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Litigating and Settling Class Actions: The Prerequisites of Entry and Exit

Judith Resnik*

I. THE IMAGES THAT FRAME THIS CONVERSATION

John Oakley has entitled the panel discussion, and now this symposium, “Summing Up Procedural Justice: Exploring the Tension Between Collective Processes and Individual Rights in the Context of Settlement and Litigating Classes.” Under this rubric we could be discussing an array of topics, but given that this conversation takes place in the winter of 1997 among a group of proceduralists, our attention has been drawn by proposed revisions to the 1966 class action rule1 and by pending and vivid case law examples (including Georgine,2 Ahearn,3 and GM

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* © Copyright 1997 Judith Resnik and the Regents of the University of California. Orrin B. Evans Professor of Law, University of Southern California Law Center. Visiting Professor of Law, New York University School of Law, 1996-97; as of July 1, 1997, Arthur Liman Professor of Law, Yale Law School.

This essay is written at the prompting of John Oakley, who assembled a panel in January of 1997 to discuss class litigation and is informed by the exchanges with co-panelists John Oakley, Eric Green, and Sam Issacharoff. My thanks also to Janet Alexander, Margaret Berger, Richard Bieder, Elizabeth Cabraser, Jack Coffee, Denny Curtis, Owen Fiss, John Frank, Deborah Hensler, and Nancy Morawetz for ongoing conversations about the scope, shape, and utility of large-scale litigation and to Alys Brehio and Jennifer Rakstad for ongoing assistance in understanding the current shape of the doctrine.


2 Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3rd Cir.), affd sub nom. Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997). The case was argued on February 18, 1997 but, as of this writing, had not yet been decided. See Judith Resnik, Postscript: The Import of Amchem Products, Inc. v. Windsor, 30 U.C. DAVIS L. REV. 881 (1997).

3 Now known as “In re Asbestos Litigation,” 90 F.3d 963, reh’g denied, 101 F.3d 368 (5th Cir. 1996), petitions for cert. filed sub nom. Flanagan v. Ahearn, No. 96-1379, 65 LW 3611 (Mar. 11, 1997) (challenging the decision not to disqualify the trial judge who approved the settlement in which he had been involved in the negotiations, as well as contesting the mandatory nature of the class) and sub nom Ortiz v. Fibreboard Corp., No. 96-1394, 65 U.S.L.W. 3631 (Mar. 18, 1997) (challenging the certification that provided for a mandatory, non-opt out class under Fed. R. Civ. P. 23(b)(1)(B)). See 65 LW 3638 (Mar. 18, 1997).
Trucks\(^4\) of class action practice, doctrine, and aspirations.\(^5\)

The issues come packaged under headings like "futures classes" and "settlement classes" and the controversy has become heated — with accusations of collusion, attorney self-interest, and judicial acquiescence in or support of unfair settlements.\(^6\)

In this heat, issues become conflated that need to be disentangled; examples stemming from cases claimed to be typical may themselves be only a part of a diverse and variable lot.

Neither rulemaking nor commentary on procedure should be driven by that which grabs attention unless we can be confident that the vivid example is paradigmatic of the set. Thus, while I share concerns about the equity and quality of certain class action (and other) settlements and about the processes that generate them, I am also concerned about a reaction to these instances that disables class action litigation rather than attempting to constrain particular distressing manifestations.

II. THE EXPECTED COURSE OF LITIGATION, 
CIRCA 1990s: SOME DATA

Both the practice of litigation and the Federal Rules of Civil Procedure are shaped today by an understanding that the act of filing a lawsuit does not constitute a statement of intention to try a lawsuit. Not only do litigants and lawyers begin most lawsuits with little expectation of trial, but judges and rulemakers also encourage them to try hard not to go to trial, and they do so through rules, doctrine, and practices.\(^7\)


\(^{5}\) Here, teachers of civil procedure owe special thanks to Tom Rowe, a member of the Advisory Committee on the Civil Rules. Via a civil procedure and federal courts "listserv," Professor Rowe disseminates information on the activities of the Rules Committee and on pending cases of import. Hence, as of May 5, 1997, we all learned that the Advisory Committee decided to defer consideration of the question of settlement classes until October and to send forward two of the proposed revisions circulated; the Committee proposes changing Rule 23(c)(1) to revise the mandate to certify "as soon as practicable" with a permissive "when" and to add a subsection (f) to provide for discretionary interlocutory appeals of class action certification decisions by district judges. Tom Rowe e-mail of May 5, 1997 (on file with the author).


\(^{7}\) See generally Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement,*
Revisions to Rule 16 of the Federal Rules, local rules in many districts, and the Civil Justice Reform Act all call for judges to control litigation and, if possible, to help create conditions under which settlement can occur. Take for example a local rule in the district of Massachusetts, which reads that:

At every conference conducted under these rules, the judicial officer shall inquire as to the utility of the parties conducting settlement negotiations, explore means of facilitating those negotiations, and offer whatever assistance may be appropriate in the circumstances.

Similarly, the Eastern District of New York's local rules oblige judges at the mandatory Rule 16 conference to explore "the feasibility of settlement or invoking alternative dispute resolution procedures, such as the use of settlement judges, early neutral evaluation, and mediation." Thus, over the past few decades, judges have shifted roles, becoming "managerial judges," "settlement judges," and one of many "players" around a bargaining table.


Resnik, Managerial Judges, supra note 8.

Judith Resnik, Procedural Innovations, Sloshing Over: A Comment on Deborah Hensler, A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation, 73 Tex. L. Rev. 1627, 1630 (1995); Francis E. McGovern, An Analysis of Mass Torts for Judges, 73 Tex. L. Rev. 1821 (1995). Some of what that "play" entails (ranging from meetings in courts to joining the judge at his home) can be found in the descriptions of the settlement process in both the majority and dissents in In re Asbestos Litigation, 90 F.3d 963, 971, reh'g denied, 101 F.3d 368 (5th Cir. 1996), petitions for cert. filed sub nom. Flanagan v. Ahearn, No. 96-1379, 65 LW 3611 (Mar. 11, 1997) (challenging the decision not to disqualify the trial judge who approved the settlement in which he had been in-
Rules, statutes, and practice are not the only sources for the proposition that the procedural system is aimed at dispositions without trial. The case law is similarly emphatic on this point. A phrase that has found its way into a few published cases is that “a bad settlement is almost always better than a good trial.” Further, the judicial policy favoring settlements is said to have special force in the class action context. And the 1996 decision by the United States Supreme Court in Matsushita provides further illustration of the commitment to the policy of settlement, for the case holds that state courts may have jurisdiction to approve settlements of lawsuits that they lack jurisdiction to try.

Given the many variables that affect decisions to go to trial, the contribution made by these rules and policies to the declin-
ing rate of trials cannot be specified, but the fact of the rarity of trials can. With the help of Stephen Yeazell, we know that trial rates have declined from about twenty percent of the federal civil caseload in 1938 to under five percent in the 1990s.16 (In 1995, the percentage of civil cases going to trial in the federal courts was just above three percent.17)

While commentators sometimes equate a low trial rate with a high settlement rate, it is erroneous to deduce a settlement rate of ninety-five percent from the trial rate of under five percent. Within the ninety-five percent of cases not tried, a significant proportion involve some form of adjudication other than trial. Estimates are that in about a third of the pending cases, judges decide contested motions such as motions to dismiss, preliminary injunctions, and summary judgment.18 Thus, my point is not that the federal courts do not adjudicate but, rather, that trials are a rare form of adjudication.19

Turning again to the specific subset of litigation that is our focus (class actions and other large-scale cases), the fact that a case is processed in the aggregate (by class action, multi-district litigation, or other mechanism) does not appear to vary these propositions. Be it two-party or multi-party litigation, trial remains the odd form of disposition while adjudications other than trial remain frequent. While empiricism on class actions is very limited,20 we have recent and welcome data from Thomas Willging’s, Laural Hooper’s, and Robert Niemic’s study for the Federal Judicial Center (FJC).21 They reviewed filings in four

16 Yeazell, supra note 8, at 633.
17 ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY 36, tbl.C-4 (Dec. 31, 1995) (reporting that 3.2% of civil cases reached trial).
18 Yeazell, supra note 8, at 636 nn.18-19.
19 Again, Professor Yeazell has provided an important picture: that in “1938, 63% of the adjudicated terminations of civil cases were trials and directed verdicts. In 1990, trials accounted for only 11% of all adjudications; the remainder were disposed of before trial.” Id. at 636 (footnotes omitted).
20 Additional information will become available when RAND’s ICJ completes an ongoing project on class action practice; data collection is under way on the study of class actions in 1995-96 in both state and federal courts. See Deborah R. Hensler, Jennifer Gross, Erik Moller, & Nicholas Pace, Preliminary Results of the RAND Study of Class Action Litigation, Documented Briefing, May, 1997 (on file with the author) [hereinafter RAND’s Class Action Study].
21 Thomas E. Willging, Laural L. Hooper, & Robert J. Niemec, An Empirical Analysis of
districts and learned that (at least in those districts) settlement rates in class actions were generally comparable to settlement rates in other civil cases. Turning to the question of trial, in three of the four districts studied, the trial rate was similar (ranging from three to six percent) to that of non-class-action litigation. And, in terms of non-trial adjudication, in about two-thirds of the class actions certified, judges made substantive rulings on contested motions.

Lawyers commencing cases and judges presiding over them know these rules, these practices, the case law, and the odds. The shared understanding is that commencing a lawsuit is a plan to litigate or to settle a case but is rarely a plan to try a case. Further, those seeking trial will be met by a rule regime that is suspicious of the activity; both individual and class litigation is handled with a strong presumption against trial.

III. CLASS ACTION STATUS: ALTERING THIS COURSE?

The predicate question for me is whether class actions should be permitted to be commenced with an assumption parallel to that of individual litigation — that trial is unlikely and perhaps implausible. Or, should the price of certification be that in class

Rule 23 to Address the Rulemaking Challenges, 71 N.Y.U. L. REV. 74, 92 (1996) [hereinafter FJC Class Action Study]. The authors remind us to attend to the problems of data collection, both their own and those of other sources. A central caveat is that the FJC study was based on an intensive inquiry into four district courts, but cannot tell us whether those courts are representative of class action litigation as a whole. Further, because of the rapid change in practice in the last few years, data from even the early 1990s may not capture activity in the late 1990s.

Specifically, the Eastern District of Pennsylvania, the Southern District of Florida, the Northern District of Illinois and the Northern District of California. Id. at 82.

Id. at 92, 182 fig.2. The researchers also remind us to take care about the differing modes of collection of data; their information comes from case files while the data about non-class actions comes from the Administrative Office (AO) of the United States Courts, which codes dispositions under categories such as "dismissed: settled," "dismissed: voluntarily," and "judgment on consent," but does not review individual files. Id. at 92 n.63. When the researchers looked at such files in four districts, they found rates of class actions different from those reported by the AO. Thus, when comparing AO data on non-class actions with the FJC Class Action Study data on class actions, one is relying on two different data sources and hence, differences in settlement rates, in substantive adjudication, and in trial rates "may simply reflect the differences in data collection methods." Id.

Id. at 92, 151 (excluding prisoner civil cases). In the fourth district, class action trials were 5.5% and non-class action civil trial rates were 3.2%.

Id. at 109-10.
actions, unlike other civil cases, lawyers have to demonstrate the ability to bring cases to trial?

One response is to argue that the distinctive features of class actions (and specifically their representative structure on behalf of absentees26) mandate different rules; for those who seek authorization from a court to function in a representative capacity, the hurdles should be higher, including a demonstration of the ability to proceed to trial at the time of certification. While this formulation has appeal, I disagree with it for several reasons.

First, I think that such a requirement limits access to courts. I worry that demanding the capacity to try a class could function like the Eisen27 requirements to preclude the litigation of meritorious claims.28 Recall in Eisen that to fulfill the obligations imposed by the Supreme Court's reading of Rule 23(b)(3), the named plaintiff proposing the class action had to provide individual notice at the time of certification to so large a circle of potential class members that the case (already found likely to succeed on the merits29) could not proceed. Similarly, if class counsel is required to establish as a predicate to certification that the lawsuit could be tried, meritorious lawsuits might fail that test, even though they might — had certification been granted — have proceeded to some form of adjudication or settlement.

Second, I am opposed to imposing this burden on class actions because it will create incentives to litigate cases under other aggregate rubrics that may provide fewer safeguards to absentees than do class actions. Class actions are but one form of grouping claims. Aggregate litigation has increased (on both the civil and criminal sides) over the past decades in frequency and appears under a variety of headings, including but not limited to class actions.

29 See Eisen v. Carlisle & Jacquelin, 54 F.R.D. 565, 567 (S.D.N.Y. 1972) (finding that the plaintiffs were "more than likely" to prevail).
Given the array of interests promoting aggregate litigation, trial judges and inventive lawyers are fully able to form aggregate lawsuits via means other than class actions, such as the multi-district litigation process, consolidation, informal aggregations via uniform pretrial orders, the assignment of special masters, and of course, bankruptcy.\textsuperscript{30} If federal rulemakers or courts impose a rigid requirement that a class cannot be certified without evidence of the ability to take that configuration to trial, such cases often will neither die nor revert to single-case processing, but will instead be processed in the aggregate, either informally or via some other process.\textsuperscript{31}

Further, federal class action law is not the only venue for class action practice; state courts are an important site of class action activity. The language of class action practice now includes terms like “portable” classes and “migration” to capture the point that cases rejected in the federal courts move to the state courts and proceed, in the aggregate, to judgment.\textsuperscript{32} Absent a United

\textsuperscript{30} See, e.g., Judith Resnik, \textit{From "Cases" to "Litigation"}, 54 L. & CONTEMP. PROBS. 5, 21-37 (Summer, 1991).

\textsuperscript{31} While the last few years have brought forth appellate concern about these innovations, those restraints have not precluded a robust practice in collective litigation. See, e.g., \textit{In re Rhone-Poulanc Rorer, Inc.}, 51 F.3d 1293 (7th Cir.) (mandamus ordering decertification of a class action, involving allegations of tainted blood to hemophiliacs, in part on the grounds that by collectivity, undue pressures to settle flowed), \textit{cert. denied}, 116 S. Ct. 184 (1995). Following that decertification, however, a group of hemophilic recipients of blood transfusions who argued that the blood exposed them to HIV infections have proceeded to settle (albeit controversially) as a collective. \textit{In re Factor VIII or IX Concentrate Blood Prods. Litig., MDL-986, N.D. Ill. May 8, 1997} (on file with author). See Darryl Van Duch, \textit{Victims of Hemophilia and Delay: Two Camps Battle for Money and Justice Over Blood Products Containing HIV Virus}, 19 NAT. LJ., Oct. 7, 1996, at A1; \textit{Four Drug Companies Ordered to Pay Hemophiliacs}, N.Y. TIMES, May 8, 1997, at D12 (describing district court approval of a settlement fund of $670 million, with payments of $100,000 to six thousand hemophiliacs, and comparing it to a settlement in Japan with payments of $450,000 per person; noting that about 550 hemophiliacs opted out and could pursue individual litigation).

Sam Issacharoff finds it “ironic” that the case proceeded toward a nationwide settlement (Issacharoff, \textit{Class Action Conflicts}, supra note 26, at 826 n.65; I find it instructive. \textit{See also In re Repetitive Stress Litig.}, 11 F.3d 968, 372-73 (2d Cir. 1993) (reversing, via mandamus, the consolidation of 44 repetitive stress claims and arguing that individual distinctions overwhelmed common issues, but also noting that the appellate court “saw nothing wrong with assigning” this set of cases “to a single district judge who may order that particular proceedings or certain discovery requests” be handled conjunctively).

\textsuperscript{32} See, e.g., White v. General Motors Corp., No. 42,865 (La. Super. Ct., 18th Dist. Dec. 20, 1996) (approving a settlement on behalf of all persons purchasing certain GM pickup trucks by a certain date) (opinion on file with author); \textit{In re General Motors Pickup Truck Fuel Tank Prods. Liab. Litig.}, MDL No. 961, 1996 U.S. Dist. LEXIS 17510, at 826 n.65; I find it instructive. \textit{See also In re Repetitive Stress Litig.}, 11 F.3d 968, 372-73 (2d Cir. 1993) (reversing, via mandamus, the consolidation of 44 repetitive stress claims and arguing that individual distinctions overwhelmed common issues, but also noting that the appellate court “saw nothing wrong with assigning” this set of cases “to a single district judge who may order that particular proceedings or certain discovery requests” be handled conjunctively).
States Supreme Court decision requiring that, as a matter of constitutional law, class actions are only permissible if plaintiffs can demonstrate their capacity at the outset to bring the aggregate configuration to trial, a federal rule imposing those limitations will not constrain state courts to whom class action practitioners have turned and will turn. To the extent federal Rule 23 offers salutary protections to absentees, it is unwise to drive aggregate litigation away from its parameters.

Third, I am less convinced than some commentators that individual class members are worse off under some of the litigation and settlement regimes than they would be in a world without settlement classes. The key phrases in this sentence are "some settlements" and "worse off." I am not here making an argument that certain recent settlements are wonderful nor about comparative states of well-being, but rather about comparative states of misery. The single-file case processing system has not served well the range of individuals who have suffered from the ills imposed by asbestos, the Dalkon Shield, and many other products or toxic substances, nor has it responded to many forms of injury that involve individually small-value claims but cumulatively significant acts of wrongdoing. While some individual plaintiffs may have obtained singular victories, a glorious record of the triumph of justice cannot be found across claimants and groups. Susan Koniak, opponent of many class settlements, uses the evocative phrase of a "widow weeping" to signify the

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individual injuries that go unredressed. My sense is that we should all be "weeping" as we watch justice processes fail in these categories of claims.

One example comes from the Dalkon Shield litigation: at the time when A.H. Robins entered bankruptcy, between fifteen thousand and thirty thousand tort claims had been filed. After the bankruptcy and an effort to notify potential claimants, some three hundred thousand individuals filed claims, of which estimates are that about two hundred thousand represented valid injuries. The tort system's singularity may have enabled the individuals who had the wherewithal to file — those first several thousand — but did not well provide for tens of thousands of others. Of course, once the unfiled claims are "invited" in, enormous questions of distributional fairness arise, but closing one's eyes to people waiting in the wings (many of whom may never get to court) is not an appealing alternative.

In the debate about the desirability and utility of settlements of classes, the assessment of the pros and cons varies depending on what is offered by way of comparison. Is the assumption that, in lieu of class-wide settlement, each member of a tort class action would otherwise be equipped with a lawyer and proceed, individually, to a judgment or settlement of significant sums? Or, is the claim that, were plaintiffs to form that line of claimants, the last in line would find no funds because the defendant(s)' assets would have been depleted? Is the implicit or explicit baseline that, absent a group-wide litigation, individuals will receive no process and no compensation at all? What lies in between?


57 This problem is particularly acute in the large-scale products and toxic cases and less difficult when the number of claimants is limited and the individuals more readily identifiable. See discussion infra notes 41-43 and accompanying text.

58 Here the ongoing debate about the HIV-hemophiliac litigation is illustrative. When the proposed remedy of $100,000 per claimant is compared to single verdicts of millions, the settlement looks very limited; when reference is made to those who have litigated and lost, or long suffered but as yet have received no compensation, or to the question of government efforts to seek reimbursement for health care costs from those who do recoup, the settlement looks preferable to waiting for remunerations that may neither come nor, if
When are defendants’ willingness to pay conflated with defendants’ ability to pay? And how do answers proffered to this list of questions correspond to the landscape of cases actually filed or processed as a group?

My co-panelists have greater confidence than I that they know the terrain. Professor Issacharoff offers the example of the twenty-four minute class action as if it were prototypical, while Professor Green relies on the illustration of one widow receiving three million and another no recovery at all. In contrast, as I look at these last several years of litigation in the arena of mass torts, I am acutely aware of the dominance of specific cases that comprise our shared referents but also of the existence of dozens of cases unseen, proceeding in state or federal courts — some formally as classes, others under the MDL rubric or in other variations.

Further, I see important features that distinguish the cases, not only as between tort and commercial litigation, between high-stakes individual claims and low-stake claims, or as between personal and property injuries, but also within such categories. For example, in products cases involving substances like asbestos, the large number of claimants (not all identified) and the problems of equity among claimants loom large. In contrast, in certain medical products cases like the Shiley Heart Valve or in certain mass disasters such as fires, a circumscribed number of readily-identifiable injured claimants, many with attorneys already retained, present a different mix of problems. And

paid, be protected from government collection efforts. See Van Duch, supra note 31 (describing the obstacles to plaintiffs’ success); Emily Swiatek, Jury Trial Puts National Class Settlement in Different Light, IND. LAW., Apr. 2, 1997, at 6 (reporting on a $2 million verdict for the death of a hemophiliac boy who had contacted AIDS). The district judge’s decision approving the settlement relied in part on the number of cases defendants had won, as contrasted with the few plaintiff victories, such as in a case without issues of “product identification” or statute of limitations. See In re Factor VIII or IX, Concentrate Blood Prods. Litig., MDL-986, N.D. Ill. May 8, 1997, at 9 of the slip opinion.

Issacharoff, Class Action Conflicts, supra note 26, at 807.


See RAND’s Class Action Study, supra note 20.

See, e.g., Bowling v. Pfizer, Inc., 927 F. Supp. 1036 (S.D. Ohio 1996) (discussing the settlement of claims involving a limited number of individuals who had received the Shiley Heart Valve and subsequent remedies of “explantation,” payments, and research); In re Nineteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig., 982 F.2d 603
consumer cases (ranging from contract to tort, some with small-value claims but others involving larger injuries to personal property) offer yet other variations on the theme. Moreover, unmentioned in most of the current discussion of class actions are civil rights lawsuits, a category dominant only three decades ago.43

From the pieces of the landscape visible to me and from those I know I can't see, I am neither prompted to celebrate class actions as a triumph of "group justice" (to borrow Eric Green's phrase44) nor to condemn them as inevitable sites of either group or individual injustice. Instead, I proceed with a strong sense of distress at the failures of civil processes in general and with only a bit of optimism about our collective interest — let alone capacity — to respond.

Hence, I offer a first conclusion. Over the past three decades, federal civil litigation has been increasingly organized around efforts to obtain dispositions without trial. The "value" of a case is not only measured by what a trial could produce. To insist that class actions — unlike the rest of civil litigation — may only proceed as if trial were the expected mode of resolution is to unduly burden this form of aggregate litigation. I therefore oppose the blanket prohibition of what are called "settlement class actions" because I believe that prohibition closes too many doors. But the vivid examples that have troubled so many judges, lawyers, and academics serve as more than a caution, requiring reconsideration of the structure of class actions.

The question is how to reformat in an attempt to monitor litigant, attorney, and judicial behaviors. When revising (via case law interpretation or rulemaking), one should endeavor to make class action and other large-scale litigation governed by an amalgam of procedural and ethical constraints and obligations imposed on both judges and lawyers. This effort would thus join much of the past decade's revisions of procedural rules (including not only Rule 11 but also Rule 16 and the Civil Justice Re-

44 Green, supra note 40, at 791.
form Act), in that all represent a melding of rules of ethics and rules of practice in an effort to control not only process but also professional behavior. While much discussion describes these efforts as "case management," that phrase is something of a misnomer, as so much of the goal is lawyer management. And, in this context as in others involving strategic interaction, each attempt to constrain begets innovative methods to avoid such limits and concerns that the constraints themselves impose costs.

**IV. ADDING OPTIONS AND VARYING STANDARDS: LITIGATING CLASSES, SETTLING CLASSES, TRIAL CLASSES, AND INCREASING SCRUTINY OF SETTLEMENTS**

To refuse a *per se* prohibition on settlement classes is not to argue that all settlement classes are desirable or even permissible. I think, rather, that rulemaking could reflect some of the variety that comes under the current blanket phrase "settlement classes" and should insist upon a distinction between the propriety of certification of a class and the adequacy of any proposed settlement. To help make distinctions among the kinds of settlement classes, I want to thicken the vocabulary by describing different kinds of class actions — specifically, "certify-to-settle classes," "litigating classes," and "trial classes." These distinctions add to the current differentiations among classes related to the form of remedy sought (such as "injunctive" or "damage" class actions) by referring to the relationship between the *timing* of a request for class certification and the *timing* of a request for approval of a class-wide settlement.

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47 See generally JAMES S. KAKALIK, TERENCE DUNWORTH, LAURA A. HILL, DANIEL MCCAFFREY, MARIAN OSHIRO, NICHOLAS M. PACE, & MARY E. VAIANA, *JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT* (RAND, 1997) (reporting research of implementation of the CJRA and concluding that it had "little effect on time to disposition, litigation costs, and attorneys' satisfaction and views of the fairness of case management").
As is detailed below, rules and doctrines should be plain that, at whatever time a settlement is proposed, a series of issues come to the fore; included are the extent of the information provided participants in a settlement about the remedy to be provided, whether claimants within a class are treated equally or distinguished by criteria that are appropriate, the relationship between compensation to claimants and to attorneys, the cost of administering the remedy and how it is financed, the degree to which opting out is either legally or practically feasible, and the timing of the processes of informing the class and permitting opt outs. Below, I offer details on what such a regime might entail, whether developed by means of interpretation of Rule 23 as it is currently formulated or by means of revision of the text and notes to that rule, or by legislation. Appended to this discussion is a rule-based formulation that Professor Jack Coffee and I provided in January of 1997 to the Advisory Committee on Civil Rules.

A. Additional Options: Settling Classes, Litigating Classes, Trial Classes

1. Certify-to-Settle Classes

This kind of class is what is currently termed the “settlement class” because settlement negotiations and a proposed disposition predate the certification of a class. The certification is the means by which to implement the settlement, rather than the settlement emerging after a case has been filed and litigated for some time; the existence of a class and of a settlement are linked and interdependent. Because no defendant contests class certification, the plaintiff has a lower burden and the court is provided with no adversarially-based test of the propriety of class litigation.\[^4\] Such proposals inspire the fear that no one (plaintiffs, defendants, or the court) is questioning the adequacy of

\[^4\] Even within this category, variations exist. For example, in “prefiling settlement classes,” the negotiations for settlement of the class predate the filing of a lawsuit. Another variation is that, while a lawsuit may have been filed before a settlement is proposed, the question of class certification has not been addressed by the court at the time a proposed resolution is reached by plaintiff and defense attorneys. Thus the court is presented simultaneously with requests for two decisions: certification and approval of a settlement. A useful shorthand to stress the simultaneous events may be “filing-certifying-settling classes.”
representation or the quality of the outcomes. Instead, what is known is that defendants' and plaintiffs' attorneys are enthusiastic.  

How common are these “certify-to-settle” classes? The short answer is that we don’t know; in terms of current empirical information, the FJC Class Action Study was limited to four federal district courts in a specific time period. We do not know if this set of 152 cases is in any way representative of class litigation as a whole, either then or now. Hence, with caveats galore, I report information that should not be read as descriptive of the universe but only as one glimpse. Class certification was limited (as compared to “unconditional” certifications) to settlement in fifty-nine of the 152 cases. Further, the docket indicated that in twenty-eight of those fifty-nine settlement classes, the requests for settlement and for certification were either filed concurrently or the settlement proposal predated the certification request. Of twenty-eight certify-to-settle cases, all settlements were approved; in most of those (twenty-four of those twenty-eight), settlements were approved without changes.

2. Litigating Classes

I offer this nomenclature to capture a distinct set of cases in which, at the time when a court is considering class certification, questions are raised about the ability of the case to be tried as a class action. Often a defendant, opposing class certification, poses the question under current Rule 23 in terms of challenges that either the prerequisites of 23(a) have not been met or that the proposed class cannot show that it can comply with 23(b)(3) standards on management and superiority. Alternatively, judges may raise the issue of the ability of plaintiffs' counsel to bring the claims to trial as an aggregate. Occasionally, an objector (sometimes competing to represent another class, other times


50 FJC Class Action Study, supra note 21, at 112. These 59 cases represent 39% of the group studied.

51 Thus, these cases were 18% of the universe of 152. Id. at 112.

52 Id. at 112-13 (eighty-six percent of the cases considered).
pressing for single-case processing) may also protest and argue that the proposed class cannot proceed to trial.

I believe that Rule 23 practice should develop to include a self-conscious and limited certification of such "litigating classes." Judges should certify classes for the pretrial process, including discovery and settlement negotiations, and then reconsider the certification if and as the case proceeds. In a sense, such class certifications parallel the formation of an aggregate under the MDL statute, which authorizes inter-district transfers of pending cases to enable collective treatment during the pretrial process. While technically under MDL, each case remains officially distinct and can be remanded for its own individual trial. In practice, the cases are more often than not disposed of en masse. Further, in such MDL cases, trial judges may appoint lawyers to work as a "plaintiff steering committee" (PSC) and vest them with authority to speak on behalf of the individual litigants, even though such litigants also have individually-retained plaintiffs' attorneys (IRPAs) who filed each individual case.

"Litigating class actions" vary the idea of the MDL in two respects — by permitting the case to proceed on behalf of absent members (i.e., unfiled claims) and by creating a rule regime that imposes obligations on judges and lawyers vis-a-vis both the absentees and the individually-identifiable plaintiffs who have filed their own cases. Adding this nomenclature highlights the change in civil process with which I began; litigation, not trial, is the focus of procedure. Labeling a set of class action cases "litigating classes" also echoes a distinction now common among lawyers, in which some are described as "litigators" (by which is meant a lawyer whose practice consists primarily of pretrial motions, discovery, and settlement efforts) and others are described as "trial lawyers" (by which is meant a lawyer who tries cases to judge or jury).

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54 See Resnik, From "Cases" to "Litigation", supra note 30, at 34-35 (from 1968-88, 18% were remanded); see, e.g., In re Asbestos Prod. Liab. Litig. (No. VI, MDL 875, 1996 WL 539589 (E.D. Pa. Sept. 16, 1996) (denying a motion to remand 2700 cases to 47 jurisdictions in the MDL asbestos litigation, in part based on the view that "plaintiffs have made great strides toward settlement of their cases").
55 See Resnik, Curtis, & Hensler, supra note 43, at 309-26 (discussing the different types of lawyers and their roles).
3. Trial Classes

This final set might also be described as "full certifications," in which, at the time of certification, a judge finds that the proposed class has met all the requirements not only to proceed through the pretrial process but also to proceed, if necessary, through trial. Certification is likely contested, as may be a good deal else about the litigation, and the question of settlement is not linked to the certification process. Given that many class actions (particularly in civil rights actions) involve bifurcation of liability and remedy, settlement may even be proposed after a part of the case is tried, raising (as we know from the case law) yet other, complex questions about what was adjudicated, what was agreed to, and the remedial authority of a court.56

B. Constraining Settlement Negotiators

With this tripartite topology (certifying-to-settle classes, litigating classes, and trial classes), the basis for my objection to the formulation of the Rule 23(b)(4) under consideration becomes clear. That text adds another option, at the time of certification, by instructing trial courts to consider proposals to certify classes in which:

the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial.57

This language and particularly the phrase "the parties to a settlement" suggest that the existence of a settlement class depends upon pre-negotiation of a proposed settlement. It thus encourages pre-filing and/or pre-certification negotiations of settlement and the very behavior that is most problematic: inviting small collectives of plaintiff and defendant lawyers — before a class action has been filed or certified — to negotiate among themselves and to present the court with an agreement that could

56 See, e.g., Martin v. Wilks, 490 U.S. 755, 769-93 (1989) (Stevens, J., dissenting); see also the Prison Litigation Reform Act, discussed supra note 14, appearing to require statements about what would have been adjudicated as a prerequisite to the continuation of consent decrees in certain prison cases.

57 Proposed Rule 23, supra note 1, 167 F.R.D. at 559.
then bind absentees. Such negotiations would proceed without any court determination that the lawyers proposing to act on behalf of a group (and in fact negotiating for a group-wide, if not "global," settlement) are in fact adequate representatives for the class they plan to represent, without notice to anyone beyond a small group that negotiations have commenced and, in many instances, without the development of sufficient information by means of discovery to provide any means of appraising the quality of the proposed resolution.

The invitation to engage in pre-certification negotiations creates incentives for behavior that is the center of criticism of settlement classes: the fear of collusive bargaining in which lawyers profit to the detriment of class members. Once such "deals" are made, those affected are presented with the choice either of opting out (often impractical) or of accepting the agreement. Reshaping the agreement, if it happens at all, tends to be at the margins.

Instead of encouraging interactions among self-selected attorneys, I think judges should sort out the different kinds of classes and promote those that maximize protection of absentees. The rule and practice should require that proposed settlements of class actions be negotiated in a manner that: (a) makes visible the many different aspects of the alleged injuries suffered by class members; (b) informs class members of the potential for settlement as early as possible; (c) gives class members information about those negotiating on their behalf; (d) puts responsibility on the court for structuring means to enhance fairness during the course of such negotiations; and (e) scrutinizes settlements with special attention to the amount of litigation that preceded them. Higher burdens of proof and persuasion should be imposed on those litigants who seek court approval of "certifying-to-settle classes." When certifying "litigating classes," notice should be provided to class members of the possibility of pretrial disposition and thereby invite in an array of representatives.

And, depending on the nature and kind of litigation that has occurred prior to the proposed settlement, one can also vary burdens of disclosure and of substantiation of the quality of a proposed settlement, create opt out rights, or devise other means by which to respond to objectors.

Of course, insisting on structure and adding participants to negotiations are not necessarily the means by which to bring conflicts to rapid conclusions. As Professors Sam Issacharoff, Douglas Laycock, and Susan Sturm have discussed (in the context of *Martin v. Wilks*[^59^]), the exclusion of certain groups from participating in the underlying litigation enabled the parties present to forge bargains unattractive to the nonparticipating disputants.[^60^] More recently, descriptions of efforts to settle the tobacco litigation refer to the multitude of views presented by state attorneys general, private lawyers, and industry members; the lack of singular representatives makes agreement more difficult as different visions of proper resolutions are pressed.[^61^] The structure suggested above will thus slow and make more cumbersome the process of agreement; more litigation than settlement may result. But as Dennis Curtis, Deborah Hensler, and I have argued, it is not the process that produces such complexity but rather the underlying amalgam of interests, parties, and agendas.[^62^]

**V. SECOND-BEST SOLUTIONS**

My concluding comments are about the difficulty of implementing these suggestions. The problem that "settlement classes" raises is an aspect of a larger problem: the quality of settlements in general and the propriety of the shift, over the past decades, toward procedural processes aimed at the production of settlement.


While the fact of settlement is not necessarily proof of a desirable outcome (however measured), courts have relied on the existence of a settlement in individual actions as a proxy for an appropriate outcome. When praising settlement, commentators and judges invoke the fact of consent, that disputants have themselves determined to abort the litigation in favor of whatever agreement they have forged. Yet, we cannot rest comfortably with the idea that such agreements are always celebrations of justice. Compromises are borne not only from the current regime that pushes for settlement but also from the many burdens of litigation, including lawyers' fees and lawyers' pressures to settle, and from disparities among litigants, some of whom are risk-prone and some risk-averse, some one-shot players and others repeat players. Settlement in group litigation is all the more problematic. We know that it is lawyers who offer consent on behalf of those they represent. We know that, in many kinds of cases, lawyers are the largest stakeholders — with more riding on costs and fees than any individual plaintiff (even one sustaining massive injuries) will recoup. Further, we know that it is meaningless to speak of the discipline of clients monitoring attorneys when “the clients” number in the thousands.

The current practice is largely to ignore the problem of settlement in individual cases. Absent facially invalid agreements, courts routinely enter proposed consent judgments as presented; they have neither obligation nor permission in individual civil litigation to scrutinize the adequacy of settlements. In a few specialized civil litigation schemes, in criminal cases when

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guilty pleas are entered,68 and in class actions,69 judges are given a different role and charged with some form of oversight. Thus, in class actions, even after courts have certified plaintiff class's lawyers as adequate representatives under Rule 23(a), judges are obliged to oversee that representation at the time of compromise or dismissal. Under Rule 23(e) and its interpretative case law, a class action cannot be settled without notice to the class and a judicial statement of the "fairness," "adequacy," and "reasonableness" of its resolution.70

But we also know that the judge — under contemporary practice — is not the disengaged arbiter coming fresh to the question of the quality of the outcome. Rather, the judge is often a participant in framing both the conditions under which negotiations have occurred and sometimes proposing terms for the settlement itself.71 Cases refer to judges who, when reviewing settlements, "suggest modifications" that become part of a settlement subsequently approved.72

Whether such judicial engagement is beneficial to litigants is the subject of debate; that the Rule 23 framework itself does not always function to provide notice to absentees or much attention to class-wide settlements is yet more disheartening. In the set of class actions the FJC Class Action Study considered, notice of proposed settlements was not provided to members in all cases, the notices that were provided often lacked important information and were jargon-filled, few objections were made, and few changes in the settlements occurred.73

69 Fed. R. Civ. P. 23(e).
71 Judge Jack Weinstein's role in the resolution of the Agent Orange litigation is often used as illustrative (see Peter H. Schuck, Agent Orange on Trial: Mass Toxic Disasters in the Courts (1987)); Judge Robert Merhige took an active part in the Dalkon Shield litigation (see Sobol, supra note 35); and Judge Bob Parker's actions in the asbestos litigation are detailed in In re Asbestos Litigation and are the subject of one of the pending petitions for certiorari, cited supra note 3.
72 See, e.g., Adams v. Robertson, 676 So. 2d 1265, 1268 (Ala. 1995) (describing the trial court's approval of a settlement "so long as the parties agreed to certain court-imposed modifications").
73 FJC Class Action Study, supra note 21, at 146-51.
In short, "judging consent" is a very difficult task.\(^7\) The purpose of a settlement regime is to avoid conflict among disputants and imposition of rules by courts. Requiring the parties to a settlement to describe the potential dispute that the settlement is designed to resolve often results in formalistic exercises that do not enlist exacting judicial scrutiny of the settlement agreements championed by the participants. And lurking behind such inquiries is the question of "what next?" If a court refuses to enter a settlement, how does it make parties litigate a case they wanted to settle?

What are the possible solutions to this problem? One option is to preclude judicially-based settlement, period. As Judge Jerry Smith has commented, "[t]he Judicial Branch can offer the trial of lawsuits. It has no power or competence to do more."\(^7\) The view might be that courts should never add their imprimatur to litigants' decisions to terminate lawsuits by means other than adjudication, for courts can make no genuine assessment of the quality of outcomes other than by means of ruling on disputed claims.\(^7\) One might rewrite the Civil Justice Reform Act, rewrite Rule 16, Rule 68, local rules, and revise the guilty plea practice — all to move settlement activity outside the judicial ambit.\(^7\)

Or, one might retreat more selectively, distinguishing between two-party cases and aggregate cases. While sanctioning two-party settlements\(^7\) on the grounds that they are founded in partici-

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\(^7\) *In re Asbestos Litig.*, 90 F.3d 963, 994 (Smith, J., dissenting) (quoting an earlier Fifth Circuit reversal of what Judge Smith described as "Chief Judge Parker's certification of another class action against Fibreboard").

\(^7\) The practice of using courts to record settlements stemmed from an era when that was one of the few modes of verifying documents and perhaps has outlived its rationale. See Resnik, *Judging Consent*, supra note 66, at 50 (reviewing English practice).

\(^7\) Paul Carrington has argued that the proposal for rulemaking about settlement classes exceeds the authority of rulemakers under the Rules Enabling Act. Paul Carrington, *The Limits of Rulemaking* (Dec. 18, 1996) (manuscript on file with author).

\(^7\) Multiple party litigation, even when only involving a few rather than thousands of participants, begins to raise questions of the fairness to all participants. See, e.g., United States v. Martínez-Molina, 64 F.3d 719, 734 (1st Cir. 1995); United States v. Daniels, 821 F.2d 76 (1st Cir. 1987) (both imposing a special obligation to inquire into voluntariness when pleas are part of a "package" agreement); United States v. Caro, 997 F.2d 657 (9th
Litigating and Settling Class Actions

1997

Litigating and Settling Class Actions

857

Ligation and consent, courts might decline to permit settlements in collective actions79 on the grounds that non-participants (absentees) can never be bound without their individual consent. A strict version of this argument is that mechanisms for opting out do not suffice to ensure genuine consent and participation, and that opt in provisions should be required; a more forgiving standard would rely on opt out provisions.80 While one might further attempt to impose such constraints in only one form of aggregation — mass torts — one would have to be aware of the “portability” of process, that procedures crafted with one set of problems in mind are often generalized and applied to other kinds of cases.81 Under such rules, the settlement activity thus dislocated would likely not only be in mass torts, but also in other aggregate cases, such as institutional reform, civil rights, and environmental litigation.82

Once again, the issues are whether and how group litigation should be treated differently than individual actions. I do not want so to burden aggregate litigation as to disable it, and I am not optimistic about disabling some class actions while preserving the practice in other arenas. I am left, under the current regime and lacking empirical information to give me confidence that I know the landscape, to urge less celebration of settlement in general83 and even greater caution in the aggregate litigation

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79 The Prison Litigation Reform Act provides an example of efforts to limit settlements, albeit for different reasons. See supra note 14.

80See Issacharoff, Class Action Conflicts, supra note 26, at 832 (recommending a “strong presumption against any class seeking to be certified under 23(b)(1) as a mandatory class action”). For suggestions that, in mass torts, administrative regimes (also possibly with opt out provisions) could be more responsive to the problems, see Richard A. Nagareda, In the Aftermath of the Mass Tort Class Action, 85 GEO. L.J. 295, 367-68 (1996) (proposing that Congress create a statute that permits agency action and that tort litigation be held “in abeyance pending agency action”).

81 See Resnik, Procedural Innovations, supra note 12, (describing how judges developed procedures for large-scale litigation and then applied them to “ordinary” actions).

82Moreover, conceptual appreciation for the role of groups may be shifting from an appreciation of the utility of groups as rights-holders to a more individualistic regime. See, e.g., James J. Brudney, Reflections on Group Action and the Law of the Workplace, 74 TEX. L. REV. 1563 (1996) (arguing that what he terms “group action” is now devalued).

context. I am left as well with reliance on a regulatory regime, implemented either by statutes or by trial judges scrutinized by appellate courts. The purposes of such regulation would be to impose a host of burdens on lawyers who propose to represent aggregates or individuals within aggregates and on judges who preside in such cases. And, I am left to criticize both the current and the proposed revision of Rule 23,\textsuperscript{84} as well as the MDL statute and many other forms of aggregation, none of which detail either judicial or lawyer obligations at the time of settlement. I suggest that more be said — again either by means of rulemaking or by doctrine.

Judges should be obliged to structure settlement negotiations (ex ante) and to evaluate settlements (ex post) in all aggregates, be they called class actions, MDLs, consolidations or whatever. As Denny Curtis, Deborah Hensler, and I have suggested, judges should require the many lawyers within aggregates to participate in negotiation processes to enable the diverse interests within the group to be plain.\textsuperscript{85} And before judges approve agreements, they must be provided with information about their facets. Specifically, the terms of settlements should include estimates of what individual members of the class are likely to receive, when such remedies will be provided, and with what costs for their distribution. If categories of class members are to be treated differently, those disparities should be plain to all presented with a proposed settlement, as should be explanations for the variations suggested. Further, participants should be informed of the fee and cost arrangements not only between defense and plaintiffs, but among plaintiffs' lawyers, including any objectors who enter the fray.\textsuperscript{86}

Two issues require amplification. First, hearings on the quality of settlement should not occur without sufficient time for notice to be disseminated,\textsuperscript{87} for discovery (either of the underlying

\textsuperscript{84} Here specifically, the suggestion of altering Rule 23(e) by adding the requirement that the trial court hold a hearing before compromise or dismissal. \textit{See Proposed Rule 23, supra} note 1, 167 F.R.D. at 560.

\textsuperscript{85} Resnik, Curtis, \\& Hensler, \textit{supra} note 43, at 391-96.

\textsuperscript{86} Some of these suggestions parallel those of Judge Schwarzer, who has suggested that Rule 23(e) be amended to require exploration of these issues. \textit{See William W Schwarzer, Settlement of Mass Tort Class Actions: Order Out of Chaos, 80 Cornell L. Rev. 837 (1995).}

\textsuperscript{87} New technologies offer the possibility of notice programs to enable pre-settlement
case or of the decisionmaking that produced the proposed settlement), and for the production of sufficient information for the court and the class members. In some instances, objectors to settlements have not been permitted to depose settlement proponents. Judges should not permit suspension of the discovery system in the federal rules, and purported needs for "fast track" treatment should be carefully scrutinized. Proponents of settlement should be required to present data (obtained by sampling or other techniques) on the kind of injuries suffered by the class and on the distribution of such injuries. Moreover, questions of inter-class equity should not be postponed to some fictive later stage: disclosure of methods of allocation of funds or other remedial forms must be provided prior to the approval of a settlement. 88

Second, as Dennis Curtis, Deborah Hensler, and I believe,89 too little attention has been paid to how attorneys and judges distribute the costs of aggregation — both in terms of lawyers' fees,90 the expenses (sometimes denominated "costs") charged directly by lawyers to clients outside the fee,91 and the adminis-
trative expenses resulting from the fact of aggregation.\textsuperscript{92} In some cases, in which layers of lawyers (individually-retained plaintiffs' attorneys and lead counsel appointed by the court) work, clients may find themselves paying two sets of "costs" as well as paying fees to two sets of lawyers, those personally retained and those designated by the court. The litigants, the judges, and the public must understand more about these costs before courts approve the settlements. In contrast, in some of the current settlements, class members know nothing or little of the terms — of recovery or costs and fees — to which they are asked either to assent or to object.

In short, judges should scrutinize all proposed settlements of aggregates, be they in classes long, recently, or concurrently certified, or in consolidated or MDL proceedings. And, when judges have little information about the underlying injuries or distribution of harm, more information should be demanded as a predicate to approval.

But as I propose thickening information and process, let me sound neither cheerful nor naive. Everyone is an interested actor in this story — litigants, lawyers, guardians ad litem, special masters, court-appointed experts, testifying witnesses, litigant activist groups, objectors, judges. Not only do these participants have specific stakes in particular cases, many are repeat players, whose incentives are framed by events beyond the case at hand. Yet to describe the participants as "interested" is not to condemn them all as either noxiously self-interested or enmeshed in collusion. Rather, I think a good many judges, lawyers, and other participants, in both state and federal courts, are struggling with misery that they see around them and are trying, in a world of second-best responses, to do something useful in the face of huge problems.

Of course, some lawyers are making lots of money; some defendants are seeking to protect themselves from liability and

\textsuperscript{92} The case law is sparse; thus far, the district judge presiding has substantial discretion. \textit{See, e.g., In re Three Additional Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig., 93 F.3d 1 (1st Cir. 1996)} (upholding a district court order requiring reimbursement of $41,500 by each of 13 insurance companies; despite the insurance companies' success on summary judgment, the court concluded that they had benefitted from a case management system including a document depository).
avoid the expenditure of their own assets, and some settlements are unwise and unjust. I am all for watching the money, for figuring out ways to regulate both fees and costs, and for exacting scrutiny of dealmaking. But the dislike of particular egregious high visibility cases should not be the sole engine that drives our processes. The landscape is richer than that, and I know there is more to know about class actions than what newspapers (themselves also with and responding to agendas\textsuperscript{93}) report. Some of the class-wide settlement efforts are borne from deep distress at both the justice and the efficiency of the individualized regime, in which some litigants have lawyers and some do not; some make it to court and others never file; some receive payment and others either lose or settle too quickly.

All of us who think about class actions or other forms of aggregation must confront that aggregates range in size, in kinds and values of claims, in dimensions of legal and factual complexity not easily mapped in the current iterations; and moreover the variations are always and unendingly changing. Whether a critic or celebrant of any particular practice or set of practices, all of us need attend to a phrase found in the Fifth Circuit's opinion in \textit{In re Asbestos}, which describes one set of lawyers as having an “inventory of some 45,000 present claims.”\textsuperscript{94} The first, obvious point is one of sheer wonder: What does it mean for a law firm to have 45,000 clients? Surely whatever has been meant by the attorney-client relationship is not captured in that nexus. But before rebellion takes hold, consider also what would happen to those forty-five thousand people were they not collected in some kind of joint framework.

My point is not that \textit{In re Asbestos} is a good or a bad settlement; I don't know. My point is that — however we name it — we must think about the group of individuals that comprise those affected by that settlement — as a group. We have to wor-

\textsuperscript{93} See, e.g., Claudia MacLachlan, \textit{Meritless Class Suits: A New Focus}, NAT’L L.J., Aug. 5, 1996, at A9 (describing the announcement by the Chrysler Corporation of a “clearinghouse” to “gather information on meritless [class action] suits and the lawyers who file them”).

\textsuperscript{94} \textit{In re Asbestos Litig.}, 90 F.3d 963, 971, \textit{reh’g denied} 101 F.3d 568 (5th Cir. 1996), \textit{petition for cert. filed sub nom. Ortiz v. Fibreboard}, 65 U.S.L.W. 3611, No. 96-1379 (Feb. 27, 1997).
ry about inter-claimant equity, about current and future claimants, and about a system that has yet to provide redress to so many.\footnote{At the AALS session in which Professors Issacharoff, Oakley, Green, and I first presented our comments, Professor Robert Bone commented on this aspect of the problem: that the difficulty of assessing settlements stems in part from the need to ascertain what trade-offs among class members are permissible. Association of American Law Schools Section on Civil Procedure, Program of Jan. 6, 1997, transcript at 55 (on file with the U.C. Davis Law Review). A predicate question, constantly haunting class settlements in which liability is capped, is the issue of whether scarcity (a "limited fund") in fact exists or whether the cap is provided in exchange for settlement and a more rapid distribution than might otherwise have occurred. \textit{Id.} at 57-59. To the extent such deals are appropriate, the ability to implement them — to distribute funds rapidly — becomes all the more salient.}

One option is to revolt against the developments of the second half of the twentieth century: to reject consent as the preferred mode of resolution, to insist on an adjudicatory regime, to rewrite rules of procedure to revalorize adjudication and trials, to create new court structures and new judges. While such a project has my sympathies, I think it unlikely to happen soon. And, in the interim, within the procedural world currently constructed — with its too few judges, too expensive lawyers, and preferences for settlement — let class actions come within these strictures and let us try to craft protections to mitigate against the miseries.
The Honorable Paul Niemeyer  
United States Court of Appeals for the Fourth Circuit  
Room 740  
101 West Lombard Street  
Baltimore, Md. 21201  

re: Additional Comments on  
Proposed Changes to Federal  
Rule of Civil Procedure 23  

Dear Judge Niemeyer:

You had asked us to provide you with joint commentary — outlining our areas of agreement about settlement classes and offering language for proposed changes to Rule 23 that take into account our different concerns. Below, we do both. Please note that we address here only the issue of settlement classes and do not reiterate the concerns we have about the proposed balancing test set forth in 23(b)(3)(f).
OUR SHARED ASSUMPTIONS

Although we have somewhat divergent views about settlement class actions, we in common recognize that there is a serious potential for abuse associated with them (particularly in cases involving future claims). At the same time, we do not believe a broad prophylactic rule, prohibiting settlement classes when an action cannot be certified for trial, is necessary. Thus, we offer below a possible compromise that attempts to protect against these abuses without adopting an overbroad prohibition.

At the outset, however, we should also note that we both object strongly to the proposed formulation of 23(b)(4). The text now states:

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

The rule should not suggest that the possibility of a settlement class depends upon the fact of pre-negotiation of a proposed settlement, nor should the rule encourage the behavior that is most problematic: inviting small collectives of plaintiff and defendant lawyers — before a class action has been filed or certified — to negotiate among themselves and to present the court with an agreement that could then bind absentees. Such negotiations proceed without any court having determined that the lawyers acting are in fact adequate representatives for the class they plan to represent, without notice to anyone beyond a small group that negotiations have commenced, and in many instances, without the development of sufficient information by means of discovery.

Such an invitation creates incentives for behavior that is the center of criticism of settlement classes: the fear of collusive bargaining in which lawyers profit to the detriment of class members or one set of claimants benefit to the detriment of co-claimants. Once such “deals” are made, those affected are presented with the choice either of opting out, which is often im-

\footnote{See, e.g., John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 COLUM. L. REV. 1343 (1995).}
practical in practice, or of accepting the agreement. Reshaping of such settlements, if it happens at all, tends to be at the margins.

Instead of encouraging interactions among self-selected attorneys, the rule should sort out the problems posed when certifications are presented jointly by attorneys for plaintiffs and defendants. The rule should also address the distinct question of cases in which class status may be appropriate for the pretrial, litigation and possibly settlement process, but it is not known, at the time of certification, whether class certification is proper for trial. Finally, the rule should require court scrutiny of all class settlements to try to guard against abuses that have become apparent, particularly in mass torts.

Below we provide proposed language. Our proposal entails what we take to be an intermediate approach; we do not ban settlement classes in all forms but impose standards by which to assess their propriety.

Two other introductory remarks are in order. First, some may object that our rule places more burdens on negotiators of proposed settlements than does the current draft. As was discussed at the hearings, because these proposals emphasize the desirability of a broad array of participants, the development of a comprehensive information base, and more exacting scrutiny of proposed settlements, it may make more difficult the process of achieving settlement in some cases. On the other hand, it will also enable some settlements that might not have occurred and make better (we hope) the quality of the settlements proposed. Second, we have not provided what an ideal, final drafted version would contain. Our draft is meant to convey the concepts and not to represent the final drafting language in which the rule would be expressed. What this draft provides are the principles that are at the core of a revision that we can support.

THE PROPOSED LANGUAGE

Proposed 23(b)(4)

(4) the court finds that provisional certification under subdivision (b)(3) for the purposes of litigation or settlement would constitute a fair and efficient method by which to advance the
resolution of the dispute, and such certification is requested either:

A) by the plaintiffs, who seek certification but are not able to establish that they can meet all the requirements of 23(b)(3). When making such a provisional certification, the court shall:

i. indicate that the proposed certification is conditional and for litigating purposes only ("litigating certification");

ii. make specific findings as to which requirements of subdivision (b)(3) it finds satisfied, unsatisfied, or to which it reserves judgment;

iii. require that members be notified of the limitations placed on the certification. Should defendants or class members object, the court shall provide a hearing, after notice, on the issue of the propriety of certification. After such a hearing, the court may alter the certification and/or appoint additional representatives, a guardian ad litem, or employ other procedures to ensure that all interests within the class are adequately represented during the litigation process.

iv. either upon motion of the parties or sua sponte, revisit the certification and alter it, either by decertifying the class, recertifying it under subdivision (b)(3) or (b)(4)(B), or by creating subclasses for certification as it deems appropriate; or,

B) jointly by one or more of the defendants to the action and by a plaintiffs' steering committee, appointed by the court, even though all of the requirements of subdivision (b)(3) might not be satisfied for the purpose of trial. Before certifying such a provisional class, the court shall:

i. make specific findings as to whether each of the requirements of subdivision (B)(3) are satisfied;

ii. if one or more of the requirements of subdivision (b)(3) are found not to be satisfied, determine whether any discrete subcategory of class members would be likely to obtain a superior result (via settlement, trial or other form of disposition) in another available forum or proceeding (including actions pending or to be commenced in the foreseeable future). In so determining, the court
shall consider whether similarly situated individuals have obtained superior results in the past in other proceedings; whether individual or representative litigation in the future in other proceedings constitutes a viable alternative for most of the class or an identifiable subcategory thereof; whether delay is likely to affect materially the effectiveness or enforceability of any judgment or remedy, and other factors (including the availability of counsel) bearing on the ability of class members to receive just and fair treatment. If the court determines, either before or after certification, that one or more discrete subcategories of class members would likely obtain or has obtained a superior result in another forum or by means of another procedure, the court shall exclude such subcategory from the certified class; and

iii. determine and make specific findings as to whether a need exists for subclasses, special counsel, guardian ad litem, or other additional procedures are needed, because of the potential differential in impact of any proposed settlement upon class members or because of the need for negotiation among subcategories as to the allocation of any proposed settlements.

C) When considering the request to approve a class action settlement, and whether the class is certified pursuant to 23(b)(3) or 23(b)(4), the court has fiduciary obligations to protect the interests of absentees. Prior to approval of any proposed settlement, the court shall require that the parties requesting the settlement provide the court with detailed information about:

i. the means by which the lawyers seeking to represent the plaintiffs came to engage in negotiations with lawyers seeking to represent defendants;

ii. the degree to which the proposed settlement treats all members of the class equally or, if distinctions are made, the bases on which such distinctions are claimed to be proper;

iii. the means by which the remedial provisions shall be accomplished;

iv. why it is in the interest of the members of the proposed class action to accept the proposed settlement in
lieu of either individual litigation or other forms of aggregate litigation, in either state or federal court or in an administrative proceeding;

v. information, if available, about the amount of compensation, including costs and fees, provided to the attorneys representing the class and the relationship between that compensation and that received by class members;

vi. information about payment of fees or costs associated with special counsel, guardians ad litem, court experts, objectors, or others;

vii. information about the methods by which other lawyers, if any, represent individual class members, shall be compensated (including fees and costs) and the amounts of such compensation; and

viii. such other information as the court deems necessary and appropriate. 2

A PROPOSED ADVISORY COMMITTEE NOTE

Under this subdivision, a court may consider two kinds of certification not provided for in 23(b)(3) — certification of classes in which, at the time of certification, it is not yet known whether the case can proceed through all phases, and particularly through trial as a class action ("litigation classes") and certification of classes jointly requested by lawyers for plaintiffs and defendants (and often, but not exclusively, including proposed settlements as well).

The purpose of litigation classes is to enable an initial exploration, on notice to affected parties, of the possibility of a group-wide disposition, either through the pretrial process or via settlement. Building on the model of the multi-litigation statute, 28 U.S.C. § 1407, a litigation class permits discovery and exploration of settlement on a class wide basis, but only upon notice to affected members and opponents. This rule revision is proposed to complement the spirit of other rules involving parties, specifically Rules 19 and 24, which endeavor to enable participation of

2 The provisions we have proposed for 23(b)(4)(C) could alternatively be placed in an expanded 23(e).
litigants with somewhat divergent interests within a single lawsuit. The rule revision is also designed to make the practice in class actions accord with that in other aspects of civil litigation, namely that few cases are in fact disposed of by trial but many proceed through pretrial litigation under the aegis of amended Rule 16. The proposed amendment to Rule 23 places burdens on judges to ensure that those affected by such litigation are adequately represented throughout the pretrial process, and further requires judges to revisit the question of certification when appropriate.

The other kind of certification contemplated by the rule is that requested jointly by plaintiff counsel, seeking to represent a class, and one or more of defendant counsel, joining in that application. A common form of such requests is that of the settlement class, in which a certification of a class is a means to implement a settlement but the findings in 23(b)(4)(B) should be made whenever the court has reason to believe that the requests for class certification and for approval of a settlement are linked. Given contemporary concerns about such cases (see John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 COLUM. L. REV. 1343 (1995)), the rule imposes higher burdens on such joint certification requests, including that courts determine whether subclasses should also be certified to ensure that all of the interests of class members are adequately represented within the litigation structure and that those affected either legally or practically by a judgment are either appropriately represented or beyond the scope of any proposed judgment.

As used in subdivision 23(b)(4)(B), the term "superior result," achieved "via settlement, trial or other form of disposition," requires the court to consider more than a comparison of the likely monetary results of the pending action as compared with likely results in another forum (e.g., an individual action in state or federal court, an administrative remedy, other forms of aggregate litigation, formal or informal, in state or federal court). In class actions involving monetary recoveries, the court should also evaluate how proposed recoveries will be funded (including the adequacy of insurance coverage) and whether relegating class members to individual actions, to multi-district litigation, or to other processes will give such class members viable remedies, if
liability is established, against defendants who are likely to remain solvent in the foreseeable future. When evaluating non-pecuniary aspects of proposed settlements, the court should evaluate carefully the actual utility of those proposals and the means by which they will be provided to class members. If the court finds that identifiable groups of class members have a viable and established remedy by means of processes other than a settling on certification class, the court shall consider the effect of divesting class members of such remedies by approving of the proposed certification. In short, this comparative analysis requires the court not only to consider the class and settlement proposed simultaneously but the other options practically available to class members, the incentives of the litigants and their attorneys to proceed by means of a class as compared to those other ways, and the availability of counsel and of access to such other fora. The question before the court is whether there are better ways to respond to the alleged injuries of the plaintiffs than by means of a settlement class action or whether, under the particular circumstances of a specific case, such a certification is appropriate.

When certified under any provision of 23(b), the provisions of 23(f) that permit discretionary appeals apply. Judges considering certifying litigating classes may take into account the concerns either that class certification inappropriately creates undue pressures to settle or, alternatively, inappropriately undermines the authority of the class representatives.

Classes certified for litigation and those certified at the behest of both plaintiffs and defendants should be accompanied by notice to class members, thereby enabling the development of information relevant to the settlement negotiations and relevant to the propriety of maintaining the class certification.

The proposed revision also provides for the appointment, by the court, of more than one kind of representative or lead counsel and the utilization of an array of lawyers and others to ensure a process of litigation and negotiation that will, in turn, facilitate the district judge’s task in considering the adequacy of proposed settlements, if any result, and will assist the judge in the discharge of his/her fiduciary task of monitoring the class representatives. “Judging” consent — evaluating the reasonableness, adequacy, and fairness of an agreement — is a very diffi-
cult task. See Judith Resnik, *Judging Consent*, 1987 U. CHI. LEGAL FORUM 43. The proposed language provides the framework by which judges are to discharge their fiduciary obligations to the absent members of the class. Because this proposal anticipates that more lawyers may participate in the pretrial proceeding and in the negotiations, judges should — in cases involving court-awarded attorneys' fees and costs or when approving settlements that provide for fees and costs — consider awarding or requiring that attorneys' fees be paid to a wider array of lawyers than those designated as attorneys for a class, those on a Plaintiffs' Steering Committee, in other "lead counsel" positions. See Judith Resnik, Dennis E. Curtis, & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296 (1996). The new language expressly calls for information to be provided to the court about the proposed compensation, including costs and fees, for all lawyers, be they class representatives, individually-retained attorneys, objectors, or others.

While the standards for considering of settlements filed concurrent with requests for certification do not preclude so-called "futures" classes per se, the standards require close scrutiny by the court of the treatment of all segments of a class when settlements are proposed.

The court should ensure an inclusive array of representatives during the course of class action litigation but should also guard against the risk that small segments of class members or their attorneys might attempt to exert control over the shape of a settlement in a fashion that proves detrimental to other, and possibly, most, members of the class. The requirement of disclosure of all fee and cost arrangements, including those among plaintiffs' lawyers as well as between plaintiffs and defendants, is aimed at enabling the court to assess the interests of all participants and the degree to which specially-identified participants (lead counsel, PSC members, special counsel, objecting counsel, defense counsel, etc.) represent the interests of the disputants.
CONCLUSION

We have erred on the side of being comprehensive in terms of our explanation, our draft, and our notes. We would be happy to meet with you to discuss means by which we could shorten these proposals or otherwise redraft them. We remain willing to help the Advisory Committee in any way that is useful to you.

Thank you for consideration of these comments.

Sincerely,

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