

# RULE 23: CHALLENGES TO THE RULEMAKING PROCESS

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*Three decades have elapsed since Rule 23 of the Federal Rules of Civil Procedure last underwent revision. Taking a cue from proposed amendments prepared by the Civil Rules Advisory Committee, Professor Cooper asks whether now is the appropriate time to revise Rule 23. In this Article, he identifies three potential "big changes" to the Rule: substantially curtailing class actions; accommodating the needs of mass-tort actions; and recognizing the class as an entity, distinct from its representatives. After outlining and critiquing the Advisory Committee's draft, Professor Cooper raises a host of questions about many aspects of Rule 23 and suggests that perhaps we do not know enough about the operation of the current version of the Rule to undertake effective reform. Although he cautions against revision of Rule 23 before we obtain answers to some of the questions posed, Professor Cooper remains optimistic that the Rule can be improved in some ways without great cost.*

## INTRODUCTION

For some time now, the Civil Rules Advisory Committee has been studying the possibility of amending Rule 23 of the Federal Rules of Civil Procedure. Following suggestions of an American Bar Association Committee, a comprehensive draft was prepared during

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This paper was prepared to summarize many of the challenges that confront the Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure as it studies Rule 23. Once a strong draft of a revised Rule 23 had been prepared, the Committee undertook many activities to gather informal advice. This Symposium has been one of those activities. This Symposium paper serves both internal and external purposes. The external purpose is to continue the process of reaching outside the Committee for further advice on the need and opportunities to revise Rule 23. The internal purpose is to provide a starting point for further Committee deliberations, recognizing that the Committee will continue to gather additional information and—if it concludes that the time has come to pursue the revision process to the next step, a recommendation that the Standing Committee approve publication of a revised rule for public comment—will likely recommend a draft rule that departs substantially from the draft described in this paper. Many of the paper's assertions and questions blend comments that have been made to the Committee or to individual Committee members, more or less formally, over a period of years. Footnotes to these assertions would be misleading even if they were possible. The research for the Federal Judicial Center Study, referred to at intervals, was only half complete when this paper was prepared. References to the completed study would weaken the quality of this paper as an artifact of the Committee process midstream. So few plausible occasions for citations remain that the Symposium editors have graciously agreed to defer to the author's vain desire to publish the paper as it was considered by the Committee, free of any encumbering footnotes.

the time when the Committee was chaired by Judge Sam Pointer. Copies of two iterations of that draft are attached as appendices. It seems fair to describe the draft as in many ways a modest revision that would clean up many aspects of the Rule, and—through deliberately flexible drafting—leave the way open for some measure of future growth. By now, the draft has been reviewed informally by a goodly number of practicing lawyers, judges, and academics. Reactions have varied. The academics, and to some extent the judges, have viewed the draft as indeed modest, a conservative but worthwhile effort to improve some obvious rough spots that does not attempt to take on the larger or more difficult questions. The practicing lawyers also have tended to view the draft as modest, but believe that the cost of adoption would far exceed the possible benefits. In their eyes, it has taken nearly three decades to beat Rule 23 into a workable instrument, an achievement that would be set back at least a decade if they were given the chance to litigate and strategize about the proposed changes.

These mixed reactions point up the questions that, in the end, are most important: Has the time come to attempt any changes in Rule 23? If so, what—and how dramatic—should they be?

Even this articulation of the questions assumes that it is appropriate to study Rule 23 with an eye to possible improvement. That assumption, at least, seems sound. The unspoken barrier that shielded Rule 23 from Enabling Act scrutiny for many years has come down. Rule 23 was last revised in 1966. The 1966 version of the Rule has taken on a life that would have astonished the Advisory Committee. Answers have been given to many questions that were not, could not, have been foreseen. A comprehensive review of this experience is now appropriate. It would be astonishing if this review were to show that we have, by a common-law process of elaborating Rule 23, developed an ideal class action procedure. Surely there is room, both here *and* there, to improve the Rule.

The conclusion that this is an appropriate time to study Rule 23 does not mean that this is an appropriate time to change Rule 23. Improvement carries its own costs as lawyers and judges struggle to understand, implement, amplify, and take strategic advantage of the intended changes. And if there is room to improve, there also is room to confuse, weaken, or even do great harm. Perhaps more to the point, seizing the opportunity to make modest improvements today will surely mean that Rule 23 will not be revisited for many years. If more significant or better improvements might be made in five years, or ten, it likely would be better to defer present action. There is no imperative to act once a problem is studied, no shame in inaction.

Much depends on the state of present knowledge and the quality of present foresight. Foresight is particularly important, not only in developing wise answers, but also in drafting them into a Rule that will deliver those answers in the face of determined attempts by adversary lawyers to wrest different answers from it.

A question framed in this way cannot be answered without also determining the measure of risk aversion appropriate to the Enabling Act process. The rulemaking process works best when it generalizes the lessons of actual experience in a smaller arena. That comforting security, however, is not always available. Rule 23 might never be amended if first we must have controlled experiments, or clear empirical measurement of actual local experience with a new provision. The Enabling Act process has often relied successfully on less rigorous evidence. The aggregated experience of all of those engaged in the formal rulemaking process, as well as the many insights provided by public comment and less formal processes such as this Symposium, can provide a secure foundation. But judgments can and do differ about the lessons of experience. There are seldom likely to be changes to any rule that do not encounter some risk, however small the rule and the changes may seem. Some risks are properly accepted. If there is a clear problem and no experience-tested solution, real risks may justifiably be run. If there is no clear problem, an esthetic desire to pretty up a rule does not justify any significant risk. The urgency of the need is as important an element as the state of knowledge and quality of foresight.

In many ways, the pending reconsideration of Rule 23 provides a good test of the Enabling Act process. If the process can operate only when there are rigorous and clear answers to the important questions about present experience, Rule 23 must remain out of reach. If the process also requires rigorous and clear predictions as to the effects of any changes, Rule 23 is even further beyond our reach. Prediction of the effects of a new rule in comparison to continued judicial evolution of the present rule, to development of other possible methods of aggregation, or to individual litigation, never will be precise. And it is simply impossible to reckon with such questions as the possible impact of new court rules in encouraging or discouraging procedural or substantive lawmaking by Congress or state legislatures.

As if these questions were not difficult enough, consideration should extend beyond the federal courts. State courts too are in the class action business, and many are likely to adapt their rules to the federal rules. It is proper at least to consider the experience of state courts, and to attempt to draft a rule that recognizes the role of state-law claims not only in federal court but also in state courts.

The final caution is that there always is a temptation to do more than really should be done by rule. Even if firm answers can be found for all the questions, large and small, it is better to avoid complicating the rule with answers to all the small questions. Once the framework is established, judicial evolution may provide good—perhaps better—answers, and can be better than the formal rulemaking process at adapting the answers to changing needs. The Manual for Complex Litigation enjoys similar advantages in helping to shape developing practice.

As to Rule 23, my own mood at the moment is one of optimistic caution. The caution arises from the staggering array of questions without clear answers. Many of these questions are described below. Caution also arises from the dramatic new uses of Rule 23 in dispersed mass-injury cases. In that field, a perfect grasp of today's reality would be superseded before it could be captured in a clear rule. The optimism arises from the belief that there are some ways at least in which Rule 23 can be improved without great cost. The optimism also is the shiny back side of a darker view that it will be at least ten years before we know enough to be able to undertake more sweeping changes within the confines of the Rules Enabling Act process.

## I BIG CHANGES

There are two obvious occasions for making potentially big changes to Rule 23, one negative—from the perspective of class action fans—and one positive. The negative changes would seek substantial curtailment of class action practice. The positive changes would seek to capture and perhaps improve the growing efforts to adapt the present Rule to the needs of dispersed mass injuries. There also may be room for a third and essentially conceptual change, perhaps not so big but potentially important. This change would recognize openly that the class—amorphous, defined in the end only by judicial fiat—is an entity apart from those who volunteer (or may be coerced) to speak for it. It is, to be sure, a juridically created entity, and must speak through people just as a corporation must speak through people. But it may help to sharpen the focus on class-as-client, speaking through one set of agents to another. These possible changes are addressed at the outset, before turning to the more detailed, even niggling questions that may be addressed whatever is done about the larger issues. The big changes will be described in terms that reflect assumptions about current experience that are widely shared but unreliable. One of the most important tasks is to learn more about the realities that

underlie these and other assumptions, a task that the Federal Judicial Center is attempting. Reality may be different from perception, and perhaps markedly different. But large questions may provoke more diligent inquiry into reality, and thereby serve a purpose even if the questions prove irrelevant in the real world.

### *A. Cutting Back on Rule 23*

Virtually all of the current discussion assumes that there is little need even to tinker with the core of (b)(1) and (b)(2) classes. This tacit assumption is hardly surprising. There may be room to change such incidents as notice and the opportunity to opt out. Creation of an opportunity to opt out would provide an indirect means of addressing the conflicts among individual members of the groups that, because of similarities that at times may be only superficial, are assumed to constitute homogeneous classes. But there is no perceived need to rethink the justification for these classes. To the contrary, it is widely assumed that (b)(1) and (b)(2) classes represent the traditional and persistently legitimate core of Rule 23. They also account for a relatively small minority of all class actions.

It may be surprising, on the other hand, that there have been few suggestions that the time has come to rethink the public-enforcement function of (b)(3) classes. It is commonly accepted that (b)(3) classes, by providing a means for aggregating small claims that would not bear the cost of individual enforcement, have significantly expanded the effective reach of many substantive principles. This effect is not beyond examination, both to assess whether it is as pervasive as some observers assert and to determine whether it is desirable. Because the question is not at the front of discussion, it deserves only brief and preliminary expansion.

One consequence of (b)(3) classes can be likened to the "freeway effect." One lesson from the early years of urban freeway construction was that pre-freeway traffic volumes expanded quickly as freeways were opened. Given an opportunity for more convenient driving, more people drove more places. The same consequence flows from procedural devices that aggregate small claims into more convenient litigating units. This effect obviously touches the aggregation court as claims that otherwise would be filed elsewhere are brought to the aggregation court. It is widely believed that beyond this reallocation of business among courts, aggregation also increases the number of claims that are made in any court. It cannot be assumed that the result always is "more justice," even accepting the underlying substantive rules at full value. One obvious risk is that defeat of aggregated

claims will obliterate many claims that would have been justly vindicated in individual actions. That this risk is seldom discussed reflects the realistic assumption—of which more later—that aggregation creates a nearly irresistible force to award something to the claimants. Another risk is found in the common cynical observation that individual actions may be brought on ten or twenty percent of valid claims, while aggregated actions may be brought on one hundred and twenty percent of valid claims. Creating aggregating mechanisms that accurately sort out the unfounded individual claims may reduce the value of aggregation substantially.

A more troubling concern is that many of our substantive rules are tolerable only so long as they are not fully enforced. One version of this concern is that full enforcement simply costs more than it is worth. One illustration, not fanciful, is provided by the class action to recover on behalf of consumers who had been duped into buying recorded music “performed” by a group that lip-synched to a performance by other artists. Putting aside any lingering doubts about the nature of the injury, great cost is incurred in mounting the action, supervising it, possibly deciding it on the merits should settlement fail, and distributing relief. It is a real question whether the cost is justified by the individual benefits of the actual award, or the aggregate benefits from deterring similar behavior. In some settings, these costs can be reduced by finding substitute means of relief. For example, the offending musicians stage a free concert or reduce the price for the next record they actually perform themselves (if anyone will buy it), or a monetary recovery is awarded to a plausibly relevant charity.

Whatever ingenuity might devise by way of “fluid,” “cy pres,” or “class” recoveries, they present a question that can be articulated in at least two ways. The direct mode is to ask whether such dispersed benefits stray too far from the connection that justifies imposing private remedies for private wrongs. The more diffuse mode is to ask whether all substantive principles really merit pervasive enforcement. Many of our substantive principles are tolerable only if they are not fully enforced. (I do not offer any examples because each of my examples would offend some, whose counterexamples might at times offend me.)

One response to this question would be to inquire whether three decades of experience with broad enforcement of at least some substantive rules through (b)(3) class actions justifies significant retrenchment. The absence of any suggestion that this inquiry should be undertaken may reflect general satisfaction with Rule 23 as a private enforcement means for public values. Surely there are many who do feel satisfied. Perhaps even those who are not satisfied prefer

continuing evolution in the courts to the risks of revision in the rulemaking process. However that may be, the rulemaking process faces a separate problem. Specifically, Rule 23 has grown into a device with sweeping substantive consequences. Substantive consequences flow from good procedure as well as bad; it is not a ground for shrinking from a procedural improvement that it will facilitate more thorough enforcement of substantive principles. It is too late to argue that the 1966 creation of present Rule 23(b)(3) is invalid because of its profound substantive impact. But it would be different to cut back on Rule 23(b)(3) because of concern that it leads to over-enforcement of substantive rules. Revising Rule 23 to cut back its substantive consequences may be as much within the Enabling Act as its original adoption and subsequent amendment, but the motive would be perceived—and correctly so—as a desire to abridge substantive rights as they are now enjoyed. It may seem a paradox, but use of the Enabling Act process to correct its own excesses, even unanticipated excesses, is fraught with real controversy.

Two relatively modest steps might be taken toward cabinining the substantive effects of Rule 23. One, by far the simpler, would be to permit consideration of the balance between the need for private enforcement of public values through Rule 23 and the costs of the proceeding. A court might be permitted to conclude that regardless of the merits, certification is inappropriate in light of the effort required to superintend the litigation, the trivial nature of individual benefits, and the insignificant character of the alleged wrong. Using a term perhaps not appropriate for the language of a formal court rule, this approach would enable a court to refuse certification because a class action “just ain’t worth it.” Certification could be denied even on the assumption that the class has a strong claim on the merits.

The second limiting approach, in some ways related to the first approach, would be to undo present doctrine and permit or require preliminary consideration of the probable outcome on the merits. Although motions to dismiss for failure to state a claim or for summary judgment are more effective than many have thought in defeating suits brought as class actions, weak—and perhaps very weak—claims can survive such preliminary challenges. Certification of a claim that is likely to fail on the merits may consume an unwarranted share of scarce judicial resources. More important, certification of a weak claim can exert a strong pressure to settle to avoid the costs of defending a class action and even create a small risk of losing a large judgment.

It is tempting to analogize preliminary consideration of the merits to the approach taken in deciding whether to issue a preliminary in-

junction. The comfort provided by this analogy unfortunately proves illusory on examination. This should be no surprise, because the function of the inquiry differs in the two settings. The primary objective of a preliminary injunction is to preserve the opportunity to grant effective relief after trial—to preserve a meaningful opportunity to resolve the claim on the merits. The primary objective of refusing certification for class pursuit of claims that do not bear the freight of individual litigation is to protect against the burdens and corresponding pressures of class action litigation. This difference affects each of the four factors in the familiar injunction formula: (1) the threshold probability of success; (2) the harm of denying relief; (3) the harm of granting relief; and (4) the public interest.

There is no reason to suppose that the threshold probability of success on the merits should be measured in the same way in the two settings. At the outset, the preliminary injunction question is likely to be addressed at the beginning of the litigation on the basis of procedures affected by the need for promptness; more deliberate procedures, often including controlled discovery, are likely to be available in addressing the class-certification question. More important, the required level of probability is likely to fluctuate around a lower point in the class-certification setting, particularly when it seems highly probable that individual claims never will be resolved on the merits absent certification. Reducing the required probability of success also seems justified by the differences in consequences between class certification and preliminary relief, as reflected in the remaining three factors.

The harm of denying relief must be measured in the class setting more by appraising the merits of the class claim than by the real-world impact of ongoing conduct that might be controlled by injunction. It also is possible to develop a test that considers not only the prospect of class success but also the importance of class success, akin to the first suggestion. If little individual harm is done by denying relief, a relatively strong prospect of success might be demanded.

The harm of granting relief must be measured in the class setting by the burdens of the class-litigation process and the pressure to settle out of the litigation burdens, again not by the real-world impact of controlling primary human activity. The importance of class success affects this assessment inseparably from the assessment of the harm of denying class relief.

The public interest, finally, must play a far larger role in class-certification determinations than ordinarily occurs with preliminary injunction decisions. Class actions that aggregate small claims that cannot effectively be enforced one-by-one are more important as a means of vindicating and enforcing the underlying public purposes of

regulating legal rules than as a means of providing often trivial relief to individual claimants. Perhaps because it is so important, measurement of the public interest must begin with the question whether it is proper for courts to distinguish—or, in a less flattering word, discriminate—between the levels of public importance represented by different underlying legal rules and by different asserted violations of those rules.

No real comfort can be found in the preliminary injunction analogy. The suggestion that class certification should be affected by a preliminary look at the merits also must reckon with the collateral consequences of taking a look. The time for making the certification decision, for example, is likely to be postponed in order to provide an adequate basis for going beyond the showings required on motion to dismiss. Often it may be possible to rely on a summary judgment record for the conclusion that although summary judgment is not warranted, the case is so thin that class certification can be denied. But at other times a summary judgment motion may focus on only some parts of the case, leaving the need for more global exploration and appraisal. If a significant prospect of success is required, it may be appropriate to reconsider the question of whether a defendant should bear some part of the costs of notifying a plaintiff class. The proposal to create an opportunity for permissive interlocutory appeal from class-certification decisions is another example—if appraisal of the merits affects the certification decision, the nature of the appeal will be changed, the probable delay increases, and the court of appeals must wrestle with the prospect that permitting appeal will embroil it in consideration of issues that will reappear on a later appeal. Many other effects are likely to emerge, some that can be foreseen with diligent imagination and others that are beyond our powers of prediction.

Either of these proposals for cutting back on Rule 23(b)(3) may be challenged as inviting improper judicial discrimination among favored and disfavored substantive principles. An unadorned provision allowing consideration of the probable outcome on the merits would be least subject to this charge, but would not be immune. Consideration of the probable outcome has strong attractions nonetheless. The simplest form would add probable outcome on the merits as one of the factors to be considered with all other factors in deciding on certification. Whether in this simple form or some more complex variation, much good might be done in protecting against the risk—however symbolic or real—that weak claims can impose heavy burdens and, through the burdens, coerce unjust settlements.

The mood of the moment, at any rate, seems to be that Rule 23 should not be cut back significantly. At most, some support might be

found for permitting consideration of the probable merits of the class claim. The question is whether the Rule should be expanded, or at least made to work more effectively within its present sphere.

### *B. Mass Torts*

A great deal of attention is being focused on "mass torts," carefully distinguishing between "single-event" cases and those that arise out of more dispersed injuries. The single-event cases are exemplified by hotel fires, airplane crashes, bridge collapses, and other circumstances in which a concluded transaction has generated a known and identifiable universe of claimants. The dispersed injuries are exemplified by environmental contamination and product injuries—most prominently asbestos—in which a prolonged course of conduct produces effects that may span periods of years or even decades, generating unknown and perhaps unpredictable numbers of claimants who suffer a wide variety of injuries that range from trifling to serious or fatal. Whether or not the consequences of such events are well-suited to resolution through any variation of our adversary judicial process, courts have had to cope with them. The starting point has been traditional enough: as compared to the small claims that will not bear the costs of individual litigation, mass torts give rise to large numbers of individual actions. The questions arise from efforts to reduce the staggering costs of proceeding case-by-case, costs that include not only transaction costs but the inconsistent treatment of claimants who, on any rational ground, should be treated consistently. Many ingenious efforts have been made, often outside Rule 23, at times within the scope of Rule 23, and at times nominally within the scope of Rule 23 but well beyond the reach that anyone would have imagined until two or three years ago.

The mass-tort phenomenon provides a particularly inviting opportunity for creative rulemaking. In broad terms, the question is whether we can invent an aggregating procedure that, as compared to present procedures, affords better net results to most claimants than now flow from individualized litigation. Many lawyers would say that present practices have not achieved this goal; that, given a choice, an individual whose claim is sufficient to support individualized litigation usually is better off opting out of an aggregated proceeding. It would be a stunning triumph to develop a procedure that supersedes this judgment. The triumph would be stunning, however, because the difficulties are so great. Perhaps three groups of these difficulties merit attention: (1) lack of knowledge; (2) limits of the Enabling Act process; and (3) intrinsic limits of judicial procedure.

### 1. *Lack of Knowledge*

Lack of knowledge needs the least emphasis. We are in the infant stages of aggregating mass-tort litigation. Many different approaches are being tried. The wisdom and long-run success of these improvisations cannot be measured for years to come. The only thing that can be said with confidence is that some approaches are dispatching cases. The most recent and dramatic examples seek to resolve tens of thousands of cases and incipient cases through class-based settlements that are driven by the defendants' needs to buy "global peace" against (almost) all claimants, both those who have been injured in the past and those—"futures" claimants—who have not yet been injured. Dispatching cases, and on a reasonably uniform basis, is a great virtue. But the most dramatic approaches also are the most improvisatory. They also veer furthest from traditional judicial methods and closest to administrative systems. In one variation or another they are being applied to problems that are similar only in presenting large numbers of claims. Some settings have matured in the senses that the facts are (or seem to be) fully developed, the law is clear, and there is substantial experience with individual litigation that demonstrates the realistic strategic value of individual claims. Asbestos litigation is often offered as an example. Some settings may generate the particularly difficult questions of marshalling limited assets to meet competing present and future claims. Again, asbestos litigation provides a familiar example. Other settings have none of these characteristics. And no setting leaves us near the point of understanding evaluation.

It is confounding, for example, to contemplate the question of "maturity." The nature of dispersed torts virtually forecloses aggregation before some individual actions have been tried. If the plaintiffs should win all of a substantial number of individual actions, an aggregated adjudication that establishes liability seems sensible if courts should shy away from nonmutual issue preclusion. This approach becomes more troubling as the proportion of defense victories increases, and becomes more troubling in a complicated way. An aggregated once-and-for-all adjudication is not attractive at the other end of the spectrum, where plaintiffs should lose all of the same substantial number of individual actions. If the aggregated litigation should impose liability in favor of all remaining class members, we would be troubled by doubts as to the correctness of the result, and troubled also by the prospect that the earlier losers should remain without redress when many others are compensated through the class adjudication. Our doubts as to the correctness of the result might well be enhanced by fear that the unnerving prospect of denying all recovery

to every plaintiff may itself exert significant pressure to impose liability. And the alternative of a settlement that in effect establishes partial liability does not gladden all hearts. As much as we value private peacemaking, the compromise may reflect either the overwhelming power of the defendant to defeat claimants in one-on-one litigation or the overwhelming power of class litigation to coerce capitulation. Surely the outcomes of individual actions that have been tried to judgment should be considered in determining whether and how to aggregate remaining claims; the means of weighing this factor, however, cannot be easily described.

## 2. *Limits of the Enabling Act Process*

The limits of the Enabling Act are equally obvious. The Federal Rules of Civil Procedure cannot directly affect the subject-matter jurisdiction limits that may impede thorough-going aggregation in federal courts. Indirect effects might be possible, most likely through clarifying the conceptual character of class litigation, but this prospect is uncertain at best. There may be greater hope for addressing questions of personal jurisdiction, subject only to Fifth Amendment due process constraints; Rule 4(k)(2) may provide reassurance on this score. The Rules cannot do anything directly about the choice-of-law problems that beset aggregation, particularly through class actions. Indirect effects may be more plausible in this area, by such devices as opt-in classes for those who agree to abide by a specified choice of law, or narrow issues classes that seek to resolve fact issues or lowest-common-denominator issues of law application. Such indirect effects may help, but they fall far short of giving coherent focus to the traditional forces that generate widely disparate consequences, state by state, for a common course of activity pursued on a regional or national level. One approach may be to attempt a closer integration of the Enabling Act process with Congress, working toward simultaneous solutions in which new rules and new legislation follow parallel paths. Any such approach must be undertaken with great care, however, lest the great virtues of Enabling Act independence be gradually diminished.

## 3. *Intrinsic Limits of Judicial Procedure*

The intrinsic limits of judicial process require reflection on what can be and on what ought to be. What is possible depends not only on procedure but also on structure: It would be possible to provide prompt individual trials by traditional procedures to all asbestos claimants, for example, if only there were enough judges—and law-

yers—to handle them. Fewer lawyers and judges would be needed if common liability issues were resolved by preclusion, whether arising from a global class determination, nonmutual preclusion based on individual litigation, consent to “bellwether” litigation, or some other means. To note this possibility is not to champion it, even as an abstract possibility. In fact, no government is going to assume the direct costs, quite apart from a lingering wonder about the uses to be found for all those lawyers and judges, when the asbestos cases are cleaned up. More important for our purposes, traditional adjudication of such a mass of cases may not be desirable at all. If liability remains open in each case, there will be inconsistent determinations of liability—very few as time goes on, but some nonetheless. Even if liability is taken as established, like injuries will win dramatically different awards. We live with the inconsistencies and irrationalities that are inevitable in our system when they occur on small levels of low visibility. It is more difficult to accept them on a large and highly visible scale.

In the real world, individual litigation of all asbestos claims will not occur. If they are to be decided by courts, as they must be for want of any alternative, some expediting device must be found. Aggregation seems to be the answer, whether it is as modest as joint trial of ten or twelve cases at a time; as imaginative as projection of a selected sample of damages verdicts to a universe of claimants; or as ambitious as class-based settlement of tens of thousands of cases at one time. These and other aggregating devices share the virtues not only of saving costs but also of promoting consistent outcomes. They also reduce or eliminate individual control of individual litigating destiny and move courts away from the traditional roles that give reassurance of legitimacy. In the more dramatic forms, they may involve courts in relatively remote supervision of administrative tasks and structures such as claims-resolution facilities that bear scant resemblance to traditional adjudication. The departure from traditional structures and procedures reflects a carefully considered judgment that new means must be found to meet new needs, but the departure remains substantial.

Volumes have been written about mass-tort litigation, and whole shelves will be filled. Every branch of the bench and bar is contributing. The question for the rulemaking process is whether the successful beginnings can be identified and captured in a few hundred words that consolidate the good, discard the weak, and above all provide the flexibility needed for future growth. It is not particularly important whether the words are placed in Rule 23 or in some new “Rule 23.3.” But it is vitally important to know where to start. The most cautious approach is that embodied in the current draft. The draft includes an

increased emphasis on issues classes, and creates opt-in classes as well as expanded opportunities for opting out or defeating any opting out. These features were deliberately designed to support further development of Rule 23 in mass-tort cases without attempting to predict the direction or extent of the development. A bolder approach may be justified, but the information base must be secure.

### *C. Class As Entity and Client*

Rule 23 requires that a class be represented by a "member" of the class whose claims or defenses are "typical" and who will "fairly and adequately protect the interests of the class." Courts rightly seek to ensure adequate representation. Representation, however, can be provided by counsel. The role of the member-representative is more ambivalent. At times courts seem to want member-representatives who can fulfill the role of sophisticated client, exercising a wise and restraining judgment. At other times courts seem more concerned with the member-representative as a token, offered up to appease memories of a superseded client-adversary model that lingers only in tradition and the formal trappings of Rule 23(a). Representatives with no significant stake and no plausible understanding of the litigation may be accepted with good cheer. Nowhere is the ambiguity more obvious than in the decisions that recognize continued representation by a class member whose individual claim has been mooted.

The questions that surround the individual representative are reflected in recent congressional attempts to revise class action procedures for claims under the securities laws. One proposal would have required appointment of a guardian for the class; another would have required appointment of a steering committee of class members with very substantial individual stakes. These proposals evidently spring from a fear that there are no real clients in these actions, and—the important point—that the system suffers for the lack.

Class representation could be sought in many quarters. Many different forms of public representation are possible; none seems a likely candidate for adoption by amending Rule 23. The familiar alternatives include class members, organizations that represent group interests more than individuals, and class counsel.

The difficulties that surround class representation by a class member vary across a broad range, reflecting the broad range of class actions. When challenged acts have inflicted relatively trifling injury on many people, there is little incentive for an individual class member to devote any significant time or energy, much less money, to the common cause; if member-representatives are not literally hard to find,

the likely reason is that counsel who find representatives assure them that they need not really bother with things. Or perhaps other rewards for the representatives are involved. When significant numbers of people have suffered individual injuries that would support individual litigation, the problems are quite different. There are likely to be conflicts of interest, more or less acute, beginning with selection of the forum, definition of the class, choice of counsel, setting the goals of litigation, and so straight on to the end. These conflicts run almost indifferently among class members, representative class members, and counsel. Resolution is most likely to be effected by counsel, at times explicitly but often implicitly, in the course of making tactical decisions. Quite different problems may be involved with "institutional reform" litigation. An employment-discrimination class, for example, may include people of divergent interests and beliefs; representative members may not be aware of the divergences, or may prefer to present the image of a homogeneous class.

Organizations that maintain class actions behind the facade of individual representatives often provide highly effective representation, driven by commitment to lofty ideals and fueled by experience and sophistication. There is a risk, however, that ideological commitment may create as much conflict with the views and interests of class members as ever arises from divergences among class members themselves. There is little reason to believe that all problems disappear when an interest group assumes the role of client.

Class counsel often enough provide the originating genius of class actions. Very often they are the only source of informed, sophisticated judgment about the goals to be pursued, and in all but the exceptional case they must choose the means of pursuit. In most cases, effective representation will be provided by counsel, without substantial let or hindrance, or it will not be provided at all. Adverse reactions to this phenomenon arise from an array of concerns. A familiar concern is that class counsel in fact are the class: they seek out token representatives, pursue the class claim primarily for the sake of fees, and measure success by their own fees rather than class relief. A somewhat different concern is that ideologically driven counsel may persist in pursuing imagined class goals far beyond the point of optimum class benefit. In greater extremes, there may be a concern that nearly frivolous claims are pursued for nuisance or strike value, without any thought of class benefit.

These tensions surrounding adequate representation will not be resolved by any likely revision of Rule 23. Some help might be found, however, in subtle changes that focus on the class more and the member-representatives less. One direct approach would be to focus di-

rectly on representation of class interests, considering the involvement of class members as simply one factor bearing on adequacy. The class would be regarded as the client, and adequate representation by counsel as the test. The greatest virtue of this approach may be derided as little more than esthetic—it would greatly reduce the unseemly spectacle of recruiting representatives who know little or nothing of the dispute and are no more than token clients. But esthetics count for something; the cynicism that readily surrounds representative class members can taint the occasional genuinely representative member. More important, this common sham can exert a gradual corrosive effect that weakens more significant constraints on the behavior of counsel. Beyond the esthetics, focus on the class as the client might improve our approach to other problems. Mootness doctrine could focus solely on the life and death of the class claim, without the complicated doctrines that permit certification to relate back to the time before the individual representative's claim became moot, continued representation by a mooted representative, and the like that now cloud the picture. Discarding the image of the representative's claims as typical might encourage a more direct focus on the definition of the class and on the conflicts that may require multiple classes or subclasses. And courts would become more obviously responsible for ensuring adequate representation.

The entity concept of the class might afford one useful perspective for addressing the question of whether class counsel also should represent individual class members. At least when individual class members have claims that would support individual litigation, there is a risk that duties to an individual client and prospects of personal attorney advantage may conflict with duties to the class. Even if individual claims would not support individual litigation, a risk of conflict arises if class representatives are allowed compensation for the effort devoted to pursuing the class claim. If the class is seen as a separate client, these questions can be addressed more thoughtfully.

Quite different advantages might flow from treating the class as an entity in dealing with questions of jurisdiction. A Rule 23 amendment that defined the class as an entity might of itself be sufficient to establish the class claim as the measure of the amount in controversy required for diversity jurisdiction. A rather neat intellectual trick would be required, justifying interpretation of the amount-in-controversy requirement as a means of identifying the cases suitable for federal adjudication by the total amount involved and the importance of the defendant's stake, while simultaneously continuing to permit focus on individual representatives to avoid the frequently disabling impact of the complete diversity requirement.

Focus on the class-as-client also might influence thinking about due-process constraints on exposing individual claimants to adjudication in a distant forum having no apparent contact with their individual claims. Connections to the interrelated events underlying all claims can be viewed as connections to the class, and membership in the litigating class as itself a tie to the forum. Jurisdictional concepts are thoroughly—and often foolishly—conceptualistic. Providing a clear concept is proper business for the Enabling Act process.

Really imaginative use of the entity concept might even support a more rational approach to choice of law. Viewing a class of victims as a whole, it is very difficult to understand why different people should win or lose, or win more or less, because different sources of law are chosen to govern the self-same conduct. If it were possible to imagine a class claim, it would be possible to choose a single law to govern the single claim, or—more likely—to choose a single law to govern the claim as to each defendant. It need not matter which variation of choice-of-law theory is selected after that point. As attractive as this prospect might seem to a true heretic, it probably reaches too far for present acceptance. It is too easy to argue that class certification can do no more than take individual claims as they exist in the nature of individual choice-of-law processes, however much those processes depend on the choice of forum. As a mere procedural device, class treatment cannot alter the conceptual substance of the individual claim, no matter how drastically the claim is affected in fact. Separate sovereignties account for the unseemly differences in outcome, and their interests cannot be thwarted by this trick.

Coming closer to the end of the litigation, evaluation of the adequacy of a proposed class settlement at times requires treating the class as an entity. When the class aggregates small claims that have no practical value as the subject of individual actions, reference to the size of individual claims cannot provide a meaningful measure. Whether the purpose of aggregation is seen as providing an effective individual remedy that otherwise would not exist, or—more realistically—enforcing important social policies, the settlement can be appraised only in relation to the total, as well as the strength, of the aggregated claims.

Entity treatment also might help in confronting the preclusion consequences of a class action judgment. In one direction, it would underscore the proposition that the claim pursued by the class often is narrower than the claim that would be defined for purposes of individual litigation. Although an individual would, for example, be expected to join statutory discrimination and contract theories in a single action for wrongful termination, a class action for discrimina-

tion often should leave the way clear for an individual contract action. This benefit could become particularly important in settings that involve many claimants with small damages and a few with large damages growing out of the same setting. Illustrations are offered by the purchasers of defectively designed motor vehicles. Many will have relatively small claims based on depreciated value; a few will have large claims based on personal injury. It is unthinkable that either settlement or litigated judgment in a class action on behalf of all should preclude individual actions by those who suffer personal injuries, either before or after the class judgment. Recognizing that the class claim is limited to the common injury would help to express and ensure this conclusion.

Matters are more confused in another direction. Class actions may augment the risks of litigation that is premature in relation to advancing knowledge. A claim on behalf of millions of users of an over-the-counter drug might be brought and fail because of inability to prove that the drug causes a particular side-effect. Ten years later, convincing proof might become available, and be most convincing as to users who were members of the original class. We are prepared to accept preclusion in individual cases that present this problem. It is not clear whether we should be prepared to accept preclusion by representation on such a grand scale. Open recognition of the distinctive character of class litigation would at least frame the question for direct investigation and response.

Attempts to pursue overlapping or successive class actions are less likely to yield to an entity vision of the class, but some progress might be made even in this direction. Certification of a class in one court could be found to engage the class claim, invoking the rules that are appropriate when two or more actions are brought by the same plaintiff on the same claim. Courts are often surprisingly willing to allow two actions to proceed on parallel tracks, however, and it may be unduly optimistic to hope that a different approach would be taken when different representatives presume to voluntarily submit the same class claim to different courts. Successive attempts to certify a class after failing in one action may prove even more difficult to control. It would be convenient to argue that the asserted class is bound by the determination that it does not exist, but the seeming self-contradiction will be difficult to accept. The initial refusal to recognize the class as an entity seems to leave no one to be bound when a different putative representative appears with a second request for recognition.

Entity treatment of the class also could provide the paradoxical benefit of encouraging more careful thought about the individuals

who constitute the class. Because the entity is obviously artificial, its separation makes it more difficult to pretend that the class *is* its members. Greater care may be taken in addressing questions of class membership and conflicts of interest, and in considering whether to frame the action as a mandatory, opt-out, or opt-in class. The sharp distinction between the class as an entity and its constituting members, moreover, may underscore the need to think clearly about the members' rights to participate both individually and through influence on class counsel.

Increasing judicial responsibility for adequate class representation may be the most important single reason for rejecting a change that would define the class as the client. Although courts now are responsible for policing adequacy, treating the class as an entity would make it clear that this responsibility is not shared with any particular class representative. It also would be clear that the representatives cannot be relied upon to make the initial selection of counsel (or, perhaps more realistically, to ratify self-selection by counsel who sought them out). At the outset, courts would be more responsible for the identity of counsel. There is no reason to allow class counsel to be selected by the first representative who appears, much less by a representative recruited by would-be class counsel. At a minimum, the court could be required to give notice of any action seeking class certification and to invite competing applications to appear as counsel for the class. As exciting as it may be to contemplate such devices as auctioning the opportunity to represent the class, judicial responsibility for selecting counsel for one of the adversaries makes substantial inroads on a system that relies on the court to remain impartial between adversaries who appear before it on their own motion. Even more troubling, courts would remain responsible throughout the litigation, taking on a role that necessarily involves particular consideration of the interests and position of one party. Maintaining a distinction between neutral assurance of adequate representation and acting as guardian of class interests must be difficult, and perhaps not fully possible. The token class member representative may not do much to assure adequate representation, and courts now are responsible for assuring adequate representation, but the change could be troubling nonetheless.

If focus on the class-as-client might have esthetic advantages, moreover, it also might have symbolic disadvantages. We can pretend that class member representatives are clients. It is more difficult to pretend that a class is a real client. Cries of barratry, champerty, and maintenance—or the more contemporary buccaneering—would redouble.

And of course the urge to focus on the class-as-client provides another illustration of generalizing from one or two class action phenomena. The need for a client is most real in cases that aggregate large numbers of small claims and do not win the involvement of any class members with substantial stakes. Entity treatment may seem most promising in such cases. Yet it is possible—although just barely—that in fact named representatives often monitor counsel in genuine and important ways, a proposition that will be almost impossible to disprove by any readily available means of empirical research. The problems that arise from actions brought by organizations that may not speak for the purported class are quite different, while the problems that arise from aggregation of large numbers of substantial individual claims are of a still different order. For that matter, defendant classes should not be overlooked. The idea of suing a class without naming at least one real defendant-representative is not plausible.

## II

### THE CURRENT DRAFT

#### *A. An Outline*

This is not the occasion for a detailed review of the current Rule 23 draft. In broadest terms, it would make three major changes in present practice. First, the present line between mandatory classes and opt-out classes would be blurred by empowering the court to permit opting out from any class, to deny opting out from any class, or to certify an opt-in class. Second, notice provisions would be generalized, explicitly requiring notice in all class actions but relaxing to some extent the strict requirements now exacted in (b)(3) classes. And third, the present opportunities for certifying subclasses and “issues” classes would be emphasized. These changes inevitably blur the sharp differences in consequence that have flowed from the choice among (b)(1), (b)(2), and (b)(3) classes. They need not necessarily blur the conceptual differences between these categories of classes; it is possible to craft a rule that allows opting out of a (b)(1) class, that explicitly requires notice in all classes, and so on, without collapsing the categories. Nonetheless, the draft transforms the “superiority” requirement of present subdivision (b)(3) into a subdivision (a) prerequisite for any class. The (b)(1), (b)(2), and (b)(3) categories become merely factors to be considered in determining superiority, adding the “matters pertinent” of present (b)(3) to the list of superiority factors. In addition to these changes, a number of smaller changes also deserve note.

### *B. The Changes*

One item that has drawn strong reaction is the addition of a requirement that a representative party be "willing" to represent the class. It is widely believed that this requirement will sound the death knell of defendant classes—except perhaps for the most dangerous case in which a named defendant is willing to "represent" the class because its interests diverge from class interests, and may even converge with the plaintiff's interests.

Quite different reactions are provoked by the allied requirement that the representative member "protect the interests of all persons while members of the class until relieved by the court from that fiduciary duty." This provision is intended to underscore the fiduciary responsibilities borne by a representative party. It does not, however, explain in any way the nature or extent of those duties. There is no indication of any specific change in present practice. Practicing lawyers in particular react to the provision with dismay. They view present understanding of the fiduciary responsibilities of counsel and representatives as satisfactory, and fear that this opaque invocation will generate much contention and no improvement.

Subdivision (b)(2) is rewritten to make it clear that it is proper to certify a defendant class in an action for injunctive or declaratory relief. Apart from the question of whether a willing representative should be required, this change seems noncontroversial.

The subdivision (b)(3) requirement that common questions of fact or law predominate is mollified by making "the extent to which" common questions predominate one factor in calculating superiority. This change is one of many that are intended to ease the path toward certification of issues classes.

Difficulties in management are made relevant to the classes that were (b)(1) and (b)(2) classes as well as (b)(3) classes, but essentially are subordinated by requiring comparison to the difficulties that will arise from adjudication by other means.

The new opt-out and opt-in provisions are set out in subdivision (c)(1)(A), perhaps the single most important portion of the revised Rule. The list of "matters pertinent to this determination" is intended to discourage opt-out (b)(1) or (b)(2) classes, but not to forbid them. Opting out of such classes is designed, at least in part, as a means of revealing the conflicts of interest that may lurk in a class that seems homogeneous to the court. The illustration in the Committee Note is an employment-discrimination action in which employees who are members of the class as defined by the court may prefer to align with the employer on questions of liability or relief. Provision is made for

imposing conditions on those who opt out, including a bar against separate actions or denial of nonmutual issue preclusion should the class win. (The bar against separate actions may need to account for class judgments that do not bar separate actions by those who remain class members.) Opt-in classes are proposed as solutions for at least two sets of problems. Opt-in defendant classes may prove plausible in some circumstances, greatly reducing the difficulties that now appear in defendant classes. Opt-in plaintiff classes may be particularly useful as to classes that include many members whose claims would support individual actions, and may help avoid problems beyond the reach of the Enabling Act. Those who opt into a class, for example, would surrender any objections to “personal jurisdiction” and could be forced to acquiesce in a stated choice of law. For all that appears on the face of the draft, finally, it may be possible to combine all features in a single class: opting out could be prohibited to some claimants and permitted to others, while defining a class that includes nonmembers only if they choose to opt in. As one possible illustration, the class might be mandatory as to small-stakes claimants, optional as to large-stakes claimants, and defined to exclude those who already have suits pending unless they choose to opt in.

The new notice provisions are set out in subdivision (c)(2). Notice of class certification is required in all class actions. The court has discretion in determining “how, and to whom, notice will be given,” considering, among other factors: the nature of the class, the importance of individual claims, the expense and difficulty of providing individual notice, and the nature and extent of any adverse consequences from failure to receive actual notice. There has been no adverse reaction to the choice to adopt explicit notice requirements for what now are (b)(1) and (b)(2) classes, nor, perhaps surprisingly, to the softening of individual notice requirements in what now are (b)(3) classes.

Subdivision (c)(4) is the focal point for a phrase that recurs throughout the draft amendments. A class may be certified as to particular “claims, defenses, or issues.” Although subdivision (c)(4) now provides for issues classes, there is a deliberate attempt to focus attention on, and to encourage, this practice. Once again, mass torts are not far from view. One potential use of issues classes would be to resolve common elements of liability, leaving, for separate actions, resolution of individual elements of liability such as comparative fault and damages. Adroit definition of the “issue” also might help to reduce choice-of-law problems, particularly with respect to fact-dominated issues such as general causation.

A new subparagraph (d)(1)(B) expressly recognizes a practice followed in most courts, permitting decision of motions under Rules

12 or 56 before the certification determination. This confirmation of general practice seems unexceptionable.

Subdivision (e) is amended to make it clear that court approval is required for dismissal of an action in which class allegations are made whether dismissal is sought before determination of the certification question or after certification is made. It also provides that a proposal to dismiss or compromise a certified class action may be referred to a magistrate judge or "other special master." The role of the special master is not defined. The Committee Note refers to "investigation" of the fairness of a proposed dismissal or settlement, to the need to consider sensitive information, and to the problem that when all parties seek approval of a settlement the court cannot rely on genuinely adversarial presentation of information that might undercut the proposal. There could be real advantages in independent investigation by a master, but the more independent and thorough the investigation, the greater the departure from the ordinary role of court officers. There may be real advantages as well in confidential submissions to an officer who will not be called upon to decide the merits if the settlement should fail, but to preserve this advantage the master may need to report to the judge in terms that do not allow effective evaluation of the master's own recommendations.

New subdivision (f), finally, authorizes the court of appeals to permit an appeal from an order granting or denying certification. The only change is to eliminate the requirement of district court certification that may defeat appeal under 28 U.S.C. § 1292(b). This subdivision rests on two judgments. The first is that interlocutory review of the certification decision can be very important, to protect against both the "death-knell" effects of a refusal to certify and the "interrorem" (reverse-death-knell) effects of certification. The second is that the courts of appeals will exercise sound judgment, granting permission to appeal only in cases in which the certification determination is manifestly important and at least subject to fair debate. Routine determinations in mature areas of class action practice are not likely subjects for permission. This provision has drawn strong support but also, although less often, vigorous disagreement.

### *C. Some Obvious Questions*

The outline of the amendments suggests the most obvious questions: Should the now-accepted (b)(1), (b)(2), and (b)(3) distinctions be collapsed? The direct reason for the collapse is the desire to change opt-out practice, create an opt-in practice, and improve the notice provisions. This reason ties to a second reason—the belief that

unnecessary energy is wasted on disputing the choice of class category as an indirect means of affecting notice and opt-out decisions. This second reason may be unimportant; even if there is significant litigation of class-category determinations in areas that have not developed a routine class practice, direct changes in the opt-out, opt-in practice, and in notice, should redirect energy toward the intended target.

The risk of collapsing class categories may lie in part in surrender of the legitimacy lent by the traditions that underlie (b)(1) and the moral force lent by the contemporary civil rights uses of (b)(2). More important risks may arise from the prospect that class members might be allowed to opt out, particularly from (b)(1) classes. Equally important risks may arise from the opportunity to defeat opting out from (b)(3) classes, particularly as to class members who wish to pursue individual litigation in hopes of better results. Flexibility and discretion have carried us far in modern procedure, but perhaps these are situations that call for the rigidity of present rules. Even if more flexibility is appropriate, the Rule should provide as much guidance as possible for its exercise.

The question of whether class representatives should be willing to represent the class has focused attention on defendant classes. There are many reasons why a defendant should be unwilling to assume the obligations of class representative. As representative, the defendant has fiduciary obligations to the class. Presumably one duty is to defend vigorously in proportion to the stakes—and the stakes are expanded, perhaps exponentially, by class certification. (Even if the representative is theoretically subject to joint liability for the plaintiff's entire claim, the very reason for pursuing a defendant class is to enhance the prospects of actual recovery.) Freedom to settle or even abandon the defense is sharply curtailed. And if the representative defendant is allowed to escape the duties of representation by settling individual liability alone, the burdens of representation may exert a coercive force to settle on unfair terms. Barring an extraordinary congruence of interest between the representative and all other class members, the duty of counsel is changed and made more difficult (if not impossible): fiduciary obligations run to absent class members as well as to the original client. And any attempt to find means of compensating the representative for these added burdens will remain difficult. Opt-in defendant classes make clear sense; opt-out classes that involve sophisticated defendants with clear actual notice can make equal sense; in other settings, these problems seem acute. Addressing them by adding a "willing" representative requirement may not be as effective as some alternative.

It is not clear, moreover, that a willing representative is any more to be welcomed. Long ago I stumbled across a case that certified a (b)(2) defendant class in an action to enjoin patent infringement. Quite apart from individual questions of infringement, different infringers may have very different stakes in the question of validity; the representative defendant, for example, could enjoy a technology that yields a scant five percent cost saving with practice of the invention, while all other class members compete with an older technology that yields a twenty-five percent cost saving with practice of the invention. The representative defendant may be made better off by a holding of validity that binds the industry. The potential conflicts may be much more subtle than this simple illustration, but equally dangerous.

The willing representative requirement also provokes the question whether defendants should be able to force plaintiff class treatment. The idea may seem far-fetched, but it is not clear whether it should be hobbled by dropping a willingness requirement into Rule 23(a)(4). The question can easily be turned back to the defendant class issue, moreover, by the device of a transposed parties action in which the plaintiff names a defendant class and seeks a declaration of nonliability. In some settings this device would be ludicrous. Imagine, for example, an action by a government official against a class of public-benefit recipients for a declaration that a new restrictive regulation is valid.

This illustration suggests that it may be appropriate to think about defendant class actions in terms that extend beyond the immediate problems of the representative defendant. Concerns about the willing representative requirement have been expressed by pointing to situations in which defendant classes seem important. The most common examples include securities-law actions against underwriting groups and actions against many-membered partnerships. These examples are particularly persuasive because the class members have formed a real-world entity whose activities give rise to the claim; recognizing the entity for this limited legal purpose, even if for no other legal purpose, is appropriate. A more exotic example is an action to resolve the identical rights of hundreds or thousands of owners of fractional interests in mineral-rights leases. This example seems persuasive because the class members have willingly engaged in a set of closely related and indistinguishable transactions. Another setting that has posed difficulties under present Rule 23(b)(2) is an action against numerous public officials pursuing seemingly identical policies but so far independent that there is no common superior to name as defendant. The classic illustration was an action against county sheriffs who, in defiance of local federal decisions and state policy, denied

contact visits to pretrial detainees. This illustration may seem persuasive because there is a strong suspicion of conscious parallelism, if not outright conspiracy, and because of the clarity of the violations both in law and in fact. The question is whether Rule 23 should attempt to capture these features in a way that clearly distinguishes between the requirements for certifying plaintiff and defendant classes.

One possibility would be to adapt the permissive joinder requirements of Rule 20, limiting the definition of a defendant class to people who are related by a common "transaction, occurrence, or series of transactions or occurrences." Others would be to stiffen the Rule 23(a) requirements of typicality and adequacy of representation, to require individual notice to all defendant class members, or to expand the right of individual participation to the limits that would be applied had all class members been joined as individual defendants. Or the plaintiff might be required to name several representative defendants, and to name those who have the most substantial stakes if class members have substantially different levels of interest in the outcome. It might even prove feasible to require the plaintiff to name all members of the defendant class that can be identified with reasonable effort—including preliminary discovery—so that the court can select a group of representatives and develop a cost-sharing plan.

Perhaps better approaches will come to hand. The important point is that we cannot blithely rely on the abstract assertion that there is no difference between precluding a potential right and imposing a liability. We must reflect on the human intuition that there is a difference, whether expressed as the psychological reality of present endowments, as the ephemeral character of "individual" rights that practically can be asserted only on a group basis, or as some more profound perception.

The almost casual reference to fiduciary responsibility in this draft of Rule 23 may touch too lightly on the single most troubling set of class action issues. It is not enough to assert that everyone understands that both representative class members and class counsel have fiduciary responsibilities to the class. The trick is to elaborate that principle in ways that respond to the special difficulties of class actions, difficulties that arise whenever there are possible conflicts of interest between individuals joined as if a homogeneous class in which anything that advances the interests of one must automatically advance the interests of all others in equal measure. The most familiar analogy may be to the problems that confront a single lawyer who represents two plaintiffs, each of whom seeks to win the maximum possible individual advantage in litigating or settling with a common defendant. The problems of class representation, however, are far

more complex. The lawyer with two clients can help each client to develop and articulate that client's own best understanding of personal needs; each of the two clients at least is in a position to supervise the lawyer's representation. Counsel for the class seldom is in a position to consult with each class member to determine individual interests and needs, or to measure and reconcile the conflicts among individual interests and needs. Many class members likely will prove unable to supervise the class lawyer at all, and reliance on the representative class members provides a pale substitute.

The difficulties presented by the attorney-class client relationship are exacerbated by the wide diversity of classes. Much current debate focuses on settlement classes that join mind-boggling numbers of members whose individual claims would support the costs of individual litigation, but who paradoxically may fall into the group of "futures" claimants who do not yet even know that they may have been injured. Such settings may present the most troubling opportunities for truly irreconcilable conflicts, and for conflicts that are not easily resolved by creating subclasses. Rigorous notice requirements and clearly explained multiple opportunities to opt out may help. The same devices may not help in other settings, particularly if the typically small size of individual claims makes opting out the equivalent of surrendering any individual claim. And quite different problems are likely to arise if the class action actually goes to trial, although the relative infrequency of trials provides little foundation for speculating even about the nature of the problems, much less about the nature of possible solutions.

Rule 23 is silent on the nature of the fiduciary duties borne by class representatives and counsel. Addressing these questions through the Rule promises real advantages. For example, federal courts would be released from the common reliance on state law to govern issues of professional responsibility, although as members of state bars lawyers might face dual regulation. In addition, it may be possible to free these questions from the constraining impact of association with matters of "ethics"—it is easier to discuss the question whether a lawyer has conformed to a procedural rule than to frame the debate in terms of ethical behavior, as discussions of current class settlements demonstrate. Yet it will be extraordinarily difficult to articulate any explicit provisions. Since outright repeal of Rule 23 does not seem to be an available option, it seems responsible to make other improvements even if ignorance forces continued silence. The challenge that may be made by those who hope for some guidance in the Rule, however, is daunting and must be addressed even if it is not accepted.

The encouragement of resort to masters to evaluate proposed settlements raises broader questions about judicial review of class settlements. These questions become all the more important as we enter an era in which settlement classes are sought out by defendants, eager to buy global peace by agreement with volunteer representatives of thousands or tens of thousands of claimants. Extraordinarily complex arrangements are being made, at the cost of pushing Rule 23 beyond all of the limits that would have seemed invulnerable until tested by the force of so many claims. In some of these cases the uncertainties seem so great that reasoned evaluation of fairness may not be possible by any means. In others there is a strong attraction to independent investigation and report, but the means seem elusive. A master, charged as the court to be impartial but armed as a party to undertake independent investigation, may be one such means. Developing practice with judgment-enforcement masters in institutional reform litigation may provide some guidance. Another possibility is to appoint an independent representative for the class, whether or not called a guardian, charged with reviewing the settlement in ways that duplicate the responsibilities of class counsel but work free from the fear of self-interest. Reliance on a master may help solve the problems of judicial time, but does little to address the questions that arise from blending advocacy and investigation with the judicial role. Reliance on a class guardian may confuse the roles of counsel and representative members, and create a framework that conduces to inadequately informed second-guessing. If the problem is real, the most obvious solutions all seem weak.

A quite different settlement role involves the familiar use of masters to facilitate settlement. Involvement of a master in the process that leads to a settlement agreement may not only improve the process but also provide a measure of reassurance that the settlement is reasonable. Good experience with this practice ensures that it will continue, even without explicit provision in Rule 23 or any obvious support in Rule 53. It may be desirable, however, to consider the question of whether a master who has promoted a settlement should be responsible for advising the court on the fairness of the settlement. Despite the great advantages of familiarity, it might be better to rely on a magistrate judge or a new and independent master if the court, unwilling to rely entirely on class member objectors, seeks advice from people who do not have a stake in the settlement.

The provision for invoking the aid of masters or magistrate judges hints at the more pervasive provisions that might be created to spell out the process of reviewing and approving class action settlements. The first questions arise from the common resort to "settlement

classes," either by an initial certification that makes it clear that the class may be decertified if settlement is not reached, or by simultaneous presentation of a motion for certification and a motion to approve a settlement already negotiated. The most fundamental question is whether the basic criteria for certification should apply differently to class settlement than to class litigation. It seems difficult to argue that there should be any significant differences in the prerequisites of numerosity, commonality, typicality, and effective representation. If superiority becomes an additional prerequisite, however, there may be more room to argue that there are very substantial differences between the superiority of class settlement and the potential superiority of class litigation. Application of the other factors that bear on a determination of superiority, moreover, is likely to be quite different with respect to settlement than with respect to litigation. Not all of the differences favor settlement; the court's ability to determine the importance of individual litigation, for example, may be much better informed by adversary argument than by the cooperative presentation made when class and adversary join to urge acceptance of a settlement. And at a deeper level, it has been argued that counsel for a class that has been certified only for purposes of settlement bargains at a great disadvantage, and perhaps with a conflict of interest. The defendant's incentive to settle is no longer the prospect of trying this case on the merits, but instead the hope of avoiding vast numbers of individual cases. And counsel for the class stands to gain nothing if settlement fails, a prospect that becomes most unsettling when class certification is sought simultaneously with a "done deal" with a defendant who might have aborted all negotiations with that counsel.

Many other details could be added to Rule 23 to spell out the nature of the court's duties in reviewing and approving class settlements. Among them is the question whether class members should be allowed to opt out of a settlement. By far the cleanest way to draft such a provision would be to recognize a right to opt out that in form extends to all class actions; it would be difficult to justify any provision that allowed the court to distinguish between class members who might reasonably bring individual actions and those who might not. An unconditional right to opt out of a settlement might, however, impose unreasonable notice costs. Perhaps this problem can be met by an indirect qualification of the right, giving the court discretion as to the means of notice to be employed, anticipating that aggregate methods of notice would be used only when individual claims are small, and perhaps relying on actual notice to a substantial sampling of class members on the theory that a significant opt-out rate should prompt reconsideration of the adequacy of the settlement. If we come to ac-

cept classes of people who have not yet experienced injury, moreover, the right to opt out might properly carry forward to the time when injury occurs and the class member chooses whether to participate in the class settlement or to pursue an individual remedy.

Other proposals for regulating settlement include various means of bringing more lawyers into the negotiation on behalf of different subclasses, bargaining for allocation among differently situated members of a nonhomogeneous "class"; providing some means of representation independent of the lawyers who have been recognized as class counsel; improving the information made available to objectors, both by detailed notice to all class members of settlement terms and by more specific response to objectors, before they are forced to articulate their grounds for objecting; and recognizing the court's power to modify the terms of settlement so long as the defendant's total obligation is not materially increased.

Discussion of settlement also raises issues of attorney fees. Simultaneous negotiation of class relief and fees creates manifest conflict-of-interest problems. Partial solutions might be found in requiring that the basis for fee determinations be established before settlement can be undertaken, or that fee issues be settled only after approval of settlement on the merits. The obstacles that either approach might create to settlement might be reduced by simply considering the occasion for fee negotiations as part of the process of approving settlement and any fee award. These and related possibilities deserve to be a major focus of the continuing study.

Many other questions could be put to the details of the draft. They get caught up, however, in the long list of questions set out next. These questions are among the number that may fairly be addressed to present practice. For the most part, they recast as questions a welter of anecdotes told by various class action observers and practitioners to illustrate today's experience and perceived—although often conflicting—truths. Taken together, they pose the embarrassing question whether we really know enough about Rule 23 to be able to make sound predictions as to the effect of the current draft or any other.

### III

#### WHAT WE MIGHT WISH TO KNOW OF CURRENT EXPERIENCE

When asked for reactions to the current state of Rule 23, one very thoughtful committee replied that it was difficult to achieve any consensus wisdom because its members individually had experience with only a few fields of class litigation. Those with substantial experi-

ence in securities litigation did not have any working knowledge of employment-discrimination litigation, and so on. This response is a useful warning. The Committee must hear from many voices, reflecting the full spectrum of experience, if it is to learn much. It also must hear voices that speak with as much candor and disinterest as possible. And, to the extent possible, it must encourage independent investigations of the sort now underway at the Federal Judicial Center. The following collection illustrates the array of assumptions that should be questioned.

### *A. Individual Actions and Aggregation*

What relationships can be identified between aggregation and numbers of individual actions growing out of the same transactional setting? Does it often happen that large numbers of individual actions proceed in the same court, or in different courts, without any attempt at aggregation? Is it possible to identify elements that encourage or discourage consolidation, considering such things as relative filing dates, progress toward disposition, identity of counsel, size of claims, numbers of claimants, substantive principles, and the like? What elements—the same, or others—influence the means of aggregation? Is actual consolidation ever pursued across the lines that separate different court systems? Are class actions more likely to be pursued after some experience with individual adjudication, or does this depend very much on the substantive area: Are class actions the first resort in some fields, as may be in some areas of securities law, and the last or never resort in other fields? How often is class certification denied because it is not desirable to concentrate litigation in one forum, because of the importance of individual control of individual actions, because of the advanced progress of many individual actions, or because of a judgment that individual actions—perhaps bolstered by non-mutual preclusion, or tacit acquiescence in bellwether litigation—will prove more manageable?

A quite different question is how many members of certified classes would have maintained individual actions absent the class action. A clear answer in general terms would help shape a good general rule; the expectation that clear answers could be given for individual cases would justify a rule that delegates case-by-case discretion to individual judges. But clear answers are likely to remain elusive, even if shrewd guesses may be possible in some settings. For that matter, it would be even nicer to know what would have been the outcomes of individual actions, how frequently conflicting results would have been reached on the merits, whether results on the merits

would tend to converge over time, and how to measure the recoveries both in the aggregate and in individual cases.

### *B. Routine Class Actions*

One common hypothesis is that a substantial portion of all actions filed with class allegations is virtually invisible because the actions are somehow standard or routine. This hypothesis may be translated into the judgment that Rule 23 is working well in most applications, that we should not be misled as to the need for reform by the occasional dramatic departures. The hypothesis seems to have at least two parts. The first part, encountered most often in speculation about the reasons that may explain the substantial under-reporting of class action filings recently uncovered by the Federal Judicial Center study, is that boilerplate class allegations are routinely ignored or dispatched without fuss. The second part, encountered regularly in the reactions of experienced class action lawyers from various fields, is that Rule 23 has been beaten into shape by the bench and bar and presents few grounds for dispute in most cases. Everyone recognizes the appropriateness of (b)(3) certification in securities-law cases, understands the notice drill, knows how to present and win approval of a settlement and fee awards, and so on.

It seems likely that indeed many actions play out in one of these ways. But it would be nice to know, and particularly to know more about the correlations between easy application of Rule 23 and the substantive subjects of dispute. It also would be nice to know what happens in the routine applications: How often is certification granted? What is the relationship between certification and settlement? How often do certified classes go to trial, and how often do they win? Is there any way to get behind bare numbers?

Suppose, for instance, it should be found that the same distribution of outcomes occurs in all actions with class allegations as in all other actions, and that the distribution also is the same for actions in which certification is granted, denied, or ignored. Could we know what this really means for common protests that class actions exert a pressure that subordinates the merits of the action to the need to escape alive? True confidence would require an unattainable measure of the merits of all the cases compared; is it enough to assume that class allegations are not added deliberately to bolster weak claims, and that class action procedure—including the cost of notice in (b)(3) cases—is sufficiently hospitable to strong claims?

Whatever can be made of these questions, we should be able to learn more about smaller issues. What is the frequency of (b)(1),

(b)(2), and (b)(3) classes? The rate of certifications granted, denied, or ignored? The correlation between substantive area and frequency of class allegations and certifications? The time consumed by class actions (and, would that it could be known, the time that would have been devoted to separate actions)?

### C. *Race To File*

The lore includes tales of “parachutists” who scramble madly to be the first to file class claims in hopes of assuming a lead role in management and fees. How often are securities class actions filed immediately upon announcement of a disappointing earnings report, or single-event tort actions before the ashes have cooled? Is there support for the claim that immediate filing is necessary to preserve evidence, particularly in the tort cases, and are class allegations important to achieving that result? Is anything lost, apart from seemliness, by filing immediately? For example, are inconvenient forums chosen; is first-filing negatively correlated with the strength of the claim or ability of counsel; do overlapping actions cause unnecessary confusion and clean-up costs? Is there, on the other hand, any reason to reject a simple rule that there is no presumption that counsel who files first should be counsel for the class, and that there must be a competition to select class counsel?

### D. *Representatives: Who? Whence? Why?*

The role of class-member-representative parties is one of the richest sources of anecdotes, and particularly cynical anecdotes. Pending securities-litigation reform bills implicitly reflect the view that class-member-representatives do not adequately fill the role of client under present practice. It has become a bromide that the beauty of many class actions is that the lawyers don't have any clients to get in the way. These occasionally querulous observations raise many questions.

Perhaps the first question is where do representatives come from. Do they search out counsel, or are they recruited by counsel? How are they recruited? What reality, if any, underlies the provision in the pending securities-litigation reform bills that would prohibit brokers from accepting remuneration for assisting an attorney in obtaining the representation of a customer? Are there “professional” representatives who appear repeatedly, at least in particular subject areas? How often do representatives have more than nominal interests? Is there a correlation between the stakes of individual representatives and the form of action—are (b)(1) actions more likely to draw representatives with substantial stakes than (b)(3) actions? Are representatives in

(b)(2) actions for injunctions more likely to be as much affected by the outcome as other class members? And how often are they recruited by interested organizations because they present particularly attractive illustrations of a group interest or injury? What is the real impact of the requirement that the representative's claims or defenses be typical of the class? Does it really add weight to the requirements of common questions and adequate representation? Does it at least provide one illustrative bundle of facts that may facilitate discovery and trial?

Most directly, what are the working relationships between representative class members and class counsel? Do the representatives play any role as clients, participating in the decisions that shape the litigating goals and strategies? How much time, effort, and expense do representatives actually devote to the litigation? Do courts often attempt to supervise this dimension of adequate representation after the adequacy determination, and, if so, how? In place of reviewing representation directly, do courts attempt to rely on substitutes such as seeking out additional representatives who are not nominated by class counsel, forming class-member committees, or even appointing independent counsel or guardians to represent the class in dealing with class counsel?

Are there significant efforts to supervise class representation by evaluating the performance of class counsel directly? What means of evaluation are chosen, and what steps are taken to reduce the implicit intrusion on the adversary process?

What do representatives get out of it all, whatever the "all" may be? Simply the satisfaction of pursuing justice, and doing good for others when the class claim succeeds? Are they rewarded in some measure for the time and perhaps risk involved in their roles by recoveries that are more favorable than those won by other class members?

### *E. Time of Certification*

Is there any pattern to the point at which the first certification decision is made? How often are actions filed simultaneously with proposed settlements and motions for certification? How often are preliminary motions on the merits decided before addressing certification? What is the effect of local rules requiring that a motion for certification be made within a stated period, perhaps ninety or one hundred days? Do they impede settlement efforts, encourage prompt resolution, or have little effect? How regularly is discovery controlled and focused on the certification question? Is it more feasible in some substantive areas than others to separate discovery on the merits from

certification discovery? How often are class definitions changed after an initial certification; is an initial denial followed by later certification, or an initial certification by decertification?

#### *F. Certification Disputes*

How much time is spent contesting certification? Are there correlations between the subjects of litigation and certification disputes? Is much effort devoted to contesting the choice among (b)(1), (b)(2), and (b)(3) classes, and does this correlate to the subject of litigation? How much thought—expressed or unexpressed—is given to the impact of the class definition on the prospects for settlement?

#### *G. Plaintiff Classes*

Do defendants ever seek and win plaintiff class certification over opposition of plaintiffs? How often do defendants acquiesce in certification of a plaintiff class, apart from settlement classes? How frequently do defendants agree to settlements that include chancy class certifications that may not deliver the hoped-for preclusion benefits?

#### *H. Defendant Classes*

How common are defendant classes? Are there identifiable but narrow settings in which they are most likely? What happens if a (b)(3) class is certified—do class members opt out in great numbers? Have means been found to alleviate the added burdens inflicted on representative defendants? Are there formal or informal means of cost sharing? How often are defendants willing to represent a class? Are unwilling representatives effective? Are willing representatives to be trusted? How do counsel identify potential conflicts between obligations to the representative client and obligations to the class, and how are the conflicts resolved?

#### *I. Issues Classes and Subclasses*

How frequently, and in what settings, are issues classes (or subclasses) used? How diligent and sophisticated is the inquiry into possible conflicts of interest within a class whenever relief is (or should be) more complicated than winning the maximum number of dollars to be distributed according to the only possible measure of uniformity? Consider a securities-fraud action in which, inevitably, different class members bought and sold different numbers of shares at different times; a “class” of all may disguise differing interests in proving the ways and times at which the fraud affected the market. Are such subtleties routinely ignored? Is it better to ignore such complications,

because the costs of making distinctions outstrip the benefits? What of actions that touch deeper social interests, such as surviving school desegregation cases in which a "class" of all students, or all minority students, almost inevitably includes people with a wide range of views about appropriate remedies?

Is there any experience at all to illuminate the post-class experience with issues classes? How often is a class-based resolution of some issue of liability followed by independent actions in different courts? How are these actions coordinated with any appeals in the issues class action? Are any efforts made to ensure that subsequent proceedings do not effectively thwart the class determination? Do the results of individually litigating individual issues diverge substantially? For example, do claimants in some states or regions win systematically greater or lesser recoveries than those in other states or regions?

More fundamentally, is enough care taken to ensure that issues certified for class treatment are usefully separate from issues that remain for individual disposition? It is frequently suggested, for example, that issues of fault and general causation are suitable for class treatment, leaving issues of comparative fault, individual cause, and proximate cause for case-by-case resolution. But how is fault to be compared without retrying the issue of fault, and perhaps implicitly impugning the class finding? And how are individual and proximate-cause issues to be resolved without retrying the evidence of general causation? If the answer is found in brute force, will the results in fact achieve sufficient uniformity to justify the attempt?

### *J. Notice*

What types of notice, at what cost, are required in (b)(1) and (b)(2) actions? Is there any reason to believe that notice in (b)(3) actions is not generally adequate? How much does notice cost, and does the cost defeat legitimate actions seeking small individual recoveries on behalf of many claimants? Is much effort devoted to litigating notice issues? How often is notice of steps other than certification provided, at what cost, and with what benefit? Do notices of impending settlement provide sufficient detail to enable intelligent appraisal, if any class member should wish to undertake or hire it? And, of course, how many class members even attempt to read the notices?

### *K. Opt-Outs and Opt-Ins*

How frequently do members opt out of (b)(3) classes? Can this be correlated with specific subject areas, size of typical individual claims, or something else? Why do members choose to opt out or

remain in? Does the fear of involvement conduce more toward doing nothing, or toward getting out? How many opt-outs bring independent actions, and again what correlations might be found? How often is (b)(2) stretched, or (b)(1) distorted, to defeat opt-out opportunities? Is there any significant converse practice, such as defining subclasses in (b)(1) or (b)(2) actions, that effectively permits opting out? Is it common to structure settlements that allow the defendant to opt out of the settlement after finding out how many plaintiff class members opt out?

Are devices employed to create what essentially are opt-in classes, by such means as defining the class to include only those members who file claims?

#### *L. Individual Member Participation*

How frequently do nonrepresentative class members seek to participate before the settlement stage? What resistance do they meet from designated representatives, class counsel, and the party opposing the class? How much communication is there between class counsel and nonrepresentative members? If nonrepresentative members attempt to seek out class counsel, how are they received? How often do nonmembers challenge settlements; seek to appeal judgments; intervene for any purpose? Is there any working concept of the right in a (b)(3) class action to enter an appearance through counsel that distinguishes it from intervention? Is there experience with this concept that might demonstrate whether it should apply to all forms of class actions?

#### *M. Settlement*

Many of the questions have been touched above. Does certification coerce settlement of frivolous or near-frivolous claims? What means have been used to support effective judicial supervision when all parties submit information in support of settlement? And if certification is first sought at the settlement stage, is the attempt to ensure compliance with notice and certification requirements more effective than the attempt to evaluate the merits of the settlement? How frequently do nonrepresentative class members appear to contest settlement, and with what effect? Are significant problems of conflicting interests within the class papered over? Do settlements often include provisions that are, by some reasonable measure, disproportionately favorable to class representatives?

### *N. Trial*

How often are certified class actions actually tried on the merits? With what results? Is there a correlation with subject matter and class type? Are trials more common in (b)(2) actions that pursue still developing legal theories, and less common in (b)(3) actions with large sums at stake?

### *O. Small Claims Classes*

How frequently do certified (b)(3) classes result in relatively trivial relief for individual class members, measured by mean, median, or mode recoveries? Is it possible to guess at the social enforcement value of a significant total parcelled out in many small shares? Are there meaningful parallel questions for other class types, such as trivial injunctive relief in a (b)(2) action, perhaps coupled with significant fees? How often do courts experiment still with substitute modes of recovery, such as distribution to charitable institutions?

### *P. Fee-Recovery Ratios*

Another cynical belief is that many class actions serve only to confer benefits on class counsel. Token class benefits are accompanied by handsome fee awards. It would be interesting to know the pattern of relationships between fee awards and total class recovery across a wide spectrum of cases. The Federal Judicial Center study of a very small number of cases from a sample chosen for other purposes suggested that class benefits regularly exceed fees, and that fees are a larger percentage of class recovery in cases that yield small total recoveries. If this pattern is generally true, it provides substantial reassurance. Additional reassurance would be supplied if there are enough cases tried on the merits to support meaningful comparison of the fee awards and ratios with settled cases.

A more elusive concern lies beyond the simple ratios. A high ratio of fees to recovery may reflect high-quality work done to support weak but deserving claims. It also may reflect the coercive benefits of pursuing undeserving claims, or the betrayal of strong class claims by bargain settlements. This concern may prove almost impossible to test.

If there is any experience to measure, it also would be useful to learn the means by which courts have attempted to regulate fees beyond use of a "lodestar" approach. How often is special importance attached to the actual benefits won for the class? Is there any significant attempt, by auction or otherwise, to stimulate competing offers of representation?

Is there any way to get at such intriguing information as a comparison between the economic gains from representing classes as compared to the economic gains from opposing classes? And is there anything to be learned from such information if it can be found: If, for example, it were concluded that class counsel average a higher return per hour of apparently equal effort, would that tell us more than an equal or lower average rate of return?

### *Q. Overlapping Classes*

How often are overlapping class actions brought in different courts? What means are found to arrange a coherent resolution that avoids parallel proceedings? Are the problems more severe if one or more overlapping actions are filed in state courts? One description has painted a startling picture of competing class actions, in which the proposed settlement in an opt-out class is met by formation of a rival class with promises of better results. Does this really happen? If it does, what are the results for class members? What about more imaginative possibilities, such as formation of a rival class and delegation to the class representatives of the power to opt out of the initial class on behalf of all members of the new class?

### *R. Counterclaims and Discovery*

There does not seem to be much concern with the prospect of counterclaims and discovery involving nonrepresentative class members. Is there regular acceptance that these devices are not worthwhile? That they are employed, but only in special settings—individual discovery of individual liability or damages issues? For example, is it disciplined, and does it occur only when it becomes immediately relevant? Are there unknown problems that should be addressed?

### *S. Res Judicata*

Peace is the tradeoff for a class judgment, win or lose. The theory is reasonably clear. But reported cases do not give much sense of actual impact. To the extent that class actions involve claims that would not support individual litigation in any event, there is little reason for concern. But it would be useful to know how often class judgments deter individual actions that otherwise would have been brought; how often individual actions are attempted but fail on preclusion grounds; and how often individual actions overcome preclusion defenses because of direct limits on preclusion, inadequate representation, inadequate notice, or other grounds.

### CONCLUSION

Several purposes are served by posing a daunting list of questions that are difficult or impossible to answer. The one that may be most important is to demonstrate a central challenge of the rulemaking process. Courts have cases and must decide them. Procedure must be adapted as well as can be to changing circumstances and needs. If all procedural reform were held hostage to the slow progress of information that meets the rigorous standards of good social science, there would be precious little reform. Nowhere is this prospect more evident than with class actions. What is needed is wise judgment regarding the balance between the enthusiasm arising from perceived needs for change on the one hand and, on the other, the caution engendered by perceived ignorance, as well as the recognition that more confident judgment is needed to justify more dramatic departures from practices proved by at least some experience. When rigorous evidence is lacking, judgment is properly informed by a consensus of anecdotes, encouraging as much anecdotal input, drawing from as much shared experience, as can be. At the same time, judgment is restrained by recognition of the inadequacies of present knowledge and the fallibilities of prediction.

Individual judgments will differ on the results of the last leap into the unknown with Rule 23. The career of the 1966 amendments surely teaches a humbling lesson on the fallibility of foresight, however good the unforeseen consequences may be. Perhaps we know enough to justify modest changes in Rule 23. Possibly we should have the courage to experiment with more drastic changes. If no changes are made, we never will know their fate. If changes are made, it will be years before we even think we know. The greatest cause for concern in the midst of all this is that there seems to be little collective sense of any need for significant change, apart from the area of mass torts. There is a real sense that we need to find better means of addressing mass torts, but almost no sense yet as to the blend of substantive and procedural means that will prove better. Rule 23 is only one alternative, and the foundation that might securely anchor a new structure still needs to be sunk.

## APPENDIX A

### PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE\*

#### Rule 23. Class Actions (February 1995 Draft)

(a) ~~Prerequisites to a Class Action.~~ One or more members of a class may sue or be sued as representative parties on behalf of all only if— with respect to the claims, defenses, or issues certified for class action treatment—

(1) ~~the class is~~ members are so numerous that joinder of all ~~members is~~ impracticable,

(2) ~~there are~~ questions of law or fact legal or factual questions are common to the class,

(3) ~~the claims or defenses of the representative parties'~~ positions typify those are typical of the claims or defenses of the class, and

(4) the representative parties and their attorneys are willing and able to ~~will~~ fairly and adequately protect the interests of all persons while members of the class until re- lieved by the court from that fiduciary duty; and

(5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

(b) ~~When Whether a Class Action Maintainable Is Superior.~~ An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition The matters pertinent in deciding under (a)(5) whether a class action is superior to other available methods include:

(1) the extent to which ~~the prosecution of~~ separate actions by or against individual members of the class ~~would create a risk of~~ might result in

(A) ~~inconsistent or varying adjudications with respect to individual members of the class which that~~ would establish incompatible standards of conduct for the party opposing the class, or

(B) ~~adjudications with respect to individual members of the class which would that,~~ as a practical matter be ~~dispositive of the interests of the other members not parties to the adjudications or substantially impair or~~

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\* New Matter is underlined; matter to be omitted is lined through.

impede, would dispose of the nonparty members' interests or reduce their ability to protect their interests; or

~~(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief the extent to which the relief may take the form of an injunction or corresponding declaratory relief with respect to judgment respecting the class as a whole; or~~

~~(3) the court finds that the extent to which common questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include;~~

~~(A4) the class members' interests of members of the class in individually controlling the prosecution or defense of separate actions;~~

~~(B5) the extent and nature of any related litigation concerning the controversy already commenced begun by or against members of the class;~~

~~(C6) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and~~

~~(D7) the likely difficulties likely to be encountered in the management of managing a class action which will be eliminated or significantly reduced if the controversy is adjudicated by other available means.~~

**(c) Determinations by Order Whether Class Action to Be Maintained Certified; Notice and Membership in Class; Judgment; Actions Conducted Partially as Class Actions Multiple Classes and Subclasses.**

~~(1) As soon as practicable after the commencement of an action brought as a class action persons sue or are sued as representatives of a class, the court shall must determine by order whether and with respect to what claims, defenses, or issues it is to be so maintained the action should be certified as a class action.~~

(A) An order certifying a class action must describe the class and determine whether, when, how, and under what conditions putative members may elect to be excluded from, or included in, the class. The matters pertinent to this determination will ordinarily include:

(i) the nature of the controversy and the relief sought;

(ii) the extent and nature of the members' injuries or liability;

(iii) potential conflicts of interest among members;

(iv) the interest of the party opposing the class in securing a final and consistent resolution of the matters in controversy; and

(v) the inefficiency or impracticality of separate actions to resolve the controversy.

When appropriate, a putative member's election to be excluded may be conditioned upon a prohibition against its maintaining a separate action on some or all of the matters in controversy in the class action or a prohibition against its relying in a separate action upon any judgment rendered or factual finding in favor of the class, and a putative member's election to be included in a class may be conditioned upon its bearing a fair share of litigation expenses incurred by the representative parties.

(B) An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits final judgment.

(2) In any class When ordering that an action be maintained certified as a class action under subdivision (b)(3) this rule, the court shall must direct that appropriate notice be given to the members of the class under subdivision (d)(1)(C). The notice must concisely and clearly describe the nature of the action; the claims, defenses, or issues with respect to which the class has been certified; the persons who are members of the class; any conditions affecting exclusion from or inclusion in the class; and the potential consequences of class membership. In determining how, and to whom, notice will be given, the court may consider the matters listed in (b) and (c)(1)(A), the expense and difficulties of providing actual notice to all class members, and the nature and extent of any adverse consequences that class members may suffer from a failure to receive actual notice. the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion;

and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action certified maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and must specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds who are to be members of the class or have elected to be excluded on conditions affecting any separate actions.

(4) When appropriate ~~(A)~~, an action may be brought or maintained certified as a class action with respect to particular claims, defenses, or issues ~~or (B)~~ by or against multiple classes or subclasses. Subclasses need not separately satisfy the requirements of subdivision (a)(1). ~~a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.~~

**(d) Orders in Conduct of Class Actions.**

(1) In the conduct of actions to which this rule applies, the court may make appropriate orders that:

(1A) ~~determining~~ determine the course of proceedings or ~~prescribing~~ prescribe measures to prevent undue repetition or complication in the presentation of evidence or argument;

(B) decide a motion under Rule 12 or 56 before the certification determination if the court concludes that the decision will promote the fair and efficient adjudication of the controversy and will not cause undue delay;

(2C) ~~requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that~~ require notice be given in such manner as the court may direct to some or all of the class members or putative members of:

(i) any step in the action, including certification, modification, or decertification of a class, or refusal to certify a class or of;

(ii) the proposed extent of the judgment; or of

(iii) the members' opportunity ~~of members~~ to signify whether they consider the representation

fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

~~(3D) imposing impose~~ conditions on the representative parties, class members, or ~~on~~ intervenors;

~~(4E) requiring require~~ that the pleadings be amended to eliminate ~~therefrom~~ allegations as to about representation of absent persons, and that the action proceed accordingly; or

~~(5F)~~ dealing with similar procedural matters.

~~(2) The orders~~ An order under Rule 23(d)(1) may be combined with an order under Rule 16, and may be altered or amended ~~as may be desirable from time to time~~.

(e) Dismissal or Compromise. An class-action in which persons sue or are sued as representatives of a class must shall not, before the court's ruling under subdivision (c)(1), be dismissed, be amended to delete the request for certification as a class action, or be compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. An action certified as a class action must not be dismissed or compromised without approval of the court, and notice of a proposed voluntary dismissal or compromise must be given to some or all members of the class in such manner as the court directs. A proposal to dismiss or compromise an action certified as a class action may be referred to a magistrate judge or other special master under Rule 53 without regard to the provisions of Rule 53(b).

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying a request for class action certification under this rule upon application to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

### COMMITTEE NOTE

PURPOSE OF REVISION. As initially adopted, Rule 23 defined class actions as "true," "hybrid," or "spurious" according to the abstract nature of the rights involved. The 1966 revision created a new tripartite classification in subdivision (b), and then established different provisions relating to notice and exclusionary rights based on that classification. For (b)(3) class actions, the rule mandated "individual notice to all members who can be identified through reasonable effort" and a right by class members to "opt-out" of the class. For

(b)(1) and (b)(2) class actions, however, the rule did not by its terms mandate any notice to class members, and was generally viewed as not permitting any exclusion of class members. This structure has frequently resulted in time-consuming procedural battles either because the operative facts did not fit neatly into any one of the three categories, or because more than one category could apply and the selection of the proper classification would have a major impact on whether and how the case should proceed as a class action.

In the revision, the separate provisions of former subdivisions (b)(1), (b)(2), and (b)(3) are combined and treated as pertinent factors in deciding "whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy," which is added to subdivision (a) as a prerequisite for any class action. The issue of superiority of class action resolution is made a critical question, without regard to whether, under the former language, the case would have been viewed as being brought under (b)(1), (b)(2), or (b)(3). Use of a unitary standard, once the prerequisites of subdivision (a) are satisfied, is the approach taken by the National Conference of Commissioners on Uniform State Laws and adopted in several states.

Questions regarding notice and exclusionary rights remain important in class actions—and, indeed, may be critical to due process. Under the revision, however, these questions are ones that should be addressed on their own merits, given the needs and circumstances of the case and without being tied artificially to the particular classification of the class action.

The revision emphasizes the need for the court, parties, and counsel to focus on the particular claims, defenses, or issues that are appropriate for adjudication in a class action. Too often, classes have been certified without recognition that separate controversies may exist between plaintiff class members and a defendant which should not be barred under the doctrine of claim preclusion. Also, the placement in subdivision (c)(4) of the provision permitting class actions for particular issues has tended to obscure the potential benefit of resolving certain claims and defenses on a class basis while leaving other controversies for resolution in separate actions.

As revised, the rule will afford some greater opportunity for use of class actions in appropriate cases notwithstanding the existence of claims for individual damages and injuries—at least for some issues, if not for the resolution of the individual damage claims themselves. The revision is not however an unqualified license for certification of a class whenever there are numerous injuries arising from a common or similar nucleus of facts. The rule does not attempt to authorize or

establish a system for "fluid recovery" or "class recovery" of damages, nor does it attempt to expand or limit the claims that are subject to federal jurisdiction by or against class members.

The major impact of this revision will be on cases at the margin: most cases that previously were certified as class actions will be certified under this rule, and most that were not certified will not be certified under the rule. There will be a limited number of cases, however, where the certification decision may differ from that under the prior rule, either because of the use of a unitary standard or the greater flexibility respecting notice and membership in the class.

Various non-substantive stylistic changes are made to conform to style conventions adopted by the Committee to simplify the present rules.

**SUBDIVISION (A).** Subdivision (a)(4) is revised to explicitly require that the proposed class representatives and their attorneys be both willing and able to undertake the fiduciary responsibilities inherent in representation of a class. The willingness to accept such responsibilities is a particular concern when the request for class treatment is not made by those who seek to be class representatives, as when a plaintiff requests certification of a defendant class. Once a class is certified, the class representatives and their attorneys will, until the class is decertified or they are otherwise relieved by the court, have an obligation to fairly and adequately represent the interests of the class, taking no action for their own benefit that would be inconsistent with the fiduciary responsibilities owed to the class.

Paragraph (5)—the superiority requirement—is taken from subdivision (b)(3) and becomes a critical element for all class actions.

The introductory language in subdivision (a) stresses that, in ascertaining whether the five prerequisites are met, the court and litigants should focus on the matters that are being considered for class action certification. The words "claims, defenses, or issues" are used in a broad and non-legalistic sense. While there might be some cases in which a class action would be authorized respecting a specifically defined cause of action, more frequently the court would set forth a generalized statement of the matters for class action treatment, such as all claims by class members against the defendant arising from the sale of specified securities during a particular period of time.

**SUBDIVISION (B).** As noted, subdivision (b) has been substantially reorganized. One element, drawn from former subdivision (b)(3), is made a controlling issue for all class actions and moved to subdivision (a)(5); namely, whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The other provisions of former subdivision (b) then become

factors to be considered in making this determination. Of course, there is no requirement that all of these factors be present before a class action may be ordered, nor is this list intended to exclude other factors that in a particular case may bear on the superiority of a class action when compared to other available methods for resolving the controversy.

SUBDIVISION (c). Former paragraph (2) of this subdivision contained the provisions for notice and exclusion in (b)(3) class actions.

Under the revision, the provisions relating to exclusion are made applicable to all class actions, but with flexibility for the court to determine whether, when, and how putative class members should be allowed to exclude themselves from the class. The court may also impose appropriate conditions on such "opt-outs"—or, in some cases, even require that a putative member "opt-in" in order to be treated as a member of the class.

The potential for class members to exclude themselves from many class actions remains a primary consideration for the court in determining whether to allow a case to proceed as a class action, both to assure due process and in recognition of individual preferences. Even in the most compelling situation for not allowing exclusion—the fact pattern described in subdivision (b)(1)(A)—a person might nevertheless be allowed to be excluded from the class upon the condition that the person will not maintain any separate action and hence, as a practical matter, be bound by the outcome of the class action. The opportunity to elect exclusion from a class may also be useful, for example, in some employment discrimination action in which certain employees otherwise part of the class may, because of their own positions, wish to align themselves with the employer's side of the litigation either to assist in the defense of the case or to oppose the relief sought for the class.

Ordinarily, putative class members electing to be excluded from a plaintiff class will be free to bring their own individual actions, unhampered by factual findings adverse to the class, while potentially able, under the doctrine of issue preclusion, to benefit from factual findings favorable to the class. The revised rule permits the court, as a means to avoid this inequity, to impose a condition on "opting out" that will preclude an excluded member from relying in a separate action upon findings favorable to the class.

Rarely should a court impose an "opt-in" requirement for membership in a class. There are, however, situations in which such a requirement may be desirable to avoid potential due process problems, such as with some defendant classes or in cases where an opt-out right would be appropriate but it is impossible or impractical to give mean-

ingful notice of the class action to all putative members of the class. With defendant classes it may be appropriate to impose a condition that requires the "opting-in" defendant class members to share in the litigation expenses of the representative party. Such a condition would be rarely needed with plaintiff classes since typically the claims on behalf of the class, if successful, would result in a common fund or benefit from which litigation expenses of the representative can be charged.

Under the revision, some notice of class certification is required for all types of class actions, but flexibility is provided respecting the type and extent of notice to be given to the class, consistent with constitutional requirements for due process. Actual notice to all putative class members should not, for example, be needed when the conditions of subdivision (b)(1) are met or when, under subdivision (c)(1)(A), membership in the class is limited to those who file an election to be members of the class. Problems have sometimes been encountered when the class members' individual interests, though meriting protection, were quite small when compared with the cost of providing notice to each member; the revision authorizes such factors to be taken into account by the court in determining, subject to due process requirements, what notice should be directed.

The revision to subdivision (c)(4) is intended to eliminate the problem when a class action with several subclasses should be certified, but one or more of the subclasses may not independently satisfy the "numerosity" requirement.

Under former paragraph (4), some issues could be certified for resolution as a class action, while other matters were not so certified. By adding similar language to other portions of the rule, the Committee intends to emphasize the potential utility of this procedure. For example, in some mass tort situations, it might be appropriate to certify some issues relating to the defendants' culpability and—if the relevant scientific knowledge is sufficiently well developed—general causation for class action treatment, while leaving issues relating to specific causation, damages, and contributory negligence for potential resolution through individual lawsuits brought by members of the class.

**SUBDIVISION (D).** The former rule generated uncertainty concerning the appropriate order of proceeding when a motion addressed to the merits of claims or defenses is submitted prior to a decision on whether a class should be certified. The revision provides the court with discretion to address a Rule 12 or Rule 56 motion in advance of a certification decision if this will promote the fair and efficient adjudi-

cation of the controversy. See *Manual for Complex Litigation, Second*, § 30.11.

Inclusion in the former subdivision (c)(2) of detailed requirements for notice in (b)(3) actions sometimes placed unnecessary barriers to formation of a class, as well as masked the desirability, if not need, for notice in (b)(1) and (b)(2) actions. Even if not required for due process, some form of notice to class members should be regarded as desirable in virtually all class actions. Subdivision (c)(2) requires that notice be given if a class is certified, though under subdivision (d)(1)(C) the particular form of notice is committed to the sound discretion of the court, keeping in mind the requirements of due process. Subdivision (d)(1)(C) contemplates that some form of notice may be desirable with respect to many other important rulings; subdivision (d)(1)(C)(i), for example, calls the attention of the court and litigants to the possible need for some notice if the court declines to certify a class in an action filed as a class action or reduces the scope of a previously certified class. In such circumstances, particularly if putative class members have become aware of the case, some notice may be needed informing the class members that they can no longer rely on the action as a means for pursuing their rights.

**SUBDIVISION (E).** There are sound reasons for requiring judicial approval of proposals to voluntarily dismiss, eliminate class allegations, or compromise an action filed or ordered maintained as a class action. The reasons for requiring notice of such a proposal to members of a putative class are significantly less compelling. Despite the language of the former rule, courts have recognized the propriety of a judicially-supervised precertification dismissal or compromise without requiring notice to putative class members. *E.g., Shelton v. Pargo*, 582 F.2d 1298 (4th Cir. 1978). The revision adopts that approach. If circumstances warrant, the court has ample authority to direct notice to some or all putative class members pursuant to the provisions of subdivision (d). While the provisions of subdivision (e) do not apply if the court denies the request for class certification, there may be cases in which the court will direct under subdivision (d) that notice of the denial of class certification be given to those who were aware of the case.

Evaluations of proposals to dismiss or settle a class action sometimes involve highly sensitive issues, particularly should the proposal be ultimately disapproved. For example, the parties may be required to disclose weaknesses in their own positions, or to provide information needed to assure that the proposal does not directly or indirectly confer benefits upon class representatives or their counsel inconsistent with the fiduciary obligations owed to members of the class or other-

wise involve conflicts of interest. Accordingly, in some circumstances, investigation of the fairness of these proposals conducted by an independent master can be of great benefit to the court, particularly since the named parties and their counsel have ceased to be adversaries with respect to the proposed dismissal or settlement. The revision clarifies that the strictures of Rule 53(b) do not preclude the court from appointing under that Rule a special master to assist the court in evaluating a proposed dismissal or settlement. The master, if not a Magistrate Judge, would be compensated as provided in Rule 53(a).

**SUBDIVISION (F).** The certification ruling is often the crucial ruling in a case filed as a class action. The plaintiff, in order to obtain appellate review of a ruling denying certification, will have to proceed with the case to final judgment and may have to incur litigation expenses wholly disproportionate to any individual recovery; and, if the plaintiff ultimately prevails on an appeal of the certification decision, postponement of the appellate decision raises the specter of "one way intervention." Conversely, if class certification is erroneously granted, a defendant may be forced to settle rather than run the risk of potentially ruinous liability of a class-wide judgment in order to secure review of the certification decision. These consequences, as well as the unique public interest in properly certified class actions, justify a special procedure allowing early review of this critical ruling.

Recognizing the disruption that can be caused by piecemeal reviews, the revision contains provisions to minimize the risk of delay and abuse. Review will be available only by leave of the court of appeals promptly sought, and proceedings in the district court with respect to other aspects of the case are not stayed by the prosecution of such an appeal unless the district court or court of appeals so orders. The appellate procedure would be the same as for appeals under 28 U.S.C. § 1292(c). The statutory authority for using the rule-making process to permit an appeal of interlocutory orders is contained in 28 U.S.C. § 1292(e), as amended in 1992.

It is anticipated that orders permitting immediate appellate review will be rare. Nevertheless, the potential for this review should encourage compliance with the certification procedures and afford an opportunity for prompt correction or error.

## PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE

### Rule 23. Class Actions (February 1995 Draft)

**(a) Prerequisites.** One or more members of a class may sue or be sued as representative parties on behalf of all if—with respect to the claims, defenses, or issues certified for class action treatment—

(1) the members are so numerous that joinder of all is impracticable,

(2) legal or factual questions are common to the class,

(3) the representative parties' positions typify those of the class,

(4) the representative parties and their attorneys are willing and able to fairly and adequately protect the interests of all persons while members of the class until relieved by the court from that fiduciary duty; and

(5) a class action is superior to other available methods for fair and efficient adjudication of the controversy.

**(b) Whether a Class Action is Superior.** The matters pertinent in deciding under (a)(5) whether a class action is superior to other available methods include:

(1) the extent to which separate actions by or against individual members might result in

(A) inconsistent or varying adjudications that would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications that, as a practical matter, would dispose of the nonparty members' interests or reduce their ability to protect their interests;

(2) the extent to which the relief may take the form of an injunction or declaratory judgment respecting the class as a whole;

(3) the extent to which common questions of law or fact predominate over any questions affecting only individual members;

(4) the class members' interests in individually controlling the prosecution or defense of separate actions;

(5) the extent and nature of any related litigation already begun by or against members of the class;

(6) the desirability or undesirability of concentrating the litigation in the particular forum; and

(7) the likely difficulties in managing a class action which will be eliminated or significantly reduced if the controversy is adjudicated by other available means.

**(c) Determination by Order Whether Class Action to Be Certified; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.**

(1) As soon as practicable after persons sue or are sued as representatives of a class, the court must determine by order whether and with respect to what claims, defenses, or issues the action should be certified as a class action.

(A) An order certifying a class action must describe the class and determine whether, when, how, and under what conditions putative members may elect to be excluded from, or included in, the class. The matters pertinent to this determination will ordinarily include:

(i) the nature of the controversy and the relief sought;

(ii) the extent and nature of the members' injuries or liability;

(iii) potential conflicts of interest among members;

(iv) the interest of the party opposing the class in securing a final and consistent resolution of the matters in controversy; and

(v) the inefficiency or impracticality of separate actions to resolve the controversy.

When appropriate, a putative member's election to be excluded may be conditioned upon a prohibition against its maintaining a separate action on some or all of the matters in controversy in the class action or a prohibition against its relying in a separate action upon any judgment rendered or factual finding in favor of the class, and a putative member's election to be included in a class may be conditioned upon its bearing a fair share of litigation expenses incurred by the representative parties.

(B) An order under this subdivision may be conditional, and may be altered or amended before final judgment.

(2) When ordering that an action be certified as a class action under this rule, the court must direct that appropriate notice be given to the class under subdivision (d)(1)(C). The notice must concisely and clearly describe the nature of the action; the claims, defenses, or issues with respect to which the class has been certified; the persons who are members of the class; any conditions affecting exclusion from or inclusion in the class; and the potential consequences of class membership. In determining how, and

to whom, notice will be given, the court may consider the matters listed in (b) and (c)(1)(A), the expense and difficulties of providing actual notice to all class members, and the nature and extent of any adverse consequences that class members may suffer from a failure to receive actual notice.

(3) The judgment in an action certified as a class action, whether or not favorable to the class, must specify or describe those who are members of the class or have elected to be excluded on conditions affecting any separate actions.

(4) When appropriate, an action may be certified as a class action with respect to particular claims, defenses, or issues by or against multiple classes or subclasses. Subclasses need not separately satisfy the requirements of subdivision (a)(1).

**(d) Orders in Conduct of Class Actions.**

(1) In the conduct of actions to which this rule applies, the court may make appropriate orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in the presentation of evidence or argument;

(B) decide a motion under Rule 12 or 56 before the certification determination if the court concludes that the decision will promote the fair and efficient adjudication of the controversy and will not cause undue delay;

(C) require notice to some or all of the class members or putative members of:

(i) any step in the action, including certification, modification, or decertification of a class, or refusal to certify a class;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(D) impose conditions on the representative parties, class members, or intervenors;

(E) require the pleadings be amended to eliminate allegations about representations of absent persons, and that the action proceed accordingly, or

(F) deal with similar procedural matters.

(2) An order under Rule 23(d)(1) may be combined with an order under Rule 16, and may be altered or amended.

**(e) Dismissal or Compromise.** An action in which persons sue or are sued as representatives of a class must not, before the court's rul-

ing under subdivision (c)(1), be dismissed, be amended to delete the request for certification as a class action, or be compromised without approval of the court. An action certified as a class action must not be dismissed or compromised without approval of the court, and notice of a proposed voluntary dismissal or compromise must be given to some or all members of the class in such manner as the court directs. A proposal to dismiss or compromise an action certified as a class action may be referred to a magistrate judge or other special master under Rule 53 without regard to the provisions of Rule 53(b).

**(f) Appeals.** A court of appeals may permit an appeal from an order granting or denying a request for class action certification under this rule upon application to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

## APPENDIX B

### November 1995 Draft Rule 23

The following draft Rule 23 was prepared by the Reporter following the November meeting of the Civil Rules Advisory Committee. This draft has not been considered by the Advisory Committee. It was submitted at the January 1996 meeting of the Committee on Rules of Practice and Procedure as an informational item, illustrating a midstream point in the progress of the Advisory Committee as it considers whether Rule 23 should be amended. This draft departs from the earlier draft in several ways. The categorical distinctions between (b)(1), (b)(2), and (b)(3) classes are restored. Several changes are made in the provisions of (b)(3). Many of the decisions reached by the Advisory Committee in November remain tentative. As one illustration, no firm decision has been made whether to adopt either of the alternative versions of item (ii) in the first paragraph of subdivision (b)(3). And many of the provisions carried over from the earlier draft have not yet been considered by the Committee. If the Committee should decide to go forward with recommendations to amend Rule 23, it is likely that the actual recommendations will depart substantially from this draft.

#### Rule 23. Class Actions (November 1995 Draft)

- (a) **Prerequisites.** One or more members of a class may sue or be sued as representative parties on behalf of all ~~only~~ if — with respect to the claims, defenses, or issues certified for class action treatment —
- (1) ~~the class is~~ members are so numerous that joinder of all members is impracticable;<sup>2</sup>
  - (2) there are questions of law or fact common to the class;<sup>2</sup>
  - (3) ~~the claims or defenses of the representative parties are typical of the claims or defenses~~ the representative parties' positions typify those of the class;<sup>2</sup> and
  - (4) the representative parties and their attorneys will fairly and adequately discharge the fiduciary duty to protect the interests of the all persons while members of the class until relieved by the court from that fiduciary duty.
- (b) **~~Class Actions Maintainable~~ When Class Actions May be Certified.** An action may be ~~maintained~~ certified as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
- (1) the prosecution of separate actions by or against individual members of the class would create a risk of

- (A) inconsistent or varying adjudications with respect to individual members of the class ~~which~~ that would establish incompatible standards of conduct for the party opposing the class, or
- (B) adjudications with respect to individual members of the class ~~which~~ that would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
- (2) ~~the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive or declaratory relief or corresponding declaratory relief~~ may be appropriate with respect to the class as a whole; or
- (3) the court finds (i) that the questions of law or fact common to the certified class members ~~of the class~~ predominate over any individual questions ~~affecting only individual members included in the class action~~, (ii) that [the class claims, issues, or defenses are not insubstantial on the merits,] ~~[alternative:]~~ [the prospect of success on the merits of the class claims, issues, or defenses is sufficient to justify the costs and burdens imposed by certification], and (iii) that a class action is superior to other available methods and necessary for the fair and efficient adjudication ~~disposition~~ of the controversy. The matters pertinent to ~~the~~ these findings include:
- (A) ~~the interest of members of the class in individually controlling the prosecution or defense of~~ practical ability of individual class members to pursue their claims without class certification and their interests in maintaining or defending separate actions;
- (B) ~~the extent and nature of any related litigation concerning the controversy already commenced by or against~~ involving class members of the class;
- (C) ~~the desirability or undesirability of concentrating the litigation of the claims in the particular forum;~~
- (D) ~~the likely difficulties likely to be encountered in the management of~~ in managing a class action that will be avoided or significantly reduced if the controversy is adjudicated by other available means;
- (E) the probable success on the merits of the class claims, issues, or defenses;

- (F) whether the public interest in — and the private benefits of — the probable relief to individual class members justify the burdens of the litigation; and
- (G) the opportunity to settle on a class basis claims that could not be litigated on a class basis or could not be litigated by [or against?] a class as comprehensive as the settlement class; or
- (4) the court finds that permissive joinder should be accomplished by allowing putative members to elect to be included in a class. The matters pertinent to this finding will ordinarily include:
- (A) the nature of the controversy and the relief sought;
- (B) the extent and nature of the members' injuries or liability;
- (C) potential conflicts of interest among members;
- (D) the interest of the party opposing the class in securing a final and consistent resolution of the matters in controversy; and
- (E) the inefficiency or impracticality of separate actions to resolve the controversy; or
- (5) the court finds that a class certified under subdivision (b)(2) should be joined with claims for individual damages that are certified as a class action under subdivision (b)(3) or (b)(4).
- (c) Determination by Order Whether Class Action to Be Maintained Certified; Notice and Membership in Class; Judgment; Actions Conducted Partially as Class Actions Multiple Classes and Subclasses.**
- (1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits. When persons sue or are sued as representatives of a class, the court shall determine by order whether and with respect to what claims, defenses, or issues the action should be certified as a class action.
- (A) An order certifying a class action must describe the class. When a class is certified under subdivision (b)(3), the order must state when and how putative members (i) may elect to be excluded from the class, and (ii) if the class is certified only for settlement, may elect to be excluded from any settlement approved by the court under subdivision (e). When a class is certified under subdivision (b)(4), the order must state when, how, and under what

conditions putative members may elect to be included in the class; the conditions of inclusion may include a requirement that class members bear a fair share of litigation expenses incurred by the representative parties.

- (B)** An order under this subdivision may be [is] conditional, and may be altered or amended before ~~the decision on the merits~~ final judgment.
- (2)(A)** When ordering that an action be certified as a class action under this rule, the court shall direct that appropriate notice be given to the class. The notice must concisely and clearly describe the nature of the action, the claims, issues, or defenses with respect to which the class has been certified, the right to elect to be excluded from a class certified under subdivision (b)(3), the right to elect to be included in a class certified under subdivision (b)(4), and the potential consequences of class membership. [A defendant may be ordered to advance the expense of notifying a plaintiff class if, under subdivision (b)(3)(E), the court finds a strong probability that the plaintiff class will win on the merits.]
- (i)** In any class action certified under subdivision (b)(1) or (2), the court shall direct a means of notice calculated to reach a sufficient number of class members to provide effective opportunity for challenges to the class certification or representation and for supervision of class representatives and class counsel by other class members.
- (ii)** In any class action ~~maintained~~ certified under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort[, but individual notice may be limited to a sampling of class members if the cost of individual notice is excessive in relation to the generally small value of individual members' claims.] The notice shall advise each member that ~~(A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.~~

(iii) In any class action certified under subdivision (b)(4), the court shall direct a means of notice calculated to accomplish the purposes of certification.

**(3) Whether or not favorable to the class,**

(A) The judgment in an action maintained certified as a class action under subdivision (b)(1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class;

(B) The judgment in an action maintained certified as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2)(A)(ii) was directed, and who have not requested exclusion, and whom the court finds to be members of the class; and

(C) The judgment in an action certified as a class action under subdivision (b)(4) shall include all those who elected to be included in the class and who were not earlier dismissed from the class.

**(4) When appropriate—(A) An action may be brought or maintained certified as a class action —**

(A) with respect to particular claims, defenses, or issues; or

(B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly by or against multiple classes or subclasses, which need not satisfy the requirement of subdivision (a)(1).

**(d) Orders in Conduct of Class Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders;**

(1) Before determining whether to certify a class the court may decide a motion made by any party under Rules 12 or 56 if the court concludes that decision will promote the fair and efficient adjudication of the controversy and will not cause undue delay.

(2) As a class action progresses, the court may make orders that:

(A) (1) determineing the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation—of evidence or argument;

(B) (2) requireing, for the protection of to protect the members of the class or otherwise for the fair conduct of the action, that notice be directed to some or all of the members of:

(i) refusal to certify a class;

- ~~(ii)~~ any step in the action; ~~;~~ ~~or~~ ~~of~~
- ~~(iii)~~ the proposed extent of the judgment; ~~;~~ ~~or~~ ~~of~~
- ~~(iv)~~ the members' opportunity ~~of the members~~ to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, ~~or to otherwise come into the action,~~ or to be excluded from or included in the class;

~~(C)~~ ~~(3)~~ ~~imposing~~ conditions on the representative parties, class members, ~~or~~ ~~on~~ ~~intervenor~~s;

~~(D)~~ ~~(4)~~ ~~requiring~~ that the pleadings be amended to eliminate ~~therefrom~~ allegations as to about representation of absent persons, and that the action proceed accordingly;

~~(E)~~ ~~(5)~~ dealing with similar procedural matters.

~~(3)~~ ~~The orders~~ An order under subdivision (d)(2) may be combined with an order under Rule 16, and may be altered or amended as ~~may be desirable from time to time.~~

**(e) Dismissal ~~or~~ and Compromise.**

~~(1)~~ Before a certification determination is made under subdivision (c)(1) in an action in which persons sue [or are sued] as representatives of a class, court approval is required for any dismissal, compromise, or amendment to delete class issues.

~~(2)~~ An class action certified as a class action shall not be dismissed or compromised without the approval of the court, and notice of the a proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

~~(3)~~ A proposal to dismiss or compromise an action certified as a class action may be referred to a magistrate judge or a person specially appointed for an independent investigation and report to the court on the fairness of the proposed dismissal or compromise. The expenses of the investigation and report and the fees of a person specially appointed shall be paid by the parties as directed by the court.

**(f) Appeals.** A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying a request for class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.