Mississippi College Law Review

Volume 24
Issue 2 *Vol. 24 Iss. 2*

Article 9

2005

The Making of Class Action Rule 23 - What Were We Thinking

John K. Rabiej

Custom Citation
24 Miss. C. L. Rev. 323 (2004-2005)

THE MAKING OF CLASS ACTION RULE 23—WHAT WERE WE THINKING?

John K. Rabiej[1]

I. INTRODUCTION

Rulemaking is a tricky business. An ambiguously worded phrase or a careless punctuation mark may significantly alter a rule's intended meaning. Lawyers' ingenuity in construing seemingly unequivocal language to their advantage is legendary, placing a premium on clear and tight drafting. The Advisory Committee on Civil Rules (hereinafter also "advisory committee") devotes substantial time to vetting proposed amendments to the Federal Rules of Civil Procedure to identify potential ambiguities and eliminate errors.[2] Its work product is scrutinized by the bench and bar, Committee on Rules of Practice and Procedure, Judicial Conference, Supreme Court, and Congress in accordance with an exacting review process.[3] Despite the careful review, it is impossible to anticipate accurately all potential consequences arising from a rule change. The effects of amendments may not emerge for many years and may arise from circumstances much changed from those existing when the rule is first promulgated.

Perhaps the history of no single rule exemplifies the pitfalls of rulemaking more than the making of Rule 23 of the Federal Rules of Civil Procedure governing class-action procedure. Its evolution from a convenient joinder device to a tremendous procedural engine would have astonished its authors.[4] At the same time, the original authors would have been

---

1. Mr. Rabiej is chief of the Rules Committee Support Office, Administrative Office of the United States Courts, and has served in that position since the office was created in 1992. The office staffs the Committee on Rules of Practice and Procedure and its five Advisory Committees on Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules of the Judicial Conference of the United States. The views expressed in this article are his alone and do not necessarily reflect the views of the Judicial Conference of the United States or its rules committees.

2. The rulemaking process is time consuming and involves a minimum of seven stages of formal comment and review. From beginning to end, it usually takes three years for a suggestion to be enacted as a rule.

3. The Judicial Conference is the policy-making arm of the federal judiciary. It is composed of the chief judges of each court of appeals and one district court judge designated from each circuit. The Chief Justice presides over the Conference. 28 U.S.C. § 331 (2004). The work of the Conference is done by approximately twenty-six standing committees, including the Committee on Rules of Practice and Procedure and its five Advisory Rules Committees on Appellate, Bankruptcy, Civil, and Criminal Procedure and Evidence Rules.

4. John Frank was a member of the Advisory Committee on Civil Rules that drafted the 1966 amendments establishing the Rule 23(b)(3) classification. While testifying before the committee in 1996, he recalled that the committee's idea of a "big case with plaintiffs unified as to liability but disparate as to damages was the Grand Canyon airplane crash." Professor Arthur Miller, an assistant to the committee's reporter, Professor Benjamin Kaplan, was more direct. He testified at one of the committee's public hearings in 1996 on Rule 23 that the 1966 committee had nothing specific on its mind regarding class actions. "Nothing was going on. There were a few antitrust cases, a few securities cases. The civil rights legislation was then putative. . . . And the rule was not thought of as having the kind of implication that it now has." Memorandum from Paul V. Niemeyer, U.S. Court of Appeals Judge for

chagrined with the serious abuses generated by the present rule, problems that they never anticipated and that continue to bedevil today's rulemakers. For rulemakers writing on a clean slate, the federal rulemakers' long journey into Rule 23 offers rewarding lessons.[5] An understanding of the choices and challenges faced by the federal rulemakers will provide useful insights into why they adopted or rejected certain provisions that might better inform state rulemakers in developing a state class-action rule.[6]

The Advisory Committee on Civil Rules finished its work on the original Federal Rule of Civil Procedure 23 in 1937; the committee amended it in 1966, 1998 and 2003.[7] The rule promulgated in 1938 carried forward a longstanding rule of equity;[8] the 1966 amendments responded to the expanded use of the rule in "spurious" class actions; the 1998 amendment established an interlocutory appeal provision (although a series of amendments aimed primarily at controlling the use of class actions in tort cases had been considered, they were ultimately rejected); and the 2003 amendments established procedures regulating class actions. We have access to transcripts of meetings and extensive reports prepared for the consideration of the advisory committee, including important records of its 1963

---

the Fourth Circuit and Chair of the Rules Adsvisory Committee, to Members of the Standing Committee and Civil Rules Advisory Committee and Introduction to Advisory Committee's Working Papers Collected in Connection with Proposed Changes to FED. R. CIV. P. 23 (Class Actions) xi (Mar. 15, 1997), *in* 1 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, ix, xi (Administrative Office of the U.S. Courts) (1997), *available at* http://www.uscourts.gov/rules/newrules10.html [hereinafter "WORKING PAPERS"].

5. These lessons are thoroughly examined by Professor Edward H. Cooper, the reporter to the Advisory Committee on Civil Rules since 1992. In a detailed and insightful article, he has laid out the principal issues with amending the class-action rule that have confronted the committee. Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13 (1996). Also, Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923 (1998), contains an excellent discussion of the decision making of the Advisory Committee on Civil Rules regarding the 1998 amendments to Rule 23.

6. During the advisory committee's consideration of proposed amendments to Rule 23, the author had the privilege and honor of serving the chairs of the Advisory Committee on Civil Rules, including Judge Sam A. Pointer, Judge Patrick E. Higginbotham, Judge Paul V. Niemeyer, and Judge Lee H. Rosenthal, and the chairs of the Standing Committee, including Judge Robert E. Keeton, Judge Alicemarie H. Stotler, Judge Anthony J. Scirica, and Judge David F. Levi (who also served as chair of the advisory committee). There are no finer judges on the bench.

7. The Judicial Conference's responsibilities regarding rules are coordinated by its Committee on Rules of Practice and Procedure, commonly referred to as the "Standing Committee." 28 U.S.C. § 2073(b) (2004). The Conference has authorized the appointment of five advisory committees to assist the Standing Committee, dealing respectively with the appellate, bankruptcy, civil, criminal and evidence rules. 28 U.S.C. § 2073(a)(2) (2004). The Standing Committee reviews and coordinates the recommendations of the five advisory committees and it recommends to the Judicial Conference proposed rules changes "as may be necessary to maintain consistency and otherwise promote the interests of justice." 28 U.S.C. § 2073(b) (2004). The Standing Committee and the advisory committees are composed of federal judges, practicing lawyers, law professors, state chief justices, and representatives of the Department of Justice. Each committee has a reporter, a prominent law professor, who is responsible for coordinating the committee's agenda and for drafting appropriate amendments to the rules and explanatory committee notes. *See generally* Federal Rulemaking, http://www.uscourts.gov/rules/proceduresum.htm (last visited Dec. 22, 2005).

8. *See* Smith v. Swormstedt, 57 U.S. (16 How.) 288 (1853), recognizing Equity Rule No. 48 of 1842, which set out a general class-action procedure.

through 1966 deliberations.[9] These records shed light on the rulemakers' deliberations, particularly on the development of the Rule 23(b)(3) class.

This article reviews the 1966, 1998 and 2003 amendments, focusing on Rule 23(b)(3) class actions established in 1966. The (b)(3) provision has had the greatest impact on class actions and has generated the most controversy.[10] Under the provision, a class action may be commenced 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."[11] After proper notice, absent class members become part of the class action unless they affirmatively opt out. This passive-participation feature infuses enormous energy into (b)(3) class actions.

In the course of the advisory committee's deliberations, many alternative provisions were considered. Whether class membership should be based on members opting in or opting out; whether the judgment should bind all absent class members; whether the rule should apply to mass-tort cases; and whether a class action should be "necessary" in addition to "superior" were among alternative provisions considered but not adopted. Not all of the alternative provisions were rejected because they were unreasonable or inappropriate. The rulemakers declined to adopt some because they were not politically feasible as a national rule, or they were outside the rulemakers' jurisdiction. In other instances, an option was not adopted only after considerable debate or on a very close vote that easily could have gone the other way under slightly different circumstances. Some of these alternative provisions continue to be debated today and have much to commend them.

II. LEGAL AND PRACTICAL LIMITATIONS IMPOSED ON FEDERAL RULEMAKERS

It is important to understand the legal and practical limitations that federal rulemakers operate under when they draft and amend the Federal Rules of Civil Procedure. The limitations often restrict the rulemakers' options and prevent them from submitting the "ideal" rule or amendment. To the extent that these general limitations do not apply, state rulemakers may

9. The Rules Committee Support Office has extensive written records of the committee's decision-making regarding the class-action amendments. Rules-related records after 1992 can be found on the Administrative Office of United States Courts Rulemaking web site, Federal Rulemaking, http://www.uscourts.gov/rules (last visited Dec. 22, 2005). Records of earlier advisory committee meetings are spottier. The 1962–1966 records, however, include verbatim transcripts of several committee meetings. Quoted passages from transcripts of meetings are given verbatim as they appear except obvious typographical errors have been corrected.

10. John Frank, a member of the 1966 advisory committee, while recalling some of the 1963–1966 committee discussions asserted that "(b)(3) was broadened in the most radical act of rulemaking since the Rule 2 'one form of action' merger of law and equity." Minutes of Advisory Committee on Civil Rules 15 (Apr. 28–29, 1994), *in* WORKING PAPERS, *supra* note 4, at 181, 186, *available at* http://www.uscourts.gov/rules/Minutes/cv4-28.htm (last visited Dec. 22. 2005).

11. FED. R. CIV. P. 23(b)(3).

be free to adopt provisions that their federal counterparts have been constrained from adopting.

The first limitation on federal rulemakers is set out by the Rules Enabling Act, which governs the federal rulemaking process.[12] Under the Act, promulgated rules must "not abridge, enlarge or modify any substantive right."[13] In other words, they should govern only procedure. The restriction is critical in light of the supersession provision established in the next sentence of the same statute, declaring that "all laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." Federal rulemakers are rightfully sensitive to overstepping their authority and routinely reject proposals that may have substantive rights implications.[14]

The entire Rule 23 itself can be challenged as being substantive.[15] And proposed amendments to parts of Rule 23 have been routinely challenged as being substantive and outside the rulemakers' jurisdiction. Whether a particular proposal is substantive or procedural raises nice questions that can be endlessly debated.[16] Although prudently cautious about amending the rule, the judiciary cannot avoid addressing the problems caused by Rule 23 that need attention. The judiciary created Rule 23 and is accountable for the rule's administration and deficiencies.[17]

---

12. 28 U.S.C. §§ 2071–2077 (2004). Congress authorized the federal judiciary to prescribe the rules of practice, procedure and evidence for the federal courts, subject to the ultimate legislative right of Congress to reject, modify or defer any rule. The authority and procedures for promulgating rules are set forth in the Rules Enabling Act. 28 U.S.C. §§ 2071–2077 (2004). The Judicial Conference of the United States is required by statute to "carry on a continuous study of the operation and effect of the general rules of practice and procedure." 28 U.S.C. § 331 (2004). As part of this continuing obligation, the Conference is authorized to recommend amendments and additions to the rules to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay.

13. 28 U.S.C. § 2072(b) (2004).

14. The Committee on Rules of Practice and Procedure has a standing policy to notify the Supreme Court of every proposed rule or amendment transmitted to the Court for its approval that may have the potential of superseding an inconsistent statute.

15. Professor Charles Alan Wright, the premier proceduralist of his time, was a member of the 1965 Advisory Committee on Civil Rules. During the advisory committee's discussion of Rule 23 amendments in 1965, he stated his view that "if the rule were being drafted for the first time he would say the Committee did not have authority under the rulemaking power as it seems to be a provision of substance. The Supreme Court in 1882 said this is the law and therefore an equity rule was made to that effect and taken over into the federal rules. If the rule is changed the slightest bit people will question the authority." Minutes of Advisory Committee on Civil Rules 29 (May 15–17, 1965) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts). Professor Wright's views were echoed thirty-two years later at an advisory committee meeting in 1997. "Any change in Rule 23 will, in some sense, have substantive consequences." Minutes of Advisory Committee on Civil Rules 2 (Mar. 20–21, 1997), *available at* http://www.uscourts.gov/rules/Minutes/cv3-97.htm.

16. *See, e.g.*, Linda Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615 (1997). After addressing arguments challenging the proposed amendments to Rule 23, Professor Mullenix concluded that the Rules Enabling Act does not prohibit the advisory committee from amending the rule's settlement provision as suggested under the proposal.

17. "But Rule 23 is social engineering in the courtroom; courts have created the rule, and have a duty to fix it when that proves possible." Minutes of Advisory Committee on Civil Rules 13 (Oct. 2000), *available at* http://www.uscourts.gov/rules/Minutes/CRACMOOO.pdf.

A principal strength of the Federal Rules of Civil Procedure is its trans-substantive nature—rules apply to every type of action; there are only a few special rules that apply solely to an individual type of action or proceeding. This strength limits the rulemakers' range of options and makes drafting a trans-substantive class-action rule challenging. Class actions take many forms. They involve many types of actions, including consumer-oriented, antitrust, fraud, assorted torts, employee discrimination, and securities actions. The requested relief may be monetary, injunctive or declaratory, and the action may involve a limited fund or a defined set of assets for apportionment. It is extremely difficult to draft a single rule that fits all these variances.[18] What makes sense for one type of class action creates problems or potential opportunities for abuse for others. Nowhere is the tension clearer than when trying to draft a single rule that accommodates class actions involving small claims and those involving large individual tort claims. The experiences of the rulemakers leading up to the 1998 amendments vividly show the difficulties.[19]

Federal rulemakers must respect political realities in promulgating a rule change, which imposes another type of limitation. A proposed federal rule amendment must run the gauntlet of criticism from and be approved by several institutional bodies, including the United States Judicial Conference, Supreme Court, and Congress.[20] Although deference is usually accorded the rulemakers' proposed amendment if it is noncontroversial, absent a general consensus, a proposed controversial amendment is promulgated only with difficulty. The natural consequence of this reality is to frustrate bold approaches while promoting incremental improvements.

Making Rule 23 too efficient raises a counter-intuitive limitation. As a general matter, the courts could never handle all claims that could possibly be litigated. They are able to cope with their caseloads only because the vast majority of litigable claims are never pursued in court. History teaches that when Rule 23 is amended to make it more efficient, more persons will participate in class actions.[21] Professor Francis McGovern, who has provided helpful counsel to the advisory committee on numerous occasions, characterizes the ironic consequence of enhancing a litigation procedure as

18. Judge Patrick E. Higginbotham, chair of the Advisory Committee on Civil Rules from 1993–1996, noted the difficulty when he observed that the committee "is persuaded that the law of class actions today is largely a set of legal cultures surrounding distinct areas of substantive law. For example, class actions in private antitrust litigation, securities litigation, employment discrimination, and mass disaster tort litigation have common links but differ fundamentally as each resonates with its own body of substantive law." Memorandum from Patrick E. Higginbotham, Chair of Advisory Committee on Civil Rules, and Reporter, Professor Edward H. Cooper, to Standing Committee on Rules and Practice, *Committee on Rules of Practice and Procedure of the Judicial Conference of the United States* 2 (Aug. 7, 1996), *in* WORKING PAPERS, *supra* note 4, at 297.

19. *See* discussion *supra* Part VI.

20. 28 U.S.C. §§ 331, 2073(a)(2), and 2074(a) (2004).

21. Professor McGovern noted that "Without a class action, perhaps [only] 10% to 20% of legitimate claims will be filed. Notice brought in lots of claims in the Dalkon Shield litigation." Minutes of Advisory Committee on Civil Rules 15 (Apr. 28–29, 1994), *available at* http://www.uscourts.gov/rules/Minutes/cv4-28.htm, *in* Working PAPERS, *supra* note 4, at 186.

the "freeway effect."[22] If you build a better highway, more drivers will be drawn to it, creating more congestion. The analogy to automobile congestion is apt. If you build a better Rule 23 to make class actions more efficient, more litigants will be attracted to it, expanding the courts' workloads and the judiciary's administrative burdens. Whether the judicial system can cope with an increased class-action workload if the class-action rule were enhanced warrants consideration. In the end, the problem may be exacerbated.

Despite the significant obstacles and restrictions, rulemakers continue their quest to improve Rule 23. Why? First, developing case law continues to push the envelope, compelling rulemakers to amend the rule or risk having the bench and bar operate independently of it. Second, class actions present the twin prizes of efficient case processing capable of resolving hundreds and sometimes thousands of cases in a single action, while simultaneously reducing transactional costs.[23]

Rulemakers' efforts have met with some success. The class-action vehicle has worked well when a single, specific property is in dispute in a so-called (b)(1) limited fund action, or when a single relief is requested, especially when injunctive or declaratory relief is sought in discrimination lawsuits under (b)(2). Successes in these types of actions prompted courts to extend the class-action rule's reach, first to discrimination, antitrust and fraud cases, and later to cases involving common issues or facts, including most importantly products liability and mass-tort accident cases. At this juncture, the entire complexion of the evolution of Rule 23 changed, as the monetary stakes reached staggeringly high levels.

III. ADVISORY COMMITTEE BEGINS TEN-YEAR STUDY OF RULE 23 IN 1991

The advisory committee had not studied Rule 23 since 1966, because of a self-imposed moratorium on further amendments. The committee began an intensive review of Rule 23 in March 1991, which grew into a ten-year project replete with subcommittee meetings, committee meetings, mini-conferences, major conferences, and countless telephone conferences. The committee concluded that Rule 23 should be improved to address problems with class actions that had emerged after the rule was last amended in 1966. The committee identified the following problems with Rule 23: (1) unwarranted pressure to settle once a class action has been certified, providing an unfair tactical advantage in cases in which a claim

22. "If you build a superhighway, there will be a traffic jam." Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 606 (1997). *See also* Francis E. McGovern, *Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1822 (1995).

23. "The transaction costs of mass tort litigation are huge. In asbestos litigation, RAND has found that less than 30% of the indemnity dollar goes to compensate plaintiffs." Minutes of Advisory Committee 14 (Apr. 28–29, 1994), *available at* http://www.uscourts.gov/rules/Minutes/cv4-28.htm, *in* WORKING PAPERS, *supra* note 4, at 185.

had little merit; (2) attorney fees out of proportion to individual class members' awards, which sometimes involved merely coupon settlements; and (3) language in opt-out and settlement notices that was often too complicated to understand.

The 1991 advisory committee was in a position similar to the position of today's rulemakers in the state of Mississippi. The bar and academia were asking the committee to develop a more effective class-action device and they were recommending many different proposals affecting the fundamental features of the class-action rule. Before adopting any changes to Rule 23, however, the committee wanted to know how we got here. In particular, the committee wanted to know what was on the minds of the 1962–1963 drafters who made the last substantive amendment of Rule 23, effecting the critical Rule 23(b)(3) change in 1966.[24]

The advisory committee that authored the 1966 amendments to Rule 23 consisted of an august body of rulemakers, chaired by former Secretary of State Dean Acheson. It included luminaries like Professor Charles Alan Wright, Judge Charles E. Wyzanski, Reporter Professor Benjamin Kaplan, Albert E. Jenner, George Cochran Doub, Professor Shelden Douglass Elliott, Professor David W. Louisell, Judge John W. McIlvanie, W. Brown Morton, Archibald M. Mull, Louis F. Oberdorfer, Judge Roszel C. Thomsen, Professor Charles W. Joiner, Arthur J. Freund, Associate Reporter Professor Albert M. Sacks, and John P. Frank. In 1966, this group amended the rule to institute its present (b)(1), (b)(2), and (b)(3) classes, and to include, for the first time, an explicit opt-out opportunity in (b)(3) actions. The committee was responding to serious problems arising from the original Rule 23.

A. Purpose of Original 1937 Rule 23

Rule 23 was originally promulgated in 1938. It was a "substantial restatement of [former] Equity Rule 38 (Representatives of Class) as that rule has been construed," which permitted a class action if the issue was "one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court."[25] The rule carried forward equity notions of necessary joinder of parties that were recognized by the Supreme Court back in the 1800s.[26] Professor

24. The records of early federal rulemaking are spotty. Fortunately we have extensive, though not complete, records of the 1966 amendments, including transcripts of discussions at committee meetings and detailed memoranda from the advisory committee's reporter. The Rules Committee Support Office, Administrative Office of United States Courts, maintains verbatim transcripts of the advisory committee meetings on May 28–30, 1962, and October 31–November 2, 1963, and extensive reports from the committee's reporter dated February 12, 1963; February 21–23, 1963; and March 18, 1963.

25. FED. R. CIV. P. 23(a) Advisory Committee's Note (1937).

26. The class action was primarily seen as an efficient tool to handle related claims asserted by multiple claimants in a single lawsuit. "The class action is a device of convenience." Memorandum from Reporter Professor Benjamin Kaplan to the Advisory Committee on Civil Rules, *Tentative Proposal to Modify Provisions Governing Class Actions—Rule 23* EE-20 (May 28–30, 1962) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts) [hereinafter *Tentative Proposal*]. Reporter Kaplan described the second purpose of the class-action device, which was designed

James W. Moore was the rule's chief draftsman.[27] Courts experienced significant difficulties in determining the binding effect of a judgment entered under Equity Rule 38. The 1937 rule attempted to clarify the binding effect of a judgment in a class action by establishing the "true," "hybrid" and "spurious" categories of class actions.[28] These categories replaced the single category under Equity Rule 38. Correctly labeling an action under one of the three new categories became important, because its categorization could determine the judgment's binding effect on absent class members.[29]

Although one of the main purposes for establishing the three class categories in 1937 was to clarify the binding effect of a judgment in a class action, the advisory committee declined to adopt an express provision specifying a judgment's effect in the rule itself. Here we come upon an example of the limitations imposed on federal rulemakers. Neither the federal rule nor the Committee Note spelled out the judgment's binding effect because the committee considered the matter to affect substantive rights, which was outside its jurisdiction.[30]

Case law quickly filled in the gap, however, aided in no small part by Professor James Moore, a member of the 1966 Standing Rules Committee. Failing to persuade the advisory committee in 1937 that a judgment's binding effect should be explicitly addressed in the rule, he went on to describe in his influential treatise what the effects of a judgment should be. Basically, a judgment in a true class action was conclusive on the class; a judgment in a hybrid class action was conclusive on persons having claims affecting specific property; and a judgment in a spurious class action was

---

to reconcile multiple claims concerning a single property. "Class action appears to arise from equity notions of necessary joinder of parties . . . . In the second place, the class action reaches back to bills of peace with multiple parties." *Id.* at EE-17.

27. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 377 (1967) [hereinafter *Continuing Work*].

28. "[T]he so-called 'true' category was defined as involving 'joint, common, or secondary rights'; the 'hybrid' category, as involving 'several' rights related to 'specific property'; the 'spurious' category, as involving 'several' rights affected by a common question and related to common relief." FED. R. CIV. P. 23 Advisory Committee's Note (1966).

29. Very few cases squarely addressed the question of whether a judgment in a class action was binding on absent members of the class. As a practical matter, virtually all such class actions are disposed of by a settlement. *Tentative Proposal*, *supra* note 26, at EE-20. The committee's reporter, Benjamin Kaplan, found little case law on the exact point in question. "It may be noted that the only federal case we have found, decided since the adoption of the federal Rules, in which the binding effect of a judgment in a class action was actually in issue, also involved the rights of policyholders in connection with a reorganization." *Id.* at EE-20.

30. "The Committee considers it beyond their functions to deal with the question of the effect of judgments on persons who are not parties." *Continuing Work*, *supra* note 27, at 378. *But see* discussion of 1966 amendments to Rule 23, which addressed the binding effect of a class-action judgment in the rule itself. *See supra* Part IV. The omission led to some confusion in the courts. The celebrated case of *Union Carbide & Carbon v. Nisley*, 300 F.2d 561 (10th Cir. 1962), incorrectly implied that the committee's decision not to include a provision on the binding effect of a judgment in the rule itself was a veiled repudiation of Professor Moore's position that a judgment can bind only the parties and privies in a spurious action. *See id.* at 588 n.13. The inference drawn by *Union Carbide* was that the committee failed to adopt Professor Moore's categorization scheme in the rule itself because it believed that nonpresent class members could be bound by a judgment in a (b)(3) action. The committee actually omitted the provision because it had misgivings that such a provision would transgress the Rules Enabling Act limitations.

conclusive only on parties and privies to the proceedings.[31] The upshot of all this is that most courts followed Professor Moore's guidance and adopted his scheme in the case law.[32]

B. *Problems Arising From the Original 1937 Rule 23*

Serious problems with the three categories emerged during the rule's twenty-eight year existence. The (b)(1)–(b)(3) categories engendered confusion and provided ingenious lawyers and judges considerable leeway to construe the rule liberally, expanding its reach.[33] Placing a particular action within one of the three categories often proved to be contentious. And after the class action was categorized, the binding effect of a judgment was open to challenge despite Professor Moore's guidance. Instead of relying on the class category, courts looked at the degree of notice provided in an individual class action when determining the extent of a judgment's effect on the class members.[34]

Significantly, the rule itself did not require notice in hybrid or spurious class actions, nor did it specify the type of notice. Under the rule, notice in a hybrid or spurious class action was given only as required by the court. The extent of notice provided to class members was examined in subsequent litigation when the court determined the binding effect of a judgment. Accordingly, the scope of a judgment rendered in a class action was left uncertain when it was entered, leading to uncertainty and causing confusion. The rule's failure to require notice became glaring in light of subsequent due process case law and placed additional pressure on the advisory committee to revise it.[35] The problems with the 1937 rule came to a head

31. The binding effect of a judgment in each of the three categories was described as follows: "The judgment rendered in the first situation ['true'] is conclusive upon the class; in the second situation ['hybrid'] it is conclusive upon all parties and privies . . . upon all claims . . . [that] may affect specific property[;] . . . and in the third situation ['spurious'] it is conclusive upon only the parties and privies to the proceeding." *Tentative Proposal*, *supra* note 26, at EE-35, citing James Wm. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 571–72 (1937).

32. "So great is the deserved respect for his treatise, that his scheme about binding outsiders has had almost as much influence upon judges as if it had been embodied in Rule 23." Lecture from Zachariah Chafee delivered at the University of Michigan (Apr. 18–22, 1949), in SOME PROBLEMS OF EQUITY: THE THOMAS M. COOLEY LECTURES, 2D SERIES 251 (1950). *But see Union Carbide*, 300 F.2d at 588, n.13.

33. "The labels . . . are inherently confusing and they appear to have confused the courts. . . . They are by no means a sure guide to binding effect; some cases following the labels seem to reach wrong conclusions, and some others reach right conclusions, but in apparent defiance of the labels or the meaning they were intended to convey." *Tentative Proposal*, *supra* note 26, at EE-36–37. *See also Continuing Work*, *supra* note 27, at 381–84.

34. "[N]otice to members can be afforded in appropriate cases to strengthen the ensuing judgment so that a later court will be encouraged to hold it to be binding." *Tentative Proposal*, *supra* note 26, at EE-26.

35. The committee's reporter, Benjamin Kaplan, stressed the omission. "Finally, the present rule hardly addresses itself to a subject now recognized to be of vital importance: the measures which may be required during the course of the action for the protection of the class, particularly giving notice to the members, which is in turn related in some instances to the question of the proper extent of the judgment in the action." Memorandum from Reporter Professor Benjamin Kaplan to the Advisory Committee on Civil Rules, *Modification of Rule 23 on Class Actions*, EE-18 (Feb. 21–23, 1963) (on file

when courts and litigants, attracted by the efficiencies of class-action procedure, began expanding its use in cases not originally intended by the 1937 authors. One line of cases expanded the rule's reach by classifying spurious classes as true classes. The most notable examples were the desegregation cases.[36] Another line of cases permitted class members to join a class action under liberal standards after it had been filed, relieving persons of complying with the more formal Rule 24 intervention requirements. A controversial offshoot of this line of cases involved decisions in which the court permitted class members to join a class action *after* liability was adjudicated.[37] On the other hand, however, if the court found no liability, absent class members who declined to join the class would remain unaffected by the unfavorable decision. This so-called "one-way" intervention ratcheted up the pressure to amend the rule.

The advisory committee found especially disturbing a contemporaneous decision upholding "one-way" intervention. In *Union Carbide & Carbon v. Nisley*, independent miners commenced an antitrust suit against two mining companies on their own behalf and on behalf of unnamed miners as a class action.[38] The jury found the existence of a conspiracy, leaving to the court the assessment of the amount of damages for any individual class member. The judge deferred entering final judgment and provided the unnamed miners who had not joined the action six months within which to file a claim. The Tenth Circuit Court of Appeals upheld the "one-way" intervention, noting that the procedure "results in the more expeditious and efficient disposition of litigation and ought therefore to be favored."[39] The dissent vigorously objected, contending that the rule was never intended to apply to absent parties. In these cases, absent class members would not be bound by an unfavorable judgment, yet they would reap the

---

with the Rules Committee Support Office, Administrative Office of the U.S. Courts) [hereinafter *Modification of Rule 23*].

36. Some spurious class-action cases were particularly well suited to be treated as class actions. Because class-action treatment in these cases made so much practical sense, courts were beginning to categorize such actually spurious class actions as true class actions. Reporter Kaplan described the best example of this practice: "You have a whole movement towards regarding what were previously thought of as spurious class actions as being 'true' under the old terminology. The classic example of that i[s] of course: the desegregation cases themselves." Minutes of Advisory Committee on Civil Rules 27 (Oct. 31–Nov. 2, 1963) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

37. Reporter Kaplan alluded to the case law permitting class members to join a class action after judgment on the merits. "Hitherto, in a few actions conducted as 'spurious' class actions and thus nominally designed to extend only to parties and others intervening *before* the determination of liability, courts have held or intimated that class members might be permitted to intervene *after* a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision." Memorandum from Reporter Professor Benjamin Kaplan to the Advisory Committee on Civil Rules, *Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, EE-16 (Mar 15, 1963) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts) [hereinafter *Preliminary Draft*].

38. The impact of *Union Carbide*, 300 F.2d at 588–89, permitting one-way intervention after liability had been determined in the case was pronounced.

39. *Id.* at 589.

benefits of a favorable judgment. The implications were apparent. A series of class actions could be filed against a defendant in the hope that a judgment in one of them would be successful, which would then apply to all absent class members.

Class-action case law was becoming hopelessly inconsistent. The increasing number of cases involving multiple claims in a single action cried out for an effective national procedural device. Yet the spurious class action was the only available remedy. But it was flawed. It failed to distinguish clearly which claims were suitable for class treatment, and a judgment's binding effect was nominally limited to named parties and privies.[40] The uncertainty of the rule left the courts wrestling with ways to adapt the spurious class action to fit individual actions, creating a patchwork of ad hoc jurisprudence. Some courts strictly applied the spurious class-action rule in limited circumstances involving only named parties and privies, while others applied it more liberally in expanded circumstances involving absent class members. Moreover, the extent of notice provided to class members varied from case to case depending on the discretion of the individual trial judge.

IV. AMENDMENTS TO RULE 23 IN 1966

In 1962, the advisory committee decided to tackle the problems raised by the 1937 Rule 23. As a basic proposition, the committee was convinced that the preservation of class actions to address common issues of fact or law was appropriate and necessary.[41] In any event, case law had overtaken them and had rapidly developed in this direction.[42]

40. Reporter Kaplan recognized the confusion but asserted that although it was wholly inadequate, spurious class action was the only available tool. "At this moment, the response to this whole problem [dealing effectively with litigation involving large numbers of persons] is the 'spurious' class action which is objectionable because it does not distinguish cases suitable for class treatment from those unsuitable, and because it has the anomalous feature of the confinement of the judgment . . . ." Memorandum from the Advisory Committee on Civil Rules to the Chairman and Members of the Standing Committee on Practice and Procedure of the Judicial Conference of the United States, *Summary Statement of the Civil Rules Amendments Recommended for Adoption* 7 (June 10, 1965) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts) [hereinafter *Summary Statement*].

41. "As Committee members have observed, some litigious situations affecting numerous persons 'naturally' or 'necessarily' call for unitary adjudication, while others do not; some situations are clearly, and some are less clearly, suited to representative treatment." The problem was how to determine which actions were suited for class-action treatment and which were not. *Modification of Rule 23*, *supra* note 35, at EE-1.

42. Reporter Kaplan underscored the importance of class actions when he opposed John Frank's recommendation to delete (b)(3) class actions. "The law is already headed in this direction [recognizing (b)(3) classes], and there is excellent reason for encouraging this growth under proper safeguards . . . . To eliminate (b)(3) would in our opinion be retrogressive." Memorandum from Reporter Professor Benjamin Kaplan to Chairman and Members of Advisory Committee on Civil Rules, *Additional Points on Preliminary Draft of Proposed Amendments of March 15, 1963*, at 5 (Sept. 12, 1963) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts). At the same time, the committee was coordinating their class-action efforts with an ad hoc Judicial Conference Committee that was established to develop an alternative approach to handle multi-district litigation. The Judicial Conference Committee was created specifically to address problems arising from the commencement of

Professor Charles Wright, a member of the advisory committee, believed that drafting a new class-action rule would be manageable, primarily because the volume of class actions was quite low. He noted that the number of class actions filed in the past decade was very small, about ten each year in federal and state courts apiece, and most of them involved integration suits.[43] Professor Benjamin Kaplan, the committee's reporter, favored expanding the rule to reach absent class members in certain cases and saw no legal impediment. In support, he noted that the "present [r]ule does not take sufficient advantage of Mr. Justice Stone's intimation that binding effect could constitutionally be had in a class action even though 'the only circumstance defining the class is that the determination of the rights of its members turn upon a single issue of fact or law . . . provided that the procedure were so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue.'"[44]

The key questions were whether a procedure could be developed to distinguish which actions were suitable for class treatment and whether proper safeguards could be fashioned to control its application.

A. Fate of Spurious Class Actions

The table was set for a heated debate within the advisory committee on the fate of spurious class actions. The committee had several choices: (1) do nothing and permit the ongoing development of a patchwork jurisprudence; (2) delete the spurious class-action provision; (3) authorize courts to determine a judgment's binding effect on a case-by-case basis; or (4) make judgments in spurious class actions binding on all class members, including absent members.[45]

The main protagonists within the advisory committee emerged. John Frank championed the demise of spurious class actions, while Reporter Kaplan favored an incremental development of spurious class actions in an

1500 lawsuits involving a single public utility. The committee's proposal eventually resulted in the Multi-District Litigation statute. 28 U.S.C. § 1407 (2004).

43. Professor Wright's usually unerringly accurate prescience faltered on this occasion. He argued against a long and detailed rule because in his view the issue warranted less attention as it so seldom arose. "Since the adoption of the federal rules there have been approximately 225 reported decisions [involving class actions] in the federal courts and some 200 reported cases in the state courts . . . . An average of some ten class actions a year in federal court is not very many, and the bulk of these, I should imagine, have been integration suits where Rule 23 poses no real problem except for the aberrational case where it is held inapplicable." Letter from Charles Alan Wright, University of Texas law professor, to Reporter Professor Benjamin Kaplan 5 (Feb. 6, 1963) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

44. *Tentative Proposal*, *supra* note 26, at EE-55 (quoting *Hansberry v. Lee*, 311 U.S. 32, 43 (1940)).

45. Reporter Kaplan lists the three options, favoring the third option that would render a judgment binding on absent class members: "where the action passes the gauntlet, where all the considerations have been duly dealt with and met, then this kind of action stands on the same footing as what used to be called the 'true' class action." Minutes of Advisory Committee on Civil Rules 22 (Oct. 31–Nov. 2, 1963) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

altered state, which might include mass-tort class actions. Their debate presaged the advisory committee's discussion in 1998 when it wrestled with amending the rule to handle both small consumer-type class actions and mass-tort class actions.[46]

The principal contours of the arguments became quickly evident. John Frank opposed spurious class actions. He vehemently opposed their use in tort cases. He championed the principle that each person has a right to litigate his or her own case, that enforcing a judgment against an absent class member would be contrary to fundamental principles of fairness.[47] Frank was particularly vexed with the insidious incentives that spurious class actions, whose judgments bound absent class members, presented to class counsel willing to settle an action on less than most favorable terms in exchange for an award of lucrative attorney fees. In his view, defendant companies would "sell" a settlement to the lowest bidder willing to settle a class action. Unscrupulous lawyers would barter away absent class members' rights in exchange for substantial attorney fees, which would still be realized in such cases.[48] He was unconvinced by Kaplan's defense that providing notice to class members would be a sufficient safeguard against lawyers' misconduct.[49] Frank's concern resonated with advisory committee members during consideration of the 1998 amendments, as opponents objected to amendments contending that a proposed settlement provision would lead to collusive arrangements ("reverse auctions") between plaintiffs' class counsel and defendant companies.[50]

Reporter Kaplan was equally adamant in his defense of the spurious class action, albeit in a revised form. He pointed out that spurious class actions had been indispensable in resolving private antitrust and fraud

46. The advisory committee in 1995 recognized that (b)(3) class actions had evolved into a multiple joinder device capable of addressing different types of actions: "(b)(3) classes represent both the dramatic expansion of remedies for small claims that could not profitably be pursued in individual actions and the growing efforts to aggregate claims that are (or would be) brought in individual actions." Minutes of Advisory Committee on Civil Rules 10 (Feb. 16–17, 1995), *available at* http://www.uscourts.gov/rules/Minutes/min-cv2.htm, *in* WORKING PAPERS, *supra* note 4, at 195, 204.

47. John Frank strongly opposed the (b)(3) option. "In the mass accident field, I could not be persuaded, I think, *ever* to allow a mass accident to be treated as a straight class action, because the values are so tremendous, and the premium it puts on just plain bribery on counsel to go a little soft and take it a little easy is just too frightening to contemplate." Minutes of Advisory Committee on Civil Rules 9–10 (Oct. 31–Nov. 2, 1963) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts). His views and the debate it engendered on collusive settlement agreements was renewed with relish during consideration of the 1998 amendments to Rule 23.

48. John Frank appeared before the advisory committee in 1994 and recounted his concerns about the (b)(3) class action expressed during the 1963 debates. "A significant fear was that big tort defendants might rig a 'patsy' plaintiff class, beguiling courts into selling res judicata at a bargain price." Minutes of Advisory Committee on Civil Rules 9 (Apr. 28–29, 1994), *available at* http://www.uscourts.gov/rules/Minutes/cv4-28.htm, *in* WORKING PAPERS, *supra* note 4, at 186.

49. "The notion that this [cheating people with class actions] can be prevented by any amount of notices, etc., is, if I may so, simply a mirage in most cases." Minutes of Advisory Committee on Civil Rules 8 (Oct. 31–Nov. 2, 1963) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

50. *See* discussion *supra* Part at VI. D.

cases.[51] And, most significantly, spurious class actions often represented the sole remedy available to poor people, who would otherwise have no practical legal recourse.[52] At the same time, Kaplan did not concede the exclusion of mass torts from Rule 23. He persistently advocated a rule that would not foreclose class-action treatment of, at least, some mass-tort cases. Often as a postscript and always emphasizing the small number of cases that would be affected, he would suggest to the advisory committee that certain mass-tort cases might be appropriate candidates for class-action treatment.[53] In no event, he persisted, should an amended Rule 23 foreclose this possibility, which he thought proper and which had already been used by courts in certain cases to good effect.[54]

B. Eliminating One-Way Intervention Class Actions

The advisory committee decided to replace the three 1937 class-action categories with the modern (b)(1), (b)(2), and (b)(3) classes. To eliminate one-way intervention suits, it also decided that (b)(3) judgments should be binding on all absent class members.[55] The expressed purpose of the

51. Reporter Kaplan strongly disagreed with John Frank's attempt at scuttling (b)(3) actions, which courts had been effectively using in selective actions. "I simply do not understand how we can possibly go to the public today with a rule which would remove from the possible sweep of class actions . . . the private antitrust proceedings, the common fraud, and that kind of thing, when repeatedly those cases have been accepted for this kind of treatment." Minutes of Advisory Committee on Civil Rules 14 (Oct. 31–Nov. 2, 1963) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts). Kaplan also stated that deleting the (b)(3) class action would be inconsistent with developing case law. "This is the growing point of the law. It isn't a sporadic case that (3) would cover. It's a long line of cases, typical of which are the fraud cases, the private antitrust cases." Minutes of Advisory Committee on Civil Rules 11 (Oct. 31–Nov. 2, 1963) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

52. Reporter Kaplan justified (b)(3) not only because it provided the only means to handle multiple small claims too small for individual litigation, but also on public policy grounds, faintly bordering on paternalism. "If separate litigations are always required, then access to the courts may be put out of reach for those whose individual stakes are low or who by reason of poverty or ignorance will not go it alone." *Summary Statement*, *supra* note 40, at 7.

53. In many respects, the advisory committee was treating the category as an experimental one. "Subdivision (d) [later (b)(3)] is a more experimental category." *Modification of Rule 23*, *supra* note 35, at EE-38. But Reporter Kaplan was sensitive to concerns that unbridled discretion would invite class-action treatment for mass torts. To quell such concerns, he said that "[t]his is not a wild appeal to bring in mass accidents. But if we were to exclude this, we would not be going forward in the class action field, we would be going backward, because plenty of these actions are now being maintained as so-called spurious suits." Minutes of Advisory Committee on Civil Rules 11 (Oct. 31–Nov. 2, 1963) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts). Kaplan conceded, however, that "this is not to say that you may not find an occasional mass accident where the class suit could be used." *Id.* at 5.

54. Professor Albert Sacks was the associate committee reporter during this period. He summarized Kaplan's views: "Now the point that I think [Kaplan] is making most strongly, and the one that deserves the most careful thought, is what should our general attitude be toward this existing development. If you simply knock out the proposed 23(b)(3) and put nothing in its place, you bring the development to an end." *Id.* at 16–17.

55. There was a strong presumption that the judgment would be binding on the entire class in the February 1963 draft of the amendments to Rule 23. "The design of the amendments is to center attention . . . on the question whether there is actual solidarity of interest among the class members and whether they are adequately and faithfully represented in the action. Where these conditions exist, presumptively the class action device should be used to the full extent, with expectation that all members of the class will be bound by the judgment." *Tentative Proposal*, *supra* note 26, at EE-1.

amendment was to create a procedural vehicle capable of producing "advantages of achieving economies of money, time, and effort, of promoting uniformity of decision, and, in some instances, of enabling small people with small claims to vindicate their rights when they could not otherwise do so."[56] Reporter Kaplan prepared a first draft for the committee's consideration at its February 1963 meeting.

Under the draft's proposed amendments, full "two-way" binding judgments on class members, including absent class members, at the commencement of the class action would be the norm, eliminating one-way intervention.[57] A court could no longer permit absent class members to wait until a defendant's liability was determined before the member decided to join the action. The advisory committee recognized the bold implications of its proposal, but it was satisfied that the rule's limiting provisions provided an effective self-regulating means that would exclude most cases from the rule's ambit. The rule was expected to apply to only a small number of cases.[58] Even so, the committee acknowledged the possibility that the proposed rule could be applied to mass-tort actions in appropriate circumstances.[59]

Not all members of the advisory committee were confident, however, that a blanket provision applying a judgment to all absent class members would be appropriate in all cases.[60] As an escape provision, the committee proposed that in exceptional circumstances a court could enter a judgment binding only part of the class and not the whole class.[61] The committee did

56. *Summary Statement*, *supra* note 40, at 7.

57. The presumptive binding effect of a judgment was premised on several conditions. "As a general rule, where the criteria are satisfied, fundamental safeguards are respected, and adequate representation is assured, the device of the class action should be used to the full extent. Full, 'two-way' binding effect should be the norm." *Tentative Proposal*, *supra* note 26, at EE-31.

58. The preliminary committee note to the February 1963 draft (b)(3) amendment made it clear that the qualifying conditions in the rule itself would act to limit the number of cases eligible for class-action treatment. The class had to be of a manageable size; otherwise, proper notice could not be provided. "It is to be observed that the procedure just outlined is suited to cases where the class is identifiable and the notice can therefore operate effectively." *Modification of Rule 23*, *supra* note 35, at EE-32.

59. The committee note to the preliminary draft amendment of Rule 23 stated that "[t]he mere fact that the gravamen of the class action is the commission of a tort, or that individuals are claiming recoveries in different amounts, or that the rights asserted are in some sense 'several' . . . should not in itself exclude full binding effect." *Tentative Proposal*, *supra* note 26, at EE-31.

60. "The examples just cited do indicate that there may be occasions when special considerations can properly move a court to deny full binding effect even when the stated criteria for a model or standard class action otherwise exist. We would emphasize, however, that these are unusual situations." *Id.* at EE-30.

61. The preliminary committee note to the draft February 1963 amendment to Rule 23 stated the applicable standard: "no blanket precepts can be set down as to the propriety of extending the judgments to the class. There will still be instances where the judgments should be limited to the original parties and any members of the class admitted as intervenors before the determination of rights in the action." *Modification of Rule 23*, *supra* note 35, at EE-32. "Where the conditions exist, but special reasons of policy suggest that the class action device should not be used to the fullest extent, the representative character of the suit may be availed of, as far as the law may permit, to secure certain incidental advantages, but the judgment may be expected to have only limited binding effect." *Tentative Proposal*, *supra* note 26, at EE-1.

not linger on what types of circumstances would qualify an action for inclusion in the exceptional category, noting only that the decision would be left to the court's discretion dependent on the particular facts and procedures used in the action.[62] Instead the committee focused on whether the extent of notice provided absent class members in these exceptional cases would be sufficient to render the judgment binding on them.

In a case when an exception to full two-way binding judgments was warranted, the court could structure the composition of the class by adjusting the type of notice provided the absent class members. The advisory committee offered several examples of how they expected the provision to operate.[63] Under an opt-out alternative, absent members could be included in the class action if they failed, after proper notice, to elect not to participate.[64] Under an opt-in alternative, only absent members who affirmatively elected to participate in a class action would be included.[65] The election could be done by formal Rule 24 intervention or by some less formal means.[66] The court could also limit membership in the class to originally named parties.

Although intended to be used sparingly, the discretion given to courts to structure the composition of a class in these exceptional cases was broad and not much different from the discretion retained under the existing rule so long as proper notice was provided the class members. Under the proposed draft, class actions could consist of "originally named" parties only, members who "opted-in," members who did not "opt-out," and, despite the committee's aversion to one-way intervention, even absent class members would be permitted to participate after liability had been adjudicated.[67] It was not at all clear whether the proposal's exception provision

62. The committee believed that it would be helpful if courts stated the binding effect of a judgment in a class action early in the litigation. "It may even be advisable for the court conducting the class action to indicate whether in its view the adjudication will be conclusive on members of the class, although the question of res judicata can only come up squarely for decision in a later action testing the effect of the judgment." *Id.* at EE-13.

63. The advisory committee specifically did not address which party should bear the expense of the notice. *Id.* at EE-12.

64. This appears to be the first reference in the committee's discussions to an opt-out opportunity that was later adopted as a required condition of Rule 23(b)(3) class actions. Reporter Kaplan cites the case in *United States v. American Optical Co.*, 97 F. Supp. 66 (N.D. Ill. 1951), as an example where the defendant class was given an opportunity to opt out of the class. *Modification of Rule 23*, *supra* note 35, at EE-35.

65. "[T]he court may invite members of the class to come in on an informal basis, not strictly on the basis of intervention, but achieving some similar results. The action, it is assumed, is nonbinding, so that members of the class who do not accept the invitation will not be affected by any adverse result of the action." *Tentative Proposal*, *supra* note 26, at EE-32.

66. The advisory committee was drawing a distinction between the proposed class-action procedure and the ordinary permissive joinder procedure. Under the permissive joinder procedure, a class member would have to formally intervene in accordance with Rule 24. But under the proposed Rule 23 procedure, the notice could require a less formal manifestation of consent that would be sufficient. *Modification of Rule 23*, *supra* note 35, at EE-7. The distinction between the two procedures was significant: "the court may invite members of the class to come in on an informal basis, not strictly on the basis of intervention . . . ." *Tentative Proposal*, *supra* note 26, at EE-32.

67. The proposal provided the trial judge with wide discretion on how to fashion the class. The primary restriction on the judge's discretion was that the extent of the binding effect of the judgment in

would swallow up the presumption that judgments in most class actions should be binding on all absent class members.

C. *Mandatory Participation in Rule 23(b)(3) Class Action, Without Opt-Out Opportunity*

Under a revised draft, dated March 15, 1963, the advisory committee abandoned the "escape provision" and proposed that the rule make a judgment binding on all members of a class with no exceptions once the class was determined.[68] By binding all class members to theaction's judgment at the commencement of a Rule 23(b)(3) class action, the rule would effectively remove a court's discretion to permit members to be added later in the proceeding, eliminating one-way intervention.[69]

Unlike its predecessor in 1937, the advisory committee in 1963 directly addressed the judgment's binding effect in the rule itself. The committee drew a fine distinction between the res judicata effects of a class-action judgment, which could be determined only in a later action by another court, and a procedural device that would include all absent class members within a judgment.[70] The former implicated substantive rights, while the latter was procedural. The distinction was lost on several committee members, but the practical need for the provision outweighed concerns that the provision might be inconsistent with the Rules Enabling Act.

Today, a proposal to revise Rule 23(b)(3) to render judgments binding on all class members, including absent members without an opt-out opportunity, would be very controversial.[71] The advisory committee in March

these cases would be closely linked to the procedural safeguards afforded to the class through notice. *Modification of Rule 23*, *supra* note 35, at EE-4.

68. The March 15, 1963, preliminary draft of proposed amendments to Rule 23 added a new (c)(2) that expressly bound all class members. "The judgment in an action maintained as a class action shall extend by its terms to the members of the class as defined, whether or not favorable to them." *Preliminary Draft*, *supra* note 37, at EE-2.

69. *Id.* at EE-17. Reporter Kaplan explained that the committee proposed a mandatory class to eliminate one-way intervention and to require a court to make the decision early on, instead of deferring the decision on the binding effect of a judgment until a later time. He said that "[n]ow after a lengthy discussion it was decided that the thing to do was to get rid of the spurious action which bound only those who were in the action or who intervened, and as a kind of trade for that we reached (c)(1), under which the court was deliberately to consider at the threshold whether he proposed to maintain the action as a class action or not, and then if an affirmative judgment was made by the court, it would be binding and *no nonsense*." Minutes of Advisory Committee on Civil Rules 20 (Oct. 31–Nov. 2, 1963) (emphasis added) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

70. The rule itself does not refer to the "binding effect" of a judgment with its connotations of res judicata, which cannot be determined by the court conducting the class action. The rule and Committee Note purposefully refer to the "extent of the judgment." The committee noted that a court could not determine the res judicata effect of a judgment, which could be determined only by another court in a later case, but it observed that questions of res judicata would be less likely to be raised at a later time if proper notice and procedural safeguards were adopted when it framed the judgment in the class action. *Modification of Rule 23*, *supra* note 35, at EE-30.

71. In 1985, the Supreme Court held that due process required an opt-out opportunity in a (b)(3) action in a state class action to establish personal jurisdiction over a member of a plaintiff class who has no significant contact with the forum. The Court did not take a position on whether an opt-out opportunity was required in a (b)(1) or (b)(2) state class action, noting that (b)(3) involved a legal remedy while the other two involved an equitable remedy. The Court's analysis was based on the minimum

1963 proceeded nonetheless. It believed the proposal was feasible because it would be infrequently applied. In its view, the stringent Rule 23 test would disqualify most actions from certification. As a prerequisite, each class action must have "common issues of fact or law [that] predominate over any questions affecting only individual members."[72] The committee believed that only a few cases could meet this test. And the empirical data to date supported its conclusion. So long as adequate procedural safeguards were adopted in the (b)(3) action, including most importantly appropriate notice, binding absent class members to the judgment without their consent would be little different from binding absent class members without consent in a (b)(1) or (b)(2) action, although the former represented a legal remedy while the latter represented equitable remedies.

In addition, the advisory committee expected that courts would be even further restrained from authorizing class actions in the first instance as a direct consequence of making the judgment binding on all members in every Rule 23(b)(3) class action. In the committee's view, a court would be less likely to certify a class action when it realized the far-reaching consequences of such an action on absent class members who would be given no opportunity to opt out.[73] Raising the ante in this fashion strengthened the committee's confidence that courts would certify only a few actions as (b)(3) class actions.

During these deliberations, the advisory committee for the first time specifically considered an alternative provision that would render a judgment binding only on class members who affirmatively opted into the class at the commencement of the class action. The committee rejected it. Reporter Kaplan explained that there was no requirement under developing case law to provide an opt-in opportunity. He also questioned the "morality" of an opt-in requirement, which would "have the effect of freezing out the claims of people—especially small claims held by small people—who for one reason or another—ignorance, timidity, lack of familiarity with business or legal matters—will simply not take any affirmative step."[74] The

---

contacts necessary to establish personal jurisdiction over an out-of-state party to comply with due process concerns. The decision does not necessarily apply to federal actions in which the same jurisdictional issues do not arise as in state actions. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 (1985).

72. Professor Sacks summarized the committee's reasoning at the committee meeting: "when a judge at the beginning of an action under (c)(1) has to decide whether this should go forward as a binding action, as a class action with binding effect, he will be much less ready to say yes than he will if it can go forward with non-binding effect. . . . [T]he thing we didn't like about the non-binding effect was that it sort of invited the judge to say Sure, what can be wrong with a class action—let it go forward, the class won't be bound if it loses. Let's try all sorts of things. This was thought to be unfair . . . ." Minutes of Advisory Committee on Civil Rules 31–32 (Oct. 31–Nov. 2, 1963) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

73. *Id.*

74. Professors Kaplan and Sacks imbued the committee's decision not to require an opt-in procedure with strong moral overtones. In an unabashedly paternalistic fashion they harshly criticized the opt-in advocates who would exploit the ignorance or timidity of "small people" holding small claims. "The morality of treating such people [who have small claims] as null quantities is very questionable. For them the class action serves something like the function of an administrative proceeding where

committee was apparently focusing on consumer-oriented class actions. It did not focus on the possible advantages of an opt-in requirement for mass torts, which might involve substantial individual claims and include individual class members who were very sophisticated. No further consideration was necessary because, under its view, few, if any, mass torts would meet the stringent Rule 23 requirements and be certified as class actions.

D. Concerns About the Class Action Device Used in Mass Torts

Individual members of the advisory committee were not so certain that revised Rule 23(b)(3) would be applied with restraint to mass torts. Again, John Frank challenged whether the Rule 23 requirements would be uniformly construed and applied to limit class actions in mass-tort cases as the committee assumed. Another committee member joined Frank and expressed concern that the rule might invite "indiscriminate use of the class-action device in mass tort situations."[75] Frank strongly advocated eliminating the possibility altogether that mass torts could be litigated as class actions.[76] In addition to the mischief that a mass-tort class action could cause, he noted that there was no need for class-action treatment because mass torts involved claims that had been and should continue to be individually litigated.[77]

Kaplan rejoined that Frank's fears were exaggerated. The Rule 23 prerequisites disfavored class-action treatment of mass torts and few, if any, mass torts would ever qualify as class actions. Most mass torts would be excluded because common issues of fact or law would not predominate over questions affecting individual claims.[78] Individuals would have significant questions affecting not only damages but also liability and defenses to liability that were dissimilar from other mass-tort claimants.[79] Responding

---

scattered individual interests are represented by the government." Memorandum from Reporter Professor Benjamin Kaplan and Associate Reporter Albert M. Sacks to the Advisory Committee on Civil Rules, *Class Actions; also Derivative Actions and Actions Involving Unincorporated Associations (Rules 23, 23.1, 23.2)*, EE-3 (Apr. 21, 1965) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts) [hereinafter *Class Actions*].

75. Judge Thomsen, a committee member, worried that "the language of (3) is so general that it invites treating these mass accident and negligence cases as class actions[,]" a result surely to be avoided. Minutes of Advisory Committee on Civil Rules 12 (Oct. 31–Nov. 2, 1963) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

76. John Frank said that even though Kaplan had tried to minimize the number of mass-tort actions that could qualify as class actions by applying the stringent Rule 23 prerequisites, he would close that "pinhole of an exception." *Id.* at 10.

77. "Number 1, in the entire history of class actions to this minute, there has never been a class action used in a tort situation." *Id.* at 43. The number of tort class actions that are actually litigated at trial remains low, if not non-existent. These cases continue to be disposed of by settlement agreements.

78. Kaplan stresses that every class action must meet the stringent Rule 23 prerequisite tests. "No sir, I think as to that you can be quite sure that the language is not an invitation to that kind of litigation, especially when you consider the reasoning that appears in the Note [limiting (b)(3) actions to cases in which a common issue predominates]." *Id.* at 12.

79. The advocates of (b)(3) responded repeatedly to arguments that the provision would invite mass-tort class actions by countering that the Rule 23 prerequisites would act as an effective barrier limiting the number of actions eligible for class-action treatment. This became the linchpin of their defense. "A 'mass accident' situation is not likely to meet the stated criterion of subdivision (d) [common issue predominates]; but even if it does, discretionary considerations will generally incline the

to Frank's persistent charges, Kaplan went so far as to say, "I want to emphasize again that in my view the case of the mass accident will be, and probably ought to be, excluded."[80] Yet, Kaplan and other committee members harbored a strong inclination to keep the rule open to permit class-action treatment of mass torts, at least under certain circumstances.[81] Kaplan found irresistible the possibility of disposing of multiple claims in a mass-tort case by resolving a single issue, like liability. After that "everything else settles itself."[82] Kaplan was beginning to envision the enormous potential of the class-action device. Combining the aggregation power of the Rule 23 joinder mechanism with settlement procedures could substantially facilitate the disposition of multiple actions, eliminating troublesome choice-of-law issues and reducing transaction costs. Though its efficiencies were becoming clearer, the potential problems with expanded use of class actions would remain hidden until they emerged many years later.

Kaplan walked a fine line between downplaying the possibility of a mass-tort class action while simultaneously not foreclosing altogether the possibility of using the rule in some few mass-tort cases that might be ideal candidates for class-action treatment. On occasion he overreached, as when he defended the proposed Rule 23 amendments by flatly asserting that the rule did not apply to mass torts, which committee members quickly contradicted.[83] On another occasion, he conceded that certifying a mass-tort class action might lead to a race-to-the-courthouse to file the action in a hospitable district. He believed, however, that the courts could handle

court against allowing a class action." *Modification of Rule 23*, *supra* note 35, at EE-3. "A 'mass accident' resulting in injuries to numerous persons is on its face not appealing 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 individual in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried." *Id.* at EE-27. On the other hand, Kaplan noted that "[t]he mere fact the gravamen of the class action is the commission of a tort, or that individuals are claiming recoveries in different amounts, or that the rights asserted are in some sense 'several' . . . should not itself exclude full binding effect." *Tentative Proposal*, *supra* note 26, at EE-31.

80. Minutes of Advisory Committee on Civil Rules 14 (Oct. 31–Nov. 2, 1963) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

81. Kaplan implored the committee not to exclude mass accidents in all cases, because "[e]very once in a while one of them [mass accidents] quite common-sensically spills over and becomes a true and binding class action." *Id.* at 11. He recommended a conservative open-minded approach: to consider class action for appropriate mass torts. "It seems to me we have an opportunity here to write (b)(3) in such a way that it will encourage cautious, but at the same time, progressive movement." *Id.* at 46.

82. The full implications of a (b)(3) class action coupled with settlement agreements would not emerge for many years. But Kaplan was clearly one of the first to foresee the possibilities. "I don't know what the range of mass accidents may be. . . . What sticks in my mind is what Judge McIlvaine said at our last meeting, on the question of mass accidents, where he expressed himself very forcefully as believing that there is some room in the picture for the class action even when you're dealing with an accident. You may find a case where there's for all practical purposes, only a question of liability. Everything else settles itself. Now why should the class action be barred in such a case[?]" *Id.* at 45–46.

83. Minutes of Advisory Committee on Civil Rules 15 (May 15–17, 1965) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

the issue, particularly because the expected number of certified class actions would be low.[84]

Characterizing the advisory committee's position on mass torts in the 1966 Committee Note required deft drafting to accurately reflect the committee's position. Kaplan originally drafted the Note to leave open the possibility that the rule could be used in limited circumstances by providing that a "mass accident . . . *is not appealing* . . . for a class action." Frank was dissatisfied and countered with a suggestion that would close the "pinhole" of an exception: "a mass accident . . . *is not appropriate* . . . for a class action." The committee decided to narrow Kaplan's exception but left the door slightly ajar by providing that: "a mass accident . . . *is ordinarily not appropriate* . . . for a class action."[85]

The proposed amendments to Rule 23 were ready to be submitted to the Standing Committee with a request that they be published for comment. Although the advisory committee had agreed on a mandatory (b)(3) class action, it did so on a divided vote. The committee made one last effort to achieve a greater consensus, which produced the "opt-out" provision that continues to cause so much consternation today.

E. Rule 23(b)(3) Opt-Out Opportunity

The main problem with a mandatory Rule 23(b)(3) action with no opt-out opportunity, advisory committee member Charles Joiner asserted, was the implication that an individual class member could not initiate a separate action.[86] The proposed amendments would effectively divest all absent class members of any control over their individual claims. Judge Wyzanski suggested that a formal opt-in opportunity would address Joiner's concern.[87] But no one supported the suggestion.

Kaplan countered with a proposal that would develop into the (b)(3) opt-out provision. In response to Joiner's concerns, he suggested that the right of an individual class member to initiate a separate action could be recognized by the court when it fashioned the certification notice by expressly excluding from the class action "any individuals who have either commenced their separate suits, or within a period of blank months set by

84. Minutes of Advisory Committee on Civil Rules 12 (Oct. 31–Nov. 2, 1963) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

85. *Id.* at 50. Professor Louisell suggested that the small opening for class-action treatment of certain well-qualified mass-tort cases should remain. "I think most of us at least would agree that we should get over the notion that ordinarily you should not use the class action in the mass tort situation; that it's an uphill fight indeed to claim that we should. But do we absolutely want to bar the possible use, however acquiescent and willing all the potential claimants are[?] It seems to me there should be some escape hatch from absolute barrier." *Id.* at 44.

86. Joiner was concerned that a class member who wanted to file and litigate a separate claim might be compelled under the draft proposal to forfeit that opportunity and participate passively as a member of the class action. He asserted that "the problem that has arisen here is a result of a draft which doesn't sufficiently emphasize the 'rights' of a person to bring and maintain a separate action, as distinguished from being forced into a class action." *Id.* at 19.

87. "I think that maybe we can solve this if the judge can make a specific finding as to whether he intends the class to include only those who voluntarily join, or intends to embrace others." *Id.* at 41.

the judge, proceed to start their own litigation."[88] Kaplan's opt-out opportunity was limited by its terms only to those who initiated or were about to initiate a separate action. No member immediately reacted to Kaplan's suggestion, but Judge Wyzanski soon raised it again. Under Judge Wyzanski's paraphrase of Kaplan's proposal, a judge could exclude a class member who "protested" within a certain period of time.[89] It is unclear whether Judge Wyzanski intended to expand Kaplan's suggestion to apply to any "protest," or whether he used the word as shorthand to capture Kaplan's reference to "individuals who have . . . commenced their separate suits."[90] In any event, there was no reaction from the committee members. But later in the committee's discussions Judge Wyzanski again raised the proposal in a formal motion proposing that the amendment be revised to read: "there shall be excluded from the class (a) anybody who specifically protests within a limited period of time, and (b) anybody who fails to get reasonable notice."[91]

The opt-out provision coupled with an effective notice provision neatly addressed Joiner's concern to preserve an individual's right to maintain a separate lawsuit.[92] In the end, Frank withdrew his motion to exclude all mass-tort cases from the rule and suggested that the committee adopt Judge Wyzanski's opt-out proposal.[93] The committee quickly voted to approve it.[94]

The advisory committee encountered one last hurdle in promulgating revised Rule 23. The amended version published for comment included an escape provision authorizing a court for good reason not to provide an opt-out opportunity in a (b)(3) class action. In other words, a court could mandate that every absent class member participate in the class action without exception. The committee was concerned that in certain class actions an opportunity to opt out and maintain a separate lawsuit could be burdensome to the defendants and the judicial system, while the interests of the individual class member in commencing a separate action were minor.[95]

88. *Id.* at 42.

89. *Id.*

90. *Id.*

91. *Id.* at 56.

92. *Id.* at 51.

93. *Id.* at 54. The opt-out option "would take the place of my problem—I wouldn't worry about mass accidents if we did that." *Id.* at 55.

94. The committee voted to approve the (b)(3) provision to be published for public comment. After it had been published for comment, however, the (b)(3) proposal nearly was rejected. John Frank succumbed to buyer's remorse and withdrew his approval at the committee's May 15–17, 1965, meeting. He moved that paragraph (b)(3) be deleted. His motion failed by a vote of eight to five. Minutes of Advisory Committee on Civil Rules 20 (May 15–17, 1965) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

95. The committee wanted to preserve a court's flexibility to fashion a mandatory (b)(3) class action when circumstances warranted it. "In particular situations, separate actions could be extremely burdensome not merely to the defendant opposing the class, but to the judicial system itself, and yet the interest of the individual in maintaining a separate action could in fact be trivial." Memorandum from Benjamin Kaplan, Reporter, and Albert Sacks, Associate Reporter, to Advisory Committee on Civil Rules 6 (Dec. 2, 1963) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts) [herinafter Dec. 2 Memo].

Public comment was negative, however, and the committee abandoned the provision.[96] Kaplan later defended the provision on other grounds. He said it would have been helpful in the rare defendant class action, when an opt out by one of the defendant class members would have destroyed the class action.[97] But since such cases would infrequently arise, he noted that there was no great need to preserve the escape provision and little objection to its demise was expressed.

V. ADDRESSING PROBLEMS WITH RULE 23 AS AMENDED IN 1966

In general, Rule 23, as amended in 1966, worked admirably for a few years. It effectively halted one-way intervention class actions. The new (b)(3) class action was being employed judiciously in a limited number of actions consistent with the 1966 advisory committee's intent.[98] Storm clouds were quickly gathering, however, as substantive tort law was undergoing a dramatic growth spurt, pressing the judicial system to develop more efficient means to handle a growing caseload.[99] Added to the mix were landmark Supreme Court decisions recognizing the national reach of state court decisions in class actions.[100]

Inevitably, lawyers and courts increasingly were turning to the class-action device to handle multiple actions in a single proceeding. Though Rule 23 was never expected nor designed to handle a wide array of class actions, lawyers and courts began to push the envelope, using the class-

96. After publication, the rule was revised to give class members an "unqualified right to 'opt out' of the action, in contrast to the qualified right given them in the published draft." *Summary Statement*, *supra* note 40, at 7.

97. Kaplan said that the committee was concerned about the rare defendant class where opt-out would make class actions inoperable. "The reason why we thought the escape clause was necessary was to deal with the rare case in which the class was a defendant." Transcript of Advisory Committee on Civil Rules Meeting of May 15–17, 1965, at 10 (prepared June 8, 1965) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts). But Kaplan and Sacks had earlier reported that the committee preferred to maintain a court's flexibility to fashion a mandatory (b)(3) class action not only for defendant classes but also for plaintiff classes. The decision was made after consultation with judges. "The judges with whom we discussed opting out were clear that it should not be allowed simply on the say-so of the individual member of the class. The interest of the individual in litigating as he pleased may be strong, but it should not be considered absolute." Dec. 2 Memo, *supra* note 95, at 6.

98. "(b)(3) is well confined. In the actual handling of pioneer cases under the rule, the courts have prevailingly shown good understanding in spelling out and applying the delimiting criteria; on this crucial matter the record, as far as it goes, should allay the fear expressed by Justice Black that the new rule does not afford sufficiently intelligible standards, and thus gives district judges power without bounds." *Continuing Work*, *supra* note 27, at 395–96 (citations omitted).

99. Professor Arthur Miller, who had assisted Reporter Kaplan during consideration of the 1966 amendments, recognized the changed legal landscape at a hearing before the advisory committee on the 1998 amendments, testifying that "you can't blame the rule, because we had the most incredible upheaval in federal substantive law in the history of the nation between 1963 and 1983, coupled with judicially-created doctrines of ancillary and pendent jurisdiction, now codified in the supplemental jurisdiction statute." Memorandum from Judge Paul V. Niemeyer, U.S. Court of Appeals for the Fourth Circuit, Chair of the Rules Advisory Committee, to Members of the Standing Committee and Civil Rules Advisory Committee and Introduction to Advisory Committee's Working Papers Collected in Connection with Proposed Changes to FED. R. CIV. P. 23 (Class Actions) xi (Mar. 15, 1997), *in* WORKING PAPERS, *supra* note 4, at ix, xi.

100. *See* Matsushita Electric Indus. Co. v. Epstein, 516 U.S. 367 (1996).

action device in novel ways and in new circumstances. A host of problems began to emerge, in particular, with Rule 23(b)(3) proceedings. Parties were filing true (b)(3) actions as (b)(1) or (b)(2) actions for tactical purposes to bind all absent class members or to lower notice costs. Class actions were allegedly filed solely to pressure quick settlements from defendants who were unwilling to assume even the remotest possibility of defeat or the costs of prolonged litigation. As the problems and issues with Rule 23 continued to mount, so too did the call for reform. The American Bar Association's Section on Litigation led the way, proposing specific amendments to Rule 23 in 1986.[101]

The Litigation Section suggested that providing a judge with substantial flexibility and discretion to fashion different procedures to fit individual class actions, depending on the circumstances, would be the best way to handle the myriad types of class actions.[102] Two of the specific measures recommended by the Section resurrected provisions that the advisory committee in 1963 considered but declined to adopt. An opt-in provision was recommended to supplement the existing opt-out provision to facilitate class actions in mass torts.[103] The opt-in provision would be especially useful in those mass torts that consisted of substantial individual claims. Collapsing the (b)(1), (b)(2), and (b)(3) class-action categories was also suggested to provide judges more discretion to fashion the composition of the class unencumbered by the sometimes artificial constraints imposed by the categories. By eliminating the categories, a judge could deny class members an opportunity to opt out in an action that would have been considered a (b)(3) action, thereby expanding the judgment's reach.

---

101. The ABA Litigation Section's proposal was based on an earlier proposal adopted by the National Conference of Commissioners on Uniform State Laws. Other changes suggested by the ABA Litigation Section's 1986 proposal included a provision for an opt-in option, specific notice requirements for (b)(1) and (b)(2) class actions, and authority to deny an opt-out opportunity to individual class members. Memorandum from Patrick E. Higginbotham, Chair, Advisory Committee on Rules, to Judge Alicemarie H. Stotler, Chair, Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, (May 17, 1996), *in* PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, CIVIL, AND CRIMINAL PROCEDURE 19, 20 (Administrative Office of the U.S. Courts) (1996) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts) [hereinafter Higginbotham-Stotler Memo].

102. Investing the courts with greater discretion to handle class actions was consistent with Professor Charles Alan Wright's judgment when he considered the amendments to Rule 23 in 1963. "I would much prefer a simple rule which would leave some room for creativity by the courts—with the text writers ever ready to lend an assist—rather than trying to do the job of thinking in advance by rule." Letter from Charles Wright, University of Texas School of Law, to Benjamin Kaplan, Reporter, Advisory Committee on Civil Rules 6 (Feb. 6, 1963) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

103. The proposal would have allowed a court to authorize an opt-in opportunity or an opt-out opportunity depending on the circumstances of the case. The unitary category established after collapsing the three class-action categories would have provided a common approach regarding notice, giving the judge discretion on what type of notice should be provided on a case-by-case basis. Opt-in classes "could address some of the difficulties encountered with particular forms of class actions, most obviously defendant classes. They also could be useful in mass tort cases, not only to assuage concern about individual control of individual claims but also to obviate concerns about the inconvenience of litigation in a distant forum and the difficulty of working through choice-of-law problems." Minutes of Advisory Committee on Civil Rules 10 (Feb. 16–17, 1995), *in* WORKING PAPERS, *supra* note 4, at 204.

Classifying a class action had become contentious, reminiscent of the problems experienced with the 1937 Rule 23 categories.[104] Collapsing the categories would eliminate the disputes. But deleting the proposed classifications would have had other implications and raised new problems.[105] Under the existing rule, classifications determined the type of notice required (individual notice in (b)(3) actions) and the extent of the binding effect of a judgment (conclusive for all members in (b)(1) and (b)(2) actions; limited to members who declined to opt out of (b)(3) actions). The Section's proposal would have eliminated these sometimes artificial constraints and provided a court with flexibility to set out notice requirements and the extent of the action's judgment in any class action, without being constrained as they were by the limitations imposed under the (b)(1), (b)(2), and (b)(3) class-action classifications.

Since 1966, the advisory committee had stayed on the sidelines because of a self-imposed moratorium on Rule 23 revisions. But in 1991 the Judicial Conference instructed the committee to review Rule 23 with a view to amending it to accommodate the demands of asbestos mass-tort litigation.[106] The committee spent several years investigating whether Rule 23 could be revised to accommodate mass torts, especially asbestos mass torts. The advisory committee concluded that rule changes to address the problems of managing mass torts would be premature because of the continuing and rapid developments in this area of law, particularly pertaining to "futures" claims—a major component of many mass-torts cases.[107] The

104. The advisory committee in 1963 quickly rejected the idea of collapsing all three categories and providing open-ended discretion to the court to certify an action as a class action. "It was felt that [the elimination of all categorization] would remit to the courts, without specific guidance, the problem among others of drawing the line between class actions looking to a judgment extending to the whole class, and class actions having more limited effect; it might also tend toward the indiscriminate use of the class-action device in 'mass-tort' situations, a result surely to be avoided." *Modification of Rule 23, supra* note 35, at EE-1.

105. The initial draft amendment proposed by the advisory committee in 1992 would have collapsed Rule 23 categories, which would have affected the mandatory nature of (b)(2) actions and notice provisions. Minutes of Advisory Committee on Civil Rules 3 (Nov. 12–14, 1992), *in* WORKING PAPERS, *supra* note 4, at 169, 170. In general, the proposal would provide a court with greater flexibility and discretion over notice, opt-in and opt-out opportunities in class actions. "The amendments will make it easier to certify future classes." Minutes of Advisory Committee on Civil Rules 10 (Oct. 21–23, 1993), *in* WORKING PAPERS, *supra* note 4, at 173, 175.

106. As part of its report to the Conference, the ad hoc committee recommended that the advisory committee study "whether Rule 23, F.R.C.P. be amended to accommodate the demands of mass tort litigation." Higginbotham-Stotler Memo, *supra* note 101, at 20.

107. "Futures" claims pertain to injuries that may manifest themselves many years after an injury is sustained. *See* ADVISORY COMMITTEE ON CIVIL RULES AND THE WORKING GROUP ON MASS TORTS TO THE CHIEF JUSTICE OF THE UNITED STATES AND TO THE JUDICIAL CONFERENCE OF THE UNITED STATES' REPORT ON MASS TORT LITIGATION (Feb. 15, 1999) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts) [hereinafter Feb. 15 Report]. "The Advisory Committee debated extensively the question whether more adventurous changes should be made to address the problems of managing mass tort litigation .... 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." FED. R. CIV. P. 23 (Proposed Draft Aug. 1996) advisory committee's note 5, *in* PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, CIVIL, AND CRIMINAL PROCEDURE 45 (Administrative Office of the U.S. Courts) (1996) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

committee's work on mass torts is documented in a lengthy report.[108] In the course of its mass-torts study, the committee turned its attention to the operation of Rule 23 and the proposals to amend it. After review and with some significant revisions, the committee proposed amendments to Rule 23 based on the Litigation Section's 1986 proposal.[109]

The advisory committee was prepared to submit the Litigation Section's proposed amendments as revised for public comment, but withdrew it at the last minute because of nagging concerns with certain of its aspects.[110] Opponents had criticized the opt-in provision because it might embolden judges unsympathetic to particular substantive law to defeat class actions enforcing the disfavored law, particularly in cases involving small claims.[111] Also, opponents were concerned that authorizing a judge to require individual notice in what had been (b)(1) or (b)(2) actions could substantially increase notice expense, which in cases involving non-profit organizations could be debilitating.[112] Finally, a general concern was raised that the proposal would create more uncertainty and result in increased litigation.[113]

VI. RULE 23 AMENDMENTS PROPOSED IN 1996 PUBLISHED FOR COMMENT

In 1993 the Chief Justice appointed Judge Patrick E. Higginbotham, Court of Appeals for the Fifth Circuit, as the new advisory committee chair. In addition to being a renowned jurist, he possessed wide practical experience as a practicing lawyer and a mediator-jurist in complex litigation.

Judge Higginbotham understood that the class-action landscape had changed dramatically over the past few years. He was skeptical that the Litigation Section's proposal to collapse the three class-action categories

108. Feb. 15 Report, *supra* note 107.

109. FED. R. CIV. P. 23 (Proposed Draft Nov. 1992) Draft Amendments to Rule 23 (Nov. 1992), *in* WORKING PAPERS, *supra* note 4, at 3.

110. Minutes of Advisory Committee on Civil Rules 9 (Oct. 21–23, 1993), *in* WORKING PAPERS, *supra* note 4, at 174, *available at* http://www.uscourts.gov/rules/Minutes/civ10-21.htm.

111. Because an opt-in provision required affirmative action by class members, the number of class members who would actually elect to opt in to a class as compared with those who would opt out in a particular class action might be much smaller, which would affect the size of the class. There was a concern that providing for an opt-in opportunity would "allow judges to defeat effective use of class actions to enforce disfavored substantive principles." Minutes of Advisory Committee on Civil Rules 11 (Oct. 21–23, 1993), *in* WORKING PAPERS, *supra* note 4, at 176, *available at* http://www.uscourts.gov/rules/Minutes/civ10-21.htm.

112. The proposal raised concerns because the "more flexible notice provisions will be used to add increased notice costs to actions that are now (b)(1) or (2) classes, and to provide inadequate notice in actions that now are (b)(3) classes." Minutes of Advisory Committee on Civil Rules, 10–11 (Oct. 21–23, 1993), *in* WORKING PAPERS, *supra* note 4, at 175–76, *available at* http://www.uscourts.gov/rules/Minutes/civ10-21.htm.

113. Minutes of Advisory Committee on Civil Rules 17 (Apr. 28–29, 1994), *in* WORKING PAPERS, *supra* note 4, at 188, *available at* http://www.uscourts.gov/rules/Minutes/cv4-28.htm. At the same time that the committee was proposing amendments to the class-action rules, it was submitting a major package of amendments dealing with the discovery rules. It decided to withdraw the class-action proposals, which were beginning to draw criticism, to concentrate on the discovery package.

would be effective to meet the changing demands of complex litigation. He was also uncertain whether the proposal could be promulgated in the face of opposition from the civil rights plaintiff's bar, which championed the (b)(2) class. The advisory committee needed more information.

Judge Higginbotham single-handedly instituted a sea change in the deliberative process of the rules committees.[114] He understood that much of the disposition of complex litigation was being accomplished outside the courthouse and the judge's presence. To really understand the problems with complex litigation and how to resolve them, the input of experienced counsel from both sides of the aisle was critical. For the next three years, the advisory committee would regularly sit down with the nation's foremost class-action and mass-torts attorneys and experienced judges, engaging them in intensive discussions on what really was going on in complex litigation. At the end of Judge Higginbotham's stewardship in October 1996, the committee had become much better informed and prepared to address the difficult issues that lay before them.[115] Judge Higginbotham's legacy continues today as the committee invites experienced lawyers and judges to meet with them and discuss proposed rules amendments on a regular basis.

Accommodating both consumer-oriented class actions and class actions involving substantial individual claims, e.g., mass torts, emerged as an overarching theme in the proposed amendments. In many ways, the advisory committee took up the spirited debate engaged in by John Frank and Benjamin Kaplan in 1962–1966. Kaplan's expectation that the (b)(3) eligibility requirements would control and confine the number of mass torts that would qualify for class-action treatment had not been realized. The "pinhole of an exception" that Frank had unsuccessfully tried to close was breached and opening wide. The committee was ardently searching for the best means to control and regulate the class-action device when applied to mass torts without impairing its use in actions involving small claims. At times, the committee's efforts resulted in mutually exclusive provisions going in opposite directions.

After three more years of study, the advisory committee published proposed amendments to Rule 23 in August 1996. The amendments contained eight main provisions, which were bold initiatives sure to attract controversy.[116] Many of the issues that the advisory committee wrestled

114. The advisory committee continues the tradition to this day. For example, recent conferences on electronic discovery invited seasoned attorneys, judges and experts in the technology to talk about their experiences with computer-based information.

115. The information gathered and considered by the advisory committee fills four large volumes. WORKING PAPERS, *supra* note 4.

116. On the other hand, the advisory committee consciously averted more complicated and, in many respects, more significant proposals, including most importantly consideration of "future claimants." Minutes of Advisory Committee on Civil Rules 4 (Oct. 17–18, 1996), *available at* http://www.uscourts.gov/rules/Minutes/cv10-1796.htm.

with in 1962–1966 rose up and were once again debated.[117] Eventually only one of the proposals, however, was promulgated.

A. *Timing of Certification*

In many class actions, the decision to certify is the single most important judicial event. Certifying an action as a class action often sets in motion negotiations that inexorably lead to settlement. In an ordinary civil case, a motion to dismiss or a motion for summary judgment would be expected to dispose of a meritless claim early in the litigation, eliminating the pressure to settle. In class actions, however, some courts construed Rule 23 to require a judge to defer ruling on such a motion until the judge had decided whether to certify the action as a class action. These courts believed that the rule's prescription for a prompt certification decision took precedence over consideration of a motion to dismiss or a motion for summary judgment, which could substantially delay the proceedings. So they ruled on the certification issue first and only later were they willing to take up the motion to dismiss or motion for summary judgment, if the action had not been first settled.

The advisory committee proposed to replace the requirement that the court's class-action certification determination be made "as soon as practicable" with the substitute "when practicable."[118] The change would confirm current practices of many courts and would not prevent a court from ruling on a motion to dismiss or for summary judgment before addressing the certification question.[119]

The proposal was criticized. A long delay in the certification decision might, as a practical matter, eliminate any real relief to injured parties in circumstances when the parties' claims would become moot if not acted on expeditiously. For example, final disposition of a motion for summary judgment that might involve discovery could take months, if not years. Seriously injured claimants might not survive the delay. The advisory committee acknowledged that some cases might present difficult questions, but

117. The advisory committee had the benefit of John Frank's recounting the committee's actions preceding the 1966 Rule 23 amendments. Professor Arthur Miller, an assistant to Reporter Benjamin Kaplan back in the early 1960s, also shared his experiences with the committee.

118. Part of the problem caused by the language had been perceived back in 1963. The original draft of Rule 23 by the 1963 advisory committee would have required that the certification decision be made as soon as practicable and "before the decision on the merits." The latter provision was deleted because it implied that the certification should be made late in the litigation. "You will recall that we are directing the district court early on to announce by order whether this is going to be run as class action or not . . . . We say as soon as practicable after the commencement and before the decision on the merits of an action brought as a class action . . . . The district judge would be likely to delay because the time limit is put in terms of decision on the merits. Suggestion is we drop the words 'and before the decision on the merits' . . . ." Transcript of Advisory Committee on Civil Rules Meeting of May 16, 1965 at 14 (prepared June 8, 1965) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

119. FED. R. CIV. P. 23(c)(1) (Proposed Draft Aug. 1996) advisory committee's note 14 *in* PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, CIVIL, AND CRIMINAL PROCEDURE 45 (Administrative Office of the U.S. Courts) (1996) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

it concluded that the proposed amendment would provide the court with sufficient discretion to handle such situations appropriately.

In light of the expressed concerns, however, the advisory committee deferred taking action on the proposed amendment and withdrew it for further study in 1997. The proposal was later taken up as part of the 2003 amendments.

B. "Necessary" Finding

A court must find that a class action is "superior to other available methods for the fair and efficient adjudication of the controversy," as a prerequisite to maintaining an action as a class action under Rule 23(b)(3).[120] The advisory committee was concerned that the class-action device was being unfairly resorted to in certain mass-torts cases not as a joinder mechanism but as a means to coerce a defendant into settling rather than risking defeat and "losing the company."[121] Individual actions involving substantial monetary claims that would likely be defeated if litigated separately pose a much different problem if they are aggregated into a single class action. The pressure for a defendant to settle, despite the small risk of losing on the merits, is often too great because of the dire consequences a loss could exact.[122]

The advisory committee proposed that a court find that the putative class action be "necessary" in addition to "superior," which would preserve the class-action device for small claims yet question its use in actions involving large claims better suited to individual litigation. The additional necessary finding would "emphasize the role of class actions in addressing [small] claims that do not bear the costs of individual litigation. For such claims, class certification is necessary. Certification is not necessary for claims that could reasonably be pursued in individual actions."[123] The proposed amendment was consistent with the spirit of John Frank's view that class actions should not be found necessary for mass torts because these cases were better suited to individual litigation.[124] Also mass torts composed of substantial claims might be better suited to individual litigation as a matter of judicial administration.[125]

---

120. FED. R. CIV. P. 23(b)(3).

121. "There also has been much concern that certification of a class can give artificial strength to claims that individually lack any significant merit. The greatest concern focuses on claims that, if valid, would generate substantial individual damage awards." Minutes of Advisory Committee on Civil Rules 8–9 (Nov. 9–10, 1995), *in* WORKING PAPERS, *supra* note 4, at 237–38.

122. "Nor should certification be granted when a weak claim on the merits has practical value . . . only because certification generates great pressure to settle." FED. R. CIV. P. 23 (Proposed Draft Mar. 1996) advisory committee's note 4 *in* WORKING PAPERS, *supra* note 4, at 67.

123. Minutes of Advisory Committee on Civil Rules, 9 (Nov. 9–10, 1995), *in* WORKING PAPERS, *supra* note 4, at 238.

124. Minutes of Advisory Committee on Civil Rules 43 (Oct. 31–Nov. 2, 1963) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

125. "If individual class member claims are so substantial as to support individual litigation, certification may be inappropriate. If class member claims are too small to support individual litigation, certification may be needed to provide meaningful individual relief." Minutes of Advisory Committee

The combination of necessary and superior findings was awkward. Drawing a distinction between the two findings in an actual case would be difficult.[126] The two-step process also seemed objectionable, suggesting that a class action be denied even if superior though not necessary.[127] The advisory committee considered substituting the "need for class certification to accomplish effective enforcement of individual claims" instead of a necessary finding.[128] In effect, the proposal "weighs in favor of class certification, all else remaining equal, if individual actions are not practicable. It weighs against class certification, all else remaining equal, if individual actions are practicable."[129] In the end, the committee withdrew the proposal as too confusing and did not publish it for comment.

C. Matters Pertinent to Rule (b)(3) "Predominance" and "Superiority" Findings

Rule 23(b)(3) sets out a number of factors that should be considered by a judge in determining whether maintaining a class action is superior to other methods and that common issues of law or fact predominate over questions concerning individual claimants. The advisory committee proposed adding several factors intended to "emphasize the distinction between class actions that aggregate small claims and those that aggregate larger claims."[130]

1. Practical Ability to Pursue Alternative Litigation Means

The advisory committee asked the Federal Judicial Center to study the amounts awarded class-action claimants. The study found that in four different districts the median individual class member recovery ranged from $315 to $528.[131] The individual awards were significantly smaller than the amount needed to support individual litigation in federal court. The committee wanted to preserve the use of the class-action device in such cases, while simultaneously raising the threshold requirements for maintaining actions consisting of large individual claims.

---

on Civil Rules 13 (Apr. 18–19, 1996), *in* WORKING PAPERS, *supra* note 4, at 269, 275, *available at* http://www.uscourts.gov/rules/Minutes/cv4-1896.htm.

126. The meanings of the two terms were so close that advisory committee members disagreed on whether the "necessary" finding might mean a lower or higher threshold than the "superior" finding. Minutes of Advisory Committee on Civil Rules 10 (Nov. 9–10, 1995), *in* WORKING PAPERS, *supra* note 4, at 239, *available at* http://www.uscourts.gov/rules/Minutes/min-cv11.htm.

127. "The purpose was to serve a heuristic function by encouraging courts to look beyond 'efficiency,' to emphasize the fairness of trying individual traditional cases in traditional ways. The combination of 'necessary' with 'superior' is awkward, however, seeming to require denial of certification for want of necessity, even though a class action might seem superior." Minutes of Advisory Committee on Civil Rules 8 (Apr. 18–19, 1996), *in* WORKING PAPERS, *supra* note 4, at 270, *available at* http://www.uscourts.gov/rules/Minutes/cv4-1896.htm.

128. *Id.* at 275.

129. *Id.* at 276.

130. Higginbotham-Stotler Memo, *supra* note 101, at 20.

131. THOMAS E. WILLGING ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 7 (1996).

Consistent with its earlier recommendation to add a necessary finding to weed out inappropriate mass-tort claims, the advisory committee proposed a provision emphasizing the "practical ability of individual members to pursue their claims without class certification" as a new Rule 23(b)(3)(A) and renumbering the existing subparagraph (A) as subparagraph (B). The proposed amendment essentially represented a fallback position in the event that the proposed amendment adding "necessary" to the Rule 23 prerequisites proved unavailing.

Existing subparagraph (A) looks at the class members' interest in maintaining or defending separate actions as an alternative to class-action litigation. Under existing subparagraph (A) and the proposed new factor, a judge would consider the possible advantages of separate litigation not only by individual plaintiffs in individual lawsuits but also by other means of aggregation.[132] If individual class members were not practically able to maintain separate litigation, class certification would be encouraged, subject to a new subparagraph (F). Conversely, individual class members with large claims would be discouraged from class-action treatment. The proposal was designed to deter the aggregation of individually large, but essentially meritless, monetary claims that would likely be defeated in separate litigation. These actions were filed for strategic purposes to compel a defendant to settle rather than assume the small risk of a catastrophic litigation defeat.

The proposed amendment was designed to "confirm and encourage the use of class actions to enforce small claims that will not support separate actions, subject to new subparagraph (F). At the same time, it will encourage courts to reflect carefully on the advantages of individual litigation before rushing to certify classes—such as mass-tort classes—that include claims that would support separate actions."[133]

2. Maturity Factor

Concerns were raised that class-action suits were filed prematurely in dispersed mass-tort cases before an adequate record could be developed for the court to review. Courts were being asked to make findings on unsettled medical, scientific or legal issues that could affect an entire class of members without the experience of actual trials and decisions in individual actions.[134] A delay in certifying a class action might provide time for science to resolve the issue (e.g., conclusive findings on whether a product

132. "The alternatives to certification of the requested class may be certification of a different class or smaller class, intervention in other pending actions, voluntary joinder, and consolidation of individual actions—including transfer for coordinated pretrial proceedings or transfer for consolidated trial." FED. R. CIV. P. 23 (Proposed Draft Aug. 1996) advisory committee's note 8 *in* PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, CIVIL, AND CRIMINAL PROCEDURE 48 (Administrative Office of the U.S. Courts) (1996) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

133. Memorandum from Patrick E. Higginbotham, Chair, Advisory Committee on Civil Rules to Standing Committee on Rules and Practice 3 (Aug. 7, 1996), *in* WORKING PAPERS, *supra* note 4, at 299.

134. "Exploration of mass tort questions time and again led experienced lawyers to offer the advice that it is better to defer class litigation until there has been substantial experience with actual trials

actually caused alleged injuries), permit lawyers to raise alternative legal theories in individual actions, or establish a record of awards and damages for comparison purposes in subsequent litigation.[135]

The advisory committee proposed a new Rule 23(b)(3)(C) that would focus on the "maturity of related litigation" as a pertinent factor in considering whether to certify the action as a class action.[136] The factor would be particularly relevant in cases involving defective products causing latent injuries that did not manifest themselves until years later. A well-developed track record of actual trials would provide invaluable guidance in determining liability and setting appropriate awards for members of a class as a whole. The proposed factor made greatest sense in the early stages of certain dispersed mass torts in which liability and award issues were uncertain, e.g., breast implant litigation. It made less sense in other class actions in which liability and damage awards issues were clear, e.g., securities and small-claims consumer actions.

3. Probable Success on the Merits Factor

The advisory committee received many complaints from defense counsel criticizing the Rule 23(b)(3) class-action device for providing plaintiffs unfair leverage to coerce settlements in meritless class actions. Defense counsel conceded that the risk of losing a "meritless" class-action claim in litigation that actually went to trial was minimal. But they asserted that their business clients regularly decided to settle such claims rather than challenge the claim in litigation.[137] Even though the defendant would likely prevail if the class action went to trial, defendants often were not willing to accept the small risk of defeat, which might ruin their companies. Because prudent counsel could rarely guarantee victory, business managers

---

and decisions in individual actions . . . . A claim that a widely used medical device has caused serious side effects, for example, may not be fully understood for many years after the first injuries are claimed." FED. R. CIV. P. 23 (Proposed Draft Aug. 1996) advisory committee's note 7 *in* PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, CIVIL, AND CRIMINAL PROCEDURE 47 (Administrative Office of the U.S. Courts) (1996) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

135. "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." FED. R. CIV. P. 23 (Proposed Draft Aug. 1996) advisory committee's note 9–10 *in* PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, CIVIL, AND CRIMINAL PROCEDURE 49–50 (Administrative Office of the U.S. Courts) (1996) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

136. "[T]his factor has loomed particularly large in the early years of litigating dispersed mass torts." Although in many respects sui generis, the asbestos mass-tort litigation provided the advisory committee with many lessons drawn from experiences with premature litigation of claims. Memorandum from Patrick E. Higginbotham, Chair, Advisory Committee on Civil Rules to Standing Committee on Rules and Practice 3 (Aug. 7, 1996), *in* WORKING PAPERS, *supra* note 4, at 299.

137. The proposal was intended to address concerns expressed by attorneys that "despite the difficulties of making a rigorous empirical demonstration, a significant share of class actions involve coercive use of the class device to force settlement of claims that have little chance of success on the merits but that promise overwhelming liability should the slender prospect of success on the merits mature into reality." Minutes of Advisory Committee on Civil Rules 19 (Nov. 9–10, 1995), *in* WORKING PAPERS, *supra* note 4, at 248, *available at* http://www.uscourts.gov/rules/Minutes/min-cv11.htm.

most often settled soon after an action had been certified as a class action to cabin potential losses.

To dispose of meritless claims before certification, the advisory committee proposed amending Rule 23 to authorize a court to determine "the probable success on the merits of the class claims, issues, or defenses" as part of its certification decision.[138] Both defense and plaintiffs' counsel raised concerns about the proposed amendments. A preliminary finding that a defendant business may lose a class action could have immediate far-reaching effects, affecting the business's status in the financial markets.[139] The value of the company's stock shares in the market could experience violent movements on such news.[140] It became clear that by raising the importance of the preliminary finding, predicting the probable outcome on the merits would lead to extensive discovery by both sides, generating unnecessary litigation.[141]

The advisory committee attempted to moderate the proposal by requiring only a preliminary assessment instead of a determination of probable merits. Alternative options "would require only a showing that the class claims, issues, or defenses are not insubstantial on the merits. The other would adopt a balancing test, requiring a finding that the prospect of success on the merits is sufficient to justify the costs and burdens imposed by certification."[142] Though more modest, both options continued to engender fears that an early finding predicting the merits would apply too much pressure on all later stages of the litigation.[143] The committee declined to recommend that the proposed provision be published for comment.

---

138. Minutes of Advisory Committee on Civil Rules 16 (Nov. 9–10, 1995), *in* WORKING PAPERS, *supra* note 4, at 245, *available at* http://www.uscourts.gov/rules/Minutes/min-cv11.htm. A rule change would be necessary in light of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), in which the Supreme Court read Rule 23 to not authorize a court to conduct a preliminary examination into the merits of an action in determining whether to certify the action as a class action.

139. The defense bar raised concerns with the practical effects of the proposal. "Although the provision may seem a boon for defendants, may it generate offsetting problems by elevating the stakes at an early stage of the litigation for fear that a preliminary finding of probable success may increase settlement pressure and even affect a defendant's standing with the financial community?" Minutes of Advisory Committee on Civil Rules 17 (Nov. 9–10, 1995), *in* WORKING PAPERS, *supra* note 4, at 246, *available at* http://www.uscourts.gov/rules/Minutes/min-cv11.htm.

140. "Impact on market evaluation of a company's stock was one frequently offered illustration." Minutes of Advisory Committee on Civil Rules 8 (Apr. 18–19, 1996), *in* WORKING PAPERS, *supra* note 4, at 270, *available at* http://www.uscourts.gov/rules/Minutes/cv4-1896.htm.

141. "One concern arises from the prospect that a prediction of the merits must be supported by extensive discovery, protracting the certification determination and adding great expense." *Id.*

142. Minutes of Advisory Committee on Civil Rules 16 (Apr. 18-19, 1996), *in* WORKING PAPERS, *supra* note 4, at 278, *available at* http://www.uscourts.gov/rules/Minutes/cv4-1896.htm.

143. "In the end, this proposal was overcome by fears that it would unduly enhance the burdens of litigating the certification question itself, and that a merits finding made at the certification stage would exert undue pressure on all subsequent stages." Memorandum from Patrick E. Higginbotham, Chair, Advisory Committee on Civil Rules to Standing Committee on Rules and Practice 7 (Aug. 7, 1996), *in* WORKING PAPERS, *supra* note 4, at 303.

4. "Just Ain't Worth It" Factor

Consumer-oriented class actions, which ordinarily involve small individual claims, have been criticized for generating enormous attorney fees while providing trivial awards to individual class members and consuming significant judicial resources. In the worst examples of abuse, class members receive worthless coupons as part of a class-action settlement, while attorneys reap substantial fees, which usually are based on a percentage of the total award, calculated as if the coupons had substantial value.

Defenders contend that the class-action device serves critical policing and deterrent functions in consumer-oriented actions. In their view, the government simply does not have sufficient resources to uncover and prosecute every violation of its own regulatory enactments.[144] The bar serves an important role in helping to enforce public policy by ensuring that wrongdoers do not profit from their ill-gotten gains.[145] Opponents argue that the judiciary is improperly encroaching on the prerogatives of the executive and legislative branches.[146] In their view, government agencies are responsible and better suited to prosecute or administratively handle the alleged wrongs raised in many consumer-oriented class actions. Whether a violation should be prosecuted and if so by whom is a quintessentially legislative or executive branch matter.[147] Redress of these wrongs rightfully should be directed to the government regulatory bodies instead of the courts.

Judge Paul V. Niemeyer, Court of Appeals for the Fourth Circuit, replaced Judge Higginbotham as chairman of the advisory committee in 1996. Judge Niemeyer was an experienced private attorney before assuming the

144. The advisory committee discussed the appropriate role of the judicial and executive branches during its consideration of Rule 23(b)(3) back in 1963. At least one committee member at that time believed that the judiciary should enhance the class-action device as a litigation enforcement tool, instead of deferring to the executive branch for enforcement through regulatory bodies. Professor Louisell said that "[h]e saw in it [Rule 23(b)(3)] the possibility of curtailing the degree of the increased movement toward the administrative remedy by enlarging the judicial potential." Minutes of Advisory Committee on Civil Rules 14 (May 15–17, 1965) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

145. These private state attorneys general can provide an important enforcement tool that supplements the government's regulatory enforcement. "[C]ontrary argument will be made that what is important is not the perhaps trivial individual recovery but enforcement of the social policies embodied in the legal rules that support the recovery. The malefactors must not be allowed to retain their ill-gotten gains because they have managed to profit from small wrongs inflicted on many people . . . ." Minutes of Advisory Committee on Civil Rules 26 (Nov. 9–10, 1995), *in* WORKING PAPERS, *supra* note 4, at 255, *available at* http://www.uscourts.gov/rules/Minutes/min-cv11.htm.

146. John Frank was distressed about class actions involving trivial claims that provide big rewards for counsel and cautioned the committee not to promote them in a misguided social policy effort. "'This Committee is not the avenging angel of social policy.' Congress can create enforcement remedies, some administrative, some judicial, pursued by public or private enforcers." Minutes of Advisory Committee on Civil Rules 12 (Apr. 18–19, 1996), *in* WORKING PAPERS, *supra* note 4, at 274, *available at* http://www.uscourts.gov/rules/Minutes/cv4-1896.htm.

147. "Most private wrongs go without redress . . . . '[W]e should not establish a roving Rule 23 commission that authorizes class counsel to enforce the law against private wrongdoers.'" Minutes of Advisory Committee on Civil Rules 11 (Apr. 18–19, 1996), *in* WORKING PAPERS, *supra* note 4, at 273, *available at* http://www.uscourts.gov/rules/Minutes/cv4-1896.htm.

bench. He crystallized the primary policy question for the committee's consideration:

> The unresolved question raised by . . . testimony and commentary about other cases is whether the class action rule is intended to be solely a procedural tool to aggregate claims for judicial efficiency or whether it is intended to serve more substantively as a social tool to enforce laws through attorneys acting de facto as private attorneys general.[148]

Judge Niemeyer recounted the history of a contemporaneous class-action case in which a defendant insurance company was ordered to disgorge gains it had amassed from improperly rounding up, instead of down to the nearest dollar, premium charges assessed millions of customers. The average billing mistake for individual class members was five dollars, but the aggregate error amounted to tens of millions of dollars. The attorney fees were over ten million dollars.[149] Inevitably, both defenders and opponents of the class action contended that the case provided a perfect example supporting their positions. Defenders argued that the wrongdoing would never have been discovered but for the incentives of the class-action device, the insurance company forfeited its ill-gotten gains, and the penalty served to deter future wrongdoers. The opponents claimed that the decision proved that the system is a windfall for attorneys. Government regulatory agencies should have prosecuted the action or handled it

148. Memorandum from Judge Paul V. Niemeyer, U.S. Court of Appeals for the Fourth Circuit, Chair of the Rules Advisory Committee, to Members of the Standing Committee and Civil Rules Advisory Committee and Introduction to Advisory Committee's Working Papers Collected in Connection with Proposed Changes to FED. R. CIV. P. 23 (Class Actions) xi (Mar. 15, 1997), *in* WORKING PAPERS, *supra* note 4, at ix, xii. Judge Niemeyer was concerned that the judiciary was becoming, in the words of John Frank, the "avenging angel of social policy." Niemeyer went on to say: "Intentionally or not, we may be coming to rely on civil litigation not only for individualized dispute resolution, but also, through the class action device, to bring about changes in the safety of products, in the disclosure requirements of securities law, in disclosures connected with banking and insurance billing methods, and in the method for compensating broad segments of society affected by singular torts. Indeed, in a few instances, Congress has passed legislation relying on class action procedures." *Id.* at x. Compare Reporter Kaplan's contrary views expressed during the 1963–1966 consideration of amendments to Rule 23 in which he recommended that the judiciary should step in and make the decisions for people who are not sophisticated in the law. In rejecting an opt-in procedure, Kaplan pointedly asked: "In the end one has to ask the question: what is to be done about individuals who will not step forward and announce themselves because in the nature of the case they have not actually received notice? And what about individuals who don't respond to a general notice or even specific notice? In the circumstances carefully delineated in (b)(3) they should, in our view, be included in the class, rather than excluded . . . ." Memorandum from Benjamin Kaplan, Reporter, and Albert Sacks, Associate Reporter, to Advisory Committee on Civil Rules EE-4 (Apr. 21, 1965) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

149. Memorandum from Judge Paul V. Niemeyer, U.S. Court of Appeals for the Fourth Circuit, Chair of the Rules Advisory Committee, to Members of the Standing Committee and Civil Rules Advisory Committee and Introduction to Advisory Committee's Working Papers Collected in Connection with Proposed Changes to FED. R. CIV. P. 23 (Class Actions) xi (Mar. 15, 1997), *in* WORKING PAPERS, *supra* note 4, at ix, xii.

administratively, which would have reduced transaction costs, including attorney fees, for the public's benefit.[150]

The advisory committee was troubled by the abuses in small consumer-oriented class actions. It recognized, however, that the class-action device served an important function in many instances. The committee would have to be careful to ensure that any proposed revision did not prevent class-action treatment in appropriate circumstances.[151] The committee also remained wary that the class-action device had over time attained a status in the law that could not be altered without affecting substantive rights. Since 1966, substantive laws had been enacted that in the view of many relied on the class-action device for enforcement. An amendment diluting this enforcement function could be challenged as affecting substantive rights outside the rulemakers' authority.[152]

The advisory committee proposed adding a new factor that would allow a court to undertake a cost-benefit analysis in making its certification decision.[153] Under a new Rule 23(b)(3)(F) a court would weigh the relief to individual class members against the costs and burdens of class litigation.[154] "If probable individual relief is slight, however, the core

150. "It is not in the public interest to divert such large sums to private attorneys who seek to become private attorneys-general at rates that would support entire divisions of many public attorney general offices, or for that matter might entirely support some of the smaller public offices." Reporter's Notes on meeting of Rule 23 Subcommittee at lines 829–33 (Dec. 4, 2000) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts). Opponents of the private attorney general justification also argued that the real motivation underlying such class actions was to win through litigation goals that could not be achieved through legislation or other political means. Minutes of Advisory Committee on Civil Rules 5 (Oct. 2000), *available at* http://www.uscourts.gov/rules/Minutes/CRACMOOO.pdf.

151. The important function of the class-action device was captured well by Reporter Kaplan when he "stated that "without a rule of this type the people are unprotected and that this is the small man's rule." Minutes of Advisory Committee on Civil Rules 14 (May 15–17, 1965) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

152. The public enforcement agencies simply do not have the resources to enforce every public law and implicitly have relied on the private sector through the class-action devices to police wrongdoers. "Rule 23 enforcement has become a major feature of the enforcement system, and only political judgments can justify substantial alteration." Minutes of Advisory Committee on Civil Rules 30 (Nov. 9–10, 1995), *in* WORKING PAPERS, *supra* note 4, at 259, *available at* http://www.uscourts.gov/rules/Minutes/min-cv11.htm. It was also argued "that whatever may have been intended when the 1966 amendments were adopted, the social-enforcement function has become a part of Rule 23." Minutes of Advisory Committee on Civil Rules 29 (Nov. 9–10, 1995), *in* WORKING PAPERS, *supra* note 4, at 258, *available at* http://www.uscourts.gov/rules/Minutes/min-cv11.htm.

153. The proposed factor was drawn from several state law models and would represent a retrenchment in the use of class actions to aggregate trivial individual claims. "This factor is likely to be relevant only when individual claims are too small to justify the cost of nonclass adjudication, so that a class action is necessary if the controversy is to be adjudicated . . . ." Minutes of Advisory Committee on Civil Rules 25–26 (Nov. 9–10, 1995), *in* WORKING PAPERS, *supra* note 4, at 254–55, *available at* http://www.uscourts.gov/rules/Minutes/min-cv11.htm.

154. Cost-benefit analysis would involve consideration of "the balance between the probable relief to individual class members and the costs and burdens of class litigation" when determining the predominance and superiority findings. But the advisory committee made it clear that the new factor was not intended to bar class actions that enforced individual claims that were too small to bear the cost of individual actions. Memorandum from Patrick E. Higginbotham, Chair, Advisory Committee on Civil Rules to Standing Committee on Rules and Practice 4 (Aug. 7, 1996), *in* WORKING PAPERS, *supra* note 4, at 300.

justification of class enforcement fails."[155] This factor was counterbalanced by other proposed factors that supported certification in cases in which individual class members were not practically able to pursue separate actions. The proposed factor was related to, but different from, the "probable success" factor earlier considered by the committee.[156] Rule 23(b)(3)(F) would be applied with the assumption that the class members would prevail in litigation. The committee declined to adopt a suggestion that the analysis also focus on whether the motivating force for initiating the class action was potentially large attorney fees.[157]

The advisory committee provided guidance on how to apply the "just ain't worth it" factor. Under the proposal, a court should consider all the costs incurred in litigating and implementing a class action. The analysis should include not only costs incurred by the litigants but also by the judiciary as a whole, including administrative costs.[158] In addition, the analysis should take into account the lost opportunities of other litigants in other cases whose interests might be adversely affected because of delay or because judicial resources were stretched too thin.[159] The committee expected that the overall costs of the action would dwarf the individual class member's award; therefore, the aggregate award must also be taken into consideration in evaluating whether the benefits of a class action offset the attendant expenses.

5. Advisory Committee Declines to Proceed with Any of the Proposed Rule 23(b)(3) Factors

The proposed rule amendments were published for comment in August 1996. After the advisory committee reviewed all public comments

155. FED. R. CIV. P. 23 (Proposed Draft Aug. 1996) advisory committee's note 10 *in* PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, CIVIL, AND CRIMINAL PROCEDURE 50 (Administrative Office of the U.S. Courts) (1996) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts). The proposal was "akin to preliminary injunction analysis, that balances the probable outcome on the merits against the burdens imposed by class certification." Minutes of Advisory Committee on Civil Rules 16 (Nov. 9–10, 1995), *in* WORKING PAPERS, *supra* note 4, at 245, *available at* http://www.uscourts.gov/rules/Minutes/min-cv11.htm.

156. The biggest difference was that under this analysis the class will be presumed to have prevailed and the determination will focus on whether such a victory will justify the costs entailed in reaching the merits and implementing the judgment. Minutes of Advisory Committee on Civil Rules 25 (Nov. 9–10, 1995), *in* WORKING PAPERS, *supra* note 4, at 254, *available at* http://www.uscourts.gov/rules/Minutes/min-cv11.htm.

157. Minutes of Advisory Committee on Civil Rules 11 (Apr. 18–19, 1996), *in* WORKING PAPERS, *supra* note 4, at 273, *available at* http://www.uscourts.gov/rules/Minutes/cv4-1896.htm.

158. Very-small-claims class actions "require enormous administrative work. And they breed cynicism about the courts." Minutes of Advisory Committee on Civil Rules 13 (Apr. 18–19, 1996), *in* WORKING PAPERS, *supra* note 4, at 275, *available at* http://www.uscourts.gov/rules/Minutes/cv4-1896.htm.

159. The number of federal judges is limited. The time that they spend on specific litigation is time that could have been spent on other cases. "A fair estimate of the costs to the judicial system—and the corresponding opportunity costs to other litigants who seek to use the judicial system—should be included in the calculation." Memorandum from Patrick E. Higginbotham, Chair, Advisory Committee on Civil Rules to Standing Committee on Rules and Practice 4 (Aug. 7, 1996) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts), *in* WORKING PAPERS, *supra* note 4, at 300.

submitted on the proposed rule amendments, it decided to withdraw all four proposed Rule 23(b)(3) factors. Each factor raised concerns from different parts of the bar. Some contended that the factors were primarily aimed at mass torts and that applying them to other types of class actions, including consumer-oriented and securities actions, would cause confusion and unnecessary delay. Others asserted that the factors intruded on substantive rights and were outside the committee's jurisdiction. The committee was divided, and without a strong committee consensus further progress was stymied. Moreover, the Supreme Court had agreed to hear major class-action issues in *Amchem Products, Inc. v. Windsor*[160] and *Ortiz v. Fibreboard Corp.*[161] that might affect the committee's decision-making. The committee decided to defer action and await events. It turned its attention to the other proposed amendments to Rule 23.

D. Settlement Provision

Most class actions, like individual lawsuits, are resolved by settlement agreements, not by trial. Settling a dispute without litigation often relieves both parties of addressing complicated and contentious issues that would otherwise have to be resolved by the court.[162] In class actions, sometimes the most troublesome issues, like choice-of-law questions and manageability issues, can be effectively sidestepped by a settlement agreement without court intervention.

In the 1980s and 1990s, parties increasingly began requesting courts to approve the settlement of an action at the same time that they requested the courts to certify the action as a class action.[163] Combining the certification and settlement questions at the outset in such pre-packaged fashion for the court's determination and approval facilitated the disposition of many class actions.

The advisory committee began considering adding provisions to the rule facilitating such prepackaged class-action settlements.[164] It was not

160. 521 U.S. 591 (1997).

161. 527 U.S. 815 (1999).

162. Settlements often reduce transaction costs, leaving more money for distribution to the class members. Minutes of Advisory Committee on Civil Rules 34–35 (Apr. 2000), *available at* http://www.uscourts.gov/rules/Minutes/400minCV.pdf.

163. "A settlement class is one in which class certification is addressed as part and parcel of a settlement: certification is sought at the same time as the parties announce their settlement and seek approval of it through the class action procedure." Minutes of Advisory Committee on Civil Rules 13 (Feb. 16–17, 1995), *in* WORKING PAPERS, *supra* note 4, at 207, *available at* http://www.uscourts.gov/rules/Minutes/min-cv2.htm. "Many courts have adopted the practice reflected in this new provision." The Committee Note included citations to cases that approved settlement of an action at the same time that the case was certified as a class action. FED. R. CIV. P. 23 (Proposed Draft Aug. 1996) advisory committee's note 11 *in* PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, CIVIL, AND CRIMINAL PROCEDURE 51 (Administrative Office of the U.S. Courts) (1996) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts). *See* WILLGING, *supra* note 131, at 64.

164. The proposal was silent as to whether it also applied to (b)(1) or (b)(2) actions. FED. R. CIV. P. 23(b)(4) (Proposed Draft Aug. 1996) advisory committee's note 11 *in* PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, CIVIL, AND CRIMINAL PROCEDURE 51

clear, however, how these prepackaged class-action settlements were to comply with the Rule 23 requirements. It was disputed whether the Rule 23 requirements must be applied in the same manner to an action presented for certification for settlement purposes as to an action presented for certification for litigation purposes.[165]

The advisory committee proposed an amendment to Rule 23 that would facilitate the use of prepackaged class-action settlements. Under the proposed amendment, a court would be allowed to certify an action as a class action for settlement purposes even if the same action might not qualify for certification as a class action for trial. The amendment would continue to require that a class action satisfy all Rule 23(a) prerequisites and the predominance and superiority requirements for class certification. But satisfying these requirements would be evaluated from the perspective of a settlement and not of a trial.[166] Issues that might seem unresolvable or unmanageable if brought to bear at trial might vanish if the action were settled. For example, the difficulties of managing many different choice-of-law questions in a single action might defeat certification of a class action for trial purposes. The same action, however, might not be disqualified for certification as a settlement class action because the choice-of-law questions would no longer arise.

The advisory committee recognized that enhancing the class-action settlement process might increase opportunities for abuse, particularly when a prepackaged class-action settlement was presented to the court for approval. A prepackaged settlement raised the specter of collusive agreements that might shield unfair agreements from the court. These settlements are subject to greater suspicion because they present greater opportunities for abuse.[167] Concerns were raised echoing John Frank's fears that defendants would engage in collusive bargaining with plaintiff counsel in reaching a settlement to the detriment of the class members.[168]

(Administrative Office of the U.S. Courts) (1996) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

165. The advisory committee faced the "basic question whether it makes sense to certify a class for settlement purposes when the same class would not—and often could not—be certified for litigation, and whether it is proper to permit a class that is first proposed for certification at the same time as a proposed settlement is presented for approval" (pre-packaged settlements). Minutes of Advisory Committee on Civil Rules 32 (Nov. 9–10, 1995), *in* WORKING PAPERS, *supra* note 4, at 261, *available at* http://www.uscourts.gov/rules/Minutes/min-cv11.htm.

166. "All of the requirements for certification must be met. But the question whether the requirements for certification are met must be addressed from the perspective of settlement, not the problems of adjudication." Minutes of Advisory Committee on Civil Rules, 34 (Nov. 9–10, 1995), *in* WORKING PAPERS, *supra* note 4, at 263, *available at* http://www.uscourts.gov/rules/Minutes/min-cv11.htm.

167. Settlement classes are susceptible to abuse, particularly when "certification is sought at the same time as the parties announce their settlement and seek approval of it through the class action procedure." Minutes of Advisory Committee on Civil Rules 13 (Feb. 16–17, 1995), *in* WORKING PAPERS, *supra* note 4, at 207, *available at* http://www.uscourts.gov/rules/Minutes/min-cv2.htm.

168. "[F]ear of collusion [between plaintiffs and defendants] is genuine . . . ." Minutes of Advisory Committee on Civil Rules 36 (Nov. 9–10, 1995), *in* WORKING PAPERS, *supra* note 4, at 265, *available at* http://www.uscourts.gov/rules/Minutes/min-cv11.htm. On the other hand, experienced counsel advised the committee that fears of collusive bargaining were greatly exaggerated. In most major class

Unlike other judicial proceedings where the assertions of each side are constantly scrutinized and challenged by opposing counsel, a court hears only favorable presentations from both sides who support the class-action settlement agreement. The benefits of an adversary system with each side challenging the assertions of the other side are lost in this context.[169] To protect the class members from collusive agreements between the defendant and counsel, the proposed amendments required the court to hold a hearing and make specific findings that the agreement was fair and reasonable.[170] The hearing must be held even if the parties waive it and no objectors appear.

During the public comment period, opponents of the proposal claimed that the settlement provision would invite collusive agreements. Although the opportunity already existed with any class-action settlement, the proposal in their view would exacerbate the problem by lowering the certification requirements, thereby increasing the number of cases eligible for certification. Much of the criticism was aimed at an earlier draft proposal that was attacked in a letter signed by 129 law professors.[171] The professors erroneously assumed that the committee had adopted the earlier draft in the version published for comment without an explanatory note.[172] Although the professors' criticisms had little impact on the committee's conclusions, the

---

actions, many law firms are usually involved, making it difficult to enter and maintain an extended conspiracy in secrecy.

169. "The biggest problem with settlements is that they sidestep the adversary process, depriving the court of the reliable information needed to evaluate a settlement." Minutes of Advisory Committee on Civil Rules 24 (Apr. 18–19, 1996), *in* WORKING PAPERS, *supra* note 4, at 286, *available at* http://www.uscourts.gov/rules/Minutes/cv4-1896.htm. There were other, more fundamental questions raised about proposals facilitating settlements in class actions. Unlike traditional litigation where the client controls the lawsuit, the unnamed class members who are not represented in a class action—except by self-appointed class counsel—have little control over the litigation that may significantly affect their rights. Minutes of Advisory Committee on Civil Rules 33 (Apr. 2000), *available at* http://www.uscourts.gov/rules/Minutes/400minCV.pdf.

170. The amendments would require a hearing to determine whether to approve dismissal or compromise of a class action. "Settlement problems are addressed, both by confirming the propriety of 'settlement classes' in subdivision (b)(4) and by making explicit the need for a hearing as part of the subdivision (e) approval procedure." FED. R. CIV. P. 23 (Proposed Draft Aug. 1996) advisory committee's note 4–5 *in* PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, CIVIL, AND CRIMINAL PROCEDURE 44–45 (Administrative Office of the U.S. Courts) (1996) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

171. Letter from Steering Committee to Oppose Proposed Rule 23 to Judge Alicemarie H. Stotler, Chair, Standing Committee on Rules of Practice and Procedure (May 28, 1996) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts). The professors' letter was delivered directly to the Standing Rules Committee, bypassing the Advisory Committee on Civil Rules. Judge Alicemarie H. Stotler, chair of the Standing Rules Committee, asked the Standing Rules Committee to consider the professors' letter, despite the professors' bypassing of the advisory committee, to ensure that all arguments had been presented for consideration. After full discussion, the Standing Rules Committee approved publication of the settlement proposal.

172. The professors were concerned that the proposal appeared to permit the courts to approve settlements of class actions that did not satisfy any of the Rule 23(a) prerequisites. *Id.* In particular, they believed that the proposal would permit courts to approve settlements involving "future classes." *Id.* Their concerns were answered in the Committee Note, which had not yet been prepared when the professors' letter was written. *See* Minutes of Advisory Committee on Civil Rules 3 (Oct. 17–18, 1996), *available at* http://www.uscourts.gov/rules/Minutes/cv10-1796.htm.

committee decided to defer approving the settlement proposal until the Supreme Court decided *Amchem Products, Inc. v. Windsor*, argued on February 19, 1997.[173]

E. Opt-In Option

The 1992–1995 drafts of proposed amendments to Rule 23 contained an opt-in provision like the opt-in option considered by the advisory committee back in 1963 that authorized permissible joinder by putative class members electing to be included in the class. When considering the opt-in provision, the 1963 advisory committee focused on small-claims class actions. On the other hand, the 1990s advisory committee focused initially on the use of the opt-in option in dispersed mass-tort class actions. The failure to adapt the opt-in provision to accommodate both types of class actions doomed the proposal in each instance.

The 1990s advisory committee expected that the opt-in option would be used only for defendant and dispersed mass-tort class actions. Supporters of the opt-in approach believed it would resolve many of the problems associated with the aggregation of meritless mass-tort claims that were filed solely to intimidate a defendant into an unfair settlement. It was presumed that most putative class members who realized they had suffered no injury and who had no justified claim would not seek relief. The proposed Committee Note to the 1990s opt-in provision suggested that the opt-in requirement should "rarely" be imposed by a court.

In 1996, the advisory committee began an intensive examination of the opt-in approach as a new Rule 23(b)(4). The draft rule listed specific factors that a court should consider in determining whether to certify an opt-in class action, including the extent and nature of the class members' injuries; potential conflicts of interest among members; and the nature of the controversy and the relief sought.[174] The factors were designed to address dispersed mass-tort class actions. Although some committee members strongly supported the opt-in option, others doubted that it would be effective in handling mass torts and in many instances they thought it might be counterproductive. It was clear that some defendants, for example, preferred the opt-out option because of its potential for resolving all claims in a single action, achieving "global peace." They suspected that the opt-in provision could be manipulated tactically in any number of ways. A series of class actions could be launched, for example, loading the first action with the strongest claims to create a high floor recovery for subsequent class actions containing weaker claims. The committee declined to include the

173. 521 U.S. 591 (1997); Minutes of Advisory Committee on Civil Rules 3 (Mar. 20–21, 1997), *available at* http://www.uscourts.gov/rules/Minutes/cv3-97.htm.

174. FED. R. CIV. P. 23 (Proposed Draft Feb. 1996), *in* WORKING PAPERS, *supra* note 4, at 57.

opt-in option as part of the amendments to Rule 23 published for public comment in August 1996.[175]

Although not published for public comment, the opt-in option was raised during the public-comment period as an alternative solution in a context other than mass-tort class actions. Supporters of small-claims class actions vehemently criticized the published "just ain't worth it" proposal. They viewed the cost-benefit analysis contained in the proposal as a threat to the commencement of all small-claims class actions. As an alternative means to control the filing of abusive small-claims class actions, suggestions were submitted during the public-comment period advocating the opt-in option not for dispersed mass-tort class actions, but for small-claims class actions. It was expected that putative class members in small-claims class actions, like members in mass-tort class actions, would decline to elect participating in a class action in which their individual claim was meritless or essentially worthless.

It was also suggested during the public comment period that the opt-out option be replaced en toto with an opt-in option.[176] The committee was concerned, however, with the risk of returning to the pre-1966 one-way intervention practice, when parties would wait until a favorable judgment was entered in one class action before they initiated their own action. Although a provision could be crafted to prevent a potential member of an opt-in class from using any earlier judgment to support issue preclusion, such a provision might implicate substantive rights, raising Rules Enabling Act questions. Also, supporters of the small-claims class actions believed that any version of an opt-in option would eviscerate these types of claims. Echoing the sentiments of Reporter Kaplan expressed during the 1963–1966 consideration of amendments to Rule 23 when he recommended that the judiciary should rely exclusively on an opt-out option to protect people who are not sophisticated in the law, the supporters of small-claims class actions decried the opt-in procedure for undercutting the rights of holders of small claims.

The opt-in provision held great promise for resolving some major problems with class actions. It presented an opportunity to address abuses in both mass-tort and small-claims class actions. But opponents of the proposal seized on potential problems that the opt-in approach would raise in particular mass-tort and small-claims class actions, eliminating any possibility of a consensus. It was clear that significant "fine tuning" of the opt-in option would be necessary to ensure that the class-action device could be used in appropriate mass-tort and small-claims class actions. The published proposed amendment to Rule 23 omitted the opt-in option, however, and

175. Memorandum from Patrick E. Higginbotham, Chair, Advisory Committee on Civil Rules to Standing Committee on Rules and Practice 5 (Aug. 7, 1996) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts), *in* WORKING PAPERS, *supra* note 4, at 303.

176. Minutes of Advisory Committee on Civil Rules 3 (Mar. 20–21, 1997), *available at* http://www.uscourts.gov/rules/Minutes/cv3-97.htm.

reinserting it in the amendments would be a substantial alteration, requiring the advisory committee to republish the proposal for public comment. Amending Rule 23 to include the opt-in option presented the possibility of drastic changes to class-action practice and if it were to be considered further, it would be a long-range project.[177] The committee did not want to take this approach and declined to adopt the option.

F. Interlocutory Appeal Provision

The decision to certify an action as a class action is often decisive as a practical matter. Denying certification can toll the death knell in actions that seek to vindicate large numbers of individual claims, especially those involving small claims. Alternatively, approving a class-action certification can exert enormous pressure on the defendant to settle.[178] Although the certification decision represents a critical part of the judicial proceeding, there was little appellate case law providing guidance on certification questions. The strict statutory provisions governing interlocutory appeals restricted the number of appeals heard by the courts of appeals, explaining the dearth of pertinent case law.[179]

Under the existing appeal statutes, the class-action certification decision is interlocutory in nature even though the decision might as a practical matter be decisive. Courts of appeals rarely reviewed certification decisions because of the stringent requirements imposed under the interlocutory appeal statute 28 U.S.C. § 1292(b), which excludes all but the most qualified appeals. Parties would resort to other less direct appeal routes, including mandamus, but such review, when granted, resulted in straining the ordinary mandamus principles.

The lack of ready appellate review hampered the development of a body of uniform national class-action principles. Worse, district courts were providing different answers to questions raised in class-action certifications, encouraging forum-shopping. Liberalizing the interlocutory appeal requirements would expand opportunities for appellate review and the development of circuit-wide precedent. But judicial workload concerns were raised that parties would automatically file an interlocutory appeal in every case to overturn the trial court's certification decision. Parties might also file the appeal petition for tactical purposes to increase cost and delay. The impact on already overburdened courts of appeals had to be carefully examined.

The advisory committee drafted an amendment authorizing a court of appeals to consider an interlocutory appeal from an order granting or denying class certification. The committee fashioned a flexible procedure designed to lift the restrictions on an appellate court's authority to hear an

177. Minutes of Advisory Committee on Civil Rules 5 (May 1–2, 1997), *available at* http://www.uscourts.gov/rules/Minutes/cv5-97.htm.

178. FED. R. CIV. P. 23(f) advisory committee's note (1998).

179. 15A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3912 (2d ed. 1991).

interlocutory appeal while ensuring that the appellate court could control and manage the added workload. Under the amendment, the decision to consider the appeal would be solely in the appellate court's discretion. Although modeled on 28 U.S.C. § 1292(b), the amendment did not require that the appeal be based on "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" nor did it require the trial court's permission to file the appeal.[180] But the Note to the proposed amendment did encourage trial court judges to offer advice on the desirability of an interlocutory appeal by explaining the reasons for granting or denying a certification request, which would be useful to the parties and the courts of appeal.[181] The amendment required that the application for the appeal be filed within ten days of the order granting or denying class certification so that the trial court proceeding would not be unduly disrupted.

The advisory committee recognized the possibility that parties might begin to file more interlocutory appeals, especially in the period immediately following the promulgation of the amendment. But the committee expected that courts of appeal would grant the petition only in cases that presented truly important and difficult issues.[182] A body of precedent within the circuit would quickly develop, informing the bar of the likelihood of success of filing such interlocutory appeals. Although courts might experience an influx of filings soon after the amendment took effect, the committee believed that the number of ill-founded appeal petitions would quickly dissipate as the bar became more familiar with the provision. Also, appellate judges had advised the committee that these interlocutory appeal petitions would be quickly processed, imposing little extra burden on the courts of appeal. The committee was confident that, as with §1292 interlocutory appeals, Rule 23(f) petitions would be quickly resolved on motion.

The advisory committee considered, but ultimately rejected, a proposal requiring the court of appeals to review every petition for interlocutory

180. Minutes of Advisory Committee on Civil Rules, 5 (Nov. 9–10, 1995), *in* WORKING PAPERS, *supra* note 4, at 234, *available at* http://www.uscourts.gov/rules/Minutes/min-cv11.htm.

181. The district judge was not required to approve the request to appeal the certification decision. The Committee Note, however, encouraged district courts "to offer advice on the desirability of appeal at the time of making certification decisions. The advice would not be a condition of appeal, but would be more or less persuasive according to the reasons offered by the district court . . . ." Minutes of Advisory Committee on Civil Rules 7 (Nov. 9–10, 1995), *in* WORKING PAPERS, *supra* note 4, at 236, *available at* http://www.uscourts.gov/rules/Minutes/min-cv11.htm.

182. Certification decisions are often fact driven and not suitable for an interlocutory appeal. "It is expected, moreover, that most certification decisions will depend heavily on specific case circumstances. There will be little reason to grant appeal in such cases; the major impetus for appeal will come in cases presenting unsettled questions of law." *Id.* "Permission almost always will be denied when the certification decision turns on case-specific matters of fact and district court discretion." FED. R. CIV. P. 23(f) (Proposed Draft Aug. 1996) advisory committee's note 16 *in* PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, CIVIL, AND CRIMINAL PROCEDURE 56 (Administrative Office of the U.S. Courts) (1996) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts). The final note language turned this provision around and suggested that permission to appeal should be granted if "novel or unsettled questions of law" were presented. FED. R. CIV. P. 23(f) advisory committee's note (1998).

review because of the significance of the certification decision. It also considered providing an automatic stay on discovery pending disposition of the appeal petition. The committee concluded that both questions would be better answered on a case-by-case basis, leaving the decisions to the court's discretion.[183]

Public comments on the proposed amendment were favorable. It took effect on December 1, 1998.

G. *Lessons Learned from the 1998 Rule 23 Rulemaking Experience*

The advisory committee approved only one of the proposed amendments to Rule 23 that were published for comment in 1996 (interlocutory appeal provision). The appeal provision was an important improvement, but the committee found it hard to reject the other proposed amendments after investing years of study. Nonetheless, it recognized that moving forward on the amendments without a consensus would be futile, halting progress now and possibly foreclosing further progress many years in the future.

The rules committees remain keenly aware that the bench and bar, historically, resist implementing and following any rule amendment that has not been adopted by a broad consensus. The committees work hard to develop a consensus to ensure the success of every proposed rule amendment. There was no consensus, however, on the proposed Rule 23 amendments. The defense bar was split. Some parts supported the proposals because they offered an opportunity to achieve "global peace" by resolving all claims in a single action, dramatically reducing transaction costs. Other parts of the defense bar opposed the proposals precisely because they could lose all claims in a single action. They preferred a more conservative course, one in which they could litigate individual cases. The plaintiff's bar was equally fractured. Class-action specialists supported the amendments, which facilitated the use of the class-action device. On the other hand, litigation specialists favored individual litigation and opposed aggregation procedures. Each of these groups objected to the proposed amendments for specific reasons. And as a general fallback argument, they also claimed that the proposed amendments violated the Rules Enabling Act, because the amendments implicated substantive rights. The cumulative adverse comments effectively doomed the proposed amendments.[184]

It is to the advisory committee's credit that it declined to pursue the proposed amendments to Rule 23 after determining that the proposals were either inappropriate, unlikely to pass, or both. The withdrawal of the proposed amendments postponed final action on them, preserving the

183. "Permission to appeal does not stay trial court proceedings." FED. R. CIV. P. 23(f) advisory committee's note (1998).

184. "A veteran committee member who 'was here for the Rule 23 wars' noted that proposals that emerged from years of hard work failed for want of any consensus for reform." Minutes of Advisory Committee on Civil Rules 36 (Apr. 2000), *available at* http://www.uscourts.gov/rules/Minutes/400min CV.pdf.

committee's options to revisit these issues if circumstances were to change. Despite withdrawing the proposed amendments, the committee's efforts were hardly in vain. Progress in promoting the committee's proposals has been achieved incrementally by employing other avenues to affect class-action practices, including providing guidance on class actions in the *Manual for Complex Litigation.* Indeed, much of the substance of the proposed rule provisions has been incorporated into the manual. Also, the committee published a four-volume series containing a compilation of its class-action study papers that continues to be influential. The publishing of the proposed amendments itself provided a tremendous resource to the bench and bar, affecting the course of class-action practice. The committee's papers and proposals provided blueprints on various ways to handle class actions, which judges and attorneys continue to rely on.

VII. RULE 23 AMENDMENTS TAKING EFFECT IN 2003

After the promulgation of the 1998 amendment to Rule 23, the advisory committee, under the chairmanship of Judge David F. Levi, focused its attention on improving class-action procedures, on the "nuts and bolts" of the process, rather than on substantive certification standards.[185] The committee shifted its focus in order to develop rule amendments that provided courts with the tools, authority and discretion to closely supervise class-action litigation.

The advisory committee had before it an extensive record on the operation of Rule 23, including the four-volume record generated in the public comments, testimony, and reporter memoranda on the proposed revisions to Rule 23 in 1998;[186] the Federal Judicial Center's 1996 empirical study of federal class-action suits;[187] the RAND Institute for Civil Justice's publication in 2000 of *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, analyzing the results of detailed case studies and surveys of lawyers engaged in class-action litigation in state and federal courts;[188] and the extensive materials assembled by the Judicial Conference's Working Group on Mass Torts, including the 1999 *Report on Mass Tort Litigation.*[189] In addition to these sources, the committee consulted experienced class-action

185. Judge David F. Levi served as a member of the Advisory Committee on Civil Rules from 1994 to 1999, chaired the committee from 1999 to 2003, and has chaired the Standing Committee from 2003 to the present. Chief Judge Anthony J. Scirica, Court of Appeals for the Third Circuit, a former member of the Advisory Committee on Civil Rules, served as chair of the Standing Committee 1998 to 2003. Their partnership on rules-related projects produced any number of outstanding achievements in rules-related matters during their committee tenure, including the promulgation of the 2003 amendments to Rule 23.

186. 1-4 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23 (Administrative Office of the U.S. Courts) (1997), *available at* http://www.uscourts.gov/rules/newrules10.html.

187. WILLGING, *supra* note 131.

188. RAND Institute for Civil Justice (2000).

189. ADVISORY COMMITTEE ON CIVIL RULES AND THE WORKING GROUP ON MASS TORTS TO THE CHIEF JUSTICE OF THE UNITED STATES AND TO THE JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT ON MASS TORT LITIGATION (Feb. 15, 1999) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

attorneys who represented all major points of view and judges who handled class actions.

The advisory committee proposed amendments addressing four main areas: the timing of the certification decision and notice; judicial oversight of settlements; attorney appointment; and attorney compensation.[190] Taken as a whole, the package was intended to protect individual class members, enhance judicial oversight and discretion, and further the overall goals of the class-action device—efficiency, uniform treatment of like cases, and access to court for claims that cannot be litigated individually without sacrificing procedural fairness or bringing about other undesirable results.

The unsuccessful 1998 Rule 23 amendments were intended to control and eliminate "inappropriate" class actions. They were substantive in nature. But the advisory committee was unable to achieve a consensus defining what types of actions were inappropriate for class-action treatment. On the other hand, the 2003 amendments were procedural in nature, often embodying the "best practices" of the courts. The committee successfully achieved a consensus on their application, and, unlike the 1998 proposed amendments, these amendments were promulgated and took effect in 2003.

A. Timing of Certification

Included in the package of proposed amendments to Rule 23 that the advisory committee declined to adopt in 1997 was an amendment to Rule 23(c)(1), which would have changed the requirement that a certification decision be made "as soon as practicable" into a requirement that the decision be made "when practicable." Although public comment was largely favorable, the Standing Committee declined to approve the amendment in 1997 on two grounds. The first was that it would be better to consider all Rule 23 changes in a single package, the consideration of which had been deferred in anticipation of the Supreme Court's pending decision in *Amchem Products, Inc. v. Windsor*.[191] The second was a concern that the change in wording would encourage courts to delay deciding certification motions, leading to unwarranted increases in precertification discovery into the merits of class suits and unduly delaying compensation of class claimants.

The advisory committee suspected that most courts did not rigidly construe the rule's "as soon as practicable" provision to require an immediate certification decision on filing.[192] The committee requested the Federal Judicial Center to study the practices of the courts and report on the disposition times between filing of the certification motion and disposition. The

190. Judge Lee H. Rosenthal, current chair of the Advisory Committee on Civil Rules, chaired the Class-Action Subcommittee that drafted the 2003 amendments to Rule 23 with the assistance of Reporter Edward H. Cooper and Special Reporter Professor Richard L. Marcus.

191. 521 U.S. 591 (1997).

192. "The change in part reflects the reality that most courts take several months to determine whether to certify a class." Minutes of Advisory Committee on Civil Rules 3 (Mar. 12, 2001), *available at* http://www.uscourts.gov/rules/Minutes/CRACMM01.pdf.

Center's study confirmed the committee's suspicion and showed that a court generally made a certification decision only after the deliberation required for a sound decision.[193] The study also showed that courts decided certification motions promptly, but only after receiving the information necessary to decide whether certification should be granted or denied and, if certification is granted, how to define the class. Significantly, the study showed that courts not infrequently disposed of motions to dismiss and motions for summary judgment before rendering a decision on a certification motion.[194]

The advisory committee slightly modified the language in the 1996 proposal. The committee introduced a new variation on the "when practicable" language, calling for a certification determination "at an early practicable time."[195] The proposed Rule 23(c)(1)(A) was intended to reflect existing good practices of courts that moved promptly, but not hastily, in rendering a certification decision. The Committee Notes clearly state that the amended language was not intended to permit undue delay or permit extensive discovery unrelated to certification.[196]

The amended rule was not a matter of semantics, though it required careful reading. Many courts had recognized the important consequences of the court's certification decision and, despite the language of the rule, declined to make the certification decision immediately. These courts allowed a certain amount of discovery, which was often useful during this period to illuminate issues bearing on certification, including: the nature of the issues that would be tried; whether the evidence on the merits was common to the members of the proposed class; whether the issues were susceptible to class-wide proof; and what trial-management problems the case would present.[197] The proposed amendment authorized the more flexible approach that these courts had taken to class-action litigation. But the rule's literal emphasis on speed in making the certification decision had led other courts to believe that they had no discretion to address non-certification issues in the period before certification.

The advisory committee was sensitive to concerns that any substantial delay in the certification decision might be used as a tactical opportunity for counsel to present arguments addressing the probable outcome of the case.[198] As the Committee Notes discuss, certification discovery should not

193. WILLGING, *supra* note 131, at 27–37. "The best practice is emphasized in the Committee Note: the court and parties should take as much time as may be needed to support a thoughtful certification decision, but no more." Minutes of Advisory Committee on Civil Rules 14–15 (Apr. 23–24, 2001), *available at* http://www.uscourts.gov/rules/Minutes/CRAC401.pdf.

194. WILLGING, *supra* note 131, at 30.

195. FED. R. CIV. P. 23(c)(1)(A).

196. FED. R. CIV. P. 23(c)(1)(A) advisory committee's note (2003).

197. "In this sense it is appropriate to conduct controlled discovery into the 'merits,' limited to those aspects relevant to making the certification decision on an informed basis." FED. R. CIV. P. 23(c)(1)(A) advisory committee's note (2003).

198. Minutes of Advisory Committee on Civil Rules 29 (Apr. 2000), *available at* http://www.uscourts.gov/rules/Minutes/400minCV.pdf.

address the weight of the merits or the strength of the evidence.[199] The amendment permitted discovery on the nature of the merits issues, which might be necessary for certification decisions, while postponing discovery pertaining to the probable outcome on the merits until after the certification decision had been made. By making it clear that the timing of a certification decision, and related discovery, is limited to that necessary to determine certification issues, the amended rule and Notes give courts and lawyers guidance that was lacking in the rule. The amendment conformed the rule with the approach taken by experienced judges. The public comment on the proposed amendment was generally favorable.[200]

B. Order Certifying a Class

Amended Rule 23(c)(1)(B) specifies the contents of an order certifying a class action. Under the amendment, a court must define the class it is certifying and identify the class claims, issues and defenses. The fuller description in the certification order facilitates application of the Rule 23(f) interlocutory appeal provision by ensuring an adequate record for appellate review. The amendment also requires that the order appoint class counsel under Rule 23(g). The explicit cross-reference to the counsel appointment provision is important because it provides the court with an opportunity to set conditions controlling and regulating attorney activities and fee arrangements at the commencement of the class action.

Under amended Rule 23(c)(1)(C), a court may amend an order granting or denying class certification at any time up to "final judgment." The former rule prohibited amendment of the order after "the decision on the merits," which might occur before final judgment. The change avoids possible ambiguity in the reference to "the decision on the merits." It might apply, for example, to a determination of a particular decision on the merits, like liability, made *before* final judgment, dissuading some courts from amending the order even though final judgment had not been entered in the case. In such cases, there may be a need to amend the class definition or subdivide the class after a finding of liability but before determining a remedy.

Rule 23(c)(1)(C) was also amended to delete the provision for conditional class certification to avoid the unintended suggestion that class certification may be granted on a tentative basis, even if it was unclear that the rule requirements had been satisfied.[201] Although every certification order is "tentative" in the sense that it can be changed at any time prior to final

199. FED. R. CIV. P. 23(c)(1)(A) advisory committee's note (2003).

200. Minutes of Advisory Committee on Civil Rules 15 (Apr. 23–24, 2001), *available at* http://www.uscourts.gov/rules/Minutes/CRAC401.pdf. The Committee Note recognizes that some "controlled" discovery may be necessary to inform the certification decision. In most class-action cases, the committee was advised that certification discovery was not a serious problem. Minutes of Advisory Committee on Civil Rules 19 (May 6–7, 2002), *available at* http://www.uscourts.gov/rules/Minutes/CRAC0502.pdf.

201. The committee recognized the need to "avoid any hint that a tentative class certification is appropriate." *Id.* at 14.

judgment, the advisory committee did not intend to promote lax practices by providing an incentive to courts to certify questionable actions knowing that the decision could later be changed under a "no harm, no foul theory."[202] In fact, the certification decision often has immediate practical effects that can be decisive in some cases, and the amendments were designed to highlight its importance. The court's power to later redefine or decertify the class was left undisturbed.

C. Notice

The amended Rule 23 requires notice of as many as three separate events to inform class members of: (1) the certification of a class action, (2) settlement of a class action, and (3) application for class counsel fees. The notice requirements can often be combined in a single notice to reduce costs. The amendments made no substantive change in existing practices.

1. Class-action Certification

There was no explicit provision for notice of a class certification in Rule 23(b)(1) and (b)(2) classes, although notice was mandatory in (b)(3) classes. The advisory committee had considered requiring some notice, not necessarily individual notice, in every (b)(1) and (b)(2) class action, even though participation in these types of class actions was mandatory. The notice was intended to provide members an opportunity to challenge the certification, class definition, or class representation. Non-profit organizations vehemently objected, contending that the additional costs incurred in providing more extensive notice would effectively prevent them from pursuing important actions.[203] The committee remained troubled, however, that members of classes certified under (b)(1) or (b)(2) have interests that maybe adversely affected without any prior notice.

The advisory committee ultimately withdrew the mandatory notice provision in (b)(1) and (b)(2) actions. The committee was persuaded that the potential cost and its adverse effect on the viability of the action might have a chilling effect on the commencement of these actions. Nonetheless, the committee decided to retain an explicit provision leaving the notice decision to the court's discretion, even though such authority already existed in another part of Rule 23.[204] Although redundant, the explicit provision was adopted to serve as a reminder and as an encouragement.

---

202. "'Certify now, think later' is not a good procedure." Minutes of Advisory Committee on Civil Rules 16 (Apr. 23–24, 2001), *available at* http://www.uscourts.gov/rules/Minutes/CRAC401.pdf.

203. Civil rights plaintiffs and representatives of non-profit organizations protested that the proposal would deter filing worthwhile cases. Minutes of Advisory Committee on Civil Rules 15 (May 6–7, 2002), *available at* http://www.uscourts.gov/rules/Minutes/CRAC0502.pdf.

204. FED. R. CIV. P. 23(d)(2).

In any class certified under (b)(1) or (b)(2), the amendments explicitly state that a court in its discretion may direct appropriate notice of certification to the class.[205] Notice to (b)(1) and (b)(2) classes, as compared with (b)(3) classes, is intended to serve more limited, but important, interests, such as the interest in monitoring the conduct of the action. The Committee Note expressly cautions courts to exercise the authority to direct notice with care. The court retains the discretion not to direct any type of notice after balancing the risk that notice costs may deter the pursuit of class relief against the benefits of notice in the particular case. If the court decides that notice is appropriate, it also need not require notice to be made in the same manner as in a (b)(3) action by individual notice, particularly because there is no right to request exclusion from (b)(1) and (b)(2) classes.

For a class action certified under Rule 23(b)(3), the amended rule retains the traditional language requiring the court to direct the best notice practicable under the circumstances to class members. An earlier draft permitted notice to be sent to a "sampling of class members" if the cost of individual notice was excessive compared with the generally small value of individual claims. The Committee spent much time on this provision, but eventually dropped it because of *Eisen* due process concerns.[206]

2. Settlement Notice

There are several key elements in the amendments governing notice of a class-action settlement or dismissal. The amended rule says that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise."[207] First, notice must be given in a reasonable manner, which may require individual notice depending on the circumstances of the case. Second, notice is required only for dispositions that bind the class through claim or issue preclusion. "[N]otice is not required when the settlement binds only the individual class representatives."[208] Third, the provision applies only to voluntary dismissals. It does not apply to court-ordered dismissals, like those following a summary judgment or motion to dismiss. This distinction was recognized in case law. Fourth, notice is not required for pre-certification dismissals. An earlier draft would have required court approval and such notice, which had been required by courts in some cases, but the committee dropped the proposal because of cost concerns and doubts about its value or effectiveness.[209]

205. The committee note suggested that general notice, like a "simple posting in a place visited by many class members" might be helpful in particular class actions by facilitating more participation by the class members. FED. R. CIV. P. 23(c)(2)(A) advisory committee's note (2003).

206. The advisory committee was also concerned that it might "seem unfair to afford an opportunity to opt out to some class members while effectively withholding it from others." Minutes of Advisory Committee on Civil Rules 4 (Mar. 12, 2001), *available at* http://www.uscourts.gov/rules/Minutes/CRACMM01.pdf.

207. FED. R. CIV. P. 23(e)(1)(B).

208. FED. R. CIV. P. 23(e)(1)(B) advisory committee's note (2003).

209. The advisory committee received many comments on the proposed amendment that indicated that absent class members would unlikely be prejudiced when a case was dismissed before the

Also under an earlier draft, a court was explicitly authorized to order a defendant to advance part or all of the expense of notifying a plaintiff class if the court found a strong probability that the class would win on the merits. But that provision was dropped because it was tied to a proposal, also later dropped, that explicitly allowed exploration of the merits as part of the (b)(3) certification decision.

3. Attorney Fees Notice

Notice to class members of counsel's fee application is required in all instances. The requirement applies solely to class counsel fee motions. Only the parties must be served notice of fee motions by others, including objectors, because these motions usually cannot be filed in time to be included in the settlement notice required by Rule 23(e).

The notice of class counsel's attorney fees motion must be "directed to class members in a reasonable manner."[210] This mimics the language in Rule 23(e) governing notice of settlements. The advisory committee hoped that this requirement would not often result in an "extra" notice, at least in settled class actions when the notice usually would be combined with the settlement notice. In class actions that were actually litigated at trial, the court would have to fashion the type of notice depending on the circumstances of the case to avoid undue expense, perhaps limiting notice to publication or to a sampling of class members. Notices should be sent in time to provide objectors adequate time to review the application.

4. Plain English Notice Requirement

The advisory committee heard many complaints about the complexity and unreadability of class-action notices. Notices advising putative class members of their rights are notoriously difficult to comprehend. At best, the dense language and fine print in some notices reflect counsel's anxiety that no important item be omitted for fear of a malfeasance challenge; at worst, the language may reflect a tactical decision to befuddle putative class members. The committee realized that it is virtually impossible to provide information about most class actions that is both accurate and easily understood by non-lawyers.[211] The amendments require what the cases treated as aspirational: the notice in a (b)(3) class-action certification "must concisely and clearly state in plain, easily understood language" its contents.[212]

---

decision was made on whether to certify it as a class. In most cases the absent class member is unaware of the filing, and the filing's dismissal would not have affected the member's decision to file a separate action. Minutes of Advisory Committee on Civil Rules 15 (May 6–7, 2002), *available at* http://www.uscourts.gov/rules/Minutes/CRAC0502.pdf.

210. FED. R. CIV. P. 23(h)(1).

211. The advisory committee realized that merely requiring clear language might not make a huge difference. It hoped that examples of good notices might be effective. The Committee Note expressly refers to model notices produced by the Federal Judicial Center. Minutes of Advisory Committee on Civil Rules 8 (Oct. 2000), *available at* http://www.uscourts.gov/rules/Minutes/CRACMOOO.pdf.

212. FED. R. CIV. P. 23(c)(2)(B).

The amendments set out the contents of the notice. The first three items are new to the rule, although they are commonly explained in notices, and include: (1) nature of the action, (2) definition of the class certified, and (3) class claims, issues, or defenses. The notice must contain other information, which was already required by the rule, including information noting: (1) "[a] class member may enter an appearance through counsel if the member so desires," (2) "the court will exclude from the class any member who requests exclusion," and (3) the "binding effect of a class judgment on class members under Rule 23(c)(3)." The committee dropped a requirement that the notice explain the "consequences of membership," because it would hopelessly complicate the wording and frustrate the amendment's purpose.

The Federal Judicial Center developed model plain-English notices using focus groups and linguistics experts. The notices are referred to in the Committee Notes and can be found on the Federal Judicial Center website.[213] They are based on three hypothetical cases. One involves a products liability claim, another involves a securities claim, and the third involves an employment discrimination claim. The notices include a single summary page and attached full sample notices explaining the settlement terms, the opt-out election, and attorney fees. The notice for the securities claim is also translated into Spanish.[214]

D. Settlement Review

The need for improved judicial review of proposed class settlements, along with the abuses that can result without effective judicial review, was a recurring theme in the testimony and written statements submitted to the advisory committee during public comment on the 1996 rule proposals. These concerns, of course, echoed John Frank's fears of collusive agreements between defendants and plaintiffs' counsel during the committee's consideration of Rule 23 in 1962–1966. The 2003 amendments to Rule 23(e) focused on strengthening the provisions governing the process of reviewing and approving proposed class settlements in a setting that often lacks the light brought by an adversary process, because both parties are in agreement when presenting the settlement to the court.[215] These amendments differed from the settlement amendments proposed (and later withdrawn) in 1996, which authorized the certification of an action solely for settlement purposes.

213. Federal Judicial Center, http://www.fjc.gov (last visited Dec. 22, 2005).

214. The Committee Note to Rule 23 published in 2001 recommended that the court determine whether notice in another language was appropriate. After public comment, the advisory committee decided to delete the recommendation. It concluded that such level of detail was too much and better suited to the MANUAL FOR COMPLEX LITIGATION (Third) (1995). Minutes of Advisory Committee on Civil Rules 19 (May 6–7, 2002), *available at* http://www.uscourts.gov/rules/Minutes/CRAC0502.pdf. One of the model notices prepared by the Federal Judicial Center, however, is translated into Spanish.

215. "[B]uilding on the perception that once class representatives and class adversaries join together in urging approval the court often lacks the vigorous adversary presentation needed to test the settlement." Minutes of Advisory Committee on Civil Rules 21–22 (Apr. 23–24, 2001), *available at* http://www.uscourts.gov/rules/Minutes/CRAC401.pdf.

The rule was amended in several respects, codifying "best practices" of courts for reviewing settlements.[216] First, it requires court approval of any settlement, voluntary dismissal, or compromise of a class claim, but only in cases in which a class has been certified.[217] Approval is not required if class allegations are withdrawn as part of a disposition reached before a class is certified since putative class members are not bound by the settlement. The committee was concerned that a voluntary dismissal before certification by the named class parties could prejudice class members under certain circumstances.[218] Absent class members, however, rarely rely on the filing and tolling of limitations periods. Under these circumstances, the committee did not approve the proposal because it was not convinced that requiring additional notice, which could be prohibitively expensive, was justified.

Second, the amendment requires notice of a proposed settlement, but only when class members would be bound by the settlement.[219] The notice must be issued to the class in a "reasonable" manner; individual notice is not required in all classes or all settlements.

Third, the amended rule adopts for the first time an explicit standard for approving a settlement for a class: the proposed settlement must be "fair, reasonable, and adequate."[220] This is the standard that has been stated in the case law. The district court must also make findings to support the conclusion that the settlement meets this standard.[221] These requirements represent the principal safeguards established by the rule to protect class members from collusive agreements between defendants and plaintiffs' counsel. An earlier draft of the amendment contained a lengthy list of factors to be considered in determining whether a settlement agreement was reasonable. The list was later transferred to the Committee Note, and still later it was withdrawn altogether primarily because the Note was too long.[222] The advisory committee believed that the list provided

216. Minutes of Advisory Committee on Civil Rules 6 (Oct. 2000), *available at* http://www.uscourts.gov/rules/Minutes/CRACMOOO.pdf.

217. FED. R. CIV. P. 23(e)(1)(A).

218. "The most obvious concern is that class members may have relied on the pending class action to toll the statute of limitations. Dismissal without notice may cause forfeiture of claims because limitations periods expire before class members recognize the danger." Minutes of Advisory Committee on Civil Rules 23 (Apr. 23–24, 2001), *available at* http://www.uscourts.gov/rules/Minutes/CRAC401.pdf. The committee concluded that "most class-action filings do not receive the kind of public attention that could realistically lead to any reliance. Another concern, however, has been that class allegations may be filed for strategic reasons, and may be dropped for strategic advantage." Minutes of Advisory Committee on Civil Rules 17 (Jan. 22–23, 2002), *available at* http://www.uscourts.gov/rules/Minutes/CRAC 0102.pdf.

219. FED. R. CIV. P. 23(e)(1)(B).

220. FED. R. CIV. P. 23(e)(1)(C).

221. The requirement is intended to require a court to make specific findings sufficient to persuade the court that the proposed settlement is "fair, reasonable, and adequate." Minutes of Advisory Committee on Civil Rules 5 (Mar. 12, 2001), *available at* http://www.uscourts.gov/rules/Minutes/CRACMM01.pdf.

222. The list included the following factors:

- comparison of the proposed settlement with the probable outcome of a trial on the merits
- probable time, duration and cost of trial

useful guidance but concluded that the existing case law in each circuit sufficiently addressed these factors.[223] The committee also feared that placing the list in the rule could be counterproductive. The courts might construe such a list as "exclusive," restraining case law development, or they might apply it mechanically.[224]

Fourth, the amendment requires parties to file statements identifying any agreements made in connection with settlements.[225] Such "side agreements" can be important to understand the terms the parties and counsel have agreed to but sometimes fail to disclose to the court.[226] Some side agreements may influence the terms of settlement by trading away possible advantages for some members of the class in return for advantages for others. The advisory committee discussed whether to require the parties to file every side agreement or require the parties only to disclose the existence of such an agreement.[227] In the end, the committee required only disclosure of such agreements, leaving it to the court's discretion whether to require filing of the entire document. Requiring the disclosure of side agreements was not intended, however, to automatically become the occasion for discovery by the parties. Nonetheless, a party can be directed to

---

- probability that the class claims, issues or defenses could be maintained through trial on a class basis
- maturity of the underlying substantive issues
- extent of participation in the settlement negotiations by class members or representatives
- number and force of objections
- probable resources and ability of the parties to pay, collect or enforce settlement
- effect of the settlement on other pending actions
- existence and probable outcome of similar claims by other classes
- comparison between the results achieved for individual class members by the settlement and the results achieved for other claimants pressing similar claims
- number of class members opting to exclude themselves from the class
- reasonableness of attorney fees

Minutes of Advisory Committee on Civil Rules 15–16 (May 6–7, 2002), *available at* http://www.uscourts.gov/rules/Minutes/CRAC0502.pdf.

223. The advisory committee decided to provide a general citation to the MANUAL FOR COMPLEX LITIGATION (Third) (1995) and a contemporaneous decision (In re: Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283 (3d Cir. 1998)), which cited the law of other circuits on this issue, as guidance. FED. R. CIV. P. 23(e)(1)(C) advisory committee's note (2003).

224. Judges might feel compelled to apply every factor to each case, disregarding relevant factors that were omitted from the list. Minutes of Advisory Committee on Civil Rules 7 (Oct. 2000), *available at* http://www.uscourts.gov/rules/Minutes/CRACMOOO.pdf.

225. FED. R. CIV. P. 23(e)(2). The requirements under an earlier draft were broader and would have required disclosure of any "understanding" in connection with the settlement. But the advisory committee concluded that the term "agreements" in the rule was sufficiently broad and would cover unwritten agreements. Moreover, the term "agreement" was a familiar legal term, while "understandings" was open to interpretation. The committee declined to include the term "understanding." Minutes of Advisory Committee on Civil Rules 21, 23 (May 6–7, 2002), *available at* http://www.uscourts.gov/rules/Minutes/CRAC0502.pdf.

226. Examples of side agreements included: (1) separately negotiated settlements of present and future claimants; (2) splitting attorney fee arrangements; and (3) limitations on future uses of discovery materials. Minutes of Advisory Committee on Civil Rules 13 (Oct. 2000), *available at* http://www.uscourts.gov/rules/Minutes/CRACMOOO.pdf.

227. The proposed amendment published for comment in 2001 would have only authorized a "court to direct parties to file a copy or summary of any agreement or understanding made in connection with the proposed settlement." Minutes of Advisory Committee on Civil Rules 16 (May 6–7, 2002), *available at* http://www.uscourts.gov/rules/Minutes/CRAC0502.pdf.

provide the court or the other parties (with appropriate confidentiality safeguards) with a copy of the full terms of any agreement identified by any party as made in connection with the settlement.

E. Second Opt-Out Opportunity

Amended Rule 23(e)(3) expressly authorizes a court to condition its acceptance of a proposed settlement agreement on a party's willingness to provide a second opportunity to opt out of a (b)(3) class if settlement is proposed after expiration of the original opportunity to request exclusion. The provision enhances judicial discretion to provide absent class members the same ability to opt out with knowledge of the settlement terms as is enjoyed by members of the many (b)(3) classes that are considered for certification at the same time that a settlement has been reached. But there is no presumption that a second opt-out opportunity should be afforded to the class members.

A second opt-out opportunity was seen to strengthen the fairness of the process. When a case is certified for trial before settlement has been reached, a class member may have to decide whether to opt out well before the member has adequate information to understand the nature and scope of liability and damages. Settlement may be reached after the class members' opportunity to request exclusion has expired, and after substantial changes in class members' circumstances and other aspects of the litigation. The amendment permits the court to refuse to approve a settlement unless a new and second opportunity is afforded to request exclusion, at a time when class members can make informed decisions based on the proposed settlement terms.[228]

The presumption of consent that follows a failure to affirmatively opt out at the time of certification may be affected significantly when circumstances have changed materially from the time when the class action is finally settled. In these cases, a second opt-out opportunity might relieve individuals of the unforeseen consequences of inaction or decisions made at the time of certification, when limited meaningful information was available. Moreover, the second opt-out opportunity may provide added assurance to the supervising court that a settlement is fair, reasonable and adequate. Settlements that are unfair will be rejected by class members exercising their second opt-out option.

An earlier proposal would have authorized an opt-out opportunity in settlements involving (b)(1) and (b)(2) class actions. But the advisory committee rejected that proposal because class participation was mandatory in these actions.[229] Another early proposal would have established a presumption in favor of a second opt-out option by providing a class member

228. "A decision to remain in the class is likely to be more carefully considered and is better informed when settlement terms are known." FED. R. CIV. P. 23(e)(3) advisory committee's note (2003).

229. Minutes of Advisory Committee on Civil Rules 6 (Mar. 12, 2001), *available at* http://www.uscourts.gov/rules/Minutes/CRACMM01.pdf.

with a "right to opt out of a proposed settlement unless good cause is shown to deny the opportunity to opt out."[230] The committee decided to leave the question of the second opt-out opportunity entirely to the court's discretion.

The second opt-out option arose from the advisory committee's concern that a judge often is not in a good position to decide whether a particular settlement is fair. In a typical case, both parties present a settlement agreement that they are happy with. The problem is how to determine whether a particular settlement might be unfair or the product of collusion, a fear expressed by John Frank in the committee's 1962–1966 discussions. At first, the committee focused on enhancing the rights of third party objectors as a safeguard to draw the court's attention to unfair settlements. The committee considered proposals providing objectors with discovery rights and fee arrangements to strengthen their position.[231] But the committee heard about many abuses involving "repetitive" objectors, who intervened solely for tactical reasons to delay proceedings, offering to withdraw their objections for a fee.[232]

The advisory committee considered alternative suggestions to appoint a class guardian, steering committee of nonrepresentative class members, special master, or direct judicial involvement by a magistrate judge to supervise and evaluate a settlement. But these proposed devices raised more questions than they answered.[233] When these efforts to bolster the role of "neutral" officers failed, Judge Levi suggested that a second opt-out opportunity might serve as an equally effective alternative, affording some degree of protection against an unfair settlement. If the bargain achieved by a collusive settlement was bad, the class member could reject it by exercising a second opt-out option.

The second opt-out opportunity introduces a measure of class member control that is consistent with traditional litigation. At a basic level, the second opt-out opportunity gives class members the same opportunity to

230. *Id.* at 21.

231. The proposal would have also authorized a court to award fees to unsuccessful objectors under certain circumstances. The advisory committee declined to adopt any of the proposals enhancing the status of objectors. Minutes of Advisory Committee on Civil Rules 22 (Apr. 23–24, 2001), *available at* http://www.uscourts.gov/rules/Minutes/CRAC401.pdf. The committee conceded that drafting a rule regulating objectors that fairly distinguished between "good" and "bad" objectors was difficult. Minutes of Advisory Committee on Civil Rules 6 (Oct. 2000), *available at* http://www.uscourts.gov/rules/Minutes/CRACMOOO.pdf.

232. "[I]t was noted that there are professional objectors who 'go from settlement to settlement'; 'they want to be, and unfortunately are bought off.' 'Their weapon is time.'" *Id.* at 11.

233. *Id.* at 9–10. The advisory committee declined to adopt a proposal authorizing a court to appoint a magistrate judge or other neutral party to investigate the reasonableness of the proposed settlement. The committee concluded that the process would be perceived as inquisitorial and would be inconsistent with our traditional adversarial process. Minutes of Advisory Committee on Civil Rules 22 (Apr. 23–24, 2001), *available at* http://www.uscourts.gov/rules/Minutes/CRAC401.pdf. It also rejected the proposal because of the increased delay and cost it would cause. Minutes of Advisory Committee on Civil Rules 10–11 (Oct. 2000), *available at* http://www.uscourts.gov/rules/Minutes/CRACMOOO.pdf.

accept or reject a proposed settlement as persons enjoy in individual lawsuits. It also provides an opportunity that is as meaningful as the opportunity afforded in the many cases that now reach settlement at the same time certification is ordered.

The second opt-out option will make a difference only in cases in which the class is certified and the initial opt-out period expires before a settlement agreement is reached. It is irrelevant in the many cases in which a settlement agreement is submitted to the court simultaneously with a request that a class be certified. Even when applicable, moreover, a court may decide that the circumstances make providing a second opportunity to request exclusion inadvisable. The case may have been litigated to a stage that makes it similar to a fully tried suit and that reduces the need for a second opportunity to opt out. There may not have been a significant change in circumstances or lapse in time between the initial opt-out opportunity and the settlement. There may be other circumstances that make the additional opt-out opportunity inadvisable. Accordingly, the amendments provide a court with broad discretion to assess and determine whether in the particular circumstances a second opt-out opportunity is warranted before approving a settlement.

The advisory committee carefully considered concerns that a second opt-out opportunity might inject additional uncertainty into settlement negotiations and create opportunities unrelated to the purpose of the second opt out, potentially defeating some settlements and making others more costly.[234] In this view, the second opt-out opportunity might provide an unfair advantage to class members who could reap the benefits of class representation by opting out and initiating separate litigation. Further, if too many class members opted out, the fees of counsel for work representing the class could be substantially diminished. Finally, concerns were raised that attorneys not participating in the named class action would mount advertising campaigns soliciting opt outs from class members during a second opt-out stage, promising higher awards than those proposed under the settlement terms.[235] In effect, the initial settlement often would establish the "floor" recovery that could be exploited by members exercising the second opt-out option in later negotiations.[236]

These concerns were offset by a history of class-action litigation that included provisions in settlement agreements allowing a second opt-out opportunity. Generally, such agreements had not scuttled class-action settlements. Many cases settled before certification in the knowledge that class members would be given an opportunity to opt out. And when settlements

234. Opponents contended that any proposal that increased the opportunity to opt out of class actions would make achieving settlements more difficult. *Id.* at 6.

235. Minutes of Advisory Committee on Civil Rules 23–24 (Mar. 12, 2001), *available at* http://www.uscourts.gov/rules/Minutes/CRACMM01.pdf.

236. In some cases involving a second opt-opt opportunity, lawyers began advertising as soon as the settlement had been disclosed to attract potential opt-out class members as clients. "They intend to bargain up from the settlement floor, and to win larger fees than would be available through participation in the class action." *Id.* at 24.

were reached after expiration of the original exclusion period, the terms—particularly in mass-tort actions—had often included a second opt-out opportunity. The possibility that "too many" class members might opt out during a second-opportunity stage, leaving a defendant with a less comprehensive settlement, was usually guarded against by including provisions in the settlement agreement allowing the parties to abandon the settlement if a predetermined number or proportion of the class took advantage of the second opt-out opportunity.[237]

Although providing a second opt-out opportunity might change the dynamics of the negotiation process in some cases, the advisory committee was persuaded that ensuring the fairness of the process outweighed any potential efficiency loss and that provision of the opportunity in appropriate cases, in the court's discretion, would not unduly disrupt settlements. The committee was confident that the district judges would apply their discretion to employ this new tool prudently. Moreover, those in the defense bar who harbored reservations about the second opt-out option preferred it, nonetheless, as an alternative to enhancing the role of a class member objecting to the settlement.

F. Class Counsel Appointment

Examinations of class-action practice have recognized the crucial significance of class counsel selection. But Rule 23 nowhere addressed the selection or responsibilities of class counsel. The adequacy of counsel had been considered only indirectly as part of the Rule 23(a)(4) determination whether the named class representatives would fairly and adequately protect the interests of the class.[238]

Amended paragraph (g)(1)(A) explicitly recognizes the requirement that class counsel be appointed by the court for each certified class, unless a statute such as the Private Securities Litigation Reform Act establishes different requirements.[239] The amendments provide a court with an opportunity to seize control of the class counsel designation at the outset of litigation. The amendments incorporated experiences under Rule 23(a)(4) and filled in the gaps by articulating the responsibility of class counsel and providing an appointment procedure.[240]

---

237. Moreover, a large number of class members opting out of a settlement would signal that perhaps the settlement terms were not fair. *Id.* at 25.

238. FED. R. CIV. P. 23(g) advisory committee's note (2003).

239. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995). The amendment for the first time expressly authorizes a court to appoint class counsel. Minutes of Advisory Committee on Civil Rules 17 (May 6–7, 2002), *available at* http://www.uscourts.gov/rules/Minutes/CRAC0502.pdf. The advisory committee considered a proposal that would have required a magistrate judge to select class counsel, avoiding any appearance that the trial judge's later rulings were based on favoritism. The committee declined to adopt the suggestion because of delay concerns and because the existing selection process had not created many problems. *Id.* at 27–28.

240. Special Reporter Professor Richard L. Marcus drafted the proposals dealing with appointment of class counsel and attorney fee awards.

Amended paragraph (1)(B) states that class counsel "must fairly and adequately represent the interests of the class."[241] The Committee Note discusses the distinctive role of class counsel, making it clear that the relationship between class counsel and individual class members, including the class representatives, is not the same as the one between a lawyer and an individual client. Appointment as class counsel entails special, paramount responsibilities to the class as a whole. The advisory committee stopped short of imposing "fiduciary" duties on class counsel.[242] The committee was concerned that the extensive body of law defining fiduciary duties would pose problems when applied to class counsel.

Amended paragraph (1)(C) sets out the criteria that a court must consider in appointing class counsel to "fairly and adequately represent" the class. The criteria include the work counsel has performed in the action, counsel's experience in complex litigation and knowledge of the applicable law, and the resources counsel will commit to the representation.[243] Amended paragraph (2) sets out the appointment procedure for class counsel. Paragraph (2)(A) points out that the court may appoint interim counsel during the precertification period as a case-management measure.[244]

Amended paragraph (2)(B) recognizes that the court's scrutiny of potential class counsel will differ depending on whether there are multiple applicants for the position. If there are multiple applicants, the court must appoint the applicant "best able to represent the interests of the class." The Note recognizes that one factor that may be important in selecting class counsel in the multiple-applicant situation is an existing attorney-client relationship between the class representative and counsel. But if there is only one applicant, the court may make the appointment if the applicant can "fairly and adequately" represent the class under the criteria specified

241. "[T]he primary responsibility of class counsel . . . is to represent the best interests of the class." FED. R. CIV. P. 23(g)(1)(B) advisory committee's note (2003).

242. "References to the 'fiduciary' role of class counsel have disappeared." Minutes of Advisory Committee on Civil Rules 9 (Mar. 12, 2001), *available at* http://www.uscourts.gov/rules/Minutes/CRACMM01.pdf. The committee was sensitive to concerns that the rule not encroach on professional responsibilities regulated by the states. Minutes of Advisory Committee on Civil Rules 29 (May 6–7, 2002), *available at* http://www.uscourts.gov/rules/Minutes/CRAC0502.pdf.

243. The advisory committee added the factor that the court should consider the prospective counsel's "knowledge and experience in the law as a relevant factor independent of experience with complex litigation" to ensure that counsel other than the established class action bar may be considered for appointment as class counsel. *Id.* at 17.

244. An early proposal would have prohibited any counsel from conducting court proceedings on any matter related to the class action, including out-of-court settlement negotiations, until appointment as class counsel. The committee was especially concerned about ineffective counsel representation and counsel selling out the class in a settlement before certification. Minutes Advisory Committee on Civil Rules 15 (Oct. 2000), *available at* http://www.uscourts.gov/rules/Minutes/CRACMOOO.pdf. The committee decided that the rule should not attempt to regulate attorneys before certification. "The Note also recognizes that counsel may do things to develop the action for certification, and otherwise engage in orderly development of the action, before the certification determination. These proper activities may include settlement discussions." Minutes of Advisory Committee on Civil Rules 36 (Apr. 23–24, 2001), *available at* http://www.uscourts.gov/rules/Minutes/CRAC401.pdf.

in Rule 23(g)(1)(C).[245] Requiring more than the stated standard can invite delay and unnecessary costs.[246] The applicants would ordinarily file information with the court describing their suitability for the appointment.[247] The amended rule takes no position on auctions or similar judicial efforts to engender competition.

Paragraph 2(C) expressly authorizes the court to include provisions regarding attorney fees in the order appointing class counsel. Under the amendment, a court may direct potential class counsel to provide additional information to assist it in making the appointment decision, including the proposed terms of an attorney fee award.[248] The provision encourages counsel and the court to reach early, shared understandings about the basis on which fees will be sought. Such a provision has been encouraged by judges emphasizing the importance of judicial control over attorney fee awards. This feature might forestall later objections to the fee request, serve as a more productive way for the court to deal in advance with fee award matters that seem to defy regulation after the fact, and accommodate competing applications or innovative approaches when appropriate.

G. Attorney Fees

The advisory committee recognized attorney fees as a principal source of abuse in class actions. Although courts are responsible for approving fee awards in class actions, the existing procedures were not helpful in providing judges with information adequate to discharge their responsibilities. The committee developed several proposals to address Rule 23's fee awards shortcomings within the Rules Enabling Act limits.[249]

The attorney fee provision in new Rule 23(h) contains five main features dealing with: scope; procedure governing the fee motion; factors to be considered in awarding reasonable fees; objections to the fee request; and court findings and award of fees. In general, these amendments are not intended to change existing grounds for fee awards. Rather, they codify best practices and are designed to provide a uniform procedure for making fee awards.

The scope of the amendments is straightforward. Under the amendments, a court may award attorney fees, first, only after an action has been

245. An application to serve as class counsel must be submitted to the court even if there is only one applicant who seeks to represent the class. Minutes of Advisory Committee on Civil Rules 15 (Oct. 2000), *available at* http://www.uscourts.gov/rules/Minutes/CRACMOOO.pdf.

246. Public comments to the published version of the amendment to Rule 23 in 2001 suggested that the rule and proposed Committee Note encouraged a court to generate competition when there was only one applicant for class counsel. The Note was revised "to show that there is no intent to favor competition when there is none." Minutes of Advisory Committee on Civil Rules 17 (May 16–17, 2002) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

247. FED. R. CIV. P. 23(g)(2) advisory committee's note (2003).

248. "The court may also direct counsel to propose terms for a potential award of attorney fees and nontaxable costs." FED. R. CIV. P. 23(g)(1)(C) advisory committee's note (2003).

249. Minutes of Advisory Committee on Civil Rules 32 (Apr. 2000), *available at* http://www.uscourts.gov/rules/Minutes/CRAC401.pdf.

certified as a class action; and, second, only when "authorized by law or by agreement of the parties."[250] As recognized by existing law, this could include fees for attorneys not designated class counsel, for example, for work done by an objector or for work done before certification. The provision makes clear that the amendment does not supersede statutory attorney fee provisions, like those in the Private Securities Litigation Reform Act.[251]

The general attorney fee provisions contained in Rule 54(d)(2) continue to govern the fee motion for awarding class counsel fees, with some explicit exceptions. The first exception deals with the time to file the motion. Under Rule 54, a fee motion must be filed within fourteen days of entry of judgment. The advisory committee was concerned that linking the motion time with the entry of judgment would prove confusing in class actions, and might allow counsel to delay filing beyond the most useful time. Rather than address these problems by simply providing a longer period to file the motion, the committee decided to rely on district court discretion, with some guidance in the Committee Note, to set the time when counsel must file the motion.

To facilitate the court's evaluation and awarding of the fee, the fee provision is structured to work in tandem with the appointment-of-class-counsel provision in new Rule 23(g), which allows a court to consider fee terms during the appointment stage. Specifically, a court may impose conditions on the award of attorney fees as part of its order appointing class counsel.[252] By doing so the court can maintain better control over the expenses throughout the litigation. For example, the court may require that class counsel provide interim fee reports as the case progresses. These periodic reports may require counsel to set up specific recordkeeping of time and costs incurred in the representation.[253] Some of this information may be confidential and the disclosures should then be made under seal. As part of its order the court may also require disclosure of any side agreements dealing with fee sharing made before the appointment and any such agreement entered into during the litigation.[254]

The advisory committee heard many complaints about excessive attorney fees.[255] Although greater control of fee awards would go far in addressing many class-action abuses, the changes that the advisory committee

250. FED. R. CIV. P. 23(h).

251. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995).

252. The rule is careful to place the responsibility of awarding a reasonable fee on the court and not on the attorney, because the states' professional responsibility and disciplinary standards apply to the attorney's request for a fee award. Minutes of Advisory Committee on Civil Rules 32 (May 6–7, 2002), *available at* http://www.uscourts.gov/rules/Minutes/CRAC0502.pdf.

253. The amendment builds on a recommendation of the 1990 Federal Courts Study Committee report to consider attorney fees at the commencement of the action so that an agreement could be reached covering "such matters as the level of staffing and the forms of work that will be compensated." Minutes of Advisory Committee on Civil Rules 37 (Apr. 23–24, 2001), *available at* http://www.uscourts.gov/rules/Minutes/CRAC401.pdf.

254. FED. R. CIV. P. 23(h) advisory committee's note (2003).

255. The summary of the RAND class-action report indicated that fees were the major problem associated with class-action abuse. Minutes of Advisory Committee on Civil Rules 32 (Apr. 2000), *available at* http://www.uscourts.gov/rules/Minutes/400minCV.pdf.

could accomplish through procedural rules are limited by Rules Enabling Act constraints.[256] Direct regulation of fee awards is a matter better suited for legislative intervention. One of the primary purposes of the Private Securities Litigation Reform Act, for instance, was to control attorney fees awards in securities litigation.[257]

The amendments set out a single criterion for awarding class counsel fees. The fees must be "reasonable."[258] The committee concluded that greater detail was not appropriate because, first, it was important for the case law to continue to develop in this area; and second, the committee recognized that there will be necessary and valid variations from circuit to circuit. There was considerable discussion whether the committee should take a position on the lodestar or percentage approach for uniformity's sake.[259] In the end, the committee decided to take no position because it considered the matter substantive and outside the Rules Enabling Act authority.

The Committee Note mentions some factors to be considered in determining whether a request for fees is reasonable. The first factor is the result actually achieved for class members. The committee was especially concerned about coupon settlements, which may have little value. It was also concerned about recoveries based on future payments. The Note suggests that a court consider delaying payment of at least a portion of counsel fees until actual payouts to the class. A second factor is that courts should give weight to agreements among the parties about the attorney fees, although the court remains ultimately responsible for setting the fee.

Early drafts included a long list of factors to be considered. The list was adapted from factors identified in the leading cases. The advisory committee feared that a list might be considered as an "exclusive" list, no matter how explicit the admonishment that other factors may be considered. The committee was also concerned that a list would be applied mechanically and that it could stymie case law development of other factors. Although the laundry list of factors was not adopted, it does provide useful guidance.

These factors included:

256. The advisory committee declined to adopt a suggestion that the fee award be tied into the actual recovery that the class received. *Id.*

257. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat.737 (1995). The Act provided large institutional investors, like those handling pension plans and mutual funds, with authority to select class counsel in actions affecting their holdings. The theory was that these institutional clients would have a self-interest to exert more control over the class counsel and drive a better bargain reducing fee awards. But prescribing effective standards in this area is particularly difficult. A business article reported that certain law firms responded to the Private Securities Litigation Reform Act by developing cozy relationships with institutional investor officials, including public officials overseeing public pension plans, in order to secure their approval as class counsel. It alleges that "[t]hese [public and union pension] boards, rather than cutting back on lawsuits and pressing lawyers for lower fees, have jumped into bed with them." Neil Weinberg & Daniel Fisher, *The Class Action Industrial Complex,* FORBES, Sept. 20, 2004, at 150, 153.

258. FED. R. CIV. P. 23(h).

259. FED. R. CIV. P. 23(h) advisory committee's note (2003).

- time devoted to the class action given its nature, complexity, and duration, which would also include any precertification work
- terms proposed by counsel in seeking appointment
- financial risks borne by counsel
- professional quality of the representation
- any agreement among the parties with respect to the fee application
- any agreement by class counsel to divide the fees
- fee awards in similar cases and the reasonableness of any nontaxable costs
- and when considering awarding fees to objectors, the presence, extent, and quality of objections

Rule 23(h) also provides for objections to a fee motion. Only a class member and any party from whom payment is sought may object to the class counsel fee motion. Nonsettling defendants, for example, may not object. The rule leaves open the time within which to make the objection. An earlier draft explicitly authorized discovery by an objector, but it was later dropped. Instead of placing it in the rule, the Committee Note makes clear that limited discovery may be requested to determine whether the fee is reasonable. But broad discovery should not normally be approved. If discovery is permitted, it is limited to objections raised by the objector. Moreover, objections are subject to Rule 11. An explicit reference to Rule 11 was dropped from an earlier draft because it might have drawn too much attention and deterred valid objections.

VIII. THE ROAD AHEAD FOR FEDERAL RULEMAKERS

Rule 23 was revised in 2003 to enhance judicial supervision of class counsel, the deliberateness of the certification decision, and the judicial review of settlements. Not surprisingly, an ever-growing number of cases have been filed in certain state courts where this kind of supervision is perceived as less demanding.[260] This movement from federal court to state court can often result in multiple filings of multi-state diversity class actions in both federal and state courts.[261] Yet this result is precisely the outcome that the class-action device was designed to prevent. The purpose of the class-action device is to eliminate repetitive litigation, promote judicial efficiency, and achieve uniform results in similar cases. But duplicative class litigation undermines these goals. Multiple filings can threaten appropriate

260. Actions on behalf of national classes are being increasingly filed in state courts. Minutes of Advisory Committee on Civil Rules 3 (Oct. 17–18, 1996), *available at* http://www.uscourts.gov/rules/Minutes/cv10-1796.htm.

261. Minutes of Advisory Committee on Civil Rules 30 (Apr. 2000), *available at* http://www.uscourts.gov/rules/Minutes/400minCV.pdf. The committee in 1963 recognized this possibility but discounted it, probably because the overall number of class actions was not significant. Minutes of Advisory Committee on Civil Rules 7 (Oct. 31–Nov. 2, 1963) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

judicial supervision, damage the interests of class members, hurt conscientious class counsel, impose undue burdens of multiple litigation on defendants, and needlessly increase judicial workloads.[262]

The advisory committee has been particularly concerned with state court filings on behalf of classes that include plaintiffs from other states. Many of these actions seek—and frequently obtain—certification of nationwide classes. Membership in these classes may overlap with classes sought—or actually certified—in other courts, state or federal. Pretrial preparations may overlap and duplicate proceedings in federal court, proliferating expense and forcing delay. Settlement negotiations in an action filed in federal court may be played off against negotiations in an action filed in state court, raising the fear of a "reverse auction" in which class representatives in one court accept terms less favorable to the class in return for rewards reaped by successful class counsel.

The certification of nationwide or multi-state class actions in one state court can intrude on federal interests. Large nationwide and multi-state class actions, involving class members from multiple states who have been injured in multiple states, are the kind of national litigation that is consistent with the purposes of diversity jurisdiction and appropriate to jurisdiction in federal court. Federal jurisdiction protects the interests of all states outside the forum state. An individual state court may properly apply the policy choices of its residents to its own citizens. But local authorities should not impose those choices outside their own states.[263]

The problems generated by overlapping, duplicative and competing class actions have been well documented and have attracted the attention of many observers. According to the American Law Institute's 1994 Complex Litigation Project, the problems caused by multiple class actions are so pressing that "[w]e are in urgent need of procedural reform to meet the exigencies of the complex litigation problem . . . . Repeated relitigation of the common issues in a complex case unduly expends the resources of attorney and client, burdens already overcrowded dockets, delays recompense for those in need, results in disparate treatment for persons harmed by essentially identical or similar conduct, and contributes to the negative

262. "The Advisory Committee concluded by consensus that this information shows that indeed there are serious problems [arising from parallel filings in state and federal courts] that are not being adequately addressed." Minutes of Advisory Committee on Civil Rules 12 (Jan. 22–23, 2002), *available at* http://www.uscourts.gov/rules/Minutes/CRAC0102.pdf.

263. "On the basis of this extensive inquiry, the Advisory Committee finds that overlapping and duplicative class actions in federal and state court create serious problems that: (a) threaten the resolution and settlement of such actions on terms that are fair to class members, (b) defeat appropriate judicial supervision, (c) waste judicial resources, (d) lead to forum shopping, (e) burden litigants with the expense and hardship of multiple litigation of the same issues, and (f) place conscientious class counsel at a potential disadvantage." Report of the Advisory Committee on Civil Rules to Standing Committee on Rules of Practice and Procedure 15–16 (May 7, 2002) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

image many people have of the legal system."[264] Although the Federal Judicial Center's study focused on class-action dispositions in only four federal districts over a period of two years, it found several illustrations of unresolved duplicative filings.[265] The RAND class-action study confirmed the seriousness of the problem.[266]

Several bills were introduced in Congress to deal with overlapping class actions by establishing minimal diversity jurisdiction in federal courts, i.e., at least one defendant and one plaintiff from different states. In March 1988, the Judicial Conference approved in principle the extension of minimal diversity federal jurisdiction to consolidate multiple litigation in state and federal courts involving personal injury and property damage arising out of a "single event."[267] This position was confirmed in March 2001 when the Judicial Conference advised Congress that the federal judiciary supported the "Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001."[268] Under the bill, which was later enacted into law, minimum diversity would be established if at least one defendant and one plaintiff were from different states.[269] In addition, the Federal Courts Study Committee recommended that Congress "should create a special federal diversity jurisdiction, based on the minimal diversity authority conferred by Article III, to make possible the consolidation of major multi-party, multi-forum litigation."[270]

The House of Representatives passed the Class Action Fairness Act of 2002 to provide easier access to federal courts in class actions by establishing minimal diversity jurisdiction.[271] In 1999, the Judicial Conference opposed a bill whose core minimal diversity jurisdictional requirements were similar to the Class Action Fairness Act. Under the earlier bill, a class action could be filed in federal court or removed from state court to federal court if there was minimal diversity among the parties. The Conference opposed the bill as drafted, "noting concerns that the provisions would add substantially to the workload of the federal courts and are inconsistent with principles of federalism." As drafted, the bill contained no effective limitation or threshold requirement on class actions that could be brought to or removed to federal court. The bill did not establish a feasible mechanism to control the number of class actions potentially filed in or removed to federal courts.

The advisory committee considered addressing the problems created by overlapping class actions through new provisions in the Civil Rules that

264. AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS 9 (1984–1994).

265. WILLGING, *supra* note 131, at 78–79.

266. DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS PURSUING PUBLIC GOALS FOR PRIVATE GAIN 416 (2000).

267. Judicial Conference of the U.S., *Reports of the Proceedings of the Judicial Conference of the United States* 21–23 (1988).

268. H.R. 860, 107th Cong. (2001).

269. 28 U.S.C. § 1369 (2005).

270. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 44–45 (1990).

271. H.R. 860, 107th Cong. (2001).

would prohibit a party from filing a class action that was similar to an action that already had been certified or for which certification had been denied.[272] Serious objections, however, were made to these draft rule amendments.[273] Both Enabling Act limits and Anti-Injunction Act limits were invoked. The issues presented were thoroughly discussed at a conference sponsored by the advisory committee at the University of Chicago Law School in October 2001. The committee concluded that there might be room to adopt valid rules provisions in the face of these objections, but to do so might test the limits of its rulemaking authority, inviting litigation over the rules themselves.[274]

In light of the constraints on rulemaking, and because of the sensitive issues of jurisdiction and federalism implicated by overlapping class actions, the advisory committee concluded that Congress was the appropriate body to deal with the question.[275] The committee envisioned several approaches that could be considered to consolidate overlapping class actions by bringing them into federal court. Legislation could be introduced, modeled on earlier bills, which could establish minimal diversity jurisdiction in federal court for class actions of a certain size or scope, with exceptions pertaining to actions involving primarily citizens of a single state. Another approach would be to authorize the Judicial Panel on Multidistrict Litigation to determine on a case-by-case basis whether particular class-action litigation should be removed to federal court.[276] This approach could prove to be flexible over time, enabling the federal court system to respond to actual problems as they arise and remain inactive when the problems are effectively resolved in the state courts. Suggestions were often made to authorize individual federal courts to coordinate federal litigation with overlapping state court actions by enjoining state court actions, if necessary, when the state court actions threatened to disrupt litigation

272. The advisory committee considered adopting a proposal that would have authorized a court that refused to certify a particular action to "direct that no other court may certify a substantially similar class to pursue substantially similar claims, issues, or defenses unless a difference of law or change of fact creates a new certification issue." Minutes of Advisory Committee on Civil Rules 16 (Apr. 23–24, 2001), *available at* http://www.uscourts.gov/rules/Minutes/CRAC401.pdf.

273. Minutes of Advisory Committee on Civil Rules 8 (Mar. 12, 2001), *available at* http://www.uscourts.gov/rules/Minutes/CRACMM01.pdf.

274. "The same view was expressed by observing that any rule solution will raise serious questions of authority. Whatever the actual resolution of the authority question might be, there can be no good outcome of a process beset by such challenges and doubts." Minutes of Advisory Committee on Civil Rules 13 (Jan. 22–23, 2002), *available at* http://www.uscourts.gov/rules/Minutes/CRAC0102.pdf.

275. "Certification preclusion may be a good idea, but it 'feels like legislation.' Perhaps it should be left for action by Congress." Minutes of Advisory Committee on Civil Rules 17 (Apr. 23–24, 2001), *available at* http://www.uscourts.gov/rules/Minutes/CRAC401.pdf. Dean Acheson proposed a similar concept in 1963 when he suggested that the "Supreme Court should appoint several Circuit judges to sit and decide whether this should be a class action and if so in which of the various courts it has been brought in it should go forward." Minutes of Advisory Committee on Civil Rules 25 (Oct. 31–Nov. 2, 1963) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

276. Minutes of Advisory Committee on Civil Rules 14 (Jan. 22–23, 2002), *available at* http://www.uscourts.gov/rules/Minutes/CRAC0102.pdf.

filed in federal court. Although this approach may have the apparent advantage of leaving federal jurisdiction where it is, it also has the obvious disadvantage of potential conflict and tension between the court systems.

After considerable discussion, the advisory committee supported the concept of minimal diversity jurisdiction for large, multi-state class actions in which the interests of no one state are paramount, with appropriate limitations or threshold requirements so that the federal courts are not unduly burdened and the states' jurisdiction over in-state class actions is left undisturbed.[277] Congress is addressing the issue, although the outcome remains uncertain.

IX. CONCLUSIONS

Rule 23 of the Federal Rules of Civil Procedure is unlike any other federal rule. The Advisory Committee on Civil Rules substantially amended it in 1966 to address specific problems that had emerged over the rule's twenty-eight-year existence. But the amended rule evolved far beyond the drafters' expectations, raising a new generation of difficult issues. Part of the problem is attributable to the rule's success. The class-action joinder mechanism provides an efficient procedure to dispose of multiple claims by multiple claimants, which the bench and bar find attractive. To reach more cases, the bench and bar have creatively construed and applied the rule in ways not contemplated by the rule's drafters. As the reach of the rule has expanded to new areas, the number of unfair results it has produced has increased. It has been unable to bear the additional demands imposed on it. The history of the amendments to Rule 23 reflects an ongoing effort by the advisory committee to rein in the use of the class-action device in inappropriate cases without unduly interfering with the rule's operation in appropriate cases.

Today's advisory committee has been working on the operation of Rule 23 for over a decade. The committee often refers to the class-action discussions of past committees, which remain relevant today. This article has described the basic themes and overarching issues that have emerged from the committee's study, which can provide useful guidance to state rulemakers who are considering adopting or amending a class-action rule. A brief recounting of these themes and issues concludes the article.

Professor Charles Alan Wright, the dean of proceduralists, early on identified two of the fundamental Rule 23 themes and issues that continue to be relevant today. Class actions can implicate substantive rights. Ordinarily, the legislature is better suited to address substantive rights, while the judiciary is better suited to address procedural court proceeding matters. Proposed procedural amendments to the rule, however, often overlap substantive matters. The extent to which a particular proposed amendment

277. For an extended discussion of the advisory committee's consideration of overlapping class actions, see Minutes of Advisory Committee on Civil Rules 11–19 (Mar. 12, 2001), *available at* http://www.uscourts.gov/rules/Minutes/CRACMM01.pdf, and Minutes of Advisory Committee on Civil Rules 17–21 (Apr. 23–24, 2001), *available at* http://www.uscourts.gov/rules/Minutes/CRAC401.pdf.

to the class-action rule crosses over to substance must be carefully evaluated in deference to the legitimate role of the legislative branch of government. Yet it must not be forgotten that the judicial branch created the class-action device and it remains responsible to address its failings to the extent that it can act within the Rules Enabling Act limits.

Professor Wright recognized a second basic theme that relates to many rule amendments, one especially pertinent to the class-action rule. A recurring question is whether judges should be provided wider discretion in fashioning class actions, or should they be given less discretion, constrained by specific conditions and procedures that they must follow. Open-ended discretion has the advantage of providing a judge greater flexibility to handle specific problem class actions, but it also provides less guidance to judges and lawyers inexperienced in class actions.[278] Moreover, significant problems can arise in an outlier jurisdiction that exercises broad discretion inappropriately. Even a single mismanaged class action can have nationwide consequences.

One of the primary purposes of the original Rule 23 was to facilitate the joinder of multiple small claims by multiple claimants that as a practical matter could not be litigated individually. A change in the rule to facilitate the use of the class-action device in these small-claims class actions, however, might have an unintended adverse impact on other types of cases such as mass-tort and securities class actions. Moreover, facilitating the class-action device in small-claims actions or large mass-tort actions might be inconsistent with the public policy of certain jurisdictions, which might disfavor class actions that encourage private state attorneys general to police wrongdoers, detracting from the government's regulatory mechanisms. Finally, amendments facilitating class actions may implicate the "freeway effect" and provide too great an incentive to file inappropriate class actions, inundating the courts.[279]

The class-action device reaches its peak efficiency when combined with settlement agreements. But the fairness of a settlement agreement, which is entered into between defendants and plaintiff counsel without the

278. A good example of one approach was set out in the letter signed by 150 law professors opposing the settlement provisions proposed by the advisory committee in 1996. The professors strongly recommended that the proposal provide more detailed direction to judges and criticized the proposal because it was cast in minimalist terms without necessary limitations and conditions. Memorandum from Patrick E. Higginbotham, Chair, Advisory Committee on Civil Rules to the Committee on Rules of Practice and Procedure 5 (June 10, 1996) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts). Professor Charles Alan Wright echoed these views: "I think if we're going to draw rules, we should have rules that point the way toward answers, not rules which lead, if not to amiable chaos, to judicial anarchy." Minutes of Advisory Committee on Civil Rules 14 (Oct. 31–Nov. 2, 1963) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

279. The "freeway effect" was an ever-present concern of the advisory committee. The committee did not want any of its proposals to open the floodgates to class actions. "If it were possible to find the equivalent in formal drafting language, the rule should caution against 'willy-nilly' certification." Minutes of Advisory Committee on Civil Rules 10 (Nov. 9–10, 1995), *available at* http://www.uscourts.gov/rules/Minutes/min-cv11.htm.

active participation of all other class members, including absent class members, can raise issues of fairness and the appearance of fairness. Strengthening the oversight and governance of settlement agreements without unduly undermining the parties' ability to enter these agreements is essential in any proposal to adopt or amend a class-action rule. Finally, safeguards restricting overlapping and duplicative filings of the same class action in the same state or in federal district court should be recognized and addressed.

The advisory committee wrestled with each of these basic questions. As Judge Patrick Higginbotham succinctly observed: "The issues attending class actions are difficult and divisive, exposing deep political differences. There are no easy choices."[280] The committee thoroughly examined all aspects of every proposed amendment because it understood that even a minor change in the class-action rule might have enormous consequences. Its discussions were often exhaustive and detailed. The committee's decision making is a matter of public record. That record is extensive and can be productively mined by state rulemakers contemplating adopting or amending a class-action rule.

280. Memorandum from Patrick E. Higginbotham, Chair, Advisory Committee on Civil Rules to the Committee on Rules of Practice and Procedure 2 (June 10, 1996) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).