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Class Action Rule Changes: A Midpoint Report

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This is a midpoint progress report of the Reporter on current proposals to amend the class action rule, Rule 23 of the Federal Rules of Civil Procedure. In part, it is one of many calls for help. The proposed amendments have been published for comment. It is important that the rulemakers hear from as many interested observers as possible. One of the pitfalls of the comment process — at least one of the pitfalls that the rulemakers like to believe in — is that there are many observers who believe that the rulemakers have got it right, and do not need to be told that they have got it right. The record of comments may make proposals seem more controversial, or less well advised, than they are. And in other part, this report is an illustration of the care that is taken in the largely invisible process that continually reviews, and periodically amends, the rules.

The rulemaking process is easily sketched from the bottom up. The process begins in the committee structure of the Judicial Conference of the United States. First-line responsibility falls on the Advisory Committee on the Federal Rules of Civil Procedure. The Advisory Committee reports to the “Standing” Committee on Rules of Practice and Procedure. Amendments tentatively endorsed by the Standing Committee are published for comment and public hearings. After publication, the Advisory Committee reviews all of the written comments and oral testimony and again reports to the Standing Committee. If substantial changes have been made, a proposal may require a second period of publication and public comment. When a proposal is ready to proceed further, the Standing Committee recommends approval by the Judicial Conference, a group of more than two dozen federal judges chaired by the Chief Justice. If the Judicial Conference approves, it transmits the proposal to the Supreme Court. The Supreme Court bears ultimate responsibility for adopting the rules and revising them. Once the Supreme Court has approved a revision, it sends the revision to Congress. Revisions adopted by the Supreme Court become effective unless Congress acts to disapprove them.

Rule 23 was extensively amended in 1966. The amendments created a new “common question” class action under Rule 23(b)(3). (b)(3) class actions were designed to facilitate enforcement of claims too small to bear the cost of individual litigation. This new device has taken on a role far beyond the dreams of its creators, enhancing the actual effect of many substantive provisions. In the last few years, it has been pressed to serve in quite a different setting as one of the many alternative
strategies used in the effort to manage vast numbers of related actions. Asbestos litigation provides the most familiar example, but other examples are almost as familiar. Attempts to win class certification have met with mixed success in dealing with such problems as silicone gel breast implants, cigarettes, sidesaddle pickup trucks, and heart valves.

The dramatic growth of (b)(3) class actions generated lively debate. For more than two decades, however, a tacit moratorium on Rule 23 proposals was observed by the Civil Rules Advisory Committee. The process of shaping Rule 23 into a working and reasonably familiar procedure was left to the creative efforts of the bar and the wisdom of the bench. In 1991, however, the report of an ad hoc Judicial Conference committee on asbestos litigation led the Judicial Conference to recommend that the Standing Committee and Advisory Committee study Rule 23. The Advisory Committee has been working on this chore ever since.

The first effort of the Advisory Committee was based in large part on proposals made by an American Bar Association committee several years ago. As refined by the Advisory Committee, then chaired by Chief Judge Sam C. Pointer, Jr., of the Northern District of Alabama, this draft would have made many changes. None of the changes was fundamental, and even together they would not have been revolutionary. Rule 23 would have been restructured. This proposal softened the long-familiar categorical distinctions between inconsistent-obligation and limited-fund (b)(1), injunction (b)(2), and “common question” (b)(3) classes. The softening was designed in large part to serve other goals, strengthening notice requirements for some actions but reducing them for others, expanding but also contracting opportunities to opt out, creating new opt-in classes, and so on. These proposals were reviewed by extensive groups of academics, lawyers, and judges. There was widespread agreement that they were relatively modest. But the lawyers in particular were concerned that the main effect would be to create at least a decade of uncertainty while they collectively worked to instruct judges on proper use of the new rule.

The questions raised by these reactions suggested to the Advisory Committee that it must undertake a broader inquiry. The central question was whether the time had come to propose any amendments whatever. Faced with a lack of helpful empirical data, the Advisory Committee enlisted the help of the researchers at the Federal Judicial Center (FJC). The FJC study set out to address a series of questions raised by widespread anecdotal observations about class actions by reviewing the files of all class actions concluded during a two-year period in four of the busiest class-action districts. The first lesson was that class actions have been dramatically undercounted. Each of the four districts had at least twice as many class-action filings as had been reported. Other lessons were more complex, and always subject to the qualifications that attach to any study based on a sample, even one carefully chosen. The Advisory Committee — now chaired by Judge Patrick E. Higginbotham of the Fifth Circuit — also reached out for the views of academics, lawyers, and judges with rich personal experience in class litigation. Lawyers were invited to address the Advisory Committee at its regular meetings. The Committee met in conjunction with, or attended, class-action symposia at law schools in Dallas, New York, Philadelphia, and Tuscaloosa. Experienced class-action practitioners also were invited to attend committee meetings, and contributed valuable suggestions. Two veterans of the 1966 amendment process, John P. Frank of the Phoenix Bar and Professor Arthur R. Miller of Harvard Law School, were actively involved in these efforts.

With all of these activities, the Advisory Committee moved to the top of several hills (none was really a mountain). It stayed on some, and moved back down from others. It has won Standing Committee approval to publish several amendments for public comment in the form submitted to the Standing Committee. The Standing Committee made it clear, however, that it was approving publication as the next logical step in a process that still must include careful reconsideration of each item in the proposal.

So what is proposed, and what earnestly considered proposals were put aside?

One proposal would create a permissive interlocutory procedure that would establish court of appeals discretion to permit appeal from an order granting or refusing class certification. Both judges and lawyers commonly greet this proposal with skepticism, fearing that bootless attempts to appeal will be made in virtually every class action. And, just as commonly, they have come to agree that the courts of appeals should be able to manage this procedure as an improvement on the unsatisfactory alternatives now available. Appellate judges in particular believe that experience with the similar permissive appeal provisions of 28 U.S.C. § 1292(b) shows that the new appeal procedure can be controlled with little burden or delay.

The other proposals that should command general interest focus on (b)(3) common-question classes. Changes are made in the list of enumerated factors that bear on the determination whether common questions “predominate” and whether a (b)(3) class is superior to other means of adjudication. These changes focus on both ends of the spectrum defined by the size of individual class-member claims. In a variety of ways, the factors are revised to encourage care in certifying classes that include many members whose claims would support individual litigation. Although class certification of mass tort cases is not prohibited, these changes reflect concern that in some situations class actions are less desirable than individual litigation or aggregation by some means other than a single large class.

At the other end of the spectrum lie claims that promise to return only minuscule recoveries to individual class members. A new factor (F) would be added, permitting the court to consider “whether the probable relief to individual class members justifies the costs and burdens of class litigation.” This provision has become known in the vernacular as
the “just ain’t worth it” provision. It is bound to be controversial. To some, it will seem a retreat from the great strides made by (b)(3) toward enforcing important social policies that are imperfectly fulfilled by public enforcement. The point of class actions, on this view, is not only to secure individual redress but also to take the profit out of violating the law. The proposal takes a rather different view, founded in the belief that private litigation is an imperfect means of enforcing public values. Adversary litigation as we know it is cumbersome and expensive. Often it is called upon to enforce the uncertain commands of obscure statutory or other policies that may be violated despite diligent and sincere efforts to comply. The costs and risks of this enforcement are justified by the prospect of meaningful individual relief. If there is no prospect of meaningful individual relief, and no one but the class lawyer stands to benefit, the costs and burdens of class litigation may not be justified.

(An attractive alternative to refusal to certify a class may be to provide for relief that need not incur the frequently crippling expenses of administering individual distribution. “Fluid” class recovery may provide attractive means of substitute relief. Rather than distribute a dollar of damages to each individual consumer injured by a short-lived pricefixing conspiracy, the defendants could be ordered to reduce prices as a way of compensating present consumers without bothering to address the discontinuities between past and present consumers. The Advisory Committee concluded that such alternatives should be put aside because they raise serious questions under the Rules Enabling Act requirement that the rules not abridge, modify, or enlarge any substantive right.)

Another new item in the list of (b)(3) factors is the “maturity” of the class claim, issue, or defense. This factor addresses problems that arise from glaring gaps in factual knowledge. Claims that a product causes an injury, for example, may rest on very uncertain science. Experience with individual litigation of related issues may show that courts regularly reach inconsistent results. In either setting, it may be unwise to risk all claims on a single throw of the class action die.

A final important (b)(3) provision is proposed by adding a new paragraph (b)(4). This proposal would permit certification of a (b)(3) class for purposes of settlement only, even though the court would not certify the same class for litigation purposes. Settlement classes have evolved gradually over the years, but recent Third Circuit decisions have adopted the limit that a class may be certified for settlement purposes only if the same class would be certified for litigation. The proposal draws from the belief that settlement classes may prove useful in addressing a variety of problems that cannot be resolved by litigation classes. Choice-of-law problems offer one clear example. Application of different state laws to dispersed events may defeat class-based litigation of some claims because common questions no longer predominate. Settlements can be achieved that bypass these problems, and that provide the additional advantage of achieving similar treatment for people suffering similar injuries. Manageability problems offer another example. A single court may be hard-pressed to resolve litigation that embraces not only common class issues but also the individual issues that must be resolved as to each class member. Settlement can bypass these problems too, at times by providing alternative means of resolving individual disputes under the court’s aegis but without making impossible demands on the court.

The decision to address (b)(3) settlement classes through a new paragraph (b)(4) has already generated a modest drafting controversy. Paragraph (b)(4) would allow “certification under subdivision (b)(3) for purposes of settlement.” Following drafting guidelines created for the Standing Committee by Bryan Garner, author of A Dictionary of Modern Legal Usage, “under” is used in place of the familiar but ungainly “pursuant to.” The explicit intention of the Advisory Committee is that a class certified under (b)(4) is a (b)(3) class. As a (b)(3) class, it must satisfy all of the prerequisites of subdivision (a) and also must satisfy all of the (b)(3) requirements. In addition, it carries the usual consequences of all (b)(3) classes, including the specific (b)(3) notice requirements and the right to request exclusion from the class. Many observers, however, have supposed that the (b)(4) class is a new entity, cut adrift from any of these requirements. This reaction is cause at once for chagrin and reconsideration. More words can be used to convey the same thought. It will be interesting to see whether there is such general concern that the drafting must be revised.

This description of the changes proposed for public comment leaves aside other changes that were carefully pursued to the final step before recommending publication. Two deserve specific comment.

Preliminary consideration of the merits was one change that rose to win great favor, met doubts, and then died. There is great concern that class actions may be brought on insubstantial claims, just one step beyond the level that can win precertification dismissal by motion for failure to state a claim or for summary judgment. Part way through the Advisory Committee’s deliberations, it was suggested that the rule should be amended to reject the Supreme Court ruling that the merits of the claim must not be considered in ruling on class certification. Much comfort was drawn from the imperfect analogy to the tentative evaluation of the merits made in
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meaning, committed by persons who diligently sought to comply. Some will regret the passing of this proposal.

Much activity will occur before any final action on the Rule 23 proposals. Much hard work will be done, most of it by lawyers and judges who voluntarily assume the burdens of responsible participation in the public comment process. All of the proposals that have been advanced, and many of those that have been put aside, will be carefully reconsidered.

Evidence that the outcome of the Rule 23 proposals is not settled by the decision to publish can be found in many earlier experiences. Many proposals have been advanced and then substantially changed, deferred, or abandoned. Recent history provides examples enough. In 1995, the Committee published four proposals. One was beyond controversy, probably because it affected a corner of interlocutory admiralty appeal practice that affects few litigants or lawyers. A second seeks to restore the 12-member civil jury; this proposal has been recommended for approval by the Standing Committee to the Judicial Conference, but remains controversial because 12-member juries cost more than 6-member juries. A third, advanced in tandem with a parallel change in the Criminal Rules, sought to ensure attorney participation in voir dire examination of prospective jurors. The comments and hearings on this proposal showed a wide difference between the perceptions of lawyers and judges. Lawyers believe that many judges conduct inadequate voir dire examinations, while many judges believe that lawyers will deliberately subvert the process in search of adversary advantage. The Advisory Committee concluded that it would be unwise to attempt reconciliation through present rule changes. Instead, efforts will be directed toward mutual education of bench and bar in the hope that the present rule can be made to work better. A majority of federal judges now permit

direct lawyer voir dire examination, and believe that it is effective so long as there is unquestioned authority to terminate or withhold the opportunity. If more come to permit lawyer participation, the present rule may prove better than the proposed alternative. Fourth and finally, a revised proposal to amend the provisions for discovery protective orders was republished. The comment process left the Advisory Committee uncertain whether any change is needed. More important, the Committee has decided to turn its attention again to the broader discovery questions that have been on — or close to — the Committee agenda without interruption for three decades. Should significant changes be made in the broad scheme of discovery, protective orders may be affected in ways that cannot be accommodated by present drafting.

Public comment taught much about these recent proposals. It will teach much about the current Rule 23 proposals. The broader the base of participation, the better the process will work. No more able group of commentators can be found than the readers of Law Quadrangle Notes. Your comments should be addressed to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure, Judicial Conference of the United States, Washington, D.C. 20544.

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