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Ross F. Bass Jr.

John W. Robinson III

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THE METAMORPHOSIS OF MASS TORT CLASS ACTIONS: A FIFTH CIRCUIT PERSPECTIVE

*Ross F. Bass, Jr.**
*John W. Robinson, III**†*

I shall be telling this with a sigh somewhere ages and ages hence; two roads diverged in a wood, and I — I took the one less traveled by, and that has made all the difference.[1]

I. INTRODUCTION

In the present-day federal court arena, no topic divides courts and commentators more than the class action lawsuit. Viewed by some as a gross abuse of the system and crutch for weak legal claims, by others as the savior of injured plaintiffs and a solution to overcrowded dockets, the class action suit has evolved to be one of the most debated and controversial forms of litigation. Recent decertification rulings in major class actions have put even more attention on this method of resolving legal disputes.

In recent years, with the explosion of mass tort litigation — as seen in the areas of asbestos, silicone gel breast implants, and tobacco-related claims — millions of potential plaintiffs are lined up to sue for alleged injuries linked to various products and services. Inevitably, plaintiffs seek to file class action lawsuits over these collective claims.

Traditionally, defendants fought vehemently to resist class certification. A major reason for this resistance was the reality that certification of a class almost always was outcome determinative — the potential for a single jury to deal a death blow to the class action defendant created enormous pressure for the defendant to settle, often without regard to the merits of the claims.[2] Likewise, courts were reluctant to certify classes because of the imbalance of bargaining power between the parties, and because it was difficult for plaintiffs to meet the technical requirements for class action suits under Rule 23 of the Federal Rules of Civil Procedure.

However, the fierce growth of mass tort litigation forced plaintiffs, defendants, and courts alike to view the class action lawsuit as a tool for managing claims and clearing dockets. In fact, courts became more willing to fit plaintiffs' claims into Rule 23. Some defendants began to welcome the class action, especially

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* Mr. Bass is a partner in the law firm of Phelps Dunbar, L.L.P., Jackson, Mississippi. B.A. 1970, Belhaven College; J.D. 1973, University of Mississippi.

** Mr. Robinson is an associate in the law firm of Phelps Dunbar, L.L.P., Jackson, Mississippi. B.A. 1986, Hampden-Sydney College; J.D. 1991, Marshall-Wythe School of Law, College of William & Mary.

† The authors gratefully appreciate the assistance of Bethany L. Brantley. Ms. Brantley is an associate in the law firm of Phelps Dunbar, L.L.P., Jackson, Mississippi. B.A. 1993, Mississippi State University; J.D. 1996, Mississippi College School of Law.

1. ROBERT FROST, THE POETRY OF ROBERT FROST 105 (1969).

2. *See generally* Barry F. McNeil & Beth L. Fancsali, *Mass Torts and Class Actions: Facing Increased Scrutiny*, reprinted at 167 F.R.D. 483. The McNeil/Fancsali paper originally was presented to the 1996 Judicial Conference of the Fifth Circuit, held in Fort Worth, Texas, on May 7, 1996.

when it could guarantee a final, global solution to all current and future common claims against them.

In turn, the use of class actions to facilitate settlement has grown in popularity. The settlement class action is a device through which plaintiffs and defendants, with the approval of courts, seek class certification for the sole purpose of negotiating a settlement. Compared to traditional lawsuits, or typical class actions, the settlement class action can yield vast savings in time, money, and judicial resources in resolving complex litigation.

The rapid growth of the mass tort class action, however, has slowed significantly over the past few years. The Third, Fifth, and Seventh Circuit Courts of Appeals have decertified major class action lawsuits, with the Fifth Circuit getting a significant portion of the attention in its *Castano v. American Tobacco Co.*[3] ruling in early 1996. *Castano* and the other decertifications warned that Rule 23 should not be interpreted too loosely by federal district judges and intimated that settlement class actions may be altogether improper in some instances. Another major ruling was handed down by the Fifth Circuit in late 1996, *Ahearn v. Fibreboard Corp.*[4] *Ahearn*, however, upheld certification and settlement of a monstrous asbestos class, perhaps breaking the recent decertification trend. The Supreme Court has also spoken to the issue of settlement class actions recently, affirming decertification by the Third Circuit of a separate asbestos class,[5] while vacating *Ahearn* for further consideration under its new ruling.[6] Finally, the U.S. Judicial Conference currently is proposing changes to Rule 23. The proposed amendments would explicitly recognize the settlement class action, and acknowledge it as a means for resolving mass tort litigation.

This Article attempts to shed light on whether our federal courts indeed will take the "road less traveled" and allow certification of enormous classes, as well as uphold huge global settlements, in order to forge a judicial solution to major social problems, while decreasing the burden on the court system in the process. The Article will focus largely on the mechanics of mass tort class action lawsuits, followed by an overview of recent "settlement class action" rulings, with special emphasis on the Fifth Circuit's recent landmark rulings. An evaluation of the recently proposed amendments to Rule 23 and the potential ramifications of those amendments, if adopted, will follow, including an analysis of the vastly conflicting views expressed by scholars and commentators. Finally, this Article briefly will address the questions left unanswered by the recent rulings and the resulting uncertainty surrounding the future of the class action.

One thing is certain, however; regardless of the road taken, resolution of the class action issues being debated today will have a significant impact on the role our federal courts will play in resolving mass tort litigation and other cases with broad societal impact.

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3. 84 F.3d 734 (5th Cir. 1996).

4. 90 F.3d 963 (5th Cir. 1996), *reh'g denied*, 101 F.3d 368 (5th Cir. 1996), *vacated sub nom.* Ahearn v. Flanagan, 117 S. Ct. 2503 (1997).

5. Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997).

6. Ahearn v. Flanagan, 117 S. Ct. 2503 (1997).

II. THE CLASS ACTION AND ITS REQUIREMENTS

A. Background: The Evolution of the Class Action

Class action suits existed at common law where the "bill of peace" gave litigants the opportunity to compile their claims into a single action in equity. However, the class action lawsuit common to American courts traces from 1938, when the original Federal Rules of Civil Procedure were promulgated. The original Rule 23 was not easily applied, and, therefore, went through a major overhaul in 1966, resulting in the modern class action lawsuit.[7]

Early on, the Eighth Circuit explained the purpose behind class actions: "[t]he class action was an invention of equity . . . mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs."[8] Thus, although class actions continue to become more complicated, their objectives remain the same.

B. The Technical Requirements for Certification

Federal Rule of Civil Procedure 23(a) imposes four prerequisites before class certification will be allowed: numerosity, commonality, typicality, and adequacy of representation.[9] If the class representative can establish all four prerequisites of Rule 23(a), he or she must also meet the requirements of at least one subsection of Rule 23(b).[10]

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7. Mississippi is among the minority of states with no rule allowing class action lawsuits in state courts. Accordingly, for Mississippi practitioners, this Article concerns only federal rules and practice.

8. Montgomery Ward & Co. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948) (citations omitted).

9. Specifically, Rule 23(a) states:

> One or more members of a class may sue or be sued as representatives on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a).

10. Specifically, Rule 23(b) provides:

(b) Class Action Maintainable. An action may be maintained as a class 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 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 interest of members of the class in individually controlling the prosection 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.

FED. R. CIV. P. 23(b).

Most of the recent decertifications have been based upon failure to meet the Rule 23(a) prerequisites. Thus, the following is a detailed explanation of each of these requirements. The first two prerequisites focus on characteristics of the class itself, while the second two focus on the suitability of the class representative. Despite this interrelation, however, each criterion serves its own important independent function in class action determinations.

1. Numerosity

A class action is appropriate where it is impracticable to join all class members as parties in a single action. No particular formula is applied by the courts; however, "impracticable" does not mean "impossible,"[11] and it is sufficient to show that to join all the members of the class would be extremely difficult or inconvenient.[12] A few dozen plaintiffs have qualified under appropriate circumstances.[13] Some modern class actions have plaintiffs whose numbers potentially include hundreds of thousands and even millions of members.[14] Adjudicating so many claims on an individual basis is precisely what Rule 23 was designed to avoid. As one commentator has noted, "[c]ertainly, when the class is very large — for example, numbering in the hundreds — joinder will be impracticable; but in most cases, the number that will, in itself, satisfy the Rule 23(a)(1) prerequisite should be much lower."[15]

While there is no minimum number of parties necessary to meet the "numerosity" requirement, neither is there an absolute maximum.[16] However, the salient problem in such large cases, at least under Rule 23(b)(3), is the superiority of a class action relative to other alternatives. Accordingly, the "numerosity" requirement is not a substantial hurdle to overcome in establishing a class.

2. Commonality

A class action is appropriate where common questions of law and fact are present for members of the class. Again, there is no precise formula applied by the courts, but the threshold for commonality is not high, and there is no requirement that *all* questions of law or fact raised in the litigation be common.[17] Specifically, the Fifth Circuit recently held that "class certification requires at least two issues in common."[18] Moreover, the "rule requires only that resolution of the common questions affect all or a substantial number of the class members." [19]

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11. *In re* Joint E & S Dist. Asbestos Litig., 129 B.R. 710 (Bankr. E.D.N.Y. 1991).

12. *See* 7A CHARLES A. WRIGHT ET. AL., FEDERAL PRACTICE AND PROCEDURE § 1762 at 150 (2d ed. 1986).

13. *See, e.g.*, Grant v. Sullivan, 131 F.R.D. 436 (M.D. Pa. 1990) (certifying class of 14 plaintiffs).

14. *See, e.g.*, Zachary v. Chase Manhattan Bank, 52 F.R.D. 532 (S.D.N.Y. 1971) (several million members).

15. HERBERT B. NEWBERG AND ALBA CONTE, NEWBERG ON CLASS ACTIONS § 3.05 at 3-25 (3d ed. 1992).

16. *See* Califano v. Yamasaki, 442 U.S. 682 (1979) (recognizing the propriety of a national class in certain instances).

17. Port Auth. Police Benevolent Ass'n v. Port Auth., 698 F.2d 150 (2d Cir. 1983) (common question was suppression of free speech).

18. Applewhite v. Reichhold Chem., Inc., 67 F.3d 571, 573 (5th Cir. 1995).

19. Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 472 (5th Cir. 1986) (citation omitted), *reh'g denied*, 785 F.2d 1034 (5th Cir. 1986); *see also* Shipes v. Trinity Indus., 987 F.2d 311, 316 (5th Cir. 1993), *cert. denied*, 510 U.S. 991 (1993).

Commonality generally is met when injunctive and declaratory relief are part of a settlement related to the class action.[20] Indeed, "[c]lass suits for injunctive or declaratory relief by their very nature often present common questions satisfying Rule 23(a)(2)."[21] Like numerosity, this requirement is easily met in most cases.

3. Typicality

The typicality element requires the court to analyze whether the class representative's claims are similar enough to the claims of the class so that she will represent them adequately. Indeed, this criterion focuses on whether there exists a relationship between the plaintiff's claims and the claims alleged on behalf of the class. It requires an "alignment of interests" within the represented group. The Fifth Circuit generally speaks in terms of requiring a "nexus" between the named party and the issue or between the named party and other class members.[22] Furthermore, the entire class must be proceeding on the same legal theories.[23]

4. Adequacy of Representation

This requirement is perhaps the most important, certainly, with respect to constitutional concerns. Indeed, adequacy of representation is necessary to meet due process standards for absent class members, because any final judgment rendered necessarily is binding on all persons whom the court determines are members of the class.[24] The adequacy of class representation has two requirements: "[t]he first concerns the qualifications of counsel, and the second concerns the interests of the class representatives and the interests of the other class members."[25]

Class counsel are required to be "qualified, experienced and generally able to conduct the proposed litigation."[26] The adequate counsel requirement may be dissected further into two factors: (1) the appearance of the ability of counsel to vigorously prosecute the action; and (2) the absence of antagonistic or conflicting interests.[27]

More importantly, unlike the first three prerequisites of Rule 23(a), the adequacy of representation requirement is not a one-time threshold test. The requirement is an ongoing obligation of the class representative and class counsel throughout all stages of litigation, placing upon the trial court a continuing duty to scrutinize the adequacy of representation.[28]

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20. 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, § 1762 at 150 (2d ed. 1986).

21. *Id.* § 1763 at 201.

22. *See, e.g.*, Satterwhite v. City of Greenville, 578 F.2d 987 (5th Cir. 1978); Camper v. Calumet Petrochemicals, Inc., 584 F.2d 70 (5th Cir. 1978).

23. Senter v. General Motors Corp., 532 F.2d 511 (6th Cir. 1976), *cert. denied*, 429 U.S. 870 (1976).

24. Rule 23(c)(3) provides that any judgment rendered in a class action must describe the individuals that the court finds to be members of the class.

25. Jenkins v. Raymark Indus., 109 F.R.D. 269, 273 (E.D. Tex. 1985), *aff'd*, 782 F.2d 468 (5th Cir. 1986).

26. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968).

27. *See, e.g.*, General Tel. Co. v. Falcon, 457 U.S. 147 (1982); Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507 (9th Cir. 1978).

28. Guerine v. J & W Inv., Inc., 544 F.2d 863 (5th Cir. 1977).

This requirement inevitably brings to light the "irreducible divergence of interest, if not a legal conflict of interest, between client and lawyer" in massive class suits,[29] where lawyers stand to collect substantial sums of money that technically are being paid for the benefit of the class members. This "conflict" alone, however, has yet to be a reason for a denial of certification. Nonetheless, it was the adequacy of representation requirement, coupled with the predominance issue, which led the Supreme Court to affirm decertification in *Amchem*.[30]

C. The Class Categories

In addition to meeting the prerequisites of Rule 23(a), a class action also must fit within one of the categories set forth in Rule 23(b).[31]

In general terms, Rule 23(b)(1) classes are designed to avoid prejudice to the defendant or absent class members that might result from individual actions. Rule 23(b)(2) classes generally are proper when injunctive relief is sought on grounds that the defendant has acted in a manner which affects the entire class. Also, Rule 23(b)(3) classes are available when class action adjudication is superior to other available alternatives and when common questions predominate over individual issues.[32]

Although many proposed class actions qualify under two or all three class categories, Rule 23(b)(1) and (2) classes differ substantially from a 23(b)(3) class. First, 23(b)(1) and (2) class members do not have the right to "opt out," while 23(b)(3) absent class members have the right to exclude themselves from the class and from the binding effect of judgment.[33] Second, the notice provisions under 23(c) differentiate between (b)(1) and (b)(3) classes. A 23(b)(3) class is *required* to receive notice of an action maintained under this subsection while (b)(1) and (2) class notice is within the discretion of the court.[34] Finally, absent class members have the right to enter an appearance through counsel.[35]

The underlying reason for these distinctions relies upon the notion that (b)(1) and (2) classes are very cohesive classes with closely aligned interests and do not need opt out rights to protect class members.

D. Evolution of the Class Action

The framers of Rule 23 did not envision its application to the wide array of "mass tort" suits filed during the past twenty years. In the notes accompanying the rule, the Advisory Committee opined that class action lawsuits usually would

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29. *See generally* Geoffrey C. Hazard Jr., *The Settlement Black Box*, 75 B.U. L. REV. 1257, 1263 (1995).
30. Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997).
31. *See supra* note 10, quoting text of Rule 23(b).
32. *See generally* NEWBERG AND CONTE, *supra* note 15, ch.11.
33. FED. R. CIV. P. 23(c)(2).
34. *Id.*
35. *Id.*

not be appropriate when litigating "mass accidents," because of the array of individual issues accompanying questions of liability and damages in such cases.[36]

However, "mass accidents" or "mass torts" are precisely what the class action today is being used to litigate in cases involving, for example, asbestos,[37] tobacco,[38] intrauterine devices,[39] and blood-clotting medications.[40] Trial judges have become amenable to certification as a means of relieving the pressure of thousands of individual suits over similar claims accumulated on their dockets. Consequently, in the 1990's, the class action lawsuit has been employed liberally to address these and other mass torts. Whether and how Rule 23 may be applied to resolve these matters is one of the most controversial subjects facing our federal courts today, and the Fifth Circuit is squarely in the middle of the debate.

III. THE SETTLEMENT CLASS ACTION

A. Overview[41]

The settlement class device is not mentioned in the current version of Rule 23. Rather, it is a judicially crafted procedure. Usually, the request for a settlement class is presented to the court by both plaintiffs and defendants; having provisionally settled the case before seeking certification, the parties move for simultaneous class certification and settlement approval. Increasingly, courts are also certifying temporary classes for the express purpose of engaging in settlement negotiations. Because this process is removed from the normal, adversarial litigation mode, the class is certified for settlement purposes only, not for litigation. Only when the settlement is finally approved after a fairness hearing does the court formally certify the class, thus binding the interests of its members by the settlement.[42]

Courts increasingly have used this device in recent years, and settlement class actions have proven extremely valuable for disposing of major and complex class actions in a variety of substantive areas ranging from toxic torts[43] to medical devices.[44] However, their use has provoked a barrage of criticism, primarily

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36. FED. R. CIV. P. 23(b)(3), Advisory Committee's note. Specifically, the comment states that:

> 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 individual in different ways. In these circumstances an action conducted nominally as a class action would degenerate and practice into multiple lawsuits separately tried.

Id. See also McNeil & Fancsali, 167 F.R.D. 483, 487.

37. Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997).

38. Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996).

39. *In re* Northern Dist. of California Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

40. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 184 (1995).

41. This description of settlement class actions and their pros and cons, is adapted in part from an excellent overview by Judge Gibson of the Third Circuit in his opinion for *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3d Cir. 1995). Though he ultimately decertified a settlement class in that case, Judge Gibson gave a balanced view of this relatively new legal device.

42. *See* NEWBERG AND CONTE, *supra* note 15, ch.1.

43. *In re* Agent Orange Prods. Liab. Litig., 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

44. *In re* Northern Dist. Of California Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847 (9th Cir. 1982), *cert denied*, 459 U.S. 1171 (1983).

claiming that the device is a vehicle for collusive settlements that primarily serve the interests of defendants — by granting expansive protection from lawsuits — and of plaintiffs' counsel — by generating large fees gladly paid by defendants as a quid pro quo for finally disposing of many troublesome claims.[45] These concerns have been at the heart of recent case law in this area as well as proposed changes to Rule 23 itself.

There was speculation that the issue would be clearly resolved once the Supreme Court issued its ruling in *Amchem Products., Inc. v. Windsor.*[46] At the appellate level, the Third Circuit had decertified a monstrous asbestos class, holding that a class could not be certified for settlement unless it could be certified for trial, essentially denying the trial court the ability to consider the existence of a proposed settlement when making a certification decision.[47] Rather than issue a definitive ruling, however, the Supreme Court merely affirmed the decertification on the grounds that the adequacy of representation and predominance requirements were not met.[48] While not explicitly recognizing a "settlement class action," the Court did note that "settlement is relevant to a class certification."[49] Indeed, the Court expressly recognized at least one permissible distinction between class actions that will be litigated and class actions that will not — the district court "need not inquire whether the case, if tried, would present intractable management problems."[50]

This issue may be definitely put to rest in the near future. The proposed amendments to Rule 23 specifically provide for a settlement class.[51] While the Supreme Court did not extend its holding to expressly allow a settlement-only class action where one or more of the Rule 23(a) requirements were absent, the Supreme Court did acknowledge the proposed amendments, stating that "courts must be mindful that the rule as now composed sets the requirements they are bound to enforce."[52] Thus, the Court appears ready and willing to recognize settlement-only class actions if and when the proposed amendments are adopted.

B. Recent Developments in Class Action Jurisprudence

An apparent assault on monster-sized class action suits broke out in the federal circuit courts in 1995. In rapid succession, the appeals courts decertified suits over automobile defects,[53] blood-clotting medications,[54] asbestos,[55] penile

45. *See, e.g.*, John C. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1367-84 (1995).

46. 117 S. Ct. 2231 (1997).

47. Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996), *cert. granted sub nom.*, Amchem Prods., Inc., v. Windsor, 117 S. Ct. 379 (1996).

48. *Amchem*, 117 S. Ct. 2231 (1997).

49. *Id.*

50. *Id.*

51. *See* Section IV, *infra*.

52. *Amchem*, 117 S. Ct. 2231 (1997).

53. *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 88 (1995).

54. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 184 (1995).

55. Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom.*, Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997).

implants,[56] and nicotine addiction.[57] Some observers say the rulings were inevitable, reflecting a judicial concern that the use of class actions has gone too far. Other observers disagree and urge that class actions, especially settlement classes, are well-suited to dispose efficiently of massive controversies which are difficult to resolve through individual cases, thereby ridding the federal court system of the "albatross" these massive controversies create.

1. The Supreme Court — *Amchem Products., Inc. v. Windsor*[58]

The *Amchem* proposed class action arose in the Third Circuit,[59] springing from the litany of litigation involving asbestos and injuries allegedly resulting from exposure to it. In 1993, the named plaintiffs filed a class action complaint, seeking to certify a nationwide class strictly for settlement purposes. The proposed settlement was to resolve the claims of between 250,000 and 2,000,000 individuals who were allegedly exposed to asbestos. The most significant factor of the proposed settlement was that it would have extinguished asbestos-related causes of action not only for exposed individuals who currently suffered physical ailments, but also for exposed individuals who had not yet developed asbestos-related diseases.[60]

Upon review of the district court's decision to certify a settlement class, the Third Circuit focused only on whether the proposed settlement class met the 23(a) requirements of typicality and adequacy of representation and the 23(b)(3) requirements of predominance and superiority. The Third Circuit refused to adopt a less stringent standard for Rule 23 certification for settlement only.[61] The court stated that "there is no language in [Rule 23] that can be read to authorize separate, liberalized criteria for settlement classes."[62]

Of primary concern to the Third Circuit was the fact that the proposed settlement would result in the extinguishment of future victims' claims, even though they had not yet accrued. Furthermore, in the context of adequacy of representation, the court was of the opinion that there was an irreconcilable conflict between the goals of those currently impaired and future claimants: future plaintiffs would seek to preserve a large fund, while injured plaintiffs would seek to maximize front-end benefits.[63] According to the court, because of the conflict created by the settlement, the adequacy of representation requirement could not be met.[64] In addition, the *Georgine* court noted that the "amalgamation of factually and legally different plaintiffs creates problematic conflicts of interest, which thwart fulfillment of [both] the typicality and adequacy of representation requirements." [65]

56. *In re* American Medical Sys., 75 F.3d 1069 (6th Cir. 1996).
57. Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996).
58. 117 S. Ct. 2231 (1997).
59. Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996).
60. *Id.*
61. *Id.*
62. *Id.* at 618 (quoting *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 799 (3d Cir. 1995)).
63. *Id.* at 618.
64. *Id.*
65. *Id.*

The *Georgine* court was also concerned with the predominance issue, and explained that individualized issues almost certainly will become overwhelming in actions involving long-term mass torts which do not arise out of a single incident.[66] As such, the court found that individual issues predominated; therefore, the mandates of Rule 23(b)(3) could not be satisfied.[67]

Finally, the court moved to the superiority of the class action over other available methods, holding that a class of the size contemplated could not be tried because too many individual issues would predominate.[68] Moreover, the Third Circuit, like both *Castano*, *infra*, and *Rhone-Poulenc*, *infra*, held that individual class members had a significant interest in pursuing separate actions where very large damage awards would be more likely.[69]

Hopefully, however, the Third Circuit may have provided the impetus to spark change in the realm of settlement class actions, stating that "[t]he desirability of innovation in the management of mass tort litigation does not escape the collective judicial experience of the panel. But reforms come from the policy-makers, not the courts . . . . The most direct and encompassing solution would be legislative action."[70]

Upon review, the Supreme Court affirmed the Third Circuit's decertification, modifying the Circuit's opinion in one primary respect: settlement is indeed relevant to a class certification, at least to the extent that when a class is for settlement purposes only, the court need not inquire into trial manageability issues.[71] The Court agreed with the Third Circuit that the adequacy of representation and predominance requirements were the chief obstacles in certifying the class.[72] All said and done, the Supreme Court tacitly acknowledged the propriety of settlement class actions, at least under limited circumstances, without overruling the Third Circuit's decertification.

Interestingly, however, the Supreme Court later took no time in declining to review the *Ahearn* settlement, *supra*, which had been approved by the Fifth Circuit, and ordered the case back to the Fifth Circuit for review in light of *Amchem*.[73]

It also bears mention that amendments to Rule 23 are currently being considered. The Supreme Court expressly recognized that the proposed amendments would make the issue moot by expressly authorizing settlement class certification even when Rule 23(b)(3) requirements are not present.[74] Nonetheless, the Court followed Rule 23 in its current form, stating the "[c]ourts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure 'shall not abridge . . . any substantive right.'"[75]

66. *Id.* at 628-30.
67. *Id.*
68. *Id.* at 632-33.
69. *Id.* at 633.
70. *Id.* at 634.
71. Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997).
72. *Id.*
73. Flanagan v. Ahearn, 117 S. Ct. 2503 (1997).
74. Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997).
75. *Id.* (citing 28 U.S.C. § 2072(b)).

Additionally, the legislative action requested by the Third Circuit and reiterated by the Supreme Court may be imminent. In the meantime, however, many scholars continue to criticize the *Georgine* court, calling its ruling a "formalistic approach [which] distort[s] the plain meaning of Rule 23 and contravene[s] the policies and purposes underlying the class action device."[76]

2. The Seventh Circuit

Matter of Rhone-Poulenc Rorer, Inc.[77] appears to have signaled the beginning of the current attack on class actions involving mass torts. The present litany of class action decisions handed down by the various courts of appeals decertifying classes seem to gravitate toward it. Thus, should opponents to the broad application of Rule 23 class actions prevail, *Rhone-Poulenc* may be seen as the precursor to the demise of mass tort class action litigation and/or settlement.

In *Rhone-Poulenc*, hemophiliacs sought certification of a nationwide class action against defendant manufacturers of an anti-hemophiliac factor concentrate.[78] Each of the plaintiffs had contracted the AIDS virus or HIV and claimed that their infection was the result of the defendants' negligence, claiming that the product manufactured by the defendants was contaminated with the virus.[79]

The primary reasons the class failed in *Rhone-Poulenc* was the novelty of the plaintiffs' legal theories, and the fact that the proposed class was certified under Rule 23(b)(3), requiring superiority to other alternatives and predominance of common issues. In decertifying the class, the Seventh Circuit reasoned that it was entirely feasible and, more importantly, superior for the plaintiffs to pursue *individual* rather than class resolution.[80] Because the theory was so novel, and because the defendants had previously been successful in twelve of thirteen similar actions, the court found that "[e]ach plaintiff if successful [was] apt to receive judgment in the millions."[81]

The *Rhone-Poulenc* court also was highly critical of the notion that one jury would decide the fate of the entire industry, whether or not adverse to that industry. The court reasoned that the jury to be empaneled by the district court may very well disagree with the other twelve cases deciding against the plaintiffs. The better alternative, the court suggested, was for the issues to be submitted to various juries.[82] Thus, in a sense, the court was leveling the playing field for the parties, giving them individually the advantage of their own jury, rather than binding them to a possibly adverse ruling by one jury.

The Seventh Circuit also placed great emphasis on the premise that individual fact questions, such as when infection occurred, were critical in assessing liability.[83] Furthermore, individual legal issues predominated because of differences in

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76. *See, e.g.*, *Recent Cases*, 110 HARV. L. REV. 529 (1996).
77. 51 F.3d 1293 (7th Cir. 1995).
78. *Id.*
79. *Id.* at 1299.
80. *Id.*.
81. *Id.* at 1300.
82. *Id.*
83. *Id.* at 1296.

state negligence laws: "[t]he voices of the quasi-sovereigns that are the states of the United States sing negligence with a different pitch."[84]

Rhone-Poulenc, however, did not involve the application of Rule 23 in the context of a proposed settlement class. Nonetheless, under the current version of Rule 23, even where the class action seeks certification for settlement purposes only, the requirements of Rule 23(a) must be satisfied as if the case were actually being litigated.[85] The Supreme Court appears to have softened this rule somewhat, however, in the *Amchem* ruling, allowing a court to disregard the trial manageability issues when a class is for settlement purposes only.[86]

3. The Fifth Circuit

The Fifth Circuit has been a front-runner in recent class action jurisprudence, recently addressing the fate of millions of class claimants. First, in *Castano v. American Tobacco Co.*,[87] the court was asked to determine the propriety of certifying a class of millions of cigarette smokers. The complaint alleged that the defendant tobacco companies had manipulated the nicotine levels of their cigarettes for the purpose of addicting the smokers to their products, and that the defendants fraudulently failed to inform smokers that nicotine was addictive.[88] Similar to the novel legal theories claimed in *Rhone-Poulenc*, none of the nicotine-addiction theories of liability had been tested.

The district court certified the class, noting that the serious problems with manageability of the monstrous class was outweighed by "the specter of thousands, if not millions, of similar trials of liability proceeding in thousands of courtrooms around the nation."[89]

With that backdrop, the Fifth Circuit began its analysis of the propriety of certifying the class. At the outset, the court noted that the district court fundamentally erred in two areas: (1) in not considering how variations in state law would affect the predominance and superiority issues; and (2) by failing to consider how a trial on the merits would be conducted in analyzing the predominance requirement.[90]

Like the Seventh Circuit in *Rhone-Poulenc*, the court held that a determination of which law will apply is necessary in determining whether individual issues predominate over class issues, recognizing that variations in state laws would ordinarily swamp common issues, thereby defeating predominance.[91] Furthermore, the surveys of the various state laws[92] which were prepared and

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84. *Id.* at 1301.
85. *See In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 799 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 88 (1995).
86. Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997).
87. 84 F.3d 734 (5th Cir. 1996).
88. Castano v. American Tobacco Co., 160 F.R.D. 544, 548 (E.D. La. 1995).
89. *Id.* at 555-56.
90. *Castano*, 84 F.3d at 739.
91. *Id.*
92. Some nationwide class actions wholly ignore such variations. *See, e.g.*, Bowling v. Pfizer, Inc., 143 F.R.D., 141, 162 (S.D. Ohio 1992). *See generally* Brian Wolfman and Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439 (1996).

provided by the plaintiffs failed to show the court why those variances would not "present insuperable obstacles."[93]

Further, in its predominance analysis, the court considered how the plaintiffs' addiction claims would be tried, either as a class or individually. The court held that in making such a determination, a trial court must look beyond the pleadings in order to make meaningful determinations of certification issues.[94] In order to determine if individual issues predominate, the court must know whether individual issues (such as fraud claims) would predominate. According to the Fifth Circuit in *Castano*, because the district court did not engage in this analysis, certification was in error.[95]

The court also noted that the class failed to meet the superiority requirement of Rule 23(b)(3).[96] The district court's rationale for certification was that a trial class would preserve judicial resources by resolving millions of claims which would otherwise inevitably require millions of individual trials. The court, however, held this reasoning too specious, finding that the judicial crisis envisioned by the district court might not materialize.[97] According to the court, the plaintiffs' theory of liability was novel and untested.[98] Until the plaintiffs decided to pursue individual claims, the court could not presume that plaintiffs would pursue legal remedies. Such speculation was not appropriate to assist the court in making a determination that a class action was superior.[99]

More recently, the Fifth Circuit further clarified its position with regard to class actions, and, seemingly, had potentially broken the trend of decertification. In *Ahearn v. Fibreboard Corp.*,[100] the district court certified a mandatory, non-opt-out class of future asbestos plaintiffs under Rule 23(b)(1) and (b)(2), for settlement purposes only and concluded that the agreement reached was fair, adequate, and reasonable to the class.[101] The *Ahearn* Court refused to adopt the Third Circuit's by-the-rules approach of ignoring the terms of the proposed settlement agreement,[102] stating that a district "can and should look at the terms of a settlement in front of it as part of its certification inquiry."[103] In short order, the court

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93. *Castano*, 84 F.3d at 742. Some courts have affirmed class certification, despite variations in state law, where the plaintiffs have creditably demonstrated, through extensive analysis of state law variances, that class certification does not "present insuperable obstacles." *See* Walsh v. Ford Motor Co., 807 F.2d 1000, 1017 (D.C. Cir. 1986). In *Castano*, however, the parties had briefly addressed the client conflict of laws issue in the matter. The court held that this review of state law variances was far from "extensive;" rather, it was a cursory review of state law variations which gave short shrift to the defendant's arguments concerning variations.

94. *Id.* at 744.

95. *Id.*

96. *Id.* at 749.

97. *Id.* at 747-48.

98. *Id.*

99. *Id.* at 740.

100. 90 F.3d 963 (5th Cir. 1996).

101. Interestingly, the same federal judge, Circuit Judge Patrick Higginbotham, who served as the *Ahearn* "settlement facilitator," chaired the advisory committee proposing the amendments to Rule 23.

102. The Third Circuit refuses to look at settlements when deciding certification issues, instead stringently applying the Rule 23(a) and (b) requirements. *See* Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996), *supra* notes 58-76 and accompanying text.

103. Ahearn v. Fibreboard Corp., 90 F.3d 963, 975 (5th Cir. 1996), *reh'g denied*, 101 F.3d 368 (5th Cir. 1996). The court clearly explained that Fifth Circuit precedent required such an inquiry into the settlement, but that the Court "would adopt this rule even if we were not bound by precedent because it enhances the ability of district courts to make informed certification decisions."

explained that all requirements of Rule 23 were met, at least for settlement purposes but recognized that the class might not be certifiable for trial purposes.[104]

The fate of the *Ahearn* settlement, however, is again at issue. Two days after the Supreme Court affirmed the *Georgine* decertification, the Court vacated the *Ahearn* decision, remanding the case back to the Fifth Circuit for review in light of the *Amchem* decision,[105] even though the two settlements raised different legal questions.[106] The Supreme Court's holding in *Amchem*, along with vacating *Ahearn*, appears to dim the likelihood for success in reaching settlement under Rule 23, primarily because the adequacy of representation flaw in *Georgine* — the conflict of single counsel representing both presently injured plaintiffs and future plaintiffs — is also present in *Ahearn*.[107]

One interesting facet of the *Ahearn* certification was the court's consideration of the defendants' financial status, and its application of the "limited fund" theory of class certification. In *Ahearn*, tens of thousands of plaintiffs had filed suit against Fibreboard, claiming personal injury and wrongful death. Because Fibreboard had only $100 million in insurance assets available to pay any claims or judgments, the proposed settlement created a $1.5 billion trust fund for payment of future claims and placed a cap on damages claims for those plaintiffs.[108] The Fifth Circuit concluded that the risk of Fibreboard becoming insolvent if a settlement was not reached substantially impaired or impeded the interests of the class.[109]

The court's application of the "limited fund" theory provided an arguably reasonable basis upon which to determine whether certification was proper. Indeed, many courts that have refused certification under Rule 23(b)(1)(B) have done so because of insufficient evidence of the defendants' inability to pay claims.[110] Such a tactic, however, according to the dissenting opinion in *Ahearn*, allows a result forbidden by the Bankruptcy Code: imposing "the entire cost of the bailout on Fibreboard's most vulnerable creditors . . . ."[111]

The Supreme Court addressed the issue of binding absent class members in *Phillips Petroleum Co. v. Shutts*,[112] concluding that such plaintiffs could be bound only if provided with "minimal procedural due process protections," including the right to opt out,[113] but limited the holding to class actions seeking predominantly money judgments.[114]

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104. *Id.*
105. Flanagan v. Ahearn, 117 S. Ct. 2503 (1997).
106. The *Amchem* class was a Rule 23(b)(3) class, which required predominance and commonality, in addition to the requirements under Rule 23(a). The *Ahearn* class was certified under Rule 23(b)(1) and (b)(2), where predominance is not required.
107. Presumably, it is this requirement that caused the Supreme Court to vacate and remand *Ahearn*, since predominance is not required in *Ahearn*.
108. Ahearn v. Fibreboard Corp., 90 F.3d 963, 972 (5th Cir. 1996).
109. *Id.* at 988.
110. *See, e.g.*, *In re* Temple, 851 F.2d 1269, 1272 (11th Cir. 1988); *In re* Northern District of California Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 852 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).
111. *Ahearn*, 90 F.3d at 996 (Smith, J., dissenting).
112. 72 U.S. 797 (1985).
113. *Id.* at 811-12.
114. *Id.*

The Fifth Circuit rejected *Shutts*-type due process arguments in *Ahearn*, however, noting that, unlike the *Shutts*' 23(b)(3) class, *Ahearn* involved a 23(b)(1)(B) class, one which has traditionally been equitably-based and usually involves unknown plaintiffs.[115] Specifically, the court stated that due process concerns were overcome because "equitable circumstances dictate the need for a unitary adjudication regardless of the individual consent of the parties affected."[116] In a novel approach harkening back to the days before Rule 23, the *Ahearn* court deemed the lawsuit an "equitable action" to which the *Shutts* mandatory opt out requirement, as a matter of fairness, should not apply.[117] In conclusion, the *Ahearn* court decided that the settlement "offer[ed] all sides the best possible solution" while "avoiding another bankruptcy of a vigorous American company."[118]

Despite its equitable appeal, *Ahearn* was met with dissatisfaction. Indeed, the dissenting opinion clearly called the opinion "an affront to the integrity of the judicial system,"[119] while commentators have referred to the decision as "the selective and nonconsensual elimination of a single class of creditors whose claims otherwise might have rendered the corporation insolvent."[120] Furthermore, one critic has surmised that the Fifth Circuit now has two sets of legal rules governing class actions: one for cases the defendant wants to fight (i.e. *Castano*), and another for those it wants to settle (i.e. *Ahearn*).[121] The Fifth Circuit now has an opportunity to change those rules, however, when it reviews *Ahearn* under the dictates of *Amchem*.

IV. PROPOSED CHANGES TO RULE 23

A. Introduction

These recent decisions in the Third, Fifth, and Seventh Circuits discussed above delineate the lack of uniformity on the utility of class actions in the mass tort context. Several of the cases denied class certification due to individual causation issues, differing state laws, and concern that huge class action being adjudicated by a single jury trial is nothing short of forcing defendants into settlement, while the *Ahearn* decision affirmed certification with less emphasis on the technical requirements where a fair settlement was in order. The Supreme Court's response in rendering the *Amchem* decision and vacating *Ahearn* still do not clarify the uncertainty surrounding class actions involving mass torts.

In partial response to the recent circuit decisions, the Federal Advisory Committee on Civil Rules[122] formulated proposed changes to Rule 23 and forwarded the proposals to the U.S. Judicial Conference Standing Committee on

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115. *Ahearn*, 90 F.3d at 986.
116. *Id.* at 986 (quoting NEWBERG AND CONTE, *supra* note 15, § 1.22 at 1-51).
117. *Id.*
118. *Id.* at 992 (referring to Dow Corning, Inc.).
119. *Id.* at 993 (Smith, J., dissenting).
120. John C. Coffee, *The Fifth Circuit's Approval of a No-Opt-Out, Mass Tort Settlement*, NAT'L L. J. Sept. 16, 1996, at B4.
121. *Id.*
122. The Advisory Committee is chaired by Judge Patrick E. Higginbotham of the United States Court of Appeals for the Fifth Circuit.

Rules of Practice and Procedure. According to the Committee, the amendments focus "only on a relatively small number of changes." Most commentators, however, disagree with the simplistic perspective. Indeed, the Advisory Committee proposed an even more extensive draft of amendments in 1995, but subsequently withdrew them. With regard to the current proposals, the Advisory Committee Notes state that the Committee

> debated extensively the question whether more adventurous changes should be made to address the problems of managing mass tort litigation, particularly the problems that arise when a common course of conduct causes injuries that are dispersed in time and space. At the end, the Committee concluded that it is too early to anticipate the lessons that will be learned from the continuing and rapid development of practice in this area.[123]

No doubt there are many lessons that are yet to be learned in the area of mass tort litigation. Thus, the proposed changes are likely to be the center of the debate on the future of class actions, particularly class action settlements and their impact upon future litigation.

B. Proposed Changes[124]

The major changes proposed, the Advisory Committee states, (1) emphasize the distinction between class actions that aggregate small claims and those that aggregate larger claims; (2) authorize the certification of a class action for settlement purposes, although the action does not meet the standards for a trial; and (3) provide for a method of permissive interlocutory appeal from orders granting or denying class certification. Each of these changes are discussed below.

1. Cost-Benefit Analysis

Two of the existing four factors would be altered, and two new ones added to the list courts must consider in determining whether to certify a Rule 23(b)(3) class. The first new factor — 23(b)(3)(A) — would require the court to consider "the practical ability of individual class members to pursue their claims without class certification."[125] This new factor is a double-edged sword which can either encourage or discourage class certification.

According to the Advisory Committee Notes, the "practical ability" factor may require the denial of class certification where individual class members are capable of pursuing individual actions.[126] Therefore, the proposed change discourages certification when an individual may have a chance at receiving a large award. The new rule indicates that individual class members who cannot pursue individual actions in a cost-effective manner are more suitable candidates for

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123. Proposed Rule 23, advisory committee's note, April 1996 draft.
124. Proposed Rule 23, April 1996 draft.
125. Proposed Rule 23(b)(3)(A), April 1996 draft.
126. Proposed Rule 23(b)(3)(A), advisory committee's note, April 1996 draft.

class certification which would allow a group of individuals to band together even though they have small individual claims.

Allowing small claimants to group together in a class action, however, would be tempered by another change — 23(b)(3)(F) — which would not allow class certification where probable relief to individual class members is not substantial in relation to "the costs and burdens of class litigation."[127] Accordingly, the proposed new factors under (b)(3) seek to quantify claims so that individual claimants are not deprived of potentially large verdicts, while classes of small claims, not worth pursuing on an individual basis, are not used to extort money from defendants.[128]

Under the proposed rule changes, Rule 23(b)(3)(B), would be altered to require courts to consider "class members interests in maintaining or defending separate actions."[129] This proposal makes clear that consideration must be given to aggregation alternatives other than class treatment which do not involve control by individual class members and to the advantages of individual litigation of those claims which would support separate actions.

Finally, under proposed Rule 23(b)(3)(C), the extent, nature, *and maturity* of any related litigation involving class members must be considered.[130] The current rule only instructs judges to consider the extent and nature of litigation concerning the controversy already commenced by, or against members of the class. Considerations of the "maturity factor" have been prominent in the recent decertifications discussed above, as indicated by the reluctance to affirm certification where the underlying theories of recovery are novel and untested.

The Advisory Committee Notes explain that maturity can reflect "the need to avoid interfering with the progress of related litigation that is 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 by several individual claims."[131]

2. Certification for Settlement Purposes

New Rule 23(b)(4) would allow certification of a class for settlement purposes "even though the requirements of subdivision (b)(3) might not be met for purposes of trial."[132] This section is clearly aimed at the Third Circuit's opinion in *Georgine* which held that a settlement class must meet all 23(b)(3) requirements and that the Rule provides no language to liberalize the criteria for settlement purposes. Proposed Rule 23(b)(4) is an attempt by the Committee to resolve the conflict as to whether settlement classes are permissible.

The Advisory Notes state: "[a] single court may be able to manage settlement when litigation would require resort to many courts. And, perhaps most impor-

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127. Proposed Rule 23(b)(3)(F), April 1996 draft.
128. *Id.*
129. Proposed Rule 23(b)(3)(B), April 1996 draft.
130. Proposed Rule 23(b)(3)(C), April 1996 draft.
131. Proposed Rule 23(b)(3)(C), advisory committee's note, April 1996 draft.
132. Proposed Rule 23(b)(4), April 1996 draft.

tant, settlement may prove far superior to litigation in devising comprehensive solutions to large-scale problems that defy ready disposition by traditional adversary litigation."[133]

Interestingly, the advisory notes to proposed Rule 23(b)(4) do not speak to the question of whether a settlement class may be certified under subdivisions (b)(1) or (b)(2). In fact, while (b)(4) is formally separate from (b)(3), any class certified under (b)(4) is by its terms a (b)(3) class with all the incidents of a (b)(3) class. It is unclear why the Committee makes this distinction, but the Advisory Notes indicate that extra precautions must be taken in these instances and include providing class members notice, the right to opt out, and insuring proper court supervision to protect against conflicts of interest among class members.[134]

3. Interlocutory Appeal

Proposed Rule 23(f) would allow an interlocutory appeal from an order granting or denying class action certification if application is made within ten days after the entry of the order.[135] The appeal is permitted in the sole discretion of the court of appeals and is designed on the model and case law behind 28 U.S.C. § 1292(b). The Advisory Notes state that permission to appeal is to be granted with restraint but allowed where an order denying certification is appealed by a plaintiff in order to avoid "proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation."[136] Similarly, an order granting certification may force a defendant to settle rather than incur the cost of defending a class action and inflate the cost of settlement. The change, therefore, is meant to address those situations where appellate review would reduce the overall costs to the parties in litigating individual claims or avoid defendants being held hostage by the other party for settlement purposes.

C. Pros and Cons of the Proposed Changes

The proposed changes have already received significant comment from both the plaintiff and defense bars, as well as academic comment. Not surprisingly, the defense bar is largely in favor of the proposed changes, while the plaintiff bar is largely against them. In addition, a contingent of law professors is opposed to the changes due to the perceived lack of clarity with regard to class action settlements.

In particular, one group of law school professors, self-proclaimed as The Steering Committee to Oppose Proposed Rule 23, has adamantly voiced concerns regarding the proposed rule, stating that settlement classes (and relaxed criteria under Rule 23(b)(3)) are extremely controversial and do not yet warrant a change to Rule 23. The professors also cite potential risks of collusion between defendants and plaintiffs willing to settle at a low price.[137]

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133. Proposed Rule 23(b)(4), advisory committee's note, April 1996 draft.
134. Proposed Rule 23(b)(4), April 1996 draft.
135. Proposed Rule 23(f), April 1996 draft.
136. Proposed Rule 23(f), advisory committee's note, April 1996 draft.
137. *See* May 28, 1996 letter to the Rules Committee.

These comments are echoed by other interest groups which also see the proposed rule as an invitation for collusive settlements. Specifically, the critics argue that the new (b)(4) settlement provision diminishes the threat of a trial and results in plaintiffs' lawyers losing leverage to extract the best possible settlement from defendants.[138] The fear centers on the notion that defendants will be able to shop around to find the lowest bidding plaintiff attorney and strike a deal.

These concerns seem to ignore the reality of class action settlements. First, courts are required by Rule 23 to take an active role in any settlement. Rule 23(e) requires court approval before a class action can be settled or dismissed. In addition, under Rule 23(d), the court is required to review any settlement to determine whether it is fair, reasonable, and adequate to all class members. This gives the court the opportunity to review all aspects of the settlement, the settlement negotiations, and the scope of the class to determine whether such a settlement is fair under the circumstances. Furthermore, the concerns do not address the reality that objectors usually will shed light on any possible problems with the settlement, including collusion.

In any settlement class under Rule 23(b)(4), it is clear that the class members will be required to receive notice and an opportunity to opt out of the class.[139] The notice received by class members will outline the claims made and the potential recoveries under the settlement. Objectors are given the opportunity to review the court file, conduct independent discovery, and appear at a fairness hearing to dispute the fairness of the settlement.[140] These measures, along with court supervision, make settlement classes a viable alternative for both plaintiffs and defendants and provide adequate measures to assure that fairness prevails throughout the settlement process.

Another criticism of the proposed rule is aimed at 23(b)(3)(F) which requires a cost-benefit analysis to determine whether small claims may be maintained as a class action. The new factor under 23(b)(3) would require a court to consider "whether the probable relief to individual class members justifies the costs and burdens of class litigation."[141] This proposed change seems to rub against the traditional role of Rule 23 in allowing aggregation of small claims in a class action to proceed against a defendant. This rationale has been recognized by the Supreme Court which has stated that a class action is appropriate if "it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages . . . ."[142] The proposed change to Rule 23 draws an ambiguous line where these claims are so small that they do not warrant class action status. The burden placed on individual judges to make this decision is high and could allow very small individual claims to go by the wayside.

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138. *Id.*

139. *See* Proposed Rule 23(e), advisory committee's note, April 1996 draft.

140. *See* NEWBERG AND CONTE, *supra* note 15, ch. 11.

141. Proposed Rule 23(b)(3)(F), April 1996 draft.

142. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 337 (1980); *see also* John C. Coffee, *Class Action 'Reform': Advisory Committee Bombshell*, N.Y. L.J., May 21, 1996, at 1.

It is certainly very difficult at an early stage of the litigation to measure how much relief an individual may be entitled to receive if the litigation were to go forward. This is especially true in class action settlement situations where a trial on the merits is to be avoided.[143] Furthermore, one of the purposes of Rule 23 is to allow settlement of a large number of individual cases where individual trials may not be warranted due to the low recoveries. Drawing a distinction between these two types of cases would appear to be very difficult. The Committee, however, has no such reservations and is putting the onus on trial courts to be actively involved in class actions and, in particular, class action settlements.

D. Summary

Without question, the merits of the proposed changes will be discussed and debated over the next several months. The period for public comment ended on February 15, 1997. Currently, the Advisory Committee is contemplating making further revisions and will soon submit any such revisions to the Judicial Conference Rules Committee for approval. The Judicial Conference is expected to take final action on the proposals at its September 1997 meeting. Their task has now become substantially complicated, however, in light of *Amchem*, where the Court stressed the importance of adequate representation even in a settlement class, and emphasized the constraints imposed by the Rules Enabling Act. From that point, the Judicial Conference will forward them to the U. S. Supreme Court and Congress for approval. Accordingly, any changes to Rule 23 are at least several months away.

VI. CONCLUSION

Further illumination of "the road less traveled" for the class action practitioner may come in the near future when the status of Rule 23 is resolved. If Rule 23 is amended as proposed, settlement class actions may become commonplace. Whatever the outcome, let us hope that the Supreme Court, either through adoption of the amended Rule 23 or through rendering more decisions, clearly lights the way so that litigants may see how to evaluate certification issues as Rule 23 evolves into the 21st century and clarifies the uncertainties surrounding which "road" the class action will take. As one lawyer aptly stated, "Undoubtedly, this story will continue."[144]

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143. *See* NEWBERG AND CONTE, *supra* note 15, ch. 11.

144. John C. Coffee, Jr., *After the High Court Decision in 'Amchem Products Inc. v. Windsor,' Can a Class Action Ever be Certified Only for the Purpose of Settlement?*, NAT'L L. J., July 21, 1997 at B4.