

PROPOSED RULE CHANGES TO FEDERAL CIVIL PROCEDURE MAY INTRODUCE NEW CHALLENGES IN ENVIRONMENTAL CLASS ACTION LITIGATION

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I. INTRODUCTION

After eleven years of public debate and consternation, the Judicial Conference of the United States (“Judicial Conference”) recently voted unanimously to approve a substantial number of revisions to the procedural rules that govern class actions in the federal court system. Ending a self-described “holy war” over the issue,¹ the judges of the Judicial Conference announced the proposed changes to Rule 23 of the Federal Rules of Civil Procedure in September 2002.² The new rules, if approved, would represent the first major change to class action procedure since 1966.³ If accepted by Congress, the changes will set standards for attorney appointment and fees, affect the timing of class certification and notice, and give judges discretion to allow class members a second opportunity to opt out.⁴

These proposals are intended to improve the class action process for all participants, and are not likely to provoke a sea change in the prosecution of class action litigation. Given the high dollar amounts and related pressures at issue in many of these cases, however, plaintiffs and defendants will undoubtedly continue to seek every possible advantage under the Rules. If there is an advantage to be found, it will be. Accordingly, notwithstanding the drafters’ efforts to adopt only a modest palliative, their proposed changes, such as those permitting an additional opt-out opportunity and increasing scrutiny on legal fees, could have substantial and unexpected impacts on leverage and incentives in future class action litigation.

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¹ ADVISORY COMM. ON RULES OF CIVIL PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, MINUTES: CIVIL RULES ADVISORY COMMITTEE 2 (2001).

² U.S. Courts, *Federal Rulemaking*, at <http://www.uscourts.gov/rules/index.html> (last visited Apr. 28, 2003) (on file with the Harvard Environmental Law Review); Linda Greenhouse, *Judges Back Rule Changes for Handling Class Actions*, N.Y. TIMES, Sept. 25, 2002, at A18.

³ Greenhouse, *supra* note 2, at A18.

⁴ See COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, AGENDA F-18 REPORT OF THE JUDICIAL CONFERENCE 8–19 (2002) [hereinafter JUDICIAL CONFERENCE COMM. REPORT].

The reform effort grew out of recommendations made in 1991 by the Judicial Conference's Ad Hoc Committee on Asbestos Litigation, a body formed to investigate asbestos mass tort claims.⁵ The Judicial Conference considered landmark changes such as eliminating the money damage class action, adopting an "opt-in" regime, and creating a rule specifically addressing mass torts.⁶ In contrast to these sweeping proposals, the rules the Judicial Conference proposed in September are more modest, and yet they may produce substantial effects on class actions in the federal court system. This Article explains the process for developing rules for the United States federal courts, examines the proposed changes to Rule 23, and suggests possible impacts of the rule changes on environmental or "toxic tort" class action litigation.⁷

In Part II, this Article presents background information about the current structure of Rule 23. This Part briefly explains the different types of class actions and helps provide an understanding of the initial context for the Judicial Conference's proposed changes. Part III introduces a short history of environmental and toxic tort class action from 1966 to the present. Following the historical and background sections of Parts II and III, Part IV explains the rule-making process for the federal courts, charts the progress of the proposed rule changes, and details the hurdles that remain before they can be enacted into law.

Part V of this Article examines the proposed changes to Rule 23. As is the case with most of the federal procedural rules, courts have developed standard procedures that augment the statutory framework of the current Rule 23. According to proponents of the proposed changes, the new version of Rule 23 would codify these practices. This Part juxtaposes the proposed changes with information about current practices in federal court, in addition to emphasizing the potential impact on toxic tort and environmental litigation. In Part VI, this Article concludes by summarizing the effects of these proposals.

⁵ ADVISORY COMM. ON RULES OF CIVIL PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, MINUTES: ADVISORY COMM. ON CIVIL RULES 6 (1993); THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER: MASS TORTS PROBLEMS & PROPOSALS, A REPORT TO THE MASS TORTS WORKING GROUP (1999), *reprinted in* THOMAS E. WILLGING ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS app. C 24 (1996) (providing both historical and prospective solutions to mass tort litigation).

⁶ *See, e.g.*, JUDICIAL CONFERENCE COMM. REPORT, *supra* note 4, at app. B 239-40.

⁷ The terms "environmental" and "toxic tort" class action litigation are sometimes used interchangeably. Environmental class actions typically involve injury to the environment (land, water, air), or to natural resources or wildlife. The term "toxic tort" sometimes involves environmental harm, but generally refers to cases involving injuries allegedly caused by or related to toxic substances. Toxic tort claims frequently involve product liability as well (*e.g.*, asbestos and tobacco). Both environmental and toxic tort class actions may involve hundreds, thousands, or even millions of claimants.

II. INTRODUCTION TO RULE 23

The current structure of Rule 23 has changed remarkably little since the 1966 amendments that overhauled the previous class action and joinder provisions. Under the current Rule 23, four basic types of class actions are possible, as designated in Rules 23(b)(1), (2), and (3).⁸ These class action varieties require the fulfillment of the four main requirements under Rule 23(a) plus additional criteria that differentiate each type from one another. In addition, the actions differ in notice requirements and in ability to bind the members of the class to the judgment or the settlement of the action. This Part introduces the requirements imposed generally by Rule 23(a) and then differentiates among the primary class types.

A. *Rule 23(a)*

Under Rule 23(a), all class actions in federal court must satisfy a four-prong test for certification at the outset. These criteria are: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. The numerosity requirement stems from a rationale of judicial economy. For a class action to be utilized, there must be so many individual lawsuits that joinder would be too impractical or difficult.⁹ Without setting strict floors on class size, the numerosity requirement of Rule 23(a) is often fulfilled by classes of plaintiffs or defendants containing more than twenty-five persons or consisting of geographically or temporally dispersed parties.¹⁰ For instance, unknown future claimants, so-called “futures,” whose identity cannot be ascertained at the time of the suit may be taken into account to fulfill the numerosity requirement. In fact, plaintiffs need not establish the precise number of class members, but may satisfy the numerosity requirement with a good faith estimate.¹¹ Because many environmental and toxic tort claims often affect a great number of people, the numerosity requirement is rarely an obstacle for class action certification in those types of cases.¹²

The commonality requirement is also easy to satisfy in environmental or toxic tort class actions. Under Rule 23(a)(2), commonality has been

⁸ FED. R. CIV. P. 23(b).

⁹ FED. R. CIV. P. 23(a). Practicability depends on many factors, including the size of the class, ease of identifying its numbers and determining their addresses, facility of making service on them if joined, and their geographic dispersion. *See Jacobs v. Osmose, Inc.*, No. 01-944, 2002 U.S. Dist. LEXIS 1926, at *4 (S.D. Fla. Feb. 25, 2003) (quoting *Hammett v. Am. Bankers Ins. Co.*, 203 F.R.D. 690, 694 (S.D. Fla. 2001)).

¹⁰ ROBERT H. KLONOFF, *CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION IN A NUTSHELL* 20–24 (1999).

¹¹ *Gomez v. Ill. State Bd. of Educ.*, 117 F.R.D. 394, 399 (N.D. Ill. 1987).

¹² ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 17.9 (4th ed. 2002); *see, e.g., Jacobs*, 2002 U.S. Dist. LEXIS 1926 (finding numerosity requirement satisfied but denying class certification on other grounds in a case involving pesticide-treated wood).

interpreted to require that common questions may be resolved for most of the class members.¹³ The requirement can be satisfied when questions of law and fact linking the class members are substantially related to the resolution of the litigation, even if the individual class members are not identically situated,¹⁴ and when there are substantial similarities in legal theories and requested remedies.¹⁵ For a single catastrophic environmental injury, such as that associated with Three Mile Island, or for the more gradual effects related to toxic exposures, such as water pollution or even asbestos contamination, a limited set of issues and legal theories are often interposed and thus are amenable to consolidation under the class action rules for the purposes of Rule 23(a).¹⁶

The typicality requirement can be more difficult to satisfy. Rule 23(a)(3) requires that the claims and defenses of the representative parties be “typical of the claims and defenses of the class.”¹⁷ The Eleventh Circuit described the standard as follows:

A sufficient nexus is established if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory. Typicality, however, does not require identical claims or defenses. A factual variation will not render a class representative’s claim atypical unless the factual position of the representative markedly differs from that of the other members of the class.¹⁸

In cases involving a single event affecting multiple parties, typicality can be a fairly low hurdle to overcome. Where multiple causation chains are at issue, however, typicality can be difficult to establish. For example, in *In re Methyl Tertiary Butyl Ether (“MTBE”) Products Liability Litigation*,¹⁹ a group of private well owners brought suit against petroleum companies alleging MTBE groundwater contamination from leaking underground storage tanks and pipes. The district court denied class certification, finding that contamination was caused by a variety of unique circumstances, including one or a combination of cracked or burst pipes or leaking tanks.²⁰

Finally, Rule 23(a) requires adequacy of representation. This requirement is closely related to typicality, since both require an assessment of

¹³ *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986).

¹⁴ See *Jacobs*, 2002 U.S. Dist. LEXIS 1926, at *5, (quoting *Sanders v. Robinson Humphrey/Am. Express, Inc.*, 634 F. Supp. 1048, 1056 (N.D. Ga. 1986)).

¹⁵ *Jenkins*, 782 F.2d at 472.

¹⁶ See CONTE & NEWBERG, *supra* note 12, §§ 17.10–17.11.

¹⁷ FED. R. CIV. P. 23(a)(3).

¹⁸ *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984), *cert. denied*, 470 U.S. 1004, (1985), *quoted in Jacobs*, 2002 U.S. Dist. LEXIS 1926, at *6.

¹⁹ 209 F.R.D. 323 (S.D.N.Y. 2002).

²⁰ *Id.* at 337.

the potential for conflicts within the class.²¹ All class actions have a representative that brings the suit on behalf of the class. To fulfill the requirement of adequacy, the representative must be free of conflicts of interest, have typical claims common to the rest of the class, and be represented by adequate counsel. The representative must also be competent to understand the suit and the responsibilities associated with being a representative of the class, namely to protect the interests of absent class members during litigation and in settlement negotiations.²² As in most proposed class actions, the adequate representation requirement is generally fulfilled in environmental suits when the representative's interests are aligned with those of his or her class.²³ Where there are significant potential conflicts between parties who suffered different types of injuries, or between parties who have a current injury and those who could potentially exhibit future injuries, courts are more likely to deny class action treatment.²⁴

B. *Types of Class Actions*

In addition to meeting the requirements of numerosity, commonality, typicality, and adequacy of representation, a potential class action must fulfill additional criteria under Rule 23 in order to proceed in federal court. Every class action will fall into one of the categories or types of class denoted in the Federal Rules as Rule 23(b)(1)(A), Rule 23(b)(1)(B), Rule 23(b)(2), and Rule 23(b)(3). Each of these class action types have been used in environmental and toxic tort litigation and are discussed below.

1. *Rule 23(b)(1)(A)*

The first action specified in the Federal Rules is a Rule 23(b)(1)(A) class action. In addition to satisfying Rule 23(a), this class action, which does not permit opt-outs generally,²⁵ must satisfy the condition that individual litigation would likely create inconsistent adjudications for the defendant.²⁶ Environmental class actions, such as the abatement of a nuisance, are among the recommended types of class actions that may fall within the Rule 23(b)(1)(A) category.²⁷ In the toxic tort context, some

²¹ See *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 632 (3d Cir. 1996).

²² *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1077-78 (2d Cir. 1995).

²³ See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977).

²⁴ See *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 632 (3d Cir. 1996).

²⁵ Nikita Pastor, *Equity and Settlement Class Actions: Can There Be Justice for All in Ortiz v. Fibreboard?*, 49 AM. U. L. REV. 773, 811 (2000).

²⁶ FED. R. CIV. P. 23(b)(1)(A).

²⁷ *Id.*; FED. R. CIV. P. 23(b)(1)(A) note (Notes on Amendments to Federal Rule 23 and Comparative State Statutes).

courts have also utilized a Rule 23(b)(1)(A) action to permit class certification for claimants exposed to pharmaceutical drugs who request medical monitoring.²⁸ The rationale, disagreed with by other courts, for the certification is that inconsistent monitoring regimes may be possible in the event that separate litigation is undertaken by members of the class.²⁹ It appears that, in large part because of uncertainty concerning the application of the “inconsistent adjudication” standard, the use of the Rule 23(b)(1)(A) action is relatively rare for environmental and mass tort claims.

2. Rule 23(b)(1)(B)

The second variety of Rule 23(b)(1) class actions is commonly known as a “limited fund” class action.³⁰ Under Rule 23(b)(1)(B), a class may be certified to protect a number of individuals who all may have an interest in a set amount of assets.³¹ In such a situation, there is a risk that separate court actions could deplete assets available to pay potential judgments, result in irreconcilably inconsistent judgments, or otherwise dramatically impair the rights of the class members.³² Staple environmental examples of Rule 23(b)(1)(B) class actions include disputes over riparian (water source) rights or inconsistent land claims.³³ In such cases, plaintiffs may sue for use or possession of the limited resource; a Rule 23(b)(1)(B) class action will therefore settle the rights of all competing plaintiffs without potential inconsistency and with greater judicial economy than multiple suits covering the same issues.

Creative uses of the limited fund concept have also been attempted. In the realm of punitive damages, suits under Rule 23(b)(1)(B) also have proceeded on the theory that excessive punitive damages may bankrupt a company and thus deplete resources for future plaintiffs.³⁴ Currently, Judge Jack Weinstein of the U.S. District Court for the Eastern District of New York has allowed certification of a class of all smokers in the United

²⁸ KLONOFF, *supra* note 10, at 51, 52. In the context of class actions, medical monitoring claims may request certain disease screening or preventative measures rather than or in addition to monetary compensation. Courts may certify a class demanding such relief under Rule 23(b)(1)(A) or under Rule 23(b)(2). Under Rule 23(b)(1)(A), certification may be possible under a theory that multiple suits may require the defendant to screen or test in conflicting ways. Under Rule 23(b)(2), certification may succeed because of the primarily injunctive nature of monitoring. *See infra* Part II.B.2. In the past, courts have refused to certify medical monitoring class actions because the different standards used in monitoring may not necessarily be incompatible. *See, e.g., Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1195 (9th Cir. 2000).

²⁹ KLONOFF, *supra* note 10, at 51, 52.

³⁰ *See, e.g.,* Mary J. Davis, *Summary Adjudication Methods in United States Civil Procedure*, 46 AM. J. COMP. L. 229, 256 n.128 (1998); Pastor, *supra* note 25, at 798.

³¹ Pastor, *supra* note 25, at 798.

³² FED. R. CIV. P. 23(b)(1) note (Notes on Amendments to Federal Rule 23 and Comparative State Provisions).

³³ *Id.*

³⁴ CONTE & NEWBERG, *supra* note 12, § 17.32, § 17.40.

States seeking punitive damages.³⁵ In addition, lower courts have recently attempted to certify such a class action in the context of asbestos-related bankruptcies. In *Ortiz v. Fibreboard*, asbestos plaintiffs sought certification as a Rule 23(b)(1)(B) limited fund class action, based on their assertion that Fibreboard had limited assets and what was viewed as the company's inevitable insolvency.³⁶ The Supreme Court, however, refused to allow certification on the limited fund theory advanced.³⁷

Courts typically require that class actions certified under Rule 23(b)(1)(A) and (B) assert primarily equitable or declaratory relief.³⁸ The limited fund concept requires a plaintiff to assert claims to a given object rather than simple damage claims against a defendant. Finally, inconsistent monetary judgments are not grounds for certification under Rule 23(b)(1)(B).

3. *Rule 23(b)(2)*

Rule 23(b)(2) classes operate to address entirely different concerns than the limited funds at issue in Rule 23(b)(1)(A) or Rule 23(b)(1)(B) actions. A Rule 23(b)(2) class action requires that the plaintiffs seek injunctive or declaratory relief that will benefit all members of the class.³⁹ Most commonly used in the context of civil rights and in employment disputes, Rule 23(b)(2) class actions tend to proscribe conduct of the defendant against the class as a whole and address concerns such as discrimination toward the class members.⁴⁰ As is also the case for Rule 23(b)(1) actions, to qualify as a Rule 23(b)(2) class action, the class must be seeking mainly equitable relief rather than money damages.⁴¹ Similarly, Rule 23(b)(2) actions are relatively uncommon in environmental or toxic tort litigation. When such classes are certified, they involve claims demanding medical monitoring as a result of toxic exposure. Examples of class actions that have utilized Rule 23(b)(2) instead of Rule 23(b)(1) in the context of medical monitoring include certification for classes alleging radiation exposure⁴² and seeking medical screening and other pro-

³⁵ *In re Simon II Litig.*, 211 F.R.D. 86, 99–100 (E.D.N.Y. 2002).

³⁶ *Ortiz v. Fibreboard*, 527 U.S. 815, 823–30 (1999).

³⁷ *Id.* at 821.

³⁸ KLONOFF, *supra* note 10, at 50.

³⁹ FED. R. CIV. P. 23(b)(2).

⁴⁰ Scotty Shively, *Resurgence of the Class Action Lawsuit in Employment Discrimination Cases: New Obstacles Presented by the 1991 Amendments to the Civil Rights Act*, 23 U. ARK. LITTLE ROCK L. REV. 925, 931 (2001); Joan Steinman, *The Newest Frontier of Judicial Activism: Removal Under the All Writs Act*, 80 B.U.L. REV. 773, 837 (2000).

⁴¹ FED. R. CIV. P. 23 advisory committee's note.

⁴² *Cook v. Rockwell Int'l Corp.*, 151 F.R.D. 378, 382 (D. Colo. 1993); *Day v. NLO, Inc.*, 144 F.R.D. 330, 335 (S.D. Ohio 1992), *vacated in part on other grounds by Day v. NLO, Inc.* 811 F. Supp. 1271 (S.D. Ohio 1992) (finding certain claims barred under the applicable statute of limitations).

cedures for early detection of possible problems arising from the exposure.

4. Rule 23(b)(3)

Finally, Rule 23(b)(3), which grew out of perhaps the most controversial amendment to the traditional class action rules made in 1966, permits use of the class action vehicle when "questions of law or fact common to the members of the class predominate" over individual concerns, the class action is superior to other available methods of adjudication, and certification would result in fair and efficient adjudication.⁴³ Most plaintiffs in environmental and toxic tort class actions elect to proceed under Rule 23(b)(3) because of its relatively flexible and practical standards for certification, among other advantages.⁴⁴

Four criteria guide courts in determining whether to certify a "(b)(3)" class. They include: (1) the interest of class members in controlling individual suits, (2) the current litigation already undertaken by class members, (3) the desirability of limiting the forum to a single court, and (4) difficulties in class management.⁴⁵ Although the creators of the (b)(3) action admit that "class action treatment is not as clearly called for" in a (b)(3) action as under other provisions of Rule 23,⁴⁶ courts frequently employ the (b)(3) class action in the pursuit of judicial economy of resources and expeditious remedies. The action allows the class to seek primarily monetary damages, unlike a (b)(2) action, and permits recovery in situations where the costs of an individual suit would deter filing.⁴⁷ In addition, settlement of all the claims in a class may help to bring an end to litigation (a so-called global settlement) to a defendant and may be used as a tactic to avoid "death by a thousand cuts."

Attorneys in large toxic tort and environmental disaster cases have invoked the (b)(3) class action vehicle with some success. In the mid-1980s, the Fifth Circuit permitted a class certification under that provision for asbestos personal injury claims to proceed,⁴⁸ and the Second Circuit allowed certification for Agent Orange litigation.⁴⁹ Additional circuit court decisions certified classes that sought recovery for asbestos removal and testing in school⁵⁰ and for injuries related to the Dalkon Shield contraceptive device.⁵¹

⁴³ FED. R. CIV. P. 23(b)(3).

⁴⁴ See CONTE & NEWBERG, *supra* note 12, § 17.18 (stating that Rule 23(b)(3) "offers the best chance for certification of a plaintiff class in a mass tort situation").

⁴⁵ FED. R. CIV. P. 23(b)(3).

⁴⁶ *Id.* advisory committee's note.

⁴⁷ Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 936-37 (1998).

⁴⁸ *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir. 1986).

⁴⁹ See *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987).

⁵⁰ *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986).

⁵¹ *In re A. H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989).

Unlike class actions that are certified under Rule 23(b)(1) and Rule 23(b)(2), classes certified under Rule 23(b)(3) require notice to the class and also allow members to “opt out” of the judgment of the litigation.⁵² In Rule 23(b)(1) and Rule 23(b)(2) class actions, once a court has certified a class, any judgment in the action will bind all the members of the class.⁵³ This restriction does not apply to members of class actions certified under Rule 23(b)(3), who may request exclusion from the class and initiate individual lawsuits.⁵⁴ Later, this Article will discuss current opt-out practice.

III. ENVIRONMENTAL LITIGATION UTILIZING CLASS ACTIONS

From 1966 to the early 1980s, plaintiffs tended to prevail in class action certification under Rule 23 in the context of desegregation suits and for various shareholder actions.⁵⁵ For toxic torts and environmental matters, however, courts were less willing to conclude that plaintiffs had met the requirements for certification, even under the less restrictive form provided by a Rule 23(b)(3) class action.⁵⁶ Because plaintiffs tended to allege different types of exposure at different times, and because defendants often changed their products or protective procedures, individual issues were seen as predominating and class actions were viewed as inappropriate.⁵⁷

Despite their slow start, class actions in environmental and toxic tort litigation came into vogue in the early 1980s. In the case of discrete toxic torts, cases involving a single explosion or source of contamination, or in the case of property damage resulting from environmental harms, courts were willing to certify Rule 23(b)(3) actions.⁵⁸ Especially utilized in asbestos cases, property damage class actions continue today for companies such as W. R. Grace, which manufactured asbestos contaminated insulation from its Zoolite division for many years.⁵⁹ Likewise, as mentioned above, courts have certified classes and obtained judgments and settlements that required defendants to provide medical monitoring, in the case of pharmaceutical and other exposure-based toxic torts, as a form of equitable relief under Rule 23(b)(2) class actions.⁶⁰ Class action certifica-

⁵² FED. R. CIV. P. 23(b)(3).

⁵³ FED. R. CIV. P. 23(b)(1), (2).

⁵⁴ FED. R. CIV. P. 23(b)(3).

⁵⁵ See generally *Cypress v. Newport News Gen. & Nonsectarian Hosp. Assoc.*, 375 F.2d 648 (4th Cir. 1967) (certifying suit in the context of discrimination against an African American physician and his patients); *Bragalini v. Biblowitz*, No. 67 Civ. 4988, 1969 U.S. Dist. LEXIS 12992 (S.D.N.Y. Dec. 16, 1969) (certifying a stockholder suit under Rule 23(b)(3)).

⁵⁶ Charles W. Schwartz & Lewis C. Sutherland, *Toxic Tort Symposium: Class Certification for Environmental and Toxic Tort Claims*, 10 TUL. ENVTL. L.J. 187, 192–94 (1997).

⁵⁷ *Id.*

⁵⁸ *Id.* at 195–96, 199–204.

⁵⁹ *W. R. Grace*, Form 10-Q, filed pursuant to the Securities and Exchange Act of 1934, File No. 1-13953, at I-11 (Nov. 13, 2003).

⁶⁰ Schwartz & Sutherland, *supra* note 56, at 197–98.

tion has thus been sought and obtained in a number of environmental and toxic tort matters, including cases involving exposure to chromium, toxic dumping, groundwater pollution, airborne particle pollution, defective pharmaceuticals, and the use of toxic products like tobacco and asbestos.⁶¹

IV. THE RULE-MAKING PROCESS

The Judicial Conference is the principal rule-making authority for the federal courts in the United States. Led by the Supreme Court Chief Justice William H. Rehnquist, twenty-seven federal judges comprise the Judicial Conference and review the administration of the federal courts.⁶² Under the Rules Enabling Act, Congress authorized the Judicial Conference to promulgate rules affecting procedure, practice, and evidence in the district and appellate federal courts.⁶³ Congress' broad delegation of power permits the Judicial Conference to amend the federal rules in order to promote "simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."⁶⁴ Rule changes proposed by the Judicial Conference and approved by the Supreme Court will become law automatically unless Congress intervenes and modifies the proposed rules.⁶⁵

As Figure 1 shows, the recent rule changes for class action lawsuits are scheduled to become federal law by the end of 2003. After the Judicial Conference approved the rule changes, it forwarded them to the Supreme Court for review in December 2002.⁶⁶ The Supreme Court adopted the rule proposals and transmitted the final rules to Congress on March 27, 2003 for their action.⁶⁷ Congress will have seven months to modify, reject, or defer the changes before they pass into law on December 1, 2003.⁶⁸

⁶¹ CONTE & NEWBERG, *supra* note 12, § 17.26.

⁶² 28 U.S.C. § 331 (1996); U.S. Courts, *Judicial Conference of the United States*, at <http://www.uscourts.gov/judconf.html> (last visited Apr. 28, 2003) (on file with the Harvard Environmental Law Review); Greenhouse, *supra* note 2, at A18.

⁶³ 28 U.S.C. §§ 2071–2077 (1994).

⁶⁴ Leonidas Ralph Mecham, *Federal Rulemaking: The Rulemaking Process—A Summary for the Bench and Bar*, at <http://www.uscourts.gov/rules/proceduresum.htm> (last visited Apr. 28, 2003) (on file with the Harvard Environmental Law Review). Mr. Mecham is the director of the Federal Rules of Practice and Procedure Administrative Office of the U.S. Courts.

⁶⁵ 28 U.S.C. § 2074.

⁶⁶ Letter from Judge Anthony J. Scirica, to the Chief Justice of the United States and the Associate Justices of the United States 3–7 (Nov. 18, 2002) (on file with the Harvard Environmental Law Review).

⁶⁷ U.S. Courts, *Amendments to the Federal Rules of Civil Procedure*, at <http://www.uscourts.gov/rules/congress0303/CV-Letters.pdf> (last visited Apr. 28, 2003); see also 28 U.S.C. §§ 2072, 2074–2075 (imposing a deadline of May 1 for transmittal of rules to Congress by the Supreme Court).

⁶⁸ *Id.* at §§ 2074–2075.

FIGURE 1. THE RULE-MAKING PROCESS:
THE PROGRESS OF THE RULE 23 CHANGES⁶⁹

10/93	Consideration by Advisory Committee of the Judicial Conference	8/96 & 8/01	Publication and Public Comment	5/02	Final Approval by the Advisory Committee	6/02	Approval by the Standing Committee of the Judicial Conference	9/02	Judicial Conference Approval	3/27/03	Supreme Court Approval	Becomes law on 12/01/03	Congressional Review

⁶⁹ See ADVISORY COMM. ON CIVIL RULES, JUDICIAL CONFERENCE OF THE UNITED STATES, AGENDA DOCKETING 8 (2002), available at <http://www.uscourts.gov/rules/cvdoCKET.pdf> [hereinafter AGENDA DOCKETING].

Because of both the intricacies of the federal rules and the thoroughness of the Judicial Conference review process, Congress historically has deferred to the Judicial Conference and allowed its proposed rules changes to become law.⁷⁰ The Judicial Conference approval of the proposed class action rule changes culminates years of review of the problems associated with Rule 23. In addition to conducting a substantial internal study, the Judicial Conference judges held numerous public hearings on the suggested changes to class action rules, including publishing proposals for comment in both 1996 and 2001.⁷¹ The proposed rule changes incorporate the opinions of governmental administrative agencies, law firms, individual attorneys, and academics received during the comment periods.⁷² Unless Congress deviates from its historical deference to the Judicial Conference, the proposed rules will become law with little or no legislative amendment.

V. THE PROPOSED RULES

According to the advisory committee of the Judicial Conference, the proposed changes to the federal rules on class actions were designed primarily to “provide the district court with the tools, authority, and discretion to closely supervise class-action litigation.”⁷³ To accomplish this goal, nineteen changes are proposed for Rule 23,⁷⁴ creating a smorgasbord of new options for the federal judiciary, many of which could impact environmental and toxic tort litigation.

The proposed changes affect four distinct areas: (1) availability of opt-out opportunities for class members; (2) appointment of attorneys and scrutiny of fee awards; (3) judicial review of settlements; and (4) mechanical details of class certification and notice.

A. Availability of Opt-Out Opportunities for Class Members

The most controversial aspect of the proposed Rule 23 changes allows a judge to grant a second opt-out opportunity for class members after a settlement has been proposed. Under the current rule, class members certified under Rule 23(b)(3) have a limited period of time during which

⁷⁰ Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 534 (2001). The only time that Congress aggressively altered a proposed rule change was in the enactment of the Federal Rules of Evidence during the Watergate era. *Id.* at 534 n.27.

⁷¹ AGENDA DOCKETING, *supra* note 69, at 8.

⁷² See generally JUDICIAL CONFERENCE COMM. REPORT, *supra* note 4, at app. B 133–242.

⁷³ *Id.* at 8.

⁷⁴ *Id.* at 9–21.

they may elect to opt out of a class, initiate their own litigation, and avoid being bound by the results of the class action.⁷⁵

The current opt-out window occurs at the beginning of the litigation and ends at a time that the court specifies.⁷⁶ While some courts have kept the opt-out window open throughout the litigation and even beyond the time of settlement, the opt-out window may in fact pass before settlement negotiations have completed.⁷⁷ The proposed Rule 23(e)(3) permits a judge to offer class members an additional opt-out opportunity after a settlement has been reached in order to allow members to make an informed decision over whether to continue with the class or on their own.

Though empirical studies have shown that class members opt out at rates of less than one percent,⁷⁸ the so-called “settlement opt-out” provision has engendered both kudos and complaints from those involved in toxic exposure and mass tort litigation. According to the Judicial Conference, the goal of the settlement opt-out is to afford individual class members the “same opportunity to accept or reject a proposed settlement as persons enjoy in individual law suits.”⁷⁹ Class members for all types of class action settlements may face claim preclusion as a condition for settlement, but class members in environmental and toxic tort cases face special risks that may counsel for the increased procedural safeguard of a second opt-out opportunity. Mass marketing and nationwide sales send harmful products across geographic and social class lines.⁸⁰ In the past, mass toxic tort settlements, such as that associated with Agent Orange, attempted to bind millions of exposed victims.⁸¹ Current mass tort litigation on product liability continues this trend, with classes composed of millions of consumers.⁸² In contrast, class actions involving property

⁷⁵ In general, members of a Rule 23(b)(1) or Rule 23(b)(2) class cannot opt out. See *supra* Part II.B.1-.3.

⁷⁶ See FED. R. CIV. P. 23(c)(2).

⁷⁷ JUDICIAL CONFERENCE COMM. REPORT, *supra* note 4, at 15.

⁷⁸ Thomas E. Willging et al., *Symposium: The Institute of Judicial Administration Research Conference on Class Actions: Class Actions and the Rulemaking Process: An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 135–36 (1996).

⁷⁹ JUDICIAL CONFERENCE COMM. REPORT, *supra* note 4, at 14.

⁸⁰ For a discussion of varied examples of mass marketing contributing to mass injury, see Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 750–51 (2002); Roger C. Cramton, *Individualized Justice, Mass Torts, and “Settlement Class Actions”*: An Introduction, 80 CORNELL L. REV. 811, 811–12, 815–16 (1995).

⁸¹ The Agent Orange settlement bound an estimated 2.4 million Vietnam veterans and their unborn children. Peter H. Schuck, *Symposium on Litigation Management: The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U.CHI. L. REV. 337, 341–42 (1986). Recently the Second Circuit allowed litigation to proceed against Agent Orange manufacturers in the case of two servicemen who experienced injuries that occurred after funds had been depleted from the global settlement. See *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 260–61 (2d. Cir. 2001).

⁸² See, e.g., Myron Levin, *Judge Orders Nationwide Tobacco Suit; Courts: Ruling Would Lump Together Millions of Injured Smokers for Damage Awards. Some Experts Say*

rights or discrimination claims binding employees of a single company tend to involve much smaller classes. By affording plaintiffs an additional opportunity to opt out, the proposed rule changes address the due process concerns raised by binding nationwide classes consisting of millions of injured persons, all of whom are denied the right to make individual claims by the resolution of the class action.⁸³

Currently, class members may decide whether to opt out before the extent of liability and possible damages has been fully explored. One of the distinguishing features of toxic tort litigation is scientific uncertainty. For tort liability predicated on environmental exposure, the causal links to disease may be disputed even among reputable scientists in the same community.⁸⁴ The infamous “battle of the experts” over causation can create significant uncertainty for class members attempting to value their claims. As more information is gathered in discovery and experts are deposed, the strength of the claim may become less opaque. At that time, a more informed decision on the appropriateness of a settlement offer can be made. While class members do not generally keep abreast of the intricacies of discovery material, counsel for the class can provide a more robust opinion on the value of the proposed settlement that is passed on to clients contemplating opt-outs.

The price of greater class member autonomy, however, is more uncertainty for the defendant trying to obtain a “bill of peace” to end litigation.⁸⁵ In the past, defendant companies have been willing to enter into multibillion dollar settlements in order to achieve finality with as many class members as possible. The prototypical examples come from the asbestos arena. Since the original asbestos suits were filed in the 1960s, manufacturers have attempted unsuccessfully on numerous occasions to conclude the litigation against them, which it is estimated will cost up to \$200 billion by completion.⁸⁶ One creative device designed for global peace was a settlement class action that purported to bind future and past

Rejection is Likely on Appeal, L.A. TIMES, Sept. 21, 2002, at 1 (reporting on a New York ruling that would establish a common pool to pay injured smokers).

⁸³ Any time anyone does not receive notice, as may be the case in smaller class actions, there are due process concerns. See JUDICIAL CONFERENCE COMM. REPORT, *supra* note 4, at app. B 145 (one member of the Judicial Conference stating adamantly that individual notice should be demanded in Rule 23(b)(1) and Rule 23(b)(2) actions as well as Rule 23(b)(3)). When many claimants do not have notice, however, then it is naturally a more prominent concern.

⁸⁴ For example, consider the past debates over whether Agent Orange, Bendectin, silicon breast implants, tobacco, and asbestos can cause illness in those exposed. See generally Michael D. Green, *The Road Less Well Traveled (and Seen): Contemporary Lawmaking in Products Liability*, 49 DEPAUL L. REV. 377 (1999) (surveying toxic torts and hypothesizing that courts have dealt with the issue of conflicting scientific opinion through creative judicial law making).

⁸⁵ JUDICIAL CONFERENCE COMM. REPORT, *supra* note 4, at app. B 193.

⁸⁶ See Michael E. Angelina & Jennifer L. Biggs, *Sizing Up Asbestos Exposure*, EMPHASIS, 2001 NO. 3, at 26. Tillinghast-Towers Perrin, an actuarial firm, derived and published the figure of \$200 billion. See *id.*

claims for all types of asbestos injuries. The Supreme Court of the United States precluded the use of such a massive class action in 1997 in its decision *Amchem Products, Inc. v. Windsor*,⁸⁷ and further trimmed the possibilities for global settlements in 1999 by barring a class action consisting entirely of yet-to-be-filed asbestos claims.⁸⁸

The Agent Orange settlement provided a \$180 million fund and barred future actions against the defendants.⁸⁹ It is, however, currently being attacked by class members absent at the time of the settlement on the ground that they were not adequately represented.⁹⁰

Under the current system, defendants typically have measured their anticipated exposure from the class action at the expiration of the opt-out period.⁹¹ Once class membership has been decided, defendants then typically attempt a settlement.⁹² The current rule proposals suggest that even class actions that satisfy the *Amchem* and *Ortiz* decisions will be exposed to further opt-out opportunities, necessarily increasing the risk that class members will sue individually.⁹³ Because of the sheer number of claims that can be associated with environmental toxic torts, particularly asbestos, defendants are understandably anxious about the possibility of a second wave of opt-outs.⁹⁴ The additional exposure to opt-out claims may also cause defendants to reduce settlement offers in anticipation of additional opt-out claimants.⁹⁵ The second opportunity also allows other lawyers a chance to woo away class members, and individuals who chose to opt out can use the settlement figures offered in the class action as a floor for further negotiations.⁹⁶ Generating much of the publicity associated with the rule proposals, the settlement opt-out represents a decision by

⁸⁷ 521 U.S. 591 (1997).

⁸⁸ *Ortiz v. Fibreboard*, 527 U.S. 815 (1999).

⁸⁹ In re "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740 (E.D.N.Y. 1984).

⁹⁰ See *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 260-61 (2d. Cir. 2001).

⁹¹ CONTE & NEWBERG, *supra* note 12, at § 17.48.

⁹² *Id.* Once a class has been certified, the defendant faces a sticky choice. Class actions can reap extremely large damages because of the number of individuals requiring compensation and the potential for punitive damages. Even if the defendant believes he believes he will prevail on the merits, the risk that he will lose creates an incentive to settle because of the potential for such large losses.

⁹³ Class action certification has continued for environmental suits, often under state law. In Louisiana, class certification was allowed for a town alleging exposure to perchloroethylene. See *Guillory v. Union Pacific Corp.*, 817 So.2d 1234, 1237-39 (La. Ct. App. 2002). Asbestos class actions are much more problematic in light of *Amchem* and *Ortiz*. See Jerry L. Beane, *Class Actions Against Insurers Arising from Asbestos Claims Handling*, MEALEY'S LITIG. REPORT: CLASS ACTIONS (June 6, 2002).

⁹⁴ See, e.g., JUDICIAL CONFERENCE COMM. REPORT, *supra* note 4, at app. B 194 (quoting a representative from Exxon-Mobil Corporation, who argued that the second opt-out creates "unnecessary uncertainty" since the defendant has already estimated its potential exposure from outside litigation after the expiration of the initial opt-out period).

⁹⁵ *Id.* at app. B 129.

⁹⁶ See, e.g., *id.* app. B at 193-94.

the Judicial Conference that “ensuring the fairness of the [class action] process outweighs any potential efficiency loss.”⁹⁷

B. Appointment of Attorneys and Scrutiny of Fee Awards

A pair of new subsections to Rule 23 superficially alter the appointment and fee structure for attorneys representing class members in a federal action. The proposed Rule 23(g) addresses the attorney appointment process, requiring counsel who “fairly and adequately represent(s) the interests of the class” to be appointed for each certified class.⁹⁸ In addition, Rule 23(g) proposes specific criteria for the court to consider in attorney appointment, including prior work in that particular action, experience in the area and substantive knowledge, and available firm resources.⁹⁹ Provision is made for interim appointment of counsel while the court considers the choice of class counsel; should there be a competition for the position, the rule provides that the court must select the attorney who will best represent the class.¹⁰⁰

Under the current rules, the attorney appointment process is not explicitly covered. The adequacy of representation provision of Rule 23(a) incorporates the idea that counsel should also be adequate.¹⁰¹ Courts currently determine counsel competency based on an examination of the totality of circumstances, pursuant to common law precedents, and without guidance from the language of the Federal Rules. Courts typically examine the qualifications, experience, and reputation of the firm for fulfillment of the requirements under Rule 23(a).¹⁰²

Proposed Rule 23(g) would give a nod to courts that have implemented bidding processes for the lead counsel position.¹⁰³ While not endorsing competitive selection of a class representative counsel, Rule 23(g) effectively permits such a process as long as the attorneys are judged on their ability to represent the class.

Complementing the new Rule 23(g) is the creation of subsection (h), which addresses the fee awards for class action attorneys. Rule 23(h) allows courts to award attorney fees and to limit such awards to a “reasonable amount.”¹⁰⁴ Notice to the class must be given concerning the proposed fee, and the court may entertain objections to the award by defendants or class members.¹⁰⁵ Emphasizing their concern over excessive fees,

⁹⁷ JUDICIAL CONFERENCE COMM. REPORT, *supra* note 4, at 16.

⁹⁸ *Id.* at 17.

⁹⁹ *Id.* at 17–18.

¹⁰⁰ *Id.* at 18.

¹⁰¹ CONTE & NEWBERG, *supra* note 12, §§ 3.21, 3.23.

¹⁰² *Id.* § 3.21.

¹⁰³ *See, e.g., In re Cendant Corp. Prides Litig.*, 51 F. Supp. 2d 537 (D.N.J. 1999), *vacated in part by* 243 F.3d 722 (3d Cir. 2001).

¹⁰⁴ JUDICIAL CONFERENCE COMM. REPORT, *supra* note 4, at 19.

¹⁰⁵ *Id.* at 20.

the Judicial Conference also included a requirement that the court make findings to justify the attorney's fee granted, enabling more effective review of fee awards on appeal.¹⁰⁶ Given that the standard for review for a trial court's fee award is abuse of discretion,¹⁰⁷ the requirement to make findings may enable reviewing courts to better determine when a fee is unreasonable. Setting out guiding principles in the non-binding notes at the end of the rules, the Judicial Conference lists factors that should influence fee awards, such as the result achieved for the class, agreements among the parties and between class counsel, the fees charged for representing individuals and objectors, and nontaxable costs incurred by the attorneys.¹⁰⁸

As is the case with the proposed changes to Rule 23(g), Rule 23(h) codifies existing common law doctrines created by some courts. Under the current system, judges review the attorney's fee application as part of the general review of settlements required under Rule 23(e).¹⁰⁹ The Supreme Court decision of *Boeing Co. v. Van Gemert* required class action attorneys to directly petition the court for reasonable fees rather than seek payment from class members directly.¹¹⁰ District courts have routinely excluded excessive hours and scrutinized fee awards under the rationale that such review is part of the requirements for approving a settlement.¹¹¹ Because courts already review fee awards under the same standards as would be the case under the proposed Rule 23(g), it is likely that these provisions may bring mere clarification rather than a wholesale change in court practice.

If the proposals in fact increase scrutiny of the attorney who represents the class and the potential fee award for such an attorney, rather than merely codify current practice, the proposed changes may have a significant impact on the practice of environmental litigation in the United States. Both Rule 23(g) and Rule 23(h) provide a disincentive for bringing lawsuits involving environmental hazards by eliminating the reward for undertaking the initial groundwork required in class actions.¹¹² Labor-intensive investigation and substantial costs are involved in analyzing complaints concerning environmental harms such as toxic dumping and hazardous work-related exposure. Costs associated with environmental class actions, such as epidemiological studies, geologic surveys, contaminant and exposure testing, and medical evaluations, are borne by the counsel that brings the action. Because the pioneering counsel can be replaced or have their negotiated fees reduced by the court under the proposed changes,

¹⁰⁶ *Id.*

¹⁰⁷ *Parker v. Anderson*, 667 F.2d 1204, 1213 (5th Cir. 1982).

¹⁰⁸ JUDICIAL CONFERENCE COMM. REPORT, *supra* note 4, at 293–97.

¹⁰⁹ CONTE & NEWBERG, *supra* note 12, § 14.1.

¹¹⁰ 444 U.S. 472, 478 (1980).

¹¹¹ *See, e.g.*, *Strong v. BellSouth Telecomm., Inc.*, 137 F.3d 844, 849 (5th Cir. 1998).

¹¹² JUDICIAL CONFERENCE COMM. REPORT, *supra* note 4, at 218, 220.

small firms and new practitioners may hesitate to invest in class action litigation due to capital constraints and risk.

Despite criticism from the plaintiff's bar, proposal proponents maintain that the changes will act to curb abuses by "entrepreneurial lawyers" seeking to generate fees rather than client results.¹¹³ Fees are often viewed as excessive for class actions involving mass tort liabilities and toxic exposure. As a recent example, the settlement of state class action claims against the tobacco industry generated a disputed \$1.23 billion in fees, which the defendants moved to vacate.¹¹⁴ Current litigation fees leave class members with less compensation than one might expect; it is estimated that in asbestos cases only 43 cents of every dollar goes to plaintiffs.¹¹⁵ Because of the current lack of explicit guidance on fees and attorney appointment in Rule 23,¹¹⁶ the Judicial Conference expects the rule changes to increase judicial monitoring of plaintiff's attorneys and awards.¹¹⁷

C. Judicial Review of Settlements

In addition to the rules regulating fees and attorney appointment and allowing a settlement opt-out, the proposed changes also may introduce a more rigorous judicial examination of settlements. Proposed amendments to Rule 23(e) mandate notice to the class of binding settlement offers and set a standard of "fair, reasonable, and adequate" for the approval of settlement proposals by the judge.¹¹⁸ As is the case for attorney's fees, the judge must also make findings to support the approval of a settlement.¹¹⁹

The proposals to alter settlement review procedure also give judges more information concerning the offers to settle that they must review. To aid the courts in understanding the settlement, the Judicial Conference

¹¹³ *Asbestos Litigation: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (2002) at <http://judiciary.senate.gov/hearing.cfm?id=472> (statement of Steven Kazan); see also Lester Brickman, *Symposium Issues II: Toxic Torts: Issues of Mass Litigation, Ethics, and Case Management: Lawyers Ethics and Fiduciary Obligation in the Brave New World of Aggregate Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 243, 266-67 (2001); *The Toxic-Time Bomb Exploding Throughout the Corporate World*, FIN. TIMES (London), Sept. 9, 2002, at 26.

¹¹⁴ The fee has currently been overturned. *Court Overturns \$1.3 Billion Attorney's Fee: Arbitration That Arose From Tobacco Settlement Alternative Dispute Resolution*, N.Y. L.J., Oct. 2, 2002, at 17. Fees for individual class action counsel may reach into the hundreds of millions. For example, Peter Angelos earned \$225 million in the early 1990s for a single lawsuit against asbestos manufacturers. Stephen Budiansky, *How Lawyers Abuse the Law*, U.S. NEWS & WORLD REPORT, Jan. 30, 1995, at 50.

¹¹⁵ RAND INST., ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT 61 (2002).

¹¹⁶ JUDICIAL CONFERENCE COMM. REPORT, *supra* note 4, at 17-19; Heather M. Williams, *Attorney Fees in Class Action Lawsuits: Implementing Change to Protect Plaintiffs from Unethical Attorney Behavior*, 7 KAN. J.L. & PUB. POL'Y 68, 72 (1998).

¹¹⁷ JUDICIAL CONFERENCE COMM. REPORT, *supra* note 4, at 17-19.

¹¹⁸ *Id.* at 13.

¹¹⁹ *Id.*

has approved revisions to Rule 23(e) that require parties to disclose to the court all side deals that may have affected the settlement.¹²⁰ As for the extent of information that should be disclosed, the Judicial Conference notes recommend that parties err on the side of disclosure.¹²¹ The notes further define the types of agreements that should be disclosed as any deals that “may influence the terms of settlement by trading away possible advantages for the class in return for advantages for others.”¹²²

The impetus for increased judicial scrutiny of settlements originates from repeated abuses by both plaintiffs’ and defendants’ counsel at the settlement stage of litigation. Comments from the advisory committee to the Judicial Conference reveal a concern about “sweetheart deals” that compromise the recovery of the class for the benefit of the lawyers or class representatives.¹²³ Such agreements can be a particular problem in the context of environmental and mass tort litigation if many of the claims are for injuries that have yet to materialize, i.e., claims that are based on an increased risk of injury.¹²⁴ Because claims of possible future harm are difficult to evaluate and quantify, attorneys for both sides can hoodwink a court by negotiating settlements that end the litigation threat to the defendant in exchange for large fees given to the plaintiff’s attorneys.¹²⁵ The proposed rule changes may ferret out inappropriate settlements by providing courts with information about what is driving the settlement deal; the type of disclosure suggested includes arrangements on fee splitting, class representative compensation, and concurrent settlements in other jurisdictions, all of which illuminate conflicts of interest that disadvantage class members.¹²⁶ One possible benefit is that the articulation of a standard for settlement and the presentation to the court of side deal arrangements will increase the ability to effectively combat “sweetheart deals” in cases such as mass torts and toxic exposures where judicial scrutiny is already a difficult task because of problems in the valuation of class action claims.¹²⁷

D. Mechanical Details of Class Certification and Notice

The final category of proposed changes to Rule 23 involve more nuanced changes to class certification and notice procedure. The first proposed changes to Rule 23(c) may affect the timing of certification decisions and

¹²⁰ *Id.* Examples of side deals include disproportionate payments to the class representative, settlements of other related cases by the same attorney, etc.

¹²¹ *Id.* at 263.

¹²² JUDICIAL CONFERENCE COMM. REPORT, *supra* note 4, at 13.

¹²³ *Id.* at 165.

¹²⁴ Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1390–91 (2000).

¹²⁵ *Id.*

¹²⁶ JUDICIAL CONFERENCE COMM. REPORT, *supra* note 4, at 165, 175–78.

¹²⁷ *Id.* at 13.

amendments to the certification decision, as well as the content of the certification order. The proposed Rule 23(c)(1)(A) amends the timing of the certification decision, guiding the courts to certify class actions “at an early practicable time,” instead of “as soon as practical.”¹²⁸ According to the Judicial Conference, the change is designed to reflect present practices and prevent judges from mistakenly rushing their certification decision.¹²⁹ In the past, courts have struggled with the language “as soon as practical,” creating so-called provisional class action certifications, i.e., temporary certification decisions that could later be changed once more evidence was gathered. Such provisional class action certifications were later determined to be outside the judicial power granted under Rule 23(c). The rationale for the change to “at an early practicable time,” according to the Judicial Conference members, was to emphasize that, with limited exceptions, certification is “for keeps.”¹³⁰

The class certification order is also altered under the proposed rule changes in Rule 23(c)(1)(B). Under the proposal, the Judicial Conference requires the court to identify the class claims, issues, and defenses in its certification order to better facilitate interlocutory review.¹³¹ Finally, proposed revisions to Rule 23(c) will provide that certification decisions can be amended at any time up to final judgment, eliminating ambiguity over the current language, “the decision on the merits,” which may apply to findings on liability that occur before the final ruling by the court.¹³²

The new proposals for Rule 23(c) also affect the notice requirements for class actions. The proposals explicitly allow the court the discretion to grant notice in Rule 23(b)(1) and (b)(2) class actions. Such actions currently require no notice and are commonly litigated in the area of civil liberties and request injunctive relief rather than monetary awards.¹³³ The original proposals for change would have required notice under all class action formats. Because notice can deter the filing of a class action, a discretionary, rather than mandatory power under Rule 23(c) was proposed.¹³⁴ For money damage class actions, the Judicial Conference did not suggest amendments to the current notice requirement, which requires the “best notice practicable,”¹³⁵ other than to mandate that notices to be in “plain, easily understood language.”¹³⁶

Codifying much of the current case law, the proposals to Rule 23(c) are likely to change little about the practice of environmental and mass

¹²⁸ *Id.* at 10.

¹²⁹ *Id.*

¹³⁰ JUDICIAL CONFERENCE COMM. REPORT, *supra* note 4, at app. B 142.

¹³¹ *Id.* at 11.

¹³² JUDICIAL CONFERENCE COMM. REPORT, *supra* note 4, at 11–12.

¹³³ *See id.* at 12.

¹³⁴ For an example of the deterrent effect of notice and its accompanying costs, see *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 170 (2d Cir. 1987).

¹³⁵ FED. R. CIV. P. 23(c)(2).

¹³⁶ JUDICIAL CONFERENCE COMM. REPORT, *supra* note 4, at 12.

tort litigation with the possible exception of the delay in the certification decision. By decreasing the emphasis on speed, the proposed rule change allows defendants to delay, a tactic that puts increased financial pressure on plaintiffs to settle.¹³⁷ Given the differences in resources between plaintiff's firms and defense counsel and the heavy costs associated with environmental litigation, further delay created by the proposed rule may prove deleterious to class actions based on toxic exposure and mass torts. Other than the change to Rule 23(c)(1)(A) concerning the timing of the certification decision, the more discretionary provisions of the proposal to change Rule 23(c) create less possibility for substantial effects on litigation practice.

F. Chart of Proposed Changes

Summarizing the changes proposed, Figure 2 (see Appendix) presents a chart of the proposed rules and suggests the effects that each may have on class action litigation in the future. The Figure organizes the rule changes as they will appear in the revised rules. Should the rule changes be adopted, the bulk of Rule 23 will be revised.

VI. CONCLUSION

Affecting all stages of class action litigation, from the time of certification to final judgment or settlement, the proposed modifications to Rule 23 codify current best practices and encourage active case management by the court. Unless Congress actively amends the proposal, the rule changes will go into effect in December 2003.

Described by members of the Judicial Conference as both "sensible" and "not remarkable," the proposed rule changes are generally expected to have only a minor impact on current class action practice. At the same time, however, the Judicial Conference also acknowledged the need for caution in adopting the proposed rule changes.¹³⁸ In high stakes class action litigation, such as that encountered in mass torts and toxic exposures, the potential for large awards gives counsel for both plaintiffs and defendants an incentive for legal creativity in a class action. In addition, the amendments will likely be incorporated into class action rules in the many states which typically seek to mirror or closely follow Rule 23 and the other Federal Rules of Civil Procedure.¹³⁹

¹³⁷ See, e.g., *id.* at 135.

¹³⁸ See *id.* at 235.

¹³⁹ See CONTE & NEWBERG, *supra* note 12, § 13.1. For example, Colorado, Arkansas, and Connecticut all have state law rules for class action procedure that are virtually identical to Rule 23 and consult the federal courts for guidance. See AM. BAR ASSOC., SURVEY OF STATE CLASS ACTION LAW 2002: A REPORT OF THE STATE LAWS SUBCOMMITTEE OF THE CLASS ACTIONS AND DERIVATIVE SUITS COMMITTEE 42, 89, 99 (2002). Likewise,

Accordingly, the proposed rules may introduce some new twists for both plaintiffs and defendants litigating in the class action environment. Judicial discretion to grant a settlement opt-out opportunity is the most apparent change to the class action process, both enhancing class member autonomy and generating additional uncertainty for defendants trying to achieve an inclusive settlement. Although only a small percentage of plaintiffs typically choose to opt out, if the new rules encourage additional opt-outs, class action settlements could begin to involve smaller percentages of the overall plaintiff pool. Information gleaned from the class proceedings could support higher settlement demands and increase the risk to the defendants that increasing numbers of plaintiffs will seek trial rather than settlement. The addition of provisions concerning the appointment of class counsel and management of attorney's fees also may impact class actions by dissuading the plaintiff's bar from bringing risky environmental or mass tort actions with substantial up-front costs. Such disincentives currently exist, but the codification of these judicial powers may heighten their deterrent effect. Another possible result of the proposed rule changes may be to uncover "sweetheart settlements" by empowering the courts to delve more deeply into settlement terms. Finally, the changes to class action timing and notice may create delay or increased burdens on counsel and the courts. While a kaleidoscope of effects on the United States class action system is possible, on their face, the newest Rule 23 proposals appear to be a change in degree, rather than in kind.

many states have rules that contain only minor permutations. Alabama and Arizona have class action rules identical to Rule 23 with the exception that both states have omitted Rule 23(f) which permits appeals of the certification decision. *Id.* at 1, 27.

APPENDIX

FIGURE 2: PROPOSED RULE CHANGES AND POSSIBLE EFFECTS

Proposed Rule		Possible Effects
Rule 23(c)(1)(A)	Specifies that the decision to certify a class should be made "at an early practicable time" rather than "as soon as practicable".	May allow defendants to delay certification decision, increasing discovery costs to plaintiffs.
Rule 23(c)(1)(B)	Requires courts to issue certification orders defining the class to be certified and listing class issues, defenses, and claims.	Facilitates interlocutory appeal of certification decision.
Rule 23(c)(1)(C)	Permits courts to amend class certification at any time up to "final judgment" rather than until a "decision on the merits."	Clarifies ambiguity in the rules over conditional certification.
Rule 23(c)(2)(A)	Permits courts to order notice to (b)(1) and (b)(2) class actions.	May increase costs for civil liberties and other declaratory non-damage class actions.
Rule 23(c)(2)(B)	Requires notice of class action to be in "plain, easily understood language."	Codifies best practices in notifying class members.
Rule 23(e)(1)(A)	States that court approval is only required for settlements that bind the class.	Limits court approval to oversight of binding class decisions.
Rule 23(e)(1)(B)	Requires notice of proposed settlements when class members will be bound.	Dovetails with the second opt-out opportunity created in Rule 23(e)(3).
Rule 23(e)(1)(C)	Adopts settlement standard of "fair, reasonable, and adequate" and requires judges to make findings in approval of settlements.	Codifies current case law on settlement standards.
Rule 23(e)(2)	Requires parties to reveal to the court side deals that influence settlements.	May limit "sweetheart deals" that advantage attorneys more than class members.
Class Certification and Notice		
Review of Settlements		

Proposed Rule		Possible Effects
Rule 23(e)(3)	Permits courts to authorize a second opt-out period at the time of settlement.	May increase uncertainty for defendants. May result in lower settlement offers. May allow class members to make informed opt-out decision based on individual circumstances and the suitability of the proposed relief.
Rule 23(g)(1)(A)	Requires class counsel for each certified class.	Codifies best practices.
Rule 23(g)(1)(B)	Adopts standard that counsel must "fairly and adequately represent the interests of the class."	Provides benchmark for court's appointment of counsel.
Rule 23(g)(1)(C)	Adopts explicit criteria that must be considered in the appointment of counsel: work performed on the action; experience and substantive knowledge; resources to commit to the litigation.	Gives useful guidance to court appointment. May decrease incentive for small firms or new practitioners to investigate and file suits.
Rule 23(g)(2)(A)	Allows appointment of interim counsel during the pre-certification procedure.	Enables case to continue while judge considers appointment of counsel.
Rule 23(g)(2)(B)	Sets standard for appointment of counsel depending on whether there are multiple competitors for the position.	Standard encourages courts to appoint counsel that can best represent the class rather than the lowest bidding firm.
Rule 23(g)(2)(C)	Authorizes courts to require fee agreements in appointment of counsel.	May curb excessive fees.
Rule 23(h)(1)	Allows courts to set the time for the attorney fee motion and requires notice of the fee motion to the class.	Allows more flexibility to court and promotes more communication about fee awards with class members.
Rule 23(h)(2)	Permits objections to the attorney fee motion.	May create additional discovery, but also may curb excessive fees.
Rule 23(h)(3)	Requires courts to make findings on the approval of an attorney fee award.	Promotes effective appellate review.
Attorney Appointment and Fees		