, enlarge, or modify substantive rights. Nonetheless, the proposed "procedural" change in Rule 23(b)(3)(F) effectively may eviscerate a variety of substantive rights -- for example protections against consumer and investor fraud or antitrust violations, by denying people access to the court if individual damages are perceived by federal judges as small. Indeed, even plaintiffs with strong claims on the merits may be denied access to the courthouse, merely because their probable individual recovery is small.<sup>6</sup>

Nor does the Rules Enabling Act permit the rules from altering Congress' decision to establish a particular jurisdictional amount threshold or to provide no such limitation whatsoever. If Congress has authorized an individual to seek redress for \$1 under a wide array of substantive statutes, why should a Federal Rule deny access to a class of \$1 claimants?

Moreover, the proposed "balance" turns one of the principal justifications for class actions on its head -- to aggregate small and medium sized claims into a unit that makes it economically feasible to litigate those claims. In fact, class actions traditionally have been seen as the only means of

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<sup>6</sup> Curiously, the minutes of the Advisory Committee's discussion suggest that any concern with "public interest" in support of these small claims class actions would be contrary to the Committee's prerogatives under the Enabling Act. Why, however, is denial of certification on the basis of the size of the claim of individual class members any less of a substantive intrusion?

adjudicating small claims. In the early case of Weeks v. Bareco Oil Co., 125 F.2d 84, 88 (7th Cir. 1941). the Court of Appeals stated:

To permit the defendants to contest liability with each claimant in a single separate suit, would in many cases give defendants an advantage which would be almost equivalent to closing the door of justice to all small claimants. This is what we think the class suit practice was to prevent. Like many another practice, necessity was its mother. Its correct limitations must be ascertained by the experiences which brought it into existence.

See also Deposit Guarantee National Bank v. Roper, 445 U.S. 326, 337 (1980) ("when it is not economically feasible to obtain relief within the traditional framework of . . . small individual suits, class members may be without an effective remedy unless a class action is available").<sup>7</sup> These observations have not lost their vitality.

Taken together, Rules 23(b)(3)(A) and 23(B)(3)(F) present courts with a "Goldilocks" conundrum. To be granted class certification, an individual class representative's claims must be "just right" -- neither too large nor too small. The focus of these proposals is perplexing in light of recent changes in the federal securities laws suggesting that plaintiffs with the

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<sup>7</sup> The unspoken issue inherent in this proposal is the argument that many class actions are brought solely to generate fees for class counsel, rather than to obtain meaningful recovery for the class. If true, the punishment is misdirected. It is grossly inappropriate to deprive individuals with small claims of their substantive right to seek redress in order to curtail possible abuses by a handful of lawyers. Moreover, the Advisory Committee's own study indicates that such abuses are rare. Absent empiric evidence to the contrary, one fears that proposed Rule 23(b)(3)(F) is driven by "myth" and "cosmic anecdotes," not "reality."

largest claims may be the "most adequate plaintiff" and the recent findings of the Federal Judicial Center study that there are few "trivial" claims, and those brought usually are dismissed early in the process.<sup>8</sup>

Certainly, not every aggregation of small claims should be certified; nor should all large claim aggregations. Nonetheless, the issues are far more complex than the simplistic language of either Rule 23(b)(3)(A) or (F) suggest. Moreover, both provisions contain major, complex substantive considerations that are outside the purview of the Committee.

Furthermore, these proposed new factors, in addition to being unnecessary, also will serve to exacerbate what is already a complex and protracted certification process. This focus on "probable relief," and especially Rule 23(b)(3)(F)'s cost-benefit analysis, is certain to lead to extensive collateral discovery -- including a merits examination into the probability of relief, the capability of class members to proceed independent of class certification, the size of individual damages by plaintiffs, and the costs and burdens of defense, including discovery into counsel fee arrangements. The consequences will be protracted

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<sup>8</sup> The recently enacted Private Securities Litigation Reform Act of 1995 imposes a rebuttable presumption that the most adequate plaintiff is the one with "the largest financial interest in the relief sought by the class." 15 U.S.C. §77z-1(a)(3)(B)(iii)(bb); 15 U.S.C. §78u-4(a)(3)(B)(iii)(bb). See also H.R. Rep. No. 369, 104th Cong. 1st Sess. 41 (1995), reprinted in 1995 U.S.C. C.A.N. 730, 740 ("Institutional investors and other class members with large amounts at stake will represent the interests of the plaintiff class more effectively than class members with small amounts at stake.").

litigation, additional strain on limited judicial resources, and increased costs to all-participants. Human nature and litigation dynamics being what they are, this will occur in a range of cases that transcends the supposed "problem" class actions. Thus the proposal is extremely problematic because it adds yet another non-merit related decision-making point to the process at a time when we are trying to reduce the cost and delay of adjudication.

I am also concerned with the practical "workability" of proposed Rule 23(b)(3)(C), which requires courts to consider the "maturity" of related litigation. This suggested change clearly is directed toward mass tort causes, a step the Advisory Committee has already acknowledged is premature. Again, the parameters of the proposal are ill-defined and virtually unworkable.

First, the scope of "related" litigation is not clear. Although the maturity of related litigation concerning the specific controversy already begun by or against members of the class may be marginally relevant, the maturity of any related litigation, regardless of subject matter, named parties, or format or locale, clearly is not relevant. Even the causes of action in the "related" action may be far different from those in the action seeking certification yet be found to fall within the ambit of Rule 23(b)(3)(C).

Second, in applying this rule, if the court suspends certification in the case before it, when does the issue again become ripe for consideration? Must the court monitor each of

the related cases to decide when the facts and legal issues are sufficiently developed to proceed? Must all action in the instant case be stayed, pending some level of "maturity" in what could be scores of related cases? What impact would settlements in the related cases have on the putative class action? Once again, the impact of the proposed revision is to protract the litigation and, possibly, to impose extensive prejudice and delay to class members who are not party to the related litigation and whose rights should not be held hostage by it.

Paragraph 23(b)(4) -- Settlement Classes

This portion of the proposal merely recognizes an existing fact of life -- settlement classes serve important purposes in today's complex litigation. Naturally, they raise the omnipresent claim of abuse. As we await the Supreme Court's decision in Georgine v. Amchem Products, 83 F.3d 610 (3d Cir. 1996), cert. granted sub nom. Amchem Products, Inc. v. Windsor, 1996 WL 480936 (Nov. 1, 1996); \_\_\_ U.S. \_\_\_ (1996), and perhaps any proposal for revision should await that decision and careful analysis of it, we are all familiar with tales of collusion, unfair remedies for future claimants, and, in particular, the "reverse auction" problem in which defendants shop around and "sell" their proposed settlement to the lowest bidder, knowing that if the settlement falls through, the class action cannot go forward for purpose of litigation.<sup>9</sup> I have little doubt that

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<sup>9</sup> The defendants' bargaining power in this circumstance may not be as strong as it might appear, considering the alternative of dozens of smaller class actions or hundreds of individual

misconduct occurs in some cases, although, again, there is no empiric basis for concluding that abuse is widespread. Indeed, the seemingly pervasive monitoring of cases by other interested lawyers serves as an effective deterrent to the success of such tactics.

The perceived problems with settlement classes, however, can be minimized in a number of ways, particularly through diligent examination by the court of the fairness and adequacy of the settlement as already is provided in Rule 23(e).<sup>10</sup> Indeed, most circuits have longstanding, well-established criteria to make that determination. See, e.g., Torresi v. Tucson Elec. Power, 8 F.3d 1370, 1375-76 (1993), cert. denied, 114 S. Ct. 2704 (1994) (review includes an analysis of the strength of plaintiffs' case, the extent of discovery completed, the stage of the proceedings). See also In re Corrugated Antitrust Litigation, 659 F.2d 1322, 1324 (5th Cir. 1981), cert. denied, 456 U.S. 998, 1012 (1982); Weinberger v. Kendrick, 698 F.2d 61 (2d Cir. 1982), cert. denied, 464 U.S. 818 (higher judicial scrutiny of the negotiations and circumstances of the settlement, including any differences in treatment of claimants); In re General Motors Corp. Pick Up Truck Fuel Tank Prod. Liability Litigation, 55 F.3d 768 (3d Cir.), cert. denied, 116 S. Ct. 88 (1995) (nine factors courts must consider in determining fairness, reasonableness, and

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actions.

<sup>10</sup> This point is made even stronger with the new explicit requirement in proposed Rule 23(e) that the court hold a hearing on all settlements.

adequacy of settlement). Moreover, if the terms of the settlement are defined prior to the application for certification, as required in this proposal, the court's objectivity in reviewing the settlement is increased.

As a further check on invasion of class member's rights, objecting class members almost always appear during the court's consideration of these factors. These objectors preserve the benefits of the adversarial process and point out any perceived inequity in the settlement. Additionally, the court can allow limited confirmatory discovery to test the strengths and weaknesses of asserted claims, and class members can opt out if the settlement appears to be an unfavorable bargain or not in their best interest.<sup>11</sup>

In the hands of a committed district judge, these well-established factors and common case management techniques, plus the various existing requirements of Rule 23, are sufficient to protect the interest of both sets of parties, and go far towards addressing the concerns expressed by opponents to this proposal. Moreover, the Committee's Draft Note makes clear that the prerequisites of Rule 23(a), particularly typicality and adequacy of representation, still must be met and the prerequisites of

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<sup>11</sup> Courts also may take such steps as appointing an advocate or representative for absent class members, limiting the representation by class attorneys of clients who are maintaining individual actions on related claims or appointing special masters to review and comment on specific issues, if the trial judge has taken a role in the settlement negotiations. These powers already are available to the district court judge under existing Rule 23's considerations of adequacy of representation, superiority, and fairness.

Rule 23(b)(3) are preserved, although they are to be interpreted in the context of settlement, rather than litigation. The proposal's nominal liberalization of certification standards merely serves to avoid forcing the parties to jump through hoops designed for litigation when there will be none, and to avoid wasting the court's time in fictional role-playing -- pretending that the case will be litigated through trial.

In sum, reasonable use of settlement classes in the context of properly framed lawsuits, accompanied by sharp, perhaps heightened, judicial scrutiny of the fairness of the settlement, particularly to absent class members, and the adequacy of the representation goes a long way to resolving many of the difficult management issues presented to courts in complex class actions. Thus, a modest recognition of the existing practice and of the systemic value of settlement seems appropriate.

#### Interlocutory Appeals - Rule 23(f)

Current guidelines for interlocutory appeals require that both the trial and appellate courts find that certain requirements are satisfied. In contrast, proposed Rule 23(f) contains no guidelines, limitations, or restraints and completely ignores the views of the trial judge -- the one responsible for maintaining and managing the class action -- as to whether an interlocutory appeal is appropriate.

Adoption of this proposed revision is certain to produce an "automatic" motion for interlocutory appeal, whenever certification is granted or denied. This enmeshes the parties

and the court in even more ancillary litigation, first regarding the need for appeal, the appropriateness of the certification, and then, extensive briefing to the appellate court. This only serves to drive up costs to the litigants, to tax judicial resources, and to protract the litigation process on matters having nothing to do with the merits of the dispute.

Appellate review of class certification may be appropriate in rare and unusual cases. When it is, currently available devices for obtaining review are adequate, and the courts of appeal have not been reluctant to use them recently. See, e.g., Valentino v. Carter-Wallace, Inc., 97 F.3d 1227 (9th Cir. 1996); Andrews v. AT&T Corp., 95 F.3d 1014 (11th Cir. 1996); In re American Medical Sys., Inc., 75 F.3d 1069 (6th Cir. 1996); In re Fiberboard Corp., 893 F.2d 706 (5th Cir. 1990); In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995); Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996). The existing techniques for mandamus and interlocutory review renders this proposed revision unnecessary.

#### Conclusion

In my judgment, many of the proposed revisions of Rule 23 reflect an overreaction to problems whose dimensions have been overstated. To the extent they attempt to address problems inherent in mass tort cases, they are premature, lacking in any empiric basis, paint with too broad a brush, and transgress the rule-making line established in Section 2072. I firmly believe that the wisdom, judgment, and good will of federal judges and

the creativity and cooperation of the district judges and the lawyers can resolve the few "real" problems that exist. That certainly was true of many of the concerns being debated at the time I penned the Frankenstein Monsters article; I believe that the experience and wisdom that comes with maturation will lead to a similar result with regard to today's issues.

Having served as a Reporter to this Committee and as one of its members, I understand the extraordinary burden of its duties and the pressures of decision-making it confronts. Despite the views expressed above, I applaud the Committee (and the Reporter) for its diligence, the quality of its work-product, the utility of the debate it has fostered, and the preservation of the rule-making process with regard to this difficult subject.

STATEMENT OF MILES N. RUTHBERG  
ON THE PROPOSED AMENDMENTS TO  
FEDERAL RULE OF CIVIL PROCEDURE 23

JANUARY 17, 1997

I appreciate the opportunity to appear before this Committee to discuss the proposed amendments to Federal Rule 23.

My comments reflect my experiences representing clients in numerous class actions, in both federal and state court, primarily on the defense side, and principally in the areas of securities, mass torts, and antitrust. I have had the privilege of being involved in some of the largest and most closely watched class actions in recent years.

My interest in class actions actually goes back over twenty years to when I was in law school and edited a lengthy student law review article on the subject.<sup>1/</sup> Now that I've been in practice, what we wrote then seems naive in many respects. But our central point about Rule 23 still seems right, which is that it operates on the edge between procedure and substance. It is a procedural device which often allows substantive claims to be brought that otherwise could not be heard.

Under the Rules Enabling Act, however, precisely because Rule 23 is a procedural device, it cannot be allowed to create or alter the underlying substantive claims. That is the job of Congress, not the Courts. And, as the Supreme Court repeatedly has reminded us in recent years, Congress does not

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1. Developments in the Law -- Class Actions, 89 Harv. L. Rev. 1318 (1975).

always want more liability exposure, as opposed to less.<sup>2/</sup>

Deterrence, to the extent intended by Congress, is appropriate; over-deterrence, given the resulting social and economic costs, is not. Unfortunately, experience has shown that trial courts too often stretch Rule 23 to accommodate class actions -- even when it means altering legal rights by glossing over differences in proof and coercing defendants to settle cases that never should have been brought.

I applaud the Committee's proposed amendments as a well-directed effort to curb these abuses. But I believe that much of what the amendments seek to accomplish is undermined by certain comments in the proposed Advisory Committee Notes. I will point out those comments in my remarks on the specific amendments. In addition, I join those who have testified that the proposed amendments should go further by amending Rule 23 to include an express requirement of class-wide proof. That is the best way to stop courts from overriding limitations on the substantive claims as established by Congress.

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2. In Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 114 S.Ct. 1439 (1994), for example, the Supreme Court overturned decades of federal cases that erroneously overextended liability under Section 10(b) of the 1934 Securities and Exchange Act to include aiding and abetting. In so doing, the Court observed that extending liability "no doubt makes the civil remedy more far-reaching, but it does not follow that the objectives of the statute are better served." Id. at 1454 (emphasis added). In the Section 10(b) context, the "ripple effects" of excessive liability exposure may "disserve the goals of fair dealing and efficiency in the securities markets." Id. at 1454.

Proposed Rule 23(f), Interlocutory Appeals

Proposed Rule 23(f), authorizing interlocutory appeals from the grant or denial of class certification, is an important and much-needed amendment for plaintiffs and defendants alike. Post-trial review of the class certification decision is often too late. From the plaintiffs' standpoint, a denial of class certification is, in many cases, the "death knell" of the litigation. See Eisen v. Carlisle & Jacquelin, 370 F.2d 119, 121 (2d Cir. 1966), cert. denied, 386 U.S. 1035 (1967). There is no question that plaintiffs in these cases would benefit from early review.

From a defense standpoint, interlocutory review of improper class certification is critical. As Judge Posner cogently explained in In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1297-98 (7th Cir.), cert. denied, 116 S.Ct. 184 (1995), orders certifying litigation classes seeking massive damages can inflict irreparable damage upon defendants. This is because the mere fact of certification skyrockets the stakes for defendants. Most cannot endure the risk of an enormous adverse judgment in a single trial -- even where that risk is small -- in order to obtain appellate review of the certification order. With no real opportunity for immediate appeal, the only escape for defendants is to negotiate a settlement at a price leveraged exponentially by the risk of a class-wide judgment.

In these cases, Rule 23 certification is nothing more than a vehicle for extracting money from defendants without

regard to any appropriate liability exposure. I can personally confirm that some courts deliberately wield certification power precisely in order to pressure settlement -- irrespective of whether the case could ever be fairly tried as a class action.<sup>3/</sup> I think most of us would agree that this is not a proper function of the federal courts.

Some suggest that defendants are adequately protected by the practice of some courts to hedge the certification decision -- either by entering a "conditional" certification, or by indicating that the class can always be decertified or narrowed in the future. That is cold comfort in the real world of litigation. Revisiting certification has the practical effect of shifting the burden of proof on class certification to the defendant, and the principle of inertia operates as surely in litigation as in the physical world: Once a thing has been decided, overburdened courts are reluctant to revisit the issue at all, let alone change course. If a defendant cannot obtain review of a bad certification decision before trial, settlement often is the only option.

As the law now stands, there is no reliable mechanism for obtaining review of class certification decisions, for plaintiffs or for defendants. Some appellate courts are willing,

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3. Some courts have been candid about their motives. See, e.g., Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996) ("The certification order which we review is brief and conclusory. The record reflects that it was entered with the express hope on the part of the district judge of encouraging settlement . . .").

but only in rare cases, to grant a petition for a writ of mandamus, as Judge Posner did in Rhone-Poulenc. But that path is extremely narrow, as Judge Posner himself made clear. 51 F.3d at 1295. Other courts, including the Ninth Circuit, have taken the position that mandamus simply is not a proper tool for review of class certification orders.<sup>4/</sup>

The only other mechanism now available is an interlocutory appeal under 28 U.S.C. § 1292(b). But that path requires the blessing of the very district court that issued the questionable ruling in the first place. If the ruling was designed to pressure settlement -- as some clearly are -- the district court is unlikely to relieve the pressure by putting the issue to the court of appeal.

The proposed broader interlocutory appeal is a good solution. Rule 23(f) would protect the appellate courts from deluge by giving them discretion to intervene or not, as they choose. The courts of appeals are accustomed to exercising their discretion whether to take certified appeals under Section 1292(b). The amendment merely would eliminate the step of having first to elicit the cooperation of the district court.

The proposed Advisory Committee Notes to Rule 23(f), however, undercut this otherwise elegant solution. There is no

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4. In Valentino, supra, 97 F.3d at 1232, the Ninth Circuit criticized Rhone-Poulenc as not "in line with the law of this circuit that has not looked favorably upon granting extraordinary relief to vacate a class certification." The dissent in Rhone-Poulenc suggested that Judge Posner had overstepped the bounds not only of Seventh Circuit precedent, but Supreme Court doctrine as well. 51 F.3d at 1304-05.

reason why appellate courts should be cautioned to grant review "with restraint" or told that "expansion of appeal opportunities effected by subdivision (f) is modest." The Notes should merely describe the change, and let the courts of appeals exercise discretion as they see fit. They can be trusted to protect their own dockets from becoming clogged with review of routine certification orders.

Proposed Rule 23(b)(4), Settlement Classes

I also strongly support Proposed Rule 23(b)(4) expressly authorizing settlement classes to be formed and evaluated as such, not as litigation classes. As the Committee knows, the proposal does no more than codify prevailing law and practice in the federal courts, with the exception of the Third Circuit.<sup>5/</sup> The proposed Rule correctly acknowledges that when parties already have agreed to settle, the courts should take that fact into account, rather than pretend the case is going to be litigated.

Granted, settlement classes occasionally have been abused and courts sometimes have failed to supervise them adequately. But settlement classes remain an indispensable device for voluntarily resolving mass litigation that otherwise would overwhelm parties and courts alike. The solution is to recognize the propriety of settlement classes and to supervise them carefully.

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5. See In re Asbestos Litigation, 90 F.3d 963, 975 (5th Cir. 1996), criticizing Georgine v. Amchem Products, Inc., 83 F.3d 610 (3rd Cir.), cert. granted, 117 S.Ct. 379 (1996).

Defendants are protected by the fact that they enter into settlements voluntarily -- assuming that the court has not improperly certified a litigation class. Plaintiffs are protected because judges still must consider -- with settlement in mind -- the adequacy of class representation, conflicts of interest, and other factors under Rule 23(a). Judges still have the obligation to give notice to the class and review the fairness of the settlement under Rule 23(e). Individual plaintiffs still have the right, as always in Rule 23(b)(3) actions, to opt out and pursue individual litigation.

Some have suggested that this Committee should table the settlement class amendment in light of the Supreme Court's decision to accept review of the Third Circuit's decision in Georgine v. Amchem Products, Inc., 83 F.3d 610 (3rd Cir.), cert. granted, 117 S.Ct. 379 (1996). To the contrary, the proposed amendment is a useful step -- whatever the Supreme Court may decide. If the Third Circuit's decision is overturned, as it should be, then the amendment will codify the proper construction of Rule 23. If the Third Circuit's interpretation of current Rule 23 is upheld, then the need for amendment of the Rule will be immediate and imperative.

While the proposed text of Rule 23(b)(4) and the accompanying Advisory Committee Notes do the job admirably, the proposed Notes to Rule 23(b)(3) need to be reconciled with the new provision. The Notes to Rule 23(b)(3) should be clarified in the following respects to make sure that settlement classes are

evaluated with respect to the facts and circumstances of settlement, not litigation.

First, there is extensive discussion in the proposed Notes to (b) (3) and to subdivisions (A) and (B) about various "abstract interests that point to individual litigation." For example, the Notes say that putative class members may have strong forum or choice of law interests, or have larger damages, or may have already initiated separate action. These interests, however, go to control of litigation and should not stand in the way of formation of a settlement class. The notice and opt-out procedures protect plaintiffs who wish to pursue individual litigation rather than accept a class settlement. The Notes should make clear that litigation control interests are not relevant to settlement classes.

Second, the proposed Notes to (b) (3) and to subdivision (C) express the view that class certification may be deferred or denied where the contours of a new tort have not been fully developed. The Notes state that the risk of premature, erroneous certification in "new tort" cases "may be translated into settlement terms that reflect the uncertainty by exacting far too much from the defendant or according far too little to the plaintiffs." This comment seems intended to highlight an unwanted consequence of premature certification for litigation purposes -- i.e., that certification may lead to unfair settlement terms. The comment easily could be misconstrued, however, as standing in the way of voluntary settlement of less

than "mature" torts prior to certification of a litigation class. This construction would needlessly postpone recovery for plaintiffs and put both sides through a forced march of "developing" claims through litigation in order to resolve them consensually.

Third, the proposed Notes should be amended to state clearly that precedents supporting settlement classes do not support certification of litigation classes. In settlement, a defendant voluntarily waives due process rights as they exist in litigation, thereby enabling an otherwise unmanageable litigation class to form a viable settlement class. In stipulating to a settlement class, a defendant is not giving up the right to object that the same class would be unfair or unmanageable if litigated.

Proposed Rule 23(b)(3)(A), (B) and (F)

Proposed subdivisions (A), (B), and (F) are also worthwhile amendments. These provisions clarify the process for determining whether a class action is "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3) (emphasis added). Class litigation is not superior when putative class members have the ability to maintain, and interest in maintaining, their own separate actions, as subdivisions (A) and (B) indicate. Nor is it superior when the relief sought does not warrant the costs and burdens of class litigation, as subdivision (F) indicates. But the proposed Notes undercut the text and actually could provide

comfort to lawyers who abuse the system by bringing class action suits that no real plaintiffs care about.

First, the proposed Notes to subdivisions (A) and (B) may be misread to suggest that class certification is warranted whenever claims are too "small" to support individual action. But many claims that would not support individual litigation also do not support class treatment. The Notes do not make this point clear. To the contrary, the commentary to (A) and (B), in conjunction with the commentary to (F), seems to tell the courts that unless a claim is so "trivial" that it is a "near certainty that few or no individual claims will be pursued," then a class action should be accommodated. This invites the very abuses that the textual amendments are designed to stop. I urge the Committee to amend the Notes to state that, just because individual claims would not be brought does not mean that a class action should be allowed. Rather, in addition to satisfying the new "it's worth it" provision in Subdivision (F), a Rule 23(b)(3) litigation class should be allowed only when common issues predominate, the class is manageable, and the other provisions of Rule 23 are satisfied.

Second, with respect to the "superiority" determination, I suggest that the Notes to subdivisions (A) and (B) offer examples beyond focusing on the size of a putative class member's stake. The real issue is whether there are superior alternatives to class action, and the Notes should be expanded to take other factors into account. For example, where

there are comprehensive regulatory schemes, state or federal agencies may pursue relief on behalf of all class members. Or a defendant may have altered its conduct, so that civil litigation is no longer worth the burden and expense where individual claims are fairly small. Under these circumstances, a civil litigation class should not be certified.

Third, the proposed Notes to subdivision (F) allude to the "public values of enforcing legal norms" through class actions. The Notes should be qualified to make clear that classes have public value if, but only if, they are consistent with the underlying substantive claims established by Congress, and are manageable, and the other provisions of Rule 23 are satisfied.

Finally, the proposed Notes to subdivisions (A) and (B) invite courts to inquire into the assets of the defendant and the availability of insurance. This is only appropriate for "limited fund" classes under 23(b)(1), and the language should be dropped.

#### Timing of Certification Decision

I fully support the Committee's proposed amendments to alleviate the pressure for premature decisions on class certification for litigation purposes. Under the current system, both the federal and local rules push courts to make the earliest possible class certification determination. This forces a life or death decision to the very front of the case before adequate

discovery or development of the claims and defenses to be tried.<sup>6/</sup>

As a result of this pressure, courts certify cases for class treatment "conditionally" or with the idea that they can always decertify later. As I noted, however, such qualifications are no comfort in real litigation. The case then proceeds on aggregated claims that could not possibly be tried fairly as a class because individual issues control liability. Certification deprives defendants of due process when fatal defects in the claims of unnamed class members are shielded from litigation. By the same token, certification deprives unnamed class members of due process when the claims of class representatives have fatal defects that do not apply to all members.

I therefore strongly support the proposed amendment to remove the language in Rule 23(c) requiring courts to make the certification decision "as soon as" practicable, and the proposed addition of Rule 23(b)(3)(C) expressly directing courts to consider the maturity of related litigation. These provisions give the parties and trial judge breathing room to develop the issues of fact and law relevant to the decision whether to try the case on a class basis. As discussed below, it is important that the judge be able to envision how class claims would be tried in order to see whether the evidence will apply to the

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6. For example, in the United States District Court for the Central District of California, the class proponent must file a motion seeking certification within 90 days of filing the complaint, and class discovery must be completed within the first 60 days. Rules 18.3, 18.4.

claims of all class members. See notes 7 and 8, below. If the evidence is not essentially uniform, then a class action trial either would be unmanageable or would deny due process.

Class-wide proof

For this reason, I urge the Committee to consider one additional amendment to Rule 23(b)(3): an express requirement that common issues in a litigation class be susceptible to class-wide proof. This amendment is necessary to tighten judicial focus on the fundamental requirement that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3) (emphasis added).

It is already implicit in Rule 23(b)(3) that the same proof that would support or defeat the claims of the class representatives will support or defeat the claims of the class members. When this unity of proof is ignored, then someone is deprived of due process (either the defendants or class members) because the representatives' cases are not really representative. If the court tries to force the case into a class action mold anyway, then the underlying substantive claims are effectively altered and/or individual issues of proof render any trial of the case unmanageable.<sup>7/</sup>

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7. See, e.g., Castano v. American Tobacco, 84 F.2d 734, 749 (5th Cir. 1996) (reversing class certification where the trial court failed to consider "how a trial on the merits would be conducted."); In re American Medical Systems, 75 F.3d 1069, 1083-86 (6th Cir. 1996) (same, issuing a writ of mandamus against class certification).

From a defense perspective, the bottom line is that Rule 23 should not be stretched to accommodate actions in a way that alters substantive rights by excusing proof of all the elements of a claim, or allowing putative class members to avoid defenses. This is how defendants are railroaded into high stakes settlements that have little or nothing to do with proper liability exposure. I therefore join others who have urged this Committee to add a subdivision that would make a class-wide proof requirement explicit.<sup>8/</sup>

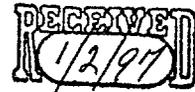
#### Conclusion

I endorse this Committee's proposed reforms to Rule 23. The proposed amendments should help to refocus the courts on the right issues. The amendments should be adopted, however, only after changes are made to the Advisory Committee Notes so that the Notes do not undermine the text of the reforms. Finally, the Rule should be amended to require class-wide proof as a predicate to certification for litigation purposes.

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8. Some federal courts have required a demonstration that liability to all purported class members be capable of common proof. See e.g., Walsh v. Ford Motor Co., 807 F.2d 1000, 1017, 1018 (D.C.Cir. 1986), cert. denied, 482 U.S. 915 (1987); Alabama v. Blue Bird Body Co., 573 F.2d 309, 321-22 (5th Cir. 1978). Some state courts also have expressly recognized the importance of class-wide proof. Here in San Francisco, for example, there is a manual for class action litigation which spells out in detail the showing required for class certification. California Superior Court, City and County of San Francisco, Manual for the Conduct of Pretrial Proceedings in Class Actions §§ 424, 426-27 (July 1982). Among other things, the manual requires the parties to spell out what can and cannot be shown through common evidence. Id. § 427-2(b).

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December 31, 1996

VIA UPS NEXT DAY AIR

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

Re: January 17, 1997 Public Hearing on Proposed Amendments to Rule 23  
of the Federal Rules of Civil Procedure

Dear Mr. McCabe:

I look forward to the opportunity of appearing before the Rules Committee on January 17, 1997 to testify in favor of the proposed amendments to Rule 23 of the Federal Rules of Civil Procedure. In the interim, please accept this brief summary of my anticipated testimony.

I write as an attorney who represents defendants in product liability actions on a national and regional basis, and who witnesses almost daily the "outcome-determinative" effects of unfettered aggregation – for litigation purposes – of disparate "mass tort" claims in federal and state courts. Whether these claims are pursued in the context of a Rule 23 class action or within a Rule 42 consolidation for trial of so-called "common issues," the fact remains that the procedural rules for aggregating claims have been stretched and contorted to an extent not envisioned by their original drafters. Thus, I am pleased to see that the Rules Committee has taken an important first step towards restoring balance and limits to the claims aggregation arena through the amendments it has proposed.

Petitioning for certification of a litigation class for product liability claims has become a "standard" tool of settlement coercion. It is a common device for masking numerous "junk" claims behind a few meritorious claims that are touted as being "illustrative" or "representative" of the rest. The threat of litigation class certification often presents a

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product liability defendant with the Hobson's choice of "betting the company" on the dice roll of a single jury's verdict, or paying "blackmail" settlements on thousands of weak claims having little more in common than the identity of the attorney filing them. The proposed amendments to Rule 23 begin to address these concerns, however, much more needs to be done to ameliorate the unfair toll that unbridled claims aggregation has exacted from participants in our justice system.

**Subsections (b)(3)(A) and (b)(3)(B):** The proposed amendments to Rule 23 subsections (b)(3)(A) and (b)(3)(B) are to be commended because they recognize that litigation class certification ordinarily is not appropriate when individual claims can stand alone, and reaffirm the traditional preference for individual control of litigation by the real litigants. The provisions tacitly acknowledge that claims aggregation can devalue substantial claims that could otherwise be tried individually, while adding weight to insubstantial claims that no one otherwise would waste time bringing. The proposed amendments to subsections (b)(3)(A) and (b)(3)(B) reinforce the 1966 Advisory Committee Note's very explicit statement that Rule 23(b)(3) ordinarily is not appropriate for "mass accidents" (much less for disparate mass tort claims). Further, the "maturity" factor of (b)(3)(B) should help avert a rush to class certification before the development of any body of experience with actual trials and verdicts in individual actions.

**Subsection (f):** The proposed provision for interlocutory appeal of class certifications will serve as a much needed safety valve on the coercive pressures of inappropriate class certifications. Under current Rule 23, by the time an appeal of an improvident certification becomes available, the irreparable harm sought to be remedied by the appeal has already occurred:

- news of the class certification and of the outcome of the class trial have wreaked havoc on the defendant's position in the financial markets
- extraordinary litigation expense has been incurred
- the class notification process has driven "out of the woodwork" numerous marginal claims that now must be resolved irrespective of whether the class is ultimately decertified

- the class notification process has served the improper collateral purpose of being little more than a court-sponsored "lawyer advertising" program
- alternatively, the appeal has been mooted by the defendant's capitulation to settlement on terms to which it would never have agreed had it been permitted to fairly evaluate claims on an individual basis.

**Subsection (b)(4):** The availability of the consensual settlement-only class device has been and continues to be essential to the ability of defendants to limit and manage their product liability risk. As long as federal and state court procedural rules are interpreted to permit the aggregation for trial of literally thousands of disparate claims, then the availability of proposed subsection (b)(4) settlement classes is critical. While subsection (b)(4) is hardly a "cure" for the ills of unrestricted claims agglomeration, it nonetheless remains a "balm" for the wounds inflicted when courts elevate docket expediency above all other Due Process considerations. The settlement-only class device obviously is a much more palatable alternative than bankruptcy. It is the only device that permits a company to achieve global peace without requiring that it declare itself insolvent and relinquish control of its assets and operations.

Additionally, subsection (b)(4) would restabilize the real world practice of consensual settlement classes, the availability and utility of which were seriously jeopardized by the United States Third Circuit Court of Appeals in its recent *GM Pickup Trucks* and *Georgine* decisions. Neither logic nor prudential concerns support restricting class-wide settlements only to claims that could also be certified for a litigation class. Subsection (b)(4) reaffirms that courts are not required to engage in the needless and counterproductive fiction of hypothesizing whether the settlement-only class could also have been certified as a litigation class. Indeed, any requirement for such a hypothetical determination would create a powerful disincentive for a product liability defendant to ever voluntarily participate in class settlement solution. It would require the defendant to position itself as the target of a litigation class in the event that certification of the settlement class were to be denied on non-Rule 23(a) grounds, for example, rejection on fairness grounds. Rule 23(b)(4) eliminates this dilemma of the Third Circuit's approach, and thus promotes rather than hinders voluntary class settlements.

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**Issues Gerrymandering:** The proposed amendments to Rule 23 do not address an area of continuing concern under current Rule 23, namely, the tendency of some courts to use Rule 23(c)(4) as justification for certifying a litigation class on so-called "common issues," thereby losing sight of the other requirements for (b)(3) certification. The "issues" approach too often is used as a settlement club – it permits the aggregation of claims that could not otherwise be aggregated in the hopes of forcing a settlement through sheer strength of numbers regardless of the merits of the claims. There is almost no group of individual actions that cannot be creatively parsed into tiny "common" issue-segments. Unfortunately, to achieve the requisite "commonality," the issues typically have been so denuded of operative fact as to render them abstract; consequently, any "common issues" determinations are more advisory in nature than based on the facts of any "real" case. Moreover, other than improperly inducing mass settlements, no judicial economies are achieved through "issues" trials in product liability actions. Experience to date – both in a class action context and in the context of massive consolidations of cases for trial – shows that "issues" trials of product liability cases result only in expensive, piecemeal litigation that drags on for years.

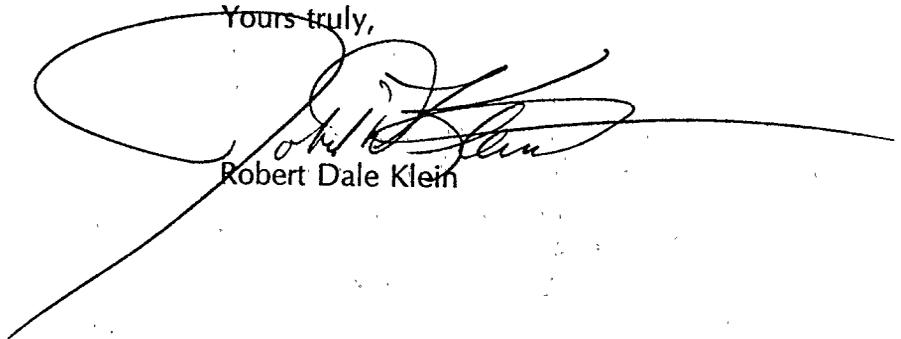
**Conclusion:** The unfettered aggregation for trial of massive numbers of otherwise independent tort claims has become the chief tool of too many courts and claimants' attorneys for leveraging disposition of cases without regard to their merits. Class actions are an example of, but hardly the exclusive or even the worst form of, these coercive methods. The fact remains that many federal and state courts too often employ more common – and much more dangerous – claims aggregation devices, including consolidated "mass" trials, "sample" or "test" cases with verdicts extrapolated across all other claims in the consolidation, "common issues" trials, and seriatim trials accompanied by the prospect of offensive collateral estoppel used against any defendant who happens to lose a case along the way. None of these more common aggregative techniques is in any way subject to the scrutiny and restraints on class action litigation under even the current version of Rule 23 or its state court counterparts. What also is lacking in these affronts to traditional conceptions of a fair trial is any means for a defendant to put the risk of such litigation behind it in a manner that truly accomplishes a global "peace." At least proposed Rule 23(b)(4) provides for such a national, consensual settlement class.

Thus, the proposed amendments to Rule 23 are important first steps on a longer journey towards returning the rules of procedure to the outcome-neutral rubrics they are

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supposed to be. That journey will not be over until the unfairness of "pseudo-class actions," i.e., the consolidating of thousands of claims for "trial" under Federal Rule 42 or its state court counterparts, also is brought under control.

Yours truly,

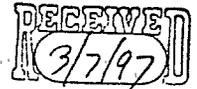
A handwritten signature in black ink, appearing to read "Robert Dale Klein", is written over a large, loopy scribble. A long horizontal line extends from the right side of the signature across the page.

Robert Dale Klein



# Bristol-Myers Squibb Company

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96-CV-

116

John L. McGoldrick  
Senior Vice President  
and General Counsel

February 28, 1997

Honorable Paul V. Niemeyer, Chair,  
and the Advisory Committee on Civil Rules  
c/o Peter G. McCabe, Esq.  
Committee on Rules of Practice  
And Procedure  
Judicial Conference of the United States  
Washington, D.C. 20544

RE: Proposed Amendments to Fed. R. Civ. P. 23

Dear Judge Niemeyer and Members of the Advisory Committee:

I would like to take this opportunity to expand upon remarks I made about the proposed amendments to Rule 23 of the Federal Rules of Civil Procedure at the Advisory Committee's January 17 hearing in San Francisco, and to make several additional points.

My views on the subject of class actions have been formed by almost 30 years spent as a private practitioner defending purported class actions in a variety of areas, including mass tort, product liability, discrimination, and securities matters. More recently, my responsibilities as Senior Vice President and General Counsel of the Bristol-Myers Squibb Company have caused me to consider not only the legal but also the business impact of the class action device. In short, I believe the proposed amendments will not be a panacea for the fundamental problems with Rule 23. Nevertheless, in my view, they are a necessary and good place to start.

I. The Reality of Class Action Abuse

To serious observers it is clear beyond peradventure that the class action device established by the current version of Rule 23 has led to serious abuse, often with the perverse result that companies that have committed no legally cognizable wrong find it necessary to pay ransom to plaintiffs' lawyers because the risk of attempting to vindicate their rights in a class action is simply not a sensible business decision. Corporate decisionmakers are confronted with the implacable arithmetic of the class action: under some circumstances even a meritless case with less than a 10 percent chance of success at trial to a jury must be settled, because large exposure times even very low risk yields a rational decision to settle. Only recently have some courts realized how radically the decision to certify a class can change the dynamics of a lawsuit. As Judge Posner recently observed, orders certifying plaintiff classes "often, perhaps typically, inflict irreparable injury on the defendants."<sup>1</sup>

Despite this everyday reality several witnesses testified at the San Francisco hearing that they questioned whether any real "abuse" of the class action device has been occurring. It has. American companies often feel forced to decide -- after shaking their heads in disgust at the legal system -- to pay what amounts to blackmail in order to settle meritless lawsuits. Often, this decision is made shortly after the company's lawyers have informed these senior executives that the chance of a judgment for the plaintiffs on the merits is quite small. This compounds the irony, and the social wastefulness, of the decision to pay large sums to settle class actions instead of using the money for research,

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<sup>1</sup> *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1295 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995)

product development, employee benefits, or other more socially useful purposes.

Occasionally, of course, companies choose to litigate their class actions vigorously. But this decision is very costly as well, and often is made after a company's management decides there are non-monetary concerns that require the company to fight the class allegations against it. Among other examples, companies with excellent affirmative action records will often pay large sums to litigate discrimination cases because the potential stigma of settling such a case could rob them of the benefits of the affirmative action program in the first place. Manufacturing companies with outstanding reputations for quality may also choose to litigate rather than settle class actions because the perceived blemish on their reputation may exceed, in non-monetary terms, the risk-adjusted cost of taking their case to a jury.

Whether companies choose to settle or to litigate class actions, the result is similar: a wealth transfer from corporate defendants to plaintiffs' lawyers, or to the cost of defending the action, often with little countervailing benefit to society. When companies pay ransom to settle meritless class actions -- as they clearly do -- they spend money that could have been applied to more socially useful purposes. When companies pay to litigate class actions, they spend far more money than it would take to defend the individual cases on which the class action is based, even when they are arguably meritorious. In either case, "abuse" occurs in a very real sense.

## II. Interlocutory Review

Before turning to the reasons why I think the Advisory Committee should adopt the proposed revision permitting interlocutory review of class certification orders (i.e., the

proposed Rule 23(f)), it is instructive to examine the arguments that have been advanced against the proposed amendment. Opponents of Rule 23 reform frequently assert that because the federal judiciary is generally excellent, we can rely on the judiciary to ferret out problems in class action practice without revising the existing rule. Presumably these opponents believe (1) that district judges can be depended upon to identify class certification issues as to which there is substantial ground for disagreement, certifying such issues for interlocutory review under 28 U.S.C § 1292(b) and (2) that the appellate bench can be depended upon to use the writ of mandamus to rein in district judges who make incorrect class certification decisions and fail to certify the decisions for interlocutory review. This faith in the judiciary's capacity for self-correction is admirable but, I am constrained by experience to say, inaccurate -- notwithstanding its correct assumption that we have a generally excellent and conscientious federal judiciary.

As Brian Anderson pointed out in his testimony at the San Francisco hearing, research indicates that over the last ten years, only 18 class certification decisions have been afforded interlocutory review by our federal appellate courts. According to Mr. Anderson's research, 15 interlocutory appeals were reviewed on the merits pursuant to 28 U.S.C. § 1292(b), and there were three petitions for writs of mandamus on which the merits were reached. Stacked against the hundreds of class certification orders entered by district courts during the same period, it is clear that the current Rule 23 class certification system cannot be regarded as self-correcting.

In addition to the systemic flaws in the current regime, there are a number of other problems with the current system's policy of effectively denying interlocutory review. First, not every judge appreciates the fact that the class certification decision is the

"whole ball game" in many purported class actions. This explains why so many judges decline to certify their decisions for review under section 1292(b), stating essentially that there will be plenty of time for appellate review once the litigation is concluded.<sup>2</sup> Second, all too often the current discretionary interlocutory appeal device is used to extort settlement terms -- in other words, to take advantage of the unfortunate but inescapable arithmetic of class action risk. In short, at least a few trial courts use class certification as a club to force settlements, knowing that a grant of class certification typically cannot be reviewed. Third, in nationwide class actions where plaintiffs can choose among different venues, it is a common practice for plaintiffs' counsel to shop for the forum (and often the judge) perceived to be the most friendly to class certification.<sup>3</sup>

With these flaws of the present system in mind, it is not difficult to understand why the business community -- and particularly major corporations engaged in interstate commerce -- support the proposed rule revision permitting interlocutory review of class certification orders. For one thing, whether a company will deem it economically rational to defend its rights in court, or decide it economically necessary to pay an extortionate settlement, may well depend on the outcome of the class certification question. The question in most cases thus is not whether appellate review will take place after the class

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<sup>2</sup> See, e.g., *In re Teltronics Pacing Sys., Inc. Prods. Liab. Litig.*, 1996 U.S. Dist. LEXIS 11088, at \*18 (S.D. Ohio Feb. 22, 1996) (declining to certify for interlocutory appeal because class certification order could be modified at a subsequent time); *In re Agent Orange Prod. Liab. Litig.*, 100 F.R.D. 735 (E.D.N.Y. 1983) (same).

<sup>3</sup> As Judge Niemeyer pointed out in San Francisco, this problem is compounded by the fact that, through artful pleading designed to avoid federal jurisdiction, plaintiffs' counsel frequently file their cases in state court. As every practitioner knows, the class action "friendliness" of state courts varies significantly from state to state.

certification decision or after trial, since commonly a decision to certify a class forces the defendant to settle the case; rather, the question is whether there will be any opportunity to seek appellate guidance on the class certification question at all. Moreover, since interlocutory review will not automatically stay proceedings on the merits of the case there is a safety valve if a stay is actually inappropriate. If anything, the realistic possibility of appellate review is likely to spur district courts to take their class certification decisions more seriously, to forswear the "settlement bludgeon" or promiscuous certification, and to issue rulings that are less susceptible to reversal on appeal.

Some witnesses at the Committee's hearings have argued that the proposed interlocutory review provision is a one-way street, providing a procedural benefit for defendants only. To the extent this criticism is based on the idea that appellate courts likely would reverse the kinds of class certification decisions currently being handed down, it begs the question. After all, if district courts are committing reversible error, there is no sound policy reason for insulating their errors from review in a higher court. But in truth, the proposed revision is likely to have salutary effects for plaintiffs as well. As it is, sophisticated defendants facing a certified class will offer settlement proposals in which the plaintiffs' damage requests are discounted by a factor representing the likelihood that the class will be decertified on appeal. With the revision, this uncertainty can be removed and, if the decision to certify is upheld, the lack of uncertainty will redound to the plaintiffs' benefit. Moreover, as Mr. Anderson's research illustrates, to the limited extent it is presently available, appellate review of class certification rulings has been sought by both plaintiffs and defendants. Ultimately, the only group with a possible interest adverse to the proposed revision is plaintiffs' lawyers -- but, of course, they were never the intended beneficiaries of Rule 23 in the first place. Finally, even were this change a "one-way

Honorable Paul V. Niemeyer, Chair  
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street," It is not your job, I respectfully submit, to recommend changes that help or hurt contending interests equally -- it is, rather, to do the right thing, regardless of whose ox is gored.

### III. Settlement Classes

Without repeating the many arguments made at the San Francisco hearing in favor of the proposed settlement class revision (i.e., the proposed Rule 23(b)(4)), I would like to add my voice to the chorus in favor of the proposed revision<sup>4</sup>. In my view, the proposed revision simply makes good practical sense. There are numerous multiple-claim disputes -- mass torts come to mind -- that lend themselves neither to class action litigation under Rule 23, nor to individual litigation with its heightened transaction costs and collective action problems. Without the possibility of class settlement, however, there is no way short of class certification and a trial on the merits for the judicial system to satisfy the numerous individual claims raised in such disputes while at the same time granting defendants the *res judicata* effect to which they are entitled under due process principles.

The arguments advanced against the proposed revision in my view are wholly unpersuasive. Under the proposed Rule 23(b)(4), trial courts would still be responsible for determining that a proposed settlement is not the product of collusion among the

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<sup>4</sup> I know it is the panel's disposition to defer until Georgine and that is rational. I would respectfully submit that you should speak out now, as a respected body which has heard much evidence. The court may find your views instructive, (even citable). And if it were to disagree, the future of the Republic would not be in peril.

parties. The trial court would still hear from objectors, who will be able to bring any lurking flaws in proposed settlements to the court's attention. And the self-interest of defendants dictates both that they will not generally collude with plaintiffs' lawyers to the detriment of class interests (because they will not want to encourage future lawsuits by the same plaintiffs' lawyers), and that they will not attempt to deprive class members of their due process rights in any way (because the defendants will want to be able to defend their class settlement as a *res judicata* bar to future claims by previous class members).

Practically, many multiple plaintiff cases will not be settled absent a class settlement device. Plaintiffs, defendants and the courts, will march arm in arm through multiple cases, gaining little ground, because an overall resolution is not available.

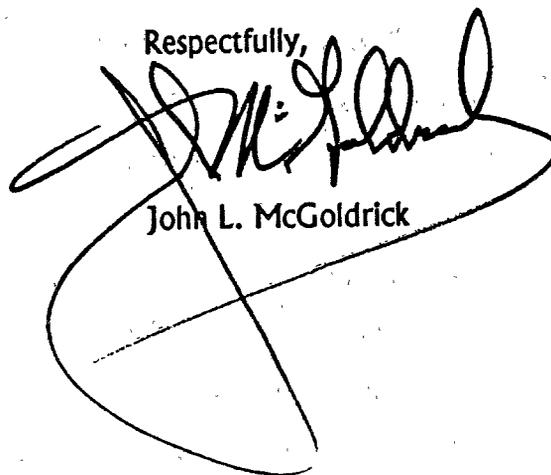
Theoretically, there is no inconsistency between the proposition that certification of a class for trial must meet the rigorous requirements of the current Rule 23 and the proposition that settlement classes should not be subject to the same type of scrutiny. Among other things, the commonality, typicality, and other related requirements of Rule 23 exist to protect the due process interests of defendants. Defendants accordingly should be free to waive these interests if they deem settlement to be in their best interests. And there is no reason to believe that the plaintiffs' interests protected by Rule 23 (such as notice and the opportunity to opt out) will be adversely affected by the proposed revision at all.

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February 28, 1997  
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\* \* \* \*

In sum, I believe that the proposed revisions to Rule 23 represent a good start in bringing common sense and fairness to the world of class action litigation. While they may not do the job all by themselves, I recommend that the Committee adopt all of the proposed revisions.<sup>5</sup>

Respectfully,



John L. McGoldrick

mcgoldl.cjr

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<sup>5</sup> I share the concern of many of my colleagues at the bar (including John W. Martin, Jr. and Shella Birnbaum) who observed that the Note to the proposed amendments in many respects simply does not track the intent of the change to the text of the Rule. Indeed, in some instances, the Note seems to diminish the desired effect of the amendment. I therefore join in urging the Advisory Committee to make a careful review of the Note to ensure that in all respects it is consistent with the letter and spirit of the revisions to the Rule 23 text.

**STATEMENT OF STANLEY M. CHESLEY  
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**Comments Regarding Proposed Revisions to Fed.R.Civ.P. 23**

The proposed changes to Rule 23 are of great interest to me, as I have been involved in complex mass tort and product liability class action litigations in the role of class counsel since 1977. The cases in which I have worked in the past, and currently, have been both in the federal and state courts.

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

The following are my comments on the proposed revisions to Rule 23, which I have attempted to keep short and to the point. My comments are derived from practical experience and thus may differ greatly from those whose backgrounds are academic in nature.

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

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<sup>1</sup> Attached is a partial listing of complex cases in which I have been involved.

class members had the practical ability of pursuing individual litigation. However, due to the complexities and expense of proving liability, more than 90% of the class desired to move forward in a class action, and the class action ultimately proved to be the most efficient and practical manner by which to resolve these claims. Further, the equitable relief obtained through the Bowling settlement, such as diagnostic research, was extremely important to the class members and could not be accomplished through individual litigation.

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

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

**(b)(4):** Currently, a request for certification for settlement purposes is subjected to a more rigorous judicial scrutiny than certification of (b)(3) classes for litigation purposes. Yet, the resolution of class actions through settlement is judicially favored. Obviously, these two concepts are contradictory and the stricter scrutiny standard may present a roadblock to resolution. As a practical matter, the proposed amendment addresses a need and facilitates settlement. Concerns have been raised as to whether the amendment may set the stage for collusion between class counsel and defendants. Yet, it must be remembered that every proposed settlement must be approved by a court and must be found to be fair and reasonable. In addition, prior to approving a settlement, a court can easily conduct a "collusion" inquiry should allegations arise. Recently, allegations of "collusion" have become a favored objection for objectors to a settlement. Very rarely is collusion actually found to exist.

**(c)(1):** The change in language from "as soon as practicable" to "when practicable" is counterproductive. It is not common practice in most class actions to decide motions to dismiss and motions for summary judgment prior to certification. If the court decides such motions prior to certification, the decision is not res judicata as to any claims but those of the named class representatives. Decisions so early in the proceedings do not benefit the court or the parties filing such motions, for closure cannot be accomplished. Further, the majority of discovery usually does not take place until subsequent to class certification and thus motions for summary judgment are premature prior to certification. In many cases, until class certification, discovery is stayed as to all issues except for certification issues.

Also, as a practical matter, many district court local rules require speedy certification decisions. The only benefit derived from such a change would be to courts which have a history of delayed certification decisions. Finally, this change in language does nothing to encourage pre-certification negotiations. In the first instance, pre-certification settlements are rare. If settlement is a possibility, a delay in the certification process does not promote speedy resolution.

(e): The proposed language change is burdensome and unnecessary. In many class actions, the suit is not dismissed upon settlement. More typically, the court retains jurisdiction to administer the settlement and the case remains open until final distribution. The language change appears to require another notice and hearing at the time of the dismissal subsequent to settlement. This would constitute an unnecessary cost and would not be expedient for the court or the parties. It must be recalled that many class actions involve thousands of class members and notices must often be published as well as mailed individually. The cost involved may be extremely substantial.

(f): The proposed rule is inherently unfair, unnecessary and defeats the primary purposes of the class action, i.e. efficiency and expediency. An order denying class certification is already considered final and appealable. The new rule arbitrarily and inequitably alters the nature of such an appeal from one of right to one of discretion. Further, appeal time is arbitrarily shortened to only 10 days. Currently, the granting of class certification may be questioned by filing a Writ of Mandamus. This assures a quick determination on the merits by a court of appeals. By making the order of certification immediately appealable as an interlocutory order, a delay of twelve to eighteen months or more is guaranteed before a decision is rendered by a court of appeals. It is irrelevant whether or not jurisdiction then remains with the district court, for as a practical matter, the parties and the court will not want to move forward and continue the litigation for such an extended period of time. It would simply be a waste of time and money to move forward when the possibility of reversal exists.

Last, I question the finding of the Federal Judicial Center that the median individual class member recovery has been \$315 to \$528 in (b)(3) class actions. I have never been involved in a class action in federal court where monies in this range have constituted the only recovery. There have been instances wherein the equitable relief has been primary and the individual damages recovered have been secondary and minimal, but never a full recovery such as that stated. I believe that it is inaccurate to rely upon this median range when addressing the need for amendments to Rule 23. Also, in the same vein, Rule 23 provides a much needed vehicle for accomplishing equitable relief over and above money damages, and this factor should be seriously considered before changes are instituted.

Thank you.

**WAITE, SCHNEIDER, BAYLESS & CHESLEY CO., L.P.A.**  
**COMPLEX LITIGATIONS**

Bowling, et al. v. Pfizer, et al., U.S. District Court, Southern District of Ohio, Western Division (Class Action)

Procter & Gamble Co. vs. Bankers Trust, et al., U.S. District Court, Southern District of Ohio, Western Division

Chamberlain, et.al. v. AK Steel Corp., Court of Common Pleas, Butler County, Ohio (Class Action)

In Re Copley Pharmaceuticals, Inc., "Albuterol" Products Liability Litigation, U.S. District Court, District of Wyoming (Class Action)

In Re Teletronics Pacing Systems, Inc., Accufix Atrial "J" Leads Products Liability Litigation, U.S. District Court, Southern District of Ohio, Western Division

In Re Commercial Explosives Price Fixing Litigation, U.S. District Court, District of Utah

Amy Adams, et.al. v. Beverly Kaech, et.al., U.S. District Court, Southern District of Ohio, Western Division at Dayton

In Re Silicone Gel Breast Implant Products Liability Litigation, U.S. District Court, Northern District of Alabama, Southern Division (Class Action)

In Re Fernald Litigation (I and II), U.S. District Court, Southern District of Ohio, Western Division (Class Action)

In Re: US Air Disaster at New York LaGuardia Airport on March 22, 1992, U.S. District Court, Northern District of Ohio, Eastern Division

State of Ohio, ex rel. Lee Fisher, Attorney General v. Louis Trauth Dairy, Inc., et al., U.S. District Court Southern District of Ohio, Western Division

Nelson, et al. v. BASF Corp., et al./ Ewing, et.al. v. BASF Corp., et.al., Court of Common Pleas, Hamilton County, Ohio (Class Action)

In Re Miamisburg Train Derailment Litigation, Court of Common Pleas, Montgomery County, Ohio (Class Action)

Ferguson, et al. v. United States Government, U.S. District Court, Western District of Kentucky, at Owensboro

Teresa Boggs, et al. v. Divested Atomic Corp., et al., U.S. District Court, Southern District of Ohio, at Columbus (Class Action)

In Re Choice Care Litigation, U.S. District Court, Southern District of Ohio, Western Division (Class Action)

In Re Chubb Drought Insurance Litigation, U.S. District Court, Southern District of Ohio, Western Division (Class Action)

In Re San Juan DuPont Plaza Hotel Fire Litigation, U.S. District Court, District of Puerto Rico

In Re Northwest Flight #255 Air Crash at Detroit Metropolitan Airport, on August 16, 1987, U.S. District Court, Eastern District of Michigan, Southern Division

In Re Aircrash Disaster of Pan Am World Airways Flight #103, on December 21, 1988 at Lockerbie, Scotland, U.S. District Court, Eastern District of New York, at Brooklyn

In Re Air Crash at Gander, Newfoundland on December 12, 1985, U.S. District Court, Eastern District of Kentucky at Louisville  
In Re Union Carbide Corporation, Gas Plant Disaster at Bhopal, India In December, 61984, U.S. District Court, Southern District of New York  
In Re Agent Orange Litigation, U.S. District Court, Eastern District of New York (Class Action)  
In Re MGM Grand Hotel Fire Litigation, U.S. District Court, District of Nevada  
In Re "Bendectin" Product Liability Litigation, U.S. District Court, Southern District of Ohio, Western Division (Class Action)  
In Re Holiday Inn, Cambridge, Ohio Fire Litigation, U.S. District Court, Southern District of Ohio, Western Division  
In Re Air Canada Disaster, U.S. District Court, Middle District of California, at Los Angeles; Eastern District of Kentucky at Covington  
In Re Beverly Hills Fire Litigation, U.S. District Court, Eastern District of Kentucky, at Covington (Class Action)  
In Re E.W. Scripps-Howard Post Printers Litigation, U.S. District Court, Southern District of Ohio, Western Division

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January 3, 1997

Honorable Paul V. Niemeyer, Chair, and the  
Advisory Committee on Civil Rules  
c/o Peter G. McCabe, Esquire  
Committee on Rules of Practice and Procedure  
Judicial Conference of the United States  
Washington, District of Columbia 20544

Re: Proposed Amendments to Rule 23 of the  
Federal Rules of Civil Procedure

Dear Judge Niemeyer and Members of the Advisory Committee:

I appreciate the opportunity to offer my comments on your proposed changes to the class action rule, Fed. R. Civ. Proc. 23. As many of you know, I have been involved in class action litigation for well over a decade, primarily representing defendants in products liability and toxic tort cases. Before that I was a law professor at New York University and Fordham University, focusing for the most part on products liability and toxic torts, including the effect of class actions in such cases. I remain an adjunct professor at NYU, and am teaching a course on mass tort litigation this Spring.

The Advisory Committee's proposed changes to Rule 23 reflect a growing recognition of what has been obvious to American corporations for some time: class action practice has grown exponentially over the last twenty years, and its growth has been spurred, in large part, by spurious suits. This fact is hardly surprising, given the structure of the present Rule 23 and the huge economic incentive for creative lawyers to file putative class actions quickly in order to become counsel for an entire class of people who often do not know, or care, about the claims that have been filed. Also contributing to the proliferation

of such actions is an overcrowded federal docket, which has made many courts reluctant to enforce what once was the underpinning of Rule 23: the presumption in favor of individual or smaller, rather than aggregated, litigation. This is especially true where judges recognize the fundamental truth that few, if any, defendants can withstand the enormous risks inherent in a classwide trial; certify the class, and the case will be removed from the docket by settlement.

This continuing perversion of the current Rule 23 has resulted in a denial of due process rights for at least two categories of people. Defendants, most often manufacturers or other large corporations, are denied due process as class members are allowed to obtain relief -- either through "bellwether" trials or by coerced settlements -- without actually having to prove their individual claims. Similarly, putative class members are denied due process, as the recovery for the few claimants who actually may have strong claims is watered down when their claims are "averaged in" with those of other members of an often ill-conceived class.

The Advisory Committee's proposed changes are a step in the right direction, as they appear at least to recognize that class actions should be the procedural tool of last -- not first -- resort. The proposed changes, however, do not go far enough. First, the Draft Note at times appears to be in direct conflict with the logic behind the Proposed Rule, as when the Note applauds federal class actions involving individual claims as small as \$315, while the Proposed Rule discourages certification where "the probable relief to individual class members" does not justify the costs and burdens of class litigation. Proposed Rule 23(b)(3)(F). Second, the Advisory Committee failed to include other proposed changes -- such as a "classwide proof" requirement, discussed *infra* -- that would further refine the use of the class action tool to those cases in which *all* plaintiffs' claims are capable of proof at a single trial.

I will first address the five changes proposed by the Advisory Committee, and then will address one other revision that could be adopted in order to effect the purpose behind Rule 23.

**I. INTERLOCUTORY APPEAL PROVIDES A NECESSARY CHECK  
ON IMPROPER CERTIFICATIONS THAT OTHERWISE MIGHT  
EVADE REVIEW**

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I strongly support proposed Rule 23(f), which allows for interlocutory review of an order granting or denying class certification. As Judge Posner so accurately explained in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995), an order certifying a class action in product liability or toxic tort litigation is effectively unreviewable. Certification exponentially raises the risk for the defendant, as the defendant no longer is able to evaluate the strengths and weaknesses of each claim in order to come up with a reasonable estimate of the company's overall risk exposure. Instead, it must gamble on the result of one trial which, if the company loses, will result in liability to the entire class. In this sense, a defendant evaluates 1,000 individual cases very differently than it evaluates a class with 1,000 members. Seldom, if ever, is a defendant willing or able to withstand the risk involved in appealing an adverse, classwide final judgment,<sup>1</sup> so defendants often are forced to settle cases after class certification and before trial -- regardless of the merits of the claims or defenses -- if they cannot obtain interlocutory review of the certification order.

Interlocutory review in many circuits, however, is difficult, if not impossible, to obtain. Judge Posner has been criticized by some for using *mandamus* as the method of effecting interlocutory review of the District Court's

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<sup>1</sup> The possibility of a successful appeal of the threshold certification question *after* an adverse class action trial verdict is, for all practical purposes, non-existent to the publicly-traded corporation. Wall Street and corporate investors dislike uncertainty; for them, the specter created by a huge class action judgment is not abated by even a strong likelihood of success -- a year or more later -- on the certification issue or the legal merits before an appellate court. Indeed, the very fact of a class being certified can cause a corporation's stock to tumble as investors become skittish over the large numbers of putative plaintiffs who all might achieve victory through a single trial. The market's extreme sensitivity thus makes the option of appeal after a classwide trial on the merits illusory for most publicly-traded corporations. It is this practical inability of publicly-traded corporations to exercise their due process right to appeal that in part makes permissive interlocutory appeal of a threshold certification decision necessary.

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order in *In re Rhone-Poulenc Rorer*. Many Circuits would refuse to grant review on similar *mandamus* petitions because of the strict standards associated with the use of the *mandamus* tool. See, e.g., *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1232 (9th Cir. 1996) (observing that *Rhone-Poulenc* "does not appear to be in line with the law of this circuit that has not looked favorably upon granting extraordinary relief to vacate a class certification"). In those Circuits, a party is effectively left without relief if the District Court refuses to certify its class certification order for appeal under 28 U.S.C. § 1292(b).

Given the importance of the class certification decision -- and the fact that 23(f) vests the Court of Appeals with the discretion to grant review -- the restrictive statements in the Draft Note are particularly troubling. There simply is no reason why Courts of Appeal, who are well aware of the breadth of their discretion under 28 U.S.C. § 1292, should be cautioned to grant review "with restraint" or prompted to think that the "expansion of appeal opportunities effected by subdivision (f) is modest." The Note should merely describe the change itself and leave it to the Courts of Appeal to exercise their discretion as they see fit.

In addition, although I believe that a stay should be granted automatically when permission to appeal is granted, I feel that it is at least a positive step that the Proposed Rule provides some mechanism for a stay. Issuing a stay once review has been granted reduces discovery costs pending resolution of the class certification issue on appeal. The sheer expense of class action discovery is enormous; it is exponentially more costly than discovery in an individual case, and that expense -- particularly at the early stages of the litigation -- is disproportionately borne by the defendants. It makes sense to refrain, as a general rule, from incurring discovery costs until the certification issue is decided by the appellate court.

**II. THE PROPOSED RULE CORRECTLY RECOGNIZES  
THAT CLASS ACTIONS GENERALLY SHOULD NOT BE  
CERTIFIED WHERE THE PUTATIVE CLASS MEMBERS  
HAVE THE ABILITY TO MAINTAIN -- AND AN INTEREST IN  
MAINTAINING -- THEIR ACTIONS WITHOUT CERTIFICATION**

Proposed Rule 23(b)(3)(A) requires a court to consider "the practical ability of individual class members to pursue their claims without class certification." This factor recognizes that class certification is less desirable -- and clearly not "superior" -- where individual class members are capable of pursuing relief through mechanisms other than a class action. In this sense, it complements the language of Rule 23(b)(3), which directs the court to focus on the availability of "other available methods for the fair and efficient adjudication of the controversy." The Draft Note, however, focuses exclusively on the alternative of "individual" actions, and suggests that class certification may actually be encouraged where individual actions are not practicable. The focus of the Draft Note is too narrow, and courts should be encouraged to evaluate the potential class action against other practical avenues that claimants may have with which to pursue relief, which may include, but be broader than, individual cases.

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

As the Draft Note correctly recognizes, Proposed Rule 23(b)(3)(B) complements subsection A by highlighting the fact that in cases, such as personal injury and other actions, where the alleged damages may be substantial, individuals have a significant interest in controlling the prosecution of their own cases. The Draft Note does an excellent job of outlining a number of the important decisions over which individuals with substantial claims may want to maintain control. Class certification works to deprive individuals of that control, and thereby makes the class action tool less "superior" to "other available methods for the fair and efficient adjudication of the controversy." Rule 23(b)(3). As the Draft Note points out, opt out rights may not protect those interests in individual control where the putative class members have not retained individual counsel prior to the running of the opt out period.

I believe, however, that the Draft Note errs in suggesting that a court may inquire into the availability of insurance and the assets of a defendant in evaluating under this subsection whether to certify a 23(b)(3) class. Marshaling assets for "equitable distribution" is not the province of Rule 23(b)(3), but is more properly reserved for a "limited fund" class under Rule 23(b)(1) or, of course, a bankruptcy court. To include such a concept in the Draft Note -- and to buttress it with the suggestion that "the decision whether to certify a (b)(3) class must rest on a judgment about the practical realities that may thwart realization of the abstract interests that point toward separate individual actions" -- is an invitation to mayhem and runs directly counter to the presumption against class certification where individual actions are maintainable.

### **III. THE PROPOSED RULE CORRECTLY COUNSELS THAT COURTS SHOULD CONSIDER THE MATURITY OF THE LITIGATION AS A FACTOR AFFECTING CERTIFICATION**

The Advisory Committee has added "maturity" of "related litigation" to the factors affecting a certification decision. Proposed Rule 23(b)(3)(C). I strongly support this addition, which is drawn from the now well-recognized principle that, particularly in the tort context, it may be extremely beneficial for a court to look at the results of a series of individual trials before determining whether a particular controversy would be capable of classwide proof. *See, e.g., Castano v. American Tobacco Co.*, 84 F.3d 734, 748-49 (5th Cir. 1996) ("Fair-

ness may demand that mass torts with few prior verdicts or judgments be litigated first in smaller units -- even single-plaintiff, single-defendant trials -- until general causation, typical injuries, and levels of damages become established"); *In re Rhone-Poulenc Rorer*, 51 F.3d at 1299-1300; *In re Norplant Contraceptive Prods. Liab. Litig.*, 168 F.R.D. 577, 578 (E.D. Tex. 1996) (citing *Castano*); Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U.L. Rev. 659 (1989).

One of the troubling aspects of class actions in the tort context is the rush to the courthouse that results from the economic incentive to be the first to file a class action in order to become lead class counsel, or at least to be a member of the Plaintiffs' Steering Committee. Often a defining event, such as the issuance of a single study suggesting an association between a product and disease, will trigger the filing of dueling class action lawsuits long before a court would be able to ascertain whether the scientific and legal issues involved are susceptible to classwide proof. The Proposed Rule and Draft Note are correct in suggesting that courts follow a cautious approach in such situations in order to see what patterns may result from individual litigation that might affect the class certification question.

#### **IV. THE PROPOSED RULE PROPERLY REQUIRES COURTS TO WEIGH THE PROBABLE RELIEF TO INDIVIDUAL CLASS MEMBERS AGAINST THE ENORMOUS COSTS AND BURDENS OF CLASS CERTIFICATION**

Proposed Rule 23(b)(3)(F) has been dubbed the "just ain't worth it" factor by some members of the Advisory Committee, and it is a very important addition to Rule 23. There has been an enormous growth in the number of "nuisance" lawsuits which claim that thousands of plaintiffs are due an insignificant amount of damages for some alleged wrong. Make no mistake, these lawsuits are lawyer-driven, *not* client-driven. It is the lawyers, after all, who stand to profit from their creativity, while the clients may gain next to nothing. These are the suits that, when certified, get settled -- and these are the types of settlements that invoke the ire of academic commentators and the public at large, for they provide significant compensation *only* for the law firms that file them.

The addition of subsection F is a necessary reminder that the certification of a class creates tremendous costs for the public, due process burdens for defendants and for the courts, and ultimately it counsels against using the class action tool to deal with insignificant claims; simply put, one does more damage than good by using a bazooka to kill a gnat. The costs, including those of class notice and discovery, often outweigh the amount of anticipated recovery itself. As noted, the irresistible pressure toward settlement, however, also should be considered under this subsection as a due process burden to be weighed against the significance of the individual plaintiffs' claims. *See In re Rhone-Poulenc Rorer*, 51 F.3d at 1299.

The certification of a class action fundamentally alters the litigation calculus for the party opposing certification, placing enormous pressure on that party to settle prior to trial, even where the class proponents' likely individual recoveries (or their likelihood of success on the merits) are low. To the defendant, one thousand individual cases are not equivalent to a class action involving 1,000 members. Faced with a large number of individual cases, the defendant may seek to quantify its litigation risk by evaluating the cases individually, taking note of their strengths, weaknesses and venues, and thereby predicting a win-loss ratio and an average jury award. Once a trial class is certified, however, the defendant must evaluate its litigation risk in the aggregate, taking into account the fact that it may face at trial only the strongest representative class members selected by class counsel. On the basis of one trial, the defendant may be found liable to all named and identified class members and, in many instances, to thousands of class members who have yet to be identified. Given the uncertainties of litigation, few defendants can withstand the pressure to settle after the class is certified rather than risk an adverse jury verdict in a single class action trial. This enormous pressure to settle is a significant burden on the defendant's exercise of its due process rights and should not be tolerated where the individual recoveries for class members would not be significant.

In light of these facts, it is surprising that the Draft Note focuses -- in discussing subsection F and throughout the Note -- on the "public value" of "small claims" classes. This focus eclipses the very reason for the balancing test. Notwithstanding the testimony this Committee has heard from some regarding the "public value" of enforcement to be served by class actions, it is outside the scope of the Rules Enabling Act for the Advisory Committee to confer upon class

counsel the role of a private attorney general, which is exactly what the Draft Note appears to do.

As those who were on the Advisory Committee long ago have testified, the 1966 Advisory Committee, in creating Rule 23(b)(3), was creating a rule of *procedural* efficiency. Nowhere did it suggest that Rule 23 was intended to be the protocol for deputizing posses of private attorneys general who file and pursue litigation on behalf of plaintiffs who are not truly interested in the outcome of the lawsuit. Only Congress, of course, is imbued with the authority to craft such a scheme, and it has created mechanisms for private citizens to implement "public values" through civil litigation only in particular, well-defined subject areas. Where Congress makes such a determination, it may create special incentives to encourage suits, such as allowing attorneys' fees or treble damages. See, e.g., the Clayton Act, 15 U.S.C. § 15; the Fair Labor Standards Act, 29 U.S.C. § 216(b); the RICO statute, 18 U.S.C. § 1964.

The Draft Note, in contrast, appears to elevate the private litigant to a private attorney general in *all* class action litigation, regardless of the subject matter of the suit. I strongly urge the Advisory Committee to excise such language from the Draft Note and to defer to Congress to determine when private actions should be encouraged to implement public policy. Cf. *Alyeska Pipeline Serv. Co. v. The Wilderness Society*, 421 U.S. 240, 270 (1975) (observing that Congress has, by statute, indicated where "the encouragement of private action to implement public policy has been viewed as desirable," and declining, in the absence of statutory authorization, "to invade the legislature's province by redistributing litigation costs" to encourage private litigation to protect the environment). Those who suggest that public policy supports extending the use of class actions based on a "public value" in the enforcement of laws should address their comments to Congress in the form of legislative proposals, not to this Committee, which is powerless under the Rules Enabling Act to effectuate such substantive reform.

Not only has Congress narrowly construed the public's interest in encouraging private litigation, but on the one occasion that Congress directly considered the question of what sorts of "consumer" class actions should be allowed, it adopted a particularly restrictive approach in order to keep relatively minor actions *out* of the federal courts. In enacting the Magnuson-Moss Warran-

ty Act -- which is the core federal "consumer" action statute -- Congress specifically provided that a putative class action under the statute is permissible in federal court *only* if the complaint includes 100 named plaintiffs. 15 U.S.C. § 2310(d)(3). Obviously, the purpose of this provision, as well as the other restrictive jurisdictional provisions in the statute, is to "avoid trivial or minor actions being brought as class actions in Federal district courts." *Novosel v. Northway Motor Car Corp.*, 460 F. Supp. 541, 543 (N.D.N.Y. 1978). See also *Skelton v. General Motors Corp.*, 660 F.2d 311, 319 n.15 (7th Cir. 1981). Put differently, the "jurisdictional provisions of section 2310(d) were designed by Congress to assure that [only] substantial class actions could be brought in federal court." *Jacks v. The Firestone Tire & Rubber Co.*, Civ. A. No. C78-1261A, slip op. at 6 (N.D. Ohio June 4, 1974). To the extent the Draft Note encourages the use of class actions where the litigants have claims involving insubstantial sums, it contravenes Congress' clear belief that federal class actions of small consumer claims should be allowed only in very limited circumstances.

As Judge Posner explained in *In re Rhone-Poulenc Rorer*, issues of broad public policy are primarily the province of the legislative and executive branches of government. 51 F.3d at 1302. Class action litigation arises in the context of private disputes between individual litigants; the judicial system's role is to determine the dispute fairly and efficiently when those litigants have a sufficient interest in the outcome to proceed with the case. A necessary corollary is that some individual claims are so insignificant as to not be worth the costs associated with class action litigation in the federal courts. The Proposed Rule does an excellent job of focusing courts on this fact. The Draft Note should be revised to do the same.

**V. THE PROPOSED RULE CORRECTLY RECOGNIZES THAT SETTLEMENT CLASSES MAY BE MAINTAINED EVEN WHERE THE SAME CLASS COULD NOT BE PROPERLY CERTIFIED FOR TRIAL PURPOSES**

There have been numerous suggestions at the public comment hearings that the Advisory Committee may defer any decision on Proposed 23(b)(4) in light of the U.S. Supreme Court's grant of certiorari in *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir.), cert. granted *sub nom.*, *Amchem*

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*Prods., Inc. v. Windsor*, 65 U.S.L.W. 3352 (U.S. Nov. 1, 1996). I believe it is wise to defer any action on settlement classes until the Committee has the benefit of the Supreme Court's anticipated opinion in this case. Nevertheless, as this is likely the only public comment period that you will have on 23(b)(4), I offer the following analysis of the proposed revision.

Despite the response of some academics to Proposed Rule 23(b)(4), the fact remains that this subsection accurately reflects the current state of the law in all but the Third Circuit. Some academics have described the settlement class as a "new device" and a "major innovation," but it is nothing new. As the Fifth Circuit recently observed, settlement classes have long been with us. *In re Asbestos Litig.*, 90 F.3d 963, 975 (5th Cir.), *reh'g en banc denied*, 101 F.3d 368 (5th Cir. 1996). The Advisory Committee, in adopting 23(b)(4), has merely amended Rule 23 to confirm current practice, specifically eschewing radical reform.

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

Settlement classes are different creatures from trial classes. In a settlement, the defendant voluntarily waives a number of its due process rights -- such as the right to insist upon the application of various states' favorable legal rules. It is this voluntary waiver of rights and defenses that transforms what

otherwise would be an unmanageable trial class into a viable settlement class.<sup>2</sup> Of course, it is for this reason that the certification of a settlement class likewise cannot be used as precedent for certification of a 23(b)(3) trial class, and the notes accompanying the rule should state this clearly.

Those who are most critical of Proposed Rule 23(b)(4) point to two decisions of Judge Becker in the Third Circuit. *See In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995); *Georgine v. AmChem Prods, Inc.*, 83 F.3d 610 (3d Cir. 1996), *cert. granted*, 65 U.S.L.W. 3352 (Nov. 1, 1996). The core of Judge Becker's concern in those decisions was that neither the text of Rule 23 nor the Note accompanying it authorized using a "liberalized criteria for settlement classes." *GM Pick-Up*, 55 F.3d at 798. In Judge Becker's view, the current Rule 23 mandates that a trial judge must evaluate a settlement class as if it were going to be tried to jury. *Georgine*, 83 F.3d at 625.

The problem with Judge Becker's analysis, however, is that there also is no language in Rule 23 or the Note to suggest that trial judges confronted with a proposed settlement class must -- in the course of evaluating the requirements of Rule 23(a) and (b)(3) -- turn a blind eye to the fact that the case will never go to trial and thus will never present the manageability difficulties presented by a trial class. Indeed, many courts have long recognized that they do not need to hypothesize that there will be a future trial in evaluating whether a settlement class meets Rule 23's criteria. *In re Asbestos Litig.*, 90 F.3d at 975 ("Most circuits to decide the issue have held that courts should consider the settlement in determining whether Rule 23 prerequisites are satisfied").

Judge Becker invited the Advisory Committee, in revising Rule 23, to make plain that "settlement classes need not meet the requirements of litigation classes." *Georgine*, 83 F.3d at 634-35. The Advisory Committee's proposal does just that and, in doing so, embraces the overwhelming majority of precedents. In reality, this amendment is merely a response to the few decisions that

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<sup>2</sup> The defendant's voluntary waiver of certain legal protections is, of course, essential to any settlement class. For a court to certify a "settlement" class -- *i.e.*, one that could not be tried as a class -- in the absence of the parties' consent would deprive the parties of their due process rights.

wrongly rely on the text of Rule 23 to conclude that a court *must* employ the artifice of a future trial to preclude settlement classes for cases that would present horrific management and conflicts of law problems if they ever were to be tried as a class. Proposed (b)(4) does not authorize a "liberalized criteria" for settlement classes; rather, it encourages trial judges to take a clear-eyed view of the facts before them when assessing whether a putative class action meets the requirements of Rule 23(a) and (b).

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

Some commentators have suggested that strong criteria must be established for settlement classes because the trial judges, plaintiffs' counsel and defendants' counsel could succumb to pressure to dispose of litigation at the expense of absent class members. Such commentators apparently fear that trial judges will be led to ignore their responsibilities to evaluate whether the requirements of Rule 23 are met and whether the settlement is fair and equitable. In my experience, federal judges usually have held extensive fairness hearings after notice has been provided to class members, have carefully examined settlements to determine if they are fair, have rejected some, and have requested that the parties renegotiate certain provisions the court believed to be unfair.

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

Some commentators also have suggested that a defendant under the new (b)(4) may "shop" around a settlement to the "lowest bidder" and then

certify a settlement class and thereby take advantage of absent class members. This view deals with a hypothetical situation, not reality. In my experience, if a putative class claim is of any merit at all, dueling class actions often are filed in which various firms angle for the choice plum of "lead" class counsel. Any firm that actually would be willing to "sell out" the class cheaply with a "collusive" settlement would face strong opposition from other law firms that would object to the settlement class or pursue parallel opt-out litigation.

In this regard, it should be noted that some counsel file purported class actions -- particularly consumer class actions raising "nuisance" claims (*e.g.*, minimal overcharge claims, claims based on unmanifested product defects) -- on a "settlement speculative" basis. In other words, with no serious intent to litigate a matter on a long term basis, counsel file an action merely to test whether a defendant will agree at an early stage to a settlement that would provide minimal benefits to individual class members and significant benefit to counsel. There is concern in some quarters that adding to Rule 23 a specific provision authorizing settlement classes will only encourage such abuse of the class device, increasing the number of needlessly filed purported class actions.

To the extent this concern has legitimacy, the Committee can address it by including in its Note on 23(b)(4) an admonition that courts should not entertain proposed settlements unless the litigation of the matter has generated a sufficient factual record to allow a meaningful review of the adequacy of whatever settlement is proposed. I am not suggesting that in all cases, certification of settlement classes should be postponed "until experience with individual actions yields sufficient information to support a wise settlement and effective review of the settlement," a suggestion the current draft Committee Note makes with respect to cases in which facts or law may be unsettled. But before approving a proposed settlement class, a court should have "lived with" the case (or related litigation) long enough and have before it sufficient record evidence to determine whether the settlement is fair. Further, in the interest of preserving the integrity of the class action device, the Note should urge courts to restrict attorneys' fee awards in purported class actions that settle at an early stage, particularly those that yield only minimal awards for the individual class members.

**VI. A "CLASSWIDE PROOF" REQUIREMENT SHOULD BE ADDED  
TO RULE 23(b) (3)**

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Although they are positive reforms in most respects, the proposed amendments fail to address two serious problems that arise repeatedly in the class action arena.

*First*, the class action device is being used by some counsel as a mechanism for avoiding their obligation to prove the claims of each member of the putative class. For example, in cases asserting claims with individual reliance elements, such as fraud, class counsel sometimes argue that since the class representative purportedly relied on a false and misleading statement, it may be inferred that the reliance prerequisite is satisfied as to all members of the putative class. *See, e.g., Castano v. American Tobacco Co.*, 84 F.2d 734, 749 (5th Cir. 1996). Thus, it is argued that on the basis of the class representative's testimony about his or her personal experience in the matter, a jury may make a sweeping, classwide determination that all other class members received the representation and relied upon it to their detriment (even though no evidence is proffered that *any* other class member actually knew about or relied upon the statement).

Obviously, this tactic is invalid because it seeks to permit individual class members to recover without ever being required to prove their claims. Allowing claims to be tried to a "yes-or-no" liability verdict as to all class members without ever confirming that the evidence presented actually applies to and proves all class members' claims "alters substantive rights." *In re Hotel Telephone Charges*, 500 F.2d 86, 90 (9th Cir. 1974) (citing *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973)). "Such enlargement or modification of substantive . . . rights by procedural devices is clearly prohibited by the Enabling Act that authorizes the Supreme Court to promulgate the Federal Rules of Civil Procedure." *Id.* Although Rule 23 permits the claims of multiple parties to be aggregated and proved simultaneously in certain carefully prescribed circumstances, it does not allow entering judgment in favor of any class member whose claims are not proved by the evidence presented by the representative plaintiff at trial.

A *second* problem is the failure of trial courts to consider how a case actually would be tried on a classwide basis if the matter were afforded class

treatment. As repeatedly noted by appellate courts in recent months, trial courts have been certifying classes without seriously assessing whether the purported class representative has means of proving all elements of all claims at issue using only proof simultaneously applicable to all class members. See, e.g., *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (reversing class certification, citing *Castano* and observing that "[t]here has been no showing by Plaintiffs of how the class trial could be conducted"); *Castano*, 84 F.2d at 740, 744-45 (reversing class certification order because the trial court "did not . . . consider [] how a trial on the merits would be conducted" and noting that "a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the [class] certification issues"); *In re American Medical Sys., Inc.*, 75 F.3d 1069, 1083-86 (6th Cir. 1996) (issuing writ of mandamus against class certification in product liability case where the trial court, *inter alia*, failed to consider how a case would be tried on a class basis).

What lies at the heart of these recent appellate court reversals of class certification orders is the need for district courts to envision how class claims would be tried to determine whether the plaintiffs' and the defendants' likely evidentiary showings actually will speak simultaneously to the claims of all class members. If the evidence of either side is not primarily a uniform, across-the-board showing, application of the class device would be either wholly unmanageable or fundamentally unfair. Either the proceeding will sink under the weight of individualized proof on a variety of issues, or class members will effectively be excused from proving their claims. Neither result is consistent with fundamental due process principles or the purposes of this procedural device.

Certain federal circuits (e.g., the District of Columbia and the Fifth) have addressed these problems with the adoption or suggestion of a "classwide proof" requirement -- a rule that a district court should not certify a class unless the class proponent demonstrates to the trial court that he or she has means of proving simultaneously the claims of all purported class members by use of the same proof. See *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 321-22 (5th Cir. 1978) (noting that if the addition or deletion of certain class members from trial would "affect the substance or quantity of evidence offered, the necessary common question might not be present"); *Windham v. American*

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*Brands, Inc.*, 539 F.2d 1016 (4th Cir. 1976), *reversed en banc on other grounds*, 565 F.2d 59 (4th Cir. 1977); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017, 1018 (D.C. Cir. 1986). These courts have made it clear that the "classwide proof" inquiry is not an attempt to require class proponents to actually prove their case at the class certification stage. *See Walsh*, 807 F.2d at 1017-18 (noting that "[c]lass action proponents may not be called upon to prove their case in order to obtain class certification"). Instead, the inquiry is an effort (1) to ensure that the class device is not used to allow individual class members to escape the same burden of proving their claim that would exist if their claims were being litigated individually, and (2) to ensure that trial courts consider fully how a case would be tried if it were afforded class treatment:

The rule suggested by these circuit courts is a sound one. It should be reflected on the face of Rule 23 by inserting an additional finding that must be made before any (b)(3) class may be certified:

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

\* \* \*

(3) the court finds (i) that the questions of law or fact common to the members of the class predominate over any questions affecting only individual class members, (ii) that the evidence likely to be admitted at trial regarding all elements of the claims asserted by the certified class is substantially the same as to all class members, and (iii) that a class is superior to other available methods for the fair and efficient adjudication of the controversy. . . .

This addition to Rule 23(b)(3) would place upon the class proponents the burden of showing that the kinds of proof that would be used at trial would be classwide and that the class lends itself to a unified evidence plan. This finding ultimately would verify that affording a matter class treatment (a) would be fair to both the putative class members and defendants, (b) would result in the efficiencies that class actions were intended to provide, and (c) would result in a quicker, less costly resolution of the dispute.

Conclusion

The need for class action reform is beyond legitimate debate. Class actions have flourished in an "anything goes" atmosphere restrained only by the limits of the imaginations of enterprising counsel. Some of the ever-more-numerous class actions confronting our federal courts attempt to bundle claims that could and should be litigated individually. Others clearly are filed solely to enrich plaintiffs' counsel; the real parties in interest simply could not care less about the claims asserted. Trial courts have done little to discourage this phenomenon; indeed, some have invited it by showing a willingness to certify classes without even considering whether the underlying dispute actually could be tried on a class basis.

For the most part, the proposed amendments to Rule 23 are directionally correct in addressing these serious challenges to our legal system. The amendments should be adopted. However, changes should be made to the several Advisory Committee Notes identified above that may be interpreted as negating some of the most important reforms included in the amendments. And to echo the concerns reflected in recent appellate decisions urging greater care by trial courts in deciding whether to certify classes, the amendments should be expanded in one respect -- the "classwide proof" requirement discussed above should be added to the class certification prerequisites contained in Rule 23(b)(3).

Thank you for the opportunity to comment on the proposed amendments.

Respectfully submitted,



Sheila L. Birnbaum

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December 11, 1996

Honorable Paul V. Niemeyer  
United States Circuit Judge  
Chair, Advisory Committee on Civil Rules  
Committee on Rules of Practice and  
Procedures of the Judicial Conference  
of the United States  
Washington, D.C. 20544

Re: Deferral of Consideration of "Change 2" Pending Windsor/Georgine

Dear Judge Niemeyer:

This firm represents Owens-Illinois, Inc. in connection with the proposed amendments to Fed. R. Civ. P. 23. Your very helpful outline of the proposed changes to Rule 23 identified as "Change 2" the addition of a new ¶ (b)(4) providing for settlement classes. For the reasons set forth below, we respectfully request that the Advisory Committee postpone the scheduled public hearings and public comment period on Change 2 until after the Supreme Court has issued an opinion in Amchem Products, Inc., v. Windsor, 83 F.3d 610 (3d Cir. 1996), cert. granted, 65 U.S.L.W. 17 (U.S. Nov. 1, 1996) (No. 96-270) ("Georgine").

The Supreme Court granted certiorari in Georgine on the precise issues raised by Change 2. The Court, therefore, is likely to address and provide guidance on the controversial issues surrounding Change 2. Thus, by waiting on the Supreme Court decision, the public will have the benefit of knowing the Supreme Court's view on Change 2 and will be able to engage in a more meaningful discussion of the issues.

We also are concerned that the public, including Owens-Illinois, will not have a meaningful opportunity to comment on Change 2 after the Supreme Court's decision. Many commentators felt that the 1993 amendments to Rule 26 would have benefited from more public comment. See, Opinion of Justice White and Scalia on Amendments to Fed. R. Civ. P. 26 (April 22, 1993) (expressing concern with the Advisory Committee recommending the adoption of the amendments to Rule 26 without further public comment after it had announced its abandonment of the duty-to-disclose requirement).

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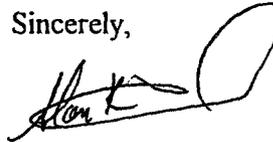
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For these reasons, we respectfully submit that the Advisory Committee should formally defer all consideration of Change 2 until after the Supreme Court decision in the Georgine case. Of course, we are not suggesting that the Advisory Committee defer consideration of the other proposed amendments.

Sincerely,

A handwritten signature in black ink, appearing to read "Alan R. Dial", with a large, stylized flourish at the end.

Alan R. Dial