

AN INTRODUCTION TO CLASS ACTION PROCEDURE IN THE UNITED STATES

Janet Cooper Alexander*

The class action is among the most powerful legal tools available in the United States. It enables the vindication of claims that otherwise could never be litigated, no matter how meritorious. Use of the courts to assert rights is practicable only if the potential benefits exceed the cost, and the costs of litigation are considerable. Claims that are too small to cover the cost of litigation will not be pursued. No matter what rights may be written in the substantive law, if there is no means by which those rights can be enforced the law might as well not exist, for it can be violated with impunity.

In a world of mass production, mass marketing, economic interdependence and swift worldwide communications and transportation, it is not uncommon for many individuals to be harmed in essentially identical ways by mass-produced products or standardized corporate practices. Individual claims are typically small – perhaps only a few dollars, or even less. But in the aggregate, these small individual harms may yield large illegal profits. Thus although the individual claims may be small, they are not trivial from the social point of view. Class actions can provide a solution to this economic obstacle by gathering many individual claims together into a single lawsuit that can support the cost of litigation.

Class actions can also be a way of leveling the playing field for poor or economically less powerful individuals. Normally an individual, especially a poor person, is at a great disadvantage in a court case against a well-financed corporate opponent who can afford high-priced lawyers. But when claims are brought together in class action form, the aggregate amount may be large enough to make it possible to engage the services of equally skilled counsel. The effectiveness of class actions in empowering the economically powerless against the economically powerful may be one reason that they have been under almost constant attack by business interests and conservative politicians.

Class actions can make it possible to litigate small claims, thereby serving the goals of compensation and deterrence (or law enforcement). By “enabling” claims, the class action device can provide appropriate incentives for corporations, assuring that they pay the true costs of their own conduct, rather than passing the costs on to consumers while retaining the benefits as profit. Class actions can also provide a more efficient way to conduct litigation, eliminating the need to relitigate the common issues in a large number of individual cases.

Class actions are only one method of responding to these concerns. They are an alternative to government regulation and industry self-regulation. Self-regulation may be ineffective, as the industry may not be motivated to discipline its members, or may not be sufficiently coherent or organized to assure that its members will comply with self-

• Professor of Law and Justin M. Roach, Jr. Faculty Scholar, Stanford Law School; Principal Investigator, Stanford Center on Conflict and Negotiation.

regulation. Government regulation may be impractical or undesirable, as it requires the creation and financing, at public expense and on an ongoing basis, of a government bureaucracy. Government agencies, particularly consumer protection agencies, frequently do not have enough resources to detect and prosecute all violations, and do not usually seek to recover compensation for consumers. Even the U.S. Securities and Exchange Commission, a venerable and respected regulatory agency, has consistently stated that private class actions are essential to enforcement of the securities laws because the agency lacks resources to provide effective enforcement on its own. Moreover, the level of government enforcement is variable, as it depends on the priorities of the political groups that staff, fund, and set policy for the agency. Finally, regulators, who are continually lobbied by industry representatives, may be “captured” and become more loyal to the regulated industry than to the public interest.

Class actions work by creating incentives for lawyers to bring private enforcement actions. Though individuals’ damages are too small to make a lawsuit worthwhile, a class action can aggregate many claims so that there is a significant total amount at stake – enough to make litigation economically feasible. The potential class recovery is large enough to cover a reasonable attorney’s fee. Thus it becomes profitable for lawyers to specialize in class action litigation, and a plaintiffs’ bar of “entrepreneurial lawyers” emerges. The lawyers’ stake in the action, their fee, is large enough for them to search out potential class claims and bring suit on behalf of the class. Thus, the existence of the class action device can create a market for private enforcement of the law. Increased enforcement, in turn, creates improved incentives for companies to comply with the law and take the appropriate degree of care. Moreover, class actions may be more effective than government action in providing compensation to injured consumers, and may provide more comprehensive deterrence than individual tort suits, even if individual suits were feasible.

Creating this market alternative to regulatory enforcement requires procedural law to authorize class actions, a supply of experienced and entrepreneurial plaintiffs’ lawyers, a way to finance the litigation, and substantive law that recognizes consumers’ claims and does so in such a way that it will be efficient to litigate hundreds, thousands or even millions of claims together.

In the United States, all types of class actions are governed by the same class action rule.¹ But in the 30 years of practice under the modern class action rule, several broad categories of cases have emerged, each with distinctive characteristics that raise special issues requiring different procedural treatment. The broad types of class actions include:

¹ See Rule 23, Federal Rules of Civil Procedure, the model for most state class action rules. Recently Congress has legislated extensive changes in the procedures for securities class actions, making securities class actions quite different in form from other class actions. Private Securities Litigation Reform Act of 1995. In general, however, procedural rules are “trans-substantive” – they apply to all cases regardless of the applicable substantive law.

1. Consumer rights. The claims are for individuals' economic losses (not for personal injuries), and are too small to justify individual suits. Most of these claims involve allegations of excessive fees or fraudulent business practices, product defects, and antitrust claims. (One could define "consumer rights" cases more broadly, to include securities cases or personal injury cases involving product defects, but this usage would obscure important characteristics of all three types of cases.)
2. Securities and antitrust. Securities class actions are often regarded as small-claim cases, but in fact a small number of very large claims usually account for most of the recovery. The substantive law and court practice are specialized, as are both the plaintiffs' and defense bar.
3. Environmental. This could be considered a form of consumer class action, but it is relatively rare for the environmental laws to be enforced through class actions, partly because the desired remedy is usually injunctive in nature rather than money damages.
4. Mass torts. This is the most rapidly growing and currently the most controversial category of class actions. Like consumer class actions, these cases involve claims by individuals against corporations for harms caused by defendants' products or business conduct. The difference is that these are large claims for personal injuries rather than small claims for purely economic losses. The claims are large enough to justify individual litigation, but they may be more efficient to bring jointly because they involve similar issues and if the defendant may not have enough assets to pay all of the potential judgments, fairness may also counsel class treatment. Often class treatment is sought to facilitate settlement of all claims against the defendant.
5. Civil rights, for example school segregation, prisoners' rights, voting rights, and employment rights of public employees. These lawsuits differ from the other categories in that they usually seek injunctive, rather than monetary, relief. A number of recent federal statutes have curtailed the use of class actions in some of these circumstances.

The discussion in this paper will focus on small-claim class actions, such as consumer class actions, as the practice and procedure in these cases is relatively straightforward. I will, however, discuss other categories briefly.

I. Class Action Procedure in the United States

The United States legal system is a complex part of our federal system of government. Each of the fifty states has its own court system. At the same time, the federal government maintains a national court system with its own trial courts in every state, as well as two tiers of appellate courts. Often the parties have a choice of several state or federal courts in which to sue. Each state system and the federal system has its own procedural law, and the states make substantive law in all areas where federal law does not govern. States are the primary lawmakers, for example, in the substantive areas of torts, contracts and property. As each state is autonomous in the areas under its control, there is substantial variation in substantive and procedural law throughout the United States. Thus, both class action procedure and the applicable substantive law may vary from state to state, and the question of what law (or laws) to apply in nationwide class actions can be quite vexing. In this paper, I consider only federal class action practice, which is the most fully developed and widely known body of United States class action law.

A. Rule 23 Requirements

Class actions are governed by Rule 23 of the Federal Rules of Civil Procedure.² Rule 23(a) sets out four prerequisites to any class action.

- First, the class must be “so *numerous* that joinder of all members is impracticable.” Classes have been certified with as few as 35 members, but normally there are hundreds, thousands or even millions of persons in the class.
- Second, there must be “*questions of law or fact common to the class.*”
- One or more persons who are members of the class may sue or be sued as representatives of everyone in the class if their claims or defenses are “*typical* of the claims or defenses of the class,” and if
- they “will fairly and adequately protect the interests of the class.”

These four basic requirements are often referred to as *numerosity, commonality, typicality, and adequacy of representation*. The rule permits both plaintiff and defendant class actions. Plaintiff class actions are by far the more common.

If the requirements of Rule 23(a) are met, the next requirement is that the action must fit into one of three categories in Rule 23(b). Most class actions seeking money damages are brought under the third category, Rule 23(b)(3).³ Rule 23(b)(3) class actions must meet two further requirements in addition to the criteria of Rule 23(a).

² Technically, Rule 23 governs class actions in the federal courts. Most states have enacted class action procedures based on Rule 23.

³ Rule 23(b)(1)(a) covers suits where separate actions might cause a risk of inconsistent judgments (for example, a taxpayer sues to invalidate a municipal tax, or a shareholder sues to compel a corporation to

- First, the questions that are common to the class must *predominate* over any questions that affect only individual class members. This requirement assures that the class will be “sufficiently cohesive to warrant adjudication by representation.”⁴ Predominance is judged on the basis of how trial time and focus will be spent.
- Second, class treatment must be “*superior* to other available methods for the fair and efficient adjudication of the controversy.” In determining whether the superiority requirement is met, the court must take into account several factors, the most important of which is “the difficulties likely to be encountered in the management of a class action,” or “*manageability*.”⁵

The paradigm of a (b)(3) class action is a case involving many small claims on behalf of consumers of a mass-produced product. Examples could include a computer chip that does not perform a certain operation accurately, a software program that does not function as advertised, or a car’s seat belts that spring open on impact. In a famous early case, a taxicab company overcharged its passengers by altering the odometers in its cabs so that they would record higher mileage than the actual mileage traveled. Such cases involve many consumers who have suffered similar harm from identical mass-produced products or standard corporate practices. Common questions of law and fact exist in such cases and would predominate at trial whenever it would require only a small part of the trial to deal with individual questions such as how many products a particular class member purchased.⁶ The class action is superior to other methods of handling such claims because in most cases the individual damages are much too small for individual lawsuits to be economically feasible, and there are no significant manageability problems.

By contrast, cases involving mass accidents (for example, mass food poisoning on a cruise ship or a fire in a crowded auditorium) or mass torts (such as injuries caused by exploding, defectively-designed gas tanks, birth defects caused by prescription drugs, or tobacco-related diseases caused by smoking or chewing tobacco) were not originally considered suitable for class treatment. The presence of many complex individual issues such as causation, damages, and affirmative defenses such as assumption of the risk or contributory negligence was usually held to defeat the predominance and manageability.

declare a dividend). Rule 23(b)(1)(b) may apply when the assets available to pay claims are limited and may not be sufficient to satisfy all claims. The use of this provision for certifying no-notice, no-opt-out classes in large mass tort cases has been controversial, and the Supreme Court recently struck down such a class. Rule 23(b)(2) concerns claims for injunctive relief, where any monetary remedy would be only incidental to the injunctive relief.

⁴ Amchem Products, Inc. v. Windsor, 117 S.Ct. 2231 (1997).

⁵ The other factors include the interests of individual class members in controlling the litigation of their own claims, the extent and nature of any individual lawsuits that are already pending, and the desirability of concentrating all claims in the chosen court. Rule 23(b)(3).

⁶ It is possible that in some circumstances cases such as those mentioned would not satisfy the predominance requirement.

Any member of the class who meets the requirements of typicality and adequacy may serve as the representative of the class. The class representative is self-nominated. All one has to do to start the class-action ball rolling is to file a complaint stating that the suit is being brought as a class action, and making allegations sufficient to satisfy the requirements of Rule 23(a) and one or more categories of Rule 23(b). The complaint must show that the plaintiff is a member of the class – that is, that her own claim is the same claim (or typical of the claims) that she is asserting on behalf of the class. Because the individual claims involved in small-claim class actions are too small to justify the time and expense required to bring and supervise litigation, lawyers who specialize in class actions are usually the moving force in the filing of a complaint. They may seek out plaintiffs to serve as named class representatives, or have ongoing relationships with individuals who are willing to serve as plaintiffs. The class representative, however, usually does not play a significant role in the litigation.

B. Class Certification

Rule 23(c) directs the court to determine “as soon as practicable” after the case is filed whether it may be maintained as a class action. If so, the class is “certified.”⁷ The certification decision is one of the most important stages of the case. Although the decision whether to certify a class is not supposed to involve a determination of the merits of the claim, as a practical matter it is a decision whether the claim will proceed at all. If the case is certified, it can proceed to discovery and resolution on the merits. If the class is not certified, the plaintiff may continue the suit to determine his individual claim, but may not represent the class. Because individual claims are usually too small to justify the costs of litigation, denial of class certification usually means that the case is over. For this reason, denial of class certification has been called the “death knell” of the lawsuit.

The judge decides the class certification issue on the basis of briefs and oral argument from the parties. This usually occurs after an opportunity for fairly intensive discovery on issues such as how extensive the common issues are and whether the named plaintiffs meet the typicality and adequacy requirements, as well as issues that will affect the manageability of the case. Though Rule 23 says that the named plaintiffs must be able adequately to represent the class, it often turns out that the named plaintiffs have little knowledge of the claims alleged in the complaint or of their responsibilities to represent the interests of other class members. Judges have usually rejected defendants’ arguments that such lack of understanding makes the named plaintiffs unfit representatives. Rather, they have held that the adequacy of representation inquiry should focus primarily on the lawyer for the class. It is the lawyer who, as a practical matter, will be running the lawsuit and making important legal decisions. So long as the lawyer is experienced, well financed and competent and the plaintiff’s claims are typical, most judges would find the requirements for certification met. Critics have argued that uninformed class representatives are unable to supervise the class lawyers properly to make sure that they are truly representing the best interests of the class. The question of how to ensure that the class’s best interests are being served is discussed below.

⁷ The certification order may be conditional, and may be altered or amended at any time before a final decision on the merits.

The definition of the class is stated in the complaint, though it may be changed later by order of the court. The representative plaintiff must be a member of the class, and must have claims that are typical of the class.⁸ For example, if a suit contends that a bank imposed excessive service charges on its checking account customers, the representative plaintiff must have had a checking account during the relevant time and must have incurred the relevant service charges. If the suit also complains about fees for bounced checks, the class representative must also have incurred such fees.⁹ If the interests of some class members may differ from others', the class may be divided into subclasses under Rule 23(c)(3), each with its own subclass representative.

Often several plaintiffs join together to bring a class action, or the court may consolidate several class actions on the same claim into one litigation. Such consolidation can increase the number of lawyers who are available to work on the case, and can ensure that there is at least one representative plaintiff who can properly raise each claim in the complaint. The court usually allows all named plaintiffs who have filed competing class actions to continue to serve as class representatives, rather than trying to choose the best representative. In consolidated cases, the court normally appoints "lead counsel" for the class when the class is certified. Lead counsel take responsibility for strategy and staffing on the case, though they may call on other lawyers who have filed complaints for help.¹⁰

C. Obligations of the Class Representative

By proposing to represent the class, the representative plaintiff takes on serious obligations to the absent class members. These obligations are sometimes described as fiduciary or "quasi-fiduciary" obligations.¹¹ Lead counsel also take on fiduciary obligations to the class. Because the rights of absent class members will be affected or even extinguished by the lawsuit without providing them any meaningful opportunity to do anything about it, the class representatives and class counsel must put the class's interests ahead of their own. Structural protections are also provided to the class. One of these is the notice requirement.

D. Notice

⁸ Normally, the class excludes persons such as employees or officers of the defendant or affiliated entities and relatives of the lawyers for the class.

⁹ This requirement is part of the general requirement of "standing." That is, the plaintiff must have an actual, concrete claim with a personalized injury.

¹⁰ Indeed, a wise lead counsel is careful to assign work to all class counsel to permit them to earn fees from the case. They will then be less likely to object to lead counsel's appointment as lead in this and other cases.

¹¹ A fiduciary relationship is a special relationship of trust and confidence in which another person relies on the fiduciary to protect his interests. One with a fiduciary obligation must put the other's interests above his own, and must not act with any conflict of interest.

In (b)(3) cases, notice must be given to the members of the class that a class action on their behalf has been certified.¹² The Supreme Court has held that some form of notice is constitutionally required, for it would be a violation of due process to adjudicate absent class members' rights without even letting them know that the case existed. Because notice is essential to fair procedure, it should be a fundamental element of any class action regime. Rule 23(c)(2) requires that the class receive "the best notice practicable under the circumstances." When individual class members can be identified through reasonable effort, they must receive individual notice (usually by mail). Otherwise, "the best notice practicable" may include newspaper, television and radio advertisements, product package inserts, billing inserts, notices mailed to doctors' offices for posting, Internet web sites, and other methods likely to reach class members. The Rule requires the notice to inform class members that the action is pending, that they have the right to elect not to be part of the class (to "opt out" of the class), and if they do not opt out, to enter an appearance by counsel if they wish. They must also be informed that if they do not opt out, they will be included in the class. This means that any judgment, whether favorable or unfavorable to the class, will bind them and they will not be able to bring suit on their own later.

The Supreme Court, in a much-criticized decision,¹³ held that the plaintiff must pay the cost of notice. The Court's rationale was that the defendant may not be required to pay when no determination has yet been made of whether it is liable. The Court reversed an order by a trial court that required the defendant to pay 90 percent of the cost of notice after the court determined that the plaintiff was likely to win on the merits. This holding, that plaintiffs must bear the cost of class notice until defendant's liability is established, may create a serious obstacle to maintaining consumer class actions. Giving notice in large class actions may be quite expensive, particularly in cases where a large number of class members can be identified and thus must receive mail notice. It has been argued that requiring plaintiffs to pay for notice may prevent meritorious suits from being brought if the plaintiffs cannot afford the cost of notice. This concern seems to be less urgent today, as well-financed and sophisticated plaintiffs' firms seem better able to advance these costs.¹⁴ The cost of the notice required when a settlement has been reached is not a significant problem, for the parties can agree in the settlement that the defendant will pay the cost of notice. Nevertheless, a jurisdiction considering whether to adopt the class action procedure should give consideration to the question of when and how notice should be given, and who should pay for it.¹⁵

¹² Rule 23(c)(2). The rule seems to contemplate that this notice will be given rather early in the case. Because notice to large classes is very expensive and Rule 23(e) also requires notice when the case is settled, class notice is often deferred to the end of the case and one notice is used to serve both functions.

¹³ *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

¹⁴ The plaintiff or her lawyers would be entitled to have these costs reimbursed from any recovery for the class.

¹⁵ Rule 23 does not expressly require that notice be given to members of (b)(1) and (b)(2) classes. Some contend that because these are "classes by necessity," in that the cases cannot be decided fairly unless all claims are resolved in the same way, no one can be permitted to opt out and therefore notice would serve no function. The counterargument is that where class members have no right to opt out of the class, notice is all the more important, because the right to participate in setting the terms by which the case is resolved is the only procedural right class members really have. The question whether notice is constitutionally required in all class actions, not just (b)(3) class actions, has not been decided.

E. The Right to Opt Out

The required notice must inform class members of their right to opt out of the class. This is another important protection for absent class members. If they do not want to be part of a class, or would rather bring their own lawsuit individually, or (if the notice is sent late in the case) do not like the terms of the settlement, they can decline to be part of the class. If they opt out, they will not receive the benefits of any judgment in favor of the class; nor will they be bound by an unfavorable result. Settlement agreements often provide that if too many class members opt out the defendant can cancel the settlement. Of course, in a small-claims class action like most consumer protection claims, the right to bring an individual suit is illusory. These lawsuits are only economically feasible if many claims are aggregated. Thus in small-claims class actions there are rarely a very large number of opt-outs. However, class members must file a claim form to receive payment. In most class actions, a large number of people do not opt out but do not file claims. This may be because they do not wish to be part of the class, or because the amount involved seems too small to bother with filing the form, or because they didn't learn of the case. These class members are still part of the class and may not bring their own claims, even though they do not receive any personal benefit from the settlement.

F. Court Approval of the Settlement

A third important structural protection for the class is the requirement in Rule 23(e) that a class action may not be dismissed or settled without notice to the class and the approval of the court. After the parties reach a proposed settlement, they present it to the court for a preliminary determination that it is fair and adequate. The parties file extensive briefs on the fairness of the settlement, and the court holds a hearing on the issue. If the court tentatively approves the settlement at this hearing, the class must receive notice of the proposed settlement. This notice must inform class members that a hearing on the fairness of the settlement will be held before the settlement is finally approved, and that class members have the right to attend that hearing and to be heard in support of or in opposition to the settlement. Only after this "fairness hearing" is the settlement finally approved.

While most settlements do end up being approved, it is not uncommon for judges to insist on modifications to the proposal before giving preliminary or final approval. Additionally, in most large class actions, the trial judge or a settlement judge is actively involved in the settlement negotiations, and so has a role in shaping the terms of the proposed settlement.¹⁶ Most judges take seriously their responsibility to protect the interests of the absent class members. In some cases, class members do appear at the fairness hearing to object to the terms of settlements. It is rare for objectors to derail a settlement

¹⁶ Sometimes the trial judge oversees settlement negotiations. In other cases, either for convenience or to preserve the trial judge's neutrality if the case does go to trial, a settlement judge may be appointed. This person may be a different trial judge of the same court, a magistrate judge (a subordinate judge of the court), or a special master (a lawyer or law professor appointed to serve in a particular case).

completely, but occasionally they force changes in the terms of the settlement or in the fees awarded to class counsel.

II. Financing Class Actions

The core idea of the class action is that although each individual claim is too small to be worth litigating, if all those small claims are added together they will amount to a large sum, sufficient to make even the additional complexity of class action practice economically worthwhile. One can thus think of the class action as a financing device. This is not the end of the matter, for the practical question of how the costs of litigation are to be paid remains.

In the United States, this problem is not too difficult. We have used contingent fees as a means of financing individual litigation from colonial times. The contingent fee is a contract by which the lawyer agrees to advance litigation expenses, including the lawyer's services. At the end of the case, the lawyer receives as a fee an agreed percentage of the recovery. If there is no recovery, the lawyer gets nothing. Contingent fees are, at their heart, a method of financing litigation. They also embody an element of insurance against litigation costs. Today, virtually all individual plaintiffs finance their suits through contingent fees.¹⁷

Contingent fee agreements are not possible in class actions, because the class members do not (and, because of their number and anonymity, cannot) contract with the lawyer before the case is filed. We do, however, achieve a similar result in suits for money damages, through a judge-made doctrine called the "common fund doctrine."¹⁸

The common fund doctrine is based on simple fairness. It says that if a person (the representative plaintiff) through his efforts creates a recovery that benefits many people, it is only fair for all the beneficiaries to share in the cost of obtaining the recovery. This is accomplished by paying that cost out of the common fund that was created by the litigation.¹⁹ The common fund rule is the most common method of financing class actions. The lawyers for the class pay all the expenses of litigation out of their own funds until the case is finally resolved, usually by settlement. If the plaintiffs lose the case, the lawyers get no fees from their clients or from the defendants, and of course there is no common fund. If the case is resolved, either by settlement or by trial, with a monetary

¹⁷ Individual defendants finance litigation costs primarily through insurance, either automobile insurance, homeowners insurance (which covers the cost of defending various types of suits), umbrella coverage liability insurance, or (in the case of corporate employees, directors and officers) insurance or indemnity provided by their employer. Publicly and privately funded legal services and labor unions provide representation for only a tiny percentage of individual suits.

¹⁸ The common fund doctrine was endorsed for federal class actions in *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1982).

¹⁹ In federal courts, the common fund doctrine applies only to suits where a common fund of money is created. *Alyeska Pipeline Serv. Co. v. Wilderness Soc.*, 421 U.S. 240 (1975). Some states have extended this concept to allow courts to require a defendant to pay attorney's fees if the litigation created a non-monetary benefit for the public, particularly if the defendant is the government. *See Serrano v. Priest*, 20Cal.3d 25, 141 Cal. Rptr. 315, 569 P.2d 1303 (1977). In federal court, however, fees can only be awarded out of a common fund or if they are specifically authorized by statute, as described below.

recovery for the plaintiff class, the lawyers for the class submit a request to the court to award them reasonable attorney's fees, which are paid out of the class recovery.

The fee award may be based on a percentage of the recovery or on the reasonable hourly fees modified by factors such as the results achieved, the difficulty of the case, and the risk of receiving no fee at all if the case is unsuccessful.²⁰ The court holds a hearing on the fee award, but the defendants almost never oppose the fee request as the fee is coming from the class recovery and does not represent an additional expense to the defendants. Sometimes members of the class appear at the hearing to object to the proposed fee, but this is a rare occurrence, and courts seldom make more than a minor adjustment to the requested fees. The court-awarded fees and expenses, usually between 25-35 percent of the total settlement, are paid to the lawyers out of the settlement fund, and then the remainder is distributed to the class as approved by the judge.

The other principal method of financing class actions is the statutory attorney's fee. When the legislature wishes to encourage certain types of litigation, particularly litigation that may not involve large money recoveries, it sometimes includes in the statute creating the right a provision that a plaintiff who prevails on her claim is entitled to recover reasonable attorney's fees from the plaintiff.²¹ These statutes in effect adopt the loser-pays litigation financing rule for a particular substantive class of cases. Additionally, most such statutes permit only plaintiffs, not defendants, to recover attorney's fees from the other side. (We sometimes call this "one-way fee shifting.") The court must also approve statutory attorney's fees, but they are paid separately by the defendant and do not come out of the class recovery. Statutory attorney's fees are frequently found in civil rights, environmental, and consumer protection laws. The primary method of financing consumer class actions, however, remains the common fund doctrine.²²

Another crucial element of the class action financing method is the "American rule": Each side to a lawsuit bears its own costs, regardless of who wins. This rule is contrary to the "loser-pays" rule, under which the losing party must pay both its own

²⁰ In a series of cases, the Supreme Court has eliminated most of the factors such as difficulty, skill and results achieved from consideration in statutory fee cases, discussed below. *See City of Burlington v. Dague*, 505 U.S. 557 (1992) (denying fee enhancement for risk of nonrecovery); *Pennsylvania v. Delaware Valley Citizens' Council (I)*, 478 U.S. 546 (1986) (barring enhancement for quality of representation); *Blum v. Stenson*, 465 U.S. 886 (1984) (denying multiplier for novelty and complexity of case). Courts are divided on the extent to which such factors can still be used to increase the fee award in common fund cases. There has been a recent trend toward awarding fees based on a percentage of the recovery, which makes the enhancement factors used in hours-based formulas irrelevant. States, of course, are free to continue to use such factors to enhance fee awards.

²¹ The most important of these statutes is the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. sec. 1988, which authorizes the award of reasonable attorney's fees to the prevailing plaintiffs in litigation under 42 U.S.C. sec. 1983.

²² Some class actions are also financed by public-interest groups, or are undertaken by law firms on a pro bono (the law firm waives its fee, undertaking the case *pro bono publico*, for the public good). Congress has prohibited the Legal Services Corporation, the federally financed agency that provides legal services to the poor, from bringing class actions.

costs and those of the winning side, that is in effect in most of the rest of the world.²³ Many people believe that if the “loser-pays” rule applied, it would be difficult to bring class actions. The plaintiffs themselves could almost never afford to become representative plaintiffs if they had to face the possibility that they might be individually responsible for paying the expensive lawyers of the corporate defendant. Therefore, the lawyers for the class would have to be the responsible parties. This additional financial risk (and note that the other side would have the power to increase the stakes by spending more on defense) would reduce the number of firms that could afford to do plaintiffs’ class action work, thus reducing the supply of class action lawyers as well as competition among them. Those who did have the economic power to take on the risk would insist on a higher return, thus lessening the recovery that would go to class members.

Thus class actions provide a way to aggregate many small claims, and the common fund doctrine (together with the American rule on attorney’s fees) provides an incentive for lawyers to specialize in class action litigation by making it possible to collect substantial fees. These incentives, in turn, have encouraged the development of an active, expert and entrepreneurial plaintiffs’ bar specializing in class action litigation. These class action lawyers search out possible cases, and then go and find individuals to serve as representative plaintiffs. In turn, the high stakes involved in class actions and the existence of an active plaintiffs’ bar has fostered the development of an expensive and expert group of elite firms that represent defendants in class actions.

A jurisdiction considering the adoption of the class action procedure would need to consider carefully how such suits would be financed, and the incentives that would thereby be created. The contingent fee is practically unique to the United States. Other countries could not draw on that historical tradition or such corollaries as the common fund doctrine. They would have to provide some mechanism for paying lawyers for the class. (Obviously, requiring the representative plaintiffs to pay them by the hour is not a practical option.). One would also want to create a financing mechanism that would not have wide-ranging effects outside the class-action context.²⁴

One financing method would be to rely on publicly or privately financed public interest lawyers to bring the cases. If the lawyers were part of a government agency, such as an agency for consumer affairs, this might in essence amount to a choice for regulation rather than litigation. On the other hand, it would be possible to create an independent, publicly financed agency to bring class actions on matters of public interest. In the past, the Legal Services Corporation, the federally funded agency created to provide legal services to the poor, brought many significant class actions. It was so effective, in fact, that Congress recently prohibited it from bringing class actions, limiting it to representing

²³ In the United States, we call this doctrine the “British rule,” but it is widespread everywhere but in the United States.

²⁴ That is, unless for independent reasons one decided to adopt contingent fees or the American rule for general use.

individual claims.²⁵ Government-financed litigation would, of course, be dependent on the extent to which the government decided to finance it each year.

Canada has an interesting variant on this strategy. Canada has created a government fund to advance costs of class action litigation. Those who wish to receive government litigation funding submit applications. At the conclusion of the case, the government fund is repaid with a percentage of the recovery. The fund is intended to be self-sustaining. Some attorneys have also experimented with bank financing via non-recourse loans to the representative plaintiffs, secured by an interest in the eventual recovery. (In the United States, we do not use bank financing of individual suits by the nominal plaintiffs. Instead, plaintiffs' firms themselves obtain bank financing, based on their receivables from their contingent-fee litigation inventory.)

The United States has a long tradition of public interest litigation brought by privately-financed groups such as the National Association for the Advancement of Colored People (NAACP) (civil rights), the American Civil Liberties Union (ACLU) (free speech and civil liberties), the Sierra Club (environmental issues), and Planned Parenthood (reproductive rights). There is a limit, of course, to the amount of litigation that can be sustained by private contributions unless successful litigation finances itself, through awards of attorney's fees for successful litigation. For this reason, public interest law firms do seek attorney's fee awards in class action litigation.

Another method is to use statutory attorney's fees or to adopt the common fund doctrine. This doctrine creates very powerful incentives. Even in the United States, where contingent fees are widespread and have a long pedigree, the lure of class-action fees based on the common fund doctrine has transformed federal and state court dockets, the liability exposure of whole industries, and even substantive law in many areas in the thirty years since the modern Rule 23 was written. Critics argue that these incentives have led to "lawyer-driven" litigation that primarily benefits lawyers rather than the public. The common fund doctrine might also have the potential of opening the door for contingent fees generally. In my view, contingent fees have been a very positive part of the U.S. justice system; but they have their detractors even in the United States, and might not be a desired innovation in other traditions.

III. The Conduct of the Class Action

Class actions are complex and expensive to litigate. The class action rules require a number of special procedures, such as class certification and court approval of the settlement, that impose significant additional expense. Because many claims are aggregated in one suit, the relevant facts are more complex than in an individual action. Evidence must be gathered about events over a longer time period and a larger geographical area. It is necessary to prove general policies rather than a single event, and to gather evidence from more people in the defendant's organization than when only one transaction is in-

²⁵ This action was intended to confine the Legal Services Corporation to a provider of individual legal services, and to prevent it from bringing "impact" litigation that would force broad social changes or have widespread impact.

volved. Because the stakes are high, both sides may feel justified in spending more time and money on legal work. Additionally, lawyers for both sides are usually specialists in class actions, and they have developed the custom of doing intensive pretrial discovery and filing many complex pretrial motions. This intensive pretrial practice is related to the fact that until recently, plaintiffs' attorney's fees were usually based on the number of hours worked. Thus the discovery and pretrial stages are longer and more expensive than they would be for an individual action. (One consequence is that years often pass before the class receives payment.)

Class actions also require more active supervision from the trial judge than most individual cases. There are more pretrial motions to be decided, of course, but this is not all. Most experienced class action judges believe that a more activist role is appropriate in class actions than is usual in U.S. courts. Unlike continental judicial systems, the U.S. follows the adversary system. The proceedings are initiated and largely controlled by the parties and their lawyers. They decide how much discovery to do, what issues to pursue, whether to make various motions, how many witnesses to call. The judge is to play an essentially passive role, much like an umpire, ruling on issues when requested to by the parties and presiding over the trial, but not taking an active role in shaping the focus or structure of the litigation. Our system has evolved in the past 20 years or so toward a more activist role for judges. This development has been especially pronounced in class actions and other complex litigation. Judges play a larger role in the pretrial stages of the case. They are expected to play an active role in settlement negotiations. Additionally, class action procedure requires judges to spend considerable time on administrative details such as the content and method of distributing notice, reviewing attorney time records in determining appropriate fee awards, and the details of processing claims and distributions to the class.²⁶

If a class action goes to trial, the facts and circumstances of the representative plaintiffs' claims are presented. If those claims are "typical" of the claims of the class, they can stand as representative proof for the entire class. Class-wide evidence is normally presented as well. Trials are longer and more complicated than in similar individual cases. Most class actions, however, do not go to trial. Because of the high stakes for both sides, the plaintiffs' lawyers' reluctance to risk losing their considerable investment of time and money in preparing the case if the trial results in a verdict for defendants, and the efforts of the judge to achieve a settlement, most cases are settled rather than tried.

IV. Delivering the Recovery to the Class

The settlement agreement sets out the recovery that will go to the class, the method of allocating the recovery among class members, the requirements for qualifying to receive a share of the recovery, the content of the class notice and the means of giving notice, and often an agreement that the defendants will not object to a fee request by class counsel of up to an agreed amount. After the settlement is approved, someone is normally appointed to administer the claims process. This task would include processing the

²⁶ Judges sometimes delegate such functions.

class notice, sending claim forms, receiving, verifying, and processing claims, calculating the amount of the recovery for each claimant, preparing and sending checks, and taking care of numerous administrative details. The court's approval is required for disbursement of funds.

Most settlements simply specify the total class recovery. This amount is divided pro rata or by some other method among those who file claims. In these settlements, the amount each claimant receives is not fixed in advance, but depends on the number of claims filed. Other settlement agreements specify what each claimant will receive. The amounts to be received by each claimant are known in advance, but the total amount to be paid by the defendant depends on the number of claims filed. Another method is to provide that claimants will divide the total recovery pro rata up to the value of their individual loss. Any funds remaining after each claimant has received full reimbursement go back to the defendant. In these cases, the settlement can end up costing the defendant less than the agreed amount if a small number of claims are filed.

The most obvious type of recovery is, of course, cash. But non-monetary settlements are also common, especially in consumer class actions. Defendants may agree to cease or modify certain business practices, or to adopt safeguards for consumers. "Coupon settlements" have been popular in some types of consumer cases. In these cases, class members are entitled to receive coupons good for free merchandise or, more commonly, discounts on future purchases. One famous coupon settlement (which was not approved by the court) would have given purchasers of General Motors (GM) pick-up trucks sold with defective (exploding) gas tanks a coupon worth \$500 toward the purchase of another new GM truck.²⁷ Coupons have also been used in settling antitrust cases against the major airlines, and in many other actions.

Defendants like coupon settlements because they do not have to pay cash out-of-pocket, and because class members must buy more of the defendant's products in order to obtain their share of the class recovery. The settlement may even wind up turning a profit for the defendant. Some plaintiffs' lawyers like coupon settlements because they often result in relatively high attorney's fees. The settlement agreement usually specifies that the lawyers' fee will be paid in cash. Experts hired by the plaintiffs' lawyers testify to the court on the value of the non-monetary settlement. Often these experts make very optimistic estimates of the number of class members who will redeem the coupons and the value of the coupons to the class. Thus the plaintiffs' lawyers can receive fees based on an inflated value of the settlement, and the defendant does not have to pay cash to the class. These settlements contain obvious possibilities for abuse and collusion between the plaintiffs' lawyers and the defendants, to the disadvantage of the class. They have been strongly criticized by many consumer advocates.

It is common for only a relatively small number of eligible persons to file claims. Even in securities cases, as many as 40 percent of the class may not file claims. For small consumer claims, such as the taxicab case referred to earlier, very few consumers

²⁷ In re General Motors Corp. Pick-Up Truck Fuel Tank Litig., 55 F.3d 768 (3d Cir. 1995). See also In re Ford Motor Co. Bronco II Prod. Liab. Litig., 1997 U.S. Dist. Lexis 104971 (E.D. La. 1997).

would go to the bother of filing a claim, even if they did read the notice in the newspaper. (These notices are usually in fine print, often appear in the back pages, and may be written in language that is difficult for non-lawyers to understand.) Additionally, when the claims are small the administrative costs of notifying the class, processing the claims, and distributing the recovery by mail may take up a large portion of the money that was recovered. It may even be impractical to try to distribute a small-claim settlement to a large class.

When the costs of administering the settlement are large compared to the benefits actually received by class members, regulation may be seen as a more efficient approach than class action litigation. Certainly if each class member receives only a trifling amount, then the primary social value of the class actions must be to deter defendants from breaking the law, rather than to compensate class members for their losses. And deterrence, with its focus on the potential defendant, is a prime objective of regulation. Regulation may not be the best alternative, however. Regulation requires the creation of a government bureaucracy and the expenditure of government funds on employees, buildings, and many other expenses. It is difficult to make quick changes in the size of the bureaucracy in reaction to changed circumstances. And the amount of regulation and enforcement depends on the priorities and policies of whoever happens to be in charge of that part of the government at the time. By contrast, private enforcement through class action is more independent of business elites and politicians.

Thus, judges and lawyers have looked for ways to decrease the costs of delivering the recovery to the class while preserving the deterrence and law enforcement aspects of class actions. One such method is called “fluid recovery.” Instead of trying to identify and reimburse the particular individuals who have suffered harm in the past, this approach recognizes that a constantly changing class of consumers is continually buying the defendant’s products or services. In the case of the taxi company that tampered with its odometers to overcharge customers, the court rejected the approach of trying to find all the individual customers in the past and mail them checks for a dollar or so. That task would have been impossible, and the attempt would have squandered the class recovery. Instead, the defendant reduced its fares by a certain amount for a specified period. The administrative costs of such a settlement are practically zero, and the class of “taxicab customers” gets the full benefit of the settlement. Some courts, however, have refused to permit fluid recovery, because there is no necessary relationship between the people who were victimized by the defendant’s past behavior and the people who received the compensation for the past wrongs. These courts have held that they had no authority to order defendants to pay people they had not injured, or to trade the interests of those who were actually harmed for payments to future customers.

V. Drawbacks of Class Actions

A. Potential Conflicts of Interest

The most important weakness of the consumer class action flows directly from its core rationale. No one in the class has a large enough claim to justify bringing a lawsuit.

By the same token, no one in the class has a large enough stake to justify the costs in time and money needed to be informed about the case, to monitor the conduct of the lawyer, and to make important litigation strategy decisions as clients do in ordinary cases. In fact, courts recognize that the class representatives cannot be expected to be knowledgeable about the case, or to take an active role in managing the litigation. Courts often brush aside defendants' objections that the named plaintiffs do not meet the adequacy requirement because they are not familiar with the legal theories of the case or their obligations as a class representative. These shortcomings are deemed irrelevant because it is the lawyers for the class who will actually be running the litigation and representing the interests of the class. If the lawyers are competent and experienced, the class will be adequately represented.

But the lawyers for the class have their own economic interests in the case, and these may not coincide with the interests of the class. The class's interest is to maximize the net recovery – the final settlement or judgment, less litigation expenses and attorney's fees, discounted for the time that must elapse before the money is distributed to the class. The class counsel's economic interest is in maximizing their effective hourly fee – that is, the fee that is eventually obtained divided by the number of hours worked on the case, and also appropriately discounted for the time elapsed before the fee is collected.

It is easy to see that these interests may often be in opposition. To take an extreme example, suppose a lawyer brings a class action. Immediately after the case has been filed, the defendant offers to settle the case for \$100,000. Let us say that in this state, the lawyer expects to be awarded a fee equal to 20 percent of the total recovery, or \$20,000. The lawyer has spent 10 hours preparing the complaint. Thus the lawyer would be compensated \$2,000 for each hour of work. Let us suppose that the lawyer believes that by litigating the case for 3 years, spending 5000 hours of lawyer time on the case and expending \$100,000 in litigation costs, she could win a judgment of \$1 million for the class. This would clearly be a better outcome for the class. They would share \$800,000 rather than \$80,000, after the 20 percent attorney's fee is deducted from the recovery. But for the lawyer would receive only \$36 per hour worked.²⁸ If no client is carefully monitoring the conduct of the case and making litigation decisions, this lawyer has an incentive to negotiate an early, cheap settlement rather than putting in a great many more hours to achieve a better result for the class but a lower effective hourly fee for the lawyer. The requirements of class notice, the fairness hearing, and judicial approval of the settlement are not effective safeguards because neither the class nor the judge is in a position to know the real value of the claim, and neither the plaintiffs' attorney nor the defendant's is going to tell them.

The plaintiffs' lawyer has strong incentives to settle the case rather than go to trial. A trial adds a substantial amount of work to the case. If the case goes to trial the plaintiffs may lose. A loss means that the plaintiffs' lawyers will receive no fees at all for all the time they have put into the case, will not be reimbursed for their substantial out of pocket expenses, and will have their reputation tarnished by the publicity accompanying

²⁸ After deducting the \$100,000 in expenses, the lawyer would receive 20% of \$900,000, or \$180,000; dividing by 5000 hours yields \$36 per hour worked.

a big trial loss. A settlement avoids these risks and guarantees a fee award. It is true that by going to trial the lawyer might win a larger judgment and thus a larger fee. But the lawyer receives only a fraction of the increased award, and a higher risk of receiving no fee at all. Moreover, trial work is more intensive and more stressful – in a word, harder – than pretrial work.

If the lawyers have a strong preference for settlement, recoveries for the class may be smaller, as defendants do not have to worry about the risk of a large judgment after trial. If all parties strongly prefer to avoid a trial, settlement amounts may actually come to have little relationship to the merits of the case.²⁹ This would eliminate a primary public value of class actions.

There are other possible conflicts of interest between the class and its lawyers, but these should suffice to illustrate the potential problems. Of course, defense counsel also have potential conflicts of interest with their clients. We need not worry about protecting defendants, however, because they are corporations, usually with their own legal departments that are sophisticated consumers of legal services and that monitor the progress of the suit carefully. Insurance companies may also be monitoring the defendant's lawyers because the defense may be funded by insurance. There is no one on the plaintiffs' side to play this role. The class must rely on its lawyers' integrity and the judge's attempts to protect its interests. But even a completely honest and sincere person's perception and judgment may be distorted by a conflict of interest, and even a conscientious judge in the U.S. adversary system does not have enough information to be able to spot possible problems.

Unfortunately, there are many examples of class action settlements that do not appear to have been in the class's best interests. For example, in a class action alleging that the gas tanks of GM pick-up trucks were defectively designed so that they could explode in a crash, a proposed settlement was reached that would have given each truck owner a coupon good for \$500 off the purchase of a new GM pick-up truck. This settlement would be of small value to the class. Most purchasers would not want a new truck, and certainly not a new GM truck. Even if they did want a new truck, they would have to pay GM considerably more than the \$500 discount to buy it. Individually negotiated discounts on new vehicles are common, so the benefit provided by the coupons may have been illusory. Very few class members would have used the coupons, and GM would probably have made a profit on those that did. The coupons could not be transferred, so a secondary market could not develop in which class members could sell their coupons. Meanwhile, the lawyers for the class were to receive a large fee, paid in cash, and GM's liability for the defective trucks would have been extinguished. The court rejected this settlement, but other similar coupon settlements have been approved, for example in suits charging major airlines with price-fixing in violation of the antitrust laws.

Conflicts of interest between the class and its lawyers may be most acute when the lawyers for the class file their request for attorney's fees. In a common fund case, the

²⁹ See *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 41 STAN. L. REV. 497 (1991) (elaborating this argument, and claiming that securities class actions follow this pattern).

attorney's fee comes directly out of the class recovery. At this point the interests of the lawyer are in direct conflict with the interests of the class. Every dollar that goes to the lawyer comes out of the class's pocket. And at that very time when the conflict between the lawyer and the class is strongest, there is no independent lawyer to provide representation for the class's interest. The defendant and the plaintiffs' lawyers are united in seeking approval of the settlement. The defendant has no reason to argue that the fee is too high, because a fight over fees will not reduce the amount the defendant must pay and may derail the entire settlement.

How does one make sure, in short, that the lawyer's interest is aligned with the class, so that the lawyer brings cases that should be brought and doesn't bring cases that are not really important; works enough on the case but not too much, and gets a fee that is commensurate with the benefit conferred on the class? The challenge – which we in the United States have not been able to solve as yet – is to find some mechanism to simulate the presence of a client, to look out for the class's interest.

1. One possibility is to tinker with the identity of the parties. Recent securities reform legislation, for example, attempted to encourage large institutional investors to serve as class representatives, in the belief that they will be able to monitor the class lawyers and make litigation decisions in the interest of the class. Preliminary empirical studies indicate that large investors have by and large declined the invitation. This approach does not appear to be feasible in consumer class actions because there will not usually be class members who have very large claims and thus an independent interest in supervising the attorneys.

The parties could also be required to notify an appropriate government agency whenever a class action is filed. The agency would then have the option of taking over the case itself, or of appearing in the case at any time to argue any position it wished as appropriate to protect the public interest. In the United States, however, agencies do not usually have the enforcement resources available to monitor and intervene in cases that are already being handled by private lawyers. This method thus would not provide meaningful protection to the class.

The class action rule could be amended to require that a public interest organization or a certified professional class representative must bring the case. This approach would introduce many administrative problems. Who would certify plaintiffs, and what criteria would they use? The approach would limit the number of persons who might be interested in bringing a suit, and meritorious suits might languish because no qualified plaintiff happened to know about them or be interested in them. This approach would add another layer of bureaucracy and probably would not produce much benefit.

2. Another possibility is to expand the scope of judicial supervision, possibly by using judicial substitutes – court employees or outside lawyers appointed to monitor the conduct of the case and investigate the fairness of the settlement. In the United States, many judges do try to protect the interests of the class, and magistrate judges and special masters have been widely used to assist in facilitating and evaluating settlements as well

as in the administrative details of class litigation. In the last 25 years U.S. judges have moved toward a much more activist and interventionist conception of their proper role in all cases. Nevertheless, in a judicial system based on the adversary model, it is hard for judges to have enough information to serve as effective guardians of the class, and many do not believe such an activist role is appropriate. In a civil law judicial system with an investigative judicial tradition, however, judicial supervision might be more effective.

3. Finally, one might address the problem where it is most acute, in the method of awarding attorney's fees. For example, rather than having the fee paid from the class recovery, the fee and the payment to the class could be negotiated and paid separately by the defendant. The payment to the class should be determined first, before any discussions of attorney's fees are permitted. In fact, the hearing and decision on the fee award should be deferred until after all claims have been filed. At this point the court is in a position to know the size of the benefit that has actually been conferred on the class. This procedure would give the defendant an incentive to challenge any excessive fee request.

B. Overlitigation

The development of a plaintiffs' class action bar may lead to the filing of suits of dubious value. In the United States, liberal pleading standards make it relatively easy to file a complaint that cannot be dismissed before trial. If the case is certified as a class action, many defendants say that the amounts at stake are so large that they cannot afford to take the risk of trial, and must settle by paying some money to the class and the lawyers. The prospect of getting some settlement even for weak cases may lead to the filing of more weak cases. The most notorious case, admittedly an extreme example, was the Milli Vanilli class action filed a few years ago. Milli Vanilli was a popular recording group, until it was disclosed that the two young men who were promoted as Milli Vanilli did not actually sing on the group's recordings -- they merely lip-synched the songs for the music videos. A well-known plaintiffs' class action firm actually filed a lawsuit on behalf of the class of people who bought Milli Vanilli's records, seeking a return of the money they had paid. (This suit, too, was dismissed.)

Thus, the economic rewards available for class action lawyers may lead to suits filed over weak or non-existent claims, or to settlements providing trivial or non-existent benefits to the class and the public at large.

We should remember that anecdotal criticism of class actions may not be representative of such cases as a whole. Moreover, one important public benefit of a robust class action practice is the cases that are never brought because the possibility of effective enforcement through private class actions deters defendants from violating the law in the first place. These deterrence benefits may justify higher transaction costs in the suits that are brought. Nevertheless, the rapid growth of the plaintiffs' class action bar and the migration of many class action lawyers from the securities and antitrust area to consumer and mass torts practice seem to have produced an increased number of consumer suits and an increasing number of large suits of dubious public benefit.

C. Multiple Suits

In the United States the possibility of multiple suits is a serious problem, in part because of our federal system of government. A class action against a manufacturer of a nationally distributed product may be brought in virtually any state. The manufacturer may be faced with suits in several states, each purporting to represent a nationwide class. There is no way to consolidate cases pending in different state courts. This can lead to inefficiency, duplication of effort, the possibility of collusion whereby defendants make a “sweetheart deal” with the least threatening plaintiffs’ lawyer in exchange for a large fee, and possibly to inconsistent results. Many of these problems would not exist in a unitary court system where all cases concerning the same product or conduct could be consolidated and treated together.

D. Self-nominated Class Representatives and the Public Interest

We allow any person who is a member of a class to initiate a class action. But it may not be clear that there is really a problem, or whether a lawsuit for mass damages is the best way to address it. Consumer class actions often involve conduct that significantly affects the public interest. But the class action procedure allows one plaintiff or one lawyer to make decisions about whether the public interest has been harmed and what should be done about it. It also allows this single lawyer to determine the legal strategy to use. If the lawyer makes serious mistakes, the public interest may actually be harmed. The same is true if the plaintiff chooses to sue over a practice that actually benefits the public. In some countries, it would not be thought appropriate for private individuals to make decisions on such public issues; rather, these issues would be thought properly made by government agencies. In the United States, we have a strong tradition of individualism which, in the class action context, may not always serve the public interest. If one chooses private class actions as an enforcement mechanism, it is difficult to avoid this problem.

A related concern is the possibility that class actions may impose such large costs on business that particular companies or the national economy will suffer. Although a few U.S. companies have gone into bankruptcy while they were defendants in large class action lawsuits (for example, Dow Corning and the silicone breast implant cases), these instances all involved mass tort claims that probably would have inundated the company even if brought individually. None of the cases involved consumer class actions as we have defined them. Moreover, invoking the protection of the bankruptcy laws is often a litigation strategy rather than an indication that court judgments have exhausted the company’s assets.³⁰ All in all, consumer class actions do not appear to have had a significant adverse effect either on U.S. companies or on U.S. economic competitiveness.

E. Effects on the Substantive Law

³⁰ For example, in bankruptcy proceedings all pending litigation against the company is stayed, all claims – whether in state or federal court – are consolidated into one courts, and the likelihood of paying punitive damages or large pain and suffering awards is greatly decreased. Once a plan of reorganization (essentially a settlement) is approved, the company can emerge from bankruptcy.

When courts perceive class actions as a beneficial way of handling certain types of claims, they may interpret the substantive law to facilitate class certification. This effect has been particularly noticeable in the U.S. in securities fraud cases. Securities claims were originally modeled on common law fraud and misrepresentation claims. But fraud and misrepresentation require proof that the plaintiff relied on the defendant's false statements, and that the defendant's misconduct caused the plaintiff's injury. Reliance and causation are individual issues, and might prevent certification of a Rule 23(b)(3) class by causing the case to fail the predominance and manageability requirements. In response to this problem, the courts developed the "fraud on the market" doctrine, under which reliance and causation are presumed if the misrepresentation or omission was material. This doctrine has made it significantly easier to prove a violation.

In the mass tort area, it has proved difficult to forge global settlements in cases such as asbestos litigation because the diseases resulting from exposure to asbestos have a long latency period. Many people who have been exposed to asbestos and are symptom-free now may develop asbestos-caused disease (and thus legal claims) in the future. Some courts have responded to this uncertainty by holding that persons who have been exposed to a toxic substance have a legal claim even if they have no symptoms (and may not even know they were exposed). Recognizing "exposure-only" claims makes it easier to certify settlement classes, but may cause other problems.³¹

E. Expansion of the Class Action to New Circumstances

It is difficult to control the evolution of a procedural device that mobilizes such strong economic incentives as does the class action. In modern society the number of occasions when a corporate product or practice causes harm to a large number of widely dispersed individuals is growing. Aggregation of claims may seem attractive in many such instances. Once an entrepreneurial plaintiffs' bar emerges, it will seek out more opportunities, including opportunities in other subject matter areas. In the United States, for example, plaintiffs' lawyers developed expertise in antitrust law in the 1970's. These same lawyers later turned their attention to securities cases, then consumer cases, and now mass tort cases.

One might think that the tendency toward expansion could be controlled by strictly limiting the circumstances in which class actions could be used. It has proved difficult, however, to confine the development of class action practice in this way. In the United States, for example, the drafters of Rule 23 in 1966 did not consider the class action appropriate for mass accident or mass tort cases, because they thought the individual differences in causation and damages would predominate over the common issues. They included language to this effect in the Advisory Committee Notes, which are an authoritative gloss on the Rules. Yet today, most courts would certify a class action for personal injuries in a mass accident, such as a hotel fire or an airline crash, and large

³¹ For example, if the claim arises upon exposure, the statute of limitations would, logically, also begin to run. If this is true, by the time the plaintiff realizes she has the disease the limitations period may already have expired.

class actions have been certified in mass tort cases, such as cases alleging personal injuries from silicone breast implants, defective heart pacemakers, and prescription drugs. Such uses of the class action device would have been unthinkable 15 or 20 years ago.

The expansion of class actions to the mass tort context has raised serious issues. Many of these claims involve grave personal injuries, even death. Such claims would be litigated through individual lawsuits even if there were no class action. But in a class action the members of the class will be represented by a lawyer they did not choose. They will not have their own lawyer during the preparation for trial, settlement negotiations, or trial of the action. They will not be able to shape the terms of the settlement of their individual claim. This loss of individual control is troubling when the individual claims are large.³²

These concerns are heightened in the controversial “future claimants” class action. In many mass torts there is a long latency period, which means that many people who were exposed may have no symptoms now, but will develop symptoms (and thus claims) in the future. Generally speaking, such individuals cannot file suit. But the existence of such “future claimants” can prevent defendants from resolving all the claims against them by means of a “global settlement” (one that includes all parties). In recent years, some courts approved global settlements of asbestos cases through certification of classes of future claimants. There was strong opposition to such classes, on the grounds that the people whose claims were being settled were not – and could not be – adequately represented. The class representative could not be a member of the class with a typical claim, because claims would arise only in the future and no one could know when the class was certified who would develop the disease. The members of the purported class would not receive meaningful notice or opportunity to opt out, because they would not know that they would develop the disease in the future. Critics also argued, and the facts of the cases often seemed to support the argument, that “futures classes” were subject to an inherent conflict of interest, in which lawyers and class representatives would be tempted to sell out the future claimants in favor of those with present claims (and present lawyers). The Supreme Court has twice struck down settlement classes of future claimants, but it remains unclear whether some such classes might eventually pass muster, and what requirements they would have to meet.

The growing acceptance of class actions in the mass tort context has sometimes led to premature decisions to seek class treatment. Once initiated, a class action is hard to stop. In the silicone breast implant cases, for example, class actions were quickly filed after a few large individual verdicts were obtained. A \$4 billion settlement had to be abandoned because ten times the number of expected claims were filed and even that gigantic amount proved insufficient to pay the claims. The primary manufacturer of silicone implants declared bankruptcy as a result of the pending suits. Meanwhile, a scientific consensus has developed that there is no evidence that silicone breast implants cause the disease alleged in the class actions. Indeed, many judges and lawyers are con-

³² In fact, Rule 23 expressly provides that “the interest of members of the class in individually controlling the prosecution or defense of separate actions” is one of the factors to be considered in determining whether a class action is superior to other available methods for adjudicating the controversy. Rule 23(b)(3)(A).

cerned that early class action certification can actually *create* “mass torts” out of claims that could be handled expeditiously and relatively inexpensively if treated as individual claims.

VI. Suggested Considerations in Drafting a Class Action Procedure

The U.S. class action procedure is not ideal, even for our circumstances. Almost since the modern Rule was adopted in 1966, we have been studying how best to amend it and improve it. In a different society, with a different legal culture and different substantive laws and social structure, class actions would inevitably look different from the U.S. version. In this section, I sketch some suggestions of what to keep, and what to consider modifying.

The core notion of a class action as an aggregation of very similar claims, brought by a representative plaintiff whose claims are typical in order to minimize possible conflicts of interest between the representative and the class, should be retained. Class actions are a way to privatize enforcement and to harness market incentives as an alternative to both government regulation and individual litigation. Provisions limiting potential plaintiffs to public interest organizations or professional plaintiffs should therefore be avoided.

Provisions designed to minimize conflicts between the class members and their representatives, and to provide meaningful supervision of the lawyers’ conduct of the case, are essential. The greatest abuses of the class action occur when lawyers for the class are free to promote their own economic interests without regard for those of the class. The most important safeguard is a requirement that the class representative adequately represent the interests of the class. Indeed, it violates fundamental fairness to allow a class member’s rights to be determined without making sure that the representative will truly act in the class’s interest. Structural assurances of adequate representation are the most effective. These include the requirements of typicality, commonality, competence, and experience. Additionally, if different segments of the class may have conflicting interests, the statute should require the class to be divided into subclasses, each with its own representative. Each represented group should be “sufficiently cohesive to warrant adjudication by representation.”³³

Another necessary structural safeguard is a means of assuring the most fundamental element of due process, notice and the opportunity to be heard. Class members should receive the best practicable notice under the circumstances – as our Supreme Court has put it, the kind of notice one would give if one actually wanted to inform the class. In some cases this would mean mail notice addressed specifically to the individual. In other cases, notice by publication in newspapers, television, the Internet, or by other means would be the best notice practicable. The kind of notice that is required should be within the discretion of the trial judge, who can take into account the circumstances of the specific case. Judges should have discretion to allocate the costs of class notice between plaintiffs and defendants. Judges should also be free to order notice to the class at any

³³ *Amchem v. Windsor, supra.*

stage of the case where the class's interests and the final disposition of the case would be served.

The three categories of our Rule 23 should not be adopted. The artificial division into three categories does not correspond with reality, nor do the consequences of the classification.

Under Rule 23, only (b)(3) actions require that class members be given notice and the opportunity to opt out of the class. The other categories do not specifically require either notice or the right to opt out of the class.³⁴ The rationale is that in these categories, class treatment is a necessity. Since no one can be permitted to opt out and litigate separately for different treatment, there is no need for notice. This reasoning overlooks the fact that when class members cannot opt out and are forced to have their rights determined as part of a class, there is still an important role for notice. Notice can inform class members of the proceeding in time for them to receive a meaningful opportunity to be heard through hearings or other methods, so that their interests will be taken into account before a final resolution is reached. This notice should occur at the start of the action, so that members can have a meaningful opportunity to participate. Notice should also be required of the terms of the proposed settlement. If notice and the right to opt out are given at the outset of the case, class members should also have the right to opt out after the terms of the settlement are known. They do not have adequate information to decide whether to remain in the class at the outset. In cases where it is not a necessity to resolve all claims in the same proceeding, class members should be given the right to opt out.

Available remedies should also reflect the realities of small-claim aggregative litigation. In particular, fluid recovery should be permitted. In cases where individual damages are too small for individual compensation to be economically feasible, the court should be able to order prospective recovery directed to the class as a whole rather than to the particular individuals who were harmed in the past.

The next essential component of a class action statute is to provide effective ways of supervising and monitoring the lawyers' conduct of the case, as a client does in traditional litigation. Especially, there should be structural protections to prevent lawyers from trading off the interests of the class for high fees. These could include controls on non-monetary settlements, careful attention to fee requests, and an active role for the court in controlling the litigation. This protection may be easier to assure in a civil law jurisdiction where judges customarily take more active control of the case and have more detailed knowledge of the facts than in the adversary model.

Perhaps the most difficult aspect of introducing class actions to a civil law system is the need to provide a way of financing the litigation. The most straightforward approach would be to provide a statutory right to attorney's fees for class counsel, to be paid out of the class recovery or, at the court's discretion, directly by the defendant. If

³⁴ The question whether the constitutional right to due process requires these protections has not been decided.

the general rule is that the loser pays the winner's costs of litigation, that rule should be abrogated in the class action context, except in cases where the suit is frivolous.

Several other ingredients have been important in the development of a robust class action practice in the United States. One is the existence of a vigorous entrepreneurial plaintiffs' bar. Because contingent fee litigation is the primary method by which individuals gain access to courts in the United States, we had ready to hand a large number of lawyers who were accustomed to taking cases without assurance of being paid, acceptance of the notion that fees can be deferred until the end of the case and paid out of the eventual award, and various doctrines that permit lawyers in effect to finance class litigation for a share of the recovery.

Our discovery rules, which permit parties a wide scope for investigating the facts of the case by compelling information from their opponents, have also been essential for the success of class actions and, indeed, for the success of all consumer litigation. Of necessity, when consumers are injured by products or practices of large corporations, they lack much essential information about how the events came to occur. This information is not available to the public. If consumers are to have a reasonable chance to prove the case, they must be able to obtain information from the defendant.

Finally, of course, it is necessary to have substantive law that establishes consumer rights and that makes class-wide proof of violations amenable to trial.

Conclusion

Introducing class actions is a large change in a procedural system. We have found the effects to be enormous, and in some cases to strain the capacity of the court system, even though many elements necessary to accommodate class actions were already well developed in the United States. After 30 years of experience with class actions, we have seen class action practice change to include many types of cases that would not have been imaginable to the drafters of the rule. To introduce this powerful procedural machinery into a system that does not have many of these characteristics, and in which a number of new doctrines such as those concerning fees would have to be legislated along with the class action, would be even more challenging.

At the same time, some aspects of the civil law system seem more suited to solving class action issues. For example, in civil law systems it is accepted that the judge plays a central role in sculpting the scope and shape of the lawsuit, and the judge has a much greater knowledge of the facts of the case than is usually true in the U.S. system. .