

# THE (CLOUDY) FUTURE OF CLASS ACTIONS

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## I. INTRODUCTION

The past, both proximate and remote, is often consulted in attempts to predict the future. Of course extrapolation from past to future is at best an uncertain art. Extrapolation, however, is not the only problem. Lessons from the recent past are distorted by lack of perspective. Lessons from the distant past are distorted by distance. The first step is to choose which of the competing pasts to consult. Selfishly, I choose to consult the recent past, as it continues through the present and on into the near-term future, from the perspective of the Advisory Committee on the Federal Rules of Civil Procedure. I gain at least two advantages from this perspective.

The first advantage is that the Civil Rules Committee experience is familiar. Many of the observations that follow build from my own summaries of the public testimony and comments on proposals to amend Rule 23 that were published in 1996. One function of these observations, indeed, is to provide an

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accessible accounting to the many who took the time and effort to participate so helpfully in the rulemaking process. The proposals were intended to be relatively modest, opening opportunities to pare back the use of class actions in some settings and to expand the flexibility of class actions in others. The testimony and comments, however, showed a wide range of conflicting views not only about the proposals but also about contemporary uses of class actions in general. Except for a proposal to add a provision for permissive interlocutory appeals, the 1996 proposals have not yet gone—and many are not likely to go—further.

The second advantage, perhaps not so obvious, is that this chosen platform provides some excuse for my inability to make clear predictions. So long as I have the great good fortune to serve as the Advisory Committee Reporter, I can have no firm views. Indeed, I cannot even make predictions as to the likely course of further Committee deliberations. The Committee maintains a continuing Rule 23 agenda. Rule 23 is caught up in the continuing dilemma of “mass tort” litigation, however, and three Committee members are participating in a mass torts working group with liaison members from five other Judicial Conference Committees. The Rule 23 agenda may well remain largely inactive until the working group has run its one-year course. A reasonably safe way to avoid wrong predictions is to make no predictions.

If I cannot have firm views or predict the next Advisory Committee steps, I can recognize clear problems that cloud the future. They can be described in a variety of ways. The simplest is to say that many lawyers and parties with class-action experience believe that whatever its successes, Rule 23 has generated undesirable and even nefarious class actions. Their views build from a variety of specific issues, and I will focus on some particular problems that so far have defied easy resolution. But common themes also should be sought. I will pursue the theme that we still do not have an adequate concept that justifies representation by class action, and that the lessons of experience do not relieve, but rather exacerbate, the disquiet that arises from conceptual inadequacy. The representation question arises at both ends of the continuum, in classes that aggregate individual claims for very small amounts and in classes that aggregate individual claims for amounts so large as to support individual stand-alone litigation. It also arises, and even more perplexingly, in the mid-range that involves not only mid-sized individual claims but, more importantly, actions that aggregate individual claims that run from small to large.

Finally, given the title for this session—“What is the Future of the Class Action after *Georgine*?”—it may be useful to observe that the *Amchem* decision<sup>1</sup> does not seem particular cause to fear for the future of class actions. The emphasis on adequacy of representation, and the correlative problem of conflicts among the

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

people that are tendered for designation as a class, is surely healthy.<sup>2</sup> Greater attention to these matters is all to the good.

## II. WHY CLASS?

The obligatory first observation carries in two directions. One is that many alternative means of aggregation can be substituted for class treatment. The choice is not between a single class suit and a stand-alone action for each individual class member. Voluntary joinder, intervention, consolidation of initially separate actions, joint trials, interpleader, consolidated pretrial, coordination among judges and courts with respect to proceedings that otherwise remain separate, and smaller class actions are among the alternatives. Even test cases and nonmutual preclusion should be considered in the array. The variation of a mandatory intervention procedure also has been considered, creating a different means of binding nonparticipants by a judgment. For mass torts, bankruptcy remains an active candidate.<sup>3</sup> All alternatives must be appraised in determining the suitability of class treatment in any particular case.

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2. It is difficult to attempt a succinct statement of the *Amchem* decision. Following lengthy prefilings negotiations with the intended defendants, would-be class representatives simultaneously filed the action, sought class certification, and proposed approval of the settlement that had been reached with the defendants. The class included persons who had been exposed to asbestos products made by the defendants and who had not yet filed personal-injury actions. Some of these persons had already experienced physical impairments, ranging from minor to fatal. Others, the "exposure-only" or "futures" class members, had not yet experienced any observable physical impairments. The settlement was approved after a careful process that included designation of a separate judge to review fairness and adequacy issues. The Third Circuit reversed, holding the class certification inappropriate on many grounds. One of the statements made by the Third Circuit was that a class can be certified for settlement only if the same class would be certified for trial. The Supreme Court affirmed, finding class certification inappropriate on two grounds. Common issues did not predominate as required for the certification under Rule 23(b)(3). And the named representatives could not provide adequate representation for a single class that included persons with conflicting interests. In affirming the Third Circuit decision, however, the Court also stated that "settlement is relevant to a class certification," because it avoids the "intractable management problems" that might thwart actual trial as a class action. *Amchem*, 117 S. Ct. at 2247-48. In making these rulings, the Court deliberately refused to rule on other challenges to the class certification. Justiciability issues of standing and ripeness were put aside because, although jurisdictional, the class certification was "logically antecedent to the existence of any Article III issues"—if class certification was improper, the Article III issues that might arise from the certification would vanish. *Id.* at 2244. The problem of providing adequate notice to exposure-only class members, many of whom might not even be aware of having been exposed to the defendants' asbestos products, also was put aside, but with the warning that "we recognize the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous." *Id.* at 2252.

3. A recent model for treating mass future claims in bankruptcy was sketched in NAT'L BANKR. REV. COMM'N, REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION, 315-50 (1997).

For all the number of alternatives, however, there is a deeper reality. The more people who are to be caught up in a judgment, whether by settlement or trial, the more the problems and procedures will come to resemble those of class actions. So long as we retain any semblance of our adversary system, no more than a few lawyers can effectively plan and control a litigation. Although it is tempting to add that no more than a few parties can enjoy meaningful participation in working with the lawyers, that formulation seems too optimistic. As the number of persons caught up increases, it becomes increasingly difficult to arrange, or even to tolerate, meaningful control by a small sample. Whether called clients, parties, representatives, steering committees, or anything else, nonlawyers cannot meaningfully conceive of the scope of the interests, potential conflicts, and issues involved. Nor should nonlawyers fairly be asked to typify, much less meaningfully to represent, others. Even if it could be arranged for all parties to participate—as if all 100 plaintiffs in 100 consolidated actions acted as a committee to instruct counsel—the participation would be quite different from the relationship between one client and one lawyer. And, barring unbelievable unanimity of views, in the end the judgment of some must prevail over the judgments of others.

The problems that can be found in the class action setting, in short, will appear whatever means of aggregation are used. The forms may be different, and some forms may afford greater conceptual solace than others. But the core problems will be substantially the same. Class action procedure relies on aggregation by representation, subject to safeguards designed to ensure adequate representation. The question is whether these safeguards are effective in the only sense that is meaningful—whether they provide a substitute for individual participation that is both intrinsically satisfactory and superior to alternative means of aggregation or individual litigation. It may be that the central advantage of Rule 23 is that we have become accustomed to it. The fact that we have become accustomed to it also may be its central disadvantage—it is too easy to believe that because we are doing it, we must be doing it well.

### III. REPRESENTATION: COMMON CHALLENGES

#### *A. Introduction: The Rule 23 Expansion of Representation*

Rule 23 rests on the theory that representation can replace the traditional right to individual notice, individual hearing, and individual control of adversary litigation choices. The class representatives at best are self-nominated; many comments suggest that often they are lawyer-recruited. Class certification, however, depends on a judicial finding of adequate representation, and demonstrably inadequate representation can lead to decertification. A class definition that is accurate in the sense that all class members share a community of homogeneous interests helps to support reliance on representation as a substitute for an individual day in court. We accept class representation in the faith that court monitoring and good lawyering are enough. We retain the ultimate safeguard that class members are not bound by the judgment if

representation was inadequate. The theory is not shabby. Theory, however, must at times encounter practice. The test of representation theory provided by recent practice is not entirely reassuring.

The representation theory must support and explain a wide range of distinct applications. Rule 23 is but one rule, yet it has developed to serve an astonishing array of functions. Many of these functions were not foreseen at the times of drafting and adopting Rule 23. Unintended and uninvited as they may be, they also may represent the wise product of a common-law process that continues to evolve and improve. Even if unwise or dangerously harmful, these unforeseen functions have become interwoven with substantive law enforcement in ways that may put them beyond amendment through the Rules Enabling Act process. It may be sound to argue that the Enabling Act process surely must be able to undo what it has created—that if Rule 23 is a valid product of a process that cannot abridge, enlarge, or modify any substantive right, the same process can correct its unintended substantive effects. Even if this argument is sound, it is not alone the test of practical Enabling Act limits. Those who would amend Rule 23 must face the constraints of gathering the information necessary for wise decision, of weighing the information and resolving the manifold conflicts of perception and policy, and of shepherding the final product through the final step of congressional acquiescence. Some of the concepts described below are surely beyond practical reach, at least during the near future. Yet they are indispensable foundations for the issues that may be open.

The most fundamental representation question goes to the heart of the attorney-client model that underlies most adversary civil litigation. An attorney can bring an action on behalf of a client only with the client's consent. At best, a class action involves a representative party who seeks to give consent on behalf of other class members. Ordinarily the representative party is not an attorney. Even if the representative party is an attorney, the representative-party role is not an attorney's role; that is what allows the representative party to play the client's role. But what alchemy of court approval really fits the representative party to make litigating decisions on behalf of others, commonly unrelated and indeed unknown? When the representative party is not an attorney, is it plausible—let alone fair to class members or the representative party—to ask the representative party to be client on behalf of the class? What insights does even the most "typical" representative have into the interests or preferences of class members? More particularly, how can the representative assess the risks of various legal strategies or settlement opportunities and make choices that reflect the different impacts on different class members? And if the representative party is an attorney, what distinguishes the class action from an action brought by two attorneys without any client?

These questions revive the familiar complaints that class representatives often are recruited by class counsel, play no client role whatsoever, and—when deposed to test the adequacy of representation—commonly show no understanding of their litigation. Class actions often are lawyer actions. Adequacy of representation is measured first and foremost by the adequacy of counsel. A

figurehead client adds no more than an obeisance to tradition. These frequent realities must be reckoned with in any persuasive theory of class representation.

### *B. (b)(1) and (2) Classes*

The functions of Rule 23 begin with the mandatory, no-opt-out (b)(1) and (b)(2) classes. These classes are thought to represent the core of the traditional and continuing legitimate class-action functions. The refusal to permit a request for exclusion places special strains on class definition and the need to ensure adequate representation as a substitute for the tradition that everyone should have a personal day in court. Strain also is placed on the uncertain line that divides (b)(1) classes from (b)(3) opt-out classes.

Perhaps in response to these strains of representation theory, early drafts considered by the Advisory Committee, beginning in 1991, would have authorized the court to permit class members to opt out of (b)(1) and (b)(2) classes, but also would have authorized conditions on the opportunity to opt out. The conditions would be designed to serve the interests now served by denying the right to opt out. Parties could be protected against inconsistent liabilities, and nonparties could be protected against effective defeat of their rights through separate litigation, by extending the preclusion consequences of the judgment or even by denying the right to maintain separate litigation. A related feature of another draft would have required separate certification of an opt-out class if damages were to be awarded incident to a (b)(2) class. These limited incursions on present practice were put aside, and the public comments and testimony on the 1996 proposals touched only incidentally on (b)(1) and (b)(2) classes. There is no reason to suppose that the core of these classes will soon be opened to reconsideration. These uses of Rule 23 will endure, at least in the near-term future. The "mandatory," non-opt-out character of these classes, however, is necessarily implicated by the repeated challenges that were addressed to the adequacy of opt-out opportunities in (b)(3) classes. The core justification for representation of unwilling nonparties has been put in issue.

### *C. (b)(3) Classes: The Mean and the Extremes*

Virtually all of the comments and testimony on the proposals published in 1996 focused—appropriately enough—on (b)(3) classes. The one clear conclusion is that (b)(3) serves widely divergent purposes. The extremes are relatively easy to identify. At one end lies the class whose members all have suffered very small individual damages. At the other end lies the class whose members all have suffered serious personal physical injury or death. In between lie classes whose members have been affected by conduct that may violate any of many different substantive laws, and who have been affected in ways that would—if the facts of violation, causation, and damages were proved—support a remarkably wide and variable level of individual recovery. Many of the comments have suggested that at least the mass tort class does not belong in this common

procedural pool. Many other comments have suggested that the very small individual damages classes do not belong in any class-action rule.

These comments left relatively few marks on the classes that span a range of individual damage claims, some small, some medium, and some large. Antitrust and securities actions were the most frequently offered examples of mature class-action practice. They illustrate the common justifications: justice is provided to many class members whose injuries otherwise would go unredressed, members who could sue alone benefit from sharing the expenses and other burdens of litigation, courts realize important efficiencies, a single adjudication avoids the danger of inconsistent outcomes, and important public policies are fully enforced. The language of the successive hearings quickly transformed these observations into the "Goldilocks" argument. Class actions are not appropriate when individual claims generally are "too big" or "too little," but are appropriate when individual claims generally are "just right." Much as it is easy to make light of the "Goldilocks" argument, it reflects important issues.

The different uses served by Rule 23 shape the nature of the concerns that surround it. Challenges to classes that seek redress for small individual claims are quite different from challenges to classes that bring together claims that could—and indeed often would—support individual litigation. There may be connections, however, in questions about the substitution of representation for individual initiation and control of litigation.

#### *D. Small Claims Classes*

Defenders of small claims classes point to willful violations of clear law amply proved. They invoke the public interest in enforcing regulatory requirements, and rely as well on the view that even small awards have important symbolic meaning to all class members and may have important tangible meaning to some class members. Many of the examples they select are compelling. These examples are bolstered by pointing to the many classes that include a wide spectrum of dollar claims, and by urging that none of the claims should be denied the benefits of class justice.

Those who attack small claims classes point to quite different examples. Often they place a thin veil, or none at all, on arguments that the underlying substantive law is too indeterminate, or too foolish, to deserve full-bore enforcement. The public interest may be better served, on this view, by no enforcement. Going beyond these substantive doubts, they focus on the fallibility of adversary civil procedure. The cost of class litigation and the uncertainty of outcome—particularly with jury trial—are said to coerce settlement of worthless claims. The effect of a 10,000-member class is said to be far greater than the prospect that 10,000 members might bring 10,000 separate actions. Given the vagaries of our courts and procedure, there may be a .10 probability of losing any one of those individual lawsuits. The expected risk of the 10,000 potential individual actions, however, is much lower than the expected risk of the single class action. Even if there were a 90% chance of winning the class action, the

stakes may be so high that the risk cannot be run. The very fact of class certification, moreover, may itself alter the prospect of success. The sheer number of putative victims may have an irrational impact that aggravates the seeming wrong, and in any event the tribunal may be intimidated by the responsibility of denying any recovery to so many. A class trial, further, is likely to focus on a carefully selected set of representatives whose individual claims are the strongest in the class. If the defendant should win 90 of the first 100 individual actions, moreover, it is not likely that all of the remaining 9,900 potential actions will be brought.

The question of small-claims classes is complicated by the accurate assumption that most of the small claims caught up in a class action would not be enforced by any other means. Some of these claims would be enforced if the claimant did not have to bear the costs of enforcement. But we do not provide free public representation for people whose valid claims simply do not bear the cost of enforcement. 10,000 small wrongs by 10,000 wrongdoers often go without redress. Why should it be different if 10,000 small wrongs are inflicted on 10,000 victims by a single wrongdoer? Is it only because the efficiencies of scale make private enforcement possible? Or is it also because we think there is a greater social importance in forcing payment by the class-scale wrongdoer? And may it be still further that we are willing to run the risks of inadequate, opportunistic, self-appointed lawyer representation because the individual small claim represents an interest more "theoretic" than real?

A more abstract range of arguments attacks small-claims classes by drawing on analogies to established justiciability concepts. Both branches of justiciability theory are invoked, looking to prudential concerns and also the core conceptualization of Article III "judicial power." Among the separately labeled justiciability concepts, standing provides the closest analogy. The prudential rules that limit third-party standing are particularly close, in part because they focus on Rule-23-like concerns with the need for, and adequacy of, representation. Part of the inquiry into third-party standing asks whether there is a nonlitigating relationship between the party and the nonparties whose rights are asserted. Another part asks whether there are obstacles that prevent the nonparty from asserting her own rights. Ordinarily it is clear that there is a case or controversy between the party and its judicial adversary; the only question is whether the party can, by relying on the rights of others, sustain its position and win for itself relief that it could not win in its own right. So in a small-claims class, ordinarily it is clear that there is a case or controversy between at least the representative class members and their adversary. But unlike third-party standing cases, the rights and interests of the nonparticipating class members are supposed to be the same as those of the representatives. The representatives can, in theory, win the same relief for themselves without any need to act on behalf of others. Representation is used solely for the purpose of championing those who have not sought to enforce their own rights. The only indications that absent class members wish to enforce their rights come from failure to opt out and—if occasion should arise—by participating in the claims process.



The small-claims balancing process embodied in proposed Rule 23(b)(3)(F) was supported in the March, 1996 draft Note on parallel grounds that reflect doubts about reliance on standing to advance the public interest in this setting. The "factor (F)" proposal would allow a court determining the superiority of class adjudication for purposes of (b)(3) class certification to consider "whether the probable relief to individual class members justifies the costs and burdens of class litigation." It must be emphasized that the draft Note was just that—a statement of one point of view crafted to stimulate thought, not to settle the debate. The most pertinent portions of the draft said this:

The value of class-action enforcement of public values, however, is not always clear. It cannot be forgotten that Rule 23 does not authorize actions to enforce the public interest on behalf of the public interest. Rule 23 depends on identification of a class of real persons or legal entities, some of whom must appear as actual representative parties. Rule 23 does not explicitly authorize substituted relief that flows to the public at large, or to court- or party-selected champions of the public interest. Adoption of a provision for "fluid" or "cy pres" class recovery would severely test the limits of the Rules Enabling Act, particularly if used to enforce statutory rights that do not provide for such relief. The persisting justification of a class action is the controversy between class members and their adversaries, and the final judgment is entered for or against the class. It is class members who reap the benefits of victory, and are bound by the *res judicata* effects of victory or defeat. If there is no prospect of meaningful class relief, an action nominally framed as a class action becomes in fact a naked action for public enforcement maintained by the class attorneys without statutory authorization and with no support in the original purpose of class litigation. Courts pay the price of administering these class actions. And the burden on the courts is displaced onto other litigants who present individually important claims that also enforce important public policies. Class adversaries also pay the price of class enforcement efforts. The cost of defending class litigation through to victory on the merits can be enormous. This cost, coupled with even a small risk of losing on the merits, can generate great pressure to settle on terms that do little or nothing to vindicate whatever public interest may underlie the substantive principles invoked by the class.

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 so slight as to be essentially trivial or meaningless, however, the core justification of class enforcement fails. Only public values can justify class certification. Public values do not always provide sufficient justification.... If...the value of any individual recovery is

insignificant, certification can be denied with little difficulty.... It is no disrespect to the vital social policies embodied in much modern regulatory legislation to recognize that the effort to control highly complex private behavior can outlaw much behavior that involves merely trivial or technical violations. Some "wrongdoing" represents nothing worse than a wrong guess about the uncertain requirements of ambiguous law, yielding "gains" that could have been won by slightly different conduct of no greater social value. Disgorgement and deterrence in such circumstances may be unfair, and indeed may thwart important public interests by discouraging desirable behavior in areas of legal indeterminacy.

This concern with private representation of the public interest can be expressed from yet another perspective. Much modern regulatory legislation is deliberately drafted in open-ended terms. Reliance is placed on responsible, public-spirited enforcement decisions to filter out offenses that violate the letter of the law but that do not violate—and indeed may serve—the underlying policies. Class-action enforcers cannot be relied upon to take an expert or wise view of the public interest.

A different perspective was suggested by some of the comments and testimony. Anecdotes were provided of responses to class-action notices by class members who expressed vigorous disapproval of the class action nominally brought in their interests. Although relatively few in number, these anecdotes draw added force from the effort taken by the class members to unravel the notice, decide to opt out, and express an opinion about the attempt to enlist them in a cause they disapproved. It is not merely that some unknown number of class members are indifferent to enforcement of their claims. It is that some unknown number—perhaps small, and perhaps not so small—actively oppose enforcement of their nominal claims. What theory of representation justifies enforcing the "rights" of those who reprehend the right?

### *E. Mass-Torts Classes*

Similar representation concerns surround the mass-tort classes. Reliance on individual litigation, or nonclass aggregation, means enormous delay and court congestion. It may jeopardize the prospect that resources will be available to compensate all victims, leaving those who came late to the queue with no remedy at all. It may fail utterly to achieve the distinctive treatment of each individual case according to its distinctive merits, as hundreds or even thousands of victims become nominal "clients" of attorneys who settle their inventories of cases in large batches with no effective constraint on the terms or allocation of the settlements. The only remedies available are those awarded in traditional litigation based on unique events that affect no more than a few people. The transaction costs are staggering; it is common to observe that something like two-thirds of the money devoted to asbestos litigation goes to the costs of litigation, leaving barely one-third for victim compensation. Class treatment can avoid these

problems, and carefully crafted settlements can provide superior remedies that simply are not available through adjudication.

Mass-tort classes are subject to attacks as vigorous as the attacks addressed to traditional piecemeal litigation. They are said to trade strong claims for weak, exerting a homogenizing influence that transforms but cannot reduce the inescapable conflicts of interest among class members. The state laws that provide the foundation of most mass-tort claims are given similar homogenizing treatment, defeating the attempts of different states to enforce different substantive principles. Settlements—the fate of most mass-tort classes—are particularly assailed as the fruit of a “reverse auction” process in which defendants buy “global peace” at bargain-basement prices by pitting would-be class representatives against each other, and even shopping different courts in the quest for approval by an acquiescent judge. It is pointed out that no single court can possibly try the individual issues of causation, proportional fault, and damages that inhere in mass torts. The most that could be achieved as an alternative to settlement is disposition of common issues, to be followed by individualized determination of issues that in fact cannot be resolved without retrying the supposedly common issues. Disposition of issues of comparative responsibility and individual causation are held out as particularly compelling demonstrations of the distortions that must arise from any attempt to avoid complete relitigation of all issues.

The mass tort cases severely try the force of the justifications for class representation, although the concerns raised can be addressed in important ways by sophisticated administration of present Rule 23. The central concern is that there cannot be adequate representation. But Rule 23(a)(4) requires adequate representation, and even now is administered to require adequate representation by counsel as well as by the representative parties. The Rule 23(a)(3) requirement that the claims of the representative parties be typical of the claims of the class further bolsters the adequacy requirement. The predominance and superiority requirements of (b)(3) add to these protections. The opportunity to opt out, however, remains crucial. The substantial concerns that remain after accounting for the other protections built into the rule would disappear if the opportunity to opt out gave assurance that every class member has made a well-advised decision that class litigation is a better choice than individual litigation (or deliberate waiver of the claim). The opt-out protection was given substantial support in the comments and testimony. No one, however, cared to advance the full-protection hypothesis. And no one dared to advance any hypothesis that would support in these terms termination of the opt-out right as to future claimants who may not even be aware of exposure or injury during the class notice and settlement process. Even apart from these “future” claimants, at any rate, there will be some class members who are caught up in class litigation and settlement who, fully informed, would have chosen to opt out in favor of individual litigation. Some of them would fare better in individual litigation, even after accounting for the efficiencies of class litigation. Representation requires strong justification in these circumstances.

### *F. Settlement Classes*

The 1996 proposals included a very restrained 23(b)(4) provision that would allow certification of a (b)(3) class for settlement, even though the same class might not be certified for trial. This proposal provoked extensive and illuminating commentary.

The risk that a settlement class may impair the positions of many, most, or virtually all class members was amply debated in the comments and testimony. By far the most poignant illustrations were drawn from mass torts that inflict grievous personal injury and death. The conflicts of interest among class members, and perhaps between class counsel and the class, are clear and deep. Most of the countervailing testimony focused on experience with antitrust and securities litigation. Classes in these areas commonly involve many members whose claims—even quite sizable claims—would not support individual litigation. Often they involve little apparent conflict of interest as to damages, in part because damages may seem susceptible to calculation by formulas based on reasonably objective facts. Such actions as these may underlie the gradual growth of settlement class certifications reflected in the Federal Judicial Center study.

There is a persuasive case for gradual but cautious expansion of settlement-class practice. The starting point is clear. We cannot have any form of class action that cannot be settled. It would be the death knell of class actions—or of most of the rest of the docket—if class certification meant the action must be tried on the merits. The question whether the court must be prepared to try the case for the very class certified, however, is not as readily answered. The argument for settlement classes has been put in many ways. Not only can transaction costs be reduced, but results can be achieved that are not possible in litigation classes. Choice-of-law problems are effectively ignored. Disposition of individual issues may be ignored as well, or shunted into modes of resolution that greatly reduce the costs, uncertainties, and vagaries that attend individual litigation. A degree of consistency and uniformity is achieved that cannot be paralleled by other means. And, in the most inventive situations, remedies can be devised that are not possible in litigation.

The case against settlement classes can be put bluntly. Representation for litigation is one thing—what happens is the result of official decision, providing ample protection for the interests of class members. Representation for settlement substitutes private disposition for official decision, subject to review by a process that commonly lacks any effective adversary element. A settlement-class lawyer who cannot threaten litigation for the same class, moreover, has too little bargaining power. The “reverse auction” follows from the fear that failure to settle yields nothing for counsel, while an adversary who hopes to buy off class claims on the cheap need only seek out another and more supine class representative.

If representation is to continue to allow settlement classes—as the decision in *Amchem* seems to contemplate—much may be done to supplement representation by imposing greater burdens on the courts. The Committee has not

yet considered any detailed proposal to increase judicial responsibility. There are at least three major approaches that can be taken separately or in combination. One is to specify by rule the structure of the representation and settlement process. The second requires the court to become directly involved, through the judge or judicial adjuncts, in the settlement process. The third requires more elaborate methods of reviewing the actual settlement terms, both by increasing the procedural support for challengers and by specifying review procedures and criteria for the court. Sketches of some of these possibilities are set out below.

### *G. Opt-in Classes*

Doubts about the justification for representation in any setting could be met easily by rather straight-forward changes in Rule 23. Whatever might be done to create a right to request exclusion from a (b)(1) or (b)(2) class, (b)(3) classes could be limited to members who affirmatively opt in. If the concept is clear and the drafting easy, however, winning acceptance likely would be difficult. Even if more than three decades of experience suggest that the brilliant invention of opt-out classes in the 1966 amendments has metastasized beyond any sufficient justification, the growth has come from deliberate evolution at the hands of courts that—without need to go so far—believed in the rightness of the cause.

An intermediate alternative would be to preserve the present structure of (b)(1), (b)(2), and (b)(3) classes, adding a new alternative that allows “permissive joinder [to] be accomplished by allowing putative members to elect to be included in a class.” This alternative was included in several drafts, and was dropped without direct review as part of the decision to go forward only with a package of relatively modest changes. Informal reactions suggested that the greatest concern was that courts hostile to class actions would seize this opportunity as an excuse to deny (b)(3) certification. That fear could be addressed—but probably would not be much allayed—by a requirement that an opt-in class could be certified only after explicit findings that the (b)(3) requirements for an opt-out class were not met.

A more modest opt-in alternative emerged from the comments and testimony on proposed (b)(3)(F). Some version of the balancing process sketched in (F) could be used, not to deny any certification but to control the choice between an opt-out class and an opt-in class. This approach would be a limited adoption of the view that class actions should not become the occasion for purely private enforcement of predominantly public values. The theory of representation of individual interests of individual claimants is stretched thin when the relief to class members is nearly meaningless. The more persuasive justification for class enforcement lies in the public interest of disgorging the gains from unlawful conduct and deterring future unlawful conduct. Private enforcement of public values is easily accepted when specifically authorized by Congress, and also when it is an incident of providing relief to claimants who genuinely desire relief. But a clear substantive choice is made when Rule 23 is used for public enforcement without any legislative direction or meaningful indication that class members

wish relief. Adoption of an opt-in alternative would retrench this unintended substantive use of Rule 23. If class members opt in at a rate that supports enforcement, well and good. If so few opt in that the litigation founders for want of support, so be it.

Publication of an opt-in proposal would direct discussion squarely to the point of public enforcement values. The Committee has been uncertain of the justifications for using the Enabling Act to expand the substantive law by providing a remedy that may sweep far beyond anything contemplated by Congress. The source of these doubts is exemplified by substantial parts of the public comments and testimony. Enforcement decisions at the inception of a class action are made not on a balance of the public interest by public officials nor in realistic pursuit of individual private interests, but to press a view of the law and facts that may be doubted or denied by public agencies and even class members. The view of the merits urged on behalf of the class often represents sincere conviction, sincerely held. At times the view of the merits may be tinged—or even suffused—with hopes of counsel fees. Although courts must be enlisted, and might seem to protect against the mere self-interest or excess enthusiasm of the class's self-appointed champions, there is strong support for the view that this protection is inadequate. Weak claims can and do survive motions to dismiss or for summary judgment, and the risks and costs of class litigation may force settlements that thwart, rather than advance, public policies and interests.

If individual class members continue to have an opportunity to assert their claims by opting in to a class, the justifications that have been advanced to overcome doubts about private enforcement of public values can be evaluated in their own terms. The confusion of private benefit with public values will be much reduced. Proponents of opt-out practice must face the task of explaining why the right to opt out is a meaningful protection that justifies representation, while the right to opt in does not provide a meaningful method of protecting individual interests. The obvious explanation is that every class-action practitioner knows that there is a great gap between opt-out rights and opt-in opportunities. Inertia, the complexity of class notices, and the widespread fear of any entanglement with legal proceedings will lead many reluctant class members to forgo the opportunity to opt out, and likewise will deter many willing class members from seizing the opportunity to opt in. This explanation, however, casts real doubt on the justification for representation assumed to arise from failure to opt out.

In the end, any modification of the familiar Rule 23(b) structure must overcome powerful arguments for holding to the present course. To be sure, there are profound reasons to doubt the adequacy of the conceptual theories of representation that make (b)(1) and (b)(2) classes mandatory, and that rely on the uncertain opt-out process for (b)(3) classes. More important, there are compelling illustrations of class actions run amok. If much good has been done through Rule 23(b)(3), there are at least occasional instances of significant harm. But many believe that the balance between good and bad weighs heavily in favor of the present rule. Wise administration of the protections built into the rule can avoid

the bad results in almost all cases. And any modified rule must be drawn with great care if it is to achieve a better balance between good and bad class actions.

Even if there is no change in the structure of Rule 23, all of these doubts about representation provide new support for examining notice requirements. The draft that was put aside at the time of the decision to go forward with the 1996 published proposals is invoked with the separate discussion of notice below.

#### IV. SMALL CLAIMS CLASSES AND PROPOSED RULE 23(b)(3)(F)

##### *A. The Proposed Rule 23(b)(3)(F) Limit*

The most regularly applauded use of Rule 23(b)(3) opt-out classes is to provide a means of enforcing an aggregation of worthy claims that individually are too small to bear the costs of individual vindication. Some instances of small-claims class litigation, however, have drawn reactions that range from concern to derision. The public image all too often is that of frivolous substantive claims advanced by proceedings that bring benefits to no one but the class lawyers. "Coupon" settlements provide a variation in which it sometimes is believed that the benefits extend to the defendant, who has to pay off the class lawyers but in return papers the class with coupons that, if redeemed, will increase the defendant's sales of airplane tickets, food processors, pickup trucks, or whatever. It is tempting to seek a means of retaining the good small-claims classes while checking uses that memorably are characterized as "legalized blackmail." Because abstract definition seems impossible, any attempt is likely to be drawn in terms that rely heavily on trial-court discretion. The Advisory Committee's 1996 attempt was a new factor to be considered in determining whether a (b)(3) class should be certified.

As published in 1996, proposed factor (b)(3)(F) would make pertinent to the determinations of predominance and superiority "whether the probable relief to individual class members justifies the costs and burdens of class litigation." This proposal came to be known, with affection or disdain, as the "just ain't worth it" proposal. As reflected in the discussion of representation, the central concern was that some small-claims class actions benefit only class counsel, not individual class members and not the public interest. The volume of comment and testimony was nearly overwhelming. Although there was strong support for the proposal, there was equally vehement opposition. At least three core issues were raised. Additional complications of administration also were addressed. It is clear that a maelstrom of protest will greet any further pursuit of this proposal in any form, including the modified version that, rather than deny certification, would relieve doubts about the value of class disposition by certifying only an opt-in class, not an opt-out class. The concerns remain, but the following sketch of the opposing arguments suggests the forces that are likely to stifle any further action in the next few years.

The first ground of protest is that it is not safe to rely on common-sense implication in administering the proposal. The simple illustration is a class

involving a \$10 injury to each of 1,000,000 people that could be litigated through to judgment on the merits at a cost of \$1,000,000. The argument is that it is folly to compare an individual benefit of \$10 to an aggregate cost of \$1,000,000. The comparison either should weigh the \$10 individual benefit against the pro rata individual cost of \$1, or the aggregate \$10,000,000 benefit against the aggregate \$1,000,000 cost. The focus on individual benefit never was intended to imply anything as ludicrous as comparing individual benefits against aggregate costs. The median class recoveries indicated in the Federal Judicial Center study of class actions undertaken for the Advisory Committee, for example, ranged from \$315 to \$528.<sup>4</sup> These figures were accepted throughout the process as benefits that would readily justify at least most class actions, even though such recoveries would scarcely support the costs of adjudication by small-claims procedures. It may prove difficult, however, to articulate the ways in which the blends of individual and aggregate costs and benefits are to be counted.

The second ground of protest is that public values must be counted as well. Witness after witness bewailed the inadequacy of public enforcement resources, tactfully questioned the cogency of some public enforcement decisions, and extolled the benefits of class-action enforcement. On this view, wrongdoers must be made to internalize the costs of their wrongs; only then will policies of social regulation be properly enforced, and only then will adequate deterrence be realized. This argument involves very important questions on the merits of the proposal. It also suggests grave drafting problems if deterrence and disgorgement deserve to be weighed in the determination whether to certify a (b)(3) class.

Both of these first two grounds of objection could be met, at least in part, by reverting to an earlier draft formulation. The version that emerged from the November, 1995, Advisory Committee meeting looked to "whether the public interest in—and the private benefits of—the probable relief to individual class members justify the burdens of the litigation." The private benefits could easily include consideration of the aggregate private relief. The public interest is explicitly included in the calculation, in terms that would allow consideration of any relevant factor. The Committee was wary of this formulation, however, because it seemed to justify discriminations based on case-specific appraisals of the substantive value of substantive principles. A court hostile to the policies embodied in constitutional, legislative, administrative, or common-law rules could simply determine that there is no public interest in enforcement, much less an interest sufficient to justify class litigation.

The third protest went to an issue that was deliberately held open by the Committee. Reference to probable relief seems to many observers to require consideration of the probable merits of the class claim. The objections to preliminary consideration of the merits raised all of the difficulties that led the Committee to recede from earlier proposals to require some measure of predicted

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4. See THOMAS E. WILLGING ET AL., *EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 13* (Federal Judicial Center, 1996).



success on the merits as a prerequisite to certification of any (b)(3) class. This issue will be discussed separately.

Beyond these three core issues lie a number of additional comments. The many challenges to proposed factor (F) are summarized first, both because they demand attention and because they set the framework for the comments that support it or urge extension of the underlying principle. In all, these comments dramatically underscore the continuing doubts that beset the enterprise of small-claims class adjudication. They may be summarized on occasionally cryptic form.

### *B. Factor (F) Opposed*

#### *1. No Need*

In a variety of ways, it was urged that there is no need for factor (F). Many say that Rule 23 works now. No need to trim it back has been shown; there are no empiric studies that document any of the alleged abuses. To the extent that (F) reflects legitimate concerns, these concerns are taken into account now as courts administer the general superiority, predominance, and manageability criteria. Superiority assumes that there are other available means for adjudicating wrongs that may be superior; for small-claims classes, there are no other means. At the very least, proponents should give illustrations of "bad" class actions that should not have been certified.

A specific variation on these themes was provided by the observation that class actions typically are undertaken on contingent-fee arrangements. Contingent-fee lawyers will undertake only "good" litigation that promises success on the merits.

A more general variation was that (F) is not an effective means of addressing such problems as may arise from actions undertaken solely to gain attorney fees. Direct regulation of fee awards is a better approach.

#### *2. Statutes*

Various statutes specifically regulate small-claims classes and recoveries in them. It is urged that the proposal is antithetical to the Fair Debt Collection Practices, Magnuson-Moss Warranty, Social Security, and Truth-in-Lending Acts.

A more general argument is that Congress has relied on the existence of Rule 23(b)(3) class enforcement in many (unspecified) statutes adopted since 1966. There has been no need to legislate overlapping and repetitious small-claims class procedures. This reliance should not be defeated by adopting (F).

#### *3. Vagueness, Discretion, and Evasion*

The general open-ended character of factor (F) has fueled many arguments. Some go directly to problems of vagueness, unguided discretion, and

evasion of Rule 23. Others, noted separately below, go to more specific difficulties of administration.

The central argument is that (F) is vague and standardless. This vague concept must be applied at the beginning of the litigation, when there is little satisfactory information for guidance.

The vagueness argument is elaborated into the argument that balancing tests—cost-benefit calculations—are not appropriate for judicial administration of Rule 23. This is social engineering, not procedure. What is “worth it” to one judge will not be to another judge. Courts hostile to class actions or to specific substantive policies will be given free rein to engage in social engineering and legislative policymaking.

#### *4. Administration*

Many of the arguments go to anticipated difficulties of administration. With such vague guidance, courts and would-be class representatives will be buried with preliminary certification litigation. This litigation will be more costly, more protracted, and less effective than the tools now available to dispatch improper class actions through wise administration of present Rule 23(b)(3) and Rules 11, 12(b)(6), 16, and 56.

The focus on probable relief requires the court to guess at what relief will be available after trial on the merits. This will lead to wrangling over probable damages. Damages often cannot be estimated without considering the merits of the claims—different theories of violation will support different measures of recovery. Experts will be called by all parties to give mutually contradictory theories and estimates. Defendants will demand discovery of individual injuries. Plaintiffs will need discovery to obtain information about probable class injuries that is available only to defendants—securities and antitrust cases are common examples.

The proposal does not state whether it addresses mean recoveries by individual class members, median recoveries by them, or only the recoveries of the representatives. Individual damages ordinarily will be spread over a wide range. At the least, the Note should state that the lowest of the Federal Judicial Center median recovery figures—\$315—is enough. And if the rule were adopted, it should explicitly draw the line at “trivial” relief, approving small relief.

There is no indication of the party costs that are to be counted. Discovery costs may be staggering in some actions, undermining very sizable aggregate claims. Counsel fees, if they count, will have to be explored. Defense estimates of counsel fees will be high; plaintiffs will insist on responding that the proposed fee arrangements and costs are unreasonable, and should not be counted in the balance. It is urged that class actions are expensive to litigate because defendants make them expensive, behavior that should not be encouraged and rewarded by denying certification.

Projecting costs is particularly difficult because costs depend on whether, and when, the case settles.

The draft Note made references to complexity that were said to be inappropriate. Most class actions involve complex issues and are necessary to support litigation of complex issues. The implicit sliding scale that required greater individual class member benefits as complexity increases will generate much motion practice.

Finally, it was urged that the only legitimate focus, if there is one, should be on the costs of notice and distributing class relief. Only if these administrative costs will surpass total class relief should certification be denied.

### *5. Court Burdens*

The costs and burdens of class litigation fall on the courts as well as the parties. But factor (F) gives no clue as to how—nor even, explicitly, whether—the burdens on the judicial system are to be figured. What is judicial time worth? Why should only class plaintiffs be turned away because of the public costs of providing justice? To the protestors, specific answers should be provided to these questions.

### *6. Specific Relief*

The proposal speaks of probable relief to individual class members. It is not clear whether a class-wide injunction or similar in-kind relief counts as individual relief. Even if such relief is included in the probable individual relief, there is no guide to evaluating the relief and weighing it in the balance. But an injunction may be the most important result of a class action, even though the action is not certified under subdivision (b)(2). The rule should clearly recognize the role of injunctive relief in any balancing process.

### *7. Moral Values*

The most emotional statements about the importance of enforcing small claims stressed the proposition that all persons and all claims must be treated as equal in the law. Typical strong statements were that it is not moral to treat people with small claims as null quantities. Factor (F) “is pernicious. To say to people, ‘you just ain’t worth it’” is a terrible message. “Junk (F). Junk it. It’s bad philosophy. It’s bad social engineering.”

One comment seemed to advance the apparently substantive suggestion that it would be better to establish a minimum pay-out to all class members—perhaps \$10—regardless of actual injury. This approach is not to treat all claims as equal, but to ask that a meaningful minimum token be awarded to anyone who has been wronged, no matter how small the injury.

### *8. Relation to Settlement Classes*

As proposed, a settlement class under subdivision (b)(4) must meet the requirements for certification under subdivision (b)(3). The only difference would be that assessment of the (b)(3) factors would be shaped by the prospect of settlement rather than trial. One comment argued that proposed (b)(4) would allow certification for settlement of a \$2 class that (F) would not allow to be certified for trial. It is not clear whether this result should count as additional support for settlement classes, or as an argument that courts must be prepared to bear—and to impose on a party opposing a class—the costs of trying a case to judgment no matter how small the individual relief.

### *9. Deterrence*

As noted earlier, one of the central arguments in favor of class-action enforcement is that public enforcement of public policies is not adequate to the need. Private enforcement remains crucial, and our system must not be structured so that small wrongs can be inflicted with impunity on vast numbers of victims. Most of the many deterrence arguments have been summarized already. One comment focused on current legislative patterns: As legislatures “deregulate,” courts must “provide legal redress ex post in order to compensate for the consequences of oversight ex ante.” The argument seems to be that legislative deregulation must be offset by increasingly effective private enforcement of such regulatory statutes and common-law provisions as remain.

### *10. Substantive Impact*

Many comments asserted that (F) is an attempt to move in an outcome-determinative direction, implementing substantive policies. They make it clear that, in the words of one witness, any revision of Rule 23 is “a very delicate matter.” Typical statements include: “It is not the role of the courts or the rulemakers to decide that some of the rights established by federal and state substantive law are unworthy of enforcement.” “The Advisory Committee approach addresses the public interest by denying its relevance.... [T]he problem is far more complex...and is freighted with major considerations of substantive policy.” (F) “embodies a value judgment about the worth of small claims class actions,” in violation of the Enabling Act. The point of adjudication is to enforce the substantive law; it is not realistic to impose on Congress the burden of specifically authorizing small-claims classes in each piece of substantive legislation.

### *C. Factor (F) Supported or Extended*

Not surprisingly, the many arguments against factor (F) were matched by equally fervent arguments that it represented the beginning of good ideas that should be carried further.

### *1. Make Threshold Requirement*

As proposed, factor (F) was merely one item in an expanded list of matters pertinent to the discretionary determination whether a (b)(3) class is appropriate because common questions predominate and class litigation is superior to other available methods of adjudication. Some supporters were so enthusiastic that they urged that (F) should be elevated from a mere matter pertinent to a requirement. It should be made a condition of certifying a (b)(3) class along with superiority and predominance. Although it is difficult to be confident about the consequences that might flow from placing this discretionary calculation in one role rather than the other, it seems likely that it would have a greater tendency to deter certification if framed as a condition of certification.

### *2. Public Perceptions*

Many testified that small-claims class action practice is giving lawyers, courts, and the law a bad public image. Examples of newspaper columns were offered to bolster this theory. The concerns expressed in these columns are not surprising. The authors write of notices they cannot understand, of hours of effort to understand, and of trivial relief. The argument is not simply that our system of civil justice cannot afford to bear the costs of the public failure to understand a worthy procedure. Rather, the argument is that the public is right—many of these actions exist only to enrich lawyers. Well-founded public disenchantment deserves an effective response.

### *3. Small Claims Beneficiaries*

The argument that it is important to provide justice for all victims of a common wrong, however small their claims, has been noted. Some responded that the image of providing relief to impecunious victims to whom even a few dollars are significant is romantic delusion. It is not the genuinely poor who participate in the small-claims judgments. The beneficiaries are the middle-class and more affluent who buy insurance, use credit cards, and take auto-purchase loans.

### *4. No Real Representatives*

Class action theory relies on one or more representative class members to safeguard class interests and to play the role of client, supervising class counsel. Adversaries of class actions argue in many settings that class representatives do not perform either function. These arguments are advanced with special fervor in opposing small-claims classes. It is said that discovery invariably reveals that representative plaintiffs have relatively little knowledge of, or interest in, the claims advanced. Usually they come into the case at the invitation of the lawyers, not the other way around. The idea of providing meaningful relief to vast numbers of caring victims shatters on the reality that not even the representatives know or care.

### 5. "Market-Value" Cases

One damages theory advanced against defective products is that although most consumers have not been injured by product failure, the latent defect depresses the product's market value. Representatives of the automobile industry urged that classes claiming that product defects have diminished the market value of automobiles involve imaginary defects, or follow—and indeed are stimulated by—the manufacturer's own voluntary campaigns to cure the defects. The only purpose is to generate publicity that will cause a decline in market values, justifying a recovery that rewards counsel for an injury counsel caused.

### 6. Deterrence-Private Attorney General

Those opposed to small-claims classes mounted assaults from many directions on the theory that small-claims class actions are necessary to enforce substantive law.

The role of public enforcement through executive and regulatory agencies was frequently stressed. "[C]ourts are not the only agency of government with the capacity to govern."

The need for deterrence was challenged from a different perspective. Lawyers overestimate the impact of litigation on business behavior. Litigation is far too uncertain to count for much in business planning decisions.

A somewhat conflicting argument was made that small-claims classes deter, or at least punish, conduct that in the best of the cases involves technical violations of vague law. This is not a matter of catching those who cheat. Indeed, the costs inflicted by class litigation work in the long run to inflict greater injury on consumers than class litigation returns in the way of benefits. And of course there is no class-action remedy to return to business the costs incurred in the mistaken belief that regulatory legislation requires expensive forms of compliance. The result is over-deterrence by many different routes, many extending from class litigation or the fear of class litigation.

It also is argued that vast numbers of legal wrongs that inflict small injury, and indeed that inflict quite substantial injury, go unchallenged and unredressed. Justice and public policy have never led to insistence that all violations of the law be litigated, nor even to provision of free public lawyers for everyone who cannot afford to pursue a desired private remedy. Ten thousand wrong acts that inflict slight injury on one person each are passed by without thought. A single wrong act that inflicts a trivial injury on each of ten thousand persons should be treated the same. Small-claims class actions have no special justification that makes them different.

Finally, it was argued in many ways that the Enabling Act does not permit adoption of a rule designed to increase deterrence by supplementing public enforcement. "It is outside the scope of the Rules Enabling Act for the Advisory Committee to confer upon class counsel the role of a private attorney general."

### *7. Dollar Threshold*

As proposed, factor (F) would allow a court to certify a class yielding very small individual recoveries. This result would be particularly likely in a wide number of situations in which a common course of wrongdoing has inflicted small injuries on some victims, but more serious victims on others. Rather than reach the very small claims, several suggestions were made that a bright-line threshold of minimum injury should be adopted. The figures suggested ranged from \$10 to \$300. The bright line apparently would exclude from the class anyone whose individual injury fell below the stated amount.

### *8. Criticisms Rebutted*

The arguments against factor (F) were generally met by asserting the opposite with equal fervor and eloquence. The argument that (F) was uncontrollably vague, leaving too much to the discretion of individual trial judges, was met by advancing the common vision that good procedure must rely on the wise exercise of judicial discretion. Factor (F) is not unworkably vague. To the contrary, it is in the nature of the Federal Rules to provide general guidelines that are filled in by trial-court discretion.

### *9. Note Changes*

Supporters urged several changes in the draft Committee Note that accompanied proposed factor (F) to bolster the effect of the proposal. The Note was seen as taking back some of the good that the text should accomplish.

The Note referred to the value of enforcing small claims. This was challenged directly. In addition, it was urged that the Note should not imply that the median potential recoveries reported by the Federal Judicial Center study are sufficient to justify class certification.

Looking to the supposed law-enforcement values of Rule 23, it was argued that the Note should recommend that account be taken of such factors as the number of complaints that have been made to the defendant or public officials about the challenged conduct; whether the defendant has undertaken voluntary corrective measures; and whether there are preexisting relationships between representative class members and counsel. The references to "trivial" claims might be changed to "small claims," allowing refusal to certify even though individual recoveries will rise above the trivial.

A suggestion that reflected the frequent arguments for adopting opt-in classes was that proposed factor (F) should be administered by considering whether a substantial number of individuals seek actively to pursue claims on behalf of the proposed class. The worthiness of the class enterprise would be supported by showing that class members, without solicitation or influence by class counsel, spontaneously believe that enforcement is important.

*D. Factor (F) In Balance*

These summaries do not reflect the deepest themes opened by the comments and testimony. There are forceful arguments that small-claims classes have become an essential means of enforcing important legal rules and the public policies embodied in those rules. There also are forceful arguments that small-claims classes are misused in ways that not only inflict unjustified costs on defendants but also exact great public costs. The proposal was designed to address these competing problems by drawing from the belief that private adversary civil litigation justifies the risks of judicial lawmaking and law enforcement only when it yields significant individual recoveries. It has been assailed directly on the ground that Rule 23 also is an important means of public enforcement. It has been assailed also on the ground that it is vague, engendering all the problems of discriminatory, costly, and arbitrary enforcement that underlie one part of "void-for-vagueness" doctrine. It has been defended as a modest beginning in a more important enterprise that must lead to more profound controls on Rule 23 excesses. The perceived administrative problems are met with the confident response that the Federal Rules witness the repeated triumph of open-ended discretionary procedure administered by strong district judges.

The core arguments have been considered repeatedly. Resolution is made no easier by the volumes of cogent comments and testimony. The more specific predictions of administrative problems to be engendered by adversary litigating responses were, in some part, new. If it is accepted that there is something about small-claims class practice that needs to be cured, it remains to decide whether (F), as proposed or as it might be modified, remains the best prescription.

## V. MASS TORTS

Most observers seem to believe that courts are coping reasonably well with the demands of "single event" mass torts—the hotel fire, airplane crash, skywalk collapse, and so on. There is a finite universe of identifiable victims, a set of facts fixed in time and place, and a somehow manageable choice of law. "Dispersed" mass torts, on the other hand, continue to generate massive problems. These problems were, inevitably, touched upon in the course of Advisory Committee deliberations and—although none of the 1996 proposals directly addressed mass torts—in the public comments and testimony on the proposals. The one safe observation possible is that the fast-developing world of ongoing practice has not yet generated lessons that provide a secure foundation for confident rulemaking. Each dispersed mass tort litigation seems to be distinctly different from the one before it, and to suggest different grounds for caution.

Satisfactory answers to dispersed mass torts are most likely to be found in legislative resolutions that move away both from tort law as we know it and from judicial procedure. If satisfactory answers exist, however, they will prove elusive. It seems likely that courts must continue to struggle with these problems into the foreseeable future. They have devised many inventive approaches in the



past, and will continue to devise new approaches. Rule 23, the assigned topic, is one device that may lend some aid and comfort.

It is premature to sketch even the outlines of possible Rule 23 approaches to dispersed mass tort litigation. Instead, the problems will be explored in two parts. The first, a bold model, asks—at least as much as it illustrates—what features must be built into a system designed to achieve a particular set of goals. The goals themselves are debatable. They are to achieve a single, uniform, fair, and efficient resolution of all claims growing out of a set of events so related as to be a “mass tort.” All claimants are treated alike—if it is found that there was no wrong done, none recover. If actionable wrong is found, all recover in appropriate relation to the extent of their injuries, without distinctions based on idiosyncratic variations in courts, choice of law, or litigation error. As a matter of intertemporal fairness, there must also be equal treatment for those whose injuries become manifest at different times. As compared to the present state of affairs, what devices might we adopt, by court rule and by statute, to serve these goals? And will reliance on class action litigation concepts help in devising, explaining, and developing these devices?

The second part briefly recounts a number of much more limited proposals that have enjoyed some consideration by the Advisory Committee.

### *A. A Bold Approach*

There is little doubt that full consistency can be achieved only by establishing power in a single court to control all litigating events that affect all claimants, all actors whose primary activity generates nonfrivolous claims of liability, and all others who may be liable—through insurance or otherwise—for indemnification or contribution. That is not to say that all trials or even pretrial events must occur in one court. But it is to say that one court, subject to appellate review only in one system, must have control.

Designation of a single court will not be easy. A simple clarification of Rule 23 to ensure that it reaches dispersed mass torts, and (if this can be done by Rule) to secure power to enjoin any competing litigation, will not do. Selection of the court would depend on jockeying among would-be representatives, and on elaborate attempts to find, not the best court, but the most favorable court. It is widely believed that defendants as well as putative class representatives may find ways to participate in the selection—most notoriously when a court is confronted at once with a complaint, agreed-upon class certification, and proposed settlement. Here only legislative power can come to the rescue. It may be remotely conceivable that an interstate compact or even reciprocal legislation could devise a state-based regime for achieving consolidation before a single court. The only realistic prospect, however, is that federal legislation will be needed. The easiest course would be to conscript the present Judicial Panel on Multidistrict Litigation, adding designation of mass-tort courts to its responsibilities. It may prove wiser to create a separate panel, particularly if state judges are to be involved to reflect the near-certainty that some pending actions will be in state courts, the possibility

that state courts might be eligible to receive consolidated litigation of common issues, and the probability that it will be desirable to send to state courts much of the residual litigation to resolve individual issues.

However a court is designated, thought also must be given to its constitution. It may not be fair or wise to saddle a single trial judge, state or federal, with sole responsibility. A familiar possibility is to create a three-judge court. Three judges should be ample to manage pretrial proceedings, and—if things should come to that—the trial of common issues. The next step, however, requires resolution of individual issues, commonly including such matters as comparative responsibility, specific causation, and damages. A variety of claims-processing facilities have been devised by settlement agreements, and may well prove effective. Such devices might be forced on unwilling claimants if made part of a legislative program that supersedes traditional tort law. So long as something akin to current tort law remains, however, the right to jury trial and traditional notions of due process are likely to defeat any attempt to force such devices on unwilling claimants. The most that likely can be done is to devise incentives that strongly encourage resort to such devices. At some point, judge-based resolution is likely to be required. Not even three judges can take care of all the claims that might remain. At this point, we should think of more expansive solutions. One possibility—far more likely to be available within the federal system than among state courts—is to assign to a new court as many judges as may be needed. The simplest device would be to create a new “mass torts court.” District judges from all parts of the country could be assigned to the court, serving under a presiding set of three judges. The assigned judges need not travel from their ordinary locations to serve on the court. To the contrary, it would be far better to allocate disposition of each individual claim to a judge who regularly sits in the best location to try that claim. Probably it would be best to assign first-instance appeals to the three presiding judges, with further review in a “mass torts appeal court” established by appointing five or seven circuit judges from as many different circuits.

This structure implies nationwide personal jurisdiction, at least for resolution of the common issues that inhere in the mass tort. Again, it is conceptually easier to rely on a federal court for this purpose. Yet perhaps Fourteenth Amendment due process is sufficiently flexible to permit a state court to exercise comparable authority, at least if authorized by specific delegation from a federal tribunal that designates the state court.

The most difficult personal jurisdiction issues arise from another aspect of a comprehensive procedure. Mass torts often involve one defendant, or a few, who are liable to every victim, while other defendants are liable only to subsets of the victims. Comprehensive and uniform resolution of all common issues can be set at naught if the procedure sweeps in only the actors who may be liable to all plaintiffs. A very simple illustration is provided by a manufacturer who produces a single product. It distributes its products directly to a few hundred retailers, who resell directly to end users. An end-user claiming injury caused by the product in Maine ordinarily will sue both the manufacturer and the retailer. Separation of

the action by assigning the claim against the manufacturer to a mass torts court in Kansas, while retaining the claim against the retailer in Maine, can easily lead to inconsistent results. Often enough it will be easy to bring the individual action to judgment before the consolidated court can move that far. The Maine court may impose liability—what of the retailer's right to indemnification if the manufacturer wins a finding of no defect in the mass torts court? And what of the retailer's rights if inconsistent results are reached in actions by different Maine plaintiffs? Or the Maine court may conclude that the product was not defective, or that the plaintiff caused her own injury by continuing to use the product after knowing of the defect, or otherwise reject the claim—what of the plaintiff's claim against the manufacturer? If we are serious about achieving consistent results, treating all claimants alike, we must find a way to bring all persons who may be liable to all claimants within the control of the single litigation. Whether framed as a class action or not, there must be no opting out unless permitted by the court.

Consistent results also require a single choice of law. The neatest solution would be to apply federal law, defined by statute or statutorily delegated for development by federal courts. The well-worn commerce power is more than adequate to the need. Unless vast swaths of tort law are to be preempted for all cases, there would be some awkwardness about identifying the circumstances that switch claimants from multiple state-law tracks to the single federal-law track. The task might nonetheless be managed. As an alternative, the mass torts court could be authorized to choose governing state law. Many conflict theorists would recoil at the thought, but it likely would be better to choose the law of one single state to govern all aspects of all claims, defenses, and collateral issues. The price would be that relationships between the Maine claimant and the Maine retailer-defendant might be governed by the law of Washington. Yet consistent results can be reached in no other way. And even if consistency could be maintained while choosing the laws of different states to govern different aspects of the dispute, a hybrid law could easily produce a combination of principles that no single government would willingly apply together.

Control by a single court naturally entails regulation of possible proceedings in other courts. The mass torts court must have power to enjoin all related proceedings. It also should have power to lift the stay for any of a variety of reasons. Individual plaintiffs may have urgent needs to move toward judgment that justify the risk of inconsistency. Individual actions might readily be permitted to resolve individual issues, subject to the binding effect of the central disposition of common issues.

Control by a single court also imposes responsibility for controlling the selection of counsel to represent the claimants and any other actors who may be grouped for litigation purposes. Yet the court should not become involved in a way that justifies fears that the court has assumed control of the adversary process by effectively selecting the adversaries.

Notice questions will prove troubling. Pursuit of the goal of consistency among all claimants, no matter how far in the future their claims may arise, in

some cases will defeat any possibility of actual notice that enables participation in the common proceeding that resolves common issues. Great reliance must be placed on representation, supplemented by notice as good as can be managed.

If all of this were not bad enough, something also must be said about maturity. For whatever reasons, it has become fashionable to seek to aggregate litigation of like claims at the earliest stages of experience. Yet great benefits can flow from allowing the gradual accumulation of knowledge through a succession of individual trials. And great benefits also can flow from awaiting the development of better knowledge in areas of immature science. Premature efforts at consistent resolution can greatly increase the risk that the consistent resolution will be wrong. Perhaps there is little reason to feel concern for the inconsistencies that are likely to emerge from the initial individual actions. But it would be satisfying to develop a system that allows a second chance, free of traditional *res judicata* principles, to early claimants whose defeats are followed by victory for vast armies of others whose claims are no better founded.

Settlement issues also must be faced. It seems inconceivable to create a form of litigation that cannot be settled, but must be pressed on to judgment or dismissed without any resolution whatever. One of the great virtues of a maturity requirement, indeed, is that it provides support for well-informed settlement terms. Settlements, moreover, may achieve remedies that are difficult to justify by adjudication under ordinary law. Settlements, however, must be arranged with great care. Several approaches are possible, alone or in combination. The settlement process can be structured by the court by designating a variety of participants who must be heard, and perhaps who must be satisfied. In addition to counsel, it may be desirable to involve some of the claimants themselves. It also may be desirable to appoint some form of independent representative for the claimants that is distinguished from counsel by a method of compensation that reduces the risk of conflicting interests. The court also may wish to participate in the settlement process, although ordinarily the judicial participant should not be the judge responsible for pretrial management or trial. Judicial evaluation of the actual settlement terms is essential, and means should be found to support genuine adversary challenges to the settlement agreement. Objectors should be supported by full (and guided) access to discovery materials, if the litigation (or earlier individual litigation) has generated adequate discovery, or by a realistic opportunity to engage in discovery on the merits. Objectors who were not privy to the settlement negotiations also should be afforded discovery on the negotiation process unless information can be gathered from reasonably neutral participants. Means should be found to ensure that the costs of objecting are awarded on terms that will encourage reasonable objections.

This sketch describes only the most salient issues that must be confronted if an attempt is made to reach broadly consistent disposition of dispersed mass tort claims. The most likely reaction is to ask whether consistency can possibly justify such extreme measures as these. A negative answer does not foreclose any useful role for class actions in dispersed mass torts. But once a clear

goal is put aside, it will be necessary to determine just what compromised goals merit class-action treatment.

### *B. Modest Beginnings*

The proposals considered by the Advisory Committee included at least four that bore on mass torts. The predominant effect of these proposals would be to sound a note of caution about attempts to rely on Rule 23 to aggregate substantial claims for personal injury. Three, which were published for comment, would have added factors (A), (B), and (C), to the list of matters pertinent to deciding whether to certify a (b)(3) class. The fourth, which never came on for serious debate in the Committee, would have created a discretionary power to certify a class limited to those who elected to join the class. The public comments and testimony on the proposed (b)(3) factors demonstrate the difficulty of ensuring that modest changes do not run out of control. These factors accordingly deserve treatment at some length. The opt-in class alternative remains on the table, albeit in uncertain form, and will be described more briefly.

The proposed (b)(3) factors are best quoted in full, including the prefatory part of (b)(3):

- (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;
  - (B) class members' interests in maintaining or defending separate actions;
  - (C) the extent, nature, and maturity of any related litigation involving class members...

#### *1. Practicability and Desirability of Individual Actions*

Factors (A) and (B) were closely related. (A) suggested that class treatment is more appropriate when class members do not have a realistic alternative in individual litigation. (B) suggested that when class members do have realistic access to individual litigation—as with mass torts involving serious physical injury—class treatment might not be appropriate.

Most of the comments and testimony addressed factor (A), but in terms that emphasized not only the difficulty of administering the seeming distinction between (A) and (B) but also the reasons why a claimant who could pursue individual litigation may prefer class litigation. The following summary gives a good sense of the observations.

The comments supporting the proposal were less detailed than the opposing comments. Some were simply that the proposal has it right, or that this is a sound beginning in a process that should limit (b)(3) classes still further.

Many of the comments emphasized the need to "return to fundamentals." The core of adversary litigation remains a contest between individual litigants, directly controlled by the parties themselves. Individual party control is essential to control the lawyers, to ensure that the litigation serves the intended purpose of aiding the parties rather than the lawyers. Rule 23(b)(3) has evolved into a body of judge-made law that has no acceptable foundations in the intent of the framers or in the theory of private-party adversary litigation. Although ATLA did not support the proposal, it stated that the purpose of Rule 23 is to aggregate small claims, not to achieve efficiency in disposing of individually large claims; that there is an important individual interest in personal injury and death claims that demands individual control.

The importance of individual control is tied in some of the comments to the needs for individual proof. Focusing on mass torts, it was urged that mass torts ordinarily require individualized proof on such issues as specific causation and damages, and that class actions cannot accommodate the need for such proof. The alternative of an "issues" class to resolve such matters as "general causation" was rejected as undesirable.

The role of individual control also was tied to a perspective caught up in proposed factor (B). This approach would emphasize the importance of alternatives that do not involve individual control. Smaller classes, consolidation under § 1407, and aggregation by other means may all sacrifice individual control but prove better than a single huge class litigation in a single court.

Several comments focused on the problems that arise when a single class includes individual claims that are strong on the merits and substantial in amount with other individual claims that are weak on the merits or insubstantial in amount. These cases present an unavoidable sacrifice of the interests of the strong and substantial claimants to the interests of others. This conflict of interests is avoided by emphasizing the importance of individual litigation.

Extension of (A) also was urged. Consideration should be given not only to individual litigation but also to the prospect of administrative relief or self-correction by the defendant. This approach would bring in small individual claims that do not support individual litigation. On this view, better relief or lower cost may be achieved by administrative proceedings, judicial proceedings instituted by public agencies, or the defendant's own acts. One formulation would add four words: "the practical ability of individual class members to pursue their claims or otherwise obtain relief without class certification."

The proponents also urged that the Note should not encourage small-claims classes. The illustration of a product defect that causes a small number of personal injuries and causes widespread loss of product value was challenged, apparently on the ground that the value loss is—if it ever is real at all—a self-fulfilling function of the publicity that surrounds class litigation.

Arguments challenging the proposal took many forms. The central propositions are that: courts already take account of this factor to the proper extent; the right to opt out protects individual interests in any event; the rule works well now; any change will cause short-term confusion and long-term administrative headaches; many class members who are able to pursue individual litigation prefer to remain in a class action; class members with large individual claims may be the best possible class representatives; and class litigation may support remedies that are not possible in individual actions. Other arguments will be summarized after these arguments are elaborated.

The argument that the valid part of (A) is embraced by present practice begins with the present rule, which makes pertinent "the interest of members of the class in individually controlling the prosecution or defense of separate actions." Practical ability, the element emphasized by proposed (A), is distinct from interest, but it has no meaning unless there is an interest in separate litigation. If there is no interest, the ability is not relevant. If there is an interest in separate litigation, the lack of ability bears only on certifying a class after all. The attempt of (A) is only to ensure that courts focus on the practical ability, but no real guidance is offered as to the nature of the intended change.

This emphasis on the interest in separate litigation underlies the most common observation. Comment after comment emphasized that many class members who would be able to pursue individual litigation prefer to remain in a class action. This observation was linked to the observation that many classes include a wide spectrum of claims, from rather small to quite large. One illustration was the corrugated container antitrust litigation, involving individual claims that ranged from less than \$100 to about \$10,000,000. The preference for class litigation may rest on several factors. One is the cost of pursuing even a sizable claim on the merits—antitrust and securities litigation provided the most frequent illustrations. Another is the fear of retaliation; ongoing relationships are not jeopardized by comparatively anonymous participation in class litigation in the way that follows from direct adversary litigation. And an efficiency argument is tied to the preference argument: there is no reason to force the inefficiencies of separate litigation on those who prefer to remain in the class.

The importance of continuing to involve large claimants in the class was often addressed by reference to the 1995 private securities litigation reform legislation. That legislation creates a presumption that the best class representative is the one with the largest individual claim.

Claimants with large individual claims, it is urged, also are those for whom the opportunity to opt out is most meaningful. They are most likely to be sufficiently sophisticated to understand the class-action notice, most likely to be represented or to seek legal advice, and most likely to act on a wise assessment of individual advantage. The litigant who is truly able to pursue individual litigation also is truly able to opt out without adding further complication to the rule. The importance of large claimants is stressed from another perspective as well. Exclusion of large claimants from the class definition makes it more difficult to

achieve settlement—a phenomenon that may be attributed to the bargaining power of their claims, or that instead may be attributed to the defendant's desire to achieve "global peace." The risk that the strong claims will be reduced in negotiation for the advantage of weak claims can be met, it is urged, by subclassing.

One comment, focusing on mass torts and drawing from the heart-valve experience, urged that even if every class member is able to pursue individual litigation, class litigation can achieve remedies that are not available in individual actions. The judgment in that litigation included funding for research that would benefit the class.

The administrative confusions foretold for (A) are many and dire. The predictions rest in part on the lack of any identified criteria for measuring the practical ability to pursue separate litigation. Does ability depend on the size of individual claims? Individual resources? Ability to secure contingent-fee representation? Individual savvy and sophistication? Actual desire? Other factors? The lack of criteria supports projections that many criteria will be relevant, or will be claimed to be relevant. Application of these criteria in turn will lead to extensive discovery. Defendants commonly have better information about many factors bearing on individual ability than is available to class representatives by other means. Identification of class members is only the beginning. Information about the nature of their transactions or events is important. So is information about the probable size of their claims. Beyond this point, it will be urged that practical ability turns on the probable merits of the claim, leading to discovery and dispute about the merits. (This prediction is particularly difficult to unravel—a defendant who wants to argue that individual class members are able to pursue individual actions is not likely to make forceful arguments about the strength of their claims on the merits. Perhaps the point is that the defendant will argue that the issues that will prove its nonliability are simple and clear, so that individual litigants can easily pursue separate actions. The class representatives will want discovery to show that this is not so.) The most dire prediction is that discovery must extend to each prospective class member, so as to measure capacity to litigate, interest in separate litigation, and the like.

Another argument stresses the desire to achieve like treatment of like-situated claimants. Individual actions will lead to recovery for some class members, but not others.

Some comments suggested that (A) is drawn from concern with the large individual claims held by members of mass-tort classes, and that this concern should be addressed separately without jeopardizing the present successes of Rule 23 in other fields. In similar fashion, it was urged that any concern with future claims should be addressed directly.

A concern not often addressed directly, but made explicit at times, was that factor (A) would make it possible for courts hostile to Rule 23 to defeat desirable class actions. This was tied to the view that by excluding all large



individual claims, the class could be narrowed to a point that would make it infeasible to bear the risks and costs of litigation even if the class were certified.

Turning to factor (B), focusing on class members' interests in maintaining or defending separate actions, the most direct criticism was that the focus on mass torts may have obscured the potential impact of (B) in other settings. There might be a tendency to exclude large claims from more traditional class actions, as in the securities field, with undesirable consequences.

A challenge aimed directly at mass tort litigation has been advanced by Professor Linda Mullenix. She has warned against romantically unrealistic views of the realities of "individual" litigation. The reality is said to be that most victims do not have real relationships with their attorneys in mass-tort proceedings. The attorneys have "inventories" of clients who do not and cannot play any realistic role in making decisions about litigation or settlement. Claims are settled in large packages, often without any real knowledge of the clients, and the allocation among different claimants is made by their common attorney. Class actions at least provide some measure of judicial supervision and reduce transaction costs for the benefit of all concerned.

Taken as a whole, these comments suggest the difficulty of attempting to draft general provisions that will adapt Rule 23 to mass-tort litigation without also inviting unintended consequences in better-settled areas of class-action practice. Similar difficulties were demonstrated by the comments and testimony on the proposed maturity factor.

## *2. Maturity*

There was substantial—although far from unanimous—support for the view that a class action should not be certified to resolve a claim that rests on uncertain and still developing scientific evidence. Set against this proposition was concern that any focus on maturity may be seriously out of place in better-established fields of class litigation. More elaborate reactions were built around this core, focusing in part on the fear that relief for class members may be delayed inordinately while the class court awaits the maturing of the class claim.

The importance of maturity was most often illustrated by mass torts. It was urged that there is a race to file the first class action, often hard on the heels of the first announcement of a new theory of injury and causation. The race is prompted by the desire to become class counsel, or at least a member of a steering committee. With little experience of the outcome of individual actions, there is a great pressure to settle and little guidance as to appropriate terms. Time and experience with individual litigation are needed. Only time will enable real science, developed by agencies independent of the litigation, to displace "junk science." This science will bolster the claims, sort out the good from the bad, or refute them all. Experience facilitates realistic settlement.

Challenges to the proposal took several directions. In the familiar vein of fears that a concept growing out of mass tort will disrupt settled areas of practice,

it was argued that maturity is out of place in regulatory enforcement actions. A securities law violation, for example, should be corrected by a single class action without awaiting the results of individual actions challenging the same violation. Far from needing time to develop fact information, fact information is much better developed and presented in the framework of a single class action that supports the full investment of resources required for full exploration of the facts.

In another familiar vein, it was urged that there is no definition, no "index" of maturity. The lack of definition will confuse practice, and will provide yet another excuse for judges hostile to class actions to deny certification. Meeting this argument, it was suggested that maturity could be defined—most likely in the Note—in various ways. One definition, attributed to the Manual for Complex Litigation, is that a class claim is mature when individual actions show that it has merit. Another, and the most popular, was that maturity emerges when individual actions begin to converge on consistent outcomes.

The lack of definitions also was noted with respect to the concept of "related" litigation. How much similarity is contemplated in the dimensions of subject-matter, named parties, format, or locale? There also may be a drafting misstep in referring to related litigation "involving class members." This phrase is a style version of the present rule, which refers to litigation by or against "members of the class." The parties to related litigation may not be class members, however, because they have been excluded from the class definition or have opted out of the class. It would be better to refer only to "related litigation," leaving any need for amplification to the Note.

Delay is yet another common theme in addressing the (b)(3) proposals. With respect to maturity, the proposition is quite direct. The attempted class action is stayed, and most likely all discovery is stayed as well, until some indeterminate time when an undefined number of individual case outcomes demonstrate maturity. Who is to be charged with maintaining vigil over the maturing process? When is ripeness achieved? How long are courts prepared to wait if, as may well happen, the individual actions settle in such large numbers that actual litigated results—most likely to be in cases that are unusually strong for claim or defense, and thus most likely to lead to disparate results—establish maturity? As maturity plods its patient way, moreover, the courts will be swamped with individual actions.

Specific suggestions to amend the maturity proposal came from a variety of perspectives. Some were related to suggestions made with respect to other of the proposals. It was suggested that the Note should state that maturity depends in part on the state of government enforcement efforts—that the need for class certification, and thus maturity, cannot be resolved until there is no clear prospect of government enforcement. In a different direction, it was suggested that one of the advantages of maturity is that experience with the litigation of several individual actions will facilitate a determination whether certification will meet a "common evidence" test that proof of the class claim will also prove all elements

of individual class members' claims. This connection should be described in the Note, or added to a new factor that focuses on common evidence.

The amendment most often suggested was that maturity should be a factor only in mass tort classes, and perhaps should be limited to cases involving scientific evidence of causation. The focus should be on "the state of existing knowledge."

Other suggested amendments were quite specific. Some way should be found to ensure that courts will consider as related actions only those that are sufficiently similar to the proposed class action. It should be made clear that the focus is on the maturity of the class claim, not simply the progress of individual actions toward judgment. The progress of the attempted class action should not be stayed to await the outcome of related individual litigation—if there is a risk of interfering with the individual actions, the individual plaintiffs can be excluded from the class definition or can opt out of the class. Related litigation should be considered only if it is pending at the time of the certification hearing. And the Note should not refer to the progress of individual actions—the concern that the class action may intrude can be met through wise application of factors (A) and (B), and through opting out of the class.

Considering all of this divergent advice, the Advisory Committee concluded that proposed factors (A) and (B) should be rejected. The risk of unintended consequences outweighed the modest benefits that had been sought. The maturity factor, proposed (C), was redrafted as a revision of present (B): "(B) the extent and nature of any related litigation, and the maturity of the issues involved in the controversy."

This draft is being carried forward on the Committee's Rule 23 agenda, together with a draft Committee Note that reflects the advice proffered by comment and testimony:

Subparagraph (B) has been modified in two respects. The focus on "litigation concerning the controversy already commenced by or against members of the class" has been simplified. The new focus on "the extent and nature of any related litigation" eliminates any requirement that the related litigation have been commenced before the action in which class certification is requested. The court should be able to consider any related litigation, including the prospect that better means of resolving the controversy may be found in an action that has not yet been filed. The new focus also avoids the complications that might arise from focusing on litigation involving "members of the class." Account can be taken, for example, of related litigation that involves parties not within a proposed class definition, or parties who have opted out of the proposed class. The concept of "related" litigation should be given a practical meaning in other ways as well. What counts is not an abstract concept of relatedness but a realistic appraisal of the competing opportunities to resolve a dispute by one class action,

several class actions, or other methods of aggregation such as transfer under 28 U.S.C. § 1407, voluntary joinder, or intervention.

The other respect in which subparagraph (B) has been modified is the new focus on the maturity of the issues involved in the controversy. The maturity element has been suggested by cases that rest on uncertain scientific premises about the causal connection between underlying events and asserted injuries. Premature certification of a class in such circumstances creates grave risks. A single determination for or against the class claim may be wrong, inflicting undeserved liability or denying deserved compensation. A settlement wrought in face of such uncertainties may likewise result in over- or under-compensation. If class certification is deferred, experience with individual litigation may help develop the information required for accurate adjudication, or may demonstrate that class treatment is not warranted. If the results of individual actions begin to converge, class certification may be supported; if the results continue to diverge, the risk of error in any class adjudication may defeat any certification.

Experience with individual litigation may illuminate the predominance requirement as well as the superiority requirement. Individual trials can show whether common issues will in fact predominate at trial, or whether so many individualized matters such as causation, comparative fault, injury, and damages typify the claims that class treatment is not appropriate.

The maturity element must be managed with caution. Class certification often may be supported, not defeated, by the presence of complex fact issues and novel legal issues. Examples are provided by many areas of familiar class adjudication, including actions under the antitrust, civil rights, employment discrimination, and securities laws. Many, most, or even all class members may lack the means or incentive required to litigate their claims in separate actions. All parties and the courts may benefit from a single class action that brings together the resources required for effective litigation and the means to avoid unnecessary duplication. Delay of class treatment may only add to costs, encourage inconsistent results in ill-prepared litigation, and defeat recovery by some deserving class members.

The focus of the maturity requirement should be on situations in which the court can be confident that there will be substantial numbers of individual actions, has strong reason to fear the inadequacy of the evidence that can be adduced to support accurate decision on the merits, and has good reason to hope that significantly better evidence will be developed in the reasonably near future.

### 3. *Opt-In Classes*

The prospect that opt-in classes might in some way be added to Rule 23 remains on the Advisory Committee agenda. The earliest proposal would have erased the distinctions between mandatory and opt-out classes, and would have added an opt-in action so that the court could limit any form of class to those members who elected to opt in, could deny the right to opt out of any form of class action, or could have permitted the right to opt out of any form of class action. When it was decided to retain the familiar distinctions between (b)(1), (b)(2), and (b)(3) classes, a general opt-in class was added as an alternative. This proposal would have added a new subdivision (b)(4):

- (4) the court finds that permissive joinder should be accomplished by allowing putative members to elect to be included in a class. The matters pertinent to this finding will ordinarily include:
  - (A) the nature of the controversy and the relief sought;
  - (B) the extent and nature of the members' injuries or liability;
  - (C) potential conflicts of interest among members;
  - (D) the interest of the party opposing the class in securing a final and consistent resolution of the matters in controversy; and
  - (E) the inefficiency or impracticality of separate actions to resolve the controversy;

The draft Committee Note explained the bearing of this proposal on mass torts:

Opt-in classes also may provide an attractive means of addressing dispersed mass torts. The class can be defined to resolve problems that could not be readily resolved without the consent that is established by opting in and accepting the definition. The law chosen to govern the dispute can be stated, terms for compensating counsel announced, procedures established for resolving individual questions in the class action or by other means, and so on. Questions of power over absent parties, analogous to personal jurisdiction questions, are avoided. Claims disposition procedures can be established that facilitate settlement. Perhaps most important, an opt-in class provides a means more effective than the now familiar opt-out class to sort out those who prefer to pursue their claims in individual litigation. Subdivision (b)(4) thus complements subdivision (b)(3), providing an alternative means of addressing dispersed mass torts. Although a court should always consider the alternative of certification under (b)(3) in determining whether to certify a class under (b)(4), certification under (b)(4) is proper even in circumstances that also would support certification under (b)(3). The same is true as to certification under subdivision (b)(2), although there are not likely to be many circumstances that support

an opt-in class for injunctive or declaratory relief. If certification is proper under subdivision (b)(1), on the other hand, reliance should be placed on (b)(1), not (b)(4).

The mass tort theme was reflected as well in portions of the draft Note expanding on the factors listed in draft (b)(4). One circumstance occasionally encountered is a product that is said to be defective, causing relatively small property-value damages to many consumers but causing severe personal injury to a much smaller number. It was suggested that factors (A) and (B) might support a decision to certify an opt-out class for the small property-value claims, while certifying an opt-in class for the personal injury claims, managing both classes together as far as might prove convenient. Problems of conflicting interests among people claiming different types of personal injury might be addressed under factor (C), relying on an opt-in class to justify somewhat greater potential conflicts than might be tolerable in an opt-out class. Factor (D), looking at the repose interests of the party opposing the class, could easily push back toward an opt-out or even mandatory class for mass torts. And factor (E) could encourage opt-in classes as a means of attaining some efficiencies without sacrificing the interests of victims who prefer separate litigation.

Because the opt-in proposal has not been published for comment, only a few informal reactions have been gathered. As might be expected, there is great concern that the opportunity to certify opt-in classes will be used by judges hostile to Rule 23 to defeat meaningful class relief. This concern of course builds on the belief that out of a potential class of 1,000,000 relatively small-stakes claimants, most would fail to opt out of a (b)(3) class, while most would fail to opt into a (b)(4) class. There is little doubt that formal publication of the (b)(4) draft for comment would draw an avalanche of hostile response. But the response is not likely to be framed directly in the terms just used. Acceptance of (b)(3) opt-out classes is strongly bolstered by the belief that the failure to opt out represents genuine, informed consent to be included in the class. Proponents of present practice are not likely to emphasize the challenges that may be addressed to this belief. Nor are they likely to emphasize the difficulty of crafting a notice that gives meaningful information about the subject of the action and the consequences of a decision to opt out or to opt in. More general and euphemistic expressions are likely to be used. The problem simply reopens the questions of litigation and preclusion by representation.

Opposition to the opt-in proposal comes from those who typically represent defendants as well as those who typically represent plaintiffs. Defendants may gain "global peace" from a broad plaintiff class, and in some mass-tort actions have eagerly sought certification of global plaintiff classes. The opt-in alternative may be worse from the defense perspective than either a broad opt-out class or individual litigation. An opt-in class can provide greater resources and more effective representation for plaintiffs than individual actions. The result might be a cascading series of successful opt-in classes, generating greater liability and greater defense costs than either an opt-out class or individual actions.

An alternative version of opt-in classes remains under more active Advisory Committee consideration than the general version that might bear on mass torts. This version returns to the problem of small-claims classes in a way that also emphasizes questions of representation theory. The concern, already noted, is that many small-claims class members may not care whether their claims are vindicated by litigation. To test this concern, the court could certify an opt-in class when likely relief seems small "and the court has reason to question whether class members would wish to resolve their claims through class representation." This version is at the opposite end of the spectrum from mass torts, and is better left to the continuing process of Committee deliberations.

#### *4. Other Proposals Affecting Mass Torts*

Of the many new matters that emerged from public comments and testimony on the 1996 proposals, two have made their way to the Committee agenda. Each, if pursued further, could bear directly on the use of Rule 23 for mass torts.

The first new agenda proposal rests on the belief that Rule 23 administration too often devalues the requirement for certification of a (b)(3) opt-out class that common issues predominate. The stronger version of this proposal would add a new requirement to the predominance and superiority elements of (b)(3) certification: "that the trial evidence will be substantially the same as to all elements of the claims of each class member." This version would defeat certification of any but the most unusual mass tort class; the individual claim elements of specific causation, comparative responsibility, and damages are not at all likely to involve substantially the same trial evidence.

The other ongoing new proposal is to take some account of competing efforts to certify a class. The public comments and testimony reflected growing concern with competing and overlapping class actions. Many different patterns were identified. The simplest arises when one court refuses class certification and another court is then asked to certify the same class or a similar class. Although there is little descriptive complexity, greater problems arise when one court certifies a class and another court is asked to certify a different but related class. Certification of a statewide class in one state, for example, could be followed by an attempt to certify a nationwide class in another court. Still greater problems arise when certification of a class is followed by competing efforts to win certification of the same class in another court. Some of the testimony suggested that in one form or another, these problems have become increasingly acute as attempts are made to persuade state courts to certify nationwide classes—including efforts to win a free ride on those who put together the first class action, beating an earlier-certified class to judgment. Mass torts have provided troubling illustrations of efforts to shop a proposed class certification and settlement among different courts and judges. Full resolution of these problems probably calls for measures beyond the limits of the Rules Enabling Act. It may be possible, however, to amend Rule 23 at least to require that account be taken of decisions

granting or denying class certification in actions arising out of the same conduct, transactions, or occurrences.

## VI. OTHER ISSUES

A number of other issues have been identified during the several years of Advisory Committee study. Some of the more prominent are simply catalogued here, to illustrate the range of questions that may be addressed to Rule 23.

Notice may be the most central issue. Despite conscientious efforts to draft plain-English class-action notices, examples abound of notices that even most lawyer class members discard unread. Emphasizing in Rule 23 the need to bring as much clarity as possible to class notices might provide some small help. It may be possible to draft a form that provides clear and uniform statements about the opportunities to participate in any class and the nature of the opportunity to request exclusion from a (b)(3) class. It is clearly possible—and I think desirable—to add express provisions for notice in (b)(1) and (b)(2) class actions. And it should be possible—and I think desirable—to ease the burden of notice in small-claims (b)(3) classes by allowing notice to a significant sample of class members.

Another issue discussed by the Advisory Committee was the possibility of requiring some preliminary assessment of the probability that a (b)(3) class claim will succeed on the merits. The concern was that simply filing an action that demands class relief imposes costly burdens on court and adversary, and that staggering burdens may be imposed by certification of a class that meets Rule 23 requirements and is barely strong enough to get by a motion to dismiss. In the end, this draft was rejected in face of opposition both from those who typically represent plaintiff classes and from those who typically oppose plaintiff classes. The costs, risks, and consequences of a preliminary assessment of the merits were thought untoward on all sides. It has been suggested that some measure of protection might be provided by requiring more particularized pleading in class actions than in other litigation. This suggestion ties to many other complaints about the costs of our system of notice pleading and sweeping discovery.

Attorney fees have been a regular focus of complaint. The most common lament is that many class actions are lawyer-driven, resulting in fat fees and no meaningful class relief. A variant is that mass-tort class actions have become an entrepreneurial undertaking second only to the software industry as a last frontier of free-market capitalism. This image is one of litigation so expensive that it can be pursued only by a small core of lawyers flush with vast fees garnered in earlier mass-tort actions and prepared to invest millions in the next set of events that can be turned first into a tort and then into a mass tort. The proposals that were advanced in public comments and testimony illustrate some of the approaches that might be taken, separately or in combination: (1) simultaneous settlement negotiations on class relief and fees should be prohibited; (2) fees should be calculated on a lodestar basis, and “coupons” and like noncash relief should not be counted in determining the fee; (3) fees paid separately by the defendant, not



out of the class recovery, create conflicts of interest that cannot be resolved—such arrangements should be prohibited; (4) fees should be restricted in cases that settle at an early stage; (5) fees should be awarded a person who successfully opposes a certification request; (6) a portion of fees should be withheld until relief has been effectively distributed—if there is “coupon” relief, fees should depend on the coupon redemption rate; (7) fees should be awarded those who successfully object to proposed settlements; (8) fees should be apportioned if some part of the value of a class claim has been created by other lawyers involved in separate litigation.

## VI. CONCLUSION

The Advisory Committee deliberately chose to pretermitt reexamination of Rule 23 from the effective date of the 1966 amendments until 1991. Almost immediately after 1966, Rule 23(b)(3) was put to uses that in many ways transformed the operative meaning of several bodies of substantive law. Debates about the wisdom of the new rule took on a dimension that is political in the pure sense, disputing the proper governmental-regulatory role of private adversary litigation. Enforcement of individually small claims that otherwise would go unredressed became the now traditional rallying point. The passions kindled by those debates remain, and new mass tort challenges can only augment the intensity of the contending interests. Once the possibility of Rule 23 amendments became known, many attorneys with enormous experience and real wisdom advised against doing anything. This view is that with more than thirty years, the common-law process of judicial evolution has battered present Rule 23 into a workable and above all well-understood tool. Any changes, however modest the intent, will become the occasion for opportunistic adversary contests for advantage. Unintended and unforeseeable consequences will emerge, and at least another decade will be required to restore some semblance of order. Absent a clear vision of necessary and controllable change, nothing should be done.

Against this wise counsel must be balanced the repeated protests that Rule 23 may be well known, but too often it is a well-known disaster. The number of class actions seems to be growing. The burdens inflicted on defendants grow apace, without any redeeming social good and at great social cost.

And you ask me to predict the future of class actions?

