

Back to the Future? Product Liability Class Actions and Proposed Rule 23 Changes

After 30 years, class action jurisprudence is in ferment, and proposed changes in Rule 23 will add to the mix

By Ian Gallacher, Bruce R. Parker and Donald L. DeVries

THE current version of Rule 23 of the Federal Rules of Civil Procedure is almost 31 years old. As perhaps with all children, the class action has evolved in ways other than its parents, the Civil Rules Advisory Committee and the Judicial Conference of the United States, might have expected, and has developed a personality all its own. In particular, Rule 23's adolescent flirtation with products liability and settlement classes has deepened into a serious, and apparently permanent, relationship.

Professor Benjamin Kaplan, reporter to the advisory committee that drafted the 1966 amendments to Rule 23, was quoted as remarking that "it will take a generation or so before we can fully appreciate the scope, the virtues, and the vices of the new Rule 23."¹ As the modern class action enters middle age, however, it faces an uncertain future. Recent decisions from the Fifth, Sixth and Seventh Circuits indicate that the future of large products liability classes is in doubt. Moreover, the availability and nature of the settlement class no doubt will change as a result of recent conflicting decisions in asbestos litigation in the Third and Fifth Circuits and the U.S. Supreme Court's review of the issue.

Now the Civil Rules Advisory Committee has decided to try to reimpose some control on its unruly offspring. It has proposed draft changes in the class action rule that, if adopted, will no doubt set its course into the foreseeable future. Public hearings on the amendments have been held in Philadelphia, Dallas and San Francisco, and the period for public comment closed February 15 of this year.

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PRODUCTS LIABILITY CLASS ACTIONS

When Rule 23 was amended in 1966, it was clear that the Civil Rules Advisory Committee had no intention of creating a device that allowed for the certification of nationwide, let alone worldwide, products liability class actions. In its note, the committee stated:

A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to li-

¹ Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 52 (1967).

ability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

Over the years, the Advisory Committee has been criticized as being "short-sighted,"² causing some courts to read and apply Rule 23 narrowly.³ In particular, the Advisory Committee note came under attack from those who argue that the class action device is being improperly restricted⁴ and that a broader interpretation of Rule 23 would achieve the goal of judicial economy and preservation of resources.⁵

Ultimately, even an ex-officio member of the advisory committee, Charles Alan Wright, sought to distance himself from the committee's 1966 position:

I was an ex officio member of the Advisory Committee on Civil Rules when Rule 23 was amended, which came out with an Advisory Committee Note saying that mass torts are inappropriate for class certification. I thought then that that was true. I am profoundly convinced now that that is untrue. Unless we can use the class action and devices built on the class action, our judicial system is simply not going to be able to cope with the challenge of mass repetitive wrong that we see in this case and so many others that have been mentioned this morning and afternoon.⁶

The value of Professor Wright's much-quoted retreat is somewhat diminished by the fact that he was appearing on behalf of the party seeking class certification in the school asbestos litigation.⁷ Recently, the Fifth Circuit noted that Professor Wright's comments "must be viewed with some caution" and quoted a letter from him in which he appears to change his position yet again:

I certainly did not intend by that statement to say that a class should be certified in all mass tort cases. I merely wanted to take the sting out of the statement in the Advisory Committee Note, and even that said only that a class action is "ordinarily not appropriate" in mass tort cases. The class action is a complex device that must be used with discernment. I think for example that Judge Jones in Louisiana would be creating a Frankenstein's monster if he should allow certification of what purports to be a class action on behalf of everyone who has ever been addicted to nicotine.⁸

By the late 1980s, the courts had been gradually persuaded by the original arguments and found that the Advisory Committee's suggestion was unworkable. It was increasingly disregarded. By 1989 it was possible for the Fourth Circuit in *A.H. Robins Co. Inc.* to state, "It is obvious that there is a movement towards a more liberal use of Rule 23 in the mass tort context."⁹

2. American Law Institute, *Complex Litigation: Statutory Recommendations and Analysis with Reporter's Study: A Model System for State-to-State Transfer and Consolidation, Introductory Note to Chapter Three*, at 28 (1994) [hereinafter ALI Project].

3. See, e.g., *In re Northern Dist. of California Dalkon Shield IUD Prod. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983); *In re Fed. Skywalk Cases*, 680 F.2d 1175 (8th Cir.), cert. denied, 459 U.S. 988 (1982); *In re Hotel Tel. Charges*, 500 F.2d 86 (9th Cir. 1973); *Ryan v. Eli Lilly & Co.*, 84 F.R.D. 230 (D. S.C. 1979).

4. See, e.g., ALI Project, *supra* note 2, at 27-30 and accompanying notes; Miller, *An Overview of Federal Class Actions: Past, Present and Future* 45 (Federal Judicial Center 1977); Comment, *Federal Mass Tort Class Actions: A Step Toward Equity and Efficiency*, 47 ALB. L. REV. 1180 (1983); Note, *Class Certification in Mass Accident Cases under Rule 23(b)(1)*, 96 HARV. L. REV. 1143 (1983).

5. See also HERBERT NEWBERG & ALBA CONTE,

NEWBERG ON CLASS ACTIONS § 17.06, at 17-20 [hereinafter NEWBERG]. This work is an extremely valuable resource for all class action practitioners. However, defense counsel should read it with a healthy dose of skepticism, since Herbert Newberg had an extremely successful practice representing plaintiffs. Indeed, the Fourth Circuit's reliance on the work in *In re A.H. Robins Co. Inc.*, 880 F.2d 709 (4th Cir. 1989), cert. denied *sub nom.* *Anderson v. Aetna Cas. & Sur. Co.*, 493 U.S. 959 (1989), is troublesome, in that Newberg himself was one of the lawyers representing the appellees in that case.

6. NEWBERG, *supra* note 5, § 17.06.

7. *In re School Asbestos Litigation*, Master File 830268 (E.D. Pa.), Class Action Argument, July 30, 1984, Tr. at 106.

8. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.19 (5th Cir. 1996), quoting letter of Dec. 22, 1994, to N. Reid Neureiter, Williams & Connolly, Washington D.C.).

9. *A.H. Robins*, 880 F.2d at 734 (4th Cir.).

SUPPLEMENTAL JURISDICTION

One of the rationales used to justify certification of mass tort class actions was that the class device permits litigants with relatively small claims to have their day in court.¹⁰ The U.S. Supreme Court addressed this issue in *Eisen v. Carlisle & Jacquelin*, an antitrust case that nevertheless has been much cited in the mass torts and products liability area. The Court stated: "A critical fact in this litigation is that petitioner's stake in the damage award he seeks is only \$70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all."¹¹

However, in *Zahn v. International Paper Co.*, a year before *Eisen*, the Supreme Court took the position that in class actions brought pursuant to 28 U.S.C. § 1332(a)'s grant of diversity jurisdiction, "Each plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—one plaintiff may not ride in on another's coattails."¹²

Although *Zahn* did not present an insurmountable obstacle to those determined to bring claims of negligible economic value in federal court, it was nonetheless a useful tool for those defending against meritless claims and a bar to those seeking to circumvent the statutory amount in controversy requirement for diversity jurisdiction. This situation persisted until Congress

passed the Judicial Improvements Act of 1990, codified at 28 U.S.C. § 1367, which provides for supplemental jurisdiction "over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." Claims under certain rules are exempted; but not claims under Rule 23.

The act has met with extensive criticism,¹³ which is understandable when its legislative history is considered. The House Committee on the Judiciary intended it to be "noncontroversial."¹⁴ Indeed, the stated essential purpose of the act was to overrule by statute the Supreme Court's decision in *Finley v. United States*,¹⁵ which held that federal courts could not exercise pendent-party jurisdiction without an express legislative grant. The House report states that the supplemental jurisdiction section of the act was not "intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*."¹⁶ Since *Zahn* was a pre-*Finley* case, the act was clearly not intended to apply to the *Zahn* holding.

Unfortunately, the drafters of the act omitted Rule 23 from the list of the Rules of Civil Procedure unaffected by the act. In a law review article, three of the drafters conceded:

It would have been better had the statute dealt with explicitly with this problem, and

10. See Professor Benjamin Kaplan, former reporter to the Advisory Committee, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 397-98 (1967) [hereinafter Kaplan].

11. 417 U.S. 156, 161 (1974). See also NEWBERG, *supra* note 5, at § 4.33, 4-95; *Hohmann v. Packard Instrument Co.*, 399 F.2d 711 (7th Cir. 1968); *Wehner v. Syntex Corp.*, 117 F.R.D. 641 (N.D. Cal. 1987).

12. 414 U.S. 291, 301 (1973), quoting from the opinion below, 469 F.2d 1033, 1035 (2d Cir. 1972).

13. See, e.g., JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 0.97[5], at 928 (2d ed. 1994) (citing "congressional sloth" in act's drafting for current confusion regarding *Zahn*'s continued viability);

Thomas C. Arthur & Richard D. Freer, *Close Enough for Government Work: What Happens When Congress Doesn't Do Its Job*, 40 EMORY L.J. 1007, 1007 (1991) (describing supplemental jurisdiction statute as "nightmare of draftsmanship").

14. 1990 U.S.C.C.A.N. 6860, 6861.

15. 490 U.S. 545 (1989).

16. 1990 U.S.C.C.A.N. at 6875 and n.17. The inclusion of this statement in the legislative history was specifically intended to show that *Zahn* was intended to survive the act. Thomas D. Rowe Jr., Stephen B. Burbank & Thomas M. Mengler, *Compounding or Creating Confusion about Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943, 960, n.90 [hereinafter Rowe]. The three authors were among the drafters of the act.

the legislative history was an attempt to correct the oversight. The resulting combination of statutory language and legislative history, however, creates the delicious possibility that despite Justice Scalia's opposition to the use of legislative history, he will have to look to the history or conclude that Section 1367 has wiped Zahn off the books.¹⁷

The result of the drafters' "oversight" was inevitable. In *In re Abbott Laboratories*, the Fifth Circuit concluded that, although the omission of class actions from the act's exceptions might have been a clerical error,

... the statute is the sole repository of congressional intent where the statute is clear and does not demand an absurd result. . . . Abolishing the strictures of Zahn is not an absurd result. Justice Brennan's dissent joined by Justices Douglas and Marshall states the counterposition. Some respected commentators would welcome Zahn's demise. . . . We are persuaded that under Section 1367 a district court can exercise supplemental jurisdiction over members of a class, although they did not meet the amount-in-controversy requirement, as did the class representatives.¹⁸

The Fifth Circuit's decision is not the last word on this issue. Two district courts, for example, have found ambiguity in the act and have looked to the legislative history to resolve it.¹⁹ Neither court, however, came up with a particularly strong reason for its finding of ambiguity, and it is likely that the *Abbott* court's holding ultimately will prevail, a result that inevitably will lead to more diversity-based class actions in federal court, either through direct filing

or removal. The acceptance of small claim class actions, moreover, will support the certification of class actions filed purely for settlement purposes, in which the majority of class members will receive an amount less than \$75,000.

RHONE-POULENC

At the beginning of 1995, the future of the products liability class action appeared limitless. First there was *A.H. Robins*, holding that a more liberal approach to class certification in the products liability area was appropriate. Then came the Judicial Improvements Act of 1990, which set aside Zahn's limitations on small claims class actions. When viewed in this context, the Seventh Circuit's decision in *In re Rhone-Poulenc Rorer Inc.*,²⁰ was nothing less than shocking.

Rhone-Poulenc involved a class action brought by hemophiliacs who alleged that they had contracted the AIDS virus as a result of the actions of a group of blood product manufacturers. The district court certified a class for certain issues only, pursuant to Rule 23(c)(4)(A), which provides that an "action may be maintained as a class action with respect to particular issues." The manufacturers petitioned the Seventh Circuit for a writ of mandamus, since the certification of a class is not a final and appealable order.

In analyzing the merits of the manufacturers' position, Judge Richard Posner, writing for the Seventh Circuit panel, determined that a writ of mandamus ordering the decertification of the class was merited. He held that, even though the decision to certify a class might ultimately be reviewable by an appellate court, such review would be too late to provide effective relief to the defendants. The rationale behind this decision was that "the sheer magnitude [court's emphasis] of the risk to which the class action, in contrast to the individual actions pending or likely," to which the defendants would be exposed would be so great that they could not afford to risk an adverse verdict. Accordingly, they would

17. Rowe, *supra* note 16 at 960 n.90.

18. 51 F.3d 524, 528-29 (5th Cir. 1995), citations omitted, *reh'g en banc denied*, 65 F.3d 33 (5th Cir. 1995). The Fifth Circuit did not discuss the patent absurdity of overruling a well-established Supreme Court decision on the basis of a "clerical error."

19. *Waters v. Grosfeld*, 904 F.Supp 616 (E.D. Mich. 1995); *Snider v. Stimson Lumber Co.*, 914 F.Supp. 388 (E.D. Cal. 1996).

20. 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S.Ct. 184 (1995).

be effectively coerced into a settlement with the plaintiffs.²¹

Judge Posner denied that he was holding that economic pressures were a valid reason for decertification of a class:

We do not want to be misunderstood as saying that class actions are bad because they place pressure on defendants to settle. That pressure is a reality, but it must be balanced against the undoubted benefits of the class action that have made it an authorized procedure for employment by federal courts. We have yet to consider the balance. All that our discussion to this point has shown is that the first condition for the grant of mandamus—that the challenged ruling not be effectively reviewable at the end of the case—is fulfilled.²²

Despite this disclaimer, Judge Posner again raised the issue of the economic implications of class actions while considering the next prong of the mandamus test—the usurpative nature of the district court's certification order. The opinion articulates three concerns that led the Seventh Circuit to the conclusion that the district court had exceeded the bounds of judicial discretion.

The first of these was Judge Posner's restated belief that the class action device should not be used to coerce a settlement from a defendant that cannot afford to litigate a class action to conclusion. "With the aggregate stakes in the tens or hundreds of millions of dollars, or even in the billions," he wrote, "it is not a waste of judicial resources to conduct more than one trial, before more than six jurors, to determine whether a major segment of the international pharmaceutical industry is to follow the asbestos manufacturers into Chapter 11."

The economic argument is probably the least successful of those offered by Judge Posner for decertification. Judge Ilana Rovner, in a dissent mostly devoted to criticism of the majority's decision to grant mandamus, roundly criticized this element of Judge Posner's opinion:

[T]he majority's arguments addressed to the propriety of forcing "defendants to stake

their companies on the outcome of a single jury trial" or of allowing a single jury "to hold the fate of an industry in the palm of its hand" seem to me at odds with Fed.R.Civ.P. 23 itself. . . . That rule expressly permits class treatment of such claims when its requirements are met, regardless of the magnitude of potential liability. And I see nothing in Rule 23, or in any of the relevant cases, that would make likelihood of success on the merits a prerequisite for class certification. . . . The majority's preference for avoiding a class trial and for submitting the negligence issue "to multiple juries constituting in the aggregate a much larger and more diverse sample of decision-makers" . . . is a rationale for amending the rule, not for avoiding its application in a single case.²³

Some courts have criticized the "economic implications" argument of *Rhone-Poulenc*. In a class action in Wyoming, the federal district court declined to follow what it termed "the Seventh Circuit's application of economic justice to the Federal Rules of Civil Procedure," and stated that Judge Posner's "economic reasoning may carry substantial weight in the Seventh Circuit, but this court must look to [Rule] 23 and its interpretation by the courts to determine the appropriateness of class certification."²⁴

Judge Posner's second stated concern is considerably more substantial than the economic argument. Put simply, the trial court intended to instruct the jury in the class trial by merging the laws of the 50 states and the District of Columbia together to form what Judge Posner termed a kind of "Esperanto" instruction. This prompted his statement:

One is put in mind of the concept of "general" common law that prevailed in the era of

21. *Id.* at 1297, 1298, citing HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973) (describing settlements induced by small probability of immense judgment in class action as "blackmail settlements").

22. *Id.* at 1299.

23. *Id.* at 1307-08, citations omitted.

24. In re Copley Pharmaceutical Inc. "Albuterol" Prod. Liab. Litig., MDL 1013 (D. Wyo., April 25, 1995), at 9, 10.

Swift v. Tyson. The assumption is that the common law of the 50 states and the District of Columbia, at least as far as bears on a claim of negligence against drug companies, is basically uniform and can be abstracted in a single instruction. It is no doubt true that at some level of generality the law of negligence is one, not only nationwide but worldwide. Negligence is a failure to take due care, and due care a function of the probability and magnitude of an accident and the costs of avoiding it. . . .

[However, if one instruction on negligence will serve to instruct the jury on the legal standards of every state of the United States applicable to a novel claim, implying that the claim despite its controversiality would be decided identically in all 50 states and the District of Columbia, one wonders what the Supreme Court thought it was doing in the *Erie* case when it held that it was *unconstitutional* for federal courts in diversity cases to apply general common law rather than the common law of the state whose law would apply if the case were being tried in state rather than federal court.²⁵

In this analysis, Judge Posner is surely correct. The differences in state products liability law may range from subtle to extreme but, as he observed, "nuance can be important." For an example of the difference a nuance can make, one need only look to the standards applied by different states to the concept of strict liability. Moreover, it is not the job of the federal courts to determine that two states have laws so close that they can be treated effectively as identical. Federal courts sitting in diversity are bound by what they believe state courts would do, "rather than what they may think personally would be the result most harmonious with the state statute."²⁶ The job of calibrating the degree to which one state's laws are similar to, or different than, those of another state is properly left to the state courts and legislatures.

25. 51 F.3d at 1300, citations omitted, court's emphasis.

26. *J.C. Wycoff & Assocs. v. Standard Fire Ins. Co.*, 936 F.2d 1474, 1485 (6th Cir. 1991).

A moment's consideration of the practical issues involved in trying a nationwide products liability case under the laws of all 50 states and the District of Columbia demonstrates why such a task is impossible. The jury instructions and verdict form alone would be impossible to craft and to understand. Moreover, some state laws are diametrically opposed on certain issues, thus rendering unified treatment impossible. These issues are rarely, if ever, tested because nationwide products liability class actions do not, as a rule, go to trial and verdict. This should not, however, blind the parties and the courts to the fact that such trials are impossible.

A more abstract, yet equally compelling, issue formed the last of Judge Posner's "concerns" in *Rhone-Poulenc*. The trial court had certified a class for some, but not all, issues. After the class trial was concluded, the district court intended to allow individual class members to sue in various state and federal courts around the country, using the class verdict obtained on their behalf to prevent duplicative litigation on issues that had already been resolved.

The problem with this plan, as observed by Judge Posner, was that it did not—and could not—preclude the possibility of subsequent juries considering issues that already had been tried and resolved by the class action jury. He wrote:

The plan of the district judge in this case is inconsistent with the principle that the findings of one jury are not to be reexamined by a second, or third or nth jury. The first jury will not determine liability. It will determine merely whether one or more of the defendants was negligent under one of the two theories. The first jury may go on to decide the additional issues with regard to the named plaintiffs. But it will not decide them with regard to the other class members. Unless the defendants settle, a second (and third, and fourth, and hundredth, and conceivably thousandth) jury will have to decide, in individual follow-on litigation by class members not named as plaintiffs in the *Wadleigh* case, such issues as comparative negligence . . . and proximate causation.

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Both issues overlap the issue of the defendants' negligence.²⁷

The Seventh Amendment bars the re-examination by a second jury of issues decided by a previous jury. To take an example even simpler than that offered by Judge Posner: in cases where punitive damages are sought by an individual, non-representative class member—after an initial class determination of negligence on the part of the defendant—the jury considering that class member's case would have to hear evidence of the defendant's conduct in order to determine whether it was sufficiently egregious to merit punitive damages. Yet the evidence of the defendant's conduct is precisely the same evidence as was considered by the first jury in order to determine the defendant's negligence. This is an axiomatic violation of the Seventh Amendment.

It is unlikely that the Rules Advisory Committee intended that Rule 23(c)(4)(A) should be used in the manner proposed by the district court in *Rhone-Poulenc*. First, as has been noted, the committee had no notion that Rule 23 would be used to support mass products liability litigation. Second, the committee note to Rule 23(c)(4) makes clear that the drafters intended that the issue bifurcation provision of the rule would be used in a manner consistent with traditional bifurcation:

The provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case, the action may retain its "class" character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

The Seventh Amendment guarantees the right to a jury trial, a particularly cherished right under the Constitution. Indeed, Judge Posner observed that when the writ of mandamus is used for the protection of the Seventh Amendment right to jury trial, "strict compliance with the stringent conditions on the availability of the writ [of

mandamus] (including the requirement of proving irreparable harm) is excused."

Judge Posner's emphasis on the Seventh Amendment problem inherent in class action issue bifurcation is subject to the same potential criticism as his concerns regarding the economic impact of class action certification on defendants. Both issues present an appellate court with a reason to grant a petition for writ of mandamus. Accordingly, runs the argument, they are both issues that appeal to a result-oriented judge who has no principled basis in law for even considering the petition, let alone granting it. Under this argument, the economic jeopardy into which a defendant is placed after class certification constitutes an "irreparable harm," since the defendant has no realistic opportunity to obtain appellate review of the decision. Moreover, if the district court bifurcates issues, it is possible that the defendant need not even be able to demonstrate irreparable injury, since the threat to its Seventh Amendment right to a jury trial is sufficient for the appellate court to grant the writ of mandamus.

Such criticisms, in part, form the basis for Judge Rovner's dissent. She noted that the majority's first assertion—that class certification is so economically coercive as to amount to an irreparable injury—would mean that virtually every certified class passed the preliminary mandamus requirement that there be a lack of alternative means for obtaining relief, stating:

Certification orders almost always increase the likelihood of settlement by expanding the scope of defendants' exposure. Yet that does not make the order any less reviewable if defendants resist the temptation to settle and litigate to final judgment. . . . Indeed, in concluding that certification orders are not immediately appealable under 28 U.S.C. § 1291, the Supreme Court observed that any order certifying a large plaintiff class "may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to

27. 51 F.3d at 1303.

abandon a meritorious defense." . . . Yet that did not stop the court from finding that "orders granting class certification are interlocutory and thus not immediately appealable as of right."²⁸

Judge Rovner also contested the majority's Seventh Amendment position, arguing in essence that such considerations were not ripe because the invasion of the right to a jury trial would come at the second phase of trials and not as an immediate and inevitable consequence of the certification order. Accordingly, "if any constitutional problem were to materialize, it would be reviewable either by this court after the class trial or by other courts reviewing phase II trials."

In this, Judge Rovner is surely mistaken. The trial court envisaged a situation in which the class trial and any appeal flowing therefrom would be followed by numerous individual trials in the federal and state courts around the country. Appellate review of the Seventh Amendment issue would not be available at the appeal of the class trial under Judge Rovner's logic, since the constitutional infringement would not yet have taken place. Certainly the Seventh Circuit would have no appellate jurisdiction to consider the argument that a defendant's Seventh Amendment rights had been violated in a phase II trial conducted, for example, in an Alabama state trial court. Any such review would have to be conducted by an Alabama appellate court.

Moreover, the only realistic remedy that a reviewing court could grant would be the retrial of all issues before the trial court, without reference to the class trial. In such a circumstance, the class trial would go for nothing, and the parties and the courts would suffer the cost, in time and money, of a class trial that ultimately would have no effect. Such a result is not compelled by case law, and indeed Judge Rovner con-

ceded that the Supreme Court cases cited by Judge Posner stood for the proposition that there was no need to await an appeal from a final judgment to remedy an obvious violation of the Seventh Amendment. Similarly, there is no need to waste the time and effort of the court and the parties where a court's certification makes a Seventh Amendment violation inevitable, even if it has not yet actually occurred.

Significantly, Judge Rovner's dissent focuses principally on the majority's decision to grant the petition for a writ of mandamus and less on the wisdom of the district court's decision to certify a class. Indeed, the dissent makes no mention of the most significant failing in the district court's certification order—the proposed amalgamation of the tort laws of the 50 states and the District of Columbia.

It is this issue, however, that has been featured prominently in two subsequent decisions, both ordering the decertification of class actions.

AMERICAN MEDICAL SYSTEMS

Any questions that the legal community might have had regarding the impact of *Rhone-Poulenc* and its effect on subsequent class action jurisprudence were answered effectively by the Sixth Circuit's 1996 opinion in *In re American Medical Systems Inc.*²⁹ There the court also was confronted with a petition for a writ of mandamus, the petitioners seeking the decertification of a class of penile prosthesis implantees.

In a unanimous opinion, the Sixth Circuit determined that the issuance of a writ of mandamus was warranted. It reviewed the trial court's analysis of the Rule 23 factors and determined that, other than the "numerosity" requirement, the trial court had erred in determining that the factors were met. Although much of the discussion in *AMS* dwells on issues that are case specific, several points have broader application.

The first of these is an acknowledgment that the trial court has an obligation to con-

28. *Id.* 1305-06, citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978).

29. 75 F.3d 1069 (6th Cir. 1996).

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duct a detailed review of the moving party's class allegations. The most obvious of the class certification standards is that the party seeking class certification has the burden of proving that Rule 23's prerequisites have been met. The court must conduct a "rigorous analysis" into whether Rule 23's requirements have been met before certifying a class. This rigorous analysis may require the court to "probe behind the pleadings" in order to determine whether or not certification is merited. Such probing is not contradictory to the Supreme Court's admonition to the courts not to consider the merits of plaintiffs' claims in determining whether a class should be certified. The Sixth Circuit found that the district court had failed to do this.

The district court's most significant failure, however, was its lack of consideration of the laws of all 50 states. Quoting from *Rhone-Poulenc*, the Sixth Circuit observed that even nuances among the various state laws can be important and that the failure to consider these differences was error.

Based on its conclusion that the parties seeking certification had failed to meet their burden of proof and that therefore the court's certification of a class was in error, the court determined that one of its criteria for granting a writ of mandamus—that the trial court committed patent error—was met. In order to determine that the other factors required for a successful mandamus petition were met, the Sixth Circuit determined that the district court's failure to make "genuine findings [of fact] on any of the elements of Rule 23 when the record before him required such action" barred the petitioners from an adequate alternative means of obtaining relief. Moreover, the nature of the trial court's certification order constituted irreparable error.

The most controversial element of the Sixth Circuit's opinion, however, came in its consideration of the fourth criterion for granting a mandamus petition—whether the district judge's certification order is "an oft-repeated error or manifests a persistent

disregard of the federal rules." The court noted that the district judge, Carl B. Rubin, had certified two prior products liability classes,³⁰ and, "In a larger context, despite a nationwide trend to deny class certification in drug or medical product liability/personal injury cases, . . . this case marks the fourth medical product liability class certified in the Southern District of Ohio in the past three years. . . ."³¹ The court went on to state, "Because the abuse of discretion in this case is so clear, and the district judge in this case has a history of such conduct, we think it appropriate for this court to exercise its mandamus powers '[to] avoid repeated errors of this magnitude in applying the Federal Rules of Civil Procedure.'"³²

The flaw in the Sixth Circuit's logic is that Judge Rubin had died prior to the publication of the circuit's decision in *AMS*. It is difficult to read the *AMS* opinion as anything less than a stern warning to the other judges of the Southern District of Ohio to heed the "national trend" to deny class certification in drug or medical product liability/personal injury cases. This impression is strengthened by the court's reminder to district judges that both Supreme Court and Sixth Circuit precedent require close adherence to the strictures of Rule 23.

Certainly, the district judges of the Southern District of Ohio appear to be heeding the *AMS* warning. Senior District

30. *Dante v. Dow Corning Corp.*, 143 F.R.D. 136 (S.D. Ohio 1992); *Wilson v. Siemens Pacesetter, Inc.*, No. C-1-93-0188 (S.D. Ohio, Sept. 10, 1993).

31. 75 F.3d at 1089, citing *Dow* (breast implants), *Siemens* (heart pacemakers), *AMS* (penile implants), and *In re Cordis Corp. Pacemaker Prod. Liab. Litig.*, MDL No. 850 (S.D. Ohio, Dec. 23, 1992) (heart pacemakers). In fact, the Sixth Circuit forgot to count *In re Teletronics Pacing Systems Inc. Accufix Atrial "J" Leads Prod. Liab. Litig.*, MDL No. 1057 (S.D. Ohio, Nov. 16, 1995) (pacemaker leads), making five major products liability class actions certified in the Southern District of Ohio within three years.

32. 75 F.3d at 1089, citing *McDonnell Douglas Corp. v. U.S. Dist. Court*, 523 F.2d 1083, 1087 (9th Cir. 1975), *cert. denied sub nom. Flanagan v. McDonnell Douglas Corp.*, 425 U.S. 911 (1976).

Judge S. Arthur Spiegel of that court recently decertified a class he previously had certified, relying in part *AMS*.³³

CASTANO

The other recent decision with a major impact on the products liability class action is the *Castano* opinion from the Fifth Circuit.³⁴ The trial court had certified what must surely have been the largest class action ever attempted, including practically all nicotine-dependent persons in the United States who had purchased and smoked cigarettes since 1943.

The size of the proposed class, however, was only tangential to the Fifth Circuit's analysis. Rather, the court stressed the same issues discussed in *Rhone-Poulenc* and *AMS*. But a difference is that the trial court in *Castano* had recognized the magnitude of the proposed undertaking and had certified his decision for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b). So the issue of class certification was before the Fifth Circuit for appellate review, not for consideration of a petition for a writ of mandamus.

As in *Rhone-Poulenc*, the district court certified a class that would resolve certain "core liability issues," deferring an analysis of how certain issues would affect the "predominance" requirement of Rule 23(b)(3) until later.

One of the issues deferred by the trial court was how variations in state law would affect the litigation. But in an opin-

ion by Judge Jerry E. Smith, the Fifth Circuit held that a trial court considering class certification has a

duty to determine whether the plaintiff has borne its burden on class certification [by considering] variations in state law when a class action involves multiple jurisdictions. "In order to make the findings required to certify a class action under Rule 23(b)(3) . . . one must initially identify the substantive law issues which will control the outcome of the litigation."³⁵

The court went on to hold that the trial court's failure to conduct a review of the differences in state law, and how these differences could be resolved in such a way as would make the class manageable, was error. However, prior to conducting a brief overview of some pertinent differences in state law for some of the "core liability issues" certified by the trial court, Judge Smith also observed that it would be "difficult to fathom how common issues could predominate in this case when variations in state law are thoroughly considered."

Accordingly, although the trial court failed to consider the variations in state law, and this error was itself in part responsible for the decertification of the class, it is likely that the Fifth Circuit would have reached the same conclusion regardless of the depth of analysis engaged in by the trial court. Although the court does not say as much, a fair reading of this opinion would be that a class action in which the laws of all fifty states must be considered is *ipso facto* uncertifiable.³⁶

The *Castano* opinion also criticizes the trial court's failure to consider how the plaintiffs' nicotine addiction claims would be tried, individually or on a class basis. The result of the trial court's failure to go beyond the pleadings, as suggested by the Supreme Court in *General Telephone Co. v. Falcon*,³⁷ was deemed to be an "incomplete and inadequate predominance inquiry."

The gravamen of the Fifth Circuit's objection to the trial court's certification analysis was, in essence, that by failing to

33. In re Telelectronics Pacing Sys. Ins., 168 F.R.D. 203 (S.D. Ohio 1996). The plaintiffs in this case have filed a renewed motion for class certification.

34. *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

35. *Id.* at 741, quoting *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 316 (5th Cir. 1978).

36. Both the Sixth (75 F.3d at 1089) and the Ninth circuits (*Valentine v. Carter-Wallace Inc.*, 97 F.3d 1227, 1233 (9th Cir. 1996)) have expressly declined to find a per se rule that class actions in products liability cases should be prohibited. In both cases, the courts reversed the certification of a class by the district courts.

37. 457 U.S. 147 (1982).

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look beyond the pleadings, the court could not make an adequate assessment of the "predominance" requirement of Rule 23(b)(3). Without looking at how a case will be tried, it is impossible to make an adequate determination of "predominance," the court declared. Failure to do so effectively would write the "predominance" requirement out of Rule 23(b)(3), since any issue sufficiently common to the class to meet the "commonality" requirement of Rule 23(a) would be so significant to the litigation as to constitute a predominating common issue.

As an alternative theory for decertification, the Castano court offered an economic argument that, at first glance, has much in common with the *Rhone-Poulenc* analysis. Judge Smith also speaks in terms of the "judicial blackmail" inherent in the certification of a class against a manufacturer or group of manufacturers, and also of the potential of bankrupting a major segment of an industry. However, Judge Smith's argument is more developed than that of Judge Posner, in part because the Fifth Circuit was presented with the issue on interlocutory appeal. There was no need for the Fifth Circuit to analyze the economic issue in terms of the irreparable injury that would be done to the defendant without issuance of a writ of mandamus.

Freed from the constraints of the mandamus analysis in *Rhone-Poulenc*, the economic argument against certification becomes much more compelling. In essence, the Fifth Circuit held that mass torts, such as the tobacco litigation, are "immature" until a number of individual trials have been conducted:

Litigation is "mature" if through previous cases (1) discovery has been completed, (2) a number of verdicts have been received indicating the value of claims, and (3) plaintiffs' contentions have been shown to have merit. . . . Typically, in such litigation little or new evidence is likely, appellate review of novel legal theories has been completed, and a full cycle of trial strategies has been exhausted; examples include the Asbestos and Dalkon Shield litigation.³⁸

Until such trials have been conducted, and the parameters of the litigation have been thus established, the court said, it is impossible to know whether claim aggregation will, for example, save judicial resources and whether the benefits of class resolution of issues will outweigh the problems caused by class certification. Accordingly, it is error to force a defendant to go through the remarkable economic pressures inherent in class certification without adequate information that common issues predominate and judicial economy can be achieved.

In addition, the Fifth Circuit held that a trial court cannot have sufficient information to determine whether class treatment of an immature mass tort is a superior method of adjudication. In particular, the maturation of the tort through the process of individual state trials will make choice of law and subclassing issues much less difficult to resolve.

Finally, Judge Smith analyzed the claim-bifurcation issue, determining that the trial court's decision to sever the issue of the defendants' liability from defenses the defendants' might be able to assert in individual cases amounted to a violation of the Seventh Amendment's bar on re-examination by a second jury of issues resolved by a first jury. The analysis here runs down very similar lines to that articulated in *Rhone-Poulenc* and by the Fifth Circuit itself in *Alabama v. Blue Bird Body Co.*³⁹

One point made by the court in its bifurcation analysis, however, is worthy of further consideration. In seeking to persuade the court that certification was appropriate, the plaintiffs argued that time was running out for many of the class members and that a class action was their best chance to resolve the litigation in their lifetimes. This argument is often made by plaintiffs in

38. 84 F.3d at 749. *Manual for Complex Litigation (Third)* § 33.26 at 322 n.1057, citing Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U.L. REV. 659, 659 (1989).

39. 573 F.2d 309 (5th Cir. 1978).

products liability class actions. As the Fifth Circuit noted, however, it fails to convince for two reasons.

It is true that mass tort litigation moves at a glacial pace and that some percentage of the plaintiffs will die before any final resolution is reached. A plaintiff's death, however, does not necessarily mean the death of the claim. As the Fifth Circuit observed, a plaintiff's family or estate can sue based on survivorship statutes. The court pointed out that the plaintiffs' class complaint envisioned survivor lawsuits and that, in fact, the named plaintiff, Dianne Castano, is a non-smoker suing both for the wrongful death of her husband and as a representative in a survival action.

Even were the survival of a plaintiff until final resolution of the litigation to be a genuine consideration in a certification decision, a class action is by no means guaranteed to be the fastest way to reach such a resolution. The court stated:

In a complicated case involving multiple jurisdictions, the conflict of law question itself could take decades to work its way through the courts. . . . Once that issue has been resolved, discovery, subclassing, and ultimately the class trial would take place. Next would come the appellate process. After the class trial, the individual trials and appeals on comparative negligence and damages would have to take place. The net result could be that the class action device would lengthen, not shorten, the time it takes for plaintiffs to reach final judgment.⁴⁰

Of course, the plaintiffs might have been

relying on the pressure of a class action to force the defendants into an early settlement, thus resolving the litigation relatively swiftly. For purposes of litigation, however, the fastest mode of trying a mass products liability case to final verdict is probably some combination of multidistrict consolidation for pretrial purposes, followed by individual trials.

SETTLEMENT CLASSES

The settlement class is a development of class action jurisprudence that could not have been anticipated by the drafters of the revised Rule 23. It is likely that the drafters of the revisions to Rule 23 in 1966 would have been shocked by the declaration of a judge that "courts have recognized that 'the requirements of Rule 23 may be more easily satisfied in the settlement context than in the more complex litigation context,'" with the rationale stated for this relaxation of Rule 23's requirements "to encourage sweeping settlements of complex disputes."⁴¹

Two recent asbestos cases have shone a bright light on the practice of settlement classes. In one, the Third Circuit dramatically tightened the requirements for settlement class certification. In the other, the Fifth Circuit, at least for the moment, has approved an extremely aggressive approach to settling mass products liability litigation.

A. Georgine

The Third Circuit's decision in *Georgine v. Amchem Products, Inc.*⁴² is significant for its holding that a settlement class must be held to the same standards as a litigation class and that Rule 23(b)(3)'s criteria also must be applied as if the case were to be litigated. This holding expands on the Third Circuit's decision in *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation (GMC Trucks)*,⁴³ in which the court had held that the Rule 23(a) requirements must be applied as if the case were going to be liti-

40. 84 F.3d at 751.

41. *Bowling v. Pfizer*, 143 F.R.D. 141, 158 (S.D. Ohio 1992), *appeal dismissed*, 14 F.3d 600 (6th Cir. 1993), *cert. denied*, 115 S.Ct. 294 (1994), quoting *A.H. Robins*, 85 B.R. at 378 (E.D. Va. 1988). See also *In re Bendectin*, 749 F.2d 300, 305 n.10 (6th Cir. 1984) (standards for certifying class are different depending on whether class is for settlement or for trial).

42. 83 F.3d 610 (3d Cir. 1996), *cert. granted sub nom. Amchem Prod. Inc. v. Windsor*, No. 96-270, 117 S.Ct. 379 (1996), oral argument Feb. 18, 1997.

43. 55 F.3d 768, *cert. denied sub nom. Gen. Motors Corp. v. French*, 116 S.Ct. 88 (1995).

gated, even though the class sought to be certified was a settlement class.

The rationale adopted by the Third Circuit was simple—there is no language in the rule that can be read to authorize separate, liberalized criteria for settlement classes. “Whatever the Advisory Committee on Civil Rules (and, of course, Congress) may ultimately determine the better rule to be,” the court declared, “we do not believe that the drafters of the present rule included a more liberal standard for 23(b)(3).” The court concluded that, despite the logistical advantages a settlement class might bring to litigation, such a class can only be certified if the case would have been “triable in class form,” to quote from *GMC Trucks*.

Judge Edward R. Becker then analyzed the class certified by the district court and concluded that it could not have been certified as a litigation class, and that therefore it could not be certified as a settlement class either. Given a potential change in Rule 23 that specifically would authorize settle-only classes, it is this analysis of class factors that might ultimately be the most influential portion of the *Georgine* opinion. The court determined that a class including all present and future claimants against asbestos manufacturers represented by the Center for Claims Resolution could not be certified because the criteria of Rule 23(a) and (b)(3) were not met. The court noted that plaintiffs who have claims based on potential future injuries had little in common, either with each other or with class members with present injuries. Although the court declined to hold that the commonality test of Rule 23(a) was not met, it ruled that this test is subsumed within the predominance requirement of Rule 23(b)(3), a requirement “which this class cannot conceivably meet.”

The court acknowledged the desirability of innovation in mass tort litigation but declared that reform of the language of Rule 23 must come from the legislative branch and not the judicial.

B. In re Asbestos Litigation

Any attempt to summarize the labyrinthine factual background to the Fifth Circuit’s recent decision in *In re Asbestos Litigation*,⁴⁴ is doomed to failure. The opinion itself sets out the factual background with admirable clarity.

It was a settlement class in which settlement negotiations were initiated by the defendants; the settlement negotiations were conducted, and concluded, prior to the filing of the motion for class certification; and the parties proposed, the trial court certified and the Fifth Circuit ultimately ratified, a class that disposed of all claims to be filed in the future against the defendants, without permitting any class member to opt-out of the proposed class.

In reaching its decision, Judge W. Eugene Davis, writing for the Fifth Circuit, held that the court should consider the terms of the settlement before it when determining whether Rule 23’s requirements had been met, stating:

The rule that a court should consider a proposed settlement, if one is before it, when deciding certification issues makes good sense. Settlements and the events leading up to them add a great deal of information to the court’s inquiry and will often expose diverging interests or common issues that were not evident or clear from the complaint.⁴⁵

In contrast, the *Georgine* court had declined to look at the settlement itself in reviewing the appropriateness of the class certification.

The settlement process in *Asbestos* was long and protracted, and several impartial parties were involved in the negotiation and review of the final settlement agreement. Judge Patrick E. Higgenbotham of the Fifth Circuit had been named by the district court to serve as “settlement facilitator,” and settlement negotiations were conducted by him, as well as by the district

44. 90 F.3d 963 (5th Cir. 1996).

45. *Id.* at 975.

judge. After the settlement was agreed to, and the class certification motion was filed, the district court appointed Professor Eric Green of the Boston University School of Law to serve as guardian ad litem for the class.

Many challenges were raised to the settlement process and the ultimate agreement, all of which the Fifth Circuit considered and rejected:

Although appellants' arguments challenging the approval of the global settlement are not insubstantial, *on the unique facts presented here* they do not carry the day. The global settlement was driven by insurance coverage litigation between Fibreboard and the Insurers which would have been catastrophic for whomever was on the losing side. None of the parties was prepared to take the enormous risk inherent in that litigation. The global settlement offers all sides the best solution possible by eliminating costly disputes between Fibreboard, its insurers, and asbestos claimants and ensuring an equitable distribution to asbestos claimants. The \$1.5 billion global settlement was a major accomplishment by all parties concerned and no one seriously challenges its adequacy or the desirability of avoiding another bankruptcy of a vigorous American company.⁴⁶

The majority's opinion is effectively criticized in a lengthy and well-reasoned dissent by Judge Jerry E. Smith, who wrote the court's opinion in *Castano*. Without attempting to paraphrase that dissent, several points about the majority's decision should be noted. The majority stresses the unique facts presented by this case. Indeed, *Asbestos* could be viewed in the context of judicial reaction (or over-reaction) to the potential judicial crisis brought on by asbestos litigation. As such, this case would not have significant applicability outside the asbestos realm.

46. *Id.* at 993 (emphasis supplied).

47. See, e.g., Richard B. Schmitt, *The Deal Makers: Some Firms Embrace the Widely Dreaded Class-Action Lawsuit*, WALL ST. J., July 18, 1996, at A1.

It is probably unrealistic, however, to believe that the Fifth Circuit's *Asbestos* opinion will not be widely quoted, or that the negotiate-first-sue-later practices employed by both sides in this litigation will not be widely emulated. Indeed, there are indications that more large businesses are looking to the class action as a friend rather than a foe as long as the correct settlement can be negotiated.⁴⁷

Another issue raised by the Fifth Circuit's opinion is the claim that the settlement offers all sides the best solution possible. The problem here is that the decision is being made for all potential future claimants. In other words, children as yet unborn, who may one day be exposed to asbestos products manufactured by the defendants in this action, already have had the parameters of their potential recovery defined by the class settlement without any say in the matter. Whatever may be the legal ramifications of the majority's opinion, the simple fact that plaintiffs who cannot be identified and might not even be born will have no ability to go beyond the confines of the present settlement will likely raise grave doubts in the minds of judges asked to certify such classes as to whether this is the "best solution possible."

Finally, although no one challenges the magnitude of the work necessary to negotiate the settlement ratified by the Fifth Circuit, and although no one may seriously challenge the adequacy of the settlement or the desirability of keeping the defendants solvent, this is not the point. Rule 23 is a rule of procedure, and the procedure set out in it, and the other Rules of Civil Procedure, must be followed. As *Georgine* demonstrates, even a settlement that is achieved after much work, and which might be in the parties' best interests, should not be approved by use of the class action mechanism if the class does not meet the requirements of Rule 23.

C. Future of Settlement Classes

The future of the settlement class is inextricably linked with the proposed revisions

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to Rule 23, discussed in the next section. However, the Civil Rules Advisory Committee appears to have taken the advice of the *Georgine* court and is proposing the liberalization of the settlement class. Doing that will marginalize the influence of the *Georgine* decision and make settlement classes much more readily obtainable. But then there also is the possibility that the Supreme Court will reverse *Georgine*.

Whether such liberality will extend to the settlement practices condoned in the Fifth Circuit's *Asbestos* decision, however, is open to doubt. Although the creativity demonstrated by defense counsel is to be applauded, it is unlikely whether many courts will be as willing to sanction the approach to settlement classes embodied in that case, especially in a case that does not pose the same real or perceived threat as does the asbestos litigation.

PROPOSED REVISIONS TO RULE 23

In 1991, the Judicial Conference of the United States requested the Standing Committee on Rules of Practice and Procedure to direct the Advisory Committee on Civil Rules to study whether Rule 23 should be amended to "accommodate the demands of mass tort litigation." The Advisory Committee has met many times and has considered many potential drafts of revisions.

To aid the Committee, the Federal Judicial Center conducted a study of all class action files terminated within a two-year period in four federal districts: the Eastern District of Pennsylvania; the Southern District of Florida; the Northern District of Illinois; and the Northern District of California.⁴⁸ The purpose was to study a variety of approaches used by the bench and bar in litigating and adjudicating class actions. In fact, however, the Administrative Office data were flawed, resulting in a substantial undercount of class action activity. This led the research group to conclude that, for the present and recent past at least, there are "no reliable data on class action activity in the federal courts."

After much debate, the Advisory Com-

mittee now has published a draft of its proposed revisions to Rule 23. If adopted, they will have a dramatic impact on class action practice well into the next century.

A. Small Claims Class Actions

The Advisory Committee states in its proposed notes that "one of the most important roles of certification under subdivision (b)(3) [of Rule 23] has been to facilitate the enforcement of valid claims for small amounts." This opinion is supported by the Federal Judicial Center study, which reported a median individual class member recovery range of \$315 to \$528. "These amounts are far below the level that would be required to support individual litigation, unless perhaps in a small claims court," the Advisory Committee states.

The draft amendments acknowledge the small claims role of class actions by addition of a new subparagraph (A) to Rule 23(b)(3), which provides that the pertinent considerations in the certification of a (b)(3) class include "the practical ability of individual class members to pursue their claims without class certification." However, the potential encouragement to certify small claims class actions is balanced by new subparagraph (F), which provides that another consideration in the certification of a (b)(3) class is "whether the probable relief to individual class members justifies the costs and burdens of class litigation."

After much debate, the advisory committee has made the decision to facilitate the filing of class actions that are likely to provide little monetary relief for the class members. This decision is unfortunate, and will perpetuate the belief that class action litigation is principally for the benefit of the lawyers, who recover large amounts while class members receive relatively small recompense.

48. Thomas E. Willging, Laura L. Hooper & Robert J. Niemic, *An Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*, at 6 (January 17, 1996).

The rationale behind the decision is laudable, but flawed. "Most private wrongs go without redress," the committee states. "Class treatment can provide meaningful redress for wrongs that otherwise would not be righted, and the value of individual relief can be important." The question is whether the federal courts are the appropriate forums for the redress of these wrongs. State courts have class action provisions, are courts of general jurisdiction and can be used to resolve litigation that, if filed individually, would not come close to meeting the jurisdictional amount in federal court.

However, the advisory committee's decision to validate small claims class actions will not significantly affect the course of class action litigation. Congress already has encouraged such litigation with its passage of the flawed Judicial Improvement Act of 1990. It seems unlikely that Congress will fix its mistake of including class actions in the supplemental jurisdiction provisions of that act. So small claims class actions are likely to be a part of federal court practice for the foreseeable future.

B. Maturity of Litigation

The advisory committee's inclusion of the maturity of any related litigation as a factor to be considered in the certification of a (b)(3) class could have a profound impact on mass product liability torts. The committee appears to have heeded the message of *Castano* that torts should be "mature" before class treatment is attempted.

In its draft notes, the committee appears to agree with the Fifth Circuit:

The more important change authorizes consideration of the "maturity" of related litigation. In one dimension, maturity can reflect the need to avoid interfering with the progress of related litigation already well advanced toward trial and judgment. When multiple claims arise out of dispersed events, however, maturity also reflects the need to support class adjudication by experience gained in completed litigation of several in-

dividual claims. If the results of individual litigation begin to converge, class adjudication may seem appropriate. Class litigation may continue to be inappropriate, however, if individual litigation continues to yield inconsistent results, or if individual litigation demonstrates that knowledge has not yet advanced far enough to support confident decision on a class basis.

This proposed revision to Rule 23 could have a significant impact on current class action practice. Instead of plaintiffs rushing to certify a class as soon as possible, a defendant might be able to delay class certification until having had the opportunity to contest several individual trials.

This will likely be a controversial revision. In particular, plaintiffs' attorneys will protest that this provision tilts Rule 23 in favor of defendants. Their argument is likely to be that class actions should permit individuals to pursue litigation against large corporations by allowing the pooling of resources for discovery and motions practice. Without this "equalization," individual plaintiffs are unlikely to be able to litigate effectively against wealthier and more sophisticated opponents. Moreover, a large defendant will be able to pick off individual cases that are potentially harmful to it, leaving only the cases it is likely to win to go forward to trial, thus creating a false impression of the litigation. On these arguments, the maturation of the tort might be a misleading yardstick by which to measure the appropriateness of class certification.

In the mass products liability context, the response to these concerns is simple. The Judicial Panel on Multidistrict Litigation exists to co-ordinate large scale litigation. The panel has the power to assign all federal cases that flow from one particular product or group of products to one court for pretrial preparation. Once the cases are prepared, they are transferred back to the transferor courts for trial.

Multidistrict consolidation provides pretrial advantages for the parties similar to those offered by class actions. Moreover, once cases have been returned to transferor

courts, trials can be conducted in individual cases, thus creating a record from which a later court can draw when making a class action determination.

C. Settlement Classes

After having followed the progress of recent litigation concerning settlement classes, the advisory committee has decided to acknowledge the existence of such classes and to embody in the language of Rule 23(b)(4) the principle that such classes can be certified even if certification of the same class for litigation purposes would not be possible.

If adopted, this subdivision will effectively overrule the principal holding of *Georgine* at the court of appeals level. The impact of this revision on the settlement practices reflected in the *Asbestos* decision, however, is less clear. The revised rule pertains only to classes to be settled pursuant to Rule 23(b)(3), whereas the class certified in *Asbestos* was a mandatory (b)(2) class. Moreover, the revision does not address the process by which the parties in *Asbestos* reached their settlement agreement.

However, the recognition of a (b)(3) settlement class might make it more difficult to certify a (b)(1) or (2) settlement class. Although a defendant may desire to settle with all potential litigants, and plaintiffs' attorneys may wish to have as many class members in a class as possible, the practice of settling a mandatory, non-opt-out class presents serious due process considerations. The establishment of an easier avenue to the certification of a (b)(3) class might encourage courts to avoid these problems by pressuring parties into accepting a (b)(3) settlement class.

D. Interlocutory Appeal

Perhaps the most intriguing aspect of the proposed revisions to Rule 23 is the inclusion of a discretionary appeal provision—draft Rule 23(f). This provision, adapted from 28 U.S.C. § 1292(e), gives appellate

courts the discretion to hear an appeal filed within 10 days of a district court's decision to grant or deny class certification. The provision does not require the district court to certify the issue for appeal and does not require that the district court's order involve a "controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," as is required now by Section 1292(b).

The advisory committee proposed note cautions that permission to appeal "should be granted with restraint," an observation that no doubt will be taken to heart by the courts of appeals, especially since it is likely that class certification decisions will be appealed routinely. It is interesting, however, that the advisory committee endorses the *Rhone-Poulenc* "economic pressures" analysis as an example of the type of case in which an appeal should be granted, stating in a draft note:

An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the courts of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.

The proposed interlocutory appeal provision should make it more difficult for class actions to be certified. District courts that, if tempted, could certify mass products liability classes in the almost certain knowledge that such classes would be settled well before traditional appellate jurisdiction could be invoked will now have the prospect of immediate appellate review of their decisions.

Moreover, a body of appellate law defining the acceptable parameters of class certification will begin to develop more reliably than it has thus far, since the courts of appeal will no longer have to rely on the district courts certifying issues for interlocutory appeal or aggrieved parties peti-

tioning for the extraordinary relief of a writ of mandamus. In addition, parties opposing class certification will be more likely to prevail in the courts of appeal, since they will no longer have to meet the heightened requirements of a mandamus petition.

E. Issues Not Addressed

The proposed changes to Rule 23 may well change the way class actions are litigated and settled for years to come, but there are several issues the advisory committee did not address and that might have had an even greater impact on the course of class action litigation.

Although it might have been impossible for a Federal Rule of Civil Procedure to resolve the substantive choice of law problem inherent in mass products liability class litigation, the inclusion of an opt-in provision might well have had the practical effect of minimizing this problem. This approach was hinted at by the Third Circuit in *Georgine* when it stated, "The Rules Committee, of course, should minimize due process concerns, but it might address them via opt-in classes, or by classes with greater opt-out rights, so as to avoid possible due process problems."⁴⁹

The *Georgine* court was speaking in terms of settlement classes, but the effect of an opt-in provision would be the same for a litigation class: potential class members would be notified, via the mandatory notice from the court, that a class had been certified and would be conducted under the law of a particular state. All class members who opted in to the class would be deemed to have agreed to be bound by the causes of action and defenses available to parties in that particular jurisdiction.

The opt-in class was considered and rejected by the 1966 Advisory Committee to Rule 23.⁵⁰ Opt-in classes were considered for inclusion in the new revisions to Rule 23, and the November 1995 draft provided

for an opt-in class. The provision, however, did not survive to the final, published version of the proposed revisions to Rule 23.

An opt-in class would have been a double-edged sword for the parties in mass products liability class action. On the one hand, the provision would have removed the single best argument in favor of non-certification of such classes—the insoluble choice of law problem, thus providing a clear benefit for the proponents of class certification. On the other hand, the number of people opting-in to the proposed class inevitably would be smaller than the total number of potential class members, in some cases perhaps dramatically so. In such a situation, the benefits of class certification might be so reduced as to render a class uncertifiable.

On balance, the failure of the advisory committee to adopt an opt-in provision probably benefits the opponents of class certification more than proponents. In particular, the absence of such a provision reduces the likelihood that plaintiffs would elect to bring their class actions in a forum best suited to them and least suited to a defendant.

The advisory committee also elected to omit any reference to a preliminary determination of the merits of litigation to be made by the district court as part of the class certification process. The committee apparently agonized over this decision, but ultimately it decided to adopt only part of one of the proposed subdivisions, and to not even mention a possible preliminary merits review in the notes.

Although the Supreme Court held in *Eisen* that a court should not review the merits of the proposed class litigation at the certification stage, such review surely would help in the weeding-out of improperly filed class complaints. District courts are familiar with making those determinations; the merits analysis forms an integral part of the injunctive relief inquiry. The decision of the advisory committee to remove the "merits analysis" language from the

49. 83 F.2d at 634-35.

50. See Kaplan, *supra* note 10, at 397-98.

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proposed revisions to Rule 23, therefore, must be seen as a disappointment to those faced with insubstantial products liability claims.

CONCLUSION

The past two or three years have been volatile ones for those engaged in class action litigation. Several significant decisions have come from various circuit courts of appeal. In addition, the publication of the proposed revisions to Rule 23 has raised many fascinating possibilities for the future of class action jurisprudence. Although the

past 30 years make clear that the only thing certain about class actions is their unpredictability, these recent decisions, and the potential impact of the proposed revisions to Rule 23, make it appear likely that class actions in mass products liability cases will be more difficult to certify than had been the case in the early 1990s.

Should this occur, then the 1966 advisory committee's much maligned caution that a "mass accident resulting in injuries to numerous persons is ordinarily not appropriate for a class action" perhaps will be vindicated, and class action jurisprudence will indeed have gone "back to the future."