THE CONSTITUTIONALITY OF THE PROPOSED RULE 23 CLASS ACTION AMENDMENTS

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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.[1]

The proposed amendments to Federal Rule 23 currently are working their way through the rulemaking process, with the public notice and comment period ending February 15, 1997.[2] The proposed amendments reflect the considered efforts of the Advisory Committee on Civil Rules, over the past four years, to amend and improve the existing federal class action rule.[3] In this period the Advisory

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1. Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 15 (1996).

2. *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, REQUEST FOR COMMENT, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, CIVIL, AND CRIMINAL PROCEDURE (1996).

3. The Advisory Committee on Civil Rules first turned its attention to amending the class action rule in 1991, under the auspices of Committee Chair Judge Sam Pointer of the United States District Court for the Northern District of Alabama. This original draft would have substantially changed the existing class action rule. First, the proposal would have conflated the existing Rules 23(b) classes and conceptually tied all classes to the superiority requirement. Second, the proposed revisions would have allowed judges, in their discretion, to permit an opt-in or opt-out right for all classes. Third, the proposal would have required notice for all types of class actions. Fourth, the proposal would have placed greater emphasis on the ability of judges to certify so-called "limited issues" classes. *See* ADVISORY

Committee has moved from a wholesale rule revision to a more "minimalist" approach to revamping the existing class action rule.

The Advisory Committee already has received an array of opinions commenting on the wisdom or ill-wisdom of the proposed revisions. Generally, the practicing bar has voiced concerns about the real-world consequences of these changes, based on experience under the existing rule. Plaintiff and defense lawyers, organized bar associations, interest-group lobbyists, and judges have capably educated the Advisory Committee concerning how the proposed rules will affect class action practice and client interests. The academic community also has assessed the effects of the proposed amendments, but generally has been more concerned with questions relating to the constitutional and statutory allocation of rulemaking power, Article III justiciability issues, and the scope of judicial discretion.[4]

Moreover, a number of commentators have posed the global question: "They can't do that, can they?,"[5] raising the so-called "Rules Enabling Act question."[6] Generally, the Rules Enabling Act question challenges the constitutionality of proposed amendments, an issue embedded in the debate over the proposed Rule 23 revisions.[7] This paper addresses the Rule Enabling Act question as it relates to the proposed amendments, focusing chiefly on the highly controversial proposal to authorize a Rule 23(b)(4) settlement class.[8] The paper also briefly addresses possible constitutional challenges to these proposals grounded in Article III and due process concerns, rather than the Rules Enabling Act.

COMMITTEE ON CIVIL RULES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO FEDERAL RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE (1991) (on file with the *Arizona Law Review*). *See also* Cooper, *supra* note 1, at 32–35 (1996) (discussing the Advisory Committee's original proposals to amend the class action rule).

In June 1992, the Standing Committee on Practice and Procedure of the United States Judicial Conference referred the Rule 23 draft proposal to the Advisory Committee for further consideration. Since fall 1993, revisions to the class action rule have proceeded under the auspices of Committee Chair Judge Patrick Higginbotham of the United States Court of Appeals for the Fifth Circuit. During this period, the Advisory Committee Reporter has been Professor Edward Cooper of the University of Michigan Law School.

4. *See, e.g.*, Letter from the Steering Committee to Oppose Proposed Rule 23 to the Standing Committee on Rules of Practice and Procedure (May 28, 1996) (on file with the *Arizona Law Review*) (opposing the proposed rule, and signed by 129 law professors).

5. See the memorably titled article by Professor Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858 (1995).

6. *See* Appendix B, 28 U.S.C. §§ 2071–2072 (1994).

7. Appellate litigants also frequently use the Rules Enabling Act question to challenge existing rules. *See, e.g.*, Business Guides Inc. v. Chromatic Communications Enters., 498 U.S. 533, 551 (1991) (challenging Rule 11). *See also infra* note 12. This paper uses the term "constitutional" in a very broad sense—i.e., relating to the separation of powers principles implicated in the proper exercise of federal rulemaking.

8. *See* Appendix A, setting forth the proposed Rule 23 amendments with the Advisory Committee's Note.

I. THE RULES ENABLING ACT ARGUMENT, GENERALLY

Beyond doubt, the Supreme Court and Congress jointly have power to amend the federal rules[9] as well as the authority to amend Rule 23. If they do not, there is no point in debating the validity of any specific proposed Rule 23 revision.[10] Thus, the pertinent question is not whether the Advisory Committee, the Judicial Conference, or the Supreme Court has the power to amend Rule 23 generally, but whether the exercise of that power in these proposed amendments exceeds that authority.

The Rules Enabling Act question is embedded in every rulemaking effort, by virtue of the statutory provisions allocating rulemaking authority:[11]

> **§ 2072. Rules of procedure and evidence; power to prescribe**
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> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
>
> (b) *Such rules shall not abridge, enlarge or modify any substantive right.* All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

The most generalized form of the "Rules Enabling Act argument" suggests that an existing or proposed rule violates the Act because the rule or proposal is substantive rather than procedural in effect. In appellate litigation, this argument is used retroactively to challenge the constitutional validity of an existing federal rule.[12] During rulemaking, opponents use this argument to challenge the judiciary's

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9. This author recognizes that there is a debate concerning whether the Rules Enabling Act confers a joint rulemaking power on the judiciary and Congress, or exclusive rulemaking power in Congress alone. This debate is outside the scope of this paper. The author has taken the position that rulemaking is a jointly-held power. *See* Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283 (1993); *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375 (1992).

10. Moreover, if the judiciary and Congress lack the power to amend Rule 23, then one can only be left to wonder whether these two branches have been acting illegitimately for more than 50 years of rule amendments. Professor Cooper's concern captures this point. *See supra* note 1.

11. *See* Appendix B, 28 U.S.C. §§ 2071–2073 (1994) (collecting the statutory provisions governing federal rulemaking procedure).

12. *See, e.g.*, Business Guides Inc. v. Chromatic Communications Enters., 498 U.S. 533, 551–54 (1991); Colegrove v. Battin, 413 U.S. 149, 162–63 (1973) (challenging Rule 48); Hanna v. Plumer, 380 U.S. 460, 464–65 (1965) (challenging Rule 4(d)(1)); Schlagenhauf v. Holder, 379 U.S. 104, 112–14 (1964) (challenging Rule 35(a)); Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 433–35 (1956) (challenging Rule 54(b)); Mississippi Publ'g Corp. v. Murphree, 326 U.S. 438, 445 (1946) (challenging Rule 4(f)); Sibbach v. Wilson, 312 U.S. 1, 14 (1941) (challenging Rule 35).

It is worth noting that the Supreme Court has never found that a Federal Rule of Civil Procedure violates the Rules Enabling Act. *See* 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1001–1008 (1987) (history of federal

authority to promulgate a proposed rule revision. Thus, during the current rulemaking, commentators have suggested that certain Rule 23 proposals transgress the Supreme Court's authority to prescribe procedural rules for the federal courts because the proposals are substantive in effect.[13]

The generalized Rules Enabling Act argument is inherently unresolvable. Neither the Supreme Court in a series of cases[14] nor academic exegesis over five decades[15] has cogently illuminated how best to determine whether a rule is "substantive" or "procedural." The Supreme Court has suggested that we can recognize procedural rules when we see them, because these rules fundamentally involve "housekeeping" arrangements.[16] Less usefully, the Supreme Court has variously (and unsuccessfully) attempted to characterize substantive rules, an exercise that involves parsing whether a particular rule is "bound up" with substantive rights and remedies.[17] Further muddling this debate is the concession that many rules fall into a "twilight zone" between substance and procedure, a rhetorical flourish that is feeble for resolving hard cases.

In the absence of clear doctrine, the generalized Rules Enabling Act argument inevitably deteriorates into a boilerplate conclusory swearing contest between rule supporters and opponents.[18] Thus, supporters proclaim that the challenged rule is procedural, invoke its housekeeping aspects, and refer to the doctrinal murkiness of the substance-procedure divide.[19] Rule opponents respond that the rule is substantive in effect, cobbling together any plausible substantive relationships that a proposed rule evokes.[20] With the contenders at an impasse, supporters resort to the ultimate Rules Enabling Act argument: that all procedural rules have substantive effect.[21] The debate over the proposed Rule 23 amendments dutifully

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procedural rulemaking); 21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5132 (1977) (presumption of validity).

13. *See infra* note 20. These specific Rules Enabling Act arguments are discussed *infra* at 19–22.

14. *See supra* note 12.

15. *See, e.g.*, Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281; Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 1012.

16. *See, e.g.*, Hanna v. Plumer, 380 U.S. at 464–65.

17. *See, e.g.*, Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 538 (1958). The Court's various attempts to distinguish substance and procedure under *Erie* doctrine have been highly criticized. *See, e.g.*, *supra* note 12; WRIGHT & GRAHAM, *supra* note 12.

18. This is the proceduralist's version of "You say *tomato* and I say *tomahto*."

19. *See, e.g.*, Letter from Professor Roger C. Cramton to the Hon. Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, Re: Consideration of Rule 23 Amendments by Civil Rules Committee (Nov. 23, 1996) (reporting the arguments of Professor Stephen Burbank in support of the proposed Rule 23(b)(4) amendment) (on file with the *Arizona Law Review*).

20. *See, e.g.*, Letter from Professor Roger C. Cramton to John K. Rabiej, Chief Rules Committee Support Office, Re: Rules Committee Hearing, at 3–5 (Nov. 22, 1996) (on file with the *Arizona Law Review*).

21. *See, e.g.*, Letter of Professor Roger C. Cramton, *supra* note 19 (setting forth arguments of Professor Burbank in support of the proposed Rule 23(b)(4)). The purpose of

has followed form, and neither side reasonably can declare victory merely by asserting that the proposed amendments are procedural or substantive in nature.

II. THE PROPOSED CLASS AMENDMENTS AND THE RULES ENABLING ACT

A. Proposals to Amend Rule 23 (Other Than the Proposal for Authorization of a Settlement Class)

The Advisory Committee has recommended a number of changes to the existing class action rule, but only two of the proposed changes have generated significant debate about whether the Advisory Committee has exceeded its authority under the Rules Enabling Act.[22] In all likelihood, the other proposed changes are within the judiciary's statutory rulemaking authority.

1. Interlocutory Review of Class Certification Orders

The Advisory Committee has proposed adding a new Rule 23(e) which provides discretionary appellate jurisdiction of appeals from district court orders granting or denying class certification.[23] By statutory authority, the Supreme Court may prescribe rules to provide for the appeal of interlocutory decisions that are not provided by other provisions of the interlocutory appeal statute.[24] In 1990 Congress amended the Rules Enabling Act specifically to permit judicial rulemakers to define when a district court order is final for purposes of appeal.[25] Unless §§ 1292(e) and 2072(c) are unconstitutional, these provisions provide direct statutory authorization for the Advisory Committee's proposed rule revision.

On the merits, this amendment is a sound rulemaking solution to the burgeoning problem of using mandamus as a back-door method to obtain interlocutory review of orders granting class certification.[26]

2. Requirement for a Fairness Hearing

The Advisory Committee has proposed revising Rule 23(e) to provide that no class action shall be dismissed or compromised without a *hearing* and court approval, and only *after* all class members have been given notice of the dismissal or compromise.[27] The central revisions are the requirements of a fairness hearing

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this point is to suggest that the "substantive" argument ought to be discounted.

22. The locus of the Rules Enabling Act debate has centered on the proposals to add a new factor (F) to Rule 23(b)(3), discussed *infra* at notes 34–38, and to authorize a new Rule 23(b)(4) settlement class, discussed *infra* at notes 39–91.

23. See Appendix A for the text of this proposal in the context of the rule.

24. 28 U.S.C. 1292(e) (1994).

25. *See* Appendix B, 28 U.S.C. § 2072(c) (1994).

26. For a discussion of this problem, see, for example, *In re* Rhone–Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995).

27. See Appendix A for the text of this proposal in the context of the rule.

with prior notice to class members. These proposed changes are intrinsically procedural and do not affect substantive law or rights. Indeed, it is difficult to conceive of rules more intrinsically procedural than those requiring prior notice and a hearing.[28]

3. Timing of the Class Certification

The Advisory Committee has proposed changing the language of Rule 23(c) to require that district courts determine whether a class action may be maintained *when* practicable after the commencement of an action brought as a class. The central change substitutes the language "*when*" for "*as soon as.*"[29] This proposed revision clarifies a timing requirement and as such intrinsically is a procedural or "housekeeping" provision, similar to numerous timing provisions scattered throughout the federal rules.[30]

4. The Proposed Rule 23(b)(3) Opt-Out Class Factors

The Advisory Committee has proposed adding new factors to the list that judges may consider when assessing certification of a (b)(3) opt-out class. New factor (C) would permit the judge to assess the maturity of a proposed class with reference to any related litigation.[31] This proposed new factor directly derives from federal court experience with the certification of mass tort litigation classes, an experience that suggests the undesirability of authorizing a class when an immature mass tort exists.[32] Proposed factor (C) therefore would permit judges, in their discretion, to assess whether it makes sense to create a class litigation unit with reference to the track record of related cases, as well as the state of scientific evidence supporting alleged claims.

The addition of the "maturity" factor to the list of Rule 23(b)(3) factors essentially reflects a pragmatic wisdom derived from mass tort class certification

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28. Two central benchmarks of procedural due process are the requirements of notice and the opportunity to be heard. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

29. See Appendix A for the text of this proposal in the context of the rule.

30. *See, e.g.*, FED. R. CIV. P. 4(m) (time limit for service of process); FED. R. CIV. P. 6 (time, computation of time); FED. R. CIV. P. 11(c)(1)(A) (time limits for filing sanction motions and safe-harbor withdrawal); FED. R. CIV. P. 12(a)(1) (time requirements for service of responsive pleadings and motions); FED. R. CIV. P. 14(a) (time requirements for third-party practice); FED. R. CIV. P. 15(a)–(d) (time requirements for amendments to pleadings and supplemental pleadings); FED. R. CIV. P. 16(b), (d) (time requirements for pretrial schedules and conferences and final pretrial conference); FED. R. CIV. P. 24(a), (b) (time requirements for intervention); FED. R. CIV. P. 25(a) (time requirements for substitution of parties). This list is not exhaustive.

31. See Appendix A for the text of this proposal in the context of the rule.

32. *See, e.g.*, Castano v. American Tobacco Co., 84 F.3d 734, 744–50 (5th Cir. 1996) (discussing the maturity factor in reversing class certification of a class of persons addicted to tobacco products); *In re* Rhone–Poulenc Rorer, Inc., 51 F.3d 1293, 1298–99 (7th Cir. 1995) (discussing litigation history of related trials involving tainted blood products in reversing class certification of such a class of claimants).

decisions. However, to the extent that assessment of the maturity factor involves a federal judge in impermissibly "previewing the merits" of class claims,[33] this proposed factor may be vulnerable to a Rules Enabling Act challenge.

More controversially, proposed new factor (F) would permit a federal judge to assess "whether the probable relief to individual class members justifies the costs and burdens of class litigation."[34] Of all the proposed Rule 23 amendments—apart from the proposed Rule 23(b)(4) settlement class[35]—this amendment arguably is most subject to a Rules Enabling Act challenge.

The formulation of this (F) factor has a long lineage in the Advisory Committee's deliberations. The current (F) factor derives from an original proposal to codify a standard permitting judges to "preview the merits" of the class claims and, in some fashion, assess the probable likelihood of success on the merits.[36] These two suggestions formed the basis of an extensive policy debate—including whether the Advisory Committee had authority under the Rules Enabling Act to codify such a principle—on the ground that previewing the merits at the certification stage affected substantive rights.

After numerous attempts to formulate language embodying these concepts, the Advisory Committee retreated from codifying either. Instead, the Advisory Committee formulated the current (F) factor, that essentially permits a federal judge to exercise discretion and balance the probable relief to class members against the costs and burdens of resolving claims through the class mechanism.

In Advisory Committee deliberations the proposed (F) factor became known as the "it just ain't worth it" factor, based on various members' belief that some small claims class actions with low compensation to class members "just ain't worth" the burdens and expense of conducting the litigation as a class. This view informed the current proposal that federal judges ought to be able to take into account the "just ain't worth it" concept when making a certification decision.

The basis for the Rules Enabling Act objection to the proposed (F) factor is grounded in the argument that this factor embodies a value judgment about the worth of small claims class actions.[37] In essence, objectors argue that the Advisory

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33. *See infra* note 36.

34. See Appendix A for the text of this proposal in the context of the rule.

35. Discussed at length *infra* at notes 39–91.

36. The debate regarding whether federal judges may "preview the merits" of class claims in making a class certification decision derives from the Supreme Court's holding in Eisen v. Jacquelin & Carlisle, 417 U.S. 156 (1974). However, recent federal court decisions have suggested that the *Eisen* holding has been misconstrued and misstated, and does not preclude a federal judge from looking beyond the pleadings in making a class certification decision. Several courts instead have suggested that the class action rule requires a federal judge to examine available information beyond the pleadings and to make a "rigorous analysis" of the class claims, defenses, and the way in which a proposed class action actually would be tried. *See, e.g., Castano*, 84 F.3d at 744–45; *In re* American Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996).

37. *See, e.g.*, Letter from Professors Arthur R. Miller and David L. Shapiro to the Hon. Alicemarie H. Stotler, Chair, Standing Committee on Rules 2–3 (May 23, 1996) (on file with the *Arizona Law Review*). *See also* Letter from the Steering Committee to Oppose

Committee has exceeded its authority in making this normative policy decision about a certain type of class action, which is a policy decision entrusted to Congress. Thus, if there is sufficient opposition to small claims class actions, Congress is the appropriate body to make this policy decision through substantive legislation, rather than the Advisory Committee accomplishing this result through rulemaking.[38]

III. THE PROPOSED SETTLEMENT CLASS AND THE RULES ENABLING ACT

A. The Settlement Class Proposal: General Observations

The Advisory Committee has proposed amending Rule 23(b) to create a fourth type of class—the so-called "settlement class." The proposal permits a district court to certify such a class if "the parties to a settlement request certification under subdivision (b)(3) for the purposes of settlement even though the requirements of subdivision (b)(3) might not be met for trial."[39]

Similar to the proposed Rule 23(b)(3)(C) factor relating to maturity,[40] the proposed settlement class provision largely embodies a pragmatic accommodation to existing practice. Rather than blazing revolutionary new ground,[41] the proposed Rule 23(b)(4) settlement class attempts to codify what many federal judges believe constitutes long-standing practice under the current rule.[42] Understanding the concept of the "settlement class" involves an appreciation of the forms that settlement classes may take in current practice. This consideration revolves largely around the timing of the class certification decision. Thus, class action settlements may arise in four different temporal postures.

First, a judge may certify a class action at the outset of litigation (or "as soon as practicable" after the action is brought as a class), after which the parties may settle and bring the settlement to the judge for review and approval under Rule 23(e). Second, a judge may "provisionally" or "conditionally" certify a class ("as soon as practicable"), after which the parties may settle and bring their settlement

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Proposed Rule 23, *supra* note 4, at 5–6 (opposing proposed factor (F) on policy grounds, without reference to the Rules Enabling Act argument).

38. Apart from the Rules Enabling Act issue, objectors to proposed factor (F) also assert that the factor is poorly drafted, permitting too much unguided judicial discretion. Furthermore, defenders of small claims class actions reassert the historical role and desirability of such class actions. *See supra* note 37.

39. See Appendix A for the text of this proposal in the context of the rule.

40. *See supra* notes 31–32.

41. *See, e.g.*, John C. Coffee Jr., *Class Action "Reform": Advisory Committee Bombshell*, N.Y.L.J., May 21, 1996, at 1.

42. Some members of the Advisory Committee articulated this belief. This appreciation of proposed Rule 23(b)(4) also is congruent with the view that Advisory Committee rulemaking more often is "behind" the practice curve rather than ahead of it. In this view, Advisory Committee rule revision typically codifies existing practice, rather than blazes revolutionary ground with untried, new procedures.

to the judge for review and approval under Rule 23(e). Third, a judge may explicitly certify a class for the purpose of settlement: that is, the judge may certify the class and instruct the parties to go forth and negotiate a settlement. Once settlement is reached, the judge will then review the settlement under Rule 23(e). Fourth, the parties may negotiate a settlement, make class certification a term of the agreement, and then take their agreement to the judge for both class certification and approval of the substantive terms of the agreement. This is the "purest" form of settlement class, exemplified by the *Georgine* settlement class, and it is a relatively recent development in federal practice.[43]

Proposed Rule 23(b)(4) largely addresses the fourth type of class action settlement and permits a judge to certify a class in these circumstances. However, because the proposed Rule 23(b)(4) permits a judge to certify a settlement class that would not otherwise satisfy standards for a triable class, there is little reason to believe a federal court could not certify a settlement class earlier.

The Rule 23(b)(4) proposal comes weighted with tremendous emotional baggage, largely inspired by the *Georgine* litigation.[44] It is virtually impossible to understand the heated controversy over the Advisory Committee's settlement class proposal without historical knowledge of the controversial *Georgine* settlement class and the massive opposition it inspired. Indeed, the same collection of lawyers and academics who condemned the *Georgine* settlement now are allied against the (b)(4) proposal, generally.[45] As is argued below, much of the Rules Enabling Act opposition to the Rule 23(b)(4) proposal is clouded by the strenuous objections to substantive terms of the *Georgine* settlement, grounded in an array of ethical objections.

Moreover, a substantial portion of the opposition to the proposed Rule 23(b)(4) settlement class is grounded in the belief that personal injury mass tort claims may not be resolved *en masse*. Generally, the *Georgine* opponents object to class action settlements of mass tort litigation, and their Rules Enabling Act arguments (as well as other arguments) embody a thorough-going repudiation of mass tort class settlements, without regard to when or how such settlements might be accomplished. Thus, a fundamental problem with the *Georgine* opposition to the proposed Rule 23(b)(4) is that it sweeps too broadly, condemning all settlement classes.[46] Against this backdrop, it is worth noting that class action practitioners

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43. *See* Georgine v. Amchem Prods., 83 F.3d 610 (3d Cir. 1996), *rev'g* 157 F.R.D. 246 (E.D. Pa. 1994), *cert. granted sub nom.* Amchem Prods., Inc. v. Windsor, 117 S. Ct. 379 (1996).

44. *See id. See also* Symposium, *The Institute of Judicial Administration Research Conference on Class Actions*, 71 N.Y.U. L. REV. 1 (1996); Symposium, *Mass Tortes: Serving Up Just Desserts*, 80 CORNELL L. REV. 811 (1995).

45. *See* Letter from the Steering Committee to Oppose Proposed Rule 23, *supra* note 4. As of December 1996, the 129 law professor signatories to this letter had expanded to 144. The core of this group (approximately 45 law professors) also signed an amicus brief in opposition of the *Georgine* settlement, which was submitted to and rejected by Judge Reed during the *Georgine* fairness hearing. *See Georgine*, 157 F.R.D. at 246.

46. It would be an interesting exercise to query the *Georgine* opponents whether their objections to the *Georgine* settlement would remain if the court had certified the *Georgine*

involved in other substantive class litigation do not oppose, but rather support, the proposed (b)(4) settlement class.[47]

B. The Rules Enabling Act Arguments in Opposition to Proposed Settlement Class

Critics of the (b)(4) settlement class attack the amendment as transgressing the Rules Enabling Act, based on the following arguments:[48]

> *1. The proposed rule in effect licenses federal district courts to promulgate new substantive law.... Settlement class actions...[i]nvolve federal courts in approving private settlement agreements that displace applicable state or federal law.... [S]ettlements are a form of contract law, substantive in character, and generally governed by state law.... Tort law in the United States is also generally a field left to the states.*[49]

This attack basically misconceives the nature of the class certification process and confuses this process with the completely separate role of the court in reviewing and approving class settlement agreements.[50] While this attack is rhetorically appealing, it is fundamentally fallacious and misleading.

It is incorrect to suggest that the mere creation of a new category of maintainable class thereby "licenses the federal court to promulgate new substantive law." Nor does the creation of a new category of a maintainable class displace applicable state contract or tort law. The mere invocation of substantive contract and tort law, and connecting this substantive law to settlement agreements, is insufficient to carry the burden of persuasion that the proposed (b)(4) category violates the Rules Enabling Act.

The structure of the class action rule sets forth the requirements that federal district courts must consider in making a decision whether to permit an action that

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class at the outset, or provisionally certified the class, or provisionally certified the class for the specific purpose of delegating the lawyers to negotiate a settlement.

47. Conversation with Professor Edward Cooper, The University of Michigan Law School (Dec. 1996) (reporting comments at the November 1996 public hearing on the proposed revisions, as well as written comments submitted to the Advisory and Standing Committees).

48. The most extensive Rules Enabling Act arguments against the proposed Rule 23(b)(4) settlement class have been set forth by Professor Roger C. Cramton of the Cornell Law School and Professor Paul D. Carrington of Duke Law School. Professor Roger C. Cramton was a paid expert witness in the *Georgine* fairness hearing in opposition to that settlement, on behalf of dissenting class members. This author was a paid, non-testifying consultant in support of the *Georgine* settlement.

49. *See* Letter from Professor Roger C. Cramton to John K. Rabiej, *supra* note 20, at 3–6. *See also* Memorandum from Professor Paul D. Carrington to the Standing Committee on Rules of the Judicial Conference of the United States (May 21, 1996) (on file with the *Arizona Law Review*); Paul D. Carrington, Rulemaking and the Fate of the French Aristocracy, at 31–43 (Draft of Dec. 1, 1996, on file with the *Arizona Law Review*).

50. FED. R. CIV. P. 23(e), not 23(b), governs the role of the court in approving settlement agreements.

has been brought as a class action may be "so maintained."[51] At the outset, the federal judge must consider whether the proposed class satisfies the threshold requirements of numerosity, commonality, typicality, and adequacy of representation.[52] Apart from these requirements, the judge must assess whether the proposed class definition is adequate,[53] and whether the class representatives are members of the proposed class.[54]

Only if these threshold requirements are met will a federal judge make the determination whether the proposed class action may be maintained under one of three existing functional categories, or "types" of class actions described in Rule 23(b)—the so-called (b)(1), (b)(2), and (b)(3) class actions. None of the current categories of maintainable (b) class actions "licenses the federal courts to create substantive law," and it is similarly fallacious to suggest that the mere creation of a new category of maintainable class thereby authorizes federal courts to create substantive law.

In essence, the class action rule embodies the ultimate joinder rule among the various joinder devices in the Federal Rules of Civil Procedure.[55] What distinguishes the class action rule from these other joinder devices is its *representational* nature, which drives the need for due process protection for absent class claimants.[56] Nonetheless, the class action rule is a joinder device, and the Rule 23(b) categories merely describe the possible functional joinder categories, or aggregations of claimants, that a federal judge may approve for group dispute resolution.

The existing Rule 23(b) categories are conceptually descriptive, and require only that the federal court determine whether the proposed class "fits" the description. In making this determination, the federal court is in no way involved with creating or applying substantive contract, tort, property, or any other substantive law.

Thus, Rule 23(b)(1) describes two types of possible "prejudice" classes,[57] and

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51. FED. R. CIV. P. 23(c)(1).

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

53. *See* 7A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1760 (2d ed. 1986) (class definition may not be not vague, amorphous, overinclusive, or underinclusive).

54. *Id.* § 1761. These two requirements are not set forth in Rule 23, but are a matter of doctrinal law.

55. *See, e.g.*, FED. R. CIV. P. 14 (third-party practice for expansion and joinder of parties and claims in an existing litigation); FED. R. CIV. P. 19 (joinder of persons needed for a just adjudication); FED. R. CIV. P. 20 (permissive joinder of parties); FED. R. CIV. P. 22 (interpleader); FED. R. CIV. P. 24 (intervention); FED. R. CIV. P. 42 (consolidation of actions).

56. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) (Kansas state-based class action); Hansberry v. Lee, 311 U.S. 32 (1940).

57. *See* FED. R. CIV. P. 23(b)(1)(A) (the possible-prejudice-to-defendants class), and FED. R. CIV. P. 23(b)(1)(B) (the possible-prejudice-to-plaintiffs class, also sometimes referred to as the "limited fund" class action). *See also* WRIGHT ET AL., *supra* note 53, §§ 1772–1774.

permits aggregation of homogeneous claimants when there is a possibility of prejudice either to defendants or plaintiffs in absence of the class mechanism to resolve the dispute.[58] Similarly, Rule 23(b)(2) describes the circumstances that permit aggregation of homogeneous claimants united in interest—the classic declaratory or injunctive relief class.[59] Finally, Rule 23(b)(3)—the so-called "opt-out" class created by the Advisory Committee in 1966—describes the special circumstances that permit aggregation or joinder of heterogeneous claimants for group resolution.[60]

The proposed new (b)(4) category is precisely that and no more: *a descriptive functional category* that permits a federal court to certify an aggregation of claimants when parties arrive at a settlement and request class treatment. The proposed (b)(4) category therefore is not structurally or conceptually different than requests for class certification of a limited fund, declaratory judgment, or injunctive class. In making those determinations, federal courts are not involved in creating, construing, or applying substantive law. So too, the proposed (b)(4) category, as a possible type of class action, does not involve the federal court in creating or applying substantive law to determine whether circumstances exist that justify certification.

Furthermore, the suggestion that "*[s]ettlement classes involve federal courts in approving settlement agreements that displace applicable state or federal law,*"[61] has absolutely nothing to do with the legitimacy of creating a new functional (b)(4) category for settlement situations. The creation of a (b)(4) category does not in any way implicate the independent process of approving a settlement agreement, which constitutes an entirely separate procedural event governed by Federal Rule 23(e).

The certification of a class, and review of a class settlement, are independent events. This is true even if the request for class certification is made simultaneously

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58. As such, the (b)(1)(A) and (b)(1)(B) classes embody a preference for the class aggregation in situations where there is likely prejudice either to plaintiffs or defendants if litigation were to proceed on a case-by-case basis.

59. FED. R. CIV. P. 23(b)(2). *See generally* WRIGHT ET AL., *supra* note 53, §§ 1775–1776.

60. *See* FED. R. CIV. P. 23(b)(3). *See also* WRIGHT ET AL., *supra* note 53, §§ 1777–1780. The (b)(3) opt-out class requires the court to make the additional finding that common questions of law or fact predominate over individual issues, and that the class is a superior method for resolving the dispute. Rule 23(b)(3) currently lists four factors that federal judges may take into account in making this determination.

61. *See supra* note 49. Even assuming the stated premise that federal courts, in their Rule 23(e) role of reviewing and approving proposed settlements, displace state or federal law, there is nothing constitutionally defective in this, provided that the court makes the required findings that the settlement is fair, adequate, and reasonable. *See supra* note 37. The essence of settlement is party compromise, and if parties are willing to displace state or federal law in return for other benefits under an agreement, there is nothing intrinsically illegitimate in negotiating and accepting such an agreement. Additionally, federal courts have repeatedly stated that important public and judicial policy favors settlement. *See, e.g.*, *In re* General Motors Corp. Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 784 (3d Cir. 1995); *In re* Pacific Enters. Sec. Litig., 47 F.3d 373, 378 (9th Cir. 1995). *See also* HERBERT NEWBERG & ALBA CONTE, CLASS ACTIONS § 1140 (1977) (citing cases).

with the class settlement, and even if the request for class certification is itself a term of the agreement.[62] A federal court's approval or disapproval of a proposed settlement involves an process entirely discrete from, and subsequent to, class certification. Moreover, review of a class settlement agreement is subject to an entirely different set of criteria than those for determining whether a class is maintainable under a particular Rule 23(b) category.[63] Thus, it would be entirely possible for a court to certify a (b)(4) settlement class, but reject the terms of the agreement on its merits as not constituting a fair, adequate, and reasonable settlement of class claims.[64]

> *2. The proposal for creation of a settlement class violates the Rules Enabling Act because of the substantive nature of settlement classes, "especially apparent" in the mass tort field. Settlement classes involve substantive issues that stretch the bounds of judicial power, including disposition of choice of law issues that displace federal or state law. Settlement classes impermissively involve judicial management techniques actively involving judges in the negotiation and settlement process, and impermissibly creating wholesale reparation schemes.*[65]

This collection of arguments against the legitimacy of proposed Rule 23(b)(4) essentially would vitiate the legitimacy of existing Rules 23(e) and 16(c)(19). Federal courts have been in the business of encouraging, reviewing, approving, and supervising settlements since 1938.[66] Moreover, Federal Rule 16(c)(19) specifically enumerates settlement as an appropriate subject for consideration at mandatory pretrial conferences. Thus, the federal rules instruct federal judges to discuss and encourage settlement; public and judicial policy favors settlement;[67] and federal judges for more than fifty years have been involved in thousands of settlements (including class settlements) that displace federal or state law as a result of negotiated compromise.

The argument that settlement classes illegitimately create substantive reparation schemes[68] also seems misguided. In one sense, every class *settlement*

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62. This is the typical manner in which settlement classes are presented to a court.

63. *See* FED. R. CIV. P. 23(e). *See also* WRIGHT ET AL., *supra* note 53, §§ 1791–1791.1 Federal courts generally must ascertain that a proposed settlement is "fair, adequate, and reasonable," although different federal courts variously define the content of these standards.

64. In this respect, the proposed settlement class mimics the existing available technique of certifying a "provisional class" for settlement purposes. Although a class is certified, the court subsequently may decertify the class or reject any proposed settlement on its merits if the settlement does not meet the standards of being fair, adequate, and reasonable.

65. Letter from Professor Roger Cramton to John K. Rabiej, *supra* note 20.

66. *See* FED. R. CIV. P. 23(e). Prior to 1996, the requirements for dismissal or compromise of a class action were governed by then Rule 23(c).

Even acknowledging that settlement agreements are a matter of contract law, federal courts still have the ability to actively supervise such agreements. *See, e.g.*, Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375 (1994).

67. *See supra* note 61.

68. The argument is that settlement classes devise wholesale comprehensive solutions

may be said to create a "reparation scheme." Thus, this particular broadside challenges the legitimacy of every other type of classwide relief, whether accomplished through settlement, limited funds, fluid recoveries, declaratory judgments, injunctions, or consent decrees—all of which, incidentally, may displace state substantive law.

Moreover, judicial authorization of a (b)(4) class would not in itself create or approve the settlement terms forming the content of a settlement agreement. In this sense, then, authorization of a settlement class does not conceptually create any "reparation scheme." Essentially, approval of a settlement class is content-empty, merely authorizing a joinder entity. It is the settlement *agreement* that contains remedial measures (and not the existence of the class), the provisions of which are subject to a fairness review.

> *3. Settlement classes embody "the difficulty that the rights of mass tort victims to whom a settlement-only class action statute would be applied are for the most part defined by state law.... Unless tort victims are all asserting rights governed by the laws of the same state, the settlement necessarily overrides differences in state law.... Surely the relationship of the federal government to the states is a matter of substance, not mere procedure to be controlled by rule of court."*[69]

Again, this criticism conflates the class certification process in proposed Rule 23(b)(4), with the entirely separate endeavor of reviewing the contents of a settlement agreement, provided for in Rule 23(e).

Apart from this basic process confusion, no conceivable Rules Enabling Act violation occurs when parties agree through negotiation to resolve their dispute with reference to any particular body of law (or, for that matter, no particular body of law). To the degree that settlements always involve compromise, settlements also may "override" the requirements of substantive law. Agreement constitutes consent which constitutes waiver. No conceivable substantive federalism interest is implicated (or harmed) if parties agree to resolve their dispute by flipping a coin. No constitutional, statutory, rule, or doctrinal principle requires that settling parties resolve their differences according to federal law, state law, or the Code of Hammurabi.

Moreover, in the mass tort arena, a major benefit (and positive utility) of the settlement class has been the ability of the negotiating parties to achieve claims resolution that would not otherwise be possible precisely because of choice-of-law complications. Thus, settlement agreements enable dispute resolution in those situations where choice of law problems would inhibit class certification because of a lack of predominance of common issues, superiority, and manageability.

> *4. "[T]he state law to be displaced [in settlement classes] is itself manifestly substantive law bearing on social and economic relations*

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to large-scale problems that should be more appropriately determined by legislative bodies, rather than a court in a non-adversary proceeding. *See* Letter from Roger C. Cramton to John K. Rabiej, *supra* note 20, at 5.

69. Carrington, *supra* note 49, at 33–34.

> *extrinsic to the litigation. To disregard an otherwise applicable standard of care or statute of limitations is a substantive choice. An order approving a class action settlement disregards a myriad of such substantive rights and duties."*[70]

Again, this criticism conflates the class certification process provided for in proposed Rule 23(b)(4) with the entirely separate endeavor of reviewing of the contents a settlement agreement, provided for in Rule 23(e).

Apart from this basic process confusion, no conceivable Rules Enabling Act violation occurs when parties agree through negotiation to resolve their dispute and disregard applicable standards of care, statutes of limitation, or the requirements of any other "substantive right." Parties routinely agree to settle disputes on terms that specify that the defendant concedes no liability. Parties also may agree, in settlement, to waive applicable statutes of limitation. There is nothing sacrosanct or inherently compelling about substantive rights, which parties often barter not only in settlement, but even in adversarial litigation.[71]

The process of ascertaining the conditions necessary for settlement class certification under the proposed Rule 23(b)(4) category simply would not trench on substantive rights. Nor would such certification effect substantive rights that in any event may be bartered, traded, yielded, conceded, or plain given away.

> *5. "A settlement-only class action necessarily depends on the establishment of a fictional contract of employment between members of the class and class counsel who will be paid from the proceeds of the settlement of members' claims.... Contracts between attorneys and their clients are substantive legal relationships and the validity of adhesion contracts is a matter of utmost substantive-political sensitivity. The settlement-only class action is a doctrine of contract law, not of procedure."*[72]

The "substantive contractual" nature of the attorney-client relationship exists in all categories of class litigation, as well as non-class litigation.[73] Hence, it is a large stretch indeed to suggest that the attorney-client relationship infuses the proposed Rule 23(b)(4) class with substantive content, thereby transgressing the Rules Enabling Act.[74] The fact that the attorney-client relationship is a matter of

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70. *Id.* at 34–35.

71. It is not uncommon in complex adversarial litigation, for example, for a plaintiff to "trade" a punitive damages claim in return for a waiver of an applicable statute of limitations.

72. Carrington, *supra* note 49, at 35.

73. *Id.*, at 36. The author concedes: "This problem of creating a fictional contract of fiduciary relations exists in some measure with respect to all (b)(3) class actions." *Id.*

74. Stated somewhat differently, asserting that the attorney-client relationship is a matter of substantive contract law cannot conceivably support the bootstrap argument that the proposed (b)(4) category for settlement classes violates the Rules Enabling Act. Additionally, attorney fee arrangements in class settlements differ widely, and not all class attorney fees are paid from the proceeds of the class settlement.

Finally, characterizing the class attorney-client relationship in the proposed Rule 23(b)(4) class as a "contract of adhesion" has no basis in fact and is highly inflammatory

contract law does not imbue class actions with substantive content or effect. All attorneys owe fiduciary duties to their clients, even in non-class litigation and settlement. If the attorney-client relationship (as a matter of contract law) imbues a rule with substantive effect, then several other federal rules specifically relating to attorney duties similarly must be vulnerable to a Rules Enabling Act attack.[75]

> *6. "The conflict of interest problem is muted even in settlement if the requirements of (b)(3) are met, but if the class is not identified by the predominance of common questions, as (b)(4) contemplates, the class lawyer is laden with conflicts of interest and cannot possibly negotiate a settlement equally faithful to all his or her fictional clients. Because it is then acutely unrealistic to infer assent, the substantive effect of (b)(4) is greater than that of (b)(3)."*[76]

Conflict-of-interest problems inherent in class representation also cannot conceivably bootstrap an argument that the proposed Rule 23(b)(4) is substantive and therefore transgresses the Rules Enabling Act. First, the potential for such conflicts exists in all categories of class litigation, even classes specifically designed for groups of homogeneous claimants, such as the (b)(1) and (b)(2) categories.[77] If the substantive effect of potential conflict of interest subverts the proposed (b)(4) class, then this argument subverts the entire class action rule. Second, speculation as to the relative degree of the substantive effect of types of classes is incalculable, and adds nothing to the debate. What exactly does it mean to argue that the substantive effect of the (b)(4) class is greater than a (b)(3) class? Third, this criticism assumes too much: namely, that (b)(4) class counsel (in classes lacking a predominance of common issues) automatically will be "laden with conflicts of interest and cannot possibly negotiate a settlement equally faithful to all his or her fictional clients."

Class counsel in classes lacking a predominance of common issues are not automatically *de facto* laden with conflicts of interest, and it is entirely possible for class counsel to proceed and negotiate a good faith settlement on behalf of all class claimants. Indeed, even in certified (b)(3) class actions where the court finds a predominance of common issues, that finding only means a *predominance* of such issues, but not an absolute identity of issues. Thus, even in the certifiable (b)(3) class actions, class counsel still represent members with diverse interests and claims. Furthermore, the class action rule contains provisions for remediating conflict problems, such as the creation of subclasses,[78] limited issues classes,[79] or

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rhetoric. There is no reason for believing that an attorney-client relationship in a (b)(4) action constitutes a contract of adhesion, any more than other such class representation under (b)(1), (b)(2), or (b)(3) classes—or even non-class representation.

75. *See, e.g.*, FED. R. CIV. P. 16(f) (pretrial conference sanctions); FED R. CIV. P. 11 (pleading sanctions); FED R. CIV. P. 26(g) (discovery obligations); FED. R. CIV. P. 37 (discovery sanctions).

76. Carrington, *supra* note 49, at 36.

77. Conflicts of interest between attorney and client also can exist in non-class litigation, but this potential does not transform a procedural rule into one imbued with substantial content.

78. FED. R. CIV. P. 23(c)(4)(B).

appointment of guardians.[80] There are no reasons why class counsel, under existing rules and the auspices of a managerial judge, cannot eliminate potential conflict problems in any class action, including settlement classes.[81]

> *7. "The fictional contract created between class members and their lawyer also modifies the powers of class attorneys as agents of class members...under conventional law, a litigant is entitled to reject a settlement negotiated without explicit advanced approval. Insofar as subdivision 23(e) confers authority implied by law, it modifies the substantive right of a client to reject settlement...in the absence of predominating common questions, no such implication is warranted. It is not a reasonable inference that a class member intends to confer such extraordinary authority on class counsel in the mass tort situation; such an unrealistic inference effects a substantial change in the law of agency."*[82]

The attack on proposed Rule 23(b)(4), predicated on the theory that settlement classes effect a substantial change in agency law, actually is an attack on the substantive nature of Rule 23(e). Apart from this, it is virtually impossible to draw any reasonable or unreasonable inferences—except bald conclusory assertions—about what authority class members intend to confer on class counsel regarding settlement authorization *in any class context.* Thus, one could also argue that it is not a reasonable inference that a (b)(2) class member in an employment discrimination action intends to confer the extraordinary authority on class counsel to negotiate specific terms of an injunction settlement without advance client approval. If this is true, then the alleged Rule 23(e) modification of agency law tars all class actions with substantive effect.

> *8. "The fiduciary duties imposed on class counsel give rise to a related body of tort law governing alleged breach of those duties.... It seems to be widely assumed, however, that court approval of a settlement under subdivision (e) insulates class counsel from collateral attack by 'clients' aggrieved by an apparent sell-out of their claims by lawyers laden with conflicts of interest.... Indeed, the fact of judicial approval might be said to make the settlement 'state action,' and hence actionable under federal civil rights laws. Whatever the answers to the questions thus posed, they are rooted in tort law. Legislation to authorize judicial certification and approval of settlement-only class actions must leave available the class members' substantive right to sue class counsel for breach of fiduciary duty, or it is an illicit modification of that right."*[83]

While it is true that legal malpractice is a branch of substantive tort law, the

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79. FED. R. CIV. P. 23(c)(4)(A).

80. FED. R. CIV. P. 23(d)(5).

81. *See, e.g.*, Ahearn v. Fibreboard, 62 F.3d 392 (5th Cir. 1996) (affirming order certifying and approving Rule 23(b)(1)(B) global "futures" asbestos settlement class including due process protections).

82. Carrington, *supra* note 49, at 37.

83. *Id.*, at 37–38.

Rule 23 authorization for (b)(1), (b)(2), and (b)(3) classes does not modify the right to pursue a malpractice claim. Neither would authorization of a (b)(4) class. Moreover, the expressed grievance against the proposed Rule 23(b)(4) category, based on the modification of the substantive tort right to assert a malpractice claim, actually is a grievance against the alleged substantive effects of Rule 23(e).

> *9. "Resolution of monetary claims en masse entails assigning monetary values to the choses in action being compromised.... When common questions do not predominate, as in proceedings under proposed paragraph (b)(4), there is no method by which an intelligent judgment can comprehend the settlement value of diverse claims. Not only class counsel, but the court acting under subdivision (e) can do no more than stab in the dark, unless it is to inform itself on the merits of each case, a process that would defeat the purposes of the exercise. There is therefore no basis for an assumption that tort victims are willing to settle for terms derived by that method.*
>
> *"Such guesswork effects a substantial modification of the rights of class members. A modification of a right from one that can be enforced at trial to one that will be measured by weakly founded guesswork effects a transfer of wealth from class members with clearly meritorious claims to those whose claims are more dubious. Intangible property rights are thus modified by any law conferring authority on a court to approve en masse a settlement of personal injury claims."*[84]

Again, this criticism conflates the class certification process provided for in proposed Rule 23(b)(4), with the entirely separate endeavor of reviewing the contents of a settlement agreement, provided for in Rule 23(e). Proposed Rule 23(b)(4), by its operation, does not create or approve monetary damage claims. Apart from this basic process confusion, no conceivable Rules Enabling Act violation occurs when parties through negotiation agree to damage awards through claims scheduling, as typically occurs in mature mass tort settlement classes.

The attack against the possibility of classwide monetary damage settlements is totally unfounded. Moreover, the characterization of such settlements as "guesswork" is offensive, inflammatory, and manifests a thoroughgoing lack of knowledge about how attorneys and judges negotiate such settlements in mass tort litigation to provide monetary awards. Lawyers and judges involved in negotiating damage claim awards in mature mass tort settlements do not rely on guesswork, stab in the dark, throw darts, or consult Ouija boards. One of the singular characteristics of mature mass tort litigation—the litigation most likely to give rise to a settlement class—is the existence of substantial experience with claims valuation.[85]

Plaintiffs' attorneys, defense lawyers, and insurance carriers would never all come to the settlement table unless a mass tort was sufficiently mature so that all

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84. *Id.*, at 39–40.

85. It was and is well-known, among the practicing asbestos bar, the valuation of any particular asbestos disease manifestation. These valuations are known based on more than 30 years of litigation experience in all asbestos disease categories.

the players knew the value of the underlying individual tort claims. Indeed, precisely detailed knowledge about claim valuation often is a crucial variable inducing momentum for a settlement class. On the contrary, when a mass tort is immature and claim values are uncertain, defendants and their insurers have little incentive to seek resolution through a settlement class, but will instead aggressively oppose class certification of a litigation class. Thus, only when there is abundant information about claims valuation are all parties likely to seek resolution ("global peace") through a settlement class.

Moreover, courts do not and need not operate "in the dark" based on guesswork to make informed and intelligent appraisals of monetary awards in proposed settlements. Judges supervising mass tort class actions, including settlement classes, typically employ a special master to independently evaluate the fairness, adequacy, and reasonableness of claim awards offered in settlement agreements.[86] Special masters performing this task characteristically do so with reference to historic values of similar claims.

Finally, the most tired, preposterous canard is the argument that settlement awards modify substantive rights by devaluing claims that might more favorably be "enforced at trial" with a higher jury award. The very essence of settlement is compromise, reflecting the risk calculations of the parties, and compromised actions almost always result in lower returns to claimants than might result through a litigated tort action.

> *10. "[T]here is the closely related problem of dividing the proceeds of a global settlement among members of the class. Typically, the defendant will have no desire to participate in that division.... This transfer of the role of defendant from the putative tortfeasor to the victims as a class has economic consequences in further devaluing the intangible property rights of the victims. It also has social and political consequences by turning the claimants away from the alleged wrongdoer and against one another. This is yet another substantive consequence."*[87]

Proposed Rule 23(b)(4) itself has absolutely nothing to do with approving or implementing a mechanism for claim distribution. The means for accomplishing claim distribution are governed by the terms of the settlement agreement, which terms the court must review and approve subject to the standards of fairness, adequacy, and reasonableness.

Apart from this technical distinction, it is difficult to conceive why the defendant's abdication from implementing claim distribution has a substantive effect in devaluing claims. Settlement agreements that include detailed damage schedules, or multiple methods for claim processing, typically do not create a Hobbesian universe of self-seeking, competitive claimants left to their own

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86. Professors Francis McGovern and Stephen Burbank have performed such duties as court-appointed special masters; Professor Burbank most recently for the court in the *Georgine* settlement class. *See* Georgine v. Amchem Prods., 157 F.R.D. 246 (E.D. Pa. 1994).

87. Carrington, *supra* note 49, at 40.

Darwinian devices. Instead, settlement agreements usually establish complicated machinery for supervising claim evaluation and distribution.

Moreover, if settlement classes do suffer this particular substantive consequence, then Rule 23(b)(1)(B) limited fund classes are equally questionable, as are fluid recovery mechanisms. Moreover, under this theory, Federal Rule 22 (the interpleader rule), likewise trenches on substantive law and is equally vulnerable to a Rules Enabling Act attack. In interpleader actions the stakeholder essentially deposits the stake with the court, throws up its hands, walks away, and leaves competing claimants to battle it out.

> *11. "[F]or the purposes of the Rules Enabling Act, the right to individual control and management of one's own personal injury claim is itself a substantive right, indeed a constitutional right, not to be abrogated by mere rule of court.... Perhaps we cannot afford that luxury in mass tort cases, but surely a law abrogating the right of individuals to be treated as individuals in regard to their distinctive personal injuries is a substantive right."*[88]

Scour the Constitution: there is no constitutional right to control and manage one's own personal injury claim. And, if this broadside constitutes a legitimate Rules Enabling Act argument, then the entire class action rule, as well as every other joinder device in the Federal Rules of Civil Procedure, violates the Rules Enabling Act.[89]

> *12. "[T]he ability of the defendant to pay is a significant factor in judging the fairness of the terms of many settlements, including many mass torts, asbestos being the obvious example. That ability to pay is connected to other substantive rights and duties. What is involved in many settlement-only class actions is therefore the creation of a voluntary bankruptcy process for use by solvent debtors.... Would the Supreme Court consider promulgating a substitute bankruptcy law as an exercise of its powers under the Rules Enabling Act? We do not think so. But the proposed [sic] in Rule 23(b)(4) is in fact quite close to that...."*[90]

Rule 24(b)(4) by its own terms does not involve federal courts in assessing the defendant's ability to pay. Again, similar to the numerous opposition arguments stated above, this critique involves an attack against the possible substantive effects of the court's power under Rule 23(e) in approving class settlements measured against standards of fairness, adequacy, and reasonableness. Moreover, this argument similarly vitiates the legitimacy of Rule 23(b)(1)(B) limited fund class actions.

> *13. "Finally, there is the problem of future claimants, including those yet unborn.... Courts imposing global peace on future plaintiffs can be expected to rely on paragraph (b)(4) with greater ease and justification than have those who fashioned the settlement-only class*

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88. *Id.*, at 41.

89. For other possible joinder devices available under the Federal Rules of Civil Procedure, see *supra* note 55.

90. Carrington, *supra* note 49, at 41–42.

> *action out of the present text of the rule. Whatever may be said in favor of an immediate foreclosure of the rights of people who do not yet know they have rights, it is surely beyond debate that a rule authorizing federal courts to take such action is one of substance, and not of practice and procedure."*[91]

No, this is not surely beyond debate. Rule 23(b)(2) declaratory and injunctive classes—including those resolved through settlement—frequently affect the rights of future claimants. The mere fact that a court may approve a settlement affecting future claimants does not talismanically transform the rule authorizing such action into a substantive rule.

IV. OTHER CONSTITUTIONAL OBJECTIONS TO THE PROPOSED SETTLEMENT CLASS

The Rules Enabling Act challenges to the proposed class action amendments present one form of constitutional argument, grounded in an appreciation of the separation of powers principles embedded in interbranch rulemaking. Entirely apart from the Rules Enabling Act question, opponents of the proposed amendments have raised two entirely separate challenges to the proposed Rule 23(b)(4) settlement class, based in Article III and due process concerns. Neither of these constitutional challenges is sustainable under current federal doctrine,[92] but it is possible that future Supreme Court pronouncements could conclude otherwise.

A. Lack of "Case or Controversy"

Opponents of the proposed Rule 23(b)(4) settlement class object that the proposed rule authorizes federal courts to process matters that fail to meet the Article III requirement for an actual "case" or "controversy."[93] The extreme form of this argument suggests that collusive settlement classes further violate justiciability requirements. This objection has led to the overblown prediction that proposed Rule 23(b)(4), in ignoring these constitutional issues, "invites much litigation over such thorny constitutional questions."[94]

In truth, the question of whether judicial review and approval of settlement agreements violates Article III has been litigated in the lower federal courts, which uniformly have repudiated this challenge.[95] Quite sensibly, lower federal courts have concluded that settlement involves resolution of an underlying dispute, and but for the prior existence of a real case or controversy, there would be no need for a settlement. Settlement is, after all, a method of dispute resolution. Thus, federal

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91. *Id.* at 42–43.

92. *See* discussion *infra* at note 96 and pt. B.

93. *See* Letter from Professor Roger Cramton, *supra* note 20, at 10–11; Letter from the Steering Committee to Oppose Proposed Rule 23, *supra* note 4, at 4.

94. *See* Letter from the Steering Committee to Oppose Proposed Rule 23, *supra* note 4, at 4.

95. *See, e.g.*, Carlough v. Amchem Prods., Inc., 834 F. Supp. 1437, 1454–54 (E.D. Pa. 1993) (discussing other cases so holding).

courts, applying keen common sense, have pragmatically rejected contorted attempts to metaphysically transform party settlements into violations of the Article III case-and-controversy requirement.[96]

B. Due Process Concerns About Adequate Class Representation

Opponents of the proposed Rule 23(b)(4) suggest that the settlement class mechanism would undermine the due process requirement for adequate class representation.[97] Here the opponents invoke a parade of horribles that settlement classes allegedly inspire: defendants' collusive selection of class counsel; a "race to the bottom" for the cheapest settling lawyers; and the judiciary's boilerplate approval of any class counsel who manage to "strik[e] a deal."[98] Similar to the Article III concerns, critics suggest that: "In any event, (b)(4) is likely to increase the number of collateral attacks on settlements based on claims of inadequate representation, which would itself undermine many of the supposed benefits to be gained by the proposed rule."[99]

Professor Eric Green cogently has responded:

> The Steering Committee's opposition based on the due process guarantee of adequate representation is a red herring. The court maintains, as always, the responsibility of assuring adequacy of representation. The proposed amendment does not affect this requirement. Adequate representation by class counsel is a concern with class actions that will be tried just as much as with class actions that are settled. In a potential class action, lawyers may qualify as class counsel and refuse to settle the case; in some of these cases the case may not be maintainable as a class action because the requirements of Rule 23 cannot be met in the context of a class action to be tried. So what? That

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96. *See* Letter from Professor Eric Green, Boston University School of Law, to the Hon. Alicemarie H. Stotler, Chair, Standing Committee on Practice 4 (June 3, 1996) (on file with the *Arizona Law Review*). Writes Professor Green:

> The second objection by the law teachers opposing the proposed amendment is based on Article III "case or controversy" concerns when a class action is simultaneously certified and settled. This is, of course, a potentially serious issue in the abstract (and, in some cases, perhaps, a reality). However, in all the cases in which I have been involved, there is no way in which any moderately objective observer could doubt the existence of a concrete dispute with all the requisite adverseness. Settlement does not eliminate the existence of a dispute between the parties. All it means is that they have tentatively worked out a way to resolve the dispute short of a fully adjudicated judgment, appeal and post-judgment skirmishes. To argue that the existence of a class action settlement destroys Article III jurisdiction overproves the contention to a point of dangerous absurdity that would have profound negative consequences far beyond the class action context.

97. *See* Letter from Professor Roger Cramton, *supra* note 20, at 10–11; Letter from the Steering Committee to Oppose Proposed Rule 23, *supra* note 4, at 4.

98. Letter from Steering Committee to Oppose Proposed Rule 23, *supra* note 4, at 4.

99. *Id.*

> is a risk counsel run. It may be true that defendants may try to shop for class counsel who are willing to "sell out" the class in settlement, but defendants may also try to shop for class counsel who will be less threatening as trial counsel. In either event, the court has the responsibility of assessing adequacy of representation, which is an exceedingly fact-based inquiry necessitating a critical, detailed examination of the case and all aspects of the proposed settlement.[100]

CONCLUSION

Three final observations concerning the constitutional challenges to the proposed Rule 23 amendments, and the problem of the Rules Enabling Act attack: First, it is difficult to follow the current debate over the proposed Rule 23(b)(4) settlement proposal without an immense sense of irony at what the rule opponents will accomplish if they successfully defeat this proposal. In essence, defeat of the settlement class proposal will kill off the possibility of resolving mass tort litigation—and many other different substantive class actions—through the auspices of classwide settlements. Coupled with the recent trend in federal courts repudiating nationwide class certification of mass tort litigation classes,[101] the combined effect will result in the disaggregation of thousands of claims into individual or other small group litigation. This is what the rule opponents desire; they believe this is the only just and fair method of resolving mass tort claims

In traditional litigation, if opposing attorneys initiate and negotiate a settlement, if they collude and cut a really bad deal, if they "sell their clients down the river," no judge ever reviews the settlement and no one protects the client. This is so because traditional non-class litigation is based on the assumption of an "actually present" capable client actively overseeing the attorneys, supervising the dispute resolution, and protecting his or her own interests. Even though this assumption lacks empirical support,[102] the reason settlements in traditional litigation are not subject to judicial review is based on this assumption.

Ironically, class action settlements—and only class action settlements—are accompanied by a panoply of due process protections unheard of in traditional litigation. This is because class actions are *representational*, and hence the constitutional need to protect the interests of absent class members.[103] In this sense, class action litigants are better protected from their own lawyers, opposing counsel, and fellow claimants than in any other form of litigation—including traditional bipolar litigation, permissive joinder of parties, third-party impleader practice,

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100. Letter from Professor Eric Green, *supra* note 96, at 5.

101. *See, e.g.*, Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996); *In re* American Med. Sys., 75 F.3d 1069 (6th Cir 1996); *In re* Rhone-Poulenc Roser, Inc., 51 F.3d 1293 (7th Cir. 1995).

102. *See, e.g.*, Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89. Studies suggest that in the real world clients have virtually no active role in the conduct of litigation and know very little about their own cases, but have their views shaped by the lawyer's own agenda.

103. *See supra* note 56 and accompanying text.

intervention, interpleader, consolidation, and multidistrict litigation. Thus, it is entirely possible to create various aggregative litigation units under the federal joinder rules that totally lack the protections that the class action rule affords litigants.

Only in class litigation are plaintiffs protected by an array of Rule 23 and doctrinal due process requirements. Only in class litigation must a judge determine if class counsel is experienced, adequate, free of conflicts of interest, and has the resources to conduct the litigation. Only in class litigation must a judge determine that fellow claimants joined in the action are free of conflicts-of-interest and, if representing the class, are capable of being adequate representatives. Only in class litigation does a judge have the authority to appoint a guardian for the interests of some claimants. Only in class litigation does a judge have the authority to appoint a special master to independently evaluate the value of claims. Only in class litigation are settlement agreements subject to judicial review, based on a standard requiring that the settlement be fair, adequate and reasonable. Only in class litigation may litigants appear before a judge to voice disagreement with the terms of a settlement. Only in Rule 23(b)(3) class litigation are plaintiffs provided with the additional protection of notice and the opportunity to exclude themselves from the litigation.

The opponents of proposed Rule 23(b)(4) vigorously and sincerely oppose settlement classes because of an alleged parade of horribles implicated in this means for resolving classwide claims. Yet in defeating the settlement class proposal, not only would these champions deny claimants of one of the few means for resolving these massive disputes, but they also would forego, on behalf of these citizens, an array of judicially required protections that simply are not available in other forms of litigation.

Second, it is unfortunate that the virulent attack on the proposed Rule 23(b)(4) settlement class chiefly derives from the highly organized and vocal advocacy of a group of law professors with passing experience—and in many instances no experience at all—with one highly controversial settlement class, the *Georgine* litigation. The fate of the Rule 23(b)(4) proposal should not rise or fall on the *Georgine* litigation, but the *Georgine* settlement class is indeed the subtext for the controversy over the (b)(4) proposal.[104]

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104. It is even more distressing to realize that this opposition is fueled by many members of the academy with virtually no knowledge or understanding of class action litigation, let alone mass tort class action litigation. In the space of a few months, numerous law professors have become self-appointed experts on mass tort settlement classes, possessing sufficient confidence in their recently-acquired expertise to join in advising the Advisory Committee against promulgating a settlement class proposal. But for its real-world consequences, this intellectual arrogance is positively breathtaking.

Ironically, it is interesting to reflect that many of the academic opponents to proposed Rule 23(b)(4) have grounded their opposition to settlement classes in an overweening obsession with the professional ethics of the lawyers and judges involved in settlement classes. Yet these same objectors have absolutely no ethical qualm—or ethical sensibility—about rendering an opinion to the federal judiciary about a matter that many have only vague hearsay knowledge or understanding.

Third, the danger of the constitutional and Rules Enabling Act attacks against the class action proposals is that if these arguments (and the prestigious collection of persons advancing them) generate enough heat, then the Advisory Committee is likely to beat a retreat to save its political capital. This would be unfortunate both for the current rulemaking, as well as the precedent it would set for future rulemaking.

The Advisory Committee has proposed a set of minimal revisions to the class action rule after lengthy and deliberative process. The Advisory Committee debated, acknowledged, understood, and evaluated the constitutional and Rules Enabling Act objections to these proposals. The Advisory Committee debated, acknowledged, understood, and evaluated the pragmatic implications of these proposals. While not perfect, the proposals are sound. It would be a tragedy, indeed, if the Advisory Committee were to capitulate to sophisticated but misguided attacks that would transform procedure into substance.

APPENDIX A

PROPOSED REVISION OF THE CLASS ACTION RULE

ADVISORY COMMITTEE ON CIVIL RULES

(Published for Notice and Comment, August 15, 1996)

Rule 23*

....

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: ...

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

(A) the practical ability of individual class members to pursue their claims without class certification;

(~~A~~B) ~~the interest of members of the class in individually controlling the prosecution or defense of~~ class members' interests in maintaining or defending separate actions;

(~~B~~C) the extent~~, and~~ nature, and maturity of any related litigation ~~concerning the controversy already commenced by or against~~ involving class members ~~of the class~~;

(~~C~~D) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(~~D~~E) the difficulties likely to be encountered in the management of a class action; and

(F) whether the probable relief to individual class members justifies the costs and burdens of class litigation; or

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

...

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) ~~As soon as~~ When practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained.

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* New material is underlined. Superseded material is struck out.

...

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

...

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

ADVISORY COMMITTEE NOTE

Class action practice has flourished and matured under Rule 23 as it was amended in 1966. Subdivision (b)(1) continues to provide a familiar anchor that secures the earlier and once-central roles of class actions. Subdivision (b)(2) has cemented the role of class actions in enforcing a wide array of civil rights claims, and subdivision (b)(3) classes have become one of the central means of aggregating large numbers of small claims that would not support individual litigation. The experience of more than three decades, however, has shown ways in which Rule 23 can be improved. These amendments may effect modest expansions in the availability of class actions in some settings, and modest restrictions in others. New factors are added to the list of matters pertinent to determining whether to certify a class under subdivision (b)(3). Settlement problems are addressed, both by confirming the propriety of "settlement classes" in subdivision (b)(4) and by making explicit the need for a hearing as part of the subdivision (e) approval procedure. The requirement in subdivision (c)(1) that the determination whether to certify a class be made as soon as practicable after commencement of an action is changed to require that the determination be made when practicable. A new subdivision (f) is added, establishing a discretionary interlocutory appeal system for orders granting or denying class certification. Many of these changes will bear on the use of class actions as one of the tools available to accomplish aggregation of tort claims. The Advisory Committee debated extensively the question whether more adventurous changes should be made to address the problems of managing mass tort litigation, particularly the problems that arise when a common course of conduct causes injuries that are dispersed in time and space. At the end, the Committee concluded that it is too early to anticipate the lessons that will be learned from the continuing and rapid development of practice in this area.

At the request of the Advisory Committee, the Federal Judicial Center undertook an empirical study designed to illuminate the general use of class actions not only in settings that capture general attention but also in more routine settings. The study is published as T.E. Willging, L.L. Hooper, and R.J. Niemic, *An Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules (1996).* The study provided much useful

information that has helped shape these amendments.

Subdivision (b)(3). Subdivision (b)(3) has been amended in several respects. Some of the changes are designed to redefine the role of class adjudication in ways that sharpen the distinction between the aggregation of individual claims that would support individual adjudication and the aggregation of individual claims that would not support individual adjudication. Current attempts by courts and lawyers to adapt Rule 23 to address the problems that arise from torts that injure many people are reflected in part in some of these changes, but these attempts have not matured to a point that would support comprehensive rulemaking.

The probability that a claim would support individual litigation depends in part on the expected recovery. One of the most important roles of certification under subdivision (b)(3) has been to facilitate the enforcement of valid claims for small amounts. The median individual class-member recovery figures reported by the Federal Judicial Center study ranged from $315 to $528. These amounts are far below the level that would be required to support individual litigation, unless perhaps in a small claims court. This vital core, however, may branch into more troubling settings. The mass tort cases may sweep into a class many members whose individual claims would support individual litigation, controlled by the class member. In such cases, denial of certification or careful definition of the class may be essential to protect these plaintiffs. As one example, a defective product may have inflicted small property value losses on millions of consumers, reflecting a small risk of serious injury, and also have caused serious personal injuries to a relatively small number of consumers. Class certification may be appropriate as to the property damage claims, but not as to the personal injury claims. More complicated variations of this problem may arise when different persons suffer injuries that are similar in type but that vary widely in extent. A single course of securities fraud, for example, may inflict on many people injuries that could not support individual litigation and at the same time inflict on a few people or institutions injuries that could readily support individual litigation. The victims who could afford to sue alone may be ideal representatives if they are willing to represent a class, and may be easily able to protect their interests in separate litigation if a (b)(3) class is certified. If a (b)(1) or (b)(2) class were certified, however, the court should consider the possibility of excluding these victims from the class definition.

Individual litigation may affect class certification in a different way, by shaping the time when a substantial number of individual decisions illuminate the nature of the class claims. Exploration of mass tort questions time and again led experienced lawyers to offer the advice that it is better to defer class litigation until there has been substantial experience with actual trials and decisions in individual actions. The need to wait until a class of claims has become "mature" seems to apply peculiarly to claims that involve highly uncertain facts that may come to be better understood over time. New and developing law may make the fact uncertainty even more daunting. A claim that a widely used medical device has caused serious side effects, for example, may not be fully understood for many years after the first injuries are claimed. Pre-maturity class certification runs the risk of mistaken decision, whether for or against the class. This risk may be

translated into settlement terms that reflect the uncertainty by exacting far too much from the defendant or according far too little to the plaintiffs.

These concerns underlie the changes made in the subdivision (b)(3) list of matters pertinent to the findings whether the law and fact questions common to class members predominate over individual questions and whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. New factors are added to the list, and some of the original factors have been reformulated.

Subparagraph (A) is new. The focus on the practical ability of individual class members to pursue their claims without class certification can either encourage or discourage class certification. This factor discourages—but does not forbid—class certification when individual class members can practicably pursue individual actions. If individual class members cannot practicably pursue individual actions, on the other hand, this factor encourages class certification. This encouragement may be offset by new subparagraph (F) if the probable relief to individual class members is too low to justify the burdens of class litigation.

Subparagraph (B), revised from former subparagraph (A), complements new subparagraph (A). The practical ability of individual class members to pursue individual actions is important when class members have significant interests in maintaining or defending separate actions. These interests include such fundamental matters as choice of forum; the timing of all events from filing to judgment; selection of coparties and adversaries; the ability to gain choice of more favorable law to govern the decision; control of litigation strategy; and litigation in a single proceeding that includes all issues of liability and remedy. These interests may require a finding that class adjudication is not superior because it is not as fair to class members, even though it may be more efficient for the judicial system in the limited sense that fewer judicial resources are required. The right to request exclusion from a (b)(3) class does not fully protect these interests, particularly as to class members who have not yet retained individual counsel at the time of class notice. These interests of class members may be served by a variety of alternatives that may not amount to individual control of separate litigation. The alternatives to certification of the requested class may be certification of a different class or smaller classes, intervention in other pending actions, voluntary joinder, and consolidation of individual actions—including transfer for coordinated pretrial proceedings or transfer for consolidated trial.

The practical ability of individual class members to pursue individual litigation and their interests in maintaining separate actions may come into conflict when there is a significant risk that the insurance and assets of the defendants may not be sufficient to fully satisfy all claims growing out of a common course of events. The plaintiffs who might win the race to secure and enforce individual judgments have an interest that is served at the cost of other plaintiffs whose interests are defeated by exhaustion of the available assets. In these circumstances, fairness and efficiency may require aggregation in a way that marshals the assets for equitable distribution. This need may justify certification under subdivision (b)(3), or in appropriate cases under subdivision (b)(1). Bankruptcy proceedings may prove a

superior alternative. The decision whether to certify a (b)(3) class must rest on a judgment about the practical realities that may thwart realization of the abstract interests that point toward separate individual actions.

Factor (C), formerly factor (B), has been amended in several respects. Other litigation can be considered so long as it is related and involves class members; there is no need to determine whether the other litigation somehow concerns the same controversy. The focus on other litigation "already commenced" is deleted, permitting consideration of litigation without regard to the time of filing in relation to the time of filing the class action. The more important change authorizes consideration of the "maturity" of related litigation. In one dimension, maturity can reflect the need to avoid interfering with the progress of related litigation already well advanced toward trial and judgment. When multiple claims arise out of dispersed events, however, maturity also reflects the need to support class adjudication by experience gained in completed litigation of several individual claims. If the results of individual litigation begin to converge, class adjudication may seem appropriate. Class adjudication may continue to be inappropriate, however, if individual litigation continues to yield inconsistent results, or if individual litigation demonstrates that knowledge has not yet advanced far enough to support confident decision on a class basis.

Subparagraph (F) has been added to subdivision (b)(3) to effect a retrenchment in the use of class actions to aggregate trivial individual claims. If the probable relief to individual class members does not justify the costs and burdens of class litigation, a class action is not a superior means of efficient adjudication. The near certainty that few or no individual claims will be pursued for trivial relief does not require class certification.

The prospect of significant benefit to class members combines with the public values of enforcing legal norms to justify the costs, burdens, and coercive effects of class actions that otherwise satisfy Rule 23 requirements. If probable individual relief is slight, however, the core justification of class enforcement fails.

The value of probable individual relief must be weighed against the costs and burdens of class-action proceedings. No particular dollar figure can be used as a threshold. A smaller figure is appropriate if issues of liability can be quickly resolved without protracted discovery or trial proceedings, the costs of class notice are low, and the costs of administering and distributing the award likewise are low. Higher figures should be demanded if the legal issues are complex or complex proceedings will be required to resolve the merits, identification of class members and notice will prove costly, and distribution of the award will be expensive. Often it will be difficult to measure these matters at the commencement of an action, when individually significant relief is likely to be demanded and the costs of class proceedings cannot be estimated with any confidence. The opportunity to decertify later should not weaken this threshold inquiry. At the same time decertification should be considered whenever the factors that seemed to justify an initial class certification are disproved as the action is more fully developed.

Subdivision (b)(4). Subdivision (b)(4) is new. It permits certification of a class under subdivision (b)(3) for settlement purposes, even though the same class might

not be certified for trial. Many courts have adopted the practice reflected in this new provision. See, e.g., *Weinberger v. Kendrick*, 698 F.2d 61, 72–73 (2d Cir. 1982); *In re Beef Industry Antitrust Litigation*, 607 F.2d 167, 170–171, 173–178 (5th Cir. 1979). Some very recent decisions, however, have stated that a class cannot be certified for settlement purposes unless the same class would be certified for trial purposes. See *Georgine v. Amchem Products, Inc.*, __ F.3d ___ (3d Cir. 1996); *In re General Motors Corp. Pick-Up Truck Fuel Tank Litigation*, 55 F.3d 768 (3d Cir. 1995). This amendment is designed to resolve this newly apparent disagreement.

Although subdivision (b)(4) is formally separate, any class certified under its terms is a (b)(3) class with all the incidents of a (b)(3) class, including the subdivision (c)(2) rights to notice and to request exclusion from the class. Subdivision (b)(4) does not speak to the question whether a settlement class may be certified under subdivisions (b)(1) or (b)(2). As with all parts of subdivision (b), all of the prerequisites of subdivision (a) must be satisfied to support certification of a (b)(4) settlement class. In addition, the predominance and superiority requirements of subdivision (b)(3) must be satisfied. Subdivision (b)(4) serves only to make it clear that implementation of the factors that control certification of a (b)(3) class is affected by the many differences between settlement and litigation of class claims or defenses. Choice-of-law difficulties, for example, may force certification of many subclasses, or even defeat any class certification, if claims are to be litigated. Settlement can be reached, however, on terms that surmount such difficulties. Many other elements are affected as well. A single court may be able to manage settlement when litigation would require resort to many courts. And, perhaps most important, settlement may prove far superior to litigation in devising comprehensive solutions to large-scale problems that defy ready disposition by traditional adversary litigation. Important benefits may be provided for those who, knowing of the class settlement and the opportunity to opt out, prefer to participate in the class judgment and avoid the costs of individual litigation.

For all the potential benefits, settlement classes also pose special risks. The court's Rule 23(e) obligation to review and approve a class settlement commonly must surmount the informational difficulties that arise when the major adversaries join forces as proponents of their settlement agreement. Objectors frequently appear to reduce these difficulties, but it may be difficult for objectors to obtain the information required for a fully informed challenge. The reassurance provided by official adjudication is missing. These difficulties may seem especially troubling if the class would not have been certified for litigation, or was shaped by a settlement agreement worked out even before the action was filed.

These competing forces are reconciled by recognizing the legitimacy of settlement classes but increasing the protections afforded to class members. Certification of a settlement class under (b)(4) is authorized only on request of parties who have reached a settlement. Certification is not authorized simply to assist parties who are interested in exploring settlement, not even when they represent that they are close to agreement and that clear definition of a class would facilitate final agreement. Certification before settlement might exert untoward pressure to reach agreement, and might increase the risk that the certification could

be transformed into certification of a trial class without adequate reconsideration. These protections cannot be circumvented by attempting to certify a settlement class directly under subdivision (b)(3) without regard to the limits imposed by (b)(4).

Notice and the right to opt out provide the central means of protecting settlement class members under subdivision (b)(3), but the court also must take particular care in applying some of Rule 23's requirements. As to notice, the Federal Judicial Center study suggests that notices of settlement do not always provide the clear and succinct information that must be provided to support meaningful decisions whether to object to the settlement or—if the class is certified under subdivision (b)(3)—whether to request exclusion. One of the most important contributions a court can make is to ensure that the notice fairly describes the litigation and the terms of the settlement. Definition of the class also must be approached with care, lest the attractions of settlement lead too easily to an over-broad definition. Particular care should be taken to ensure that there are no disabling conflicts of interests among people who are urged to form a single class. If the case presents facts or law that are unsettled and that are likely to be litigated in individual actions, it may be better to postpone any class certification until experience with individual actions yields sufficient information to support a wise settlement and effective review of the settlement.

Subdivision (c). The requirement that the court determine whether to certify a class "as soon as practicable after commencement of an action" is amended to provide for certification "when practicable."

The Federal Judicial Center study showed many cases in which it was doubtful whether determination of the class-action question was made as soon as practicable after commencement of the action. This result occurred even in districts with local rules requiring determination within a specified period. These practices may reflect the dominance of practicability as a pragmatic concept that effectively has translated "as soon as" to mean "when." The amendment makes this approach secure, and supports the changes made in subdivision (b)(3) and the addition of subdivision (b)(4). Significant preliminary preparation may be required in a (b)(3) action, for example, to appraise the factors identified in new or amended subparagraphs (A), (B), (C), and (F). These and similar inquiries should not be made under pressure of an early certification requirement. Certification of a settlement class under new subdivision (b)(4) cannot happen until the parties have reached a settlement agreement, and there should not be any pressure to reach settlement "as soon as practicable."

Amendment of the "as soon as practicable" requirement also confirms the common practice of ruling on motions to dismiss or for summary judgment before the class certification decision. A few courts have feared that this useful practice is inconsistent with the "as soon as practicable" requirement.

Subdivision (e). Subdivision (e) is amended to confirm the common practice of holding hearings as part of the process of approving dismissal or compromise of a class action. The judicial responsibility to the class is heavy. The parties to the settlement cease to be adversaries in presenting the settlement for approval, and

objectors may find it difficult to command the information or resources necessary for effective opposition. These problems may be exacerbated when a proposed settlement is presented at, or close to the beginning, of the action. A hearing should be held to explore a proposed settlement even if the proponents seek to waive the hearing and no objectors have appeared.

Subdivision (f). This permissive interlocutory appeal provision is adopted under the power conferred by 28 U.S.C. § 1292(e). Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals. No other type of Rule 23 order is covered by this provision. It is designed on the model of § 1292(b), relying in many ways on the jurisprudence that has developed around § 1292(b) to reduce the potential costs of interlocutory appeals. At the same time, subdivision (f) departs from § 1292(b) in two significant ways. It does not require that the district court certify the certification ruling for appeal, although the district court often can assist the parties and court of appeals by offering advice on the desirability of appeal. And it does not include the potentially limiting requirements of § 1292(b) that the district court order "involve[] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

Permission to appeal should be granted with restraint. The Federal Judicial Center study supports the view that many suits with class action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings. Yet several concerns justify expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.

The expansion of appeal opportunities effected by subdivision (f) is modest. Court of appeals discretion is as broad as under § 1292(b). Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive. Permission is most likely to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation. Such questions are most likely to arise during the early years of experience with new class-action provisions as they may be adopted into Rule 23 or enacted by legislation. Permission almost always will be denied when the certification decision turns on case-specific matters of fact and district court discretion.

The district court, having worked through the certification decision, often will be able to provide cogent advice on the factors that bear on the decision whether to permit appeal. This advice can be particularly valuable if the certification decision

is tentative. Even as to a firm certification decision, a statement of reasons bearing on the probable benefits and costs of immediate appeal can help focus the court of appeals decision, and may persuade the disappointed party that an attempt to appeal would be fruitless.

The 10-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings. It is expected that the courts of appeals will act quickly in making the preliminary determination whether to permit appeal. Permission to appeal does not stay trial court proceedings. A stay should be sought first from the trial court. If the trial court refuses a stay, its action and any explanation of its views should weigh heavily with the court of appeals.

Appellate Rule 5 has been modified to establish the procedure for petitioning for leave to appeal under subdivision (f).

APPENDIX B

STATUTORY PROVISIONS RELATING TO FEDERAL RULEMAKING AUTHORITY

UNITED STATES CODE ANNOTATED

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

PART V—PROCEDURE

CHAPTER 131—RULES OF COURTS

§ 2071. Rule-making power generally

(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

(b) Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court and shall have such effect on pending proceedings as the prescribing court may order.

(c)(1) A rule of a district court prescribed under subsection (a) shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit.

(2) Any other rule prescribed by a court other than the Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference.

(d) Copies of rules prescribed under subsection (a) by a district court shall be furnished to the judicial council, and copies of all rules prescribed by a court other than the Supreme Court under subsection (a) shall be furnished to the Director of the Administrative Office of the United States Courts and made available to the public.

(e) If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment.

(f) No rule may be prescribed by a district court other than under this section.

§ 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All

laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

§ 2073. Rules of procedure and evidence; method of prescribing

(a)(1) The Judicial Conference shall prescribe and publish the procedures for the consideration of proposed rules under this section.

(2) The Judicial Conference may authorize the appointment of committees to assist the Conference by recommending rules to be prescribed under sections 2072 and 2075 of this title. Each such committee shall consist of members of the bench and the professional bar, and trial and appellate judges.

(b) The Judicial Conference shall authorize the appointment of a standing committee on rules of practice, procedure, and evidence under subsection (a) of this section. Such standing committee shall review each recommendation of any other committees so appointed and recommend to the Judicial Conference rules of practice, procedure, and evidence and such changes in rules proposed by a committee appointed under subsection (a)(2) of this section as may be necessary to maintain consistency and otherwise promote the interest of justice.

(c)(1) Each meeting for the transaction of business under this chapter by any committee appointed under this section shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public, and states the reason for so closing the meeting. Minutes of each meeting for the transaction of business under this chapter shall be maintained by the committee and made available to the public, except that any portion of such minutes, relating to a closed meeting and made available to the public, may contain such deletions as may be necessary to avoid frustrating the purposes of closing the meeting.

(2) Any meeting for the transaction of business under this chapter, by a committee appointed under this section, shall be preceded by sufficient notice to enable all interested persons to attend.

(d) In making a recommendation under this section or under section 2072 or 2075, the body making that recommendation shall provide a proposed rule, an explanatory note on the rule, and a written report explaining the body's action, including any minority or other separate views.

(e) Failure to comply with this section does not invalidate a rule prescribed under section 2072 or 2075 of this title.