

**SUMMARY OF THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed revisions to Forms 1, 2, 3, and 5 in the Appendix to the Appellate Rules and transmit these changes to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law p. 2
2. Approve the proposed amendments to Bankruptcy Rules 1005, 1007, 2002, 2003, 2009, 2016, and new Rule 7007.1 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law pp. 3-6
3. (a) Approve the proposed revisions to Bankruptcy Official Forms 1, 5, and 17 relating to multilateral clearing banks and child-support creditors to take effect on December 1, 2002 pp. 6-7

(b) Approve the proposed privacy-related revisions to Bankruptcy Official Forms 1, 3, 5, 6, 7, 8, 9, 10, 16A, 16C, 17, and 19 to take effect on December 1, 2003 pp. 6-7

NOTICE
NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE JUDICIAL CONFERENCE ITSELF.

- 4. Approve the proposed amendments to Civil Rules 23, 51, 53, 54, and 71A and the revisions to Forms 19, 31, and 32 and transmit these changes to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law pp. 8-25
- 5. Oppose legislation that would amend Criminal Rule 46 to eliminate the authority of a judge to forfeit a bail bond for a breach of a condition of release, other than for failing to appear physically before the court pp. 31-32
- 6. Approve the proposed amendments to Evidence Rule 608(b) and transmit these changes to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law pp. 33-34

The remainder of the report is submitted for the record, and includes the following items for the information of the Conference:

- ▶ Federal Rules of Appellate Procedure pp. 2-3
- ▶ Federal Rules of Bankruptcy Procedure pp. 3-7
- ▶ Federal Rules of Civil Procedure pp. 8-31
- ▶ Report on Duplicative and Competing Class Actions pp. 25-31
- ▶ Federal Rules of Criminal Procedure pp. 31-33
- ▶ Federal Rules of Evidence pp. 33-35
- ▶ Rules Governing Attorney Conduct pp. 35-36
- ▶ Long-Range Planning p. 36
- ▶ Report to the Chief Justice p. 36

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rules 23, 51, 53, 54, and 71A with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments were circulated to the bench and bar for comment in August 2001. Public hearings were held on the proposed amendments in San Francisco, California, and Washington, D.C. More than 40 witnesses testified at the hearings. The advisory committee also sponsored a conference at the University of Chicago Law School on proposed amendments to Rule 23. In addition to the published amendments, the conference addressed preliminary proposals dealing with overlapping and competing class actions filed in state courts.

RULE 23 (CLASS ACTIONS)

Over the last ten years, the advisory committee has undertaken an intensive consideration and review of Rule 23, the class-action rule. This ongoing review by the advisory committee is the first review of Rule 23 following the thorough reworking of the Rule in amendments made in 1966. But in the now almost 40 years since that time, Rule 23 has figured prominently in the explosive growth of large-scale group litigation in federal and state courts, and has both shaped and — in its interpretation and application — been shaped by revolutionary developments in modern complex litigation. The drafters of the 1966 amendments knew that after some appropriate period of time it would be important to reconsider what they had done.

The present set of proposed amendments takes account of continuing rapid changes in Rule 23 practice and focuses on the persistent problem areas in the conduct of class suits. The proposals focus on class-action procedures rather than on substantive certification standards. The overall goal of the advisory committee has been to develop rule amendments that provide the district courts with the tools, authority, and discretion to closely supervise class-action litigation.

The advisory committee had before it an unusually rich record concerning the operation of Rule 23, including the voluminous record generated in the public comments on the proposed revisions to Rule 23 in 1996; the Federal Judicial Center's 1996 empirical study of federal class action suits; the RAND Institute for Civil Justice's publication in 2000 of *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, analyzing the results of detailed case studies and surveys of lawyers engaged in class-action litigation in state and federal courts; and the extensive materials assembled by the Working Group on Mass Torts, including the 1999 *Report on Mass Tort Litigation*. In addition to these sources, the advisory committee obtained practical insight by consulting with a number of experienced class-action practitioners who represent all major points of view. Taken as a whole, the package is a balanced and neutral attempt to protect individual class members, enhance judicial oversight and discretion, and further the overall goals of the class-action device — efficiency, uniform treatment of like cases, and access to court for claims that cannot be litigated individually without sacrificing procedural fairness or bringing about other undesirable results.

The proposed amendments focus on four areas: the timing of the certification decision and notice; judicial oversight of settlements; attorney appointment; and attorney compensation.

Rule 23(c)(1)(A): The Timing of Certification

In 1996, the advisory committee published a package of proposed amendments to Rule 23 dealing with class certification for comment. Included was a proposed amendment to Rule 23(c)(1) that would change the requirement that a certification decision be made "as soon as practicable" into a requirement that the decision be made "when practicable." Although public comment was largely favorable, the Standing Rules Committee declined to approve the amendment on two grounds. The first was that it would be better to consider all Rule 23 changes in a single package, the consideration of which had been deferred in anticipation of the Supreme

Court's pending decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). The second was concern that the change in wording would encourage courts to delay deciding certification motions, leading to an unwarranted increase in precertification discovery into the merits of a class suit.

Amended Rule 23(c)(1)(A) recommends a new variation on the "when practicable" language, calling for a certification determination "at an early practicable time." The Committee Notes address the concerns previously identified. The proposed language is consistent with present good practices. Courts generally make certification decisions only after the deliberation required for a sound decision, as shown by Federal Judicial Center statistics on the time from filing to decision of certification motions. Courts decide certification motions promptly, but only after receiving the information necessary to decide whether certification should be granted or denied and how to define the class if certification is granted. The Committee Notes clearly state that the amended language is not intended to permit undue delay or permit extensive discovery unrelated to certification.

The proposed amendment at first reading may seem a matter of semantics. In fact, it authorizes the more flexible approach many courts take to class-action litigation, recognizing the important consequences to the parties of the court's decision on certification. The current rule's emphasis on dispatch in making the certification decision has, in some circumstances, led courts to believe that they are overly constrained in the period before certification. A certain amount of discovery may be appropriate during this period to illuminate issues bearing on certification, including the nature of the issues that will be tried; whether the evidence on the merits is common to the members of the proposed class; whether the issues are susceptible to class-wide proof; and what trial-management problems the case will present.

The proposed language is consistent with the practice of authorizing discovery on the nature of the merits issues, which may be necessary for certification decisions, while postponing discovery pertaining to the probable outcome on the merits until after the certification decision has been made. As the Committee Notes discuss, certification discovery need not concern the weight of the merits or the strength of the evidence. By making it clear that the timing of a certification decision, and related discovery, is limited to that necessary to determine certification issues, the amended Rule and Note give courts and lawyers guidance lacking in the present rule. The proposed amendment brings the present rule into conformity with the approach taken by experienced judicial officers. The relatively extensive public comment on this proposal was generally favorable.

Rule 23(c)(1)(B): The Order Certifying a Class

Proposed Rule 23(c)(1)(B) specifies the contents of an order certifying a class action. Such a requirement facilitates application of the interlocutory-appeal provision of Rule 23(f) by requiring that a court must define the class it is certifying and identify the class claims, issues, and defenses. The proposed amendment also requires that the order appoint class counsel under Rule 23(g).

Rule 23(c)(1)(C): The Conditional Nature of Class Certification

Under proposed Rule 23(c)(1)(C) an order granting or denying class certification may be amended at any time up to "final judgment"; the current rule terminates the power at "the decision on the merits," an event that may happen before final judgment. This change avoids possible ambiguity in the reference to "the decision on the merits," which may apply, for example, to a determination of liability made *before* final disposition. Later proceedings to define the remedy may demonstrate the need to amend the class definition or subdivide the class. Rule 23(c)(1)(C) would also be amended to delete the provision for conditional class

certification. The provision for conditional class certification is deleted to avoid the unintended suggestion, which some courts have adopted, that class certification may be granted on a tentative basis, even if it is unclear that the rule requirements are satisfied. The court's power to later redefine or decertify the class is left undisturbed.

Rule 23(c)(2): Notice

Amended Rule 23(c)(2)(A) would recognize the court's authority to direct "appropriate" notice in (b)(1) and (b)(2) class actions. Members of classes certified under (b)(1) or (b)(2) have interests that may deserve protection by notice. Notice to such classes, as compared with (b)(3) classes, is intended to serve more limited, but important, interests, such as the interest in monitoring the conduct of the action. The advisory committee, however, was sensitive to the concern that mandating notice in all (b)(1) and (b)(2) actions could overwhelm a public-interest group seeking class-action relief with only modest resources. In response to public comment from members of the civil rights bar, the advisory committee revised the language — which had been mandatory — to place the giving of notice in (b)(1) and (b)(2) actions within the district court's discretion. The Committee Note expressly cautions courts to exercise the authority to direct notice in these actions with care. The court retains the discretion not to direct any type of notice after balancing the risk that notice costs may deter the pursuit of class relief against the benefits of notice in the particular case. If the court decides that notice is appropriate, it also need not require notice to be made in the same manner as in a (b)(3) action by individual notice, because there is no right to request exclusion from (b)(1) and (b)(2) classes.

Proposed new Rule 23(c)(2)(B) carries forward the present notice requirement for (b)(3) class actions. It requires what the cases now treat as aspirational: class-action notices are to be in "plain, easily understood language."

Rule 23(e): Settlement Review

The need for improved judicial review of proposed class settlements, along with the abuses that can result without effective judicial review, was a recurring theme in the testimony and written statements submitted to the advisory committee during public comment on the 1996 rule proposals. The RAND study also called for closer judicial review of class-action settlements. The proposed amendments focus on strengthening the rule provisions governing the process of reviewing and approving proposed class settlements in a setting that often lacks the illumination brought by an adversary process.

New Rule 23(e)(1)(A) would limit the requirement of court approval of any settlement, voluntary dismissal, or compromise of a class claim to cases in which a class has been certified. Approval is not required if class allegations are withdrawn as part of a disposition reached before a class is certified since putative class members are not bound by the settlement.

New Rule 23(e)(1)(B) would require notice of a proposed settlement, but only when class members would be bound by the settlement. The notice is to issue to the class in a "reasonable" manner; individual notice is not required in all classes or all settlements.

New Rule 23(e)(1)(C) would adopt an explicit standard for approving a settlement for a class: the proposed settlement must be "fair, reasonable, and adequate." This is the standard that has been stated in the case law. The district court must also make findings to support the conclusion that the settlement meets this standard.

New Rule 23(e)(2) would require the parties to file a statement identifying any agreement made in connection with a settlement. Such "side agreements" can be important to understanding the terms the parties and counsel have agreed to, but sometimes are not disclosed to the court. There is concern that some side agreements may influence the terms of settlement by trading away possible advantages for the class in return for advantages for others.

The disclosure of side agreements, however, should not automatically become the occasion for discovery by the parties. Nonetheless, a court can direct a party to provide to the court or to the other parties (with appropriate confidentiality safeguards) a copy of the full terms of any agreement identified by any party as made in connection with the settlement.

Rule 23(e)(3): Second Opt-Out Opportunity

New Rule 23(e)(3) would establish authority to permit a second opportunity to opt out of a (b)(3) class if settlement is proposed after expiration of the original opportunity to request exclusion. There is no presumption that a second opt-out opportunity should be afforded. That question is left entirely to the court's discretion. This provision would enhance judicial discretion to provide the same ability to opt out with knowledge of the settlement terms that is enjoyed by members of the many (b)(3) classes that are considered for certification — and thus afford a right to request exclusion — after a settlement has been reached:

When a case is certified for trial before settlement has been reached, the decision whether to opt out may be made well before the nature and scope of liability and damages are understood. Settlement may be reached only after the opportunity to request exclusion has expired, and after great changes in class members' circumstances and other aspects of the litigation. The proposal permits the court to refuse to approve a settlement unless it affords a new opportunity to request exclusion, at a time when class members can make an informed decision based on the proposed settlement terms. In appropriate cases, the court can establish an opportunity to opt out that is as meaningful as the opportunity afforded in the many cases that now reach settlement before certification is ordered. And at a more basic level, the second opt-out opportunity gives class members the same opportunity to accept or reject a proposed settlement as persons enjoy in individual law suits.

This proposal introduces a measure of class-member self-determination and control that best harmonizes the class action with traditional litigation. The presumption of consent that follows a failure to affirmatively opt out at the time of certification may lose its footing when circumstances have changed materially from the time when the class action is finally settled. In these cases, a second opt-out opportunity could relieve individuals from the unforeseen consequences of inaction or decisions made at the time of certification, when limited meaningful information was available. The proposed second opt-out opportunity may provide added assurance to the supervising court that a settlement is fair, reasonable, and adequate. It is just the sort of "structural assurance of fairness," mentioned in *Amchem Products Inc.*, that permits class actions in the first place.

The proposal will only make a difference in cases in which the class is certified and the initial opt-out period expires before a settlement agreement is reached. It is irrelevant in those cases in which a settlement agreement is submitted to the court simultaneously with a request that a class be certified. Even when applicable, however, a court may decide that the circumstances make providing a second opportunity to request exclusion inadvisable. The case may have been litigated to a stage that makes it similar to a fully tried suit and that reduces the need for a second opportunity to opt out. There may not have been a significant change in circumstances or lapse in time between the initial opt-out opportunity and the settlement. There may be other circumstances that make the additional opt-out opportunity inadvisable. Accordingly, the amendments provide a court with broad discretion to assess and determine whether in the particular circumstances a second opt-out opportunity is warranted before approving a settlement.

The advisory committee received several comments on this proposal. It is fair to say that the comments, whether favorable or unfavorable, do not line up by plaintiffs and defendants.

Some class-action plaintiffs' lawyers favor and some oppose the proposal. The same is true of the defense bar. Academic commentary has been favorable. District judge members of the advisory committee and of the Standing Rules Committee welcome the enhancement to their discretion.

The advisory committee carefully considered concerns that a second opt-out opportunity might inject additional uncertainty into settlement and create opportunities unrelated to the purpose of the second opt out, potentially defeating some settlements and making others more costly. Under this view, the proposal would create an opportunity for dissatisfied or mercenary counsel to woo class members away from the settlement with promises of a superior alternative settlement award. Balanced against these concerns is the fact that permission to opt out after a tentative settlement is reached is not novel in certain kinds of class-action litigation and generally has not been detrimental to these class-action settlements. Many cases settle before certification in the knowledge that class members must be given a first opportunity to opt out. And when settlements are reached after expiration of the original exclusion period, the terms — particularly in mass tort actions — often include a second opt-out opportunity. The possibility that "too many" class members may opt out during a second-opportunity stage, leaving a defendant with a less comprehensive settlement, is usually guarded against by including provisions in the settlement agreement allowing the parties to abandon the settlement if a pre-determined number or proportion of the class takes advantage of the second opt-out opportunity.

Although providing a second opt-out opportunity may change the dynamics of the negotiation process in some cases, the advisory committee is persuaded that ensuring the fairness of the process outweighs any potential efficiency loss and that provision of the opportunity in appropriate cases, in the court's discretion, will not be unduly disruptive to settlement. District

judges are by no means averse to class-action settlements, and they will apply their discretion to employ this new tool carefully.

New Rule 23(e)(4) would confirm the right of class members to object to a proposed settlement, and would require court approval for withdrawal of an objection.

Rule 23(g): Class Counsel Appointment

All recent examinations of class-action practice recognize the crucial significance of class counsel. But Rule 23 nowhere addresses the selection or responsibilities of class counsel. Until now, the adequacy of counsel has been considered only indirectly as part of the Rule 23(a)(4) determination whether the named class representatives will fairly and adequately protect the interests of the class. The proposed amendments build on experience under Rule 23(a)(4) and fill the gap by articulating the responsibility of class counsel and providing an appointment procedure.

Proposed paragraph (1)(A) recognizes the requirement that class counsel be appointed for each class that the court certifies, unless a statute such as the Private Securities Litigation Reform Act (Pub. Law No. 104-67) establishes different requirements.

Proposed paragraph (1)(B) states that class counsel "must fairly and adequately represent the interests of the class." The Committee Note discusses the distinctive role of class counsel, making it clear that the relationship between class counsel and individual class members, including the class representatives, is not the same as the one between a lawyer and an individual client. Appointment as class counsel entails special, paramount responsibilities to the class as a whole.

Proposed paragraph (1)(C) sets out the criteria that a court must consider in appointing class counsel, including the work counsel has performed in the action, counsel's experience in complex litigation and knowledge of the applicable law, and the resources counsel will commit

to the representation. Under the proposed amendments, a court may also direct potential class counsel to provide additional information to assist it in making the appointment decision, including the proposed terms of an attorney fee award. The provision encourages counsel and the court to reach early shared understandings about the basis on which fees will be sought. Such a provision has been encouraged by judges emphasizing the importance of judicial control over attorney fee awards. This feature might obviate later objections to the fee request, serve as a more productive way for the court to deal in advance with fee award matters that seem to defy regulation after the fact, and accommodate competing applications or innovative approaches when appropriate.

Proposed paragraph (2) sets out the appointment procedure for class counsel. Paragraph (2)(A) would point out that the court may appoint interim counsel during the precertification period as a case-management measure. Paragraph (2)(B) would recognize that the court's scrutiny of potential class counsel will differ depending on whether there are multiple applicants for the position. If there is one applicant, the court may make the appointment only if the applicant is adequate under the criteria identified in Rule 23(g)(1)(C). If there are multiple applicants, however, the court must appoint the applicant best able to represent the interests of the class. The proposed rule takes no position on auctions or similar judicial efforts to engender competition. The Note recognizes that one factor that may be important in selecting class counsel in the multiple-applicant situation is an existing attorney-client relationship between the class representative and counsel. Paragraph 2(C) would specifically authorize the court to include provisions regarding attorney fees in the order appointing class counsel.

The advisory committee made several adjustments to the proposal in response to public comment. Most of the changes clarified the difference between the situation in which no

applicant applies for appointment and the situation in which several lawyers or firms seek appointment.

Rule 23(h): Attorney Fees

Attorney fees play a prominent role in class-action practice and are the focus of much of the concern about class actions. The award of large attorney fees in the absence of meaningful recoveries by class members in some class actions brings the civil justice system into disrepute. Courts have increasingly assumed significant responsibility for determining attorney's fees, rather than simply accepting previously negotiated arrangements. They have also examined the actual benefits accruing to the class members as opposed to speculative estimates (such as coupon recoveries). But the Civil Rules themselves provide little guidance in this area, which may have contributed to some inconsistency in application. The only provisions on fee awards in the Civil Rules appear in Rule 54(d)(2), but that Rule is not tailored to the special features of class actions. The proposed amendment addresses notification to the class of a motion for award of fees, the rights of objectors, and the criteria to be considered in determining the amount of the fee award.

Under proposed subdivision (h), a court may award attorney fees in a class action only if authorized by law or the parties' agreement. The award must be "reasonable," and it is the court's duty to determine the reasonable amount. The proposed rule does not attempt to influence the ongoing case law development regarding a choice between (or combination of) the percentage and lodestar amounts. As emphasized in the Committee Note, because the class action is a creation of the court, the court has a special responsibility to monitor the attorney fee award, as it also does with regard to proposed settlements. The Note further recognizes the critical role of the court in ensuring that the class action achieved actual results for class members that warrant a substantial fee award.

Paragraph (1) would establish that the attorney fee motion is made under Rule 54(d)(2), "subject to the provisions of this subdivision, at a time set by the court." It is important to maintain the integration of all fee orders with the entry-of-judgment and appeal-time provisions of Civil Rule 58 and Appellate Rule 4, which — under amendments to take effect this December 1 — are explicitly integrated with Rule 54. But it also is important to recognize the distinctive features of class-action fee applications, particularly with respect to the appropriate time for a fee motion. Subdivision (h) would provide that a motion for fees must be made "at a time set by the court."

The proposed amendment also requires that notice regarding attorney fee motions by class counsel be directed to class members in a reasonable manner (similar to Rule 23(e) notice to the class of a proposed settlement). In a case in which settlement approval is contemplated, notice of class counsel's fee motion should be combined with notice of the proposed settlement. In an adjudicated case, the court may modify the notice to avoid undue expense.

Paragraph (2) would allow any class member or party from whom payment is sought to object to the attorney fee motion. The Committee Note points out that the court may direct discovery depending on the completeness of the material submitted in support of the fee motion, which depends in part on the applicable fee-measurement standard. The Note also makes clear that broad discovery is not normally approved in regard to fee motions.

Proposed paragraph (3) calls for findings under Rule 52(a) and authorizes the court to determine whether to hold a hearing on the motion. In settled class actions, the hearing might well be held in conjunction with proceedings under Rule 23(e), and in other situations there should be considerable flexibility in determining what suffices as a hearing. The findings requirement provides important support for meaningful appellate review. As under Rule 54(d)(2), the court can refer the motion to a special master or magistrate judge. The Committee

Note sets out the factors that courts have recently, and consistently, found important to consider in determining whether the fee sought is "reasonable." The Note attempts to identify the analytic framework for such determinations, recognizing that the case law will continue to develop and will have subtle variations from circuit to circuit. The factors discussed in the Note cut across different methods of determining the size of fee awards, such as percentage of fund or lodestar.

RULE 51 (INSTRUCTIONS TO JURY: OBJECTION)

The Rule 51 project began with a specific request from the Ninth Circuit Judicial Council. Reviewing local district rules, the Ninth Circuit found that many districts had rules that require submission of proposed jury instructions before trial begins. The Council was concerned that these rules may be invalid in light of Rule 51's provision for filing requests "[a]t the close of the evidence or at such earlier time *during trial* as the court reasonably directs." The proposed amendments expressly validate the practices of these courts. The proposed amendments also are designed to capture many of the interpretations of Rule 51 that have emerged in practice and remove traps for the unwary.

Proposed amendments to subdivision (a) govern requests regarding instructions to the jury. The revision recognizes a court's authority to direct that the requests be submitted before trial. But the amendment expressly allows a party to file a later request concerning issues that could not reasonably have been anticipated at the earlier time for requests set by the court. The court also may permit untimely requests on any issue.

The proposed amendments to subdivision (b) govern the instructions to the jury. Paragraph (1) requires the court to inform the parties of all instructions, not only action on requests, before instructing the jury and before jury arguments. Paragraph (2) makes explicit the parties' opportunity to object on the record to the proposed instructions. Paragraph (3) recognizes