Manual for Complex Litigation, Fourth

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Equity courts created class action procedures to manage group litigation fairly and efficiently. Since 1966, when Federal Rule of Civil Procedure 23[736] was amended to add the damages class action under Rule 23(b)(3), class action litigation has greatly expanded. Class actions range from claims involving very small individual recoveries (such as consumer claims) that would otherwise likely not be litigated because no individual has a stake sufficient to justify individual litigation, to claims in which individual damages are high but the volume of claims creates advantages in group resolution. Because the stakes and scope of class action litigation can be great, class actions often require closer judicial oversight and more active judicial management than other types of litigation. Class action suits present many of the same problems and issues inherent in other types of complex litigation. The aggregation of a large number of claims and the ability to bind people who are not individual litigants tend to magnify those problems and issues, increase the stakes for the named parties, and create potential risks of prejudice or unfairness for absent class members.[737] This imposes unique responsibilities on the court and

736. Rule 23's predecessor was Federal Equity Rule 38, which provided that one or more may sue or defend for the whole when the question is "one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court." Fed. R. Civ. P. 23(a) committee note (1937 adoption).

737. *See generally* Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997). For a discussion of problems in class action litigation, see Deborah R. Hensler et al., Class Action Dilemmas: Pursuing Public Goals for Private Gain

counsel. Once class allegations are made, decisions such as whether to settle and on what terms are no longer wholly within the litigants' control. Rather, the attorneys and named plaintiffs assume responsibilities to represent the class. The court must protect the interests of absent class members, and Rule 23(d) gives the judge broad administrative powers to do so, reflecting the equity origins of class actions.[738]

This section applies to a broad spectrum of subject areas, including statutory and common-law causes of action involving personal injury, property damage, consumer, civil rights, antitrust, environmental, and employment-related claims. This section also covers various types of relief, including injunctions, declaratory judgments, common resolution of particular issues in a case, and damages.[739] The various aspects of managing class action litigation discussed in this section are closely intertwined with other *MCL, 4th* sections, including those on mass tort litigation, attorney fees, and multiple jurisdiction litigation. Other sections of the *MCL, 4th* describe three types of class actions that have unusual features and procedural requirements: mass torts (see section 22.7); private securities litigation, including shareholder derivative actions under Rule 23.1 (see section 31.5); and employment discrimination (see section 32.42).

Occasionally, a plaintiff or other party seeks to have a defendant class certified. Such requests are unusual. The rules discussed in this section, which focus on plaintiffs' classes, must be specifically tailored to the issues defendant classes raise.[740] Additionally, conflicts of interest between an unwilling class

(2000); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1367–82 (1995) (discussing incentives for collusion in settlement class actions); Note, *In-Kind Class Action Settlements*, 109 Harv. L. Rev. 810 (1996).

738. *See Ortiz*, 527 U.S. at 832–33; Blanchard v. Edgemark Fin. Corp., 175 F.R.D. 293, 298–300 (N.D. Ill. 1997) (holding that any individual settlement with a certified class representative must be submitted to the court for approval because the representative has voluntarily undertaken a fiduciary responsibility toward the class as a whole and the court has a commensurate duty to protect absent class members); 7A Charles Alan Wright et al., Federal Practice and Procedure: Civil 2d § 1751 (1986 & Supp. 2002).

739. For reference to the law of class actions, see generally Alba Conte & Herbert B. Newberg, Newberg on Class Actions (4th ed. 2002); 5 James Wm. Moore et al., Moore's Federal Practice (3d ed. 1997 & Supp. 2002); 7A & 7B Wright et al., *supra* note 738. The case-management requirements imposed by the Private Securities Litigation Reform Act of 1995 are discussed in *infra* section 31.33.

740. *See* 2 Conte & Newberg, *supra* note 739, § 4:46, at 339 (indicating that "[d]efendant class actions must meet all the Rule 23 criteria" and that "[d]efendant classes pose unique problems in the application of Rule 23 criteria" and raise distinct due process concerns). For examples of Rule 23 analysis in the defendant class certification context, see *CBS, Inc. v. Smith*, 681 F. Supp. 794 (S.D. Fla. 1988); *In re LILCO Sec. Litig.*, 111 F.R.D. 663 (E.D.N.Y. 1986). *See*

representative and the class warrant special attention when a defendant class certification motion is made.[741] Plans for compensating counsel for a defendant class representative need to be addressed at the certification stage. A class settlement that provides for a defendant class representative's attorney fees also may demand special scrutiny.

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21.11 Initial Case-Management Orders

Initial case-management orders in a class action guide the parties in presenting the judge with the information necessary to make the certification decision and permit the orderly and efficient development of the case.

also Scott D. Miller, Note, *Certification of Defendant Classes Under Rule 23(b)(2)*, 84 Colum. L. Rev. 1371, 1387–89 (1984) (discussing potential burdens defendant classes may impose on courts). Defendant classes may also raise questions about ascertaining the identity of class members that differ from plaintiff classes. S. Ute Indian Tribe v. Amoco Prod. Co., 2 F.3d 1023, 1029–30 (10th Cir. 1993). There is a split among courts of appeals concerning whether Rule 23(b)(2) applies to defendant cases. *See* Henson v. E. Lincoln Township, 814 F.2d 410 (7th Cir. 1987) (affirming district court's order denying certification of a defendant class); *cf.* Marcera v. Chinlund, 595 F.2d 1231, 1238 (2d Cir.), *vacated on other grounds sub nom.* Lombard v. Marcera, 442 U.S. 915 (1979); Luyando v. Bowen, 124 F.R.D. 52, 59 (S.D.N.Y. 1989) (certifying a defendant class). Protecting absent members of a defendant class may require special effort on the part of court and counsel. *In re* Integra Realty Res., Inc., 262 F.3d 1089, 1105 (10th Cir. 2001) (stating that "defendant class actions create a special need to be attentive to the due process rights of absent parties").

741. Courts should give greater scrutiny to the adequacy of representation in defendant class actions "because of the risk that plaintiff[s] will seek out weak adversaries to represent the class." 7A Wright et al., *supra* note 738, § 1770. *See, e.g.*, *In re Integra Realty*, 262 F.3d at 1111–13 (finding representation by unwilling mutual fund with largest losses to be adequate and noting that a settlement providing compensation for attorney fees was potentially troubling). For further commentary on *Integra*, see 15A Charles Alan Wright et al., Federal Practice and Procedure: Jurisdiction 2d § 3902.1, at 53–54 (Supp. 2002).

Whether a class is certified and how its membership is defined affects case management as well as outcome. Certification and class membership determine not only the stakes involved, but also the scope and timing of discovery and motion practice, the structure of trial and methods of proof, and the length and cost of the litigation. Certification decisions are critical and should be made only after consideration of all relevant information and arguments presented by the parties.[742]

Before ruling on class certification, a judge should address the following matters at an early stage in the case, typically in initial case-management conferences under Rule 16:

- *Whether to hear and determine threshold dispositive motions, particularly motions that do not require extensive discovery, before hearing and determining class certification motions.* Motions such as challenges to jurisdiction and venue, motions to dismiss for failure to state a claim, and motions for summary judgment may be decided before a motion to certify the class, although such precertification rulings bind only the named parties. If the judge decides to hear such threshold motions before ruling on class certification, the initial scheduling order should set a timetable for the submission of motions for briefs and for any necessary discovery.
- *Whether to appoint interim class counsel during the period before class certification is decided.*[743] If the lawyer who filed the suit is likely to be the only lawyer seeking appointment as class counsel, appointing interim class counsel may be unnecessary. If, however, there are a number of overlapping, duplicative, or competing suits pending in other courts, and some or all of those suits may be consolidated, a number of lawyers may compete for class counsel appointment. In such cases, designation of interim counsel clarifies responsibility for protecting the interests of the class during precertification activities, such as making and responding to motions, conducting any necessary discovery, moving for class certification, and negotiating settlement. In cases

742. A court may act on its own initiative in deciding whether to certify a class. McGowan v. Faulkner Concrete Pipe Co., 659 F.2d 554, 559 (5th Cir. 1981) ("The trial court has an independent obligation to decide whether an action was properly brought as a class action, even where neither party moves for a ruling on class certification."). A court may not, however, act on its own initiative to expand an individual complaint into a class action. Newsom v. Norris, 888 F.2d 371, 380–82 (6th Cir. 1989) (vacating district court order converting an individual action into a class action and certifying the class).

743. *See* Fed. R. Civ. P. 23(g)(2)(A) committee note (permitting the designation of interim counsel before determining whether to certify a class).

involving overlapping, duplicative, or competing suits in other federal courts or in state courts, the lawyers may stipulate to the appointment of a lead interim counsel and a steering committee to act for the proposed class. Such a stipulation leaves the court with the tasks of determining that the chosen counsel is adequate to serve as interim class counsel and making a formal order of appointment. Absent a stipulation, the court may need to select interim class counsel from lawyers competing for the role and formally designate the lawyer selected.

- *Whether and how to obtain information from parties and their counsel about the status of all related cases pending in state or federal courts, including pretrial preparation, schedules and orders, and the need for any coordinated activity.* Section 20.31 discusses coordination and other approaches to pending parallel litigation with state judges.
- *Whether any discovery is needed to decide whether to certify the proposed class.* See section 21.13. Precertification discovery permits the parties to "gather information necessary to make the certification decision," which "often includes information required to identify the nature of the issues that actually will be presented at trial."[744] To define the need for and appropriate limits on precertification discovery, it is useful to direct the parties to discuss these and related problems at the Rule 26(f) conference and to present a plan to the court at an early Rule 16 hearing. The judge can then put into place a schedule for determining the scope of discovery necessary to decide certification, as opposed to merits discovery. At such hearings, the judge should also inquire whether the parties contemplate precertification discovery from the potential class members, determine whether such proposed discovery fills a legitimate need, and make appropriate plans for the most cost-effective means of conducting it.

21.12 Precertification Communications with the Proposed Class

Rule 23(d) authorizes the court to regulate communications with potential class members, even before certification.[745] Such regulations, however, could

744. *See* Fed. R. Civ. P. 23(c)(1) committee note (setting a flexible time standard by providing that certification decisions should be made "at an early practicable time").

745. *In re* Sch. Asbestos Litig., 842 F.2d 671, 680 (3d Cir. 1988) ("Rule 23 specifically empowers district courts to issue orders to prevent abuse of the class action process.").

implicate the First Amendment.[746] Moreover, restrictions of this type may be difficult to implement given the ease and speed of communicating with dispersed groups. For example, many class actions attorneys establish Internet Web sites for specific class actions, in addition to using conventional means of communication, such as newspapers. Most judges are reluctant to restrict communications between the parties or their counsel and potential class members, except when necessary to prevent serious misconduct.[747]

Direct communications with class members, however, whether by plaintiffs or defendants, can lead to abuse.[748] For example, defendants might attempt to obtain releases from class members without informing them that a proposed class action complaint has been filed. If defendants are in an ongoing business relationship with members of a putative class, the court might consider requiring production of communications relating to the case. In appropriate cases, courts have informed counsel that communications during an ongoing business relationship, including individual releases or waivers, must be accompanied by notification to the members of the proposed class that the litigation is pending.[749]

Judicial intervention is generally justified only on a clear record and with specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties. Such intervention "should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances."[750] Even if the court finds that there has been an abuse, less burdensome remedies may suffice, such as requiring parties to initiate communication with potential class members

746. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).

747. Gulf Oil Co. v. Bernard, 452 U.S. 89, 101–02 (1981).

748. *See id.* at 99–100 & n.12; Kleiner v. First Nat'l Bank, 751 F.2d 1193 (11th Cir. 1985); Keystone Tobacco Co. v. U.S. Tobacco Co., 238 F. Supp. 2d 151 (D.D.C. 2002), *reconsideration denied*, 2003 U.S. District LEXIS 14653 (2003); Hampton Hardware Inc. v. Cotter & Co., 156 F.R.D. 630 (N.D. Tex. 1994).

749. Ralph Oldsmobile, Inc. v. Gen. Motors Corp., No. 99 Civ. 4567, 2001 WL 1035132, at *7 (S.D.N.Y. Sept. 7, 2001); *see also* 2 Geoffrey C. Hazard & W. William Hodes, The Law of Lawyering § 38.4, at 38-6 (3d ed. 2002) (copies of communications sent by defendants who have ongoing business relationships with potential class members relating to pending litigation should be given to opposing counsel).

750. *Gulf Oil*, 452 U.S. at 101–02. For an example of a limited ban on communications between a defendant and class members, see *Rankin v. Board of Education of Wichita Public Schools*, 174 F.R.D. 695, 697 (D. Kan. 1997) (ordering that "defendants and their counsel shall not make any contact or communication with [prospective class members] which expressly refers to this litigation"). Generally, more than just the potential for abuse is required to support issuance of a protective order. Basco v. Wal-Mart Stores, Inc., No. CIV.A.00-3184, 2002 WL 272384, at 3–4 (E.D. La. Feb. 25, 2002).

only in writing or to file copies of all nonprivileged communications with class members.[751] If class members have received inaccurate precertification communications, the judge can take action to cure the miscommunication and to prevent similar problems in the future.[752] Rule 23 and the case law make clear that, even before certification or a formal attorney–client relationship, an attorney acting on behalf of a putative class must act in the best interests of the class as a whole.[753]

Misrepresentations or other misconduct in communicating with the class may impair the fairness and adequacy of representation under Rule 23(a)(4), may affect the decision whether to appoint counsel under proposed Rule 23(g), and may be prohibited and penalized under the court's Rule 23(d)(2) plenary protective authority. Defendants and their counsel generally may communicate with potential class members in the ordinary course of business, including discussing settlement before certification,[754] but may not give false, misleading, or intimidating information, conceal material information, or attempt to influence the decision about whether to request exclusion from a class certified under Rule 23(b)(3). Ethics rules restricting communications with individuals represented by counsel may apply to restrict a defendant's communications contract with the named plaintiffs.[755]

751. *See Gulf Oil*, 452 U.S. at 104 n.20.

752. E.E.O.C. v. Mitsubishi Motor Mfg. of Am., Inc., 102 F.3d 869, 870–71 (7th Cir. 1996) (reciting district court action to cure precertification miscommunication regarding communications between employees and employer and to require prior notice to prevent future miscommunications); *Ralph Oldsmobile*, 2001 WL 1035132, at *7 (curative notice sent to members of the proposed class at the expense of defendant).

753. *See* Fed. R. Civ. P. 23(g)(2)(A) committee note; *cf.* 2 Hazard & Hodes, *supra* note 749, § 38.4, at 38-7 (indicating that the lawyer for the proposed class has a fiduciary obligation and owes class members "duties of loyalty and care").

754. *See Gulf Oil*, 452 U.S. 95 (after a class action had been commenced but before certification, defendant continued to deal directly with potential class members concerning an offer of settlement that had been earlier negotiated with the Equal Employment Opportunity Commission (EEOC)).

755. *See Ralph Oldsmobile*, 2001 WL 1035132, at *4, *7 (finding that defendant's failure to inform independent dealers about pending class actions was misleading and ordering defendant to send corrective notice to potential members of the proposed class); Hampton Hardware v. Cotter & Co., 156 F.R.D. 630, 634–35 (N.D. Tex. 1994) (court found abuse and issued protective order limiting communications after defendant contacted potential class members and encouraged them not to participate in the class action by stating that such participation would negatively impact the parties' ongoing business relationship); *see also infra* section 21.323 (other communications from class members). *See generally* Kleiner v. First Nat'l Bank of Atlanta, 751 F.2d 1193, 1202 (11th Cir. 1985) ("If the class and the class opponent are involved in an ongoing business relationship, communications from the class opponent may be coercive.") (quoting Note, *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1600 (1976)).

21.13 Standards for Class Certification and Precertification Discovery

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21.131 Certifying a Litigation Class

To obtain an order to prevail in their efforts to certify a class, proponents must satisfy two sets of requirements: those set forth in Rule 23(a) and those contained in Rule 23(b). Rule 23(a) requires that (1) the proposed class be sufficiently numerous; (2) there is at least one common question of fact or law; (3) the named plaintiff's claims are typical of the class as a whole; and (4) the named plaintiff will adequately represent the class.[756]

Rule 23(b) permits maintenance as a class action if the action satisfies Rule 23(a)'s prerequisites and meets one of three alternative criteria for maintainability. First, Rule 23(b)(1)(A) permits certification to prevent inconsistent rulings regarding defendants' required conduct. Standards for certifying a class under Rule 23(b)(1)(B) relate primarily to limited fund settlements and are discussed below in section 21.132. Second, Rule 23(b)(2) permits a class action if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Third, Rule 23(b)(3) permits a class action if "the court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Section 21.141 elaborates on the requirements for certifying a litigation class.

21.132 Certifying a Settlement Class

Parties frequently settle before the judge has decided whether to certify a class.[757] Some settle before a motion to certify or even a class action complaint has been filed. Such settlements typically stipulate that the court may certify a class as defined in the agreement, but only for the purpose of settlement. When a case settles as a class action before certification, the parties must present the

756. Fed. R. Civ. P. 23(a).

757. *See, e.g.*, *In re* Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283 (3d Cir. 1998); Hanlon v. Chrysler Corp., 150 F.3d 1011 (9th Cir. 1998); *In re* Inter-Op Hip Prosthesis Liab. Litig., 204 F.R.D. 330 (N.D. Ohio 2001); *In re* Diet Drugs Prods. Liab. Litig., MDL No. 1203, 2000 WL 1222042 (E.D. Pa. Aug. 28, 2000); *In re* Lease Oil Antitrust Litig., 186 F.R.D. 403 (S.D. Tex. 1999).

court a plan for notifying the class and, if Rule 23(b)(3) applies, providing an opportunity to opt out, along with the motions for certification and preliminary approval of the settlement. If the case settles after it has been certified as a litigation class, different notice requirements apply (see section 21.312).

Rule 23(a) and (b) standards apply equally to certifying a class action for settlement or for trial, with one exception. In *Amchem Products, Inc. v. Windsor*, the Supreme Court held that because a settlement class action obviates a trial, a district judge faced with a request to certify a settlement class action "need not inquire whether the case, if tried, would present intractable management problems"[758] under Rule 23(b)(3)(D). The Court added, however, "that the settlement context demands undiluted, even heightened attention to unwarranted or overbroad class definitions."[759]

Post-*Amchem* courts have emphasized that a settlement class must be cohesive. This means, according to one court of appeals, that there should be a common nucleus of facts and potential legal remedies among all class members,[760] and that the class and any necessary subclasses must be definable and defined for the judge. In a nationwide or multistate settlement class, counsel should be ready at the class certification hearing to explain the common elements of the substantive law that are applicable to all class members so that choice of law issues will not defeat predominance and the manageability component of superiority.[761] As in a litigation class, counsel seeking certification of a settlement class must address variations in applicable state law. The court must determine whether the variations or conflicts defeat commonality, predominance, and superiority and the extent to which the creation of subclasses removes such conflicts so as to permit certification. As in a litigation class, counsel seeking certification of a settlement class must show that there are no actual conflicts among the anticipated claims of class members[762] or must show that conflicts can be avoided or ameliorated by proposing subclasses or by providing a plan for distributing benefits based on objective

758. 521 U.S. 591, 620 (1997).

759. *Id.*

760. *Hanlon*, 150 F.3d at 1022 (affirming certification of a settlement class).

761. *Id.*

762. *Id.* at 1021 (finding "no structural conflict of interest based on variations in state law [in part, because] . . . the differences in state remedies are not sufficiently substantial so as to warrant the creation of subclasses"); *see also In re* Mex. Money Transfer Litig., 267 F.3d 743, 747 (7th Cir. 2001) (affirming a nationwide class action settlement against objections that class members from certain states had superior remedies not reflected in the settlement terms and noting that class representatives avoided the "pitfall" of state law variations by confining their theories to "federal law plus aspects of state law that are uniform" and by asking for "certification of a class for settlement only"); *In re Prudential*, 148 F.3d at 314–15.

criteria. The court must determine whether the process for presenting claims and awarding relief to individual class members is manageable and takes account of differences among class members without creating conflicting interests.[763] Counsel seeking class certification must also present a plan for communicating adequate notice of a settlement to individual class members, an important factor in the court's determination that the proposed settlement class is manageable.[764]

A proposed settlement of a mandatory "limited fund" class[765] under Rule 23(b)(1)(B) must meet the exacting standards articulated by the Supreme Court in *Ortiz v. Fibreboard Corp*.[766] Because limited-fund classes do not permit opt-outs, certification for settlement imposes particularly stringent standards.

In any certification for settlement, the court must examine adequacy of representation and predominance of common issues to be sure that the settlement does not mask either conflicts within classes or the overwhelming presence of individual issues. Section 21.61 discusses determining whether to approve the terms of proposed settlements in class actions, which involves a separate set of issues from deciding whether to certify a proposed settlement action. The particular problems raised by proposed class and other settlements in mass torts cases are discussed in section 22.9.

21.133 Timing of the Certification Decision

Federal Rule of Civil Procedure 23(c)(1) directs the court to determine "at an early practicable time"[767] whether to certify an action as a class action. The "early practicable time" is when the court has sufficient information to decide

763. *In re* Diet Drugs Prods. Liab. Litig., MDL No. 1203, 2000 WL 1222042, at *43, *51–*52 (E.D. Pa. Aug. 28, 2000) (certifying a settlement class based on objective national standards for claims); *cf.* Walker v. Liggett Group, Inc., 175 F.R.D. 226, 232–33 (S.D. W. Va. 1997) (denying certification of a settlement class and citing need to ascertain variations in state law, to decide how millions of class members could offer input during the comment period, to create subclasses, and to appoint representatives to an already difficult to define class).

764. Thomas v. NCO Fin. Sys., Inc., No. CIV.A.00-5118, 2002 WL 1773035, at *5–*7 (E.D. Pa. July 31, 2002) (denying certification of a settlement class where parties proposed notice in two newspapers and failed to introduce evidence that the individual names of class members were available).

765. Class actions certified under Rule 23(b)(1) or (b)(2) are often referred to as "mandatory" class actions because Rule 23 does not expressly require that members be permitted to opt out; some courts, however, have granted limited opt-out rights in so-called "mandatory" class actions, recognizing this act as being within the court's discretion and equity jurisdiction. *See, e.g.*, County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1302–03 (2d Cir. 1990).

766. 527 U.S. 815, 838–53 (1999).

767. Fed. R. Civ. P. 23(c)(1)(A).

whether the action meets the certification criteria of Rules 23(a) and (b). The timing of the certification decision deserves discussion early in the case, often at the initial scheduling conference where the judge and counsel can address the issues bearing on certification and can establish a schedule for the work necessary to permit an informed ruling on the class certification motion. Appropriate timing will vary with the circumstances of the case, although an early resolution is generally desirable.

Precertification discovery may be necessary. The court may rule on motions pursuant to Rule 12, Rule 56, or other threshold issues before deciding on certification; however, such rulings bind only the named parties.[768] Most courts agree, and Rule 23(c)(1)(A) reflects, that such precertification rulings on threshold dispositive motions are proper, and one study found a substantial rate of precertification rulings on motions to dismiss or for summary judgment.[769] Precertification rulings frequently dispose of all or part of the litigation.[770]

Efficiency and economy are strong reasons for a court to resolve challenges to personal or subject-matter jurisdiction before ruling on certification. The judge should direct counsel to raise such challenges before filing motions to certify. Similarly, courts should rule early on motions to dismiss, challenging whether the plaintiffs have stated a cause of action. Early resolution of these questions may avoid expense for the parties and burdens for the court and may minimize use of the class action process for cases that are weak on the merits.[771] In unusual cases, involuntary precertification dismissal may unfairly

768. Dismissal before certification is *res judicata* only as to the class representatives, not class members. Wright v. Schock, 742 F.2d 541, 544 (9th Cir. 1984); *see also* Schwarzchild v. Tse, 69 F.3d 293, 297 (9th Cir. 1995) (moving for and obtaining summary judgment after class certification but before notice to the class implicitly waives defendant's interest in notifying the class). A grant of summary judgment dismissing the claims of class representatives often has the effect of mooting the class certification issue. Cowen v. Bank United of Tex., 70 F.3d 937, 941 (7th Cir. 1995).

769. Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 29–32 (Federal Judicial Center 1996) [hereinafter FJC Empirical Study of Class Actions] (finding that the rate of precertification rulings on motions to dismiss was about 80% in three of four districts studied and about 60% in the other district).

770. *Id.* at 33 (finding that "[a]pproximately three out of ten cases in each district were terminated as a direct result of a ruling on a motion to dismiss or for summary judgment").

771. *See, e.g.*, Curtin v. United Airlines, Inc., 275 F.3d 88, 93 (D.C. Cir. 2001) (holding that "where . . . the plaintiffs' claims can be readily resolved on summary judgment, where the defendant seeks an early disposition of those claims, and where the plaintiffs are not prejudiced thereby, a district court does not abuse its discretion by resolving the merits before considering the question of class certification"); Mira v. Nuclear Measurements Corp., 107 F.3d 466, 474–76

affect the interests of members of the proposed class. For example, in a case in which the filing was accompanied by extensive publicity, but where the dismissal had little publicity, individual members of the proposed class may rely on the pendency of the class action to toll limitations. If the risk of unfair prejudice is present, some form of notice under Rule 23(d)(2) may be appropriate.

Some local rules specify a short period within which the plaintiff must file a motion to certify a class action. Such rules, however, may be inconsistent with Rule 23(c)(1)(A)'s emphasis on the parties' obligation to present the court with sufficient information to support an informed decision on certification. Parties need sufficient time to develop an adequate record.

Rule 23(c)(1)(C) makes clear that an action should be certified only if it meets Rule 23's requirements. However, Rule 23(c)(1)(C) permits later alteration or amendment of an order granting or denying class certification. Nevertheless, decertifying or redefining an expansive class, certified on insufficient information, may unnecessarily cost the parties substantial time and expense and add to the court's load. In a federal question case, the pendency of class action allegations tolls the statute of limitations.[772] Individuals removed from a narrowed class after receiving notice that they were included may be entitled to notice that the statute of limitations has now begun to run against them.[773] If the judge expands a class definition in a Rule 23(b)(3) case, those added members must receive notice and an opportunity to opt out, adding expense and effort.

(7th Cir. 1997) (asserting that deciding summary judgment before ruling on class certification was an appropriate way to deal with meritless litigation).

772. Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1974).

773. For those excluded from the class, the statute of limitations, which was tolled by the filing of the class complaint, begins to run again when the opt-out form is filed. *See, e.g.*, Chardon v. Fumero Soto, 462 U.S. 650 (1983); Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983); *Am. Pipe*, 414 U.S. at 561. In diversity cases, state rules on equitable and cross-jurisdictional tolling may or may not toll the statute of limitations for individual claims filed subsequent to the denial of certification of a class action. *See, e.g.*, Wade v. Danek Med., Inc., 182 F.3d 281, 290 (4th Cir. 1999) (affirming that statute of limitations for state law claims was not tolled during the pendency of a diversity-based class action in federal court); Vaught v. Showa Denko K.K., 107 F.3d 1137, 1147 (5th Cir. 1997) (same).

21.14 Precertification Discovery

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A judge faced with a motion for class certification must decide whether the record is sufficient to determine if the prerequisites of Rule 23 have been met and, if so, how to define the class.

A threshold question is whether precertification discovery is needed. Discovery may not be necessary when claims for relief rest on readily available and undisputed facts or raise only issues of law (such as a challenge to the legality of a statute or regulation). Some discovery may be necessary, however, when the facts relevant to any of the certification requirements are disputed (see sections 21.141 and 21.142), or when the opposing party contends that proof of the claims or defenses unavoidably raises individual issues. Generally, application of the Rule 23 criteria requires the judge to examine the elements of the parties' substantive claims and defenses[774] in order to analyze commonality, typicality, and adequacy of representation under Rule 23(a), as well as the satisfaction of Rule 23(b)'s maintainability requirements.[775]

At this stage, the court should not decide or even attempt to predict the weight or outcome of the underlying claims and defenses,[776] but it need not rely only on the bare allegations of the pleadings. A preliminary inquiry into the merits may be required to decide whether the claims and defenses can be presented and resolved on a class-wide basis.[777] Some precertification discovery

774. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 & n.12 (1978) (reasoning that "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action'" and that "'[e]valuation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims'" (quoting Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 558 (1963) and 15 Charles Wright et al., Federal Practice and Procedure § 3911, at 485 n.45 (1976))); *see also* Castano v. Am. Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996) (ruling that "[g]oing beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues" (citing Manual for Complex Litigation, Third, § 30.11 (1995))). For consideration of how examination of the merits has evolved in the context of mass tort class actions and other forms of aggregation, see *infra* sections 22.2 and 22.31.

775. Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir.) ("Before deciding whether to allow a case to proceed as a class action, therefore, a judge should make whatever factual and legal inquiries are necessary under Rule 23."), *cert. denied*, 534 U.S. 951 (2001).

776. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177–79 (1974) (reversing order requiring defendant to pay for class notice based on preliminary assessment of probabilities of plaintiff's success).

777. *Szabo*, 249 F.3d at 676.

may be necessary if the allegations in the pleadings—with affidavits, declarations, and arguments or representations of counsel—do not provide sufficient, reliable information.[778] To make this decision, the court should encourage counsel to confer and stipulate as to relevant facts that are not genuinely disputed, to reduce the extent of precertification discovery, and to refine the pertinent issues for deciding class certification.

Discovery relevant only to the merits delays the certification decision and may ultimately be unnecessary. Courts often bifurcate discovery between certification issues and those related to the merits of the allegations. Generally, discovery into certification issues pertains to the requirements of Rule 23 and tests whether the claims and defenses are susceptible to class-wide proof; discovery into the merits pertains to the strength or weaknesses of the claims or defenses and tests whether they are likely to succeed. There is not always a bright line between the two. Courts have recognized that information about the nature of the claims on the merits and the proof that they require is important to deciding certification. Arbitrary insistence on the merits/class discovery distinction sometimes thwarts the informed judicial assessment that current class certification practice emphasizes.

Allowing some merits discovery during the precertification period is generally more appropriate for cases that are large and likely to continue even if not certified. On the other hand, in cases that are unlikely to continue if not certified, discovery into aspects of the merits unrelated to certification delays the certification decision and can create extraordinary and unnecessary expense and burden. If merits discovery is stayed during the precertification period, the judge should provide for lifting the stay after deciding the certification motion.

It is often useful under Rule 26(f) to require a specific and detailed precertification discovery plan from the parties. The plan should identify the depositions and other discovery contemplated, as well as the subject matter to be covered and the reason it is material to determining the certification inquiry under Rule 23. Discovery relevant to certification should generally be directed to the named parties. Discovery of unnamed members of a proposed class requires a demonstration of need.[779] If precertification discovery of unnamed class members is appropriate, the court should consider imposing limits beyond those contemplated by the Federal Rules of Civil Procedure. Such limits might include the scope, subject matter, number, and time allowed for depositions, interrogatories, or other discovery directed to class representatives

778. *Id.* (referring to use of affidavits and inquiries from judges); Sirota v. Solitron Devices, Inc., 673 F.2d 566, 571–72 (2d Cir. 1982).

779. *See* Baldwin & Flynn v. Nat'l Safety Assocs., 149 F.R.D. 598 (N.D. Cal. 1993).

or unnamed class members, and might limit the period for completing certification-related discovery. Section 21.41 discusses postcertification discovery from unnamed class members. If some merits discovery is permitted during the precertification period, consider limits that minimize the time and effort involved, such as requiring the use of questionnaires or interrogatories rather than depositions, and consider limiting discovery to a certain number or a sample of proposed class members.[780]

21.141 Precertification Discovery into the Rule 23(a) Requirements

Numerosity. Determining whether the proposed class is sufficiently numerous for certification is usually straightforward. Affidavits, declarations, or even reasonable estimates in briefs are often sufficient to establish the approximate size of the class and whether joinder might be a practical and manageable alternative to class action litigation.

Commonality. Identifying common questions typically requires examining the parties' claims and defenses, identifying the type of proof the parties expect to present, and deciding the extent to which there is a need for individual, as opposed to common, proof. Courts have come to varying results in applying such tests, particularly in the mass tort context. See section 22.7.

A trial plan often assists in identifying the relationship between individual and common elements of proof, but Rule 23 does not operate in a vacuum. Bifurcation and severance under Rule 42 are available as tools that might make a case more manageable by separating out discrete issues for a phased or sequenced decision by the judge or at trial. In making such decisions, the judge must decide whether certification of issues classes, bifurcation, or severance are fair and workable ways to achieve class certification, or whether they would merely mask the predominance of individual issues and result in prejudice

780. Transamerican Ref. Corp. v. Dravo Corp., 139 F.R.D. 619, 621–22 (S.D. Tex. 1991) (approving interrogatories relevant to common issues and limiting their service to 50 of 6,000 absent class members); *cf.* Schwartz v. Celestial Seasonings, Inc., 185 F.R.D. 313 (D. Colo. 1999) (allowing after class certification, brief, nonmandatory questionnaire relating to common issues); McCarthy v. Paine Webber Group, Inc., 164 F.R.D. 309 (D. Conn. 1995). On the other hand, courts have declined to limit discovery conducted on behalf of a class to a sample selected by the defendant. *See* Buycks-Roberson v. Citibank Fed. Sav. Bank, 162 F.R.D. 338, 343 (N.D. Ill. 1995) (noting that "[t]he Federal Rules and this [c]ourt do not countenance self-selecting discovery by either party"). Accordingly, the court should assure that any use of sampling in the context of class-related discovery provides a meaningful random, or at least objective, sample of data.

from presenting claims or defenses out of context.[781] Issues classes are discussed further at section 21.24.

Typicality. Deciding typicality requires determining whether the named plaintiff's claim arises from the same course of events and involves legal arguments similar to those of each class member.[782] The court must also establish that the proposed class representative's claims are not subject to defenses that do not apply to other members of the class.[783] Discovery may be necessary to determine if the plaintiff's claim is atypical, although discovery may not be necessary if the pleadings or readily available information reveals that a named plaintiff's claim is idiosyncratic.

Adequacy of representation. The named plaintiffs must show that the proposed action will fairly and adequately protect the interests of the class. They must first demonstrate that class counsel is qualified, experienced, and able to conduct the litigation in the interests of the class. That also is part of the showing required for appointment of class counsel under Rule 23(g). See section 21.27.

Plaintiffs also must show that the named representatives have no substantial interests antagonistic to those of proposed class members and that the representatives share the desire to prosecute the action vigorously. A trial plan can help to identify distinct claims that may demand separate representation or a denial of certification. If the motion to certify is for a litigation class or for a settlement class that is opposed, as contrasted with a jointly submitted motion to certify a class for settlement, the adversaries may help to identify the range and divergence of claims. In a jointly submitted motion to certify a settlement class, the judge may need to press the parties to identify differences in the positions or interests of class members. Proposed class members' interests may differ from those of the named representatives for a variety of

781. *See, e.g.*, *In re* Hanford Nuclear Reservation Litig., 292 F.3d 1124, 1139 (9th Cir. 2002) (remanding with recommendation that the trial court consider "[class] certification only for questions of generic causation common to plaintiffs who suffer from the same or a materially similar disease"); *In re* Bendectin Litig., 857 F.2d 290 (6th Cir. 1988) (upholding constitutionality of aggregate phase I trial on common issues of generic causation); Jenkins v. Raymark Indus., Inc., 782 F.2d 468 (5th Cir. 1986) (dividing trial into phases dealing with common and individual issues separately); *see also* Simon v. Philip Morris, Inc., 200 F.R.D. 21 (E.D.N.Y. 2001) (discussing severance and consolidation of issues for phased trials in class action); *but cf. In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1303 (7th Cir. 1995) (discussing difficulty of having multiple juries decide comparative negligence and proximate causation).

782. *See generally* Gen. Tel. Co. v. Falcon, 457 U.S. 147 (1982) (rejecting claim of employee denied promotion as not typical of claims of applicants for work).

783. *See* Chateau de Ville Prods., Inc. v. Tams-Witmark Music Library, Inc., 586 F.2d 962, 966 (2d Cir. 1978); Douglas M. Towns, Note, *Merit-Based Class Action Certification: Old Wine in a New Bottle*, 78 Va. L. Rev. 1001, 1032–33 (1992).

reasons. Different state law may apply to different class members.[784] In a mass tort case, those with present injuries have different interests than those who have been exposed to the injurious substance but have not yet manifested injury.[785] Those with severe injuries may have different interests than those with slight injuries.

The proponents of certification sometimes attempt to meet Rule 23's adequacy-of-representation requirements by suing for only one type of relief, such as an injunction, on behalf of the class. In that case, the named plaintiffs may be inadequate representatives for class members who also have existing damage claims.[786] Discovery may be needed to identify any appropriate remedies not included in the proposed class claims.

Under the Private Securities Litigation Reform Act (PSLRA), courts must select as "lead plaintiff" the most knowledgeable and sophisticated investor who is willing to serve.[787] Note that the court may or may not select the lead plaintiff to serve as a Rule 23(a) "class representative" if the court decides to certify a class. Even without such a statutory requirement, the proposed class representative should be willing to participate in discovery[788] and demonstrate familiarity with the claims asserted and the role of the class representative.[789]

784. *See generally In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 288 F.3d 1012 (7th Cir. 2002); Spence v. Glock, 227 F.3d 308 (5th Cir. 2000).

785. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

786. *In re* Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 209 F.R.D. 323, 338–40 (S.D.N.Y. 2002) (actual conflicts between proposed class representatives who seek injunctive relief and members of the proposed class who have already experienced personal injuries render the representatives inadequate under Rule 23(a)); *see also* Thompson v. Am. Tobacco Co., 189 F.R.D. 544, 550–51 (D. Minn. 1999) (same).

787. 15 U.S.C. § 78u-4(a)(2)(A) (2000); Berger v. Compaq Computer Corp., 257 F.3d 475, 483 (5th Cir. 2001) (noting that the PSLRA raises the adequacy of representation standard by requiring that "securities class actions be managed by active, able class representatives who are informed and can demonstrate they are directing the litigation"), *reh'g denied*, 279 F.3d 313 (2002) (noting that the Rule 23 standard remains the same).

788. *In re* Storage Tech. Corp. Sec. Litig., 113 F.R.D. 113, 118 (D. Colo. 1986) (holding that "failure to comply with proper discovery is a sufficient basis . . . to conclude that these plaintiffs would not adequately represent the class").

789. Morris v. Transouth Fin. Corp., 175 F.R.D. 694, 698 (M.D. Ala. 1997) (finding that adequate class representatives need only "have a basic understanding about the nature of [the] lawsuit" and "need not be intimately familiar with every factual and legal aspect" of the litigation). A named plaintiff who shows no understanding of the complaint and proceedings is inadequate. Kelley v. Mid-America Racing Stables, Inc., 139 F.R.D. 405, 409 (W.D. Okla. 1990) (finding named plaintiffs inadequate because of "their almost total lack of familiarity with the facts of their case"); *In re Storage Tech.*, 113 F.R.D. at 118 (disqualifying one plaintiff who was "unaware of even the most material aspects of this action" and another who was "too passive to assure vigorous prosecution").

Precertification inquiries into the named parties' finances or the financial arrangements between the class representatives and their counsel are rarely appropriate, except to obtain information necessary to determine whether the parties and their counsel have the resources to represent the class adequately. Ethics rules permit attorneys to advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter.[790] Such arrangements may later become relevant when awarding fees. See section 14.12.

21.142 Precertification Discovery into the Rule 23(b) Requirements

Rule 23(b)(1)(B). In addition to satisfying the Rule 23(a) criteria, a Rule 23(b)(1)(B) non-opt-out "limited fund" class must overcome a high threshold set by the Supreme Court.[791] Indeed, the Court has questioned whether a mass tort class action could ever be certified as a limited-fund class action.[792] First, the judge must find that there is a limited fund. The evidence must prove that the value of class claims exceeds the proven value of the fund.[793] Next, the judge must find that there would be equitable treatment of all claimants,[794] which may require the creation of subclasses for differing interests or, if the interests are too numerous and too conflicting, may defeat certification.[795] Finally, the judge must find that payment of the claims would exhaust the limited fund or that failure to exhaust the fund would be justified.[796] Efforts to certify limited-fund class actions after *Ortiz* have not been successful.[797]

790. Model Rules of Prof'l Conduct R. 1.8(e)(1) (2002). *See* Rand v. Monsanto Co., 926 F.2d 596, 599 (7th Cir. 1991) (indicating that class representatives are not responsible to underwrite class-wide costs and that class counsel who are compensated based on class benefits are more appropriate underwriters); Paul E. Iacono Structural Eng'r, Inc. v. Humphrey, 722 F.2d 435 (9th Cir. 1983); *In re* Workers' Comp., 130 F.R.D. 99, 108 (D. Minn. 1990).

791. Ortiz v. Fibreboard Corp., 527 U.S. 815, 838–53 (1999).

792. *Id.* at 842, 844, 864. *See also* S. Elizabeth Gibson, Case Studies of Mass Tort Limited Fund Class Action Settlements & Bankruptcy Reorganizations 37 (Federal Judicial Center 2000) (indicating that the Supreme Court reserved "[t]he larger question . . . whether a mass tort case could ever qualify for mandatory class treatment under Rule 23(b)(1)(B)").

793. *Ortiz*, 527 U.S. at 849.

794. *Id.* at 841.

795. *Id.* at 856–57.

796. *Id.* at 841, 858–60.

797. *See, e.g.*, *In re* Telectronics Pacing Sys., Inc., Accufix Atrial "J" Leads Prods. Liab. Litig., 221 F.3d 870, 873 (6th Cir. 2000) (decertifying a limited fund settlement class because parties did not have a "limited fund"); *In re* Telectronics Pacing Sys., Inc., Accufix Atrial "J" Leads Prods. Liab. Litig., 137 F. Supp. 2d 985, 1029 (S.D. Ohio 2001) (a renegotiated Rule 23(b)(3) opt-out settlement was granted final approval). *See also In re* River City Towing Servs., Inc., 204 F.R.D. 94, 96 (E.D. La. 2001) (finding that the "kind of limited fund necessary to certify a (b)(1)

Certifying a Rule 23(b)(1)(B) class ordinarily will call for extensive factual findings showing that the standards have been met,[798] which may require extensive discovery.

Rule 23(b)(2). The Rule 23(b)(2) class action applies when class-wide injunctive or declaratory relief is necessary to redress group injuries, such as infringements on civil rights, and is commonly relied on by litigants seeking institutional reform through injunctive relief.[799] Because a Rule 23(b)(2) class action does not permit opting out, it presumes that the class is homogenous and therefore cohesive. That presumption can be destroyed by showing individualized issues as to liability or remedy.

The grant of Rule 23(b)(2) certification in the tort context depends on factors such as whether state law recognizes medical monitoring claims, and, if so, treats them as calling for injunctive relief rather than money damages. Discovery may be necessary to show the existence of underlying state law preconditions for such claims as medical monitoring. Section 22.74 further

class action" was not determined); Doe v. Karadzic, 192 F.R.D. 133, 144 (S.D.N.Y. 2000) (decertifying after reconsideration because plaintiffs could not provide evidence of a limited fund); *In re* Diet Drugs Prods. Liab. Litig., MDL No. 1203, 1999 WL 782560, at *10 (E.D. Pa. Sept. 27, 1999) (vacating a conditionally certified settlement because the parties could not provide evidence of a true limited fund). *Cf. In re* Inter-Op Hip Prosthesis Liab. Litig., 204 F.R.D. 359, 378, 383 (N.D. Ohio) (preliminarily approving a Rule 23(b)(3) class in which participants in settlement would be given prior liens on defendant's assets over opt outs), *later proceeding at* 174 F. Supp. 2d 648, 653–55 (N.D. Ohio) (granting injunctive relief by enjoining the initiation of claims against defendants), *and injunction stayed*, No. 01-4039, 2001 WL 1774017, at *1 (6th Cir. Oct. 29, 2001) (ruling that "financial disincentives on the right to opt out of the settlement class . . . raise the due process concerns addressed in Ortiz").

798. *See In re* Phenylpropanolamine (PPA) Prods. Liab. Litig., 208 F.R.D. 625, 634 (W.D. Wash. 2002) (stating that "to certify such a class in the context of a limited fund claim, the court must have before it, at a minimum, evidence as to the assets and potential insolvency of the defendants involved in these cases").

799. Baby Neal *ex rel.* Kanter v. Casey, 43 F.3d 48, 58 (3d Cir. 1994). *See also* Daniels v. City of New York, 198 F.R.D. 409, 422 (S.D.N.Y. 2001) (certifying class of African-American and Latino men who were allegedly stopped and frisked by police street crimes unit without reasonable suspicion); Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439, 451–52 (N.D. Cal. 1994) (certifying class of disabled theatergoers who sought movie theaters' compliance with the Americans with Disabilities Act). In addition to its frequent application to civil rights cases, some courts have extended this provision to, *inter alia*, classes alleging systemic failure of child welfare services, *see, e.g.*, *Baby Neal*, 43 F.3d at 58–59 *and* LaShawn A. v. Dixon, 762 F. Supp. 959, 960 (D.D.C. 1991), as well as suits alleging miscalculation of Social Security benefits. *See* Forbush v. J.C. Penney Co., 994 F.2d 1101, 1106 (5th Cir. 1993); Gilchrist v. Human Res. Admin., No. 87 CV 7820, 1989 U.S. Dist. LEXIS 7850, at *10 (S.D.N.Y. July 13, 1989). Indeed, its drafters stated expressly that "[s]ubdivision (b)(2) is not limited to civil-rights cases." Fed. R. Civ. P. 23(b)(2) committee note (1966 amendment).

discusses medical monitoring claims and the factors affecting whether they may be certified as class actions under either Rule 23(b)(2) or Rule 23(b)(3).

When a proposed class seeks both injunctive relief and damages, the judge may have to make findings as to the relative importance of the damage claims and decide whether to provide class members notice and an opportunity to opt out. Rule 23(c)(4)(A) permits certification under the appropriate subsection of the rule to be made on a claim-by-claim basis. Some claims justify Rule 23(b)(3) certification, others will justify Rule 23(b)(2) treatment, and other claims should not be certified at all.

Rule 23(b)(3). Rule 23(b)(3) maintainability requires the judge to determine that common questions predominate over individualized ones and that class action treatment is superior to other available methods for the fair and efficient adjudication of the controversy.

To analyze predominance, the judge must determine whether there are individualized issues of fact and how they relate to the common issues, and then examine how the class action process compares to available alternatives (either alone or in combination): individual suits or joinder; consolidation, intervention, or other nonrepresentational forms of aggregate litigation; test cases; more narrowly defined class actions, perhaps filed in different courts; and agency enforcement. The Supreme Court has emphasized that judges should consider, in cases involving small claims, the access to court that the class mechanism provides.[800]

Precertification discovery may be needed to assist the judge in distinguishing the individual from the common elements of the claims, issues, and defenses, and in deciding the extent to which the need for individual proof outweighs the economy of receiving common proof. A trial plan addressing each element of the claims can help to identify the nature and extent of the individualized proof required.

To analyze superiority, the judge will need information from the parties about alternative approaches to the claims of the proposed class and the defenses they will face. Discovery may be needed to determine the extent to which individual potential class members have an interest in separate actions, inconsistent with class treatment. For example, discovery may be necessary to determine whether some class members are likely to assert individual claims for damages that could support individual suits, while other class members have claims for small amounts that would not justify individual litigation.

800. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (stating that "'[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights'" (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997))).

The judge must decide whether the proposed Rule 23(b)(3) class will be manageable. For the most part, courts determine manageability by reviewing affidavits, declarations, trial plans, and choice-of-law analyses that counsel present.[801] Discovery may be needed to determine whether a need for individual proof will hinder the fair presentation of common questions to the finder of fact[802] and whether class members can be identified without making numerous fact-intensive inquiries. In unusual circumstances, judges have used test cases or alternative dispute resolution (ADR) approaches to test the manageability of a class trial. See section 21.5.

An important aspect of precertification discovery is coordination with any discovery underway or anticipated in cases involving parallel suits simultaneously pending in other federal or state courts. The following section discusses the precertification relationship with other cases.

21.15 Relationship with Other Cases Pending During the Precertification Period

There may be other class actions, consolidated cases, or individual lawsuits in other courts or before other judges in the same division or district that arise out of the same legal and factual basis as the class action proposed for certification. These cases may purport to bind overlapping or duplicative groups. A federal district judge asked to certify a class action that overlaps with, duplicates, or competes with cases pending in other federal or state courts may face conflicts involving rulings on discovery or substantive motions, timetables for discovery, selection of class counsel, certification rulings, trial, and settlement, and may also face duplicative work and expense. The judge should obtain complete information from the parties about other pending or terminated actions in federal or state courts relating to the claims, defenses, and issues presented.

If multiple cases are pending in federal courts, the Judicial Panel on Multidistrict Litigation has the authority to transfer related federal cases to one district court for consolidated and coordinated pretrial proceedings[803] in order to prevent inconsistent rulings and to minimize duplicative discovery. See

801. *See, e.g.*, Zinser v. Accufix Research Inst., 253 F.3d 1180, 1187–90 (9th Cir. 2001) (discussing plaintiff's proposals for managing variations in state laws); *cf.* Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir. 2001) (stating that a judge should "receive evidence (if only by affidavit) and resolve the disputes before deciding whether to certify the class").

802. *See Szabo*, 253 F.3d at 676 (indicating that determining manageability required making a choice-of-law decision that in turn required resolving a factual issue on the merits).

803. 28 U.S.C. § 1407(a) (West 2002).

section 20.1. Prior to overlapping federal cases being transferred, or if the federal cases are not transferred at all, coordination among the judges handling the cases may be critical. Such coordination can be informal, consisting of telephone calls or other communication to minimize conflicts in scheduling and to arrange for the results of discovery to be used in all or most of the related cases. Some judges prefer more formal procedures, such as orders entered in the related cases that establish a coordinated schedule and arrangements for discovery and motions practice.

If the overlapping or duplicative cases are pending in both state and federal courts, there is no formal mechanism for global consolidation. If the federal cases have been transferred to one judge, the transferee court can then contact the other courts to discuss cooperation and coordination. Section 20.31 discusses in more detail approaches to coordination with state courts, particularly after a class action has been certified in the federal court.

Courts rely on a variety of techniques to coordinate overlapping or duplicative cases, such as establishing coordinated schedules for discovery and the filing and briefing of motions. Federal and state judges sometimes jointly hold hearings or arguments on the motions and establish coordinated discovery schedules.

The pendency of overlapping or duplicative cases in other courts may affect the timing of the certification decision. If transfer to a multidistrict litigation (MDL) proceeding is likely, it is usually best to defer certification until the MDL Panel acts (see generally section 20.31). A delay in deciding certification might also be appropriate if other cases in state or federal court are at a more advanced stage in the litigation.

A court may want to defer to other courts that have developed the record necessary to decide certification or are about to decide threshold dispositive motions to dismiss or for summary judgment.[804] Judges sometimes defer certification decisions pending the results of individual actions that are in or nearing trial or summary judgment. For example, in a mass tort case the trial of individual claims might inform a judge considering class certification about the nature of the claims and defenses and whether class certification is proper.[805] On the other hand, if the federal case is more advanced, the judge

804. *See, e.g.*, Nolan v. Cooper Tire & Rubber Co., No. CIV.A.01-83, 2001 WL 253865 (E.D. Pa. Mar. 14, 2001) (remanding nationwide class action to state court based in part on conduct originating in New Jersey).

805. *See In re* Norplant Contraceptive Prods. Liab. Litig., 955 F. Supp. 700 (E.D. Tex. 1997) (ruling on first set of bellwether plaintiffs' complaints); *infra* section 22.31 (criteria for aggregating mass tort claims); *see also* Thomas E. Willging, *Beyond Maturity: Mass Tort Case Management in the Manual for Complex Litigation*, 148 U. Pa. L. Rev. 2225, 2253–61 (2000)

may want to accelerate action on certification to protect against inconsistent rulings on class certification, appointment of class counsel, discovery motions, choice of law, and dispositive motions.

Competing class actions may produce a race to certification in different courts for the perceived advantages of a given forum. Such efforts should not influence the timing of the certification decision, and, through coordination with other courts, the judge should avoid facilitating such adversarial contests.

When informal efforts at cooperation and coordination prove unsuccessful, federal courts have on occasion felt it necessary to resort to efforts to stay parallel suits pending in other fora. The Anti-Injunction Act[806] and the All Writs Act[807] define federal court authority to stay or enjoin state court proceedings. Under these statutes, a federal court may enjoin actions in state courts, but only when necessary to aid its jurisdiction.[808] For example, a federal court may enjoin parallel state court actions to protect a class action settlement preliminarily or finally approved in the federal court.[809] Less clear is federal court authority to issue such orders outside the context of a pending settlement and before a class is certified.[810] A federal court considering an injunction

(discussing a multidimensional approach to mass tort case management that includes, among other factors, the concept of maturity). *See generally* McGovern, *Mass Torts for Judges*, *supra* note 705, at 1841–45 (presenting the concept of maturity, i.e., the idea that individual cases should be adjudicated and evaluated before courts consider certifying a class or otherwise aggregating claims).

806. 28 U.S.C. § 2283 (West 2002).

807. *Id.* § 1651.

808. At least four federal courts of appeals have approved such an injunction in "consolidated multidistrict litigation, where a parallel state court action threatens to frustrate proceedings and disrupt the orderly resolution of the federal litigation." Winkler v. Eli Lilly & Co., 101 F.3d 1196, 1202 (7th Cir. 1996) (citing Carlough v. Amchem Prods., Inc., 10 F.3d 189, 197 (3d Cir. 1993); *In re* Baldwin-United Corp., 770 F.2d 328, 336 (2d Cir. 1985); *In re* Corrugated Container Antitrust Litig., 659 F.2d 1332, 1334–35 (5th Cir. 1981)); *see also, e.g.*, Hanlon v. Chrysler Corp., 150 F.3d 1011, 1025 (9th Cir. 1998) (affirming the district court's injunction of state court proceedings where it had preliminarily approved a nationwide class settlement); White v. Nat'l Football League, 41 F.3d 402, 409 (8th Cir. 1994) (affirming injunction of related proceedings where district court had given final approval to a nationwide class settlement); Carlough v. Amchem Prods., Inc., 10 F.3d 189, 197 (3d Cir. 1993) (same).

809. *Hanlon*, 150 F.3d at 1025; *White*, 41 F.3d at 409; *Carlough*, 10 F.3d at 197; *In re* Baldwin-United Corp., 770 F.2d 328, 336 (2d Cir. 1985); *In re* Corrugated Container Antitrust Litig., 659 F.2d 1332, 1334–35 (5th Cir. 1981).

810. *See In re* Bridgestone/Firestone Tires Prods. Liab. Litig., Nos. 03-1-1399 & 03-1564 (7th Cir. June 20, 2003) (once federal appellate court held nationwide class action improper, federal district courts required to enjoin members of the putative national classes and their lawyers to have nationwide classes certified over defendants opposition with respect to same claims). *See also* Newby v. Enron Corp., 302 F.3d 295, 300 (5th Cir. 2002) (indicating *in dicta* that a district

or similar action directed toward parallel state court actions, before the federal court has certified a class or preliminarily approved a settlement, should be cautious in doing so; it is critical that the court be clear and precise in identifying the legal and factual basis for the injunction and the parties against whom the injunction operates.

21.2 Deciding the Certification Motion

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21.21 Certification Hearings and Orders

A hearing under Federal Rule of Civil Procedure 23(c) is a routine part of the certification decision. The nature and scope of the disputed issues relating to class certification bear on the kind of hearing[811] the judge should conduct. An evidentiary hearing may be necessary in a challenge to the factual basis for a

judge could not issue an injunction restraining a lawyer from filing related state court proceedings absent a pattern of abuse); *In re* Inter-Op Hip Prosthesis Prod. Liab. Litig., No. 01-4039, 2001 WL 1774017, at *2 (6th Cir. Oct. 29, 2001) (staying injunction against members of the proposed class in conditionally certified class "[b]ecause the validity of the proposed settlement is questionable"). *See also infra* section 31.32.

811. Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir. 2001) ("Before deciding whether to allow a case to proceed as a class action, therefore, a judge should make whatever factual and legal inquiries are necessary under Rule 23."); Marisol A. *ex rel.* Forbes v. Giuliani, 126 F.3d 372, 379 (2d Cir. 1997) (affirming certification but ordering the district court to create subclasses and "[i]f necessary, . . . allow additional discovery and hold evidentiary hearings in order to determine which classifications may be appropriate"); Morrison v. Booth, 730 F.2d 642, 644 (11th Cir. 1984) (remanding and holding that an evidentiary hearing on class certification is required unless clear grounds for denying certification exist); *cf. In re* Domestic Air Transp. Antitrust Litig., 137 F.R.D. 677, 682 n.4 (N.D. Ga. 1991) (holding that discretionary evidentiary hearing need not afford defendants unlimited opportunity to examine or cross-examine witnesses opposing class certification and addressing the merits).

class action.[812] Disputed facts material to deciding certification may be narrowed or eliminated by stipulations, requests for admission, affidavits, or declarations. The parties should submit a statement of stipulated facts and identify disputed facts relevant to Rule 23 issues using the general procedure described in section 11.47. When there is disagreement over the legal standards but not over the facts material to the certification decision, the court may rely on the parties' stipulations of fact, affidavits, declarations, and relevant documents to establish the factual record. In such a case, a hearing may be limited to argument over whether the certification requirements are met. A hearing is appropriate, even if the parties jointly move for certification of a class for settlement and for approval of the settlement class. A hearing ensures a full record, particularly if it is unclear that the certification standards are met or if there are likely to be objections to the settlement.

An evidentiary hearing to resolve disputed facts relevant to the certification decision should not be a minitrial on the merits of the class or individual claims.[813] Instead, the parties should present facts and arguments to let the judge determine the nature of the claims and defenses and how they will be presented at trial, whether there are common issues that can be tried on a class-wide basis, and whether those common issues predominate and class treatment is a superior method of resolving them. The judge may limit the number of witnesses, require depositions to be summarized, call for written statements of the direct evidence, and use other techniques described in section 12.5 for nonjury proceedings.[814]

If the parties have submitted a trial plan to aid the judge in determining whether certification standards are met, the certification hearing provides an opportunity to examine the plan and its feasibility.

Expert witnesses play a limited role in class certification hearings; some courts admit testimony on whether Rule 23 standards, such as predominance and superiority, have been met.[815] The judge need not decide at the certification stage whether such expert testimony satisfies standards for admissibility at

812. *See* Gen. Tel. Co. v. Falcon, 457 U.S. 147, 157–60 (1982).

813. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177–78 (1974).

814. *In re Domestic Air*, 137 F.R.D. at 682 (allowing each side to use written statements of expert witnesses).

815. *See, e.g.*, *In re* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 134–35 (2d Cir. 2001) (affirming district court's reliance on plaintiff's expert testimony to support its decision to certify a class), *cert. denied*, 536 U.S. 917 (2002); *In re* Linerboard Antitrust Litig., 203 F.R.D. 197, 214–18 (E.D. Pa. 2001) (relying on an econometrics expert to show that issues relating to common impact and common damages predominate and are susceptible to class-wide proof); *In re* Cardizem CD Antitrust Litig., 200 F.R.D. 297, 321–26 (E.D. Mich. 2001) (using expert testimony to show a plausible method of proving class-wide damages).

trial. Courts have applied a high threshold for assessing the need for expert testimony at the certification stage.[816] A judge should not be drawn prematurely into a battle of competing experts.[817]

After the hearing, the court should enter findings of fact and conclusions of law addressing each of the applicable criteria of Rule 23. Failure to make such findings may result in reversal or remand for further proceedings after interlocutory appeal under Rule 23(f).[818]

Rule 23(c)(1)(B) specifies that an order certifying a class must define the class membership and identify the class claims, issues, or defenses. It also requires that the order appoint class counsel under Rule 23(g). An order certifying a Rule 23(b)(3) class must inform the members of the proposed class when and how they may elect to opt out.[819]

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21.221 Type of Class

The certification order must specify whether Rule 23(b)(1), (b)(2), or (b)(3) forms the basis for certification. Members of a Rule 23(b)(3) class are entitled to individual notice and an opportunity to opt out.[820] Rules 23(b)(1)

816. *See, e.g.*, *In re Visa*, 280 F.3d at 135 ("A district court must ensure that the basis of the expert opinion is not so flawed that it would be inadmissible as a matter of law." (citing Cruz v. Coach Stores, Inc., 96 Civ. 8099, 1998 U.S. Dist. LEXIS 18051, at *13 n.3 (S.D.N.Y. Nov. 18, 1998))); Vickers v. Gen. Motors Corp., 204 F.R.D. 476, 479 (D. Kan. 2001) (same).

817. *See, e.g.*, *In re Visa*, 280 F.3d at 135 ("[A] district court may not weigh conflicting expert evidence or engage in 'statistical dueling' of experts." (citing Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 292 (2d Cir. 1999))); *In re Linerboard*, 203 F.R.D. at 217 n.13 (same); *see also In re* Polypropylene Carpet Antitrust Litig., 996 F. Supp. 18, 30 (N.D. Ga. 1997) (noting that "the evidence relied upon . . . has not been subjected to the adjudicative process" and that class certification "'should not be viewed as a prediction that Plaintiffs will ultimately prevail on the merits'" (quoting Diaz v. Hillsborough County Hosp. Auth., 165 F.R.D. 689, 692 (M.D. Fla. 1996))).

818. *See* Consol. Edison Co. of N.Y. v. Richardson, 233 F.3d 1376, 1384 (Fed. Cir. 2000) (remanding issue of certification because district court provided no reasons for its denial), *amended by* No. 99-1436, 2000 U.S. App. LEXIS 35446, at *22–*23 (Fed. Cir. Feb. 27, 2001); *see also* Lienhart v. Dryvit Sys., Inc., 255 F.3d 138, 149–50 (4th Cir. 2001) (vacating and remanding for determination of factual issue); Prado-Steiman *ex rel.* Prado v. Bush, 221 F.3d 1266, 1276 (11th Cir. 2000) (noting "a limited or insufficient record may adversely affect the appellate court's ability to evaluate fully and fairly the class certification decision").

819. Fed. R. Civ. P. 23(c)(2)(B).

820. *Id.*

and (b)(2) do not mandate notice or an opt-out opportunity, but amended Rule 23(c)(2)(A) recognizes a court's discretion to require notice of class certification in such cases. See section 21.311.[821]

A class action seeking injunctive and declaratory relief may also include a claim for monetary relief, and the judge must decide whether a class should be certified under Rule 23(b)(2) or (b)(3).[822] Courts have held that where money damages constitute the primary relief requested, even though injunctive relief is also sought, the class must be certified under Rule 23(b)(3) and must meet due process requirements.[823] In such cases, the notice and opt-out requirements of that subsection apply, even if the class also qualifies for certification under Rule 23(b)(1) or (b)(2).[824] On the other hand, where the damages flow directly from the equitable remedy, without the need for individual calculation, some courts have held that Rule 23(b)(2) is the only standard that must be met.[825] The circuits have divided on the resolution of this issue, which arises most often in employment discrimination class actions.

821. A court has discretion under Rules 23(d)(2) and (d)(5) to permit a class member to exclude itself from a Rule 23(b)(1)(B) class. County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1304–05 (2d Cir. 1990). A court is not precluded from defining a class under Rule 23(b)(1) or (b)(2) to include only those potential class members who do not opt out of the litigation. Such a definition may be appropriate in some Rule 23(b)(2) cases or in a Rule 23(b)(1)(B) case in which the class was formed merely because separate actions by class members might impede their ability to protect their interests. *See, e.g.*, Penson v. Terminal Transp. Co., 634 F.2d 989, 993 (5th Cir. 1981).

822. Eubanks v. Billington, 110 F.3d 87, 91–92 (D.C. Cir. 1997). The above cases deal with employment discrimination actions. Courts have similarly divided over whom to certify in proposed mass tort medical monitoring class actions, and whether under Rule 23(b)(2) or (b)(3). *See infra* section 22.74 (medical monitoring class actions).

823. Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998); *see also* Molski v. Gleich, 318 F.3d 937, 947–48 (9th Cir. 2003) (holding in a case primarily seeking injunctive relief that release in settlement of claims for individual damages triggers applicability of Rule 23(b)(3) requirements of individual notice and the right to opt out); Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894 (7th Cir. 1999).

824. *In re* Ikon Office Solutions, Inc. Sec. Litig., 209 F.R.D. 94, 101–02 (E.D. Pa. 2002) (certifying Rule 23(b)(1) and (b)(3) settlement classes with first-class mail notice supplemented by publication and Internet posting); Wilson v. United Int'l Investigative Servs. 401(k) Sav. Plan, No. CIV.A.01-CV-6126, 2002 WL 734339, at *6–*7 (E.D. Pa. Apr. 23, 2002) (certifying Rule 23(b)(2) and (b)(3) class with individual notice pursuant to Rule 23(c)(2)).

825. *See Allison*, 151 F.3d at 414–15, and cases cited therein. Damages would be incidental to an injunction when a statute serving as the basis for an injunction also establishes a fixed sum as damages. Robinson v. Metro-North Commuter R.R., 267 F.3d 147, 164 (2d Cir. 2001) (holding that Rule 23(b)(2) certification is permissible if the district court finds that "'the positive weight or value [to the plaintiffs] of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed'" and that "class treatment would be

21.222 Definition of Class

Defining the class is of critical importance because it identifies the persons (1) entitled to relief, (2) bound by a final judgment, and (3) entitled under Rule 23(c)(2) to the "best notice practicable" in a Rule 23(b)(3) action. The definition must be precise, objective, and presently ascertainable. For example, the class may consist of those persons and companies that purchased specified products or securities from the defendants during a specified period, or it may consist of all persons who sought employment or who were employed by the defendant during a fixed period.

Although the identity of individual class members need not be ascertained before class certification, the membership of the class must be ascertainable. Because individual class members must receive the best notice practicable and have an opportunity to opt out, and because individual damage claims are likely, Rule 23(b)(3) actions require a class definition that will permit identification of individual class members, while Rule 23(b)(1) or (b)(2) actions may not.[826] An identifiable class exists if its members can be ascertained by reference to objective criteria. The order defining the class should avoid subjective standards (e.g., a plaintiff's state of mind) or terms that depend on resolution of the merits (e.g., persons who were discriminated against).[827] The order should use objective terms in defining persons to be excluded from the class, such as affiliates of the defendants, residents of particular states, persons who have filed their own actions, or members of another class.

A class may be defined to include individuals who may not become part of the class until later. Such "future claimants" are primarily a feature of those mass tort actions involving latent injury. Section 22.1 defines the three types of mass tort future claimants. Apart from mass tort cases, membership in a Rule 23(b)(3) class ordinarily should be ascertainable when the court enters judgment. There is no need to identify every individual member at the time of certification of a Rule 23(b)(2) class action for injunctive relief as long as the court can determine at any given time whether a particular individual is a

efficient and manageable" (quoting *Allison*, 151 F.3d at 430 (Dennis, J., dissenting))), *cert. denied*, 535 U.S. 951 (2002).

826. Garrish v. United Auto., Aerospace, & Agric. Implement Workers, 149 F. Supp. 2d 326, 331 (E.D. Mich. 2001) (finding that the plaintiff's definition of the Rule 23(b)(3) class is "readily ascertainable by reference to objective criteria"); *see generally* 5 Moore et al., *supra* note 626, §§ 23.21[1] & 23.21[3] (discussing how a precise class definition allows courts to determine whether a particular individual is a member of the proposed class and who is entitled to notice).

827. *See, e.g.*, Forman v. Data Transfer, Inc., 164 F.R.D. 400, 403 (E.D. Pa. 1995) ("defining the purported class as 'all residents and businesses who have received unsolicited facsimile advertisements' requires addressing the central issue of liability" and "[d]etermining a membership in the class would essentially require a mini-hearing on the merits of each case").

member of the class.[828] See section 21.24 for a discussion of issues classes certified under Rule 23(c)(4).

The court should also consider whether the class definition captures all members necessary for efficient and fair resolution of common questions of fact and law in a single proceeding. If the definition fails to include a substantial number of persons with claims similar to those of the class members, the definition of the class may be questionable. A broader class action definition or separate class might be more appropriate. If the class definition includes people with similar claims but divergent interests or positions, subclasses with separate class representatives and counsel might suffice.

The applicable substantive law and choice-of-law considerations may also affect the appropriate scope of the class.[829] The difficulties posed by these considerations are likely to be compounded in nationwide or multistate class action litigation raising state law claims or defenses. Differences in applicable law and the number of divergent interests may lead a court to decline to certify a class.[830]

The class definition should describe the operative claims, issues, or defenses, such as injury resulting from securities fraud or denial of employment on account of race.[831] The relevant time should be included in the class definition. The relevant time, often referred to as the "class period," is, for example, the period during which members of the proposed class incurred the claimed injury. The order should delineate how the class representatives meet the commonality and typicality requirements of Rule 23(a).[832] In a Rule 23(b)(3) case, defining the class and the class claims in the order helps confirm

828. Robertson v. Nat'l Basketball Ass'n, 389 F. Supp. 867, 897 (S.D.N.Y. 1975).

829. A court to which cases have been transferred, through multidistrict proceedings or otherwise, is obliged to apply the choice-of-law rules of the transferor court. Van Dusen v. Barrack, 376 U.S. 612 (1964). Courts have applied *Van Dusen* to proceedings under the multidistrict litigation statute. *See* Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. Rev. 547, 552 n.14 (1996) (citing case law).

830. *In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 288 F.3d 1012 (7th Cir. 2002); Spence v. Glock, 227 F.3d 308, 313 (5th Cir. 2000); Castano v. Am. Tobacco Co., 84 F.3d 734, 741 (5th Cir. 1996).

831. Fed. R. Civ. P. 23(c)(2)(B). A description of the claims made on behalf of or against the class will be useful if questions relating to preclusive effects arise in later litigation. *See* Collins v. E.I. Dupont de Nemours & Co., 34 F.3d 172, 179–80 (3d Cir. 1994); *cf.* Cooper v. Fed. Reserve Bank, 467 U.S. 867, 880–81 (1984) (judgment against class in Title VII action bars only "class claims" and individual claims actually tried).

832. Gen. Tel. Co. v. Falcon, 457 U.S. 147 (1982) (meritorious individual claim of employment discrimination in promotion could not serve as a basis for certifying a class claim relating to "across the board" hiring practices).

that class treatment is superior to other available methods for the fair and efficient adjudication of the controversy.[833]

21.23 Role of Subclasses

Subclasses must be created when differences in the positions of class members require separate representatives and separate counsel. Those differences may arise from a variety of sources. Subclassing sometimes represents a workable solution to differences in substantive law and for choice-of-law difficulties. For example, in tort cases class members may have different levels of exposure to the same allegedly toxic substance, allege different types and degrees of injury, or seek different relief. Class members who have been exposed to a toxic substance but have no present injury (so-called future claimants) have an interest in ensuring that they will receive adequate compensation if an injury manifests itself in the future; those whose exposure has already resulted in injury have a conflicting interest in maximizing the present recovery for the damage they have already sustained. In securities fraud cases, class members may have received different information or communications at different times, requiring the creation of subclasses.

Each class or subclass must independently satisfy all the prerequisites of Rules 23(a) and (b).[834] The necessity of a large number of subclasses may indicate that common questions do not predominate. The creation of a number of subclasses may result in some that are too small to satisfy the numerosity requirement, may make the case unmanageable, or, in a Rule 23(b)(3) suit, may defeat the superiority requirement. Denial of class status in such circumstances is appropriate; if conflicts and differences among class members are so sharp that a number of small subclasses result, class treatment may not be justified in the first place.

21.24 Role of Issues Classes

Rule 23(c)(4)(A) permits a class to be certified for specific issues or elements of claims raised in the litigation.[835] Selectively used, this provision

833. Fed. R. Civ. P. 23(b)(3); *see also In re* Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990); Cimino v. Raymark Indus., Inc., 751 F. Supp. 649 (E.D. Tex. 1990), *vacated in part*, 151 F.3d 297 (5th Cir. 1998). *See infra* section 22.

834. Fed. R. Civ. P. 23(c)(4)(B); *see, e.g.*, *In re* Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 209 F.R.D. 323, 351 (S.D.N.Y. 2002).

835. *See, e.g.*, Cent. Wesleyan Coll. v. W.R. Grace & Co., 6 F.3d 177, 184 (4th Cir. 1993) (class certified for eight common issues); Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 472–73

may enable a court to achieve the economies of class action treatment for a portion of a case, the rest of which may either not qualify under Rule 23(a) or may be unmanageable as a class action.[836] A court may certify a Rule 23(b)(3) class for certain claims, allowing class members to opt out, while creating a non-opt-out Rule 23(b)(1) or (b)(2) class for other claims.[837] Certification of an issues class is appropriate only if it permits fair presentation of the claims and defenses and materially advances the disposition of the litigation as a whole.[838] If the resolution of an issues class leaves a large number of issues requiring individual decisions, the certification may not meet this test. In product-liability cases, there is a split of authority as to whether questions relating to product defects should be certified in an issues class.[839]

(5th Cir. 1986) (class action to adjudicate "state of the art" defense); Weathers v. Peters Realty Corp., 499 F.2d 1197 (6th Cir. 1974) (class for injunctive relief).

836. *See, e.g.*, Halderman v. Pennhurst State Sch. & Hosp., 612 F.2d 84 (3d Cir. 1979) (dictum), *rev'd on other grounds*, 451 U.S. 1 (1981). This appears to have been the intention of the drafters of the clause. *See* Fed. R. Civ. P. 23(c)(4) committee note (1966 amendment). Courts have, for example, considered the propriety of post-verdict proceedings in class actions under the securities acts in which, after the jury has determined liability, individual plaintiffs could seek recovery for qualifying shares. *See* Biben v. Card, 789 F. Supp. 1001, 1003 (W.D. Mo. 1992) (bifurcating trial proceeding into liability determination phase and individual claims for damages phase); Jaroslawicz v. Engelhard Corp., 724 F. Supp. 294, 302–03 (D.N.J. 1989) ("[I]t is well settled that the issue of liability may be tried separately from the damage claims of individual class members."). If filing a claim is the only way for class members to recover individual damages, this process amounts to a "claims class," that is, one in which liability has been determined on a class-wide basis, and individual damages are based on reviewing individual claims from class members.

837. *In re* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 147 (2d Cir. 2001); *see also* Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147 (2d Cir. 2001), *cert. denied*, 535 U.S. 951 (2002).

838. *Robinson*, 267 F.3d at 167 n.12 ("'the issues covered by the request be such that their resolution (as a class matter) will materially advance a disposition of the litigation as a whole'" (quoting *In re* Tetracycline Cases, 107 F.R.D. 719, 727 (W.D. Mo. 1985))). *See also MTBE*, 209 F.R.D. at 352–53.

839. *See infra* section 22.75. *Compare In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1302–03 (7th Cir. 1995) (rejecting the use of an issues class in product liability case because of individual liability issues), *and* Castano v. Am. Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir. 1996) (same), *with* Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996) (indicating that even "if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues"). *See also* Bolin v. Sears, Roebuck & Co., 231 F.3d 970, 976 (5th Cir. 2000) (reciting the advantages of claim-by-claim certification and remanding case for determination of whether certification of a modified class with respect to some of the claims under Rule 23(b)(2) or (b)(3) would be proper).

An issues-class approach contemplates a bifurcated trial where the common issues are tried first, followed by individual trials on questions such as proximate causation and damages. A bifurcated trial must adequately present to the jury applicable defenses and be solely a class trial on liability.[840] There is a split of authority on whether the Seventh Amendment is violated by asking different juries to decide separate elements of a single claim.[841]

Before certifying an issues class under Rule 23(d), the judge should be satisfied that common questions are sufficiently separate from other issues and that a severed trial will not infringe any party's constitutional right to a jury trial and will permit all the parties fairly to present the claims and defenses.[842]

21.25 Multiple Cases and Classes: The Effect on Certification

The broad range of venues available in class actions means that competing, conflicting, or overlapping suits are often simultaneously pending in state and federal courts. Any of the following circumstances or combinations of circumstances may exist:

- multiple cases with similar class allegations, each of which might be appropriately certified under Rule 23 but which may overlap or conflict if more than one is certified;
- cases alleging a nationwide class and cases seeking multistate or single-state class certification pending in different courts at the same time;
- cases filed as class actions in federal and state courts relating to the same type of transactions and involving some or all of the same parties;
- cases filed by the same lawyers seeking to represent an overlapping or duplicative class of plaintiffs in order to obtain the most favorable forum;
- cases filed by different lawyers competing for the fastest and most favorable rulings on class certification and appointment as class counsel;

840. *In re Rhone-Poulenc*, 51 F.3d at 1299.

841. *Compare In re Rhone-Poulenc*, 51 F.3d at 1303 (holding that the Seventh Amendment includes "a right to have juriable issues determined by the first jury impaneled to hear them"), *with Robinson*, 267 F.3d at 169 ("Trying a bifurcated claim before separate juries does not run afoul of the Seventh Amendment" as long as a single factual issue is not "tried by different, successive juries."). *See also* Steven S. Gensler, *Bifurcation Unbound*, 75 Wash. L. Rev. 705, 736–37 (2000); Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 Iowa L. Rev. 499 (1998).

842. *See* Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 500 (1931); Alabama v. Blue Bird Body Co., 573 F.2d 309, 318 (5th Cir. 1978). *See also supra* section 21.132.

- multiple individual actions or other forms of aggregate litigation pending in state and federal courts, raising the same issues and involving some or all of the same parties; or
- prior unsuccessful class certification efforts in state or federal courts.

A judge should be mindful of the various possibilities in deciding the best approach to precertification case management, in deciding whether and for what purpose to certify a class action, and in determining how to define the class. The first step is to obtain complete information from the parties about other pending or terminated actions in federal or state courts relating to the claims presented.

If all the cases are pending in federal court and have been centralized by an MDL proceeding, the transferee court can order consolidated pleadings and motions to decide how to resolve competing claims for certification, appointment of class counsel, and appointment of lead class counsel. See section 21.27. Counsel sometimes request certification of multiple classes and subclasses primarily to gain appointment to positions of leadership in the litigation. The court should attempt to distinguish such requests from competing certification motions that reflect more significant differences.

If multiple class actions or individual actions are pending at the same time in one or more federal and state courts, the certification decision requires the judge to consider the relationship among the cases. Federal class actions may encompass plaintiffs who are parties to individual cases or members of proposed class actions pending in other federal courts. If the MDL Panel has not been asked to centralize those cases, a court that has gathered information about the cases' status might discuss with counsel whether MDL status should be sought. In order to enable and facilitate essential intercourt communication and as an ongoing duty of candor to the tribunal, the court should, at an early date, call on counsel to disclose all related actions in other courts (state or federal) that may involve multiple, overlapping, or competing class allegations. Whether the related cases are pending in other federal or state courts, the federal judge asked to certify a class action that will overlap with or duplicate parallel cases should communicate with the judges handling the other proceedings and coordinate approaches to the class certification issues, including precertification discovery, motions, arguments, and proposed class definitions. See sections 20.14 and 20.31.

If each case meets the Rule 23 requirements, the judge has broad discretion in deciding which of several related cases to certify as a class action. A number of factors are relevant to this decision:

- the extent and nature of other litigation;[843]
- choice-of-law consequences (see section 21.23);
- whether persons who are class members under the allegations of one complaint are also included as members of other classes pleaded in other courts; and
- the existence of parallel state court actions.

If a state court class action has proceeded to certification before the federal action, there may be no need for the federal action. If the federal court finds that a certifiable class exists, it might define that class so as to exclude the members of a certified state class,[844] thus preventing needless conflicts between state and federal proceedings.

To the extent that these problems relate to differences in pleadings in different cases, they may be solved by ordering or allowing the filing of a consolidated complaint that amends existing complaints to add the necessary or appropriate claims and parties. A single pleading, in a single action, can then serve as the vehicle for defining the proposed class and deciding class certification.

A federal class action may include plaintiffs who are members of state classes. Because a prior resolution of the federal action may have a preclusive effect on claims pending in state courts, it is important to give adequate notice to enable individual state plaintiffs[845] to decide whether to opt out. Note, however, that a judgment in a federal non-opt-out Rule 23(b)(1) or (b)(2) class case has the practical effect of an injunction against the state court proceeding.[846] See section 21.3.

21.26 Appointment of the Class Representatives

The judge must appoint one or more representatives of the class and any subclass. The Private Securities Litigation Reform Act (PSLRA) requires that a class representative act independently of counsel, be familiar with the subject

843. *See* Califano v. Yamasaki, 442 U.S. 682, 703 (1979) (need to consider whether proposed nationwide class would improperly interfere with similar pending litigation in other courts).

844. *See, e.g.*, *In re* Diet Drugs Prods. Liab. Litig., MDL No. 1203, 1999 U.S. Dist. LEXIS 13228, at *49–*50 (E.D. Pa. Aug. 26, 1999) (conditionally certifying nationwide medical monitoring class that excludes members of certified state medical monitoring classes).

845. Due process for individual class members requires that the decision whether or not to opt out rests with the individual and not be made by a class representative or class counsel. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1024–25 (9th Cir. 1998); *see also* Conte & Newberg *supra* note 739, § 16.16 at 210.

846. *See In re* Fed. Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982).

matter of the complaint, and authorize initiation of the action.[847] In other kinds of class actions as well, courts have required that representatives be knowledgeable about the issues in the case. This does not necessarily require legal experience or expertise on the part of the representative, who is usually a layperson. No particular level of education or sophistication is required.[848] In all cases, the representatives must be free of conflicts and must represent the class adequately throughout the litigation. The judge must ensure that the representatives understand their responsibility to remain free of conflicts and to vigorously pursue the litigation in the interests of the class,[849] including subjecting themselves to discovery.

Later replacement of a class representative may become necessary if, for example, the representative's individual claim has been mooted or otherwise significantly altered. Replacement also may be appropriate if a representative has engaged in conduct inconsistent with the interests of the class or is no longer pursuing the litigation.[850] In such circumstances, courts generally allow class counsel time to make reasonable efforts to recruit and identify a new representative who meets the Rule 23(a) requirements. The court may permit intervention by a new representative or may simply designate that person as a representative in the order granting class certification.[851]

847. 15 U.S.C. § 78u-4(a)(2)(A) (2000). *See generally* Berger v. Compaq Computer Corp., 257 F.3d 475 (5th Cir. 2001), *reh'g denied*, 279 F.3d 313 (2002); *see also In re* Cell Pathways, Inc., Sec. Litig. II, 203 F.R.D. 189, 193–94 (E.D. Pa. 2001) (granting a post-PSLRA motion of a group of four businessmen to serve as lead plaintiffs indicating that they were all "sophisticated businessmen who share a substantial and compelling interest in vigorously prosecuting the claims on behalf of the class"). In a nonsecurities context, courts have commented that demanding a high degree of sophistication from class representatives is inconsistent with allegations in consumer cases that defendants' conduct targets those who are not sophisticated. *See* Dienese v. McKenzie Check Advance of Wis., L.L.C., No. 99-C-50, 2000 U.S. Dist. LEXIS 20389, at *20 (E.D. Wis. Dec. 11, 2000); *see also* Morris v. Transouth Fin. Corp., 175 F.R.D. 694, 698 (M.D. Ala. 1997) (holding that an unsophisticated consumer's reliance on counsel to investigate and litigate the case does not make this plaintiff an inadequate class representative).

848. *See* cases cited *supra* note 789.

849. *See In re* Storage Tech. Corp. Sec. Litig., 113 F.R.D. 113, 118 (D. Colo. 1986) (disqualifying named plaintiffs who failed to appear at depositions and another who appeared too passive to prosecute the case vigorously); 1 Conte & Newberg, *supra* note 739, § 3:22, at 409–14.

850. *See* Greenfield v. U.S. Healthcare, Inc., 146 F.R.D. 118 (E.D. Pa. 1993).

851. *See In re* Telectronics Pacing Sys., Inc., Accufix Atrial "J" Leads Prods. Liab. Litig., 172 F.R.D. 271, 283 (S.D. Ohio 1997) (court named substitute new class representative without formal intervention joinder); *see also* Shankroff v. Advest, Inc., 112 F.R.D. 190, 194 (S.D.N.Y. 1986) (sole proposed representative found inadequate, although other class certification criteria were met; plaintiff's counsel were given thirty days to propose at least one substitute representative).

Aside from the need to replace a class representative, formal intervention by class members is infrequent. Intervention is not necessary for a class member to pursue an appeal after objecting to a class settlement.[852] Class members in Rule 23(b)(3) actions may, however, appear by their own attorneys, subject to the court's power to adopt appropriate controls regarding the organization of counsel.

21.27 Appointment of Class Counsel

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Rules 23(c)(1)(B) and 23(g) recognize that the certification decision and order require judicial appointment of counsel for the class and any subclasses. This section deals with that process. Sections 21.7 and 14 discuss the procedures for reviewing and awarding attorney fees for class counsel.

Unlike other civil litigation, many class action suits do not involve a client who chooses a lawyer, negotiates the terms of the engagement, and monitors the lawyer's performance. Those tasks, by default, fall to the judge, who creates the class by certifying it and must supervise those who conduct the litigation on behalf of the class. The judge must ensure that the lawyer seeking appointment as class counsel will fairly and adequately represent the interests of the class.[853] If the certification decision includes the creation of subclasses reflecting divergent interests among class members, each subclass must have separate counsel to represent its interests.[854]

21.271 Criteria for Appointment

Rule 23(g) sets out the criteria and procedures for appointment of class counsel. In every case, the judge must inquire into the work counsel has done in investigating and identifying the particular case; counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action; counsel's knowledge of the applicable law; the resources counsel will commit to representing the class; and any other factors that bear on the attorney's ability to represent the class fairly and adequately. This last category may include the ability to coordinate the litigation with other state and federal

852. Devlin v. Scardelletti, 536 U.S. 1, 14 (2002) (holding that "nonnamed class members . . . who have objected in a timely manner to approval of the settlement at the fairness hearing have the power to bring an appeal without first intervening").

853. Fed. R. Civ. P. 23(g)(1)(B).

854. Fed. R. Civ. P. 23(g)(1)(A) committee note.

class and individual actions involving the same subject matter. Those seeking appointment as class counsel must identify related litigation in which they are participating. It is important for the judge to ensure that counsel does not have a conflict with class interests.[855]

In many cases, the lawyers who filed the suit will be the obvious or only choice to be appointed counsel for the class. In such cases, the judge's task is to determine whether the applicant is able to provide adequate representation for the class in light of the Rule 23(g)(1)(C) factors.

The judge must choose the class counsel when more than one class action has been filed and consolidated or centralized, or more than one lawyer seeks the appointment. The term "appoint" here means to "select" as well as to "designate" the lawyer as class counsel. If there are multiple applicants, the court's task is to select the applicant best able to represent the interests of the class. No single factor is dispositive in evaluating prospective class counsel. In addition to those listed above, relevant considerations might include

- involvement in parallel cases in other courts;
- any existing attorney–client relationship with a named party; and
- fee and expense arrangements that may accompany the proposed appointment.

21.272 Approaches to Selecting Counsel

There are several methods for selecting among competing applicants. By far the most common is the so-called "private ordering" approach: The lawyers agree who should be lead class counsel and the court approves the selection after a review to ensure that the counsel selected is adequate to represent the class interests.[856] Counsel may agree to designate a particular lead class counsel in exchange for commitments to share the legal work and fees. To guard against overstaffing and unnecessary fees,[857] the court should order the attorneys to produce for court examination any agreements they have made relating to fees or costs.[858] See section 21.631.

855. For an overview of possible conflicts of interest and other abuses (such as the "reverse auction" settlement in which defendant seeks to settle with counsel willing to accept the lowest offer), see sources cited *supra* note 737 and see *infra* sections 21.611–21.612.

856. *See* Third Circuit Task Force Report on Selection of Class Counsel, 74 Temp. L. Rev. 689, 693–94 (2001) [hereinafter Third Circuit 2001 Task Force Report]; *see generally supra* section 14.

857. *See, e.g.*, *In re* Fine Paper Antitrust Litig., 98 F.R.D. 48 (E.D. Pa. 1983), *modified*, 751 F.2d 562 (3d Cir. 1984).

858. *See* Fed. R. Civ. P. 23(h) committee note; *see also* Fed. R. Civ. P. 23(e)(2) (settlement approval); Fed. R. Civ. P. 54(d)(2)(B) (attorney fees motions).

In the "selection from competing counsel" approach, the judge selects from counsel who have filed actions, are unable to agree on a lead class counsel, and are competing for appointment. The lawyer best able to represent the class's interests may emerge from an examination of the factors listed in Rule 23(g)(1)(C), as well as other factors, such as those delineated above.

A third and relatively novel approach, competitive bidding, entails inviting applicants for appointment as class counsel to submit competing bids. The fees to be awarded are one of the many factors in the selection.[859] Rules 23(g)(1)(iii) and 23(g)(2)(C) expressly permit the court to consider fee arrangements in appointing counsel. Some judges propose a fee structure as a framework for comparing bids for different percentages at different levels of recovery.[860]

Judges in antitrust and securities class actions have used competitive bidding to select counsel and to establish in advance a rate or formula for calculating attorney fees. Studies suggest that bidding may be more appropriate when

- prospective damages are relatively high;
- the chances of success are relatively predictable;
- prefiling investigative work was conducted by governmental agencies or others, so that the lawyers' foundational work is minimal; and
- the bidding process does not directly conflict with statutory or policy goals.

Bidding remains an experimental approach to selecting counsel and establishing presumptive fee levels.[861]

859. *See* Third Circuit 2001 Task Force Report, *supra* note 856, at 715–22; Laural L. Hooper & Marie Leary, Auctioning the Role of Class Counsel in Class Action Cases: A Descriptive Study (Federal Judicial Center Aug. 29, 2001), *reprinted in* 209 F.R.D. 519 (2002); *see also In re* Auction Houses Antitrust Litig., 197 F.R.D. 71 (S.D.N.Y. 2000); *In re* Amino Acid Lysine Antitrust Litig., 918 F. Supp. 1190 (N.D. Ill. 1996); *In re* Wells Fargo Sec. Litig., 156 F.R.D. 223 (N.D. Cal.), *later proceedings at* 157 F.R.D. 467 (N.D. Cal. 1994); *In re* Oracle Sec. Litig., 131 F.R.D. 688 (N.D. Cal.), *later proceedings at* 132 F.R.D. 538 (N.D. Cal. 1990), *and* 136 F.R.D. 639 (N.D. Cal. 1991); *supra* section 10.224. *See generally* Alan Hirsch & Diane Sheehey, Awarding Attorneys' Fees and Managing Fee Litigation 99–101 (Federal Judicial Center 1994); Steven A. Burns, Note, *Setting Class Action Attorneys' Fees: Reform Efforts Raise Ethical Concerns*, 6 Geo. J. Legal Ethics 1161 (1993).

860. For examples of fee structures that were used in the bidding cases, see Hooper & Leary, *supra* note 859, at 34–45, reprinted in 209 F.R.D. at 561–73 (documenting key features of the various bidding approaches used in all twelve bidding cases identified in this descriptive study).

861. *See generally* Hooper & Leary, *supra* note 859; Third Circuit 2001 Task Force Report, *supra* note 856.

Cases in which liability is relatively clear and the amount of damages relatively predictable may be particularly good candidates for *ex ante* fee setting. Even if there is no court-ordered competition, a court may consider asking counsel to submit fee proposals to help analyze which application is best able to represent the class. In any case in which the judge does not appoint as class counsel the attorneys who investigated and filed the case, those attorneys may be entitled to compensation based on work performed. See section 14.12.

The Private Securities Litigation Reform Act of 1995 mandates an "empowered-plaintiff" approach to appointment of counsel in securities class actions.[862] This statute-based model provides that "[t]he most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class."[863] Section 31.3 provides a useful analogy for similar class actions brought by sophisticated plaintiffs with large losses or sizeable claims.

The order that appoints counsel might specify some of the criteria the judge expects to use in determining a fee award. The order can include provisions that will affect the fees *ex ante*[864] as part of the appointment process, even in jurisdictions that require a searching and detailed *ex post* review of the fee award at the end of the case. For example, the court can clarify whether it will use the percentage or lodestar method or a combination of the two in calculating fees. The judge can also specify terms that may reduce duplicative work, unnecessary hours, and unnecessary costs, such as agreements on the numbers of lawyers who may appear at depositions or agreements on the types of permissible expenses. See section 14.211. With the percentage-of-fund method for calculating attorney fee awards, such detailed limitations are less important since the maximum fee award is fixed at a reasonable percentage of the class recovery, no matter how many lawyers work to produce it. Even under a percentage-of-fund approach, however, consider controlling litigation

862. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended at 15 U.S.C. §§ 77z-1, 78u-4 to 78u-5 (2000)). For a discussion of the underpinnings of the empowered plaintiff model, see generally Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 Yale L.J. 2053 (1995).

863. 15 U.S.C. §§ 77z-1(a)(3)(B)(v), 78u-4(a)(3)(B)(v) (2000).

864. At least one court of appeals has expressed a preference for establishing the terms of appointment *ex ante*. *See In re* Synthroid Mktg. Litig., 264 F.3d 712, 718–19 (7th Cir. 2001) ("The best time to determine [a market] rate is the beginning of the case, not the end . . . ."). Another court of appeals has ruled that *ex ante* consideration of the terms of appointing counsel is not a substitute for *ex post* review of fees that were calculated using a formula established at the outset of the litigation. *In re* Cendant Corp. Prides Litig., 243 F.3d 722, 736–37 (3d Cir. 2001).

expenses that would ordinarily be deducted from the award to the class before fees are calculated. Many courts use the lodestar method as a cross-check on the reasonableness of the fee awarded under a percentage-of-fund approach. See section 14.122.

If no applicant would provide adequate representation, the judge may refuse to certify the class. If the class appears otherwise certifiable, however, refusal to certify solely on a finding of inadequate representation is very problematic. One alternative is to allow a reasonable time period for other attorneys to seek appointment.

21.273 Procedures for Appointment

If only one lawyer seeks appointment as class counsel, or if the parties agree who should be class counsel or lead class counsel, the application is generally submitted as part of the certification motion. If competing applications are likely, a reasonable period after commencement of the action should be allowed for attorneys to file class counsel applications. Competing applications are likely where more than one class action has been filed or other attorneys have filed individual actions on behalf of members of the proposed class. To facilitate comparison among applications, consider ordering applicants to follow a common format designed to elicit information about the court's appointment criterion. Any order of appointment should include a statement of the reasons for the appointment. Section 10.2 considers appointment of liaison counsel and committees of counsel in complex class action cases or cases resulting from the consolidation of different classes or subclasses.

21.28 Interlocutory Appeals of Certification Decisions

Rule 23(f) provides that a court of appeals may permit parties to appeal a district court order granting or denying class certification if application to the court of appeals is made within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or court of appeals so orders. Whether to grant an interlocutory appeal lies within the discretion of the court of appeals. The reported opinions produce a rough consensus[865] that interlocutory review should not be granted unless one or

865. *See* Prado-Steiman *ex rel.* Prado v. Bush, 221 F.3d 1266 (11th Cir. 2000); Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288 (1st Cir. 2000); Blair v. Equifax Check Servs., Inc., 181 F.3d 832 (7th Cir. 1999); *but cf.* Isaacs v. Sprint Corp., 261 F.3d 679 (7th Cir. 2001). Other courts, however, have indicated a more expansive standard for granting interlocutory appeals. *See, e.g.*, *Isaacs*, 261 F.3d at 681 (expressing doubt that creating an exhaustive list of factors to

more of the following factors are evident: (1) the certification order represents the death knell of the litigation for either the plaintiffs (who may not be able to proceed without certification) or defendant (who may be compelled to settle after certification); (2) the certification decision shows a substantial weakness, amounting to an abuse of discretion; or (3) an interlocutory appeal will resolve an unsettled legal issue that is central to the case and intrinsically important to other cases but is otherwise likely to escape review.[866]

Rule 23(f) differs from other interlocutory review provisions in that it does not call for the district judge to recommend whether the appellate court accept the interlocutory appeal. Rule 23(f) also does not automatically impose a stay, either during the pendency of the petition or during any appeal that the court of appeals permits.[867] A party seeking a stay should file an application in the trial court in the first instance.[868] Interlocutory appeals can disrupt and delay the litigation without necessarily changing the outcome of what are often familiar and almost routine issues.[869] Granting a stay depends, in the language of one early decision applying the amended rule, on "a demonstration that the probability of error in the class certification decision is high enough that the costs of pressing ahead in the district court exceed the cost of waiting."[870] In deciding whether to enter a stay, the effect of the certification decision on the statute of limitations is a consideration.[871] A stay of an order denying certifica-

consider in deciding whether to allow an interlocutory appeal would be desirable); Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 165 (3d Cir. 2001) (an "erroneous ruling" by the trial court or "'any consideration that the court of appeals finds persuasive'" justifies granting an interlocutory appeal (quoting Fed. R. Civ. P. 23(f) committee note (1998 amendment))).

866. *Prado-Steiman*, 221 F.3d at 1274–75. The court also indicated that the pretrial posture of the case, the state of the record, and future events, such as an impending settlement or bankruptcy, could have a substantial impact on the decision of whether to allow an interlocutory appeal. *Id.* at 1276.

867. Fed. R. Civ. P. 23(f) committee note ("Permission to appeal does not stay trial court proceedings.").

868. *Newton*, 259 F.3d at 165.

869. Fed. R. Civ. P. 23(f) committee note (referring to FJC Empirical Study of Class Actions, *supra* note 769); *see also In re* Sumitomo Copper Litig., 262 F.3d 134, 140 (2d Cir. 2001) (noting that "parties should not view Rule 23(f) as a vehicle to delay proceedings in the district court"); *Newton*, 259 F.3d at 165; *Prado-Steiman*, 221 F.3d at 1272 (citing Fed. R. Civ. P. 23(f) committee note).

870. *Blair*, 181 F.3d at 835 (noting that "Rule 23(f) is drafted to avoid delay"); *see also In re Sumitomo*, 262 F.3d at 140 (holding that "a stay will not issue unless the likelihood of error on the part of the district court tips the balance of hardships in favor of the party seeking the stay").

871. *See* Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc., No. 98 CV 1492, 2000 U.S. Dist. LEXIS 13910 (E.D.N.Y. Sept. 26, 2000); *see also In re* Silicone Gel Breast Implant Prods. Liab. Litig., MDL No. 926, 1994 WL 114580, at *4, *7 (N.D. Ala. Apr. 1, 1994) (extending

tion may continue to toll the statute of limitations and thereby discourage the filing of individual cases that might otherwise follow denial of class certification, particularly where the stakes for an individual are large enough to support litigation.[872] In general, a court considering whether to grant a stay pending interlocutory appeal should consider possible prejudice to the parties that may arise from delaying the proceedings. If the appeal is from a grant of certification, the district court should ordinarily stay the dissemination of class notice to avoid the confusion and the substantial expense of renotification that may result from appellate reversal or modification after notice dissemination.[873] The ten-day rule for filing appeals is applied strictly.[874]

21.3 Postcertification Communications with Class Members

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Communication by the court and counsel with the class is a major concern in the management of class actions. It is important to develop appropriate means for providing information to, and obtaining information from, class

indefinitely the time for opting out of a provisionally certified class action and stating that the pendency of that action would toll the statute of limitations for members of that class). Ordinarily, the tolling effect of a proposed class action ceases when a court denies class certification. Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1378 (11th Cir. 1998).

872. *Nat'l Asbestos Workers*, 2000 U.S. Dist. LEXIS 13910, at *8. *See also Armstrong*, 138 F.3d at 1380, 1389–90 (a pre-Rule 23(f) decision in which appellants did not seek to certify an interlocutory appeal under 28 U.S.C. § 1292(b); stating test for tolling as whether it is reasonable for members of the proposed class to rely on the possibility of reconsideration, or reversal through an interlocutory appeal, and holding that it was not reasonable in that case).

873. *See* Ramirez v. DeCoster, 203 F.R.D. 30, 40 (D. Me. 2001) (ordering a fairness hearing if no Rule 23(f) appeal filed, staying proceedings if appeal filed).

874. *See, e.g.*, Richardson Elecs., Ltd. v. Panache Broad. of Pa., Inc., 202 F.3d 957, 958–59 (7th Cir. 2000) (denying inexcusably late Rule 23(f) petition to appeal and rebuffing attempt to treat such a petition as an interlocutory appeal under 28 U.S.C. § 1292(b)); Gary v. Sheahan, 188 F.3d 891, 893 (7th Cir. 1999) (ruling that to extend the ten-day rule, a motion for reconsideration must be filed within ten days of the certification decision).

members, and for handling inquiries from potential or actual class members. It is equally necessary to avoid communications that might interfere with or burden the litigation. Rule 23(c)(2) provides significant guidance on the form and content of notices to the class. A committee note to that rule urges courts to "work unremittingly at the difficult task of communicating with class members" in plain language.[875]

21.31 Notices from the Court to the Class

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Notice to class members is required in three circumstances: (1) when a Rule 23(b)(3) class is certified; (2) when the parties propose a settlement or voluntary dismissal that would be binding on the class; and (3) when an attorney or party makes a claim for an attorney fee award. Rule 23(c)(2)(A) expressly grants the court discretion to require certification notice in Rule 23(b)(1) and (b)(2) classes in appropriate circumstances. Notice of settlement is required in all class actions. Rule 23(h)(1) requires that the court direct notice to the class members "in a reasonable manner" when an attorney or party files a motion for an award of attorney fees.[876] A judge who simultaneously certifies a class action and preliminarily approves a class-wide settlement (see section 21.612) typically combines notice of certification with notice of settlement and ordinarily includes notice of an application for an award of attorney fees. A case that is certified as a class action and has notice issue at that point, then settles at a later date (see section 21.611) requires a separate notice of the settlement.

Notice is a critical part of class action practice. It provides the structural assurance of fairness that permits representative parties to bind absent class members.[877] In a Rule 23(b)(3) class, notice conveys the information absent class members need to decide whether to opt out and the opportunity to do so. In all class actions, notice provides an opportunity for class members to participate in the litigation, to monitor the performance of class representatives and class counsel, and to ensure that the predictions of adequate representation made at the time of certification are fulfilled. Proper notice also

875. Fed. R. Civ. P. 23(c)(2)(B) committee note.
876. Fed. R. Civ. P. 23(h)(1).
877. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 627 (1997).

lessens the vulnerability of the final judgment to collateral attack by class members.[878]

Rule 23(c)(2)(B) specifies information that must be included in a notice, such as the nature of the action, the definition of the class, and the claims, issues, and defenses to be litigated. The rule requires that notices state essential terms "concisely and clearly . . . in plain, easily understood language." In addition, the court can require notice to be given when needed for the protection of class members or for the fair conduct of the action.[879] Notice generally is given in the name of the court, although one of the parties typically prepares and distributes it.

The Federal Judicial Center has produced illustrative forms of notice that combine notice of class certification and settlement in two types of class actions: a securities case and a products liability case in which both monetary damages and medical monitoring are provided. These forms can be adapted to specific cases. The Center has also drafted a form illustrating certification notice in an employment discrimination case. The form notices can be downloaded from the Center's Web site.[880]

Published notice should be designed to catch the attention of the class members to whom it applies. In many cases, a one-page summary of the salient points is useful, leaving fuller explanation for a separate document. Headlines and formatting should draw the reader's attention to key features of the notice. A short, informative blurb ("If you were exposed to ___, you may have a claim in a proposed class action settlement") on the outside of a mailing envelope serves a similar purpose.

Question-and-answer formats help to make information accessible and can guide the reader through each step of a complicated certification or settlement explanation. Counsel should logically order the information that will assist the class member in making important decisions, such as whether to opt out of the class, object to a settlement, or file a claim. Counsel should discuss with the court whether class members are likely to require notice in a language other than English or delivery by a means other than mail. Lists of class members usually provide the best source of information for deciding how to deliver notice. In some cases, the cohesiveness of a class (for example, employees of a single plant) or the existence of a common gathering place (for

878. *See* 7B Wright et al., *supra* note 738, §§ 1789, 1793.

879. Fed. R. Civ. P. 23(d).

880. The FJC has tested the form notices for comprehension and identified some principles that will be of value to those drafting such notices. Forms and discussion of plain language drafting principles are on the Center's Web page at http://www.fjc.gov (last visited Nov. 10, 2003).

example, shelters or food kitchens for a case involving the homeless) may suggest reliable and efficient ways to communicate notice.[881]

21.311 Certification Notice

Rule 23(c)(2)(A) and Rule 23(d) authorize the court to direct notice that a case has been certified as a Rule 23(b)(1) or (b)(2) class action. The court must provide notice for Rule 23(b)(3) classes. Notice in Rule 23(b)(1) and (b)(2) actions is within the district judge's discretion. Rule 23(c)(2)(A) recognizes the court's authority to direct "appropriate" notice in Rule 23(b)(1) and (b)(2) class actions, but contemplates different and more flexible standards for those cases than for Rule 23(b)(3) actions. Notice to members of classes certified under Rule 23(b)(1) or (b)(2) serves limited but important interests, such as monitoring the conduct of the action. This more flexible role of notice recognizes that in some cases, such as public interest organizations' civil rights class action suits, the costs of a wide-reaching notice might prove crippling and the benefits may be relatively small.

A court must decide whether and how to provide notice in Rule 23(b)(1) and (b)(2) actions. It may be preferable in some cases to forego ordering notice if there is a risk that notice costs could outweigh the benefits of notice, deterring the pursuit of class relief. If notice is appropriate, it need not be individual notice because, unlike a Rule 23(b)(3) class, there is no right to request exclusion from Rule 23(b)(1) and (b)(2) classes.

Who is to receive notice and how is notice to be delivered? Individual members in a Rule 23(b)(3) action have a right to opt out of the class proceedings. Rule 23(c)(2)(B) requires that individual notice in 23(b)(3) actions be given to class members who can be identified through reasonable effort. Those who cannot be readily identified must be given "the best notice practicable under the circumstances."[882] When the names and addresses of most class members are known, notice by mail[883] usually is preferred.

881. For a description of a case involving communication of notice on a worldwide basis to disparate groups, see *In re Holocaust Victims Assets Litigation*, 105 F. Supp. 2d 139, 144 (E.D.N.Y. 2000) ("Swiss Banks" litigation). Under the notice plan approved by the court, notice went to forty-eight countries under a "multi-faceted notice plan, involving, in addition to direct mail utilizing existing lists covering segments of the settlement classes, worldwide publication, public relations (i.e., 'earned media'), Internet and grass roots community outreach." *Id.*

882. Fed. R. Civ. P. 23(c)(2)(B); *In re Holocaust Victims*, 105 F. Supp. 2d at 144. Historically, due process has not required actual notice to parties who cannot reasonably be identified. *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313–19 (1950); Silber v. Mabon, 18 F.3d 1449 (9th Cir. 1994); *but see Amchem*, 521 U.S. at 595. *See also In re* Orthopedic Bone Screw Prods. Liab. Litig., 246 F.3d 315, 327 n.11 (3d Cir. 2001) (listing recommended practices for expanding the pool of names of class members for actual notice); *In re Holocaust Victims*, 105 F.

Posting notices on dedicated Internet sites, likely to be visited by class members and linked to more detailed certification information, is a useful supplement to individual notice, might be provided at a relatively low cost, and will become increasingly useful as the percentage of the population that regularly relies on the Internet for information increases. An advantage of Internet notice is that follow-up information can easily be added, and lists can be created to notify class members of changes that may occur during the litigation. Similarly, referring class members to an Internet site for further information can provide complete access to a wide range of information about a class settlement.[884] Many courts include the Internet as a component of class certification and class settlement notice programs.

Publication in magazines, newspapers, or trade journals may be necessary if individual class members are not identifiable after reasonable effort or as a supplement to other notice efforts. For example, if no records were kept of sales of an allegedly defective product from retailers to consumers, publication notice may be necessary. Financial and legal journals or financial sections of broad circulation newspapers, while useful to a degree, might not be read by many members of the general public. Such publications may, however, be useful in certain kinds of cases, such as securities fraud suits. Determination of whether a given notification is reasonable under the circumstances of the case is discretionary. The sufficiency of the effort made might become an issue if the preclusive effect of the class action judgment is later challenged. Section 21.22–21.23 discusses class certification under Rule 23(b)(3) in conjunction with Rule 23(b)(2).

When should notice be given? Ordinarily, notice to class members should be given promptly after the certification order is issued. When the parties are nearing settlement, however, a reasonable delay in notice might increase incentives to settle and avoid the need for separate class notices of certification and settlement. Delaying notice of certification until after settlement apparently is a common practice in such cases.[885]

Notice to the added class members is required if the certification order is amended to expand the class definition. If the certification order is amended to

Supp. 2d at 144–45; *In re* Diet Drugs Prods. Liab. Litig., MDL No. 1203, 2000 WL 1222042 (E.D. Pa. Aug. 28, 2000).

883. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 356 n.22 (1978), speaks favorably of the use of mail, without specifying the class of mail.

884. See, for example, the notice and forms published on a Web site created for the diet drugs class action settlement in *In re Diet Drugs Products Liability Litigation*. The site can be visited at http://www.settlementdietdrugs.com/dhome.php3#forms (last visited Nov. 10, 2003).

885. FJC Empirical Study of Class Actions, *supra* note 769, at 62.

eliminate previously included class members, consider whether notice is necessary to inform affected individuals who might have relied on the class action to protect their rights. If repetitive notice and frequent orders affect class interests, ordering the parties to use the Internet—especially a specific Web site dedicated to the litigation—may be a particularly cost-effective means to provide current information in a rapidly evolving situation.

What must the notice include? If a class is certified and settled simultaneously, a single notice is generally used. Rule 23(c)(2)(B) requires that a class certification notice advise class members of the following:

- the nature of the action;
- the definition of the class and any subclasses;
- the claims, issues, and defenses for which the class has been certified;
- the right of a potential class member to be excluded or to opt out from the class;
- the right of a class member to enter an appearance by counsel; and
- the binding effect of a class judgment.

In Rule 23(b)(3) actions, the notice also must describe when and how a class member may opt out of the class.

Sufficient information about the case should be provided to enable class members to make an informed decision about their participation. The notice should

- describe succinctly the positions of the parties;
- identify the opposing parties, class representatives, and counsel;
- describe the relief sought; and
- explain any risks and benefits of retaining class membership and opting out, while emphasizing that the court has not ruled on the merits of any claims or defenses.

A simple and clear form for opting out is often included with the notice. If the certification notice is combined with a settlement notice, it should identify specific benefits for class or subclass members (or a formula for calculating such benefits), the choices available to class members, and any other information a class member reasonably would need to make an informed judgment about whether to remain in the class.[886] In a combined notice of certification and settlement, the opt-out form should be distinguished from a claims form

886. Ravens v. Iftikar, 174 F.R.D. 651, 655 (N.D. Cal. 1997) (citing *In re* Nissan Motor Corp. Antitrust Litig., 552 F.2d 1088, 1104–05 (5th Cir. 1977)).

or a notice of appearance. Color coding or similar approaches may be appropriate.

Notice may be published in more than one language if appropriate to the demographics of the class.[887] The Federal Judicial Center's illustrative notices offer guidance in meeting the plain language requirement.[888]

Who pays for the notice? In a Rule 23(b)(3) class, the parties seeking class certification must initially bear the cost of preparing and distributing the certification notice,[889] including the expense of identifying the class members.[890] Individual class representatives, however, are responsible only for their pro rata share of notice costs (and other class action costs).[891] Class counsel may properly advance such costs with repayment contingent on recovery.[892] Class counsel should keep accurate and complete records of the steps taken to provide notice. Those records will be useful for assessing costs and for responding to any post-judgment attacks on the adequacy of notice.

There is no clear rule regarding who should pay the initial cost of preparing and distributing certification notice when it is ordered in Rule 23(b)(1) and (b)(2) actions. Some judges have required class representatives to pay this cost.[893] Others have required the defendant to bear these costs, particularly

887. *See, e.g.*, Montelongo v. Meese, 803 F.2d 1341, 1352 (5th Cir. 1986) (finding notice with English and Spanish language mailings, announcements on Spanish radio, and notice in Spanish newspapers to be sufficient); S.F. NAACP v. S.F. Unified Sch. Dist., No. C-78-1445, 2001 WL 1922333, at *4 (N.D. Cal. Oct. 24, 2001) (finding notice requirements met because of publication and postings in English, Chinese, and Spanish); *In re* Mex. Money Transfer Litig., 164 F. Supp. 2d 1002, 1020 (N.D. Ill. 2000) (reporting "notice was provided via television, radio, and newspaper advertising in the Untied States and Mexico").

888. See the Center's Web page at http://www.fjc.gov (last visited Nov. 10, 2003).

889. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177–79 (1974) (interpreting Rule 23).

890. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 356 (1978).

891. Rand v. Monsanto Co., 926 F.2d 596, 601 (7th Cir. 1991) (holding that "a district court may not establish a per se rule that the representative plaintiff must be willing to bear all (as opposed to a pro rata share) of the costs of the action").

892. Model Rules of Prof'l Conduct R. 1.8(e)(1) (2002).

893. Coalition for Econ. Equity v. Wilson, No. C 96-4024, 1996 WL 788376, at *4 (N.D. Cal. Dec. 16, 1996); Lynch Corp. v. MII Liquidating Co., 82 F.R.D. 478, 483 (D.S.D. 1979).

when the defendant requested the notice[894] or where notice follows a finding of liability and the granting of injunctive relief.[895]

In Rule 23(b)(3) class actions, determining how and to whom notice should be delivered can be controversial. The mode and extent of notice implicates issues of cost and fairness to the parties and class members, and raises the potential for prejudice to one side or the other. In securities cases, for example, brokers or financial institutions might hold the shares of many class members, but giving notice to these agents for class members alone may not always suffice to give notice to the class members.[896] In that case, however, the class representatives usually are able to make arrangements with the nominees to forward the notices to class members, or at least to provide a list of the names and addresses of the beneficial owners. If the nominees are not willing to do so and are not parties to the litigation, the court can issue a subpoena *duces tecum* directing them to produce the records from which the class representatives can compile a mailing list. If the litigation eventually is terminated favorably to the class, the representatives might be entitled to reimbursement for these expenses, either from the entire fund recovered for the class, from that part of the fund recovered on behalf of security holders whose shares were held by brokers, or perhaps from the defendants.[897]

Similar problems may arise in consumer class actions on behalf of individual purchasers of goods or services. Sales records might be lost, incomplete, or unreliable, making identification and notification of individual class members difficult. A program to publish notice is especially useful in such cases. The

894. *See generally* 7B Wright et al., *supra* note 738, § 1788; *see also* S. Ute Indian Tribe v. Amoco Prod. Co., 2 F.3d 1023, 1030 (10th Cir. 1993) (observing that one of two issues certified would only benefit a class of defendants and reversing an order that plaintiffs pay a portion of the costs that representative defendant had previously incurred in compiling a list of defendants).

895. *See* Barahona-Gomez v. Reno, 167 F.3d 1228, 1236–37 (9th Cir. 1999) (upholding notice of preliminary injunction based in part on finding that notice would not impose a burden on defendant).

896. *Compare* Silber v. Mabon, 18 F.3d 1449, 1454, n.3 (9th Cir. 1994) (approving method of notice where brokerage house forwards notice to shareholders and affirming that class member's notice was sufficient even though not actually received until after the opt-out period expired), *and In re* Victor Tech. Sec. Litig., 792 F.2d 862, 866 (9th Cir. 1986) (affirming order requiring plaintiffs to pay, in advance, record owners for costs related to forwarding notice to shareholders), *with* Blum v. BankAtlantic Fin. Corp., 925 F.2d 1357, 1362, n.10 (11th Cir. 1991) (noting that evidence of industry practice of record owners not forwarding notice may "sustain a Rule 23(c)(2) challenge" but appellants presented no current evidence of this practice).

897. *See* Zuckerman v. Smart Choice Auto. Group, Inc., No. 6:99-CV-237, 2001 WL 686879, at *2 (M.D. Fla. May 3, 2001).

published notice should give class members access to more detailed and ongoing information by providing telephone numbers and Internet addresses.

Individual notice generally is preferable. If individual names or addresses cannot be obtained through reasonable efforts, the court must, with counsel's assistance, determine how to provide the best notice practicable under the circumstances. Alternative techniques for providing notice include

- publication notice;[898]
- Internet notice;[899] and
- posting notice in public places likely to be frequented by class members.[900]

Plaintiffs may propose distributing notice with a defendant company's routine mailings when, for example, the class members consist of, or overlap with, shareholders, credit card holders, customers, or employees.[901] Defendant may object that requiring it to use its own mailings to announce the certification of

898. *In re* Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 327 (3d Cir. 1998) (notice published in newspapers in all fifty states and the District of Columbia); Fry v. Hayt, Hayt & Landau, 198 F.R.D. 461, 475 (E.D. Pa. 2000) (notice published one time in national newspaper); *In re* Diet Drugs Prods. Liab. Litig., MDL No. 1203, 2000 WL 1222042, at *35 (E.D. Pa. Aug. 28, 2000) (notice published in largest newspapers across the country including those that targeted the Hispanic market).

899. *Fry*, 198 F.R.D. at 475 (Internet notice published on news Web site); *In re Diet Drugs*, 2000 WL 1222042, at *35 (Web site provided detailed notice package to class members who registered); *In re* Holocaust Victim Assets Litig., 105 F. Supp. 2d 139, 144 (E.D.N.Y. 2000) (extensive notice package was "successfully implemented," which included world-wide publication, press coverage, extensive community outreach, direct mail to 1.4 million people in forty-eight countries, and Internet notice).

900. *In re* Domestic Air Transp. Antitrust Litig., 141 F.R.D. 534, 549 (N.D. Ga. 1992) (notice posters sent to "approximately 36,000 travel agencies in the United States"); *cf. In re* Ariz. Dairy Prods. Litig., No. Civ. 74-569A, 1975 WL 966, at *1 (D. Ariz. Oct. 7, 1975) (notice printed on milk cartons).

901. *See* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 356 n.22 (1978) (noting that "a number of courts have required defendants in Rule 23(b)(3) class actions to enclose class notices in their own periodic mailings to class members in order to reduce the expense of sending the notice"); *In re* Nasdaq Market-Makers Antitrust Litig., 169 F.R.D. 493, 515 n.19 (S.D.N.Y. 1996) (requiring notice sent to subclass be inserted in defendants' mailings); Kan. Hosp. Ass'n v. Whiteman, 167 F.R.D. 144, 145–46 (D. Kan. 1996) (requiring defendants to insert notice of the "proposed disposition" of case into monthly mailings); Sollenbarger v. Mountain States Tel. & Tel. Co., 121 F.R.D. 417, 437 (D.N.M. 1988) (allowing plaintiffs to provide individual notice to class members by enclosing an insert in defendant's monthly billing statements to current customers).

a class against it may be prejudicial[902] and may even deprive it of First Amendment rights.[903] It is important to balance any efficiencies that might be gained by this approach against the burden such mailings can impose. Before requiring a defendant to use its own mailings to provide certification notice, the court should require class counsel to show the absence of feasible alternatives.

21.312 Settlement Notice

Rule 23(e)(1)(B) requires the court to "direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise" regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3). Certification and settlement notices are subject to many of the same considerations.[904]

When is a settlement notice required? Rule 23(e) requires notice of a settlement only if it would bind the class. If individual members settle individual claims before class certification, notice to the class is not required even if the class claims have been dismissed without prejudice or withdrawn. When a proposed class has not been certified, however, special circumstances might lead a court to impose terms to prevent abuse of the class action procedure. Section 21.61 discusses potential abuses, especially the filing and voluntary dismissal of class allegations for strategic purposes; section 21.62 discusses criteria for reviewing proposed settlements, especially when named plaintiffs receive relief that is disproportionately large. The judge might also require notice directed to the absent members of the proposed class under Rule 23(d)(2).[905] However, requiring such notice is unusual. The court should

902. Katz v. Carte Blanche Corp., 496 F.2d 747, 757 (3d Cir. 1974) (en banc) (noting that credit card customers might refuse to pay their regular bills as a result of a notice including information about statutory damages).

903. *See* Pac. Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1 (1986) (plurality opinion in nonclass action context).

904. *See supra* note 880. *See, e.g.*, *In re* Nissan Motor Corp. Antitrust Litig., 552 F.2d 1088, 1105 (5th Cir. 1977).

905. The cases cited in this note were all decided under the pre-2003 version of Rule 23(e). *See, e.g.*, Diaz v. Trust Territory of Pac. Islands, 876 F.2d 1401, 1409 (9th Cir. 1989) (notice of a precertification voluntary dismissal of a complaint with class action allegations should be given to protect members of the proposed class from "prejudice [they] would otherwise suffer if class members have refrained from filing suit because of knowledge of the pending class action"; notice not required in Diaz case); *see also* Glidden v. Chromalloy Am. Corp., 808 F.2d 621, 627 (7th Cir. 1986) (dicta that notice of a settlement or summary judgment dismissal of a case before deciding on certification should be given because the settlement or dismissal "creates obvious dangers; the representative may have been a poor negotiator or may even be in cahoots with the defendant"); *In re* Nazi Era Cases Against German Defendants Litig., 198 F.R.D. 429, 439 (D.N.J.

weigh the costs and consequences of such notices against the need for the protection it may provide in a given case.[906]

Who is to receive settlement notice and how is notice to be delivered? Rule 23(e)(1)(B) requires notice in a reasonable manner to "all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise." Even if a class member has opted out after receiving a certification notice, the parties might direct notice to such opt outs to give them an opportunity to opt back into the class and participate in the proposed settlement.

In general, settlement notices should be delivered or communicated to class members in the same manner as certification notices (see section 21.311). As with certification notices, individual notice is required, where practicable, in Rule 23(b)(3) actions. Posting notices and other information on the Internet, publishing short, attention-getting notices in newspapers and magazines, and issuing public service announcements may be viable substitutes for, or more often supplements to, individual notice if that is not reasonably practicable.

When should the notice be given? In an order preliminarily approving the settlement under Rule 23(e), the judge sets the date for providing notice of the proposed settlement. This order, as well as the notice, should establish the time and place of a public hearing on the proposed settlement and specify the procedure and timetable for opting out, filing objections, and appearing at the settlement hearing. If problems or questions concerning the terms of the settlement are identified at the preliminary approval stage, notice to the class ordinarily is deferred until there has been an opportunity to resolve those issues.

What must the notice include? The notice should announce the terms of a proposed settlement and state that, if approved, it will bind all class members. If the class has been certified only for settlement purposes, that fact should be disclosed. Even though a settlement is proposed, the notice should outline the original claims, relief sought, and defenses so class members can make an informed decision about whether to opt out.[907]

2000) (stating that "a district court should make a 'proper inquiry' to determine whether a proposed settlement and dismissal are tainted by collusion or will prejudice absent members of the putative class"); Gassie v. SMH, Ltd., Civ. A. No. 97-1786, 1997 U.S. Dist. LEXIS 13687, at *4–*5 (E.D. La. Sept. 9, 1997) (same).

906. *Diaz*, 876 F.2d at 1411.

907. If the class had been certified previously under Rule 23(b)(3), and if the parties propose a class settlement after expiration of the opportunity for class members to opt out, Rule 23(e)(3) authorizes the court, in its discretion, to refuse to approve a settlement unless the parties provide a second opportunity to opt out. *See infra* section 21.611.

The notice should

- define the class and any subclasses;
- describe clearly the options open to the class members and the deadlines for taking action;
- describe the essential terms of the proposed settlement;
- disclose any special benefits provided to the class representatives;
- provide information regarding attorney fees (see section 14);
- indicate the time and place of the hearing to consider approval of the settlement;
- describe the method for objecting to (or, if permitted, for opting out of) the settlement;
- explain the procedures for allocating and distributing settlement funds, and, if the settlement provides different kinds of relief for different categories of class members, clearly set forth those variations;
- explain the basis for valuation of nonmonetary benefits if the settlement includes them;
- provide information that will enable class members to calculate or at least estimate their individual recoveries, including estimates of the size of the class and any subclasses;[908] and
- prominently display the address and phone number of class counsel and how to make inquiries.

In a Rule 23(b)(3) class, the notice and any Internet Web site should include opt-out forms. The notice must clearly explain the options available to a class member and the difference between opting out and claiming benefits.[909] If the details of a claims procedure have been determined, and there is little

908. *See, e.g.*, Grunin v. Int'l House of Pancakes, 513 F.2d 114, 122 (8th Cir. 1975) (stating "the notice may consist of a very general description of the proposed settlement, including a summary of the monetary and other benefits that the class would receive and an estimation of attorneys' fees and other expenses"); Boggess v. Hogan, 410 F. Supp. 433, 442 (N.D. Ill. 1975) (stating "the notice should . . . include . . . an estimated range of unitary recovery"). *Cf.* 3 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 8:32, at 265 (4th ed. 2002) (indicating that "[i]t is unnecessary for the settlement distribution formula to specify precisely the amount that each individual class member may expect to recover").

909. *But see In re* Domestic Air Transp. Antitrust Litig., 141 F.R.D. 534, 554 (N.D. Ga. 1992) (refusing to include opt-out form with notice to class because of "possible confusion resulting from inclusion of such a form" (citing Roberts v. Heim, 130 F.R.D. 416, 423 (N.D. Cal. 1988) (disallowing opt-out form with class notice on the basis that "on balance, such a separate form will engender confusion and encourage investors to unwittingly opt out of the class"))); *see also* 3 Conte & Newberg, *supra* note 908, § 8:31, at 257–59 (describing use of forms for class members to notify court of desire to be excluded).

indication of any serious challenge to or problems with the settlement, claims forms might be included with the settlement notice. Often, however, the outcome of objections to or concerns over the settlement terms and the details of allocation and distribution are not established until after the settlement is approved. In that situation, claims forms are distributed after the approval.[910] The court can direct class counsel or their agents (such as settlement claims administrators) to communicate with class members whose intentions are unclear in order to help ensure that they make an informed election or exclusion of class membership and that the outcome (claimant status or opt-out status) is what they intended. Rule 23(d)(2) permits the court to revoke inadvertent opt outs to protect class members' interests and advance "the fair conduct of the action."

In most instances, the notice does not include the full text of the proposed settlement. If the agreement itself is not distributed, however, the notice must contain a clear, accurate description of the key terms of the settlement and inform class members where they can examine or obtain a copy, such as from the Internet, the clerk's office, class counsel, or another readily accessible source. For example, in an employment discrimination case, the agreement may be obtained from a defendant's employer's office.

Who pays for the notice? The parties generally use the settlement agreement to allocate the cost of settlement notices. The costs are often assessed against a fund created by the defendants or to the defendant, in addition to any funds paid to the class.

21.313 Other Court Notices

Rule 23(d)(2) authorizes the court to require that notice be given

> for the protection of the members of the class . . . of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action.

910. For example, in *In re Holocaust Victim Assets Litigation ("Swiss Banks")*, the pre-fairness hearing on worldwide notice did not include a detailed plan of allocation; instead, the notice program was actively used to solicit allocation proposals and preferences from the class members themselves. These were submitted to a court-appointed special master, who in turn considered the suggestions and prepared a detailed plan of allocation, after final settlement approval, that the court ultimately approved and implemented. *See In re* Holocaust Victim Assets Litig., No. CV 96-4849, 2000 U.S. Dist. LEXIS 20817, at *13 (E.D.N.Y. Nov. 22, 2000).

There are a number of circumstances under which notice is appropriate to protect the class or proposed class or for the fair conduct of the action. For example, if a decision is made to decertify a previously certified class or to exclude previously included members of the class after certification notice has been issued and after the time for opting out has expired, the judge should consider whether to inform the affected class members of the change in their status and any effect on the statute of limitations.[911]

The type and contents of any notice and who should bear the cost depend on the circumstances surrounding the notice, including what prompted the notice, who should be notified, whose duties are discharged, and when the notice is given. The court may consider using means less costly than personal notice. For example, if there was little or no publicity about the filing of a proposed class action, posting or publishing a notice of the court's denial of certification may suffice.

In Rule 23(b)(3) actions in which liability issues are adjudicated on a class-wide basis and individual damages claims are left for separate resolution, the class members must be provided notice of the results of the liability adjudication and an opportunity to file claims for individual relief in a later phase of the proceedings. See, e.g., section 21.322.

The judge also can require notice to correct misinformation or misrepresentations made by one of the parties or by parties' attorneys.[912] See section 21.33. Those who made the misstatements should bear the cost of a notice to correct misstatements. Curative notices generally should be disseminated in the same form as was the misinformation to be corrected.

If the notice of settlement does not establish a claims procedure, subsequent notice will be necessary to advise the class about when, where, and how to file claims, and the notice should also provide claims forms. This notice should be sent to all known members of the class and is generally part of the cost of administering the settlement, paid out of a settlement fund.

911. *See* Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 354 (1983); Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 561 (1974); *see also* Culver v. City of Milwaukee, 277 F.3d 908, 915 (7th Cir. 2002) (notice of decertification of class required unless "it is plain that there is no prejudice"); Crawford v. F. Hoffman-La Roche Ltd., 267 F.3d 760, 764–65 (8th Cir. 2001) (when class has not been certified, notice of voluntary dismissal is not required unless there is prejudice).

912. Georgine v. Amchem Prods., Inc., 160 F.R.D. 498, 518 (E.D. Pa. 1995) (finding objectors' communications about settlement misleading and inaccurate and ordering curative action).

21.32 Communications from Class Members

.321 Class Members' Right to Elect Exclusion 298
.322 Communications Relating to Damage or Benefit Claims 299
.323 Other Communications from Class Members 299

Important types of communications from class members include solicited responses (such as returns of opt-out forms or claim benefit forms) and unsolicited communications initiated by class members.

21.321 Class Members' Right to Elect Exclusion

In Rule 23(b)(3) actions, class members must have the opportunity to exclude themselves from the litigation; this opportunity is discretionary in other types of class actions. See section 21.311. The opt-out procedure should be simple and should afford class members a reasonable time in which to exercise their option. Courts usually establish a period of thirty to sixty days (or longer if appropriate) following mailing or publication of the notice for class members to opt out. If the case involves a complex settlement or significant individual claims, a class member might need more time to consult with attorneys or financial advisors before making an informed opt-out decision. A form for members of the proposed class who wish to opt out might be included with the notice; it should clearly and concisely explain the available alternatives and their consequences. Typically, opt-out forms are filed with the clerk, although in large class actions the court can arrange for a special mailing address and designate an administrator retained by counsel and accountable to the court to assume responsibility for receiving, time-stamping, tabulating, and entering into a database the information from responses (such as name, address, and social security number).

The judge may treat as effective a tardy election to opt out. Factors affecting this decision include the reasons for the delay, whether there was excusable neglect, and whether prejudice resulted.[913] Relief from deadlines, however, should be granted only if the delinquency is not substantial or if there is good cause shown. The state of the class at the end of the opt-out period should be fixed enough to allow parties to conduct their affairs. A general extension of time for making the election may be appropriate if logistical or other problems require further mailings or publications.

Counsel should maintain careful records of who has opted out and when, both to comply with Rule 23(c)(3) and for use in allocating and distributing

913. Silber v. Mabon, 18 F.3d 1449, 1455 (9th Cir. 1994).

funds obtained in the litigation for the class. Computer databases are routinely used and are critical if the class is large. For a discussion of settlement opt-out opportunities, see section 21.611.

21.322 Communications Relating to Damage or Benefit Claims

Class members are sometimes asked for information regarding their individual claims. This may be appropriate in connection with preparation for the second stage of a bifurcated trial (with adequate time allowed for discovery) or the determination of entitlement to individual relief under a judgment or settlement. See section 21.66.

21.323 Other Communications from Class Members

The court can expect to receive inquiries about the litigation from class members and the public and should establish procedures for responding to such inquiries. Notices and other communications to the class should instruct class members to communicate directly with counsel through mechanisms developed for the case, including communications addressed to the court at a post office box number maintained by counsel. A Web site, a voicemail system providing scripted answers to frequently asked questions, or a toll-free telephone number with an automated menu or support staff can provide information efficiently without placing demands on court personnel. The court can establish a routine procedure, using the clerk's office, to refer inquiries to class counsel or another appropriate source of information. If the clerk's office has procedures to handle such matters efficiently and fairly, there should rarely be cause for judicial involvement.

If communications from the class—such as assertions that counsel have refused to respond to their inquiries—indicate the possibility of inadequate representation, the judge should take appropriate steps, including holding a hearing, ordering additional information directed to the class, or, in unusual cases, substituting new class counsel. See section 21.27. If misleading communications have contaminated the notice period, the judge should consider necessary action to correct the misinformation.[914]

914. *See, e.g.*, Kleiner v. First Nat'l Bank, 751 F.2d 1193, 1209–11 (11th Cir. 1985) (trial court found that defendants violated court order limiting communication with class members by initiating a surreptitious telephone campaign to solicit potential class members to opt out; trial court ordered defendant's lead trial counsel disqualified and issued a $50,000 fine against defendants; on appeal, order and fine upheld, but disqualification order remanded for notice and hearing); *Georgine*, 160 F.R.D. at 518–19 (objectors to settlement sent misleading communications and advertisements to absent class members encouraging them to opt out of settlement agreement; court ordered second notice and opt-out period); Impervious Paint Indus., Inc. v.

21.33 Communications Among Parties, Counsel, and Class Members

Once a class has been certified, the rules governing communications apply as though each class member is a client of the class counsel.[915] (Section 21.12 discusses precertification communication between interim class counsel and potential class members.) Defendants' attorneys, and defendants acting in collaboration with their attorneys, may only communicate through class counsel with class members on matters regarding the litigation.[916] Communications with class members in the ordinary course of business, unrelated to the litigation, remain permitted.

Where appropriate, the court should authorize defendants' counsel to answer inquiries from class members about a proposed class settlement. Such inquiries are expected in cases in which the class members have an ongoing relationship with the defendant, such as policyholders in a class action against an insurance company, account holders in a class action against a bank, customers in a class action against a telephone company, or employees in a class action against an employer. To avoid problems over such communication, the courts often channel class members' requests for information to a "hotline." Such a telephone line can be staffed by individuals who use agreed-on scripts to respond to questions. Another technique is to include a list of "frequently asked questions" on a Web site or in a notice (or both), with answers prepared jointly by the parties and approved by the court. An interactive Web site can also be used.

The judge has ultimate control over communications among the parties, third parties, or their agents and class members on the subject matter of the litigation to ensure the integrity of the proceedings and the protection of the class.[917] Objectors to a class settlement or their attorneys may not communi-

Ashland Oil, 508 F. Supp. 720, 723–24 (W.D. Ky. 1981) (finding that defendant contacted class members during opt-out period with the intent of sabotaging the class and ordering corrective notice).

915. *See In re* Sch. Asbestos Litig., 842 F.2d 671, 679–83 (3d Cir. 1988) (indicating that court had authority under Rule 23(d) to require defendants' affiliate prominently to display a proscribed court-approved notice whenever it communicated directly with the members of the class); Erhardt v. Prudential Group, Inc., 629 F.2d 843, 845 (2d Cir. 1980) (detailing defendants' compliance with district court's contempt order enjoining them from further communicating with class members without prior court approval).

916. *Kleiner*, 751 F.2d at 1207 n.28; Blanchard v. Edgemark Fin. Corp., 175 F.R.D. 293, 300–02 (N.D. Ill. 1997); Resnick v. Am. Dental Ass'n, 95 F.R.D. 372, 376–77 (N.D. Ill. 1982); *see also* Gulf Oil Co. v. Bernard, 452 U.S. 89, 104 n.21 (1981).

917. Corrective or prophylactic notice to potential class members may be ordered under Rule 23(d)(2)at any stage of the proceedings, including the precertification stage. Ralph

cate misleading or inaccurate statements to class members about the terms of a settlement to induce them to file objections or to opt out.[918]

If improper communications occur, curative action might be necessary, such as extending deadlines for opting out, intervening, or responding to a proposed settlement, or voiding improperly solicited opt outs and providing a new opportunity to opt out.[919] Other sanctions may be justified, such as exclusion of information gained in violation of the attorney–client relationship,[920] contempt and fines,[921] assessment of fees, or, in the most egregious situations, the replacement of counsel or a class representative.[922]

Restrictions on communications with the class can create problems. For example, in employment discrimination class actions, key individuals in supervisory positions might be members of the class. Barring direct communications would seriously handicap the employer's defense because the employer must rely on those individuals for evidence and for assisting its attorneys. In such circumstances, the court can consider certification under Rule 23(b)(3) (enabling class members to opt out), exclusion of such persons from the class

Oldsmobile, Inc. v. Gen. Motors Corp., No. 99 Civ. 4567, 2001 WL 1035132, at *7 (S.D.N.Y. Sept. 7, 2001) (ordering curative notice for improper precertification communications). The issuance of corrective or protective notice under Rule 23(d)(2) is considered an exercise of the court's case-management authority. The "district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." *Gulf Oil*, 452 U.S. at 100. Courts need not issue a formal injunction requiring the party to meet the procedural requirements of Federal Rule of Civil Procedure 65. *See Kleiner*, 751 F.2d at 1201; *cf. In re* Domestic Air Transp. Antitrust Litig., MDL No. 861, 1992 WL 357433, at *1 (N.D. Ga. Nov. 2, 1992) (finding "injunctive relief requested by plaintiffs" is appropriate under Rule 23(d)(2), which "gives to the certifying court specific authority to devise and issue appropriate orders necessary for the protection of class members").

918. *Georgine*, 160 F.R.D. at 518.

919. *Id.* at 502–08 (invalidating previous opt outs, mandating curative notice limited to opt outs, and creating a new four week opt-out period for them); *cf. In re* Potash Antitrust Litig., 896 F. Supp. 916, 919–21 (D. Minn. 1995) (rejecting request for gag order and ordering defendants to gather communications and submit for in camera review).

920. Hammond v. City of Junction City, 167 F. Supp. 2d 1271, 1293 (D. Kan. 2001) (excluding evidence gained from improper communications).

921. *Ralph Oldsmobile*, 2001 WL 1035132, at *7 (ordering corrective notice be sent at the expense of the party at fault); *Hammond*, 167 F. Supp. 2d at 1293–94 (ordering party at fault to pay attorneys' fees and costs incurred by opposing party to file protective orders); *In re* McKesson HBOC, Inc. Sec. Litig., 126 F. Supp. 2d 1239, 1247 (N.D. Cal. 2000) (ordering printing and mailing costs of curative notice to be paid by party at fault).

922. *See Hammond*, 167 F. Supp. 2d at 1289 (disqualifying plaintiff's counsel and their firm because of improper communications); *see also Kleiner*, 751 F.2d at 1210–11 (holding that due process requires notice and a hearing before any disqualification of counsel).

if they have no genuine claims, or certification of a subclass for which the court could permit limited communication with the defendant.

21.4 Postcertification Case Management

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21.41 Discovery from Class Members

Postcertification discovery directed at individual class members (other than named plaintiffs) should be conditioned on a showing that it serves a legitimate purpose. See section 21.14. One of the principal advantages of class actions over massive joinder or consolidation would be lost if all class members were routinely subjected to discovery. Most courts limit discovery against unnamed class members, but do not forbid it altogether.[923] In setting appropriate limits, a judge should inquire whether the information sought from absent class members is available from other sources[924] and whether the proposed discovery will require class members to obtain personal legal counsel or technical advice from an expert.[925] Some courts have held that class members are not parties for the purpose of discovery by interrogatories,[926] but may be required to respond to a questionnaire approved by the court. Others have

923. 8A Charles Alan Wright et al., Federal Practice and Procedure: Civil 2d § 2171, at 277 (1994).

924. *See* Redmond v. Moody's Investor Serv., No. 92 CIV. 9161, 1995 WL 276150, at *2 (S.D.N.Y. May 10, 1995) (granting plaintiff's motion for protective order under Rule 26(c) to restrict interrogatories and document requests); *see also* Dellums v. Powell, 566 F.2d 167, 187 (D.C. Cir. 1977).

925. *See, e.g.*, Collins v. Int'l Dairy Queen, 190 F.R.D. 629, 632–33 (M.D. Ga. 1999) (denying discovery motion allowing defendant opportunity to ask absent class members questions that would "require the assistance of an accountant or an attorney"); Kline v. First W. Gov't Sec., Inc., No. CIV.A.83-1076, 1996 WL 122717, at *5 (E.D. Pa. Mar. 11, 1996) (denying defendant's motion for discovery of absent class members and noting discovery would be impractical as class members would need to consult an attorney or accountant).

926. *See, e.g.*, Schwartz v. Celestial Seasonings, Inc., 185 F.R.D. 313, 319 (D. Colo. 1999) (holding that while "class members are not considered parties for purposes of traditional discovery measures," limited discovery of class members will be allowed "in the form of questionnaires"); McCarthy v. Paine Webber Group, Inc., 164 F.R.D. 309, 313 (D. Conn. 1995) (holding that questionnaire directed at absent class members was essentially a "proof of claim" form and would not be allowed); *cf.* Krueger v. N.Y. Tel. Co., 163 F.R.D. 446, 451 (S.D.N.Y. 1995) (allowing defendant to send to all members of a small class a questionnaire limited to individual damage questions).

permitted limited numbers of interrogatories upon a showing of need,[927] limited the number of class members to whom interrogatories may be directed,[928] limited the scope of the discovery to a brief, nonmandatory questionnaire relating to common issues,[929] or have imposed on defendants the added cost of mailing otherwise permissible interrogatories to absent members of a plaintiff class.[930] Deposing absent class members requires greater justification than written discovery.[931]

21.42 Relationship with Other Cases

Claims identical or similar to those in a federal class action might be the subject of other litigation in the same court, in other federal district or bankruptcy courts, or in state courts. Once the federal class action has been certified, the issues involving cases pending in other courts are somewhat different than those arising before certification (discussed in section 21.15).

When the claims asserted in a certified Rule 23(b)(3) class action overlap with claims in individual cases pending in other federal courts, in bankruptcy court,[932] or in state courts, the claimants ordinarily will have opted out of the federal class action or will be pursuing related individual actions. Persons who are members of a certified federal court class might pursue their own separate

927. *See* Long v. Trans World Airlines Inc., 761 F. Supp. 1320, 1329 (N.D. Ill. 1991) (finding discovery of absent class members by sampling necessary and appropriate in determining damage claims).

928. Transamerican Ref. Corp. v. Dravo Corp., 139 F.R.D. 619, 622 (S.D. Tex. 1991) (permitting discovery from 50 of 6,000 absent class members); *Long*, 761 F. Supp. at 1333 (allowing discovery of absent class members "only on a random sample basis"); *cf.* Buycks-Roberson v. Citibank Fed. Sav. Bank, 162 F.R.D. 338, 341–42 (N.D. Ill. 1995) (declining to limit discovery conducted on behalf of a class to a sample selected by the defendant). *See also supra* note 780 and accompanying text.

929. *Schwartz*, 185 F.R.D. at 316–17, 319; *see also* Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. Chi. L. Rev. 394, 403–04 (1986) (describing the use of a survey interview protocol by specially trained college students to elicit information from 9,000 claimants).

930. Alexander v. Burrus, Cootes & Burrus, 24 Fed. R. Serv. 2d (Callaghan) 1313, 1314 (4th Cir. 1978) (per curiam) (unpublished opinion) (allowing defendant accounting firm to use contact information furnished by plaintiffs to mail its interrogatories to class members at its own expense); *cf. Schwartz*, 185 F.R.D. at 320 (requiring plaintiffs and defendants to share the costs of mailing to absent class members a questionnaire that aids both sides); *In re* Airline Ticket Comm'n Antitrust Litig., 918 F. Supp. 283, 288 (D. Minn. 1996) (ordering defendants to pay 75% of costs relating to survey of absent class members).

931. *See* Redmond v. Moody's Investor Serv., No. 92 CIV. 9161, 1995 WL 276150, at *2 (S.D.N.Y. May 10, 1995).

932. *See, e.g.*, *In re* Flight Trans. Corp. Sec. Litig., 730 F.2d 1128 (8th Cir. 1984).

actions in the same court or in other courts even if they have not elected to be excluded from the class. A member of a certified Rule 23(b)(2) class in a civil rights action might, for example, wish to pursue a damage claim not encompassed in the 23(b)(2) action.[933] Much of the discovery in those parallel cases might be related to the class action and many of the witnesses will overlap. The judges involved should coordinate to avoid undue burden, expense, and conflict. If a federal court has certified a class action that overlaps with individual lawsuits or class actions pending in other federal courts, coordinated action or consolidation can be accomplished through reassignment of cases pending in the same division (see section 20.11); through informal coordination between the judges (see section 2014); by invoking 28 U.S.C. § 1404, the statutory provision for change of venue (see section 20.12); or through multidistrict transfers under 28 U.S.C. § 1407 (see section 20.13).

If the federal court has certified a class action that duplicates or overlaps with individual suits or class actions pending in state courts, the federal court should consider coordinating the litigation with state courts. Appropriate techniques may include coordinating motions, briefing schedules, and trial schedules setting simultaneous arguments before the different judges, and coordinating the timetable for, and use of, discovery in the different proceedings. See section 20.3.

If informal coordination is unsuccessful, the court may entertain a motion to enjoin the related state cases on the ground that the state cases conflict with, or threaten the integrity of, the federal class action.[934] Some of the constraints

933. *See, e.g.*, Hiser v. Franklin, 94 F.3d 1287, 1290–92 (9th Cir. 1996) (issue not resolved in injunctive action and plaintiff's claim had not arisen before the injunction); Fortner v. Thomas, 983 F.2d 1024, 1031 (11th Cir. 1993) (stating "[i]t is clear that a prisoner's claim for monetary damages or other particularized relief is not barred if the class representative sought only declaratory and injunctive relief, even if the prisoner is a member of a pending class action"); *but see In re* Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 209 F.R.D. 323, 339–40 (S.D.N.Y. 2002) (holding that claims for equitable relief and damages for personal injuries related to groundwater contamination could not be split and distinguishing Hiser and Fortner that allow claims splitting).

934. *See In re* Diet Drugs Prods. Liab. Litig., 282 F.3d 220, 235 (3d Cir. 2002) (holding that "a federal court entertaining complex litigation, especially when it involves a substantial class of persons from multiple states, or represents a consolidation of cases from multiple districts, may appropriately enjoin state court proceedings in order to protect its jurisdiction" (citing Carlough v. Amchem Prods., Inc., 10 F.3d 189, 202–04 (3d Cir. 1993))); Winkler v. Eli Lilly & Co., 101 F.3d 1196, 1202 (7th Cir. 1996) (injunction may be issued where "the state court action threatens to frustrate proceedings and disrupt the orderly resolution of the federal litigation"); *see also* Newby v. Enron Corp., 302 F.3d 295, 301 (5th Cir. 2002) (affirming injunction restraining a lawyer from filing related state court proceedings without the federal district judge's approval and seeking *ex parte* relief dealing with matters previously adjudicated in

that limit the federal court's authority to issue such injunctions before certification are not present once the class certification order has issued.[935] For example, the federal court might not have jurisdiction to enjoin state actions before certification[936] because the Anti-Injunction Act, 28 U.S.C. § 2283, limits the power of federal courts to enjoin state proceedings, with certain narrow exceptions. After certification, the federal court is authorized to issue an injunction "when necessary in aid of its jurisdiction,"[937] which may make it possible to enjoin pending state litigation if settlement in the certified federal class action is completed or imminent and the need to protect the class settlement is shown.[938] Another exception allows for an injunction "when

federal court); *In re* Prudential Ins. Co. of Am. Sales Practice Litig., 261 F.3d 355, 364–65 (3d Cir. 2001) (injunction appropriate to prevent relitigation of claims settled in federal class action). *But see In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 145 (3d Cir. 1998) (declining to invoke the All Writs Act to interfere with the state court settlement of a revised version of a proposed settlement a federal court had previously rejected). *See generally* Southeastern Pa. Transp. Auth. v. Pa. Pub. Util. Comm'n, 210 F. Supp. 2d 689 (E.D. Pa. 2002); *In re* Briarpatch Film Corp., 281 B.R. 820 (Bankr. S.D.N.Y. 2002).

935. *See generally In re Diet Drugs*, 282 F.3d at 236–36; Carlough v. Amchem Prods., Inc., 10 F.3d 189, 203 (3d Cir. 1993).

936. *In re Diet Drugs*, 282 F.3d at 236 (noting that the "threat to the federal court's jurisdiction posed by parallel state actions is particularly significant where there are conditional class certifications and impending settlements in federal actions"); *cf. In re* Inter-Op Hip Prosthesis Prod. Liab. Litig., No. 01-4039, 2001 WL 1774017, at *2 (6th Cir. Oct. 29, 2001) (staying injunction against members of the proposed class in a conditionally certified class from opting out or pursuing litigation in state court pending review of a class settlement). *See also* sources cited *supra* notes 806–810.

937. 28 U.S.C. § 2283 (West 2002). The exception overlaps with the provision in the All Writs Act allowing federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions." *Id.* § 1651(a). The All Writs Act's use of the term "appropriate" suggests a broader authority than the reference to "necessary" in both the All Writs Act and the Anti-Injunction Act. *In re Diet Drugs*, 282 F.3d at 239.

938. *See* Hanlon v. Chrysler Corp., 150 F.3d 1011, 1025 (9th Cir. 1998); *Carlough*, 10 F.3d at 201–04; *In re* Baldwin-United Corp., 770 F.2d 328, 336–38 (2d Cir. 1985); *In re* Corrugated Container Antitrust Litig., 659 F.2d 1332 (5th Cir. 1981); *supra* notes 808–09 and accompanying text. *See also infra* section 20.32. An extraordinary writ staying or otherwise limiting other litigation involving the same claims or parties may also be warranted. *In re* Lease Oil Litig., 200 F.3d 317 (5th Cir. 2000). In *In re Lease Oil*, the district judge framed an injunction to bar the parties from settling federal claims in other related cases without its approval, and the court of appeals affirmed the injunction. *Id.* at 319; *see also In re Diet Drugs*, 282 F.3d at 242 (affirming order enjoining a mass opt out of the consolidated federal litigation by a statewide subclass); *Carlough*, 10 F.3d at 202–04 (affirming injunction enjoining state court proceedings pursuant to the "necessary in aid of jurisdiction" exception under the Anti-Injunction Act and All Writs Act).

expressly authorized by Act of Congress."[939] An injunction or extraordinary writ might also be available to protect the settlement during the period between conditional approval of the class action settlement and the Rule 23(e) fairness hearing.[940]

The binding effect of a judgment in an individual or class action on other related actions depends on principles of claim and issue preclusion. A judgment in the class action adverse to the class will, however, bar only class claims or individual claims actually litigated and resolved in the class action.[941] Questions concerning the court's ability to bind class members outside of its jurisdiction and the adequacy of the notice given might raise complex due process issues that affect the binding effect of a class action judgment.[942]

21.5 Trials

Trial techniques applicable to other forms of complex litigation will also be useful for class actions. Section 12.4 discusses jury notebooks, preliminary instructions, and special verdicts, all of which might help jurors organize the volume of complex information that is likely to be involved in a class action trial. Sections 21.141 and 21.21 discuss trial plans submitted as part of the certification process. In nonjury class action trials, the judge can limit the number of witnesses, require depositions to be summarized, call for the presentation of the direct evidence of witnesses by written statements, and use other techniques (described in section 12.5).

In jury cases, the court may consider trying common issues first, preserving individual issues for later determination. Such orders must be carefully drawn to protect the parties' right to a fair and balanced presentation of their claims and defenses and their right to have the same jury determine separate claims.[943] Approaches that have been tried in mass tort litigation might apply

939. 28 U.S.C. § 2283 (West 2002); *see also, e.g.*, *In re* BankAmerica Corp. Sec. Litig., 263 F.3d 795, 801 (8th Cir. 2001) (injunction authorized where a federal statute, the Private Securities Litigation Reform Act of 1995, "create[d] a federal right or remedy that can only be given its intended scope by such an injunction").

940. *See* cases cited *supra* note 934.

941. *See* Cooper v. Fed. Res. Bank, 467 U.S. 867, 880–81 (1984).

942. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

943. *See In re* Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001) (describing multiphase class-wide trial of claims arising from the Exxon Valdez oil spill; affirming class-wide compensatory damages award, and vacating and remanding for district court recalculation the punitive damages verdict); Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996) (describing and affirming three-phase class-wide trial of punitive damages, liability, and compensatory damages of 10,000 member class of victims of alleged atrocities by the Marcos regime); *In re* Bendectin

(see section 22.93). Judges can encourage parties to stipulate to a test case approach, in which a sufficient number of individual or consolidated cases are tried in order to test the merits of the litigation. Such an approach is particularly useful if the claim is novel or otherwise "immature." See section 22.315. Some courts have used summary jury trials, an alternative dispute resolution (ADR) technique,[944] to determine the manageability of a class-wide trial of common issues. For example, in the *Telectronics* litigation, summary jury trial demonstrated the manageability of a common-issues trial and, as a result, facilitated informed settlement discussions.[945]

Although not accepted as mainstream, the following approaches have occasionally been suggested as ways to facilitate class action trials: using court-appointed experts to examine cases and report their findings to a jury, subject to cross-examination by the parties;[946] or adopting administrative models to administer damage awards, to the extent that such administrative models meet Seventh Amendment standards.[947] There is no consensus on the use of such procedures, however, and appellate review is scant.

Litig., 857 F.2d 290 (6th Cir. 1988) (describing and upholding constitutionality of trial to verdict of generic causation issue in aggregate proceedings); *see also In re* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 141 (2d Cir. 2001) (suggesting "bifurcating liability and damage trials with the same or different juries" as one alternative for trial of antitrust action).

944. *See* Robert J. Niemic, Donna Stienstra & Randall E. Ravitz, Guide to Judicial Management of Cases in ADR 8–9, 44–45 (Federal Judicial Center 2001).

945. *See In re* Telectronics Pacing Sys., Inc., Accufix Atrial "J" Leads Prods. Liab. Litig., 137 F. Supp. 2d 985 (S.D. Ohio 2001).

946. *Hilao*, 103 F.3d at 782–84 (describing district court's use of a special master as a court-appointed expert); *see also* Sol Schreiber & Laura D. Weissbach, *In re Estate of Ferdinand E. Marcos Human Rights Litigation: A Personal Account of the Role of the Special Master*, 31 Loy. L.A. L. Rev. 475 (1998).

947. *See* Samuel Issacharoff, *Administering Damage Awards in Mass-Tort Litigation*, 10 Rev. Litig. 463, 471–80 (1991) (discussing administrative models for determining damage awards in mass contract, Title VII, and tort cases); *see also In re Visa*, 280 F.3d at 141 (listing five alternatives for district court to consider in approaching any need for individualized damages determinations).

21.6 Settlements

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This section deals with judicial review of the fairness, reasonableness, and adequacy of proposed settlements in class actions. (Section 13 discusses settlement in complex litigation generally; section 22.9 discusses settlement in the context of mass tort litigation; and section 31.8 discusses settlement in the context of securities class action litigation. Section 21.132 discusses issues relating to certification standards for settlement classes.)

Whether a class action is certified for settlement or certified for trial and later settled, the judge must determine that the settlement terms are fair, adequate, and reasonable. Rule 23(e)(1)(A) mandates judicial review of any "settlement, voluntary dismissal, or compromise of the claims, issues, or

defenses of a certified class."[948] Rule 23.1 contains a similar directive for shareholder derivative actions.

The judicial role in reviewing a proposed settlement is critical, but limited to approving the proposed settlement, disapproving it, or imposing conditions on it. The judge cannot rewrite the agreement.[949] A judge's statement of conditions for approval, reasons for disapproval, or discussion of reservations about proposed settlement terms, however, might lead the parties to revise the agreement. See section 13.14. The parties might be willing to make changes before the notice of the settlement agreement is sent to the class members if the judge makes such suggestions at the preliminary approval stage.[950] Even after notice of a proposed settlement is sent, a judge's statement of concerns about the settlement during the fairness hearing might stimulate the parties to renegotiate in order to avoid possible rejection by the judge.[951] If the fairness hearing leads to substantial changes adversely affecting some members of the class, additional notice, followed by an opportunity to be heard, might be necessary.

To determine whether a proposed settlement is fair, reasonable, and adequate, the court must examine whether the interests of the class are better served by the settlement than by further litigation. Judicial review must be exacting and thorough. The task is demanding because the adversariness of litigation is often lost after the agreement to settle. The settling parties frequently make a joint presentation of the benefits of the settlement without significant information about any drawbacks. If objectors do not emerge, there may be no lawyers or litigants criticizing the settlement or seeking to expose flaws or abuses. Even if objectors are present, they might simply seek to be treated differently than the class as a whole, rather than advocating for class-

948. Rule 23(e) does not require court approval when the parties voluntarily dismiss class allegations before certification. However, in certain situations in which a voluntary dismissal might represent an abuse of the class action process, the court should inquire into the circumstances behind the dismissal. *See* discussion *supra* section 21.312 and text accompanying notes 905–06.

949. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998) ("The settlement must stand or fall in its entirety."); *but cf. In re* Auction Houses Antitrust Litig., No. 00 Civ. 0648, 2001 WL 170792, at *18 (S.D.N.Y. Feb. 22, 2001) (conditioning approval of a settlement on parties' adopting changes specified by the district court).

950. Romstadt v. Apple Computer, Inc., 948 F. Supp. 701, 707 (N.D. Ohio 1996) (noting that a "proposed agreement is more readily alterable" and that "[t]he choice facing the court and parties is not limited to the binary alternatives of approval or rejection").

951. *See, e.g.*, Bowling v. Pfizer, Inc. 143 F.R.D. 138 (S.D. Ohio 1992) (raising questions about proposed settlement and continuing fairness hearing); Bowling v. Pfizer, Inc., 143 F.R.D. 141, 146 (S.D. Ohio 1992) (approving revised settlement); *see also* Jay Tidmarsh, Mass Tort Settlement Class Actions: Five Case Studies 35, 38 (Federal Judicial Center 1998).

wide interests. The lack of significant opposition may mean that the settlement meets the requirements of fairness, reasonableness, and adequacy. On the other hand, it might signify no more than inertia by class members or it may indicate success on counsel's part in obtaining, from likely opponents and critics, agreements not to object. Whether or not there are objectors or opponents to the proposed settlement, the court must make an independent analysis of the settlement terms.

Factors that moved the parties to settle can impede the judge's efforts to evaluate the terms of the proposed settlement, to appraise the strength of the class's position, and to understand the nature of the negotiations. Because there is typically no client with the motivation, knowledge, and resources to protect its own interests, the judge must adopt the role of a skeptical client and critically examine the class certification elements, the proposed settlement terms, and procedures for implementation.

There are a number of recurring potential abuses in class action litigation that judges should be wary of as they review proposed settlements:

- conducting a "reverse auction," in which a defendant selects among attorneys for competing classes and negotiates an agreement with the attorneys who are willing to accept the lowest class recovery (typically in exchange for generous attorney fees);[952]
- granting class members illusory nonmonetary benefits, such as discount coupons for more of defendants' product, while granting substantial monetary attorney fee awards;[953]
- filing or voluntarily dismissing class allegations for strategic purposes (for example, to facilitate shopping for a favorable forum or to obtain a settlement for the named plaintiffs and their attorneys that is disproportionate to the merits of their respective claims);[954]

952. *Coffee*, *supra* note 737, at 1354, 1370–73; *see, e.g.*, Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 839 (7th Cir. 1999) (suggesting that "[p]erhaps [defendant] found a plaintiff (or lawyer) willing to sell out the class"); *see also* Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 283 (7th Cir. 2002) (finding that "[a]lthough there is no proof that the settlement was actually collusive in the reverse-auction sense, the circumstances demanded closer scrutiny than the district judge gave it"); Crawford v. Equifax Payment Servs., Inc., 201 F.3d 877, 882 (7th Cir. 2000) (rejecting class settlement because "Crawford and his attorney were paid handsomely to go away; the other class members received nothing").

953. *See, e.g.*, *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 818–19 (3d Cir. 1995) (rejecting as unfair a settlement based on $1,000 nontransferable coupon redeemable only upon purchase of new GM truck); *see generally* FJC Empirical Study of Class Actions, *supra* note 769, at 77–78, 183–85; Note, *supra* note 737, at 816–17.

954. Diaz v. Trust Territory of Pac. Islands, 876 F.2d 1401, 1408 (9th Cir. 1989); Shelton v. Pargo, Inc., 582 F.2d 1298, 1303, 1314 (4th Cir. 1978) (holding that the Rule 23(e) notice

- imposing such strict eligibility conditions or cumbersome claims procedures that many members will be unlikely to claim benefits, particularly if the settlement provides that the unclaimed portions of the fund will revert to the defendants;[955]
- treating similarly situated class members differently (for example, by settling objectors' claims at significantly higher rates than class members' claims);[956]
- releasing claims against parties who did not contribute to the class settlement;[957]
- releasing claims of parties who received no compensation in the settlement;[958]
- setting attorney fees based on a very high value ascribed to nonmonetary relief awarded to the class, such as medical monitoring injunctions or coupons, or calculating the fee based on the allocated settle-

requirement does not apply to a precertification dismissal that does not bind the class, but that "the court must, after a careful hearing, determine what 'claims are being compromised' between the plaintiff and defendant and whether the settling plaintiff has used the class action claim for unfair personal aggrandizement in the settlement, with prejudice to absent putative class members"); 3 Conte & Newberg, *supra* note 908, § 8:19. In many instances, notice and court approval of a voluntary dismissal will not be given or obtainable because the members of the proposed class will not yet have been determined. *Shelton*, 582 F.2d at 1303.

955. *See, e.g.*, Reynolds, 288 F.3d at 282–83; *see also* Deborah R. Hensler et al., Class Action Dilemmas: Pursuing Public Goals for Private Gain 427–30 (2000) [hereinafter RAND Class Action Report] (reporting actual distribution of benefits in ten case studies, in three of which class members claimed less than half the funds).

956. Gibson, *supra* note 792, at 154–55 (payment for dismissal of objectors' appeal regarding Rule 23(b)(1)(B) mandatory class); Tidmarsh, *supra* note 951, at 40–41 (objectors entered into private fee-sharing arrangements; opt-out cases settled for much higher sums than class members received).

957. *See, e.g.*, *In re* Telectronics Pacing Sys., Inc., Accufix Atrial "J" Leads Prods. Liab. Litig., 221 F.3d 870, 873 (6th Cir. 2000) (decertifying a limited fund settlement class because some of the released parties did not qualify for "limited fund" certification); *see also In re* Telectronics Pacing Sys., Inc., Accufix Atrial "J" Leads Prods. Liab. Litig., 137 F. Supp. 2d 985 (S.D. Ohio 2001) (approving a Rule 23(b)(3) opt-out settlement).

958. Molski v. Gleich, 318 F.3d 937 (9th Cir. 2003) (finding that settlement released individual damage claims without compensating class members other than class representative); Crawford v. Equifax Payment Servs., Inc., 201 F.3d 877, 882 (7th Cir. 2000) (finding that only the class representative received compensation); Bowling v. Pfizer, Inc., 143 F.R.D. 141, 169–70 (S.D. Ohio 1992) (concluding that objection concerning lack of compensation for release of claims for loss of consortium became moot by addition of $10 million fund for spouses of class members).

ment funds, rather than the funds actually claimed by and distributed to class members;[959] and

- assessing class members for attorney fees in excess of the amount of damages awarded to each individual.[960]

In addition, although Rule 23(e) no longer requires court approval of a settlement or voluntary dismissal of individual claims as long as the settlement does not bind the class, the settlement of individual claims can represent an abuse of the class action process. For example, a party might plead class allegations to promote forum-shopping or to extract an unreasonably high settlement for the sole benefit of potential class representatives and their attorneys. Use of the court's supervisory authority to police the conduct of proposed class actions under Rule 23(d) may be appropriate in such circumstances.[961]

21.611 Issues Relating to Cases Certified for Trial and Later Settled

When a Rule 23(b)(3) class is certified for trial, the decision whether to opt out might have to 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 changes in class members' circumstances and other aspects of the litigation have occurred. Rule 23(e)(3) 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.[962]

This second opt-out opportunity helps to provide the supervising court the "structural assurance of fairness," called for in *Amchem Products Inc.* This part of Rule 23(e)(3) affects only cases in which the class is certified and the

959. *See supra* section 14.121.

960. The only reported example of this egregious practice is *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1349 (7th Cir. 1996) (Easterbrook, J., dissenting from denial of rehearing en banc) (class member received an award of $2.19, but $91.33 was deducted from class member's bank account for attorney fees).

961. *See supra* notes 904–10 and accompanying text. Prior to the change on this issue in Rule 23(e), some courts subjected precertification requests for dismissal to rigorous review. For an example of the Rule 23(e) analysis of the district court in the dismissal (pursuant to diplomatic settlement) of major German Holocaust-related litigation, see *In re Nazi Era Cases Against German Defendants Litigation*, 198 F.R.D. 429 (D.N.J. 2000).

962. Providing a second opportunity to opt out may be appropriate "if the earlier opportunity . . . provided with the certification notice has expired by the time of the settlement notice" and if there have been "changes in the information available to class members since expiration of the first opportunity to elect exclusion." Rule 23(e)(3) committee note. See also text at note 238 for a description of an organized opt-out campaign.

initial opt-out period expires before a settlement agreement is reached. The rule provides a court with broad discretion to determine whether, in the particular circumstances, a second opt-out opportunity is warranted before approving a settlement.

21.612 Issues Relating to Cases Certified and Settled at the Same Time

Parties quite frequently enter into settlement agreements before a decision has been reached whether to certify a class.[963] Section 21.132 discusses the standards for certifying such a class. This section is about reviewing a proposed settlement in such a context.

Settlement classes—cases certified as class actions solely for settlement—can provide significant benefits to class members and enable the defendants to achieve final resolution of multiple suits. See section 22.921. Settlement classes also permit defendants to settle while preserving the right to contest the propriety and scope of the class allegations if the settlement is not approved and, in Rule 23(b)(3) actions, to withdraw from the settlement if too many class members opt out. An early settlement produces certainty for the plaintiffs and defendants and greatly reduces litigation expenses.[964]

Class actions certified solely for settlement, particularly early in the case, sometimes make meaningful judicial review more difficult and more important. Courts have held that approval of settlement class actions under Rule 23(e) requires closer judicial scrutiny than approval of settlements reached only after class certification has been litigated through the adversary process.[965] See section 22.9. Extended litigation between or among adversaries might

963. FJC Empirical Study of Class Actions, *supra* note 769, at 35.

964. *See supra* section 14.12 (noting the desirability of fee arrangements that reward counsel for efficiency, such as percentage of recovery fees). *See also* Hirsch & Sheehey, *supra* note 859, at 65–66.

965. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998) (calling for "a higher standard of fairness" in reviewing a settlement negotiated before class certification), and cases cited therein. *Cf.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997) (calling for "undiluted, even heightened, attention" to class certification requirements in a settlement class context). *Cf. also In re* PaineWebber Ltd. P'ships Litig., 171 F.R.D. 104, 122 (S.D.N.Y.) (holding that close scrutiny need not be given when class was certified for settlement purposes long before an agreement was reached), *aff'd*, 117 F.3d 721 (2d Cir. 1997). *See generally* Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 Cornell L. Rev. 811, 826–35 (1995) (discussing problems relating to adequacy of representation in settlement class involving claims relating to future injuries and setting forth principles for reviewing settlement class actions); *Coffee*, *supra* note 737, at 1367–82, 1461–65 (discussing incentives for collusion in settlement class actions and possible antidotes). *See also* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370 (2000).

bolster confidence that the settlement negotiations were at arm's length. If, by contrast, the case is filed as a settlement class action or certified for settlement with little or no discovery, it may be more difficult to assess the strengths and weaknesses of the parties' claims and defenses, to determine the appropriate definition of the class, and to consider how class members will actually benefit from the proposed settlement. The court should ask questions about the settlement and provide an adequate opportunity for settlement opponents to be fully heard.

Recurring issues raised by settlement classes include the following:

- *Conflicts between class counsel and counsel for individual plaintiffs.* Approval of the class settlement will, for the most part, take responsibility for providing relief to individual claimants from their individual attorneys and shift it to class counsel. Settlement will also effectively terminate other pending individual and class actions subsumed in the certified settlement class. Divergent interests must be taken into account and fairly accommodated before the parties negotiate a final settlement. Consider whether the counsel who have negotiated the settlement have fairly represented the interests of all class members. (This concern appears to be one of the major reasons the Court rejected the proposed settlement in *Amchem.*[966]) If the parties have not anticipated the need for subclasses, the court may decide to certify subclasses, appoint attorneys to represent the subclasses, and send the parties back to the negotiating table.
- *Future claimants.* In some mass tort cases, the court should consider whether a settlement purports to bind persons who might know that they were exposed to an allegedly harmful substance but are not yet injured, and persons who might not even be aware that they were exposed. The opt-out rights of those in the first category can be illusory in a Rule 23(b)(3)[967] action unless they are protected by "back-end opt-out" rights that permit individuals to decide whether to remain in the class after they become aware that they are injured, may have a claim, and understand the severity of their injury. (Rule 23(e)(3) gives a trial judge discretion to provide class members an opportunity to opt out of a Rule 23(b)(3) class settlement even though they had an earlier opportunity to opt out of the class after it was certified.) Because those in the second category, those who might not even know that they have been exposed or injured, cannot be given meaningful notice, an effort

966. 521 U.S. at 620.
967. *See generally id.*

to include them in the class can raise constitutional and due process issues.[968] See section 22.72. In some settlements, parties have negotiated terms that allow certain class members to defer choosing between accepting the benefits of a class settlement or litigating the class member's claim until after the claim arises.[969]

- *Administration of claims procedure.* The court should determine whether the persons chosen to administer the procedure are disinterested and free from conflicts arising from representing individual claimants.
- *Review of attorney fee applications*. See section 21.7.

21.62 Criteria for Evaluating a Proposed Settlement

Rule 23(e)(1)(C) establishes that the settlement must be fair, reasonable, and adequate. Fairness calls for a comparative analysis of the treatment of class members vis-à-vis each other and vis-à-vis similar individuals with similar claims who are not in the class. Reasonableness depends on an analysis of the class allegations and claims and the responsiveness of the settlement to those claims. Adequacy of the settlement involves a comparison of the relief granted relative to what class members might have obtained without using the class action process.

A number of factors are used to apply those criteria and evaluate a proposed settlement. Deciding which factors apply and what weight to give them depends on a number of variables: (1) the merits of the substantive class claims, issues, or defenses; (2) whether the class is mandatory or opt-out; and (3) the mix of claims that can support individual litigation, such as personal injury claims, and claims that are only viable within a class action, such as small economic loss claims. A class involving small claims may provide the only opportunity for relief and pose little risk that the settlement terms will sacrifice the interests of individual class members. A class involving many claims that can support individual suits—ranging from claims of severe injury or death to relatively slight harms, as for example a mass torts personal-injury class—might require more scrutiny by the court to fairness.

968. *See id.* at 628 (questioning whether proper notice could ever be given to "legions so unselfconscious and amorphous").

969. *See, e.g.*, *In re* Diet Drugs, MDL No. 1203, 2000 WL 1222042, at *21 (E.D. Pa. Aug. 28, 2000) (approving second opt-out opportunity to pursue individual claim for compensatory (but not punitive) damages if injury worsens); Bowling v. Pfizer, Inc., 143 F.R.D. 141, 170 (S.D. Ohio 1992) (approving settlement in which class members retain rights to sue, pursue arbitration, or accept a guaranteed settlement amount for a future heart valve fracture).

Some factors that may bear on review of a settlement are set out below:[970]

1. the advantages of the proposed settlement versus the probable outcome of a trial on the merits of liability and damages as to the claims, issues, or defenses of the class and individual class members;
2. the probable time, duration, and cost of trial;
3. the probability that the class claims, issues, or defenses could be maintained through trial on a class basis;
4. the maturity of the underlying substantive issues, as measured by the information and experience gained through adjudicating individual actions, the development of scientific knowledge, and other factors that bear on the probable outcome of a trial on the merits;
5. the extent of participation in the settlement negotiations by class members or class representatives, and by a judge, a magistrate judge, or a special master;
6. the number and force of objections by class members;
7. the probable resources and ability of the parties to pay, collect, or enforce the settlement compared with enforcement of the probable judgment predicted under above paragraph 1 or 4;
8. the effect of the settlement on other pending actions;
9. similar claims by other classes and subclasses and their probable outcome;
10. the comparison of the results achieved for individual class or subclass members by the settlement or compromise and the results achieved or likely to be achieved for other claimants pressing similar claims;
11. whether class or subclass members have the right to request exclusion from the settlement, and, if so, the number exercising that right;
12. the reasonableness of any provisions for attorney fees, including agreements on the division of fees among attorneys and the terms of any agreements affecting the fees to be charged for representing individual claimants or objectors;
13. the fairness and reasonableness of the procedure for processing individual claims under the settlement;

970. The list is not exclusive and is subject to change depending on common-law development, including evolving interpretation of the 2003 amendments to Rule 23(e) and any legislation affecting class action or other mass tort suits. A helpful review of many factors that may deserve consideration is provided by *In re Prudential Insurance Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 316–24 (3d Cir. 1998).

14. whether another court has rejected a substantially similar settlement for a similar class; and
15. the apparent intrinsic fairness of the settlement terms.

In determining the weight accorded these and other factors, courts have examined whether

- other courts have rejected similar settlements for competing or overlapping classes;
- the named plaintiffs are the only class members to receive monetary relief or are to receive relief that is disproportionately large (differentials are not necessarily improper, but may call for judicial scrutiny);[971]
- the settlement amount is much less than the estimated damages incurred by members of the class as indicated by preliminary discovery or other objective measures, including settlements or verdicts in individual cases;
- the settlement was completed at an early stage of the litigation without substantial discovery and with significant uncertainties remaining;
- nonmonetary relief, such as coupons or discounts, is unlikely to have much, if any, market or other value to the class;[972]
- significant components of the settlement provide illusory benefits because of strict eligibility conditions;
- some defendants have incentives to restrict payment of claims because they may reclaim residual funds;
- major claims or types of relief sought in the complaint have been omitted from the settlement;
- particular segments of the class are treated significantly differently from others;
- claimants who are not members of the class (e.g., opt outs) or objectors receive better settlements than the class to resolve similar claims against the same defendants;
- attorney fees are so high in relation to the actual or probable class recovery that they suggest a strong possibility of collusion;

971. Compensation for class representatives may sometimes be merited for time spent meeting with class members, monitoring cases, or responding to discovery. *In re* Dun & Bradstreet Credit Servs. Customer Litig., 130 F.R.D. 366, 374 (S.D. Ohio 1990).

972. *See, e.g.*, *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 818–19 (3d Cir. 1995) (rejecting as unfair a settlement based on $1,000 nontransferable coupon redeemable only upon purchase of new GM vehicles); *see generally* Note, *supra* note 737.

- defendants appear to have selected, without court involvement, a negotiator from among a number of plaintiffs' counsel; and
- a significant number of class members raise apparently cogent objections to the settlement. (The court should interpret the number of objectors in light of the individual monetary stakes involved in the litigation. When the recovery for each class member is small, the paucity of objections may reflect apathy rather than satisfaction. When the recovery for each class member is high enough to support individual litigation, the percentage of class members who object may be an accurate measure of the class' sentiments toward the settlement. However, an apparently high number of objections may reflect an organized campaign, rather than the sentiments of the class at large. A similar phenomenon is the organized opt-out campaign.)[973]

A settlement will occasionally cover a class different from that certified. Review of the terms of the settlement or objections might reveal a need to redefine the class or to create subclasses based on the revelation of conflicts among class members. Frequently, the parties propose to enlarge the class or the claims of the class to give the settling defendants greater protection against future litigation. The court faced with a request for an expanded class definition should require the parties to explain in detail what new facts, changed circumstances, or earlier errors support the alteration of the original definition. If a Rule 23(b)(3) class is enlarged, notice must be given to the newly added members of their right to opt out; if a class is reduced, those being excluded should receive notice under Rule 23(d) if they previously received notice that they were included in the class and did not opt out.

21.63 Procedures for Reviewing a Proposed Settlement

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21.631 Obtaining Information

Required disclosures. Counsel for the class and the other settling parties bear the burden of persuasion that the proposed settlement is fair, reasonable, and adequate. In discharging that burden, counsel must submit to the court certain required disclosures, such as the terms of the settlement. Rule 23(e)(2)

973. *See* Carlough v. Amchem Prods., Inc., 10 F.3d 189 (3d Cir. 1993).

also requires a statement identifying any agreement made in connection with the settlement, including all agreements and undertakings "that, although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others. Doubts should be resolved in favor of identification."[974]

Separate side agreements or understandings may encompass such matters as resolution of claims outside the class settlement, positions to be taken on later fee applications, division of fees among counsel, or restrictions on counsel's ability to bring related actions in the future. The reference to agreements or undertakings related to the proposed settlement is necessarily open-ended. It is intended to reach agreements that accompany settlement but are not reflected in formal settlement documents and, perhaps, not even reduced to writing. The spirit of Rule 23(e)(2) is to compel identification of any agreement or understanding that might have affected the interests of class members by altering what they may be receiving or foregoing. Side agreements might indicate, for example, that the settlement is not reasonable because they may reveal additional funds that might have been paid to the class that are instead paid to selected claimants or their attorneys.

The court should, after reviewing the statement identifying related agreements and undertakings, decide whether to require specified agreements to be revealed and whether to require filing complete copies or only summaries of the agreements. Requiring the parties to file the complete agreement might elicit comments from class members and facilitate judicial review. A judge might consider acting in steps, calling first for a summary of any agreement that might have affected the settlement and then for a complete version if the summary does not provide an adequate basis for review.

A direction to disclose a summary or copy of an agreement might raise confidentiality concerns, as with agreements that include information that merits protection against general disclosure. The parties should be given an opportunity to claim work-product or other protections. Opt-out agreements, in which a defendant conditions its agreement on a limit on the number or value of opt outs, may warrant confidential treatment. Knowledge of the specific number of opt outs that will vitiate a settlement might encourage third parties to solicit class members to opt out. A common practice is to receive information about such agreements *in camera*.

Agreements between a liability insurer and a defendant may require balancing the need to know the terms of the agreement with the potential impact of making such terms public. The amount of insurance coverage

974. Fed. R. Civ. P. 23(e)(2) committee note.

available to compensate class members can bear on the reasonableness of the settlement, and identification of such agreements sometimes provides insufficient information. Unrestricted access to the details of such agreements, on the other hand, might impede resolution of important coverage disputes.

Rule 23(e)(2) does not specify sanctions for failure to identify an agreement or an understanding connected with the settlement. One possible sanction is reopening the settlement if the agreements or understandings not identified bear significantly on the settlement's reasonableness.

Requests for additional information. The judge may direct counsel to provide additional information necessary to evaluate the proposed settlement. Where settlement is proposed early in the litigation, for example, consider asking counsel to provide complete and detailed information about the factors that indicate the value of the settlement. Such factors include[975]

- likelihood of success at trial;
- likelihood of class certification;
- status of competing or overlapping actions;
- claimant's damages and value of claims;
- total present value of monetary and nonmonetary terms;
- attorney fees;
- cost of litigation; and
- defendant's ability to pay.

Discovery in parallel litigation may supply additional information. The outcomes of parallel litigation may also inform the court and objecting class members about the fairness, reasonableness, and adequacy of the proposed settlement.

21.632 Preliminary Fairness Review

Review of a proposed class action settlement generally involves two hearings.[976] First, counsel submit the proposed terms of settlement and the judge makes a preliminary fairness evaluation. In some cases, this initial evaluation can be made on the basis of information already known, supple-

975. The enumeration of issues and factors affecting the evaluation of settlements in this section draws on the opinion in *In re Prudential Insurance Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283 (3d Cir. 1998), and William W Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 Cornell L. Rev. 837, 843–44 (1995). *See also* RAND Class Action Report, *supra* note 955, at 486–90.

976. *See, e.g.*, *In re* Amino Acid Lysine Antitrust Litig., MDL No. 1083, 1996 U.S. Dist. LEXIS 5308, at *11 (N.D. Ill. Apr. 22, 1996) (conducting a preliminary review of whether a proposed settlement is within the range of reasonableness and raising questions for the fairness hearing).

mented as necessary by briefs, motions, or informal presentations by parties. If the case is presented for both class certification and settlement approval, the certification hearing and preliminary fairness evaluation can usually be combined. The judge should make a preliminary determination that the proposed class satisfies the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b). See section 21.22. If there is a need for subclasses, the judge must define them and appoint counsel to represent them. The judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing. In settlement classes, however, it is often prudent to hear not only from counsel but also from the named plaintiffs, from other parties, and from attorneys who represent individual class members but did not participate in the settlement negotiations.

Whether the case has been certified as a class at an earlier stage or presented for certification and settlement approval at the same time, the judge can have a court-appointed expert or special master review the proposed settlement terms, gather information necessary to understand how those terms affect the absent class members, and assist the judge in determining whether the fairness, reasonableness, and adequacy requirements for approval are met. Individuals sometimes provide expert testimony regarding the valuation of the settlement or even of its legal validity. Given the nonadversarial posture of these experts, it is important to evaluate such testimony under Federal Rules of Evidence 701, 702, and 703 and question whether the proffered expert testimony will "assist the trier of fact to understand the evidence or determine a fact in issue."[977] The judge should raise questions at the preliminary hearing and perhaps seek an independent review if there are reservations about the settlement, such as unduly preferential treatment of class representatives or segments of the class, inadequate compensation or harms to the classes, the need for subclasses, or excessive compensation for attorneys. The parties then have an opportunity to resume negotiations in an effort to remove potential obstacles to court approval.

21.633 Notice of Fairness Hearing

Once the judge is satisfied as to the certifiability of the class and the results of the initial inquiry into the fairness, reasonableness, and adequacy of the settlement, notice of a formal Rule 23(e) fairness hearing is given to the class members. For economy, the notice under Rule 23(c)(2) and the Rule 23(e)

977. Fed. R. Evid. 702.

notice are sometimes combined. The fairness hearing notice should alert the class that the hearing will provide class members an opportunity to present their views on the proposed settlement and to hear arguments and evidence for and against the terms.

The notice of the fairness hearing should tell objectors to file written statements of their objections with the clerk of court by a specified date in advance of the hearing and to give notice if they intend to appear at the fairness hearing. Despite such ground rules, people who have not filed a written statement may be allowed to present objections at the hearing.[978]

21.634 Fairness Hearing

At the fairness hearing, the proponents of the settlement must show that the proposed settlement is "'fair, reasonable, and adequate.'"[979] The parties may present witnesses, experts, and affidavits or declarations. Objectors and class members may also appear and testify. Time limits on the arguments of objectors are appropriate, as is refusal to hear the same objections more than once. An extended hearing may be necessary.[980]

21.635 Findings and Conclusions

Even if there are no or few objections or adverse appearances before or at the fairness hearing, the judge must ensure that there is a sufficient record as to the basis and justification for the settlement. Rule 23 and good practice both require specific findings as to how the settlement meets or fails to meet the statutory requirements. The record and findings must demonstrate to a reviewing court that the judge has made the requisite inquiry and has consid-

978. *See, e.g.*, *In re* Ford Motor Co. Bronco II Prods. Liab. Litig., MDL No. 991, 1994 U.S. Dist. LEXIS 15790 (E.D. La. Nov. 1, 1994) (permitting testimony by objectors who had not filed written statements, subject to inclusion of such objectors on witness lists and to limitation by the judge based on weight and significance of arguments); *In re* Prudential-Bache Energy Income P'ships Sec. Litig., 815 F. Supp. 177, 179 (E.D. La. 1993) (allowing objectors to submit evidence and testimony and to cross examine plaintiffs' experts). *See also* Tidmarsh, *supra* note 951, at 56, 68 (observing that two mass tort settlement class actions used trial-like procedure at the fairness hearing).

979. *In re* Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 316 (3d Cir. 1998) (quoting *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 785 (3d Cir. 1995)); *see also* Fed. R. Civ. P. 23(e)(1)(C).

980. *In re* Silicone Gel Breast Implant Prods. Liab. Litig., MDL No. 926, 1994 WL 578353 (N.D. Ala. Sept. 1, 1994) (reporting hearing from breast implant recipients during three days of hearings); *In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 746–47 (E.D.N.Y. 1984) (reporting on national hearings involving numerous veterans and their families), *aff'd*, 818 F.2d 226 (2d Cir. 1987).

ered the diverse interests and the requisite factors in determining the settlement's fairness, reasonableness, and adequacy.

21.64 Role of Other Participants in Settlement Review

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21.641 Role of Class Counsel in Settlement

Attorneys representing a class are responsible for communicating a settlement offer to the class representatives and ultimately to the members of the class. But the attorneys are also responsible for protecting the interests of the class as a whole, even in circumstances where the class representatives take a position that counsel consider contrary to the interests of absent class members.[981] Class counsel must discuss with the class representatives the terms of any settlement offered to the class.[982] Approval or rejection of the offer by the representatives, however, does not end the attorneys' obligations, because they must act in the best interests of the class as a whole.[983] Similarly, class counsel should bring to the court's attention any settlement offer that the class representatives approve, even if, as attorneys for the entire class, they believe it should not receive court approval.

Class counsel must be available to answer questions from class members in the interval between notice of the settlement and the settlement hearing. Counsel for the parties can create a Web site to convey factual information

981. *See, e.g.*, Flinn v. FMC Corp., 528 F.2d 1169, 1174–76 (4th Cir. 1975); *cf.* Parker v. Anderson, 667 F.2d 1204, 1211 (5th Cir. 1982); Saylor v. Lindsley, 456 F.2d 896, 899–900 (2d Cir. 1972). In the Diet Drugs litigation, several of the subclass representatives opposed approval of a settlement that had been negotiated on their behalf; the trial court discussed adequacy of representation requirements under these circumstances, and the fulfillment of *Amchem* criteria. *In re* Diet Drugs Prods. Liab. Litig., 2000 WL 1222042, at *50–*53 (E.D. Pa. Aug. 28, 2000).

982. Byes v. Telecheck Recovery Servs., Inc., 173 F.R.D. 421, 428–29 (E.D. La. 1997) (finding inadequacy of representation, based in part on counsel's failure to communicate with named plaintiff about settlement offers); Deadwyler v. Volkswagen of Am., Inc., 134 F.R.D. 128, 140–41 (W.D.N.C. 1991) (ordering sanctions because class counsel failed to communicate settlement offers to class representatives).

983. *See, e.g.*, Kincade v. Gen. Tire & Rubber Co., 635 F.2d 501, 508 (5th Cir. 1981) (indicating that "the 'client' in a class action consists of numerous unnamed class members as well as the class representative"); *see also* Heit v. Van Ochten, 126 F. Supp. 2d 487, 494–95 (W.D. Mich. 2001) (approving proposed settlement and approving class counsel's motion to withdraw from representing named representative who filed objection to the settlement).

about the settlement, including a complete copy of the agreement, and to give jointly prepared and court-approved answers to frequently asked questions.[984] Counsel for the parties may also arrange for a toll-free telephone number that provides information and an opportunity for class members to speak with personnel who have been trained to follow prearranged scripts in responding to various types of questions. In addition to or in lieu of an automated system, the notice may tell members to direct questions to class counsel and give a mailing address, a fax number, an E-mail address, or a telephone number. When most of the class members reside in the same locale (for example, in employment discrimination cases involving a single plant or facility), class attorneys and class representatives can meet with members to explain the terms and consequences of the proposed settlement.

Counsel for the parties are the main court's source of information about the settlement. The judge should ensure that counsel meet their obligations to disclose fully all agreements and understandings, including side agreements with attorneys or class members (see section 21.631) and be prepared to explain how the settlement was reached and why it is fair and reasonable. Counsel must also disclose any facet of the settlement that may adversely affect any member of the class or may result in unequal treatment of class members.

Ordinarily, counsel should confer with the judge to develop an appropriate review process. See section 21.61. Counsel should submit the settlement documents and a draft order setting a hearing date, prescribing the notice to be given to class members, and fixing the procedure for objections. Counsel may also be asked for statements about the status of discovery, the identity of those involved in the settlement discussions, the arrangements and understandings about attorney fees, and the reasons the settlement is in the best interests of the class. Counsel should be required to disclose and explain any incentive awards or other benefits to be received only by the class representatives.

At the hearing to consider final approval of the proposed settlement, counsel for the settling parties must make an appropriate showing on the record as to why the settlement should be approved. The nature and extent of that showing depends on the circumstances of the case—e.g., the importance of individual class members' stakes, the extent of disapproval within the class with regard to the settlement, whether relief to the class is in-kind only,

984. *See, e.g.*, *In re* Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig., No. 1:01-CV-9000, 2001 WL 1842315, at *16 (N.D. Ohio Oct. 20, 2001) (notice of class action and proposed settlement can be found at http://www.sulzerimplantsettlement.com (last visited Nov. 10, 2003)); *In re* Diet Drugs Prods. Liab. Litig., MDL No. 1203, 2000 WL 1222042, at *35 (E.D. Pa. Aug. 28, 2000) (additional information available at http://www.settlementdietdrugs.com (last visited Nov. 10, 2003)).

whether individual cases are being settled concurrently, and any varying allocations among groups of claimants and attorneys.

Counsel owe a duty of candor to the court to disclose all information relevant to the fairness of the settlement. If the class was certified in adversary proceedings, counsel must take into account their ongoing obligation to their clients and the need to protect their clients' positions should the settlement fail. In evaluating the settlement, the court should take into account not only the presentations of counsel but also information from other sources, such as comments from class representatives and class members, presentations by objections, the court's own knowledge of the case obtained during pretrial proceedings, and information provided by special masters or experts appointed by the court to assess the settlement.

21.642 Role of Class Representatives in Settlement

The court should examine closely any opposition by class representatives to a proposed settlement; those objections might be symptomatic of strained attorney–client relations. Notice of the settlement hearing might indicate any terms about which class counsel and class representatives differ.

Although rejection of a proposed settlement by a class representative may influence class counsel not to present the settlement to the court, a class representative cannot alone veto a settlement, especially one that has been presented to and approved by the court.[985] If the judge concludes that class representatives have placed individual interests ahead of the class's and impeded a settlement that is advantageous to the class as a whole, the judge should take appropriate action, such as notifying the class of the proposed settlement or removing the class representatives, or both.

When class representatives favor acceptance of a settlement offer that class counsel believe is inadequate or unfair, the representatives should be permitted to submit it to the court for preliminary approval and, if the court so orders, a fairness hearing. Although the court will ordinarily not approve a settlement that counsel do not recommend, class counsel, like class representatives, have no veto power over settlement of class actions.

985. *See, e.g.*, Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 591 (3d Cir. 1999) (affirming order approving settlement of class action and denying lead plaintiff's objections and motions for certification of subclass and disqualification of class counsel); *see also* Maywalt v. Parker & Parsley Petroleum Co., 864 F. Supp. 1422, 1429–30 (S.D.N.Y. 1994) (holding that settlement was fair, adequate, and reasonable despite objections from class representatives and some class members).

21.643 Role of Objectors in Settlement

Objectors can play a useful role in the court's evaluation of the proposed settlement terms. They might, however, have interests and motivations vastly different from other attorneys and parties.

Objectors can provide important information regarding the fairness, adequacy, and reasonableness of settlements. Objectors can also play a beneficial role in opening a proposed settlement to scrutiny and identifying areas that need improvement. For example, an organization's objection in one case transformed a settlement from one in which the lawyers received a majority of the funds to one that primarily benefited class members.[986]

Some objections, however, are made for improper purposes, and benefit only the objectors and their attorneys (e.g., by seeking additional compensation to withdraw even ill-founded objections). An objection, even of little merit, can be costly and significantly delay implementation of a class settlement. Even a weak objection may have more influence than its merits justify in light of the inherent difficulties that surround review and approval of a class settlement. Objections may be motivated by self-interest rather than a desire to win significant improvements in the class settlement. A challenge for the judge is to distinguish between meritorious objections and those advanced for improper purposes.[987] An objector who wins changes in the settlement that benefit the class may be entitled to attorney fees, either under a fee-shifting statute or under the "common-fund" theory. Fee awards made on the basis of insignificant or cosmetic changes in the settlement serve to condone and encourage improper use of the objection process. Federal Rule of Civil Procedure 11 applies to objectors and their attorneys and should be invoked in appropriate cases.

Who may object? Any class member who does not opt out may object to a settlement, voluntary dismissal, or compromise that would bind the class. Any party to the settlement may also object (for example, a shareholder of a corporation involved in the settlement).[988]

986. RAND Class Action Report, *supra* note 955, at 461–62. For a detailed discussion of the objections and the settlement discussions in that case, see *id.* at 201–05. *See also id.* at 355–60 (discussing objections, the fairness hearing, and a renegotiated settlement in the *Oriented Strand Board Home Siding Litigation*).

987. *See In re* Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297 (N.D. Ga. 1993).

988. *See* 4 Conte & Newberg, *supra* note 908, § 11:55, at 168 ("Any party to the settlement proceeding has standing to object to the proposed settlement."). *See also id.* at 176–77 ("[A]n objection may be registered by . . . any settling defendant, or any shareholder whose corporation is involved in settlement" (footnote call number omitted)).

Individually based objections. Objectors sometimes act individually, arguing that the objector should not be included in the class definition or is entitled to terms different than the terms afforded other class members. Unless a number of class members raise similar objections, individual objectors rarely provide much information about the overall reasonableness of the settlement. Individual terms more favorable than those applicable to other class members should be approved *only* on a showing of a reasonable relationship to facts or law that distinguish the objector's position from other class members.

If a complaint about differential treatment reflects genuine distinctions between the objector's position and the positions of other class members, the court should consider whether that distinction requires a subclass or otherwise uncovers an imperfection in the class definition or the settlement terms. Any modification to the settlement agreement generally should benefit other members of the class or subclass in addition to the objector. In the context of a certified class, different treatment of an individual objector must be based on a finding that the objector shares the common characteristics of the class yet possesses distinct attributes that are so unique as not to call for a subclass.

Class-based objections. Objections also may be made in terms common to class members or that seem to invoke both individual and class interests. So long as an objector is acting at least in part on behalf of the class, it is appropriate to impose on the objector a duty to the class similar to the duty assumed by a named class representative. In order to guard against an objector who is using the strategic power of objecting for private advantage, the court should examine and consider disapproving the proposed withdrawal of an objection if the objector is receiving payment or other benefits more favorable than those available to other similarly situated class members.[989]

Discovery and other procedural support. The important role some objectors play might justify additional discovery, access to information obtained by class counsel and class representatives, and the right to participate in the fairness hearing.[990] Parties to the settlement agreement should generally provide access

989. *See, e.g.*, Duhaime v. John Hancock Mut. Life Ins. Co., 183 F.3d 1 (1st Cir. 1999).

990. *See* Scardelletti v. Debarr, 265 F.3d 195, 204 n.10 (4th Cir. 2001) (affirming denial of motion to intervene and stating "'while [the court] should extend to any objector to the settlement leave to be heard, to examine witnesses and to submit evidence on the fairness of the settlement, it is entirely in order for the trial court to limit its proceedings to whatever is necessary to aid it in reaching an informed, just and reasoned decision'" (quoting Flinn v. FMC Corp., 528 F.2d 1169, 1173 (4th Cir. 1975) (internal quotation marks in original omitted))), *rev'd on other grounds sub nom.* Devlin v. Scardelletti, 536 U.S. 1 (2002); *In re* Lorazepam & Clorazepate Antitrust Litig., 205 F.R.D. 24, 26 (D.D.C. 2001) (holding that "[c]lass members who object to a class action settlement do not have an absolute right to discovery; the Court may

to discovery produced during the litigation phases of the class action (if any) as a means of facilitating appraisal of the strengths of the class positions on the merits.

Objectors might seek intervention and discovery to demonstrate the inadequacy of the settlement. Discovery should be minimal and conditioned on a showing of need, because it will delay settlement, introduce uncertainty, and might be undertaken primarily to justify an award of attorney fees to the objector's counsel. A court should monitor postsettlement discovery by objectors and limit it to providing objectors with information central to the fairness of the proposed settlement. A court should not allow discovery into the settlement-negotiation process unless the objector makes a preliminary showing of collusion or other improper behavior.[991]

An opportunity to opt out after the settlement terms are known, either at the initial opportunity or a second opportunity, might reduce the need to provide procedural support to objectors or to rely on objectors to reveal deficiencies in a proposed settlement. Class members who find the settlement unattractive can protect their own interests by opting out of the class.

Withdrawal of objections. Court approval is necessary for withdrawal of objections to settlements binding on the class.[992] If objections are withdrawn but result in modifications to the class settlement terms, the withdrawal is reviewed as part of the class settlement. If the objector simply abandons pursuit of the objection, the judge should inquire into the circumstances, asking the parties and the objector to identify any benefit conveyed or promised to the objector or objector's counsel in connection with the withdrawal. Although an objector cannot ordinarily be required to pursue objections, judicial inquiry into—and potential disapproval of—so-called side agreements or tacit understandings can discourage improper uses of objections.

Intervention and appeal. A class member may appear at the settlement hearing and object without seeking intervention. Objectors need not formally intervene to appeal matters to which they objected during the fairness hearing.[993] Once an objector appeals, control of the proceeding lies in the court of appeals.

in its discretion allow discovery if it will help the Court determine whether the settlement is fair, reasonable, and adequate" and allowing limited discovery).

991. Bowling v. Pfizer, 143 F.R.D. 141, 153 & n.10 (S.D. Ohio 1992).

992. Fed. R. Civ. P. 23(e)(4)(B).

993. Devlin v. Scardelletti, 536 U.S. 1 (2002).

21.644 Role of Magistrate Judges, Special Masters, and Other Judicial Adjuncts in Settlement

Reviewing a proposed class settlement for fairness, reasonableness, and adequacy is a time-consuming and demanding task, but it is essential and must be done by the judge. Typically, the parties and their attorneys will be primarily interested in upholding the settlement and may present information in a way that supports their position. In cases with a sparse record, the judge may appoint an adjunct: a magistrate judge, guardian *ad litem*, special master, court-appointed expert, or technical advisor, to help obtain or analyze information relevant to the proposed settlement.[994] For example, a judge might retain a special master or a magistrate judge to examine issues regarding the value of nonmonetary benefits to the class and their fairness, reasonableness, and adequacy.[995] Even in that context, however, the judge generally has to identify the issues and the procedures needed to address and resolve them.

21.65 Issues Raised by Partial or Conditional Settlements

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21.651 Partial Settlements

Settlement classes present special problems when they involve partial settlements, such as a settlement with one of several defendants. The settling defendant might be liable to the class as a whole or only to certain members of the class, and members of the settlement class might have difficulty understanding their position in the litigation. Because they may not know whether they will be members of a class with respect to claims against nonsettling defendants, they might be unable to make an informed decision regarding the adequacy of the settlement.

Given that the litigation might continue against other defendants, the parties may be reluctant to disclose fully and candidly their assessment of the proposed settlement's strengths and weaknesses that led them to settle separately. The adequacy of the settlement depends in part on the relative exposure and resources of other parties. An informed evaluation is extremely difficult if

994. For examples of such appointments in a mass tort context, see *infra* notes 1344–46 and accompanying text. Expert testimony may assist the court in making its evaluation. *See In re* Corrugated Container Antitrust Litig., 643 F.2d 195, 215 n.30 (5th Cir.), *on second appeal*, 659 F.2d 1322 (5th Cir. 1981).

995. *See, e.g.*, Gibson, *supra* note 792, at 22–23.

discovery is incomplete or has been conducted against only a few of the defendants.

Partial settlements are nevertheless not unusual. If several such settlements are being negotiated, it is ordinarily wise to defer consideration until all are submitted, thereby saving the time and expense of successive notices and hearings and allowing the judge and class members to assess the adequacy of the settlements as a whole. In the interest of fairness, a partial settlement should be brought to the attention of all parties. The judge may wish to defer ruling on temporary approval if a nonsettling party so requests and shows substantial progress in negotiating a settlement of its own. Funds from the settlements typically are placed in income-producing trusts established by class counsel for the benefit of the class and held until the case is fully resolved.

Partial settlements shortly before trial can disrupt the trial, resulting, for example, in the departure of a lead counsel. The court should set a deadline for the presentation of partial settlements sufficiently in advance of trial so that fairness hearings may be completed while still allowing the parties sufficient time to prepare for trial. See section 13.21.

Partial settlements containing provisions that might interfere with further proceedings, such as those attempting to limit further discovery, should rarely be approved. See section 13.22. A provision under which the class agrees to a refund if it later settles on terms more favorable to other defendants is particularly inappropriate, because the adequacy of such a proposed settlement cannot be fairly determined. Similarly, a defendant's agreement to increase the settlement fund if individual plaintiffs later settle for a greater amount does not diminish the court's responsibility to evaluate the adequacy of the amount offered to the class. See section 13.23. Although the court can give some deference to provisions purporting to allocate a settlement fund according to particular theories of recovery, claims, or time periods, it should reserve the power to make modifications when warranted. See section 13.21.

21.652 Conditional Settlements

The parties sometimes propose a precertification settlement that permits the settling parties to withdraw from the settlement if a specified number of persons opt out of the class or settlement. Although doing so might promote settlement by giving a defendant greater assurance of ending the controversy and avoiding the expense of litigating numerous individual claims, it might delay a final settlement. A reasonable cut-off date for the defendant's election, such as thirty days after the opt-out period, should keep any delays to a minimum. An alternative approach is to provide that the benefits paid to the class will be reduced in proportion to the number of opt outs or the total amount of their claims. If the reduction in benefits is substantial, fairness might require providing class members another opportunity to opt out.

Some settlements, particularly in securities and consumer litigation, are conditioned on class members waiving claims for additional periods not covered by the pleadings or are conditioned on waiving additional potential claims against the settling defendants. Often such waivers take the form of changing the definition of the class (e.g., by adding spouses or children). Review of such waivers will ensure that notice of them is clear, conspicuous, and not abusive.

21.66 Settlement Administration

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.662 Undistributed Funds 333

Class settlements are rarely self-executing and various problems may arise in their administration. Sometimes a settlement fund is to be divided equally among all class members who meet specified criteria (for example, employees who sought promotion during a certain time period) or allocated in proportion to some measure of damage or injury (for example, the price paid for particular securities). In such cases, the class members are in potentially conflicting roles, because increasing one claimant's benefits will reduce another's recovery. Where the settlement provides that each qualifying class member receive a specified payment, either a flat sum or an amount determined according to a formula, settling defendants may have an interest in maximizing the extent to which class members are disqualified or have their claims reduced.

Class members must usually file claims forms providing details about their claims and other information needed to administer the settlement.[996] In larger class actions, forms and instructions might be provided on the Internet, and an E-mail address or a toll-free telephone number may be established for handling questions. In any event, class members should receive some means of personal communication. Verification of claims forms by oath or affirmation under 28 U.S.C. § 1746 may be required, and it may be appropriate to require substantiation of the claims (e.g., through invoices, confirmations, or brokers' records).

Completion and documentation of the claims forms should be no more burdensome than necessary. Nor, for purposes of administering a settlement, should the court require the same amount and specificity of evidence needed

996. For examples of claims forms, see *In re Diet Drugs Products Liability Litigation*, AHP Diet Drug Settlement Forms, available at http://www.settlementdietdrugs.com/d.home.php3 #forms (last visited Nov. 10, 2003).

to establish damages at a trial; secondary forms of proof and estimates are generally acceptable. A default award may be appropriate for those who can establish membership in the class but cannot, or prefer not to, submit detailed claims. Typically, such an award would be at the low end of the range of expected claims. The parties will usually have negotiated the amount and nature of proof necessary for a class member to recover under the settlement. To achieve the intended distribution to beneficiaries, additional mailings, telephone calls, and investigative searches might be needed if notices to class members are returned or if class members fail to submit claim forms. There may be no need to require action by class members, as where the defendants' records provide a satisfactory, inexpensive, and accurate method for determining the distribution of a settlement fund.

Class counsel should establish a procedure for recording receipt of the claims forms and tabulating their contents, with arrangements subject to court approval. If the class is large, forms are customarily sent to a separate mailing address and the essential information is recorded on computers. Judges sometimes require class counsel to use follow-up procedures to contact class members where only a few have filed claims.[997] Form letters can answer common inquiries from class members and deal with recurring errors in completing the claims forms. These procedures should be made part of the record to minimize subsequent disputes.

Audit and review procedures will depend on the nature of the case. Claims for modest amounts are frequently accepted solely on the basis of the verified claim forms.[998] Medium-sized claims or a portion of such claims selected by random sampling may be subjected to telephone audit inquiries or cross-checks against other records. Large claims might warrant a field audit to check for inaccuracies or fraud.[999]

21.661 Claims Administrator or Special Master

Judges often appoint a claims administrator or special master and describe the duties assigned in the order approving the settlement agreement. Duties may include taking custody of settlement funds, administering the distribution procedures, and overseeing implementation of an injunction. The adminis-

997. *See* Fed. R. Civ. P. 23(d)(2); *In re* Orthopedic Bone Screw Prods. Liab. Litig., 246 F.3d 315, 327–28, n.11 (3d Cir. 2001) (listing recommended practices for identifying class members entitled to actual notice).

998. *See infra* section 40.44.

999. *See, e.g.*, *In re* Diet Drugs Prods. Liab. Litig., 236 F. Supp. 2d 445, 462, 464 (E.D. Pa. 2002) (order increasing field audits for doctors and law firms that had submitted medically unreasonable claims).

trator or special master may be charged with reviewing the claims and deciding whether to allow claims that are late, deficient in documentation, or questionable for other reasons.[1000] The specific procedure for reviewing claims may be limited to the materials submitted or may include a hearing at which the claimant and other interested parties may present information bearing on the claim. The claims procedure may allow appeal of a decision to disallow a claim. That appeal may involve review by a disinterested individual or panel or, in some instances, by the court.

The administrator should make periodic reports to the court. These reports should include information about distributions made, interest earned, allowance and disallowance of claims, the progress of the distribution process, administrative claims for fees and expenses, and other matters involving the status of administration. Section 32.39 discusses the use of special masters and magistrate judges in implementing class settlements in employment discrimination cases.

21.662 Undistributed Funds

The settlement might provide for disposition of undistributed or unclaimed funds.[1001] Judicial approval is required for such disposition, and the parties may want the funds to be returned to the settling defendant, paid to other class members, or distributed to a charitable or nonprofit institution. The court should allow adequate time for late claims before any refund or other disposition of settlement funds occurs,[1002] and might consider ordering a reserve for late claims.

1000. *See, e.g.*, *In re* Crazy Eddie Sec. Litig., 906 F. Supp. 840, 844–47 (E.D.N.Y. 1995) (reviewing criteria for deciding whether to allow late claims).

1001. Although disfavored in a fully tried class action, "fluid recovery," in which damages are paid in the aggregate without individual proof, may be permissible in a settlement. *See In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 179, 185–86 (2d Cir. 1987) (finding "some 'fluidity' is permissible in the distribution of settlement proceeds" and holding that the district court must supervise the programs that will consume such proceeds). *Compare* Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1305 (9th Cir. 1990) (noting "[f]ederal courts have frequently approved this remedy [fluid recovery for distribution of unclaimed funds] in the settlement of class actions where the proof of individual claims would be burdensome or distribution of damages costly"), *with* Daly v. Harris, 209 F.R.D. 180, 197 n.5 (D. Haw. 2002) (noting "fluid recovery system, as a method of aggregating damages as opposed to a distribution method, would not be appropriate here since Section 1983 requires proof of actual damages").

1002. *In re Crazy Eddie*, 906 F. Supp. at 845 (noting "there is an implicit recognition that late claims should ordinarily be considered in the administration of a settlement" (citing Manual for Complex Litigation, Third, § 30.47 (Federal Judicial Center 1995)).

The court's equitable powers may be necessary to deal with other problems that commonly arise during administration of settlement but might not be covered by the terms of the agreement. Such problems include

- the impact of divorce, death, incompetence, claims by minors, and dissolution of business entities or other organizations;
- investment of settlement funds (security of settlement funds is critical—the court should permit these funds to be held in only the most secure investments unless prudent investment of long-term holdings (e.g., to administer a trust for a mass tort settlement involving latent claims) calls for a balance between maintaining security and gaining returns on the investment);
- interim distributions and partial payments of fees and expenses; and
- procedures for handling lost or returned checks (although checks should ordinarily be stamped with a legend requiring deposit or negotiation within ninety days, counsel should be authorized to grant additional time).

The court and counsel should be alert to the possibility of persons soliciting class members after the settlement and offering to provide "collection services" for a percentage of the claims. Such activities might fraudulently deprive class members of benefits provided by the settlement and impinge on the court's responsibility to control fees in class actions.[1003]

21.7 Attorney Fee Awards

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Attorney fee applications may arise as part of the settlement of a class award or after litigation of the class proceedings. The request may be based on a percentage of a common fund that the class action has produced or may be based on a statutory fee award. Statutory awards are generally calculated using the lodestar method (number of hours reasonably spent on the litigation

1003. Jack Faucett Assocs., Inc. v. Am. Tel. & Tel. Co., 1985-2 Trade Cas. (CCH) ¶ 66,830 (D.D.C. 1985).

multiplied by the hourly rate, enhanced in some circumstances by a multiplier), subject to any applicable statutory ceiling on the hourly rate. Some courts use a lodestar method as a crosscheck to ensure that the percentage method does not result in an excessive award. See section 14.122.

The court's settlement review should include provisions for the payment of class counsel. In class actions whose primary objective is to recover money damages, settlements may be negotiated on the basis of a lump sum that covers both class claims and attorney fees. Although there is no bar to such arrangements,[1004] the simultaneous negotiation of class relief and attorney fees creates a potential conflict.[1005] Separate negotiation of the class settlement before an agreement on fees is generally preferable. See generally sections 14.22, 14.23 (court-awarded attorney fees), and 32.463 (employment discrimination, attorney fees). This procedure does not entirely eliminate the risk of conflict, and, if negotiations are to be conducted in stages, counsel must scrupulously avoid making concessions affecting the class for personal advantage. If an agreement is reached on the amount of a settlement fund and a separate amount for attorney fees and expenses, both amounts must be disclosed to the class. Moreover, the sum of the two amounts ordinarily should be treated as a settlement fund for the benefit of the class, with the agreed-on fee amount constituting the upper limit on the fees that can be awarded to counsel. The total fund could be used to measure whether the portion allocated to the class and to attorney fees is reasonable. Although the court may not rewrite the parties' agreement, it can find the proposed funds for the class inadequate and the proposed attorney fees excessive, and can allow the parties to renegotiate their agreement. The judge can condition approval of the settlement on a separate review of the proposed attorneys' compensation.

1004. *See* Evans v. Jeff D., 475 U.S. 717, 733–34 (1986); Marek v. Chesny, 473 U.S. 1, 5–7 (1985).

1005. *See, e.g.*, *In re* Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 334–35 (3d Cir. 1998) (approving a settlement in which parties sought permission of the court to negotiate fees after the merits had been resolved); Malchman v. Davis, 761 F.2d 893, 904–05 (2d Cir. 1985) (rejecting, for lack of factual support, appellant's argument that simultaneous negotiation of the merits and fees had tainted the settlement); Manchaca v. Chater, 927 F. Supp. 962, 966 (E.D. Tex. 1996) ("The decision by plaintiffs to pursue attorneys' fees and costs subsequent to judicial approval of a settlement agreement demonstrates their commitment to arms-length negotiations."). *See also* Court Awarded Attorney Fees: Report of the Third Circuit Task Force, 108 F.R.D. 237, 269 (1985) (calling for, among other things, allowing parties to enter into a conditional settlement pending resolution of fees and for parties to seek the court's permission before discussing fees).

21.71 Criteria for Approval

Compensating counsel for the actual benefits conferred on the class members is the basis for awarding attorney fees. The "fundamental focus is the result actually achieved for class members."[1006] That approach is premised on finding a tangible benefit actually obtained by the class members. See section 14.11. In comparing the fees sought by the lawyers to the benefits conferred on the class, the court's task is easiest when class members are all provided cash benefits that are distributed. It is more complicated when class members receive nonmonetary or delayed benefits. In such cases, the judge must determine the value of those benefits.

Nonmonetary benefits can take a number of forms. In a Rule 23(b)(3) case, nonmonetary benefits can include coupons, discounts, or securities, or other forms. In a Rule 23(b)(2) case, the benefits may include different forms of injunctive relief, or relief that may mix injunctive and damages elements. A court may need to determine the dollar value of medical monitoring programs or warranty programs. A civil rights case may require evaluating an injunction redressing employment or other forms of discrimination. The court's evaluation and review of such benefits as part of the settlement review process (see section 21.62) is important for its review of fee applications. If a settlement provides only speculative, uncertain, or amorphous benefits to the class, that resists valuation in dollar terms.

The court should carefully scrutinize any agreement providing that attorneys for the class receive a noncontingent cash award.[1007] The court should refuse to allow attorneys to receive fees based on an inflated or arbitrary evaluation of the benefits to be delivered to class members. It might be appropriate to require attorneys to share in the risk of fluctuations in the value of an in-kind settlement, either by taking all or part of its counsel fees in in-kind benefits or by deferring collection of fees and making them contingent on the value of in-kind benefits that are actually delivered to the class members.[1008]

1006. Fed. R. Civ. P. 23(h) committee note. *See also* 15 U.S.C. § 77z-1(a)(6) (2000) (limiting fee award to a "reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class"); RAND Class Action Report, *supra* note 955, at 490 (concluding that the "single most important action that judges can take to support the public goals of class action litigation is to reward class action attorneys only for lawsuits that actually accomplish something of value to class members and society") (emphasis omitted).

1007. *See* RAND Class Action Report, *supra* note 955, at 429 ("In at least three instances [among 10 cases studied in depth], class members claimed less than half of the funds set aside for compensation.").

1008. *See supra* section 24.121; *see also, e.g.*, Bowling v. Pfizer, Inc., 132 F.3d 1147 (6th Cir. 1998) (reserving decisions on fees related to future funding until the class receives its benefits over a ten-year period); *In re* Auction Houses Antitrust Litig., No. 00 Civ. 0648, 2001 WL

In some instances, the court might find the benefit to the class so speculative that it will use the lodestar method rather than the common-fund method to determine the amount of fees to which the attorneys are entitled.[1009] In other instances, the court may greatly reduce the parties' estimates of the dollar value of the benefits delivered to the class members and base the attorney fee award on the reduced amount. In cases involving a claims procedure or a distribution of benefits over time, the court should not base the attorney fee award on the amount of money set aside to satisfy potential claims. Rather, the fee awards should be based only on the benefits actually delivered. It is common to delay a final assessment of the fee award and to withhold all or a substantial part of the fee until the distribution process is complete.

If a case is primarily concerned with injunctive or declaratory relief, exclusive concern with monetary benefits may not be appropriate.[1010] If the value of such relief cannot be reliably determined or estimated, consider using the lodestar method, including any appropriate multiplier, to calculate fee awards.

The common-fund theory may call for awarding attorney fees to counsel other than class counsel. If the court has appointed as class counsel attorneys who did not file one of the original complaints (see section 21.27), attorneys who investigated and filed the case might be entitled to a fee award. Attorneys for objectors to the settlement or to class counsel's fee application might also have provided sufficient benefits to a class to justify an award.[1011]

Rule 23(h) also authorizes the award of nontaxable costs in class action litigation and settlements.

170792, at *3–*5, *15–*17 (S.D.N.Y. Feb. 22, 2001) (counsel fees for cash and coupon components of settlement to be paid in same proportion of cash and coupons as class benefits paid).

1009. Strong v. BellSouth Telecomms., Inc., 137 F.3d 844, 851–52 (5th Cir. 1998) (upholding use of lodestar method of calculating fees in relation to a "phantom" common fund); *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 821 (3d Cir. 1995) (calling for lodestar calculation where common benefit "evades the precise evaluation needed for the percentage of recovery method").

1010. Fed. R. Civ. P. 23(h) committee note (citing an individual civil rights action for the proposition that placing an "'undesirable emphasis' on 'the importance of the recovery of damages in civil rights litigation' . . . might 'shortchange efforts to seek effective injunctive or declaratory relief'" (quoting Blanchard v. Bergeron, 489 U.S. 87, 95 (1989))).

1011. *Id.*