

Representative Litigation in Maryland: the Past, Present, and Future of the Class Action Rule in State Court

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Article

REPRESENTATIVE LITIGATION IN MARYLAND: THE PAST, PRESENT, AND FUTURE OF THE CLASS ACTION RULE IN STATE COURT*

IAN GALLACHER**

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* After this Article went to press, the Maryland Court of Appeals issued its decision in *Philip Morris Inc. v. Angeletti*, Misc. No. 2, 2000 WL 622933 (Md. Ct. App. May 16, 2000). By a four-to-three vote, the court granted a writ of mandamus that directed the Circuit Court for Baltimore City to vacate its order certifying two classes of tobacco users. In this Article, Mr. Gallacher argues that the class action rule, Maryland Rule 2-231, should be amended in order to make certification decisions immediately and routinely appealable. In so doing, he predicts that the Court of Appeals would not grant a writ of mandamus to review class certification decisions. See *infra* note 166. In light of the extraordinary nature of this form of relief, Mr. Gallacher's mistaken prediction does not substantially alter the relevance and merit of his argument.—eds.

** The author is an associate at Goodell, DeVries, Leech & Gray, LLP, where he is, among other things, part of the defense team in the Telectronics litigation discussed in this Article. All opinions expressed in this Article are entirely those of the author and are not necessarily shared by other attorneys at Goodell, DeVries, the firm, or its clients. The author would like to thank all the partners and associates at Goodell, DeVries, and particularly Charles P. Goodell, Jr., Donald L. DeVries, Jr., Richard M. Barnes, E. Charles Dann, David W. Allen, and the incomparable Thomas J.S. Waxter, III, for their insights, support, friendship, and tolerance. In addition, the author would like to thank the staff at Goodell, DeVries, and in particular Margaret Scally, Charlene Jones, Kathy Wyatt, and Constance Cugel for their invaluable help. There are many people who have given freely of their time and expertise in support of this project, including Scott Fisher, James A. Comodeca, Gina M. Saelinger, Cindy Oliver, Neil Tabor, the Honorable James F. Schneider, and the staffs of both the Maryland Rules Advisory Committee and the Federal Rules Advisory Committee, whose contribution to this Article is gratefully acknowledged. Thanks also to the Honorable Frederic N. Smalkin for his advice, Shannon Hanson for her friendship, Julia McKinstry, without whom this would all be pointless, and particularly to my mother, Joan Upton-Holder, without whom this would not have been possible.

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INTRODUCTION

Representative litigation in Maryland has existed since at least the middle of the nineteenth century.¹ Despite this fact, the class action suit—the modern-day equivalent of representative litigation—has not

1. See *infra* notes 13-29 and accompanying text (discussing *Negro Jerry v. Townshend*, 2 Md. 274 (1852)). This Article limits its review of representative litigation in Maryland to the published opinions of the Maryland Court of Appeals in the *Maryland Reports*, which contain cases decided since 1851. It is likely, however, that a review of the archives would show that this state has known and recognized the representative suit for a substantially longer period of time.

been a widely used procedural device in this state.² There are signs, however, that this could soon change. Recent interest in the class action rule³ has been accompanied by an increasing hostility to class actions in the federal courts,⁴ the traditionally friendly forum for class actions. This hostility has been matched by Congress's apparent continued interest in disengaging the federal courts from state law concerns by restricting the federal courts' diversity jurisdiction.⁵

Nonetheless, the federal forum certainly offers some tempting advantages to practitioners over state court class action practice. The federal courts, for example, historically have been more receptive to the concept of nationwide class actions than have the state courts, even though the Supreme Court has indicated that state courts may

2. Neither the circuit courts of Maryland nor the Court of Appeals of Maryland maintain statistics detailing the number of class actions filed annually in Maryland. Telephone Interview with Faye Gaskin, Assistant Administrator, Administrative Office of the Maryland Courts (Aug. 11, 1998). Both anecdotal evidence and the relative scarcity of reported opinions concerning the class action rule indicate that a limited number of class actions have been filed. Little reliance can be placed on this indicator, however, because class action suits may have settled, been dismissed, or not been appealed. In 1980, the Maryland Court of Appeals Standing Committee on Rules of Practice and Procedure, while discussing the revision of Maryland's class action rule, stated, "The consensus of the Committee was that there is no such evidence [of abuse of the class action rule] mainly because there are so few class actions in state courts." THE COURT OF APPEALS OF MARYLAND STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, MINUTES OF THE MEETING OF STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (Nov. 21, 1980) 16 [hereinafter 1980 STANDING COMMITTEE MINUTES].

3. See FED. R. CIV. P. 23; MD. RULE 2-231. See generally Kieron F. Quinn, *Tort Class Actions: Friend or Foe?*, MD. B.J., Sept/Oct. 1995, at 23, 24 (discussing some of the "contentious issues" involved in tort class actions in light of recent developments in the field); Marc Seldin Rosen, *The Ethical Approach to Mass Tort Litigation*, MD. B.J., Nov./Dec. 1996, at 22 (discussing elements of class action practice). In addition, the filing and certification of a class action suit in the tobacco litigation has generated interest in the local legal community. See *Richardson v. Philip Morris Inc.*, No. 96145050/CE212596, slip op. at 69 (Baltimore City Cir. Ct., Jan. 28, 1998) (permitting class certification).

4. See *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2237 (1997) (holding that a class of asbestos litigants did not satisfy the Rule 23 class action requirements); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1230 (9th Cir. 1996) (vacating class action certification in medical products liability litigation for failure to meet Rule 23 class action requirements); *Castano v. American Tobacco Co.*, 84 F.3d 734, 737 (5th Cir. 1996) (reversing a district court's certification of a class of smokers and nicotine-dependent persons); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996) (holding that plaintiffs failed to satisfy Rule 23 requirements in a class action suit against penile implant manufacturer); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1304 (7th Cir. 1995) (mandating that a class of hemophiliacs be decertified in action against manufacturers of blood solids).

5. See Federal Courts Improvement Act of 1997, H.R. 2294, 105th Cong. § 302 (1997) (proposing to prevent plaintiffs from bringing a diversity-based lawsuit in the federal court in their home state); see also 28 U.S.C. § 1332 (1994 & Supp. II 1996) (increasing the jurisdictional amount in diversity actions from \$50,000 to \$75,000). There are, however, indications that Congress may seek to federalize the class action device, thus depriving state courts of the class action rule. See *infra* note 9 (discussing proposed federal legislation).

certify nationwide class actions.⁶ Recently, however, the practicality of federal actions has been called into question,⁷ and it seems likely that mass products liability litigation will follow the example of the tobacco litigation⁸ and bring more class actions in state courts.⁹

6. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814, 822 (1985) (holding that the Supreme Court of Kansas had jurisdiction over plaintiffs in a class action lawsuit, but that application of Kansas law to every claim would be unconstitutional). As a practical matter, however, *Shutts* places a heavy choice of law burden on state courts attempting this practice. See *id.* at 821-22 (asserting that the state must have “a significant contact or significant aggregation of contacts” to the claims asserted by each member of the plaintiff class, contacts “creating state interests,” in order to ensure that the choice of . . . Kansas law is not arbitrary or unfair” (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (plurality opinion))); see also Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1, 57, 62 (1986) (cautioning that the *Shutts* holding, although restricting choice of law decisions, may encourage the choice of favorable “magnet” forums that would ignore the laws and policies of other states, and recommending that “constitutional limitations on choice of law should be interpreted to limit unreasonable forum shopping and preserve parties’ expectations”); Quinn, *supra* note 3, at 26 (arguing that, while *Shutts* poses choice of law obstacles to class certification, if a corporate defendant were incorporated in a state, that state court could certify a nationwide class and apply its own law to all claims in light of the state’s interest in regulating the corporate citizen). As a practical matter, however, it is debatable whether a Maryland court would be willing to certify such an expansive class.

7. This unpracticality stems from three requirements: (1) that a federal court sitting in diversity must apply state law, *Erie R.R. v. Tompkins*, 304 U.S. 64, 90 (1938); (2) that a federal court in this circumstance must apply the choice of law rules of the state in which it sits, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); and (3) that it is unconstitutional for a state to apply its own substantive law in a nationwide class action unless this state has a legitimate state interest in each class member’s claim, *Shutts*, 472 U.S. at 822. As a result, a federal court could be required to apply the laws of all 50 states (and the District of Columbia) in a nationwide class action. See Quinn, *supra* note 3, at 26. This requirement, in turn, has caused appellate courts to order the decertification of several recent nationwide class actions. See, e.g., *Castano*, 84 F.3d at 742 n.15 (dismissing a nationwide class action after finding it “difficult to fathom how common issues could predominate . . . when variations in state law are thoroughly considered”); *In re American Med. Sys.*, 75 F.3d at 1085 (“If more than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing a jury on the relevant law, yet another reason why class certification would not be the appropriate course of action.”); *In re Rhone-Poulenc*, 51 F.3d at 1300 (dismissing class certification in part because of distinct “nuance[s]” in “differing state pattern instructions on negligence and differing judicial formulations of the meaning of negligence”). But see *Wilson v. Siemens Pacesetter, Inc.*, No. C-1-93-0188, slip op. at 8 (S.D. Ohio Mar. 15, 1994) (recognizing that Ohio’s choice of law provisions would require the court to apply the law of all 50 states, but holding that the class action would be tried solely under Ohio law on the ground that, otherwise, “the entire concept of a national class action would also be seriously eroded”).

8. When the Fifth Circuit decertified the *Castano* class action, plaintiffs began filing single state class actions in state court. See, e.g., *Richardson*, No. 9614050/CE212596, slip op. at 69 (certifying a state class action, but noting that the decision to certify is subject to alteration or amendment pursuant to Md. Rule Civ. P. 2-231(c)).

9. As a practical matter, however, Congress may federalize the class action by establishing minimal diversity jurisdiction requirements. See Class Action Jurisdiction Act of 1998, H.R. 3789, 105th Cong. § 2(b)(1)(A) (1998) (conferring jurisdiction on the federal

The Supreme Court recently has enhanced the value of state class actions outside the products liability context by holding that a federal court may not withhold full faith and credit from a state court class action settlement simply because the settlement releases claims that fall within the exclusive jurisdiction of the federal courts.¹⁰ This ruling is likely to encourage plaintiffs to find ways of bringing what would traditionally be deemed federal class actions in state court. In order to facilitate the state court class action, proposals to resolve problems posed by numerous state court class actions involving the same or similar subject matter are now being actively considered.¹¹

district courts for a class action in which "any member of a proposed plaintiff class is a citizen of a state different from *any* defendant" (emphasis added)); Class Action Fairness Act of 1998, S. 2083, 105th Cong. § 3(2)(A) (1998) (same). These bills, although unlikely to pass in their present form, would result in few class actions being brought in state court.

10. See *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 369 (1996). *Matsushita* involved two lawsuits arising from Matsushita's tender offer for MCA, Inc.'s common stock: a state law class action filed in Delaware, and a suit seeking certification of a federal class in California federal district court. *Id.* at 369-70. During the pendency of the state proceeding, the federal district court declined to certify a class and granted summary judgment in favor of Matsushita. *Id.* at 370. Plaintiffs appealed, and during the pendency of that appeal before the Ninth Circuit, the parties to the Delaware state class action negotiated a settlement. *Id.* at 370-71. This settlement included a global release of all claims arising out of the Matsushita/MCA acquisition, which included the claims in the case pending before the Ninth Circuit. *Id.* at 371. On appeal from the Ninth Circuit's decision not to enforce the settlement under the Full Faith and Credit Act (on the ground that the preclusive effect of a state court's settlement was limited to those claims which could have been extinguished by the preclusive effect of an adjudication of the state law claims), the Supreme Court held that the settlement should be enforced. *Id.* at 369. The Court reasoned that as long as the state court possessed subject matter jurisdiction and jurisdiction over the defendants, the Full Faith and Credit Act's exception for lack of subject matter jurisdiction did not apply, despite the existence of a federal statute that provides for exclusive federal jurisdiction over certain claims. *Id.* at 386. Thus the general rule is that the Full Faith and Credit Act "is generally applicable in cases in which the state court judgment at issue incorporates a class action settlement releasing claims solely within the jurisdiction of the federal courts." *Id.* at 375.

The scope of the *Matsushita* decision was recently at issue in *In re Lease Oil Antitrust Litigation (No. II)*, 16 F. Supp. 2d 744 (S.D. Tex. 1998). In this case, the district court determined that, unlike Delaware state law in *Matsushita*, Alabama state law limited the preclusive effect of a judgment to claims that could have been previously adjudicated, so that a state settlement did not have preclusive effect on subsequent actions brought under federal antitrust law. *Id.* at 756. Because Alabama's "prior jurisdictional competency" rule is the majority position, see *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 382 (1985), other courts will likely interpret *Matsushita* similarly, and the scope of state court class action settlements will be dramatically restricted.

11. See COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS § 4.02, at 202 (1994) (proposing that states adopt a uniform act in order "to facilitate interstate aggregation of related litigation among the courts of participating states"); see also UNIF. TRANSFER OF LITIG. ACT, 14 U.L.A. 181 (Supp. 1998) [hereinafter U.T.L.A.] (providing a system for the transfer of litigation from one jurisdiction to another). See generally Edward H. Cooper, *Interstate Consolidation: A Comparison of the ALI Project with the Uniform Transfer of*

Thus, the stage is being set for a new-found interest in class action litigation in Maryland. This Article is intended as an introduction to Maryland's class action rule. Part I describes the history of representative litigation in the state. Part II discusses the genesis of Maryland's first class action rule, which was adopted in 1961. Next, Part III examines the impact of the 1961 rule by reviewing the limited state case law construing that rule. The Article then reviews the process by which the state's second, and current, rule came into being, and the case law which construes that rule.

The historical review of the state class action rule is followed, in Part IV, by an introduction to some of the more practical aspects of class litigation. This sort of litigation poses many challenges and little Maryland law exists to help the practitioner or judge attempting to meet these challenges. The analysis in Part IV is intended to flesh out the bare bones of the state class action rule by studying cases that interpret the federal class action rule upon which the current Maryland rule is based.

Finally, Part V discusses changes that might be considered in the Maryland rule. In particular, this Part discusses the question of a direct appeal provision for class certification decisions and the benefits and disadvantages of adopting an opt-in, as opposed to opt-out, class structure.

I. THE HISTORY OF REPRESENTATIVE LITIGATION IN MARYLAND

Representative litigation has existed in Maryland for substantially longer than the formal class action embodied by the Maryland rules.¹² The earliest reported Maryland case in which a few representatives sought to litigate on behalf of many is *Negro Jerry v. Townshend*,¹³ in which two slaves sought to have their petition for freedom¹⁴ removed

Litigation Act, 54 LA. L. REV. 897, 906 (1994) (comparing two proposals designed to ease transfer of multiparty litigation and recommending adoption of the U.T.L.A.).

12. This Part is intended only as a brief overview of the history of class-type litigation in Maryland. For more information, see 1 HERBERT B. NEWBERG & ALBA CONTE, *NEWBERG ON CLASS ACTIONS* § 1.09 (3d ed. 1992) (discussing the history of class action litigation) and STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987) (discussing the history of group litigation).

13. 2 Md. 274 (1852).

14. See Act of 1796, ch. 67, in 1 CLEMENT DORSEY, *THE GENERAL PUBLIC STATUTORY LAW AND PUBLIC LOCAL LAW OF THE STATE OF MARYLAND* 334 (1840) [hereinafter Act of 1796, ch. 67] (setting forth this petition as the only method by which a slave could obtain freedom in Maryland). This Act required that all petitions for freedom "commence and be tried only in the county where such petitioner or petitioners shall reside." *Id.* § 21. The petitioner or defendant could request a jury trial, and both the petitioner and the defendant had the right to issue preemptory challenges to twelve of the prospective jurors. *Id.*

from the Prince George's county court of the first judicial district to the Anne Arundel county court of the third judicial district.¹⁵ The slaves sued on behalf of themselves "and others,"¹⁶ thereby making their case, in effect, the first reported civil rights class action in Maryland.

The two slaves originally brought their petition in Prince George's County, which was then a part of the first judicial district.¹⁷ Concerned that they could not get a fair trial, however, the slaves, supported by an affidavit of their lawyer, had the case removed to Anne Arundel County, which was then part of the third judicial district.¹⁸ The defendant, Jeremiah Townshend, successfully moved to remand the case back to Prince George's County on the ground that removal to a court outside the first judicial district was improper; the Court of Appeals of Maryland considered the slaves' appeal of this grant of the motion to remand.¹⁹

The slaves' petition for freedom revolved around two central questions: (1) the constitutionality of chapter 518 of the 1849 Act, which authorized the removal of a suit or action at law to the county court of an adjoining district for the purpose of trying the case;²⁰ and

§§ 22, 24. In an apparent effort to dissuade members of the bar from aiding slaves, the Act provided that, if a petition were dismissed, the attorney bringing it would be required to pay legal costs unless the court found "probable ground to suppose that said petitioner or petitioners had a right to freedom." *Id.* § 25.

15. *Negro Jerry (I)*, 2 Md. at 275. The published opinion provides only the facts necessary for an understanding of the narrow legal issues before the court. Two subsequent opinions, however, provide more detail. Jeremiah Townshend was one of the heirs of John Townshend, a Prince George's County farmer who died in May 1846. *Townshend v. Townshend*, 5 Md. 287, 288 (1853). Twice before his death, John Townshend executed deeds of manumission liberating seventy of his slaves, and a will giving them all his real estate. *Id.* John Townshend's heirs claimed that he had been insane prior to his death and successfully petitioned the Prince George's county court to have his will declared null and void. *Id.* When the will was declared void, Jeremiah Townshend took and maintained possession of the slaves. *Id.* Although John Townshend's will had been declared void, the deeds of manumission were not; on this basis, two slaves petitioned for freedom on behalf of themselves and sixty-eight others. *Negro Jerry v. Townshend*, 9 Md. 145, 146 (1856).

16. *Negro Jerry (I)*, 2 Md. at 274.

17. *Id.* at 275.

18. *Id.*

19. *Id.* at 277.

20. *Id.* The Act provided in pertinent part:

[I]n any suit or action of law now pending . . . in any county courts of this State[,] . . . the judges thereof, upon suggestion in writing, by either of the parties thereto or their attorneys, supported by affidavit or other proper evidence, either before or after issue joined in the said cause, that a fair and impartial trial cannot be had in the county courts of the county . . . where such writ or action may be depending, shall and may order and direct the record of their proceedings in such suit or action, to be transmitted to the judges of any county court of any adjoining judicial district for trial, and the judges of such county court, to whom

(2) the question of whether a petition for freedom was a suit at law as contemplated by the Act.²¹ Thomas Bowie,²² attorney for Townshend, argued that the 1849 Act permitting removal of a petition for freedom to a court in another judicial district was unconstitutional because a case could only be removed from one adjoining county to another within the same judicial district.²³ Bowie's theory was based on the common law, which, he argued, required that a trial be conducted in the same vicinage where the facts of the case occurred.²⁴ Bowie also contended that, because slaves could not bring actions at law, a petition for freedom could not be considered an action at law within the meaning of the Act permitting removal.²⁵

Rejecting Bowie's arguments, the Court of Appeals, in an opinion delivered by Justice Mason, held that the 1849 Act was consistent with the old constitution of Maryland, as embodied in a previous Act of 1804, which gave the legislature "the power to regulate at will the subject of removals."²⁶ On the thornier question of whether a petition for freedom fell within the bounds of an action at law, and therefore qualified as a "suit" which could be removed under the terms of the 1849 Act, the Court of Appeals, in an interesting early example of judicial activism, reasoned that the purpose of the Act—to escape the influence of local prejudice—"appl[ied] with equal force to a case like the present, as to one strictly and technically embraced within the term 'action at law.'"²⁷ Moreover, it would be "a contradiction of terms to say that [a slave] shall have the benefit of our courts of justice, but at the same time that his case shall be tried in a county where he cannot have a fair and impartial trial."²⁸ Thus the Court of Ap-

the said record may be transmitted, shall hear and determine the same in like manner and to the same extent as if such suit or action had been originally instituted therein.

Act of 1849, ch. 518, 1849 Md. Laws 86 (passed Mar. 7, 1850).

21. *Negro Jerry (I)*, 2 Md. at 276-77.

22. For a brief account of Thomas Fielder Bowie, also known as General Bowie, see EFFIE GWYNN BOWIE, *ACROSS THE YEARS IN PRINCE GEORGE'S COUNTY 748-50* (1947).

23. *Negro Jerry (I)*, 2 Md. at 276-77.

24. *Id.* at 277.

25. *Id.* at 276-77. Bowie's argument was weak. If, as he contended, a slave could not bring an action at law, then the common law prohibition of removal past the bounds of vicinage presumably would not apply to this case, because it only applied to suits at law. Bowie attempted to skirt this issue by observing that "[a] slave cannot bring an action at law, but assuming that he could, the removal must still be made to a county within the same judicial district." *Id.*

26. *Id.* at 278.

27. *Id.* at 278-79.

28. *Id.* at 279.

peals concluded that the petition for freedom would be heard in Anne Arundel County.²⁹

The *Townshend* case can be viewed as a class action because the plaintiffs represented the interests of others not named as parties to the litigation. Under the doctrine of representation,³⁰ which the Maryland Court of Appeals explicitly recognized in *Bowen v. Gent*,³¹ the rights of individuals who are not before the court are protected if they are affected by the court's ruling and have a common interest with those who are before the court.³² Under this doctrine, plaintiffs are permitted to sue as "representatives of a class, in behalf of themselves and all others similarly situated, and where defendants may be sued as representing others having similar interests."³³ The courts,

29. *Id.* The story does not have a happy ending. Heirs of John Townshend filed a bill in the Equity Side of the Circuit Court for Prince George's County, claiming that John Townshend's insanity voided the deeds of manumission executed by him. *Townshend v. Townshend*, 5 Md. 287, 287-89 (1853). The heirs argued that, because of the number of slaves who would claim freedom under the deeds, the heirs would be "put to enormous and ruinous costs from the multiplicity of suits." *Id.* at 289. They sought consolidation—in effect, class certification—of all claims of freedom in one equity suit, and an injunction restraining the prosecution of the petitions for freedom until the issue of John Townshend's sanity in executing the deeds of manumission could be determined in a court of law. *Id.* The Prince George's circuit court granted the injunction, and the Court of Appeals heard argument on this case for the second time. *Id.* at 290. The Court of Appeals held that, pursuant to statute, the proper method to try the entitlement of a slave to freedom was by petition filed in the circuit court, and that John Townshend's mental capacity to execute a deed of manumission should be determined by the same tribunal that would rule on the petition for freedom. *Id.* at 296.

The case then proceeded to a trial in the Circuit Court for Anne Arundel County. See *Negro Jerry v. Townshend*, 9 Md. 145 (1856). The jury ruled in favor of Jeremiah Townshend; the Court of Appeals—nine years after the slaves began their attempt to gain freedom—affirmed the judgment, see *id.* at 159, ensuring that they would remain slaves until the Maryland Constitution was amended eight years later to abolish slavery.

30. For the discussion of the doctrine of representation in Maryland, and of the early development of class action litigation in the state, I am indebted to Neil Tabor. See MELVIN J. SYKES & NEIL TABOR, WEST'S MARYLAND LAW ENCYCLOPEDIA, PROCEDURAL FORMS FOR MARYLAND RULES AND PRACTICE §§ 241-260 (1964); Memorandum on Class Actions, from Neil Tabor, Assistant Reporter, Court of Appeals of Maryland Standing Committee on Rules of Practice and Procedure, to Standing Committee on Rules of Practice and Procedure (June 16, 1961) [hereinafter Tabor, Memorandum on Class Actions]. This Memorandum appears to have been the only review of class action law generally, and Maryland practice specifically, considered by the Committee before it voted on Maryland's first class action rule in June 1961.

31. 54 Md. 555 (1880).

32. See *id.* at 570-71 (stating that the doctrine of representation "is always founded on the fact that persons to be affected by the decree have a common interest with those before the court, [so that] the rights of absent persons will . . . be protected" (citing JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS §§ 126, 140, 144, 146, 147 (John M. Gould ed., 9th ed. 1879))).

33. *Ridgely v. Pflugstang*, 188 Md. 209, 237, 50 A.2d 578, 591 (1946) (internal quotation marks omitted) (quoting EDGAR G. MILLER, JR., EQUITY PROCEDURE AS ESTABLISHED IN

however, were loath to utilize the doctrine, asserting that “[t]he principle that all must be made parties whose interests may be affected by the decree is only departed from where it becomes extremely difficult or inconvenient to enforce the rule.”³⁴

The Court of Appeals set forth circumstances justifying the use of representative litigation in a 1911 case, *Leviness v. Consolidated Gas Electric Light & Power Co.*:³⁵

While the general rule undoubtedly requires that all persons interested must be made parties to any proceeding by which they may be affected, yet to this rule there are well-recognized exceptions founded upon considerations of practical convenience and adopted to avoid a denial of justice. These exceptions are . . . : “(1) Where the question is one of a common or general interest, and one or more sue or defend for the benefit of the whole; (2) where the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the rights and interests of the whole; (3) where the parties are very numerous and though they have or may have separate and distinct interests, yet it is impractical to bring them all before the Court.”³⁶

THE COURTS OF MARYLAND § 40, at 48 (1897)). In the quoted treatise, Miller noted that most representative cases brought by plaintiffs involved creditors suing on behalf of themselves and other creditors. MILLER, *supra*, § 40, at 49.

34. *Ridgely*, 188 Md. at 238, 50 A.2d at 591 (internal quotation marks omitted) (quoting *Railroad Co. v. Orr*, 85 U.S. (18 Wall.) 471, 473-74 (1873)); see *Saunders v. Roland Park Co.*, 174 Md. 188, 194, 198 A. 269, 271 (1938) (recognizing the doctrine of representative litigation, but finding that plaintiffs did not have the requisite “community of interest”); *Long v. Long*, 62 Md. 33, 66-68 (1884) (holding that contingent remaindermen were not bound by a judicial decree and sale of an estate because neither they nor their interests were represented in the prior hearing).

35. 114 Md. 559, 567-71, 80 A. 304, 307-08 (1911).

36. *Id.* at 567-68, 80 A. at 307 (quoting STORRY, *supra* note 32, § 97, at 95); see *Wallace v. Adams*, 204 U.S. 415, 425 (1907) (noting that a court of equity may “name as defendants a few individuals who are in fact the representatives of a large class having a common interest . . . and make the decree effective not merely upon those individuals, but also upon the class represented by them”); *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 302-03 (1853) (“For convenience, . . . and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court.”). The binding effect of a judgment in representative litigation has been recently addressed. See *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 880-82 (6th Cir. 1997) (rejecting the use of the doctrine of “virtual representation *res judicata*” to bind a party to a previous adjudication when that party was not a class member, and instead requiring “‘approval of the court’ for a representative of a class ‘to represent,’ for privity purposes, later plaintiffs” (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 41 (1980))).

The Court of Appeals emphasized that the representatives of the class must be adequate to represent the interests of the whole class, stating that “the Court [must] tak[e] care that sufficient persons are before it honestly, fairly and fully to ascertain and try the general right in contest.”³⁷ In another case, the court stressed that it was essential that suits proceeding under the doctrine of representation be “free from fraud and collusion, and proceed with the utmost fairness and good faith.”³⁸

A cursory examination of the parameters of a representative suit as articulated by the Maryland Court of Appeals shows that the basic structure of the modern class action was in place by the late nineteenth, early twentieth century. The fundamental concepts of numerosity, commonality, typicality, and adequacy—all the components of the current federal class action Rule³⁹—were requirements of the representative suit for this period. In some ways, the doctrine of representation was similar to current class action practice. For example, the “numerosity” analysis mirrored the current practice of focusing not on the number of class members, but instead on the convenience of bringing all interested parties before the court as the relevant consideration.⁴⁰ Moreover, courts were concerned with the adequacy of representation, expressed in terms of the “sufficiency” of the representative party to represent the class, because only by establishing the fairness of the proceeding could courts insure that the decree issued in the representative case would be *res judicata* as to all who were represented.⁴¹

The doctrine of representation also differed, however, from contemporary class action practice. Most notably, there is no indication that any Maryland court sought to expand the use of the doctrine from its equitable origin into the law courts.⁴² Moreover, the repre-

37. *Leviness*, 114 Md. at 568, 80 A. at 307 (internal quotation marks omitted) (quoting STORY, *supra* note 32, § 120, at 116).

38. *Holt v. Moxley*, 157 Md. 619, 624, 147 A. 596, 598 (1929).

39. See FED. R. CIV. P. 23(a) (stating the prerequisites to a class action).

40. Compare FED. R. CIV. P. 23(a) (requiring a class to be “so numerous that joinder of all members [be] impracticable”) with *Smith*, 57 U.S. (16 How.) at 302 (noting that representation turns in part on the “convenience” of binding all parties).

41. Compare FED. R. CIV. P. 23(a) (requiring that “the representative parties will fairly and adequately protect the interests of the class”) with *Leviness*, 114 Md. at 568, 80 A. at 307 (requiring the court to take “care that sufficient persons are before it honestly, fairly and fully to ascertain and try the general right in contest” (internal quotation marks omitted) (quoting STORY, *supra* note 32, § 120, at 116)).

42. See Tabor, Memorandum on Class Actions, *supra* note 30, at 2 (“The doctrine of representation originated in equity and in Maryland, it appears to have been applied only in equitable actions.”)

sentation doctrine carried with it no requirement that those represented be put on notice that an action that would bind them was being litigated.⁴³ As an equitable action, the representative party had only to petition the court to dismiss the action at any time prior to trial, upon payment of costs, in order to obtain an order of dismissal, unless the defendant had become entitled to relief from the court.⁴⁴ Although by 1961 this result had prompted some states to enact legislation or rules prohibiting class actions to be dismissed without court approval,⁴⁵ the general rule was that a party who sued as a representative of a class could dismiss the action before other interested members of the class had intervened and before the court had passed an order affecting class members' rights.⁴⁶

II. THE HISTORY OF MARYLAND'S CLASS ACTION RULE

The first federal class action rule was enacted in 1938,⁴⁷ and cre-

43. In fact, however, this lack of a notice requirement is not entirely alien to contemporary practice. Compare FED. R. CIV. P. 23(c)(2)(e) (requiring notice when a case is to be settled, or litigated under 23(b)(3)) with FED. R. CIV. P. 23(b)(1-2) (not requiring notice for a class certified for litigation under these provisions). Under these rules, the trial of a (b)(1) or (b)(2) class does not require notice to the class—although, as a practical matter, the court may order such notice if the court deems it appropriate—whereas a proposed settlement does require notice. It is unclear why a class member's right to know the disposition of her rights is considered less important if the case goes to trial, but more important if the case settles.

44. See *Camden Sewer Co. v. Mayor & City Council of Salisbury*, 157 Md. 175, 184, 145 A. 497, 500 (1929) (“[O]rdinarily and as a general rule the complainant [in an equity proceeding] is the master of his own litigation and has the right to dismiss his proceedings at any time up to a final determination of the case, by following the approved practice of making application to the court for leave to do so.”).

45. See Tabor, Memorandum on Class Actions, *supra* note 30, at 3-4 (citing New Jersey Rule 4:36-3, Schedule B).

46. *Id.* at 3 (citing 17 AM. JUR. *Dismissal* § 16 (1957)).

47. FED. R. CIV. P. 23 (1938); 2 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* 2219 (1938). The 1938 rule provided as follows:

(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

(b) Secondary action by shareholders. In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which

ated no discernible impact in Maryland state practice.⁴⁸ In 1961, however, the Maryland Standing Committee on Rules of Practice and Procedure, as part of its reorganization of the Maryland rules, including the codification of common law and equity practices, asked the Assistant Reporter to the Committee, Neil Tabor, to survey the law of Maryland and other states regarding class actions.⁴⁹ This survey analyzed the state of representative litigation in Maryland,⁵⁰ and examined class

may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort.

(c) Dismissal or compromise. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.

Prior to the 1938 rule, federal representative litigation could be brought in equity pursuant to Federal Equity Rule 38, which provided: "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, one or more may sue to defend for the whole." FED. R. EQ. 38.

48. *But see* 3 NEWBERG & CONTE, *supra* note 12, § 13.04, at 17 nn.45-46 (stating that Alaska, Georgia, Louisiana, New Mexico, North Carolina, Rhode Island, West Virginia and Puerto Rico all adopted class action rules modeled after the original Federal Rule 23). All have now moved to a class action rule more consistent with Federal Rule 23.

This original Federal Rule created distinctions among class actions based on the substantive character of the right asserted by the plaintiff. 3 NEWBERG & CONTE, *supra* note 12, § 13.04, at 17. These different types of class actions—named "true," "hybrid," and "spurious"—have caused confusion since they were originally coined. *Id.* § 13.04, at 18. In brief, a "true" class action existed if the class rights were joint, or common, or secondary, as contemplated by the first section of the rule. *Id.* § 13.04, at 17. If each class member had a separate interest which could be asserted or defended individually, but also shared an interest in a specific fund or property, as contemplated by the second section of the rule, then the class was "hybrid." *Id.* Finally, a "spurious" class action involved class rights which were several, but which shared a common question of law or fact, and the class sought common relief, as contemplated by the third section of the rule. *Id.* According to Newberg, the "spurious" class was "not really a class category at all, but a device for permissive joinder." *Id.* § 13.04, at 17-18.

49. Telephone interview with Neil Tabor, Former Assistant Reporter, Maryland Standing Committee on Rules of Practice and Procedure (Mar. 19, 1998). Mr. Tabor could not recall any specific impetus to generate a class action rule.

50. Tabor also looked at the only Maryland Rules then extant which had any relationship to class proceedings. *See* Tabor, Memorandum on Class Actions, *supra* note 30, at 4 (discussing MD. RULES 205, 275 (1952) (repealed 1984)). These rules both concerned the empowerment of personal representatives, such as an executor or guardian ad litem, to

action rules and statutes in other jurisdictions.⁵¹

Tabor noted that there were two types of class action rules in effect in 1961: those that were detailed with respect to the circumstances under which a class action could be brought, such as Federal Rule 23 and the New Jersey state rule,⁵² and those that were broader and less detailed, such as New York's proposed class action rule.⁵³ Tabor observed that the federal-type, detailed class rule had been criticized because it relied on the "true," "hybrid," and "spurious" distinctions, which were substantive rather than procedural in nature, confusing, and unnecessary in determining whether or not a class ac-

represent those unable to represent themselves. This sort of representation differs fundamentally from a true class action. In a class action, a representative party sues on behalf of herself, and also seeks to assert the rights of others; in the "representative" litigation covered by these former Rules, the representative has no personal stake in the proceedings and simply stands in the shoes of the incapable plaintiff, for example, when a trustee represents the beneficiaries of a trust. See *infra* text accompanying notes 190-195 (distinguishing a trust from a class action and concluding that class representatives, unlike trustees, must be individuals who have sued the defendant, intervened in the action, or been sued by the defendant).

51. See Tabor, Memorandum on Class Actions, *supra* note 30, at 4.

52. *Id.* at 5 (noting the virtual similarity of then extant New Jersey Rule 4:36 with the 1938 Federal Rule 23); see *supra* note 47 (providing the text of FED. R. CIV. P. 23 (1938)).

53. See Tabor, Memorandum on Class Actions, *supra* note 30, at 4. At this time, New York's current rule was still based on its 1849 Field Code, the first statutory basis for a state class action. See 3 NEWBERG & CONTE, *supra* note 12, § 13.04, at 14 & n.24 (setting forth the text of the Field Code). New York, however, was considering changing its rule. See Jack B. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF. L. REV. 433, 433-34 (1960). The proposed rule was as follows:

23.5 Class Actions

(a) When allowed. When there is a question of law or fact common to persons whose joinder is impracticable, one or more of them whose claims or defenses are representative of the claims or defenses of all and who will fairly and adequately protect the interests of all may sue or be sued on behalf of all. . . .

(b) Elimination of representative character. Except where a class action is maintained of right, the court may, at any time prior to judgment, order an amendment of the pleadings eliminating therefrom all reference to the representative character of the action and render judgment in such form as to bind only the parties to the action.

(c) Protective orders; notice. The court at any stage of the action may impose such terms as shall fairly and adequately protect the interests of the persons on whose behalf the action is brought or defended. It may order that notice be given in such manner as it may direct: (1) of the pendency of the action, (2) of a proposed settlement, (3) of rendition of judgment or (4) of any other proceedings in the action, including notice to come in and present claims.

(d) Court approval for compromise, discontinuance and dismissal. A class action shall not be compromised, discontinued or dismissed by consent, by default or for failure to prosecute except with the approval of the court.

Id. at 457-58 (quoting First Report, N.Y. Advisory Committee on Practice and Procedure, Legis. Doc. No. 6(b), 34-35 (1957)).

tion should be granted.⁵⁴ In particular, Tabor noted that the “spurious” class action—which allows a class when there is a common question of law or fact, even though the right at issue is several rather than joint, and the judgment is not binding on the members of the class who are not parties—was not a necessary component of a state class action rule; instead, this category was intended under the federal system to permit the “joinder by representation” of parties whose actual joinder might defeat diversity jurisdiction.⁵⁵

Tabor concluded the Memorandum without a recommendation as to the form that Maryland’s class action rule, if any, should take.⁵⁶ In the letter accompanying the Memorandum, however, Tabor recommended that the Standing Committee on Rules of Practice and Procedure give “serious thought to recommending a rule along the same lines as the rule proposed in the New York study.”⁵⁷ Two weeks later, during a two-day meeting at the Tidewater Inn in Easton, the Standing Committee took Tabor’s advice and adopted a rule that was virtually identical to the proposed New York rule.⁵⁸ On September 15,

54. See Tabor, Memorandum on Class Actions, *supra* note 30, at 5-6 (citing Weinstein, *supra* note 53).

55. *Id.* at 5-6 (citing Weinstein, *supra* note 53, at 456); see *infra* notes 93-119 (discussing Maryland and federal decisions which have held that separate and distinct claims of individual class members could not be aggregated to meet the jurisdictional monetary amount requirement and detailing the Rules Committee’s attempt to circumvent this result). Weinstein did not fully expand on the principal problem presented by the “spurious” class action, although he hinted at it by noting the tendency of courts to permit parties to intervene after judgment in such suits. See Weinstein, *supra* note 53, at 443 & n.39 (citing *Wilson v. City of Paducah*, 100 F. Supp. 116, 118 (W.D. Ky. 1951)). This practice, known as “one-way intervention,” allowed class members to wait out the verdict in a case brought as a “spurious” class action. See *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974) (“A recurrent source of abuse under the former Rule [23, prior to its 1966 amendment] lay in the potential that members of the claimed [spurious] class could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests.”). The 1966 amendments were intended, in part, to prevent this procedural unfairness. *Id.* at 547-48.

56. Letter from Neil Tabor, Assistant Reporter, Court of Appeals of Maryland Standing Committee on Rules of Practice and Procedure, to William H. Adkins and E. Clinton Bamberger, Jr. 1 (June 5, 1961) [hereinafter, Tabor, Letter] (noting that the Memorandum does not address this issue). Although the transmittal letter in the files of the Standing Committee on Rules of Practice and Procedure is dated June 5, 1961, Tabor’s Memorandum is dated June 16, 1961. Tabor, Memorandum on Class Actions, *supra* note 30, at 1. There is no explanation for this disparity.

57. Tabor, Letter, *supra* note 56, at 2.

58. See MD. RULE 209 (1961) (repealed 1984). Rule 209 provided as follows:

(a) *When allowed.* When there is a question of law or fact common to persons of a numerous class whose joinder is impracticable, one or more of them whose claims or defenses are representative of the claims or defenses of all and who will fairly and adequately protect the interests of all may sue or be sued on behalf of all.

1961, Rule 209, the first Maryland class action rule, went into effect.⁵⁹ Subsequent to Maryland's enactment of Rule 209, however, New York rejected the language of its proposed rule.⁶⁰

A. Practice Under Rule 209

Maryland's class action rule received little attention from the appellate courts. Only a handful of opinions were published to aid practitioners in construing the rule, and most of these provided little help.

The Court of Appeals first confronted Rule 209 in *Hooks v. Comptroller of the Treasury*.⁶¹ In this case, the Court of Appeals considered whether a representative could bring a class action under Maryland's Retail Sales Tax Act (the Tax Act).⁶² The court first held, on the basis of clear statutory language, that any application for a refund of sales tax brought under the Tax Act must be made by the individual who paid the tax or by the vendor who collected the tax from others.⁶³

In addition, the court held that Section 352 of the Tax Act permitted "any taxpayer" to appeal to the Maryland Tax Court.⁶⁴ Although the Tax Act defined taxpayer as "any person required . . . to pay or pay over to the Comptroller the tax imposed,"⁶⁵ and further defined person as encompassing a person acting in a fiduciary or rep-

(b) *Elimination of Representative Character.* Except where a class action is maintained of right, the court may adjudicate and declare the nonrepresentative character of the action and render judgment specifically determining that only the parties to the action are bound thereby.

(c) *Protective Orders—Notice.* The court at any stage of the action may impose such terms as shall fairly and adequately protect the interests of the persons on whose behalf the action is brought or defended, including an order that notice be given in such manner as it may direct: (1) of the pendency of the action, (2) of a proposed settlement, (3) of rendition of judgment, (4) to come in and present claims, or (5) of any other proceedings in the action.

(d) *Court Approval for Compromise or Dismissal.* Except with the approval of the court, a class action shall not be compromised or dismissed.

Id.; see *supra* note 53 (setting forth the text of the New York rule on which Rule 209 was based).

59. MD. RULE 209 (1961) (repealed 1984).

60. See PAUL V. NIEMEYER & LINDA M. SCHUETT, MARYLAND RULES COMMENTARY 143 (2d ed. 1992) (noting that New York declined to adopt the draft language of the rule because it was "too liberal and lacked adequate standards").

61. 265 Md. 380, 289 A.2d 332 (1972).

62. MD. ANN. CODE art. 81, §§ 324-371 (1957 & 1969 Repl. Vol.) (repealed 1988).

63. See *Hooks*, 265 Md. at 383, 289 A.2d at 334 (noting that applications for taxes "erroneously, illegally or unconstitutionally paid" must be made "by the person upon whom the tax was imposed," so that "it would seem patently clear that applications for refund may be made only by the taxpayer who paid the tax or by any vendor who has collected the tax from others." (quoting MD. ANN. CODE art. 81, § 348 (1957 & 1969 Repl. Vol.))).

64. *Id.* (quoting MD. ANN. CODE art. 81, § 352 (1969)).

65. *Id.* (quoting MD. ANN. CODE art. 81, § 324(a) (1969)).

representative capacity, or a group of "individuals acting as a unit,"⁶⁶ the court was not convinced that an individual could act in a representative capacity before the Maryland Tax Court.⁶⁷ The court reasoned that the apparently broad definition of "person in Section 324 must be read" in the context of Section 348, which provided that "application must be made by the person who paid the tax."⁶⁸ Almost as an afterthought, the court added that Rule 209, on which the individual taxpayer relied, was not applicable to proceedings in the Maryland Tax Court.⁶⁹

The Court of Special Appeals first looked at the class action rule in 1975 in *Johnson v. Chrysler Credit Corp.*⁷⁰ Taking a somewhat pessimistic view of class actions, the court reviewed case law throughout the country, but determined that these cases were "helpful only as indicating the premature withering of a budding new proceeding."⁷¹ The Court of Special Appeals also noted the dearth of class action opinions in Maryland, bemoaning *Hooks* as a "slender . . . reed" on which to base its own opinion.⁷²

Indeed, in relying on *Hooks*, the Court of Special Appeals gave the impression of grasping at straws. In *Johnson*, the plaintiffs had sued the Chrysler Credit Corporation and the Ford Credit Company over instruments which contained clauses that plaintiffs claimed to be prohibited by certain provisions of the Maryland Retail Installment Sales Act of 1941 (Sales Act).⁷³ Relying on *Hooks*, the Court of Special Appeals determined that an individual could not bring a class action suit under the Sales Act:

66. *Id.* at 384, 289 A.2d at 334 (quoting MD. ANN. CODE art. 81, § 324(a) (1969)).

67. *Id.*

68. *Id.*

69. *Id.*

70. 26 Md. App. 122, 337 A.2d 210 (1975).

71. *Id.* at 125, 337 A.2d at 212; *see id.* at 125 n.2, 337 A.2d at 212 n.2 ("It appears that the initial enthusiasm for the Rule has been tempered by recognition of the practical problems inherent in its use." (internal quotation marks omitted) (quoting *Abercrombie v. Lum's, Inc.*, 1972 Trade Cas. (CCH) ¶ 74,118 (S.D. Fla.))).

72. *Id.* at 126, 337 A.2d at 213.

73. *Id.* at 123-24, 337 A.2d at 211. The plaintiffs claimed that instruments held by them contained clauses known as "insecure" clauses, allowing for acceleration and repossession merely by the seller or holder deeming himself insecure, which were prohibited under the provisions of the Sales Act. *Id.* at 123, 337 A.2d at 211 (citing Retail Installment Sales Act of May 29, 1941, ch. 851, 1941 Md. Laws 1501 (codified at MD. ANN. CODE art. 83, §§ 128-153 (1975) (repealed 1975))). The plaintiffs sued on behalf of themselves and others similarly situated, even though they did not allege that the offending clauses had been exercised, for damages in the amount of \$70,000,000 against Chrysler and \$120,000,000 against Ford. *Id.* at 124, 337 A.2d at 211.

Further, we have examined the Retail Installment Sales Act as the Court of Appeals did the Retail Sales Tax Act [in *Hooks*], and we arrive at a similar conclusion. There is no language which expressly or impliedly suggests that the Legislature intended to provide class relief as a matter of right for violations of the Act. Since the class rule was not in effect when the statute was adopted we would be hard pressed to read Legislative intent as contemplating a procedure that did not exist.⁷⁴

The Court of Special Appeals appears to have misread *Hooks* and misunderstood the history of representative litigation. It is true that, in *Hooks*, the Court of Appeals denied taxpayers the ability to bring class action lawsuits.⁷⁵ The *Hooks* opinion, however, was based on the specific language of the Tax Act, which provided that the application for a tax refund could be made by the person upon whom the tax was imposed or the person who collected and paid the tax to the Comptroller.⁷⁶ In *Johnson*, by contrast, the Court of Special Appeals, pointing to no parallel provision in the Sales Act, noted only that there was no language that implied the legislature's intent to provide class relief for violations of the Sales Act.⁷⁷

It is true that there is no language in the Sales Act that specifically authorizes class proceedings.⁷⁸ Indeed, it would be the rare act that contains such specific language. The court was wrong, however, to observe that the Maryland legislature could not have contemplated a representative case being brought under the Sales Act. As already discussed, representative litigation has existed in Maryland at least since the middle of the nineteenth century.⁷⁹ Although the class action rule regulates the practice of such litigation, it did not create the representative suit. It is conceivable, then, that the legislature was aware of the practice of representative litigation,⁸⁰ yet did not choose to re-

74. *Id.* at 127, 337 A.2d at 213. The court suggested an alternative ground for its decision. *See id.* at 124 n.1A, 337 A.2d at 211 n.1A (noting "[o]ur affirmation of the trial court's holding that [plaintiffs] do not represent the members of the class").

75. *Hooks v. Comptroller of the Treasury*, 265 Md. 380, 383-84, 289 A.2d 332, 334 (1972); *see supra* notes 61-69 and accompanying text (discussing *Hooks*).

76. *Hooks*, 265 Md. at 383, 289 A.2d at 334.

77. *Johnson*, 26 Md. App. at 127, 337 A.2d at 213.

78. *See id.* ("Since the class rule was not in effect when the statute was adopted we would be hard pressed to read Legislative intent as contemplating a procedure that did not exist.").

79. *See supra* notes 12-46 and accompanying text (discussing the early history of representative litigation in Maryland).

80. *See Board of Educ. v. Lendo*, 295 Md. 55, 63, 453 A.2d 1185, 1189 (1982) ("The General Assembly is presumed to have had, and acted with respect to, full knowledge and

fer to it in the language of the Sales Act.

The *Johnson* court also seemed to adopt two holdings from *Eisen v. Carlisle & Jacquelin*.⁸¹ In *Eisen*, the Supreme Court refused to shift the costs of providing notice to each class-member from plaintiffs to defendants and refused to permit a trial court to conduct a preliminary inquiry on the merits of the case as part of the determination whether a class action suit may be maintained.⁸² In *Johnson*, the class proponents, apparently admitting their inability to pay the cost of notifying in excess of 100,000 class members, proposed that the trial judge order the defendants below to "place the necessary funds in escrow to give the adequate notices . . . with the provision that same would be deducted from the share of those members who apply for and receive funds and credits from [defendants]."⁸³ The Court of Special Appeals, without affirmatively adopting it, quoted the *Eisen* holding that a class proponent bears the cost of providing notice.⁸⁴ Similarly, without indicating its reason for agreement, the *Johnson* court also cited the *Eisen* holding that the trial court should not in-

information as to prior and existing law and legislation on the subject of the statute and the policy of the prior law.").

81. 417 U.S. 156 (1974). The Court of Special Appeals discussed *Eisen* despite the fact that the Supreme Court's interpretation of Federal Rule 23, which was substantially more detailed than the then extant Maryland class action rule, was not binding on the Court of Special Appeals. See *Johnson*, 26 Md. App. at 127, 337 A.2d at 213 (citing *Eisen*, 417 U.S. 156) (noting that the Supreme Court's analysis is "persuasive, but not binding" and that Federal Rule 23 is "substantially more detail[ed]" than the Maryland rule).

82. *Eisen*, 417 U.S. at 177-78.

83. *Johnson*, 26 Md. App. at 127, 337 A.2d at 213 (internal quotation marks omitted) (quoting appellant's argument (ellipsis in original)).

84. *Id.* at 128, 337 A.2d at 213. The Court of Special Appeals' adherence to *Eisen* was not appropriate because the court neither analyzed the Federal Rule nor considered its difference from the Maryland rule. At this time, Federal Rule 23 provided (as it still does) that a class receive "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." FED. R. CIV. P. 23(c)(2). This (c)(2) notice requirement, however, applies only to classes certified under FED. R. CIV. P. 23(b)(3); the (c)(2) notice requirement is so rigorous because of the due process issue inherent in an opt-out class. By contrast, a class sought to be certified under FED. R. CIV. P. 23(b)(2), the appropriate subdivision for injunctive or other equitable relief, requires no notification of class members. Because the *Johnson* class proponents were seeking declaratory relief from the trial court, see *Johnson*, 26 Md. App. at 122, 337 A.2d at 210, a proper analysis of the Federal Rule would have suggested that no notice was required. Moreover, the 1974 Maryland class action rule permitted the court to protect the interests of the class members by directing that notice be given "in such manner as it may direct." MD. RULE 209(c) (1971). The trial court in *Johnson* could have ordered that the class members be notified by some means less exhaustive and costly than personal notification. Nothing in the *Johnson* opinion indicates that the parties, the trial court, or the Court of Special Appeals raised these issues.

quire into the merits of the litigation during the class certification phase.⁸⁵

In its conclusion, the Court of Special Appeals noted the importance of the class action as a "public interest device"⁸⁶ but observed that, in some circumstances:

[I]t contravenes the more traditional notions of an individual's jurisprudential rights. As a potential and perhaps unwilling litigant, an individual must assert affirmatively his right to be left alone, the very articulation of which reveals its incongruity. While we recognize the procedural vacuum a class suit may fill, we commend care in applying such relief⁸⁷

In 1976, the Standing Committee on Rules of Practice and Procedure displayed the first signs of uneasiness about Maryland's class action rule. The Committee considered, but did not act upon, a draft of the Uniform Class Actions Act (U.C.A.A.) published by the National Conference of Commissioners on Uniform State Laws.⁸⁸ Although the Committee did not adopt the U.C.A.A., and no record exists in the Committee's minutes of any draft or proposed changes in the Maryland class action rule,⁸⁹ the Act ultimately provided the basis for current rule 2-231(g).⁹⁰

85. *Johnson*, 26 Md. App. at 129, 337 A.2d at 214 (quoting *Eisen*, 417 U.S. at 177-78).

86. *Id.*

87. *Id.*

88. See Memorandum from William H. Adkins, II, Executive Secretary to the Maryland Judicial Conference, to the Subcommittee on Civil Law and Procedures (Sept. 24, 1976) (attaching draft of Uniform Class Actions Act); Letter from George B. Gifford, Reporter to the Court of Appeals of Maryland Standing Committee on Rules of Practice and Procedure, to Russell R. Reno, Jr., Chairman, Chapter 200 Rules Subcommittee (Sept. 27, 1976) (forwarding copy of Act and proposing that draft changes to Rule 209 be made in anticipation of a June 1977 meeting of the Committee). For the Act itself, see UNIF. CLASS ACTIONS ACT (amended 1987), 12 U.L.A. 99 (1996) [hereinafter U.C.A.A.].

89. The lack of such a draft does not mean that it did not exist. The minutes of a subsequent meeting of the Committee refers to a "proposed Rule 2-204 (formerly 2-203) on Class Actions." THE COURT OF APPEALS OF MARYLAND STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, MINUTES OF THE MEETING OF STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 25 (Mar. 2-3, 1979) [hereinafter 1979 STANDING COMMITTEE MINUTES]. The records of the Committee's deliberations on the class action rule throughout the years appear to be incomplete. For example, the 1961 Tabor report on Class Actions was only added to the files in November 1976, during the period in which the Committee was considering a revision to the class action rules. See Memorandum from George B. Gifford, Reporter to the Court of Appeals of Maryland Standing Committee on Rules of Practice and Procedure, to Chapter 200 Rules Subcommittee (Nov. 26, 1976) (forwarding Neil Tabor's 1961 memorandum on class actions and noting that it had been missing from the Committee's files).

90. See THE COURT OF APPEALS OF MARYLAND STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, MINUTES OF THE MEETING OF THE STANDING COMMITTEE ON RULES OF

After the 1976 meeting, dissatisfaction with the state's class action rule became more apparent in the minutes of a March 1979 meeting of the Committee to discuss the rule. Mr. (soon to be Judge) Niemeyer observed that the Maryland rule was patterned on a proposed New York rule that had not been adopted by the New York legislature, and that "there are many problems with both the Maryland rule and with the Federal rule on class actions, and no one really feels comfortable with either."⁹¹ The Committee did not act immediately, however, and referred the issue of revisions to the class action rule to a subcommittee with a request that it research "the various aspects involved in class actions, including derivative minority stockholder suits and taxpayer suits."⁹²

While the Committee was considering potential revisions to the class action rule, the Maryland courts were again construing the rule as it then existed. In *Pollokoff v. Maryland National Bank*,⁹³ both the Court of Special Appeals and the Court of Appeals addressed the issue

PRACTICE AND PROCEDURE 24 (Jan. 9, 1981) [hereinafter 1981 STANDING COMMITTEE MINUTES] ("The Reporter stated that section (f), limiting discovery to representative parties, is new and that its source is the Uniform Class Actions Act."). Compare U.C.A.A. § 10 (distinguishing class members appearing in the suit from nonrepresentative parties and parties not appearing, and permitting discovery with respect to the latter group only by court order) with 1981 STANDING COMMITTEE MINUTES, *supra*, at 24 (noting that the Committee, finding that proposed section (f) of the Maryland rule, based on the U.C.A.A., was unclear, added "a second sentence . . . to provide that a court, upon application, may allow discovery by or against any other members of the class").

The result of these amendments, current Maryland Rule 2-231(g), provides: "For purposes of discovery, only representative parties shall be treated as parties. On motion, the court may allow discovery by or against any other member of the class." MD. RULE 2-231(g). The Maryland rule provides no guidance as to the circumstances under which a court might permit discovery of absent class members. Because of the origins of the discovery portion of the rule, however, courts and practitioners would be justified in using the U.C.A.A. as a basis for such guidance, including its provision for discovery of fees. See U.C.A.A. § 10(a) (listing relevant factors for a court to consider in allowing discovery against absent class members); *id.* § 10 cmt. (noting that discovery against representative parties may include fee arrangements).

91. 1979 STANDING COMMITTEE MINUTES, *supra* note 89, at 25. Judge Niemeyer's observation was significant in light of the unique position that he occupied; he was intimately involved with the drafting of the current Maryland rule as a member of the Maryland Rules Committee and also acted as chairman of the Federal Rules Advisory Committee during much of its extensive review of Federal Rule 23. See THE AMERICAN BENCH: JUDGES OF THE NATION 67-68 (Jeanie L. Clapp et al. eds., 9th ed. 1997-98); H.H. WALTER LEWIS & JAMES F. SCHNEIDER, A BICENTENNIAL HISTORY OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND 155 (1990) (providing summaries of Judge Niemeyer's involvement with the revision of both the Maryland and federal rules).

92. 1979 STANDING COMMITTEE MINUTES, *supra* note 89, at 25.

93. 44 Md. App. 188, 407 A.2d 799 (1979), *aff'd*, 288 Md. 485, 418 A.2d 1201 (1980).

of aggregating claims within a class action to meet the jurisdictional amount-requirements of the Maryland Code.⁹⁴

This case involved the accrued interest on a passbook savings account with the Maryland National Bank.⁹⁵ The plaintiffs claimed that they had been denied \$27.62 in interest which had accrued between March 23, 1978 and May 19, 1978.⁹⁶ The plaintiffs sued in the Superior Court of Baltimore City on behalf of themselves and all other persons similarly situated,⁹⁷ in order to recover the allegedly accrued interest.⁹⁸ The defendants contested the court's jurisdiction on the ground that the amount in controversy was below the minimum, and that aggregation was not permitted; the trial court granted the motion, and the plaintiff appealed.⁹⁹

Although this issue—whether the claims of individual class members can be aggregated to meet a jurisdictional monetary requirement—was one of first impression in Maryland,¹⁰⁰ the Court of Special Appeals noted that the United States Supreme Court had twice considered this issue and had held that separate claims of class members could not be aggregated for this purpose.¹⁰¹ The plaintiffs contended that, if aggregation were not permitted, and they could not obtain jurisdiction in the circuit courts, then the inability of the district court to handle administratively a class action would effectively deny them any relief.¹⁰² The Court of Special Appeals replied, how-

94. See *Pollokoff*, 288 Md. at 486-87, 418 A.2d at 1202; *Pollokoff*, 44 Md. App. at 189-90, 407 A.2d at 800. Both cases concerned jurisdictional restrictions imposed by statute. See MD. CODE ANN., CTS. & JUD. PROC. §§ 4-401-402 (1974) (providing exclusive jurisdiction in state district court for contract and tort claims under \$5000, concurrent jurisdiction in state district and circuit court for other claims exceeding \$2500, and removing equity jurisdiction from state district court with some exceptions).

95. *Pollokoff*, 44 Md. App. at 189, 407 A.2d at 800.

96. *Id.* at 189-90, 407 A.2d at 800.

97. *Id.* at 189, 407 A.2d at 800. Neither the Court of Special Appeals nor the Court of Appeals opinions indicated how many other account holders might have been potential class members; the latter court observed that, because the trial court had concluded that the jurisdictional amount could not be met by aggregation, it made no factual determination as to the total dollar amount that would result from the aggregation of class claims. See *Pollokoff*, 288 Md. at 488 n.3, 418 A.2d at 1203 n.3.

98. *Pollokoff*, 44 Md. App. at 189, 407 A.2d at 800.

99. *Id.* at 189-90, 407 A.2d at 800.

100. *Id.* at 190, 407 A.2d at 801.

101. *Id.* at 192, 407 A.2d at 801 (citing *Zahn v. International Paper Co.*, 414 U.S. 291 (1973); *Snyder v. Harris*, 394 U.S. 332 (1969)).

102. *Id.* There was a more fundamental obstacle to the district court's involvement in class actions. Rule 209 applied only to Maryland courts of general jurisdiction, and not the district court. Accordingly, no rule authorized the certification of a class in district court. See *Pollokoff*, 288 Md. at 498, 418 A.2d at 1208 (declining to express an opinion on this issue because it was not before the court).

ever, that it was the wrong forum to resolve this issue and invited the plaintiffs to seek relief from the Legislature or from the Court of Appeals through a change in the class action rule.¹⁰³

The plaintiffs appealed to the Court of Appeals, which issued its own decision in September 1980.¹⁰⁴ Relying on its previous decisions, the Court of Appeals noted that multiple claims of the same plaintiff against the same defendant may be aggregated in a determination of the amount in controversy.¹⁰⁵ The Court of Appeals also noted that federal case law prohibited the aggregation of distinct and several claims for purposes of meeting jurisdictional requirements, including in the context of class actions.¹⁰⁶ Although the issue had not been considered by Maryland's appellate courts prior to *Pollokoff*, the Court of Appeals also noted that two Maryland trial courts had denied aggregation of class members' separate and distinct claims in reliance on the Supreme Court's *Snyder v. Harris* decision.¹⁰⁷ Moreover, the court, noting that class aggregation had been rejected by several state courts,¹⁰⁸ found particularly persuasive the rationale stated by the Court of Appeals of Kentucky:

103. *Pollokoff*, 44 Md. App. at 192, 407 A.2d at 801.

104. *Pollokoff*, 288 Md. at 501, 418 A.2d at 1210.

105. *Id.* at 490-92, 418 A.2d at 1204-05 (discussing *Purvis v. Forrest Street Apartments*, 286 Md. 398, 403, 408 A.2d 388, 391 (1979), which held that a landlord's two claims, one for unpaid rent and the other for possession of the premises, could be aggregated to meet the amount in controversy requirement, and *Reese v. Hawks*, 63 Md. 130, 130-32 (1885), which held that the interest on two promissory notes and their principal sums could be aggregated to meet the jurisdictional amount in controversy). The Court of Appeals noted that the federal courts had also reached the conclusion that multiple claims of the same plaintiff against the same defendant may be aggregated. See *id.* at 492, 418 A.2d at 1205 (citing 14 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3704, at 411 (1st ed. 1972)).

106. *Id.* at 492-94, 418 A.2d at 1205-07 (citing *Zahn*, 414 U.S. at 301 (holding that no action could be maintained on behalf of plaintiffs whose separate and distinct claims could not satisfy the jurisdictional amount); *Snyder*, 394 U.S. at 338 (same); *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 593 (1939) (same); *Pinel v. Pinel*, 240 U.S. 594, 596 (1916) (same); *Oliver v. Alexander*, 31 U.S. (6 Pet.) 143, 147 (1832) (same)).

107. *Id.* at 495, 418 A.2d at 1207 (citing *Little v. Tinley*, DAILY RECORD, Dec. 14, 1977, at 2 (Cir. Ct. for Anne Arundel County 1977) (disallowing aggregation as to contract claims of apartment project tenants), *aff'd*, 45 Md. App. 178, 412 A.2d 251 (1980); *Siegrist v. Continental Ins. Co.*, DAILY RECORD, Nov. 27, 1972, at 2 (Sup. Ct. of Baltimore City Nov. 10, 1972) (disallowing aggregation of insurance premium overcharges)).

108. *Id.* at 499, 418 A.2d at 1209 (citing *Curtis Publ'g Co. v. Bader*, 266 So. 2d 78, 79 (Fla. Dist Ct. App. 1972) (holding that claims may not be aggregated to meet minimum jurisdictional requirements); *Kentucky Dep't Store, Inc. v. Fidelity-Phoenix Fire Ins. Co.*, 351 S.W.2d 508, 509 (Ky. 1961) (same); *Davies v. Columbia Gas & Elec. Corp.*, 86 N.E.2d 603, 607 (Ohio 1949) (same); *Berberian v. New England Tel. & Tel. Co.*, 369 A.2d 1109 (R.I. 1977) (same); *Bolling v. Old Dominion Power Co.*, 25 S.E.2d 266, 268 (Va. 1943) (same)). The *Pollokoff* court noted that, after *Davies*, Ohio Rule of Civil Procedure 23(f) permitted aggregation of claims. *Id.*

It has been uniformly held in this jurisdiction that the independent claims of several plaintiffs against the same defendant, even though they may be and are joined . . . in one action, cannot be added together for the purposes of jurisdictional amount. . . . If the claims of parties who actually join as plaintiffs cannot be aggregated, it is an apodictic proposition that neither can the claims of nonappearing parties.¹⁰⁹

On this basis, the Court of Appeals affirmed the judgment of the Court of Special Appeals.¹¹⁰

The *Pollokoff* case attracted the interest of the Standing Committee on Rules of Practice and Procedure after the Court of Special Appeals announced its decision in November 1979. Judith C. Levinson, the Assistant Reporter to the Committee, forwarded the court's opinion to Albert D. Brault, a member of the subcommittee reviewing the class action rule; she noted particularly the court's comment that the issue raised might best be resolved by a change in the rule or by the state legislature.¹¹¹ The entire Committee then reviewed the Court of Appeals' decision at its November 21, 1980 meeting.¹¹²

The Committee's discussion focused almost entirely on how the *Pollokoff* decision could be circumvented, either by the class proponent seeking relief which only the circuit courts could grant,¹¹³ one-way intervention,¹¹⁴ narrow construction,¹¹⁵ supplemental jurisdic-

109. *Id.* at 499-500, 418 A.2d at 1209 (ellipses in original) (internal quotation marks omitted) (quoting *Kentucky Dep't Store*, 351 S.W.2d at 509).

110. *Id.* at 501, 418 A.2d at 1210.

111. Letter from Judith C. Levinson, Assistant Reporter, The Court of Appeals of Maryland Standing Committee on Rules of Practice and Procedure, to Albert D. Brault, Member, Standing Committee on Rules of Practice and Procedure (Dec. 3, 1979).

112. See 1980 STANDING COMMITTEE MINUTES, *supra* note 2, at 14-16.

113. See *id.* at 14-15 (discussing a proposal to confer circuit court jurisdiction in a class action suit, regardless of the amount in controversy, if the plaintiff seeks injunctive or declaratory relief, but noting that circuit courts either might not render a judgment below their jurisdictional amounts, or permit a legal claim for damages to be recharacterized as an equitable action to have money returned from plaintiffs to defendants). In fact, other than the district court's replevin and tenant jurisdiction, which is exclusive, see MD. CODE ANN., CTS. & JUD. PROC. § 4-401(2), (4) (1995 & Supp. 1997), and its concurrent jurisdiction over certain family law cases, see MD. CODE ANN., FAM. LAW §§ 1-201, 4-501(d) (1999 Repl. Vol.), the district court has no equity jurisdiction. See MD. CODE ANN., CTS. & JUD. PROC. § 4-402(a). Thus, any class relief which was truly equitable in nature could only have been brought in the circuit court.

114. See 1980 STANDING COMMITTEE MINUTES, *supra* note 2, at 15 (discussing the possibility that a plaintiff who fails to meet the jurisdictional amount of the circuit court could bring the action in a district court, and that if the case is decided favorably to the plaintiff, other class members could invoke collateral estoppel to win in the district court, but noting that the purpose of the class action is to avoid a multiplicity of suits); see also *supra* note 55 and accompanying text (discussing the intent of the 1966 amendments of the federal

tion,¹¹⁶ or simple overruling.¹¹⁷ Ultimately, however, the Committee

rule to eliminate the procedural unfairness posed by one-way intervention in the context of a "spurious" class action).

115. See 1980 STANDING COMMITTEE MINUTES, *supra* note 2, at 15-16 (discussing the suggestion of Professor Bowie that the Court of Appeals be persuaded to construe its holding in *Pollkoff* narrowly, by holding in other cases that the amount in controversy is the total amount wrongfully collected by the defendant rather than the individual amount lost by a plaintiff); see also *Pollkoff*, 288 Md. at 496, 418 A.2d at 1207-08 (distinguishing the issue of aggregation in the context of taxpayer suits from the jurisdictional amount problem presented in *Pollkoff*).

116. See 1980 STANDING COMMITTEE MINUTES, *supra* note 2, at 16 (noting Mr. Ryan's question "whether a plaintiff who meets the jurisdictional amount of the circuit court may join other plaintiffs whose claims for relief do not meet the requisite amount in controversy").

This issue of supplemental jurisdiction has been addressed, albeit in a confusing manner, under federal law. First, the Supreme Court held that each plaintiff in a rule 23(b)(3) class action "must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—'one plaintiff may not ride in on another's coattails.'" *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973) (quoting *Zahn v. International Paper Co.*, 469 F.2d 1033, 1035 (2d Cir. 1972)).

Subsequently, Congress passed the Judicial Improvements Act of 1990, including a new supplemental jurisdiction statute, which provides that "the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367(a) (1994). The statute exempts, however, claims under certain of the Federal Rules (14, 19, 20, and 24), but *not* Rule 23. *Id.* § 1367(b). Thus, on its face, this statute appears to overrule *Zahn* by conferring supplemental jurisdiction over class claims that do not meet the amount in controversy minimum.

There are indications, however, that Congress did not intend this result. Three individuals who assisted in the drafting of this statute later wrote that they intended the rule in *Zahn* to survive this statute. See Thomas D. Rowe, Jr. et al., *Compounding or Creating Confusion about Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943, 960 n.90 (1991). Moreover, the Fifth Circuit has observed that the legislative history of the statute indicates that Congress's intent was limited to overruling *Finley v. United States*, 490 U.S. 545 (1989), which had held that "federal courts could not exercise pendent-party jurisdiction without an express legislative grant, a grant never thought necessary before." *In re Abbot Labs.*, 51 F.3d 524, 528 (5th Cir. 1995). This court further observed that, according to the legislative history, *Zahn* was a pre-*Finley* case, and the statute was "not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*." *Id.* (internal quotation marks omitted) (quoting 1990 U.S.C.C.A.N. at 6860, 6875).

As a result of this confusion, a federal court interpreting § 1367 must choose between the plain meaning of the statute, which would allow supplemental jurisdiction, and its legislative history, which would not. For example, the Fifth Circuit chose the former course because, despite its acknowledgment of the legislative history noted above, it was not absurd to overrule the rule in *Zahn*, and "the statute is the sole repository of congressional intent where the statute is clear and does not demand an absurd result." *Id.* at 529.

Many courts, however, have disagreed with the Fifth Circuit's approach. See, e.g., *Daniels v. Philip Morris Cos.*, 18 F. Supp. 2d 1110, 1114 (S.D. Cal. 1998) (stating that, to overrule *Zahn* would have "profound implications" by "allow[ing] individuals with claims which do not independently satisfy the amount in controversy requirement to bootstrap those insufficient claims into federal court"); *Stern v. Ford Motor Co.*, No. C-98-2710MMC, 1998 WL 646673, at *1 (N.D. Cal. July 20, 1998) ("It is well-settled that in federal class actions,

decided that the new class action rule it was drafting should not address the jurisdictional issues raised by *Pollokoff*.¹¹⁸ In 1987, the Maryland legislature passed a statute directly abrogating *Pollokoff*.¹¹⁹

In its November 21, 1980 meeting, the Committee also set the parameters for the class action rule that it was considering. The Committee resolved to make only procedural changes in the rule¹²⁰ and to retain its character as a general rule instead of one delineating detailed requirements for class certification.¹²¹ Despite its apparent resolve to keep the class action rule uncluttered, the Committee voted that the new rule should establish some form of certification process,¹²² and that it should specify different categories of class action.¹²³ The Committee also agreed to retain the general notice provisions of

'plaintiffs may not aggregate their "separate and distinct" claims in an attempt to reach the jurisdictional minimum' for diversity jurisdiction." (quoting *Snow v. Ford Motor Co.*, 561 F.2d 787, 789 (9th Cir. 1977)); *Tortola Restaurants v. Kimberly-Clark Corp.*, 987 F. Supp. 1186, 1190 (N.D. Cal. 1997) (agreeing that "the Judicial Improvements Act did not overrule the Supreme Court decision in *Zahn*" (footnote omitted)); *Snider v. Stimson Lumber Co.*, 914 F. Supp. 388, 392 (E.D. Cal. 1996) ("[T]his court, joining the vast majority of district courts around the country, concludes that where plaintiffs base jurisdiction of a class action upon diversity and allege separate and distinct claims, they must allege that each class member has a \$50,000 [now \$75,000] claim to maintain the case."); *Waters v. Grosfeld*, 904 F. Supp. 616, 620 (E.D. Mich. 1995) (finding that, based on legislative history, section 1367 does not overrule *Zahn*).

Finally, it is worth noting that courts do not seem yet to have addressed the question of how a class representative's case can be "typical" of the class claims where there is a disparity in the valuation of the case such that the representative's case is worth more than the jurisdictional amount but the remainder of the class claims fall below that amount.

117. See 1980 STANDING COMMITTEE MINUTES, *supra* note 2, at 16 (discussing the advisability of overruling *Pollokoff* and alternatives to doing so).

118. See *id.* at 19 (deciding that the new class action rule "should not address jurisdictional issues, and that such issues should be left to the legislature to decide"); 1981 STANDING COMMITTEE MINUTES, *supra* note 90, at 1 (same).

119. Act of June 2, 1987, ch. 613, 1987 Md. Laws 2879 (codified as amended at MD. CODE ANN., CTS. & JUD. PROC. § 4-402 (1995 & Supp. 1997)). The current code provides that "[i]n the case of a class action, the separate claims of the proposed members of the class may be aggregated to meet the minimum amount in controversy." MD. CODE ANN., CTS. & JUD. PROC. § 4-402(d)(ii) (Supp. 1997).

120. See 1980 STANDING COMMITTEE MINUTES, *supra* note 2, at 18 (noting the Committee's decision "that the general policies embodied in Rule 209 be retained").

121. See *id.* (noting that the current rule "merely recognizes the general right to maintain a class action" and arguing that "it would be a mistake to make a radical policy decision to eliminate this Rule when the legislature has implicitly adopted its general purpose [by not having supplied any details]").

122. See *id.* at 19 (adopting the motion that the "rule contain some type of certification process, generally requiring that a judge should give early consideration to the question of whether a class action should be maintained").

123. See *id.* (adopting the motion that the "rule distinguish between those class actions which are discretionary and those which may be maintained as of right").

Rule 209,¹²⁴ as well as the requirement that a judge be consulted before any party to a class action settles or dismisses the action.¹²⁵

The subcommittee charged with the task of drafting the new class action rule was given the freedom to rethink the issues decided by the full Committee, taking the Committee's decisions only as general guidance.¹²⁶ The subcommittee took this advice to heart, and presented a draft rule to the Committee, at its January 9, 1981 meeting, that owed much more to the federal rule than to the current Maryland rule.¹²⁷

124. *See id.* at 19-20 (adopting the motion that the general notice provisions of the rule be maintained and that more specific notice issues be left to the legislature).

125. *Id.* at 20.

126. *Id.*

127. *See* 1981 STANDING COMMITTEE MINUTES, *supra* note 90, at 10-12 (setting forth the text of draft rule 2-3, as it was tentatively numbered). The draft rule was as follows:

(a) Prerequisites to a Class Action

One or more members of a class may sue or be sued as representative parties on behalf of all if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable

(1) Of Right

An action may be maintained as a class action if the prerequisites of section (a) are satisfied, and in addition:

(A) the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(B) the prosecution of separate actions by or against individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(C) 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.

(2) Permissive

The court may permit an action to be maintained as a class action if the court finds that the 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.

(c) Certification

Unless deferred by the court, as soon as practicable after the commencement of a class action, the court shall determine whether it is to be so maintained. The court shall by order certify or refuse to certify the action as a class action. If appropriate, the court may certify the action as a class action with respect to a particular claim, issue, or mode of relief or divide the class into subclasses. The

The Committee noted that the draft section (a) was the same as Federal Rule 23(a),¹²⁸ and was substantially similar to then current Maryland Rule 209a.¹²⁹ This portion of the draft rule was approved without comment.¹³⁰ The Committee also noted that subsection (b) of the Maryland draft rule is derived from Federal Rule 23(b).¹³¹ However, the second sentence of Rule 23(b)(3), describing the matters pertinent to the court's determination of whether common questions of law or fact predominate over questions affecting only individual members, was omitted from this draft of the Maryland rule.¹³²

certification order may be conditional and may be altered or amended before the decision on the merits.

(d) Orders in Conduct of Action

The court at any stage of the action may impose such terms as shall fairly and adequately protect the interests of the class members including an order that notice be given in such manner as it may direct of the pendency of the action, of a proposed settlement, of rendition of judgment, or the need to present claims, or of any other proceedings in the action.

(e) Exclusion

In an action brought under section (b)(2), notice shall be given in such manner as the court directs advising each class member that that class member may request exclusion from the class and that if no request for exclusion is made the class member will be bound by the judgment, and may, if the class member desires, enter an appearance through counsel.

(f) Discovery

Discovery under Chapter 2-400 may be used only upon order of the court against a member of the class who is not a representative party or who has not appeared.

(g) Dismissal or Compromise

A class action may not be dismissed or compromised without court approval.

Id.

128. In fact, the Maryland draft differed in one small respect. As presented to the Committee, section (a) provided that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all if . . ." *Id.* at 10. By contrast, Rule 23 provides that one or more members of a class may sue or be sued as representative parties on behalf of all "only if . . ." FED. R. CIV. P. 23(a) (emphasis added). It is unlikely that this omission would have caused a problem, because this section of the draft rule is phrased in the conjunctive, making a class certifiable only if all four of the requirements have been met. Apparently to avoid any potential for mischief, however, the missing "only" was added to the final version of the rule, which now reads exactly as its federal counterpart. *See* MD. RULE 2-231.

129. 1981 STANDING COMMITTEE MINUTES, *supra* note 90, at 13.

130. *Id.*

131. *Id.*

132. *Id.* Compare *id.* at 10-12 (setting forth the text of the draft rule) with FED. R. CIV. P. 23(b)(3). The missing language was eventually added to this subsection in order to provide some guidance to the court and attorneys. *See* THE COURT OF APPEALS OF MARYLAND STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, MINUTES OF THE MEETING OF STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 72 (Mar. 11-12, 1983) [hereinafter 1983 STANDING COMMITTEE MINUTES].

The draft rule was hardly a "general" approach to class certification and certainly deviated both from then current Maryland Rule 209 and the resolution of the Committee two months before.¹³³ Apparently, however, the Committee did not disagree with the approach the subcommittee had taken, because the discussion recorded in the Committee's minutes revolved principally around the headings which had been added to the subsections of the rule.¹³⁴

Indeed, the remainder of the Committee's comments show that the members had moved from their insistence on a "general" rule to seeking more detail in the class action rule. The Committee unanimously adopted a motion requiring the rule to define a procedure by which the certification process is triggered and adding the right to a hearing on class certification by request.¹³⁵ Moreover, the Committee agreed to insert language similar to that contained in the Uniform Class Action Rule that an order explaining the court's certification decision should be built into the court's ruling.¹³⁶

One issue which the Committee declined to resolve involved the appealability of a certification order. Although one Committee member questioned the wisdom of deferring the resolution of this issue to case law, another member, Mr. Sykes, observed that the position of the Committee "has always been to defer to the legislature on matters concerning appealability."¹³⁷ A motion that the rule should address the question of whether an order certifying or refusing to certify a class is immediately appealable was defeated.¹³⁸

Although the Committee had originally determined that notice issues were "political" in nature,¹³⁹ and therefore best left to the legislature, the Committee also decided that the new Maryland Rule required more notice information than had been drafted. After debate, the Committee decided to adopt the language of Federal Rule 23(c),

133. See *supra* notes 120-125 and accompanying text.

134. See 1981 STANDING COMMITTEE MINUTES, *supra* note 90, at 14-16 (noting that the headings "of right" and "permissive" would be misleading when used in conjunction with language from the federal rule, because the latter did not contain these headings). The ultimate version of the Maryland Rule adopted the headings used by the federal rule. Compare FED. R. CIV. P. 23(a) ("Prerequisites to a class action") with MD. RULE 2-231(a) (same) and FED. R. CIV. P. 23(b) ("Class actions maintainable") with MD. RULE 2-231(b) (same).

135. 1981 STANDING COMMITTEE MINUTES, *supra* note 90, at 16-17.

136. *Id.* at 17-18; see MD. RULE 2-231(c) (incorporating this requirement).

137. 1981 STANDING COMMITTEE MINUTES, *supra* note 90, at 18.

138. See *id.* (noting that the legislature should be informed of the Committee's decision and invited to address the appealability issue).

139. *Id.* at 22 ("The Reporter responded that [a portion of Fed. R. Civ. P. 23(c)(2)] was deleted in accordance with the Committee's directive not to deal with such 'political' issues as notice.").

excluding the language "the best notice practicable under the circumstances," and adding language, where necessary, to conform the new rule to previous decisions made by the Committee.¹⁴⁰ The Committee also adopted the language of Federal Rule 23(d) in its entirety.¹⁴¹ Finally, the Committee decided to adopt the language of Federal Rule 23(e), which provides that a class action shall not be dismissed or compromised without notification to the class members, without additions or deletions.¹⁴² Accordingly, after having initially taken the position that it would leave notice issues to the legislature, the Committee adopted all of the federal rule's notice provisions with only minor alterations.

The Committee then laid the class action rule aside for two years, returning to it in March 1983.¹⁴³ The rule had been re-drafted to conform with the resolutions of the Committee, with one significant exception. Rule 2-231(b)(3), as it had been renumbered, now contained language from Federal Rule 23(b)(3), concerning criteria for the court to consider in determining whether common questions of law or fact predominate over questions affecting only individual members, which had been previously omitted.¹⁴⁴ An explanatory note appended to the draft indicated that this language had been added to the subsection in light of a comment received from the Attorney General's office, and that this language would afford "some guidance to the court and the attorneys."¹⁴⁵ The revision to subsection (b)(3) was accepted, and with it, the rule came to be in its present form.¹⁴⁶

The first opinion to review the new Maryland class action rule, *Snowden v. Baltimore Gas & Electric Co.*,¹⁴⁷ is a stark illustration of the problem caused by the Committee's decision not to address the ap-

140. *Id.* at 23-24.

141. *Id.*

142. *Id.* at 24-25.

143. See 1983 STANDING COMMITTEE MINUTES, *supra* note 132.

144. See *supra* note 132 and accompanying text.

145. 1983 STANDING COMMITTEE MINUTES, *supra* note 132, at 72.

146. See MD. RULE 2-231. Before the adoption of the new class action rule, the Court of Special Appeals had reason to consider the old rule one last time. See *Kirkpatrick v. Gilchrist*, 56 Md. App. 242, 250, 467 A.2d 562, 566 (1983) (holding that the trial court erred in dismissing the case because it should have ruled on the request for class certification before or concurrently with ruling on the preliminary motion for want of necessary parties). The Court of Special Appeals interpreted then extant Rule 209 as requiring notice to all class members, *id.*, without understanding that notice has never been required in class actions seeking equitable or declaratory relief, as was true in this case. See *supra* notes 43, 84 and accompanying text (discussing the absence of the notice requirement in this context). Because this case concerned an old version of the class action rule, and is questionable in its own right, it is best viewed as no longer applicable.

147. 300 Md. 555, 479 A.2d 1329 (1984).

pealability of a class certification decision.¹⁴⁸ In *Snowden*, the trial court determined that the named plaintiff was not an adequate class representative because his claim could not be typical of a class.¹⁴⁹ In view of the nonrepresentative character of the suit, the trial court granted the defendant's motion for determination of nonclass status,¹⁵⁰ and ordered that the action should be "dismissed as to the unnamed plaintiffs, members of the alleged class of others similarly situated."¹⁵¹ The class proponents then filed a motion with the trial court requesting that its order determining nonclass status be made final and appealable under former Maryland Rule 605a; the trial court granted this motion.¹⁵² After the plaintiff appealed, the Court of Appeals issued a writ of certiorari and requested supplemental briefing on the issue of "[w]hether the circuit court's order . . . constitutes an appealable judgment in light of Maryland Rule 605a."¹⁵³ Thus, the Court of Appeals posed the question the Committee had declined to answer: Is a class certification decision an appealable order?

The Court of Appeals noted that Rule 605a had been construed to permit the disposal of one entire claim, in a case where there are multiple claims,¹⁵⁴ and that the term "multiple claims" had been construed to include "multiple parties."¹⁵⁵ Thus, the court reasoned that, "if a trial court's order is dispositive with respect to one party, the order can be made final as to that party by the express determination and direction required under Rule 605a."¹⁵⁶ The Court of Appeals also noted, however, that it had not previously reached this issue in the context of a class action, but that the federal courts had.¹⁵⁷

148. See *supra* notes 137-138 and accompanying text.

149. *Snowden*, 300 Md. at 558, 479 A.2d at 1330.

150. Although the Court of Appeals did not comment on this method of raising the issue of class certification with the trial court, this case demonstrates that a class opponent need not be a passive participant in the certification process. See MD. RULE 2-231(c) (noting that the court shall determine whether a suit is to be maintained as a class action "[o]n motion of any party or on the court's own initiative" (emphasis added)).

151. *Snowden*, 300 Md. at 558, 479 A.2d at 1330 (internal quotation marks omitted) (quoting trial court's order).

152. See *id.* at 558 & n.1, 479 A.2d at 1331 & n.1 (quoting Rule 605, now amended and renumbered as MD. RULE 3-602, which provided that a court could enter final judgment on less than all of the claims in a suit only if there were no just reason for delay, and that, in the absence of such reason, any other order adjudicating less than all the claims was revisable and would not terminate the action as to any of the claims).

153. *Id.* at 559, 479 A.2d at 1331 (internal quotation marks omitted) (quoting order by Court of Appeals requesting additional briefing).

154. *Id.* at 560, 479 A.2d at 1332.

155. *Id.* at 561, 479 A.2d at 1332 (citations omitted).

156. *Id.*

157. *Id.* The rationale for applying Rule 605a would be that the "parties" whose claims would be disposed of, making the class certification decision appealable, would be the

In light of the similarities between Maryland Rule 605a and Federal Rule 54(b),¹⁵⁸ the Court of Appeals looked to the Supreme Court's decision in *Coopers & Lybrand v. Livesay*.¹⁵⁹ In *Livesay*, the Court rejected the so-called "death knell" doctrine, according to which an order denying class certification is appealable if it is likely to sound the death-knell of the litigation.¹⁶⁰ The Court held that the death knell doctrine provided insufficient support for considering class certification orders a "final decision" within the meaning of [28 U.S.C.] § 1291," and therefore that such orders were not appealable as a matter of right.¹⁶¹ The Court found that certification orders were only appealable, if at all, under the procedure set forth in the Federal Interlocutory Appeals Act of 1958.¹⁶²

In *Snowden*, the Court of Appeals concluded that, because a class certification decision is not dispositive with respect to an entire claim or party, such decisions are not appealable under Maryland Rule 605a.¹⁶³ The problem for Maryland practitioners, of course, is that Maryland has no statute or rule that parallels the Federal Interlocutory Appeals Act.¹⁶⁴ As a result, a Maryland class certification decision is not appealable, and this certification battle can become—for both class proponents and opponents—the entire war. A loss for the class proponents means lengthy and expensive litigation with no guarantee that an appellate court will decide that a class should have been certified. By contrast, a certified class means that a class opponent will have to litigate a case that could have enormous economic ramifica-

absent class members, who would no longer be part of the litigation if the class was not certified.

158. *Id.* (citing *Diener Enters. v. Miller*, 266 Md. 551, 554, 295 A.2d 470, 472 (1972)).

159. 437 U.S. 463 (1978).

160. *See id.* at 469-70. This doctrine is unfair because it confers the advantage of appeal only on the class proponent, while denying it to the class opponent, even though the grant of class certification also can have a serious impact upon the latter. *See In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (noting that pressure on defendants to settle a certified class action can be so great as to constitute a "blackmail settlement[]" (quoting HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 120 (1973))). Despite this unfairness, some state courts have adopted this doctrine or its rationale. *See, e.g., Butler v. Audio/Video Affiliates, Inc.*, 611 So. 2d 330, 331 (Ala. 1992) (noting the death-knell effect of a denial of class certification).

161. *Livesay*, 437 U.S. at 477.

162. *Id.* at 474-75, 475 n.27; *see also* 28 U.S.C. § 1292(b) (1994) (providing a discretionary procedure for a federal appellate court to review controlling questions of law that, although not immediately appealable, involve "a substantial ground for difference of opinion," if their resolution "may materially advance the ultimate termination of the litigation").

163. *Snowden v. Baltimore Gas & Elec. Co.*, 300 Md. 555, 566-67, 479 A.2d 1329, 1335 (1984).

164. *Id.* at 563 n.7, 479 A.2d at 1333 n.7.

tions if it loses.¹⁶⁵ In both cases, the pressure to settle can be irresistible. Accordingly, for both plaintiffs and defendants, the Court of Appeals's decision in *Snowden* was unfortunate.¹⁶⁶

The court's ruling in *Snowden*, however, is probably consistent with the Maryland class action rule as currently drafted. The rule provides that a class action order "may be conditional and may be altered or amended before the decision on the merits."¹⁶⁷ In light of this language, it is difficult to argue that a class certification decision is so "final" that it can be appealable under the Maryland Rules or the opinions construing those rules. The rightness of the *Snowden* decision, however, is little comfort to those parties, either proponents or opponents of a class, who are trapped into making significant decisions about litigation without any true recourse to an independent review of a trial court's certification decision.¹⁶⁸

After *Snowden*, there have been few opinions that even mention the class action rule; the only significant opinion is one which construed the aggregation provision of the Maryland Code. In *Rein v. Koons Ford, Inc.*,¹⁶⁹ Maryland residents and class members who purchased cars from a Virginia dealership brought claims, under a Virginia statute, of \$100 each against the dealership. Because the law of the forum governs procedural issues, the court considered whether these \$100 claims could be aggregated to meet the \$2500 jurisdic-

165. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d at 1298 (positing scenarios under which defendants may face intense pressure to settle their suits if the plaintiff class is certified).

166. Another procedural device for granting review of class certification decisions—the writ of mandamus—has been used in federal court but, practically speaking, would be unavailable in Maryland. See, e.g., *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1090 (6th Cir. 1996) (granting a petition for a writ of mandamus directing the district judge to decertify the plaintiff class); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d at 1304 (same). This vehicle to review is unavailable in Maryland because, while a court may issue a writ of mandamus to correct lower court decisions that are contrary to law, or that are unsupported by evidence, see *State Dep't of Health v. Walker*, 238 Md. 512, 523, 209 A.2d 555, 561 (1965), the purpose of mandamus is to "prevent disorder, from a failure of justice, where the law has established no specific remedy, and where in justice and good government there ought to be one." *In re Petition for Writ of Prohibition*, 312 Md. 280, 307, 539 A.2d 664, 766 (1988) (quoting *Runkel v. Winemiller*, 4 H. & McH. 429, 449 (Md. 1799)). The Court of Appeals has never granted a writ of mandamus to review a lower court's ruling on the issue of class certification and, on the contrary, has indicated that it will not issue this writ in order to micromanage complex litigation. See *Keene Corp. v. Levin*, 330 Md. 287, 294, 623 A.2d 662, 665-66 (1993).

167. MD. RULE 2-231(c).

168. Although *Snowden* represents the last word at present on this issue, the Maryland Rules Committee can, and should, act to add an appeals subsection of the class action rule. See *infra* Part IV.A (suggesting that Maryland should adopt a rule allowing for the interlocutory appeal of class certification decisions as soon as possible).

169. 318 Md. 130, 567 A.2d 101 (1989).

tional minimum for Maryland Circuit Court.¹⁷⁰ The Court of Appeals held that Section 4-402(d)(1)(ii) of the Courts and Judicial Proceedings Article of the Maryland Code “permits the separate claims of proposed members of [a] class to be aggregated to meet the minimum amount in controversy for circuit court jurisdiction.”¹⁷¹

III. THE CLASS ACTION RULE INTERPRETED

The Maryland case law analyzing the class action rule is sparse, and provides little help to the practitioner seeking to bring or defend a class action. Because the Maryland rule is almost identical to the federal rule, however, the case law interpreting that rule can be used as a guidepost to practice in the state court.¹⁷² The vast amount of federal case law, however, is a Pandora’s box of conflicting opinions, which reflect the judicial trends of the time, and confirm that class actions are creatures of the specific facts of the case in which they are sought.

This Part seeks to provide an elementary overview of some fundamental principles of class action practice. The reader is cautioned, however, that this Article is intended to be neither exhaustive nor definitive and should be viewed only as a starting place for further research.¹⁷³ Moreover, this Article is written at a time when heightened judicial interest in the class action device is bringing new opinions at a rapid rate, and in which the rule itself is changing.¹⁷⁴ Accordingly, the practitioner is advised to review the currency of a particular holding before relying on it.

A. *The Class Representative Must Be a Member of the Class*

It is axiomatic that a class representative must be a member of the class he or she seeks to represent.¹⁷⁵ Indeed, it is rare for a proposed

170. *Id.* at 147, 567 A.2d at 109.

171. *Id.*

172. See *Pollokoff v. Maryland Nat’l Bank*, 288 Md. 485, 491, 418 A.2d 1201, 1205 (1980) (“A large body of decisional law has been developed in the federal courts interpreting the federal standard, which, while not binding, is a logical reference.”). Throughout this Part, classes will be discussed by reference to their subdivision in the federal rules—(b)(1)(B), (b)(3), and so on. The appropriate Maryland rule section will also be given, and any significant differences between the federal and the Maryland rules will be discussed.

173. There are several valuable research tools for the class action practitioner. See THOMAS A. DICKERSON, *CLASS ACTIONS: THE LAW OF 50 STATES* (1988); *MANUAL FOR COMPLEX LITIGATION (THIRD)* (1995); LINDA S. MULLENIX, *MASS TORT LITIGATION: CASES AND MATERIALS* (1996); NEWBERG & CONTE, *supra* note 12.

174. See *infra* Part IV.

175. See 7A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1761, at 132-33 (2d ed. 1986) (“This prerequisite is inherent in the real party in interest require-

class representative to seek to represent a class of which he or she is not facially a member. Complications can arise, however, when the proposed class representative faces a procedural bar to class membership.

Courts have held that the existence of a unique defense to the claims of a proposed class representative does not render that representative's claim atypical for purposes of Rule 23(a)(3).¹⁷⁶ A proposed class representative who is time-barred from pursuing a claim, however, is not truly a member of the class, and therefore fails to meet the threshold requirement of Federal Rule of Civil Procedure 23(a).¹⁷⁷

An attorney who is also a member of a class cannot function both as class counsel and as class representative.¹⁷⁸ The problem in this arrangement is the inherent conflict of interest between the attorney, who has an interest in receiving as great a fee as possible, and the class, which has an interest in minimizing the attorney's fee.¹⁷⁹

B. *The Representative Party Must Sue or Have Been Sued*

Both Maryland Rule 2-231 and Federal Rule of Civil Procedure 23 provide that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all."¹⁸⁰ In *In re Teletronics Pacing Systems, Inc.*, however, a federal district court found that it is "unnecessary for a class member to have filed an individual action in order to qualify as a class representative."¹⁸¹ This view can pose significant

ment prescribed by Rule 17(a) and is reinforced by the statement in Rule 23(a) that "one or more members of a class may sue or be sued as representative parties . . ." (ellipsis in original) (footnote omitted) (quoting FED. R. CIV. P. 23(a)).

176. See, e.g., *Smith v. B & O R.R. Co.*, 473 F. Supp. 572, 581 (D. Md. 1979) (finding that the unique defense of estoppel did not make plaintiff's claim atypical).

177. See, e.g., *Weinberger v. Retail Credit Co.*, 498 F.2d 552, 556 (4th Cir. 1974) (holding that because section 4B of the Clayton Act time-barred plaintiff's claim, he was not a member of the class and therefore did not fulfill the first prerequisite of Rule 23(a)); *In re Nissan Motor Corp. Antitrust Litig.*, 82 F.R.D. 193, 196 (S.D. Fla. 1979) (ordering the dismissal of two plaintiffs whose claims were time-barred because they were "inadequate representatives" under Rule 23(a)(4)).

178. See *Kramer v. Scientific Control Corp.*, 534 F.2d 1085, 1093 (3d Cir. 1976) (concluding that "no member of the bar . . . may serve as counsel to the class if the action might result in the creation of a fund from which an attorneys' fee [would be paid]").

179. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 8.14, at 493 (1986) (discussing class and lawyer conflicts); Thomas J. Urbelis, Comment, *The Attorney as Plaintiff and Quasi-Plaintiff in Class and Derivative Actions: Ethical and Procedural Considerations*, 18 B.C. INDUS. & COM. L. REV. 467, 474-76 (1977) (discussing potential conflicts in areas of fees, solicitation, and settlement).

180. FED. R. CIV. P. 23(a); MD. RULE 2-231(a).

181. 172 F.R.D. 271, 283 (S.D. Ohio 1997). The author of this Article was one of the attorneys involved in the defense of the *Teletronics* litigation.

problems in multiple defendant cases, or cases in which there are several groups of class members with different, but related, interests.¹⁸² Hence, it is important to see the flaw in the court's reasoning by examining the language of the Federal Rules of Civil Procedure.

The rules of civil procedure do not define the term "party." An examination of the rules taken together, however, makes clear that a "party" is one who has sued or is being sued in current litigation,¹⁸³ or one who has intervened in the action, and is therefore an active, not passive, litigant.¹⁸⁴ The provision of Federal Rule 23 that a class member can sue or be sued as a representative party clearly contemplates active participation in the litigation.¹⁸⁵ In Maryland, the requirement that only the representative parties shall be considered "parties" for discovery purposes is an even stronger indication that the representative party must have filed suit against the defendant, or have been sued by the defendant, in order to qualify as a class representative.¹⁸⁶

182. See *infra* note 195 and accompanying text.

183. See, e.g., FED. R. CIV. P. 11 (providing that "[e]very pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party"); FED. R. CIV. P. 17(a) (requiring that every action "shall be prosecuted in the name of the real party in interest"); FED. R. CIV. P. 19(a) (providing that, if certain conditions are met, "[a] person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action"). See also MD. RULE 1-311 (setting forth the same requirement as FED. R. CIV. P. 11); MD. RULE 2-201 (setting forth the same requirement as FED. R. CIV. P. 17(a)); MD. RULE 2-211 (using "party" in similar fashion to FED. R. CIV. P. 19(a)).

184. See, e.g., *Williams v. General Elec. Capital Auto Lease, Inc.*, 159 F.3d 266, 269 (7th Cir. 1998) (noting that "absent class members are not 'parties' before the court in the sense of being able to direct the litigation," and that, instead, "the named representative . . . is the 'party' to the lawsuit who acts on behalf of the entire class").

185. Federal courts must give the federal rules their plain meaning. See *Business Guides, Inc. v. Chromatic Communications Enter.*, 498 U.S. 533, 540 (1991) ("We give the Federal Rules of Civil Procedure their plain meaning." (internal quotation marks omitted) (quoting *Pavelic & Leflore v. Marvel Entertainment Group*, 493 U.S. 120, 123 (1989))); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 391 (1990) (noting that the statutory grant of the Court's authority to promulgate the rules requires the Court to interpret them according to their plain meaning). The same is true of Maryland courts. See *State v. Harrell*, 348 Md. 69, 80, 702 A.2d 723, 728 (1997) ("[W]e must examine the 'words of the rule, giving them their ordinary and natural meaning.'" (quoting *In re Victor B.*, 336 Md. 85, 94, 646 A.2d 1012, 1016 (1994))). Moreover, judicial inquiry into the meaning of the rules is complete when a court finds the terms unambiguous. See *Pavelic*, 493 U.S. at 123 (noting that "[w]hen we find the terms . . . unambiguous, judicial inquiry is complete" (internal quotation marks omitted) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981) (ellipsis and alteration in original))); *Harrell*, 348 Md. at 80, 702 A.2d at 728 (same).

186. See MD. RULE 2-231(g). In addition, the ability of the class representative to represent the class on appeal is predicated on that representative being an active participant in the underlying litigation. See *Felzen v. Andreas*, 134 F.3d 873 (7th Cir.), *aff'd sub nom. California Pub. Employees' Retirement Sys. v. Felzen*, 119 S. Ct. 720 (1999) (per curiam). In this case, the Seventh Circuit held that a shareholder who opposes a court's decision in

The *Telectronics* court's error apparently flowed from its mistaken analysis of the legal status of a class and its members. The court noted that the individuals at issue were members of the class and that class members are not generally required to intervene in a class action.¹⁸⁷ Moreover, new class representatives can be substituted by the court for representatives who are deemed inadequate after the class is certified.¹⁸⁸ On this basis, the *Telectronics* court concluded that it is unnecessary for class representatives to have filed individual actions.¹⁸⁹

The court's rationale was predicated on viewing a class as a legal entity, like a trust, and on logic similar to the old rule that a trust does not fail for want of a trustee.¹⁹⁰ In fact, however, only when a court certifies a class does that class acquire a legal status separate from the

a Rule 23.1 derivative action can appeal only if that class member has first intervened in the action. See *Felzen*, 134 F.3d at 877-78. The Seventh Circuit relied on the Supreme Court's holding in *Marino*. See *id.* at 874 ("The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled. . . . We think the better practice [than allowing exceptions] is for [an affected] nonparty to seek intervention for purposes of appeal" (internal quotation marks omitted) (quoting *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam))). In reaching its holding, the Seventh Circuit joined a line of cases which recognized the importance of gaining party status prior to appeal. See, e.g., *Wilkenson v. Hercules Engines, Inc.*, 138 F.3d 608, 612 (6th Cir. 1998) (holding that nonrepresentative class members lacked standing to appeal after failing to intervene below); *In re Brand Name Prescription Drugs Antitrust Litig.*, 115 F.3d 456, 457 (7th Cir.) (stating that nonparty should intervene in district court in order to preserve appeal right), *rev'd on other grounds*, 123 F.3d 599 (7th Cir. 1997); *Shults v. Champion Int'l Corp.*, 35 F.3d 1056, 1061 (6th Cir. 1994) (clarifying that a mere voluntary appearance by a class member to state or file objections to proposed settlement is an insufficient basis for standing to appeal); *Gottlieb v. Wiles*, 11 F.3d 1004, 1009 (10th Cir. 1993) (concluding that, absent formal intervention, unnamed class members have no standing to appeal if class was properly certified); *Croyden Assoc. v. Alleco, Inc.*, 969 F.2d 675, 680 (8th Cir. 1992) (stating that intervention is required for nonnamed class member to appeal).

But see *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1310 (3d Cir. 1993) (concluding that, given agency, collective action, and information problems inherent in settlements of derivative litigation, and the court's broad view of objector standing, the plaintiff-shareholder who had attended the settlement hearing and objected had standing to appeal); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (9th Cir. 1977) (noting that, because class settlement affects legal rights of unnamed parties, they have standing to appeal). The Supreme Court's per curiam affirmation of *Felzen* has resolved this circuit split.

187. *In re Telectronics Pacing Sys., Inc.*, 172 F.R.D. 271, 283 (S.D. Ohio 1997). The ability to litigate on behalf of a large group of individuals without requiring them to intervene in the litigation is the purpose of the class action.

188. *Id.*

189. *Id.*

190. See, e.g., *Catawba Indian Tribe v. South Carolina*, 978 F.2d 1334, 1347 (4th Cir. 1992) (in banc) ("It is a fundamental rule of trust law that a trust will not fail for want of a trustee.").

interest asserted by the class representative.¹⁹¹ The post-certification substitution of class representatives is permissible because the class's interest in the litigation may outlive the class representative's interest.¹⁹² Accordingly, the mootness of the class representative's claim does not inexorably moot the class's claims as well.¹⁹³

This issue carries more than mere academic significance. A ruling that a class representative who has not sued can properly represent the class poses distinct practical problems for both the class and its opponents. For example, a class representative who is not a party cannot appeal an adverse decision on behalf of the class.¹⁹⁴ Moreover, a defendant cannot move to dismiss a complaint, or move for summary judgment, and cannot compel discovery against a class representative who is not a party to the litigation. For these reasons, courts should reject the *Telectronics* court's ruling, and should decline to accept as class representatives any individuals who have not sued the defendant, intervened in the action, or been sued.¹⁹⁵

C. *The Filing of the Class Action Complaint*

The filing of a class action complaint initiates two important but little understood events: the creation of a relationship between class members and class attorneys, and the tolling of the statute of limitations for all class members.

1. *The Relationship Between Class Members and Class Counsel.*—The nature of the relationship between potential class members and class counsel, from the time a class complaint is filed until the certification ruling, is significant because it can affect the ability of counsel for the class opponent to communicate, and perhaps pursue settlement, with individual unrepresented class members.

191. See *Sosna v. Iowa*, 419 U.S. 393, 399 (1975) (noting that, after certification, "the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by the [class representative]").

192. See, e.g., *id.* at 401 (finding that although the controversy was moot as to the named class representative, it remained alive for the certified class).

193. *Id.*

194. See sources cited *supra* note 186.

195. However, in a case involving multiple defendants allegedly engaged in related activity, it is not necessary that each class representative have a claim against each defendant, but only that at least one class representative have asserted a claim against each proposed defendant. It is possible to use the subclassing provision of Maryland Rule 2-231(d) to simplify such multi-plaintiff/multi-defendant cases. See MD. RULE 2-231(d) (providing that a class action can be limited to certain issues, and that a class can be divided into separately treated subclasses).

Some commentators have reasoned that class members should be deemed to have a full-fledged attorney-client relationship with class counsel upon the filing of the class complaint.¹⁹⁶ The *Manual for Complex Litigation*, however, states that, "Although no formal attorney-client relationship exists between class counsel and the putative members of the class prior to class certification," there is at least an incipient fiduciary relationship between class counsel and the class he or she is seeking to represent.¹⁹⁷

This incipient fiduciary relationship presumably places some obligation on counsel for the proposed class to act in the best interests of the whole class, and not just of his or her individual client.¹⁹⁸ The level of representation at this stage, however, does not prevent counsel opposing the class from communicating with putative class members about the possibility of individual settlement.¹⁹⁹ This treatment of a class complaint as, in essence, an individual complaint until a class is certified by the court is consistent with the conclusion that a class is not a legal entity until the court determines that it is.²⁰⁰

Once a class is certified, however, there is little doubt that an attorney-client relationship exists between class members and class counsel.²⁰¹

196. See DICKERSON, *supra* note 173, § 4.06 [2] ("[M]embers of the purported class . . . are deemed represented by counsel for the class representative as of the time the complaint is filed with the court.").

197. MANUAL FOR COMPLEX LITIGATION, *supra* note 173, § 30.24, at 256; see also Resnick v. American Dental Ass'n, 95 F.R.D. 372, 376 n.6 (N.D. Ill. 1982) ("Before certification DR 7-104 [concerning communications with a represented party] does not apply because the potential class members are not yet 'represented by' counsel." (citing Cada v. Costa Line, Inc., 93 F.R.D. 95, 98 (N.D. Ill. 1981))).

198. See Gulf Oil Co. v. Bernard, 452 U.S. 89, 104 & n.21 (holding that local district court rules restricting communications between class counsel and prospective class members constituted an abuse of the district court's discretion, and that the rules of ethics may impose restraints upon such communications).

199. See MANUAL FOR COMPLEX LITIGATION, *supra* note 173, § 30.24, at 233 ("Defendants ordinarily are not precluded from communications with putative class members, including discussions of settlement offers with individual class members before certification, but may not give false or misleading information or attempt to influence class members in making their decision to remain in the class." (footnote omitted)); see also 3 NEWBERG & CONTE, *supra* note 12, § 15.14 ("In the absence of a local rule or a pretrial order prohibiting or restricting communications by the defendants with absent class members, the defendants may continue to communicate in the ordinary course of business with members of the class, as long as they do not infringe on what some courts have characterized as the constructive attorney-client relationship that exists between counsel for class representatives and the members of the class.").

200. See *supra* note 191 and accompanying text (explaining that a class acquires distinct legal status only upon certification).

201. See Palumbo v. Tele-Communications, Inc., 157 F.R.D. 129, 133 (D.D.C. 1994) (finding that certification of class confers on absent persons the status of litigants and

It is important to note that the restrictions on communication with represented individuals apply not only to counsel opposing the class but to their clients as well. As one court has observed, the reason for this restriction is that such clients may seek "to sabotage the class notice."²⁰²

Court-ordered sanctions for violations of the rules of professional conduct in relation to improper communications with class members have been harsh. For example, for counsel's failure to prevent a client from communicating with class members with the intent of encouraging them to opt-out of a class action, a federal district court ordered the following relief: that the attorneys and the client reimburse plaintiffs' counsel for all reasonable fees incurred in the preparation and presentation of the sanctions proceeding; that the defendants reimburse the plaintiffs for the cost of preparing and mailing the class notice; and that certain counsel with knowledge of the ethical violation be disqualified from taking any further part in the proceedings.²⁰³

In light of the complexities involved in class litigation, counsel are well-advised to analyze carefully their ethical obligations at various times during the progress of the class motion in order to avoid the well-camouflaged trap of communicating with class members in violation of Maryland Rule of Professional Conduct 4.2.²⁰⁴

creates an attorney-client relationship between those persons and lawyers); *Resnick*, 95 F.R.D. at 376 ("Class counsel have the fiduciary responsibility and all the other hallmarks of a lawyer representing a client."); *MANUAL FOR COMPLEX LITIGATION*, *supra* note 173, § 30.24, at 234 ("Once a class is certified, the rules governing communications apply as though each class member is a client of class counsel. Under accepted ethical principles, defendants and their attorneys may communicate on matters regarding the litigation with class members who have not opted out, but only through class counsel."). Indeed, courts have held that class counsel's status as representatives of a class subjects her to a higher standard than that for individual counsel. *See, e.g., Palumbo*, 157 F.R.D. at 133 ("Precisely because of the responsibility to absent class members, counsel's qualifications in the class action context are subject to a 'heightened standard.'" (quoting *Smith v. Josten's Am. Yearbook Co.*, 78 F.R.D. 154, 163 (D. Kan. 1978))).

202. *See Impervious Paint Indus., Inc. v. Ashland Oil*, 508 F. Supp. 720, 723 (W.D. Ky. 1981) (enjoining any contact by corporate defendant with class members in light of the former's effort to sabotage class notice).

203. *See Kleiner v. First Nat'l Bank of Atlanta*, 102 F.R.D. 754, 775-76 (N.D. Ga. 1983), *aff'd in part, vacated in part*, 751 F.2d 1193 (11th Cir. 1985).

204. *See MD. LAWYERS' RULES OF PROFESSIONAL CONDUCT* Rule 4.2 (prohibiting a lawyer from communicating with a party that he or she knows to be represented, except with consent of the lawyer). If an individual is independently represented by counsel, and then becomes a class member, the class-opposing counsel seeking to settle the case of an individual member should wait until the individual opts out of the class (assuming the class is certified under Maryland Rule 2-231(b)(3)), at which time the attorney-client relationship with class counsel is severed. If circumstances suggest the advantage of settlement prior to opting-out, class-opposing counsel could attempt a three-way settlement negotiation, but

2. *Tolling of the Statute of Limitations.*—Although the filing of a class action complaint might initiate only an “incipient” fiduciary relationship between the putative class and class counsel, it carries one potential benefit for the class: under the *American Pipe* doctrine,²⁰⁵ the commencement of a class action suit may toll the statute of limitations,²⁰⁶ and, if tolled, the statute remains tolled until class certification is denied.²⁰⁷

Maryland courts have not had occasion to rule on the applicability of the *American Pipe* doctrine in Maryland.²⁰⁸ Although the majority of states which have considered the tolling doctrine have accepted it,²⁰⁹ the rule is not without its critics²¹⁰ and should not be blindly

this would pose the danger of drawing class counsel’s attention to a case which, from class-opposing counsel’s perspective, might have been better left unnoticed.

205. See *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974).

206. *Id.* at 554 (explaining the rule that “[t]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action”).

207. See *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983) (adding to the *American Pipe* rule that, once commencement of the class action suspends the statute of limitations, it remains suspended until class certification is denied).

208. Although Maryland courts have not adopted the *American Pipe* doctrine, the state legislature has addressed the issue of mass torts and the statute of limitations. See MD. CODE ANN., CTS. & JUD. PROC. § 5-116 (Supp. 1997) (requiring that an action for damages for the effects of a breast implant must be filed within the later of 180 days after the close of an opt-out period, 180 days after the close of nonbinding mediation in which the claimant is a class member, or any other limitations period). This statute was intended to permit class members in the Silicone Gel Breast Implant Litigation, MDL 926, to opt-out of the settlement class and bring their own case, even though the limitations period might have run. See Act of May 25, 1995, ch. 638, 1995 Md. Laws 3605 (codified at MD. CODE ANN., CTS. & JUD. PROC. § 5-116 (Supp. 1997)). While this could be taken as a tacit rejection of the *American Pipe* doctrine, significant reliance should not be placed on such an extrapolation.

209. *First Baptist Church of Citronelle v. Citronelle-Mobile Gathering, Inc.*, 409 So. 2d 727, 729 (Ala. 1982); *Nolan v. Sea Airmotive, Inc.*, 627 P.2d 1035, 1041 (Alaska 1981); *Rosenthal v. Dean Witter Reynolds, Inc.*, 883 P.2d 522, 531 (Colo. Ct. App. 1994), *aff’d in part, rev’d in part*, 908 P.2d 1095 (Colo. 1995); *Campbell v. New Milford Bd. of Educ.*, 423 A.2d 900, 905 (Conn. Super. Ct. 1980); *Levi v. University of Hawaii*, 678 P.2d 129, 133 (Haw. 1984); *Pope v. Intermountain Gas Co.*, 646 P.2d 988, 1010 (Idaho 1982); *Steinberg v. Chicago Med. Sch.*, 371 N.E.2d 634, 645 (Ill. 1977); *Arnold v. Dirrim*, 398 N.E.2d 426, 439 (Ind. 1979); *Lucas v. Pioneer, Inc.*, 256 N.W.2d 167, 180 (Iowa 1977); *Warren Consol. Sch. v. W.R. Grace & Co.*, 518 N.W.2d 508, 511 (Mich. Ct. App. 1994); *Hyatt Corp. v. Occidental Fire & Cas. Co.*, 801 S.W.2d 382, 389 (Mo. Ct. App. 1990); *White v. Violent Crimes Compensation Bd.*, 388 A.2d 206, 211 (N.J. 1978); *Yollin v. Holland Am. Cruises, Inc.*, 468 N.Y.S.2d 873, 875 (App. Div. 1983); *Bergquist v. International Realty, Ltd.*, 537 P.2d 553, 561 (Or. 1975) (in banc); *Allessandro v. State Farm Mut. Auto. Ins. Co.*, 409 A.2d 347, 350 (Pa. 1979); *American Tierra Corp. v. City of West Jordan*, 840 P.2d 757, 762 (Utah 1992).

210. See *Wade v. Danek Med., Inc.*, 5 F. Supp. 2d 379, 383 (E.D. Va. 1998) (rejecting the argument that the *American Pipe* tolling doctrine applied in this mass personal injury litigation because unlike *American Pipe* the limitations period was not derived from federal stat-

adopted.²¹¹ Moreover, adoption of the *American Pipe* doctrine should also mean adoption of its corollary—the so-called “piggyback doctrine”—which denies tolling for classes that have been denied certification and then are re-filed.²¹² In addition, plaintiffs who have

utes, and finding that this distinction removed the overriding federal interest in *American Pipe*); *Jolly v. Eli Lilly & Co.*, 751 P.2d 923, 936 (Cal. 1988) (declining to extend the tolling doctrine of *American Pipe* where the class action complaint neither satisfied the statute of limitations policy of putting defendant on notice of the substance and nature of claims against it nor the policy of promoting efficiency and economy in litigation); *Kleiboemer v. District of Columbia*, 458 A.2d 731, 735 (D.C. 1983) (finding that the legislative purpose served by the three-year filing deadline for tax refund claims, namely promoting financial stability, overrides the purposes served by the *American Pipe* tolling doctrine); *Bell v. Showa Denko*, 899 S.W.2d 749, 756-58 (Tex. Ct. App. 1995) (stating that the tolling doctrine of *American Pipe* is operative where the defendant has notice of the type and potential number of claims against it, and finding that an application of the doctrine to toll the limitations period in this suit was not warranted because it was a “mass personal injury suit, in a federal court, in another state, with a variety of claims necessarily involved in such a case”). See generally Mitchell A. Lowenthal & Norman Menachem Feder, *The Impropriety of Class Action Tolling for Mass Tort Statutes of Limitations*, 64 GEO. WASH. L. REV. 532 (1996) (arguing that in mass tort cases, state courts should reject a blanket application of the *American Pipe* tolling doctrine in favor of an independent evaluation of the value of class action tolling in each individual case); Note, *Statutes of Limitations and Opting Out of Class Actions*, 81 MICH. L. REV. 399 (1982) (arguing that the tolling doctrine of *American Pipe* should not apply to a class member who opts-out of the class suit after certification for the time during which the individual was a class member).

211. For example, the Illinois Supreme Court recently rejected the concept of cross-jurisdictional tolling and held that the Illinois statute of limitations is not tolled during the pendency of a class action in federal court. See *Portwood v. Ford Motor Co.*, 701 N.E.2d 1102, 1104 (Ill. 1998). In this case, plaintiffs filed an untimely complaint in Illinois; plaintiffs argued, however, that the statute of limitations had been tolled during the pendency of an ultimately unsuccessful putative class action in federal district court in the District of Columbia. *Id.* Rejecting this argument, the Illinois Supreme Court noted that a state that accepted the concept of cross-jurisdictional tolling would “increase the burden on that state’s court system, because plaintiffs from across the country may elect to file a subsequent suit in that state solely to take advantage of the generous tolling rule.” *Id.* The court added that state courts “should not be required to entertain stale claims simply because the controlling statute of limitations expired while a federal court considered whether to certify a class action.” *Id.*

212. See, e.g., *Basch v. Ground Round, Inc.*, 139 F.3d 6, 11 (1st Cir.) (holding that “[p]laintiffs may not stack one class action on top of another and continue to toll the statute of limitations indefinitely”), cert. denied, 119 S. Ct. 165 (1998); *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1378 (11th Cir. 1998) (holding that “tolling of the statute of limitations ceases when the district court enters an interlocutory order denying class certification”); *Korwek v. Hunt*, 827 F.2d 874, 876 (2d Cir. 1987) (holding that the *American Pipe* tolling rule does not apply “to permit the filing by putative class members of a subsequent class action nearly identical in scope to the original class action which was denied certification”). See generally *Salazar-Calderon v. Presidio Valley Farmers Ass’n*, 765 F.2d 1334, 1351 (5th Cir. 1985) (coining the term “piggyback” and deciding that “putative class members may [not] piggyback one class action onto another and thus toll the statute of limitations indefinitely,” because this practice would be an abuse of the *American Pipe* tolling doctrine). But see *In re Norplant Contraceptive Prods. Liab. Litig.*, 961 F. Supp. 163, 167-68 (E.D. Tex. 1997) (refusing to apply the piggyback exception to the *American Pipe* tolling

chosen to assert individual claims against a defendant, thereby eschewing the benefits of class litigation, should not be allowed to enjoy the tolling benefits of class filing.²¹³

D. *Pre-Certification Procedure*

In a class action certification, the party seeking certification has the burden of proof.²¹⁴ Some courts, however, have created exceptions to this general rule. For example, although class representatives have the burden to show facts that will support a finding that they will adequately represent the interests of absentee class members, at least one court has held that the burden then shifts to the defendant to demonstrate the inadequacy of representation.²¹⁵ The Supreme Court's *Amchem* decision, however, makes clear that it is the class proponent who has the burden of satisfying this and all other requirements of Rule 23: "In addition to satisfying Rule 23(a)'s prerequisites, parties *seeking* class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)."²¹⁶

doctrine because plaintiffs filed their case in another state rather than in another division of the Eastern District of Texas, and because the plaintiffs had not relied on the out of state court case to protect their rights). The *Norplant* result is erroneous because the court failed to consider adequately the policies underlying a statute of limitations. See *Walko Corp. v. Burger Chef Sys., Inc.*, 281 Md. 207, 210, 378 A.2d 1100, 1101 (1977) (noting that statutes of limitation "are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost" (quoting *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945))); *Decker v. Fink*, 47 Md. App. 202, 206, 422 A.2d 389, 391-92 (1980) ("The legislative policy underlying statutes of limitation include [sic] the encouragement of promptness in instituting actions, the suppression of stale or fraudulent claims, and most of all, the providing of the elements of fairness to defendants."). The importance of fairness to the defendant in not having to litigate stale claims speaks strongly in favor of not applying the *American Pipe* tolling doctrine in Maryland.

213. See, e.g., *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897 MDL 997, 1998 WL 474146, at *8 (N.D. Ill. Aug. 6, 1998) (holding that "it would be inequitable to . . . allow the Individual Plaintiffs [who had opted out prior to the court's class certification decision] to reap the benefits of a doctrine which is designed for a group—the Class and its putative members"), *motion for cert. of interlocutory appeal granted*, 1998 WL 808992 (N.D. Ill. Nov. 17, 1998).

214. *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996); *Castano v. American Tobacco Co.*, 160 F.R.D. 544, 550 (E.D. La. 1995), *rev'd on other grounds*, 84 F.3d 734, 740 (5th Cir. 1996).

215. *In re Asbestos Sch. Litig.*, 104 F.R.D. 422, 430 (E.D. Pa. 1984) (addressing the requirement of Rule 23(a)(4) that the representative parties will fairly and adequately protect the interests of the class and stating that "[t]he burden is on the defendant to demonstrate that the representation will be inadequate"), *aff'd in part, vacated in part on other grounds*, 789 F.2d 996 (3d Cir. 1986).

216. *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2245 (1997) (emphasis added).

In making its determination on the merits of class certification, a federal court is not permitted to consider the merits of the litigation as a whole.²¹⁷ This does not mean, as some courts have concluded, that the court should not look beyond the complaint and must accept the allegations pled therein as true.²¹⁸ As the Eleventh Circuit has noted, "This principle should not be talismanically invoked to artificially limit a trial court's examination of the factors necessary to a rea-

217. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) (holding that there is "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action"). But see *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 599 (7th Cir. 1993) (noting that "the 'boundary between class determination and the merits may not always be easily discernible'" (quoting *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890, 895 (7th Cir. 1981))); Bartlett H. McGuire, *The Death Knell for Eisen: Why the Class Action Should Include an Assessment of the Merits*, 168 F.R.D. 366, 368 (1996) (criticizing *Eisen* on this point as "unsound as a matter of policy, inaccurate as an interpretation of Rule 23, and inconsistent with later Supreme Court statements"); Douglas M. Towns, Note, *Merit-Based Class Action Certification: Old Wine in a New Bottle*, 78 VA. L. REV. 1001, 1028-33 (1992) (proposing that courts be allowed to make preliminary inquiry into merits of class claims during certification process).

One of the changes to Rule 23 which has been considered by the Rules Advisory Committee would substitute the requirement that the certification decision be made "as soon as practicable" with "when practicable." See Memorandum from Patrick E. Higginbotham, Chair, Advisory Committee on Civil Rules, and Professor Edward H. Cooper, Reporter, Advisory Committee on Civil Rules, to Standing Committee on Rules and Practice (Aug. 7, 1996) [hereinafter Higginbotham Memorandum] (noting that this change would "support[] the common practice of deciding motions to dismiss or for summary judgment before addressing the certification question"), in 1 ADVISORY COMMITTEE ON CIVIL RULES, WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at 297, 302 (1997) [hereinafter WORKING PAPERS].

A defendant can circumvent the bar on merits consideration by filing a dispositive motion prior to the trial court's consideration of the class certification issue. Although the defendant would have to give up any class-wide res judicata effect that a successful motion would exert, a pre-certification motion represents a defendant's pragmatic decision to forgo a more sweeping result for the advantages of disposing of the claims of an individual class representative. Such a strategy can be particularly effective where the claims of the class representative are truly typical and common of the class claims because, in this scenario, an individual dispositive motion could have the practical effect of ending the litigation. See *Cowen v. Bank United of Tex.*, 70 F.3d 937, 944 (7th Cir. 1995) (affirming the district court's decision to grant defendant's motion for summary judgment, and thereby rendering moot the class certification question, because the ground on which the individual case was dismissed applied equally to any other member of the class). Although it seems unlikely at this time that the Federal Rules Advisory Committee will pursue this amendment, the Maryland Rules Committee is not constrained by the federal committee's actions and may want to consider a codification of this practice.

218. See, e.g., *Blackie v. Barrack*, 524 F.2d 891, 901 & n.17 (9th Cir. 1975) (stating that in addition to the substantive allegations of the complaint, the district judge properly considered the nature and range of proof necessary to establish those allegations and the future course of the litigation, and noting that "the court may request the parties to supplement the pleadings with sufficient material to allow an informed judgment on each of the Rule's requirements").

soned determination of whether a plaintiff has met her burden of establishing each of the Rule 23 class action requirements."²¹⁹ In fact, the Supreme Court has recognized that it might be necessary for the trial court to "probe behind the pleadings" in order to make its class certification decision.²²⁰

Such probing inevitably requires discovery.²²¹ Although both the Maryland and federal rules require that the court determine whether a case should be maintained as a class action as soon as practicable,²²² practicality and due process²²³ require that the class opponent²²⁴ be

219. *Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984).

220. *General Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 160 (1982); see also *Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996) ("Going 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."); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996) ("A class is not maintainable as a class action by virtue of its designation as such in the pleadings."); *Curley v. Cumberland Farms Dairy, Inc.*, 728 F. Supp. 1123, 1128 (D.N.J. 1990) (pointing out that "the court must look beyond the bald allegations in the complaint to determine whether plaintiff has satisfied the requirements of Rule 23"), *aff'd*, 27 F.3d 556 (3d Cir. 1994); *McElhaney v. Eli Lilly & Co.*, 93 F.R.D. 875, 878 (D.S.D. 1982) ("While the particular merits of plaintiff's claim are not an issue to be considered upon a motion for class certification . . . , an analysis of the issues and the nature of proof which will be required at trial is relevant to a determination of the typicality of plaintiff's claim."); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 390 (1967) (noting that "[t]he new provision [a Rule 23(b)(3) class action] invites a close look at the case before it is accepted as a class action and even then requires that it be specially treated").

221. See Susan Getzendanner, *Class Certification Discovery*, 15 LITIG., Fall 1988, at 25, 25 ("When a complaint alleges a class, discovery on whether it should be certified will be where the action is.").

222. FED. R. CIV. P. 23(c) ("As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained."); MD. RULE 2-231(c) ("On motion of any party or on the court's own initiative, the court shall determine by order as soon as practicable after commencement of the action whether it is to be maintained as a class action.").

223. See, e.g., *In re American Med. Sys.*, 75 F.3d at 1086 (noting that defendant's due process rights were violated by a decision to include it as a class defendant three days after it was served, without opportunity to conduct discovery or have a hearing).

224. The class proponent might also seek to conduct discovery. For example, class proponents might need discovery in order to gain facts sufficient to satisfy the numerosity requirement under Federal Rule 23(a)(1), and Maryland Rule 2-231(a)(1). It is likely, however, that the numerosity issue can be resolved by stipulation because the standard for this requirement is so low. See *infra* Part III(F) (discussing the numerosity requirement). Moreover, courts typically do not hold counsel to a particularly demanding Rule 11 standard when considering class action allegations. *But see* *Barnett v. Laborers' Int'l Union of N. Am.*, 75 F.R.D. 544, 545 (W.D. Pa. 1977) (stating that "an attorney filing a complaint alleging the existence of a class of persons entitled to relief has a professional responsibility before signing and filing that complaint to determine that there is a sufficient evidentiary basis to support the class action allegations").

given some time to conduct class discovery.²²⁵ Such discovery should be limited, as much as possible, to certification issues.²²⁶ Inevitably, however, some merits discovery will be necessary in order fully to explore questions of commonality, typicality, and predominance.²²⁷

In Maryland, class certification discovery is limited by rule to the class representative.²²⁸ Accordingly, it is crucial that the class representative be carefully chosen. For example, where a class seeks relief against several defendants, and the class representative has a claim against only one of them, the other defendants would not be able to conduct meaningful class certification discovery, and the potential inadequacy of the representative would endanger certification of the class.²²⁹

Some courts have found that the class action rule should be liberally construed.²³⁰ The explanation for this is that a court always has the discretion to revisit a certification decision and to decertify a class later.²³¹ Although the determination of certification may be altered under the explicit terms of Rule 23(c), the better and more recent view of the rule's construction suggests that a court should strictly ad-

225. See generally Beverly J. Westbrook, Annotation, *Discovery for Purposes of Determining Whether Class Action Requirements Under Rule 23(a) and (b) of Federal Rules of Civil Procedure Are Satisfied*, 24 A.L.R. FED 872 (1975) (discussing the case law concerning pre-certification discovery).

226. See MANUAL FOR COMPLEX LITIGATION, *supra* note 173, § 30.12, at 215-16 (recommending that the court require parties to produce a discovery plan that identifies depositions and other discovery techniques, and that specifies the subject matter to be covered, in order to avoid duplicative discovery and unnecessary collateral discovery disputes between counsel). Although helpful in theory, it is perhaps unrealistic to expect class opposing counsel, who have had little time to evaluate the complaint, let alone class issues, to commit to a discovery plan at such an early stage in the proceedings. A more practical approach is for the court to encourage counsel to initiate class certification discovery at the earliest opportunity and then set a realistic, but tight, schedule for class briefings to be filed.

227. See, e.g., FED. R. CIV. P. 23(a)(3) (requiring that the "claims or defenses of the representative parties [be] typical of the claims or defenses of the class"); MD. RULE 2-231(b)(3) (same).

228. See MD. RULE 2-231(g) ("For purposes of discovery, only representative parties shall be treated as parties. On motion, the court may allow discovery by or against any other members of the class.").

229. In this situation, where a class is sought against multiple defendants, the better practice is to divide the total class into subclasses, each with its own representative.

230. See, e.g., *In re A.H. Robbins Co.*, 880 F.2d 709, 740 (4th Cir. 1989) (noting that the trend in applying Rule 23(a) is to construe it liberally, in order to serve the ends of justice and judicial efficiency).

231. See, e.g., *In re Kirschner Med. Corp. Sec. Litig.*, 139 F.R.D. 74, 85 (D. Md. 1991) (noting that, under Federal Rule 23(c)(1), the determination of class certification "may be altered or amended at any time before a decision on the merits").

here to the rule's requirements of commonality, typicality, and so forth.²³²

E. Class Definition

Although not articulated as a requirement for class certification by either the federal or Maryland rules, the ability to define and identify a class has been recognized as a threshold requirement for class certification.²³³ Thus, for example, in a case involving medication with allegedly tainted production batches, the inability of the class members, the class representative, and the defendants to identify whether or not a particular container containing the medication was from one of the allegedly affected batches should result in a denial of class certification.²³⁴

The reasons for this result are self-evident. If the class cannot be identified, any class verdict is unenforceable, because no class member will be able to establish that he or she is a member of the class. Indeed, one court has noted that the inability of the parties or class members to determine who is a member of the class raises serious due process concerns as to whether class notice could be crafted that would permit the class members to make an informed decision as to whether to opt out of the class.²³⁵

This problem has particular relevance to classes that seek to recover present-day damages (or at least establish the entitlement to

232. See *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1089 (6th Cir. 1996) (requiring "strict adherence to Rule 23 in products liability cases involving drug or medical products which require FDA approval"); see also *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2248 (1997) (overruling the judicially-created doctrine that the requirements of Rule 23 could be more readily met in the context of a class certified for settlement purposes than in a class certified for litigation).

233. See *In re A.H. Robbins Co.*, 880 F.2d at 728 ("Though not specified in the Rule, establishment of a class action implicitly requires both that there be an identifiable class and that the plaintiff or plaintiffs be a member of such class."); MANUAL FOR COMPLEX LITIGATION, *supra* note 173, § 30.14, at 217 ("Class definition is of critical importance because it identifies the persons (1) entitled to relief, (2) bound by a final judgment, and (3) entitled to notice in a Rule 23(b)(3) action. It is therefore necessary to arrive at a definition that is precise, objective, and presently ascertainable.").

234. See, e.g., *Surette v. Warner-Lambert Co.*, No. MRS-L-595-96 (N.J. Super. Ct. Law Div. Apr. 8, 1998) (denying class certification where a plaintiff could not identify a definable class of purchasers of the allegedly affected lots of medication).

235. See *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (noting in suit involving a nationwide plaintiff class and subclass in a products liability case against the manufacturer of a drug used for the treatment of epilepsy that the number of known users who had reportedly suffered actual injuries from the drug was relatively small in comparison with all the users of the drug, so that many potential members of the classes could not yet know if they are part of the class). See generally FED. R. CIV. P. 23 (c)(2) (providing for notice of class certification); MD. RULE 2-231(e) (same).

such damages) for class members who are not injured but might be injured at some time in the future. According to the *Manual for Complex Litigation*, such classes are certifiable, but class membership should be ascertainable at the time of judgment.²³⁶ Certainly courts have certified classes with so-called "future injury" class members.²³⁷ The propriety of such a certification, however, is questionable. Although the class might be definable, and all potential future injury plaintiffs can be identified, the potential class member simply has insufficient information at the time she must make the opt-out determination to decide if her interests are better served by accepting membership in the class or waiting to sue in her individual capacity after injury. Indeed, sometimes the class members are unable to make the opt-out determination at all, as when future injury class members include unborn children.²³⁸

Class proponents should also be careful to avoid defining the class with subjective criteria²³⁹ or basing the class definition on the merits of the litigation.²⁴⁰ Subjective class definitions will require the court to inquire as to each class member's state of mind, thus creating an administrative nightmare and rendering class treatment impractical, unmanageable, and inferior to individual litigation. Where the class is defined in terms of the merits, it will be impossible for the class proponent to prevent the court from inquiring into the merits of the case, in violation of *Eisen's* policy against merits-based class consideration.²⁴¹

F. Numerosity

The first of the threshold requirements, contained in Federal Rule 23(a) and Maryland Rule 2-231(a), is the "numerosity" require-

236. See MANUAL FOR COMPLEX LITIGATION, *supra* note 173, § 30.14, at 218.

237. See, e.g., *In re Teletronics Pacing Sys., Inc.*, 172 F.R.D. 271, 278-79 (S.D. Ohio 1997) (certifying subclasses of all implantees of pacemaker lead, including those whose leads had not yet fractured).

238. The practice of certifying "future" classes presents serious due process concerns, particularly when the class involves unborn children. No satisfactory explanation has been offered to demonstrate how these class members' due process rights can be preserved by a notice requiring an opt-out response to be filed prior to their conception. Cf. *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2252 (1997) ("Many persons in the exposure-only category . . . may not even know of their exposure, or realize the extent of the harm they may incur. Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.").

239. For example, a class defined as "all persons who believed defendant's claims as to the efficacy of product x."

240. For example, a class defined as "all persons who were injured by product x."

241. See *supra* notes 217-220 and accompanying text (discussing merits-based inquiry).

ment.²⁴² As with most class certification issues, numerosity is a case specific issue, and no magic number exists as a floor for certification purposes.²⁴³ Classes of twenty five to thirty members have been deemed sufficiently numerous to satisfy this requirement.²⁴⁴ When class sizes reach substantial numbers, courts have found the numerosity requirement to be satisfied by the sheer weight of numbers.²⁴⁵ Any proposed class action seeking relief under the Magnuson-Moss Act, however, must comply with the statutory requirement that the class contain at least 100 members.²⁴⁶

The "impracticality" required by the rule is not an "impossibility" standard. Instead, the rule addresses the difficulty or inconvenience of joining all members of the class together under standard joinder principles.²⁴⁷ Moreover, courts have traditionally been willing to accept less than an exact number of class members if common sense or

242. See FED. R. CIV. P. 23(a) (requiring that "the class [be] so numerous that joinder of all members is impracticable"); MD. RULE 2-231(a)(1) (same). Although the informal "numerosity" title is unlikely to change, the language of the rules suggests that this requirement is more properly referred to as the "impracticality" requirement.

243. See *General Tel. Co. of the N.W. v. EEOC*, 446 U.S. 318, 330 (1980) ("The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations."). *But cf. Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 262 (S.D. Cal. 1988) (stating that, as a rule of thumb, twenty class members is too few for class certification, a class of between twenty and forty may or may not meet the numerosity requirement, and a class of more than forty class members will probably be sufficiently numerous).

244. See *In re Kirschner Med. Corp. Sec. Litig.*, 139 F.R.D. 74, 78 (D. Md. 1991) (recognizing that a class of as few as 25 to 30 members raises the presumption that joinder would be impracticable and finding that the numerosity requirement was met in their suit because joinder of the 1570 stockholders involved would be impracticable); *Dameron v. Sinai Hosp.*, 595 F. Supp. 1404, 1408 (D. Md. 1984) (stating that a class consisting of as few as 25 to 30 members raises the presumption that joinder would be impracticable, and finding that the numerosity requirement was satisfied in this case in which the class consisted of 47 to 51 persons), *aff'd in part, rev'd in part on other grounds*, 815 F.2d 975 (4th Cir. 1987).

245. See *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996) (holding that the numerosity requirement was met where the class size was determined to be in the range of 15,000 to 120,000 persons).

246. See 15 U.S.C. § 2310(d)(3)(C) (1994) (requiring 100 members in a class action to enforce consumer warranties under this statute).

247. See *Senter v. General Motors Corp.*, 532 F.2d 511, 523 n.24 (6th Cir. 1976) ("There is no specific number below which class action relief is automatically precluded. Impracticality of joinder is not determined according to a strict numerical test, but upon the circumstances surrounding the case."); see also *In re Copley Pharm., Inc.*, 158 F.R.D. 485, 489 (D. Wyo. 1994) (concluding that the numerosity requirement had been met because the geographic distribution of class members made joinder impracticable); *In re Southeast Hotel Properties Ltd. Partnership Investor Litig.*, 151 F.R.D. 597, 601 (W.D.N.C. 1993) (same); *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 63 (S.D. Ohio 1991) ("Satisfaction of the numerosity requirement does not require that joinder is impossible, but only that plaintiff will suffer a strong litigational hardship or inconvenience if joinder is required.").

common knowledge suggests the numerosity of the class, and therefore the impracticality of joinder.²⁴⁸

G. Commonality

In order to meet the threshold requirements of class certification, the party seeking the class must establish that there are questions of fact or law common to the class.²⁴⁹ Although the plural form used in the rule would imply that the class proponent must show that more than one common question exists, courts have held that one common issue of fact or law suffices to satisfy the requirements of the rule.²⁵⁰ The disjunctive "or," however, is honored. Accordingly, a single issue of law, or a single factual issue, which is common to the class is sufficient to satisfy the rule.²⁵¹

The class action is, by its nature, a device that contradicts the generally accepted principle that an individual controls his or her own case. Because such litigation can occur only when there is a common thread to the claims of all class members, commonality always has been a crucial feature of class action practice.²⁵² Under the equitable doctrine of representation, the class proponent was required to show a unity of interest among the class members.²⁵³ This practice is consistent with the policy rationale underlying the class concept. Courts construing the class action rule, however, have held that the "commonality" requirement can be met even though class members have

248. See, e.g., *Jordan v. Global Natural Resources, Inc.*, 102 F.R.D. 45, 49 (S.D. Ohio 1984) (finding that the numerosity requirement was satisfied based on the substantial number of shares of the defendant's stock sold in a particular period of time).

249. FED. R. CIV. P. 23(a)(2); MD. RULE 2-231(a)(2).

250. See, e.g., *Port Auth. Police Benevolent Ass'n v. Port Auth.*, 698 F.2d 150, 154 (2d Cir. 1983) (holding that the single question of whether the Port Authority had suppressed protected expression of its employees satisfied the requirement of Rule 23(a)(2)); *Stewart v. Winter*, 669 F.2d 328, 335 (5th Cir. 1982) (reasoning that there must "be at least one issue whose resolution will affect all or a significant number of the putative class members" to satisfy Rule 23(a)(2) (footnote omitted) (emphasis added)).

251. See *supra* note 250.

252. See *General Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 155 (1982) (noting that "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23" (internal quotation marks omitted) (alteration in original) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979))).

253. See, e.g., *MILLER*, *supra* note 33, § 40, at 48 n.1 (asserting that the doctrine of representation applies when "all the parties stand, or are supposed to stand, in the same situation, and have one common right or one common interest, the operation and protection of which will be for the common benefit of all and cannot be to the injury of any").

important individual issues remaining for resolution after the class trial is over.²⁵⁴

The fact that significant noncommon issues can exist within a class, together with the construction of the rule that permits one common question of law or fact to satisfy the (a) (2) requirement, conspire to render the commonality threshold almost meaningless. It is difficult to conceive of a situation in which a party could not bring a class action that would not have at least one colorably common question of law or fact shared by all class members.²⁵⁵ Should a class be sought under subsection (b) (3), however, the class proponent will have to meet a significantly higher commonality burden and persuade the court that the (a) (2) "common" issues predominate over any individual issues in the case.²⁵⁶

H. Typicality

The "typicality" requirement is central to the concept of representative litigation. In order to meet this requirement, the class proponent must demonstrate that his or her claims or defenses are typical of the claims or defenses of the class.²⁵⁷ Courts have held that the "typicality" requirement does not mean that the class claims and those of the class representative must be identical.²⁵⁸ Even so, it is axio-

254. See *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988) (stating that "the mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible"); *Gerdom v. Continental Airlines, Inc.*, 648 F.2d 1223, 1228 (9th Cir. 1981) (conducting an inquiry into individual injuries sustained by class members, while still permitting class certification); *Central Wesleyan College v. W.R. Grace & Co.*, 143 F.R.D. 628, 636 (D.S.C. 1992) (finding that Rule 23(a) (2) "does not require that all, or even most issues be common, nor that common issues predominate, but only that common issues exist"), *aff'd*, 6 F.3d 177 (4th Cir. 1993).

255. *But see In re American Med. Sys., Inc.*, 75 F.3d 1069, 1089 (6th Cir. 1996) (requiring strict adherence to the commonality and typicality requirements in the context of mass product liability tort actions and citing *In re Temple*, 851 F.2d 1269, 1273 n.7 (11th Cir. 1988)).

256. See *infra* Part III.N.2 (discussing the requirements of a 23(b) (3) class).

257. See FED. R. Civ. P. 23(a) (3) (stating that "the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class"); MD. RULE 2-231 (a) (3) (same).

258. See, e.g., *Am/Comm Sys., Inc. v. American Tel. & Tel. Co.*, 101 F.R.D. 317, 321 (E.D. Pa. 1984) (noting that "the representatives' claims need not be identical to those of the class," and that "[t]his requirement [of typicality] is met if the representatives' claims arise from the same event or course of conduct that gives rise to the claims of the class members and are based on the same legal theory"); 1 NEWBERG & CONTE, *supra* note 12, § 3.13, at 77 ("When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims.").

matic that the class representative must be able to prove the class members' cases by proving his or her own case.²⁵⁹ For this reason, courts have declined to certify class actions in numerous products liability²⁶⁰ and fraud²⁶¹ cases.

259. See *Brooks v. Southern Bell Tel. & Tel. Co.*, 133 F.R.D. 54, 58 (S.D. Fla. 1990) ("If proof of the representatives' claims would not necessarily prove all the proposed class members' claims, the representatives' claims are not typical of the proposed members' claims."); *Amswiss Int'l Corp. v. Heublein, Inc.*, 69 F.R.D. 663, 667 (N.D. Ga. 1975) ("The claims and defenses of the representative would not be typical if it would require substantially more or less proof than required for the other members of the class."); *Shaw v. Mobil Oil Corp.*, 60 F.R.D. 566, 570 (D.N.H. 1973) (rejecting class certification in part because "[n]either plaintiff's nor any other member's proof in respect to these issues would be dispositive of claims made by other class members"). The fact that the class representative must be able to prove the class members' cases by proving his own merges the commonality and typicality requirements. See *General Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 157 n.13 (1982) (holding that these requirements merge because "[b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence")

260. See, e.g., *In re Northern Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 850, 856 (9th Cir. 1982) (reversing class certification because the "liability class does not satisfy the typicality requirement"); *Kurcz v. Eli Lilly & Co.*, 160 F.R.D. 667, 677-78 (N.D. Ohio 1995) (finding that the named plaintiffs failed to satisfy the typicality requirement because, even if she prevailed, "[e]ach plaintiff would still have to prove injury, causation, and liability"); *Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 263 (S.D. Cal. 1988) (noting that, due to individual differences in liability and damages, "courts historically have been very reluctant to certify classes in mass tort cases" (citing 3 NEWBERG, NEWBERG ON CLASS ACTIONS § 170.2)); *McKernan v. United Techs. Corp.*, 120 F.R.D. 452, 454 (D. Conn. 1988) (refusing certification because the named plaintiffs would "seek vigorously to litigate damage theories which differ considerably from those a present owner [of the allegedly defective product] would pursue").

Class certification in products liability cases is particularly difficult where emotional injury is at issue. See *Mehornay v. Pfizer, Inc.*, No. CV 91-101-HLH, 1991 WL 540731, at *1 (C.D. Cal. June 3, 1991) (finding an absence of typicality because, in a class consisting of people with working heart valves, "the extent of emotional distress must range from zero (with implantees who have not heard that there is a problem, or who have heard of the problem but been informed that it is statistically small, or who are so glad to be alive that their joy in life far exceeds their distress) to substantial"); *Sanna v. Delta Airlines*, 132 F.R.D. 47, 50 (N.D. Ohio 1990) (denying class certification and noting that "[c]ourts have been hesitant to find 'emotional injuries' typical" in part because emotional injury is inherently individual (citing *Alvarado Morales v. Digital Equip. Corp.*, 669 F. Supp. 1173, 1185 (D.P.R. 1987), *aff'd*, 843 F.2d 613 (1st Cir. 1988))); *Alvarado Morales*, 669 F. Supp. at 1185 ("It strains credulity to imagine that any two members of the class would have suffered similar . . . emotional injury which would give rise to common questions of law or fact or typical claims or defenses.").

261. See, e.g., *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) (holding that "a fraud class action cannot be certified when individual reliance will be an issue"); *Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 656 (C.D. Cal. 1996) (asserting that "allegations of fraud usually raise state of mind and credibility issues and usually require that each claim be considered separately, suggesting the inappropriateness of class treatment for such issues").

Class proponents have sought to avoid, or at least mitigate, the potential problems presented by the "typicality" requirement by seeking certification for certain issues only or for subclasses.²⁶² In practice, however, these solutions can present as many problems as they may solve.²⁶³

I. Adequacy

The last of the threshold requirements for class certification requires the class representative to demonstrate that he or she will fairly and adequately represent the interests of the class.²⁶⁴ The purpose of this inquiry is to satisfy the due process rights of absent class members,²⁶⁵ and to ensure that the litigation is not being controlled by the attorneys, by using a class representative as a puppet figure.²⁶⁶ Notwithstanding some opinions to the contrary,²⁶⁷ the burden, as with

262. See FED. R. CIV. P. 23(c)(4) (providing that "[w]hen appropriate, (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly"); MD. RULE 2-231(d) (providing similarly, but omitting the final clause of subpart (B) of the federal rule); see also 1981 STANDING COMMITTEE MINUTES, *supra* note 90, at 23-24 (adopting the language of Federal Rule 23(d), omitting some other language, but making no mention of the language that was ultimately left out); 1983 STANDING COMMITTEE MINUTES, *supra* note 132, at 69-72 (approving the final draft of current Maryland Rule 2-231, and omitting the final clause of Federal Rule 23(d) without comment). This omission is not significant. Although the Federal Rule's language makes clear that the provisions of the rule shall apply to each subclass certified under the rule, this result is at least implicit in the Maryland provision that "each subclass [shall be] treated as a class." MD. RULE 2-231(d). There is, therefore, no reason to believe that a subclass certified under the Maryland rule should be treated differently than one certified under the federal rule. In both instances, each subclass must independently meet the requirements of class certification as articulated in the appropriate class action rule.

263. See *infra* notes 415-427 and accompanying text (discussing judicial economy and constitutional problems posed by issue bifurcation).

264. See FED. R. CIV. P. 23(a)(4) (stating that "the representative parties [must] fairly and adequately protect the interests of the class"); MD. RULE 2-231(a)(4) (same).

265. *Hansberry v. Lee*, 311 U.S. 32, 42-46 (1940) (acknowledging the constitutionality of a judgment rendered in a class suit being *res judicata* as to members of the class who are not formal parties to the suit except where there has been a failure of due process because the procedure adopted failed to insure the protection of interests of the absent parties).

266. See 7A WRIGHT ET AL., *supra* note 175, § 1766, at 310-11 ("This inquiry into the knowledge of the representative [about the suit] is to ensure that the party is not simply lending his name to a suit controlled entirely by the class attorney."). Although some have proposed eliminating the class representative as an impediment to the litigation process, it is unlikely that such a radical step will be taken in the near future. See Jean Wegman Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 HASTINGS L.J. 165, 200 (1990) (proposing that exemplary class members and class monitors replace the present class representative in class actions).

267. See, e.g., *Lewis v. Curtis*, 671 F.2d 779, 788 (3d Cir. 1982) (holding that "[t]he burden is on the defendant [the class opponent] to demonstrate that the representation will

all class certification requirements, is on the class proponent to demonstrate that representation is adequate.²⁶⁸

Some have noted the apparent incongruity of a class opponent—typically a defendant—challenging the ability of a class representative and class counsel adequately to represent the interests of the very class that seeks to assert claims against it.²⁶⁹ In fact, however, it is crucial for the class opponent to conduct as vigorous an investigation into the class representative and class counsel as possible. Without such an investigation, if members of the class later protest that their interests were inadequately protected by the representative and class counsel, then a class victory for the opponent can be transformed into a victory only in the individual case.²⁷⁰

The Supreme Court's bar on merits analysis at the class certification stage has led some to contend that the relative strength of a proposed class representative's case should not be considered by the court in making its class certification decision with respect to the issue of adequacy.²⁷¹ This result is based on an over-interpretation of the Supreme Court's *Eisen* decision, in which the Court held that the issue confronting district courts during the certification phase was not whether the plaintiffs have stated a cause of action or will ultimately prevail on the merits, but instead whether the requirements of the rule are met.²⁷² In any event, when making this determination with

be inadequate" (citing *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 592 n.15 (5th Cir. 1979))).

268. See *Senter v. General Motors Corp.*, 532 F.2d 511, 522 (6th Cir. 1976) (stating that the burden is on the party seeking to utilize the class action device to establish his right to do so by satisfying all four of the prerequisites contained in Rule 23(a) including the condition that the representative will fairly and adequately protect the interests of the class); see *supra* notes 214-216 and accompanying text (discussing burden of proof).

269. Cf. David Crump, *What Really Happens During Class Certification? A Primer for the First-Time Defense Attorney*, 10 REV. LITIG. 1, 13 (1990) (noting that "defendants may even argue that class counsel will provide inadequate representation," but that this is understandable in order to ensure *res judicata* protection).

270. See, e.g., *Hansberry*, 311 U.S. at 44-46 (permitting a suit to proceed even though the issue was resolved in a prior class suit because absent class members were not adequately represented in the class suit); *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 726 (11th Cir. 1987) (stating that the purpose of the adequate representation requirement "is to protect the legal rights of the absent class members . . . [from] the *res judicata* effect of the judgment").

271. See, e.g., *In re Teletronics Pacing Sys., Inc.*, 172 F.R.D. 271, 282 (S.D. Ohio 1997) ("While the Court must probe behind the pleadings in order to determine if class certification is proper, it is inappropriate for the Court to examine the merits of the claim in doing so. Thus, a class representative cannot be found inadequate merely on the basis of the strength of his or her claims." (citation omitted)).

272. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (emphasizing that the proper inquiry into class certification is not based on likelihood of success on the merits, but instead on "whether the requirements of Rule 23 are met" (internal quotation marks

respect to adequacy the trial court must at least consider the question of the proposed representative's claims.

For example, where a proposed class representative is time-barred from bringing a claim, that representative is inadequate to represent the class as a whole.²⁷³ In addition, a class representative may not have claims that are antagonistic to those of some class members.²⁷⁴ In order properly to consider the adequacy of a proposed class representative, therefore, a court should evaluate the strength of the representative's case if the party opposing the class raises relevant adequacy issues.²⁷⁵

omitted) (quoting *Miller v. Mackey Int'l*, 452 F.2d 424, 427 (5th Cir. 1971)); *supra* note 217 (discussing *Eisen*).

273. *In re Nissan Motor Corp. Antitrust Litig.*, 82 F.R.D. 193, 196 (S.D. Fla. 1979) (stating that when representatives do not fall within the time restrictions established by the court for the classes, "they are not members of those certified classes, and therefore inadequate representatives under Rule 23(a)(4)").

274. For example, a class seeking, in part, recovery for presently injured class members cannot adequately be represented by a class member seeking funding for a medical monitoring program to prevent potential future injuries because these factions have antagonistic interests. *See, e.g., Ortiz v. Fibreboard Corp.*, 119 S. Ct. 2295, 2319-20 (1999) ("[I]t is obvious after *Amchem* that a class divided between holders of present and future claims (some of the latter involving no physical injury and . . . claimants not yet born) requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel."). The reasons for this are readily apparent—those in the medical monitoring group, who have not yet been injured, should seek to retain as much of the anticipated recovery for the monitoring, whereas those in the presently injured group have only an interest in maximizing their own present recovery.

A similar problem is presented by a class in which those with a relatively strong claim against the defendants are combined with those whose claim is weak or nonexistent. *See In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 165-66 (2d Cir. 1987) (noting that "potential plaintiffs in toxic tort cases do not share common interests because of differences in the strength of their claims," and explaining that plaintiffs with weak claims benefit from even a small settlement, whereas those with stronger claims may see their recovery diluted).

The Supreme Court's *Ortiz* decision emphasizes the importance of separate representation of subclasses with divergent interests within the larger class, but adds a puzzlingly indeterminate note. The Court states that "at some point there must be an end to reclassification with separate counsel," *Ortiz*, 119 S. Ct. at 2320, yet fails to explain what this means. The only logical interpretation is that, at some point, the subclassing necessary to protect divergent class interest will become so complex that no class can be certified.

275. An alternative method of raising the merits of a particular class representative's case is for the party opposing the class to file a summary judgment motion prior to, or simultaneously with, the class opposition. Such a motion would be *res judicata* only as to the class representative and not to the class as a whole. *See Wright v. Schock*, 742 F.2d 541, 545 (9th Cir. 1984) (affirming the district court's grant of summary judgment on the issue of liability before it ruled on the class certification issue as a proper exercise of discretion). The party opposing the class, however, should be allowed to trade the benefits of class-wide *res judicata* for a ruling on the merits of a particular class representative's case. As a practical matter, such a ruling may deter further litigation if it appears that the claims of the class have no merit, yet will not unfairly bar other class members from seeking to assert those

One of the dangers of class action litigation is that the class representative will take a passive role in the prosecution of the case, thus ceding too much power to class counsel.²⁷⁶ Due process demands that the class representative take as active a role in a class action as an individual plaintiff would take in an individual lawsuit.²⁷⁷ For this reason, courts have declined to certify classes where the proposed class representative was not the "driving force" of the litigation.²⁷⁸

Courts have identified several other factors to consider when evaluating the adequacy of the proposed class representative, including potential economic antagonisms between the representative and the class, the representative's unfamiliarity with the litigation, other litigation pending between the representative and the class opponents, the relative magnitude of the proposed class representative's personal interest in the litigation, and the degree of support the proposed representative has from the class.²⁷⁹ The inability of a proposed class representative to travel, either for deposition or to testify at trial, as well as his lack of knowledge that he was a proposed class representative, has also resulted in a finding of inadequacy.²⁸⁰

Finally, although not stated specifically in the rule, courts have held that the attorney for the proposed class must also be adequate to

claims. See MANUAL FOR COMPLEX LITIGATION, *supra* note 173, § 30.11, at 214 ("When it is clear that the action lacks merit, dismissal will avoid unnecessary expense for the parties and burdens for the court, but the court should consider whether the interests of putative class members may be prejudiced." (footnote omitted)). The opposite practice—granting a summary judgment motion in favor of the class representative prior to class certification—should not be observed. See *id.* § 30.11, at 214 n.671 (noting that the "potential use of collateral estoppel [in conjunction with this practice] may have inequitable consequences similar to those of one-way intervention, a practice that Fed. R. Civ. P. 23(c)(3) was intended to prevent").

276. See *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1083 (6th Cir. 1996) (noting the trial court's description of the class representative as a mere name or symbol that does not control the litigation, but rejecting this description as inconsistent with the requirement of adequacy (citing *Senter v. General Motors Corp.*, 532 F.2d 511 (6th Cir. 1976))).

277. See *In re Goldchip Funding Co.*, 61 F.R.D. 592, 594 (M.D. Pa. 1974) (noting the benefits of active participation by a class representative and adding that, "[b]ecause absent members of the class would be conclusively bound by the results [of the class action] . . . , due process requires that [the representatives] be more than pro forma representatives").

278. See, e.g., *Efros v. Nationwide Corp.*, 98 F.R.D. 703, 707-08 (S.D. Ohio 1983) (denying class certification in part because the motion for certification was filed before the representative plaintiff even contacted counsel, indicating that she was not the "driving force" in the litigation and that she had given "unfettered discretion" to her attorneys).

279. See *id.* at 706 (quoting *Davis v. Comed, Inc.*, 619 F.2d 588, 593-94 (6th Cir. 1980)).

280. See *In re Telectronics Pacing Sys., Inc.*, 168 F.R.D. 203, 218 (S.D. Ohio 1996) (refusing to ratify an "attempt to appoint a class representative who is unable to travel and has no knowledge that he is a class representative").

the task of representing the legal interests of class members.²⁸¹ The question of attorney adequacy is generally divided into considerations of competency²⁸² and conflict of interest.²⁸³

J. Rule 23(b) Requirements

Once the threshold requirements of Rule 23(a) have been met, the class proponent must establish that the requirements of at least one of the four subdivisions of Rule 23(b) are satisfied.²⁸⁴ Often, class proponents will seek to establish that a class is certifiable under several of these subdivisions. Unless great care is taken, however, or unless the unique facts of the case warrant such an approach, this

281. See, e.g., *General Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 157-58 n.13 (1982) (noting that the adequacy requirement "raises concerns about the competency of class counsel and conflicts of interest"); *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 484 (5th Cir. 1982) (per curiam) (noting that the adequacy requirement "mandates an inquiry into the zeal and competence of the representative's counsel"); *Cross v. National Trust Life Ins. Co.*, 553 F.2d 1026, 1031 (6th Cir. 1977) (noting that adequacy depends on "the experience and ability of counsel . . . and whether there is any antagonism between the interests of the plaintiffs and other members of the class they seek to represent" (citing *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968))).

282. See *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1021 (9th Cir. 1998) ("Although there are no fixed standards by which 'vigor' [of the named representatives and class counsel] can be assayed, considerations include competency of counsel and, in the context of a settlement-only class, an assessment of the rationale for not pursuing further litigation.").

283. It would be impossible for one lawyer, or group of lawyers, to represent all subclasses under the "adequacy" test of Rule 23. See *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 337-38 (4th Cir. 1998) (noting that, when there is a conflict of interest between different groups of class members with respect to the appropriate relief, "the adequate representation requirement of Rule 23(a)(4) . . . preclude[s] class certification" (citing *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2250-51 (1997); *General Tel. Co. of the N.W. v. EEOC*, 446 U.S. 318, 331 (1980); *Kidwell v. Transportations Communications Int'l Union*, 946 F.2d 283, 305-06 (4th Cir. 1991); *Lukenas v. Bryce's Mountain Resort, Inc.*, 538 F.2d 594, 596 (4th Cir. 1976))); *Hanlon*, 150 F.3d at 1020 (noting that the "[e]xamination of potential conflicts of interest has long been an important prerequisite to class certification").

The Supreme Court's *Amchem* decision has focused particular attention on this issue; this case involved the proposed settlement of numerous asbestos-related claims, some of which involved claims for potential future injury. The Court observed:

[N]amed parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future.

Amchem, 117 S. Ct. at 2251 (citing *General Tel. Co. of the N.W.*, 446 U.S. at 331). This problem infects not only the class representatives, but also, perhaps even more so, their counsel. Subclassing, with separate representatives for each subclass, can protect the integrity of separate class claims, and, after *Ortiz*, is clearly required.

284. See FED. R. CIV. P. 23(b) (requiring that a class proponent satisfy the prerequisites of subdivision (a) and one of the following: 23(b)(1)(A), (b)(1)(B), (b)(2), or (b)(3)).

practice is inadvisable because each of the subdivisions of Rule 23(b) encompasses a different form of class action. For example, an attempt to certify a class under Rule 23(b)(2) and (b)(3) lays a class proponent open to a challenge that the availability of a (b)(2) class renders the proponent unable to satisfy the (b)(3) requirement that a class under this subdivision be "superior to other available methods for the fair and efficient adjudication of the controversy."²⁸⁵ Conversely, a class opponent could argue that the availability of a (b)(3) class means that the class proponent is seeking legal, not equitable, relief, thus rendering a (b)(2) class unnecessary.²⁸⁶

Of the four types of class action encompassed by Federal Rule 23(b) and Maryland Rule 2-231(b), only one—the (b)(3) class action—permits the class members to opt-out of the class after certification,²⁸⁷ although some circuit courts of appeals have found a right to

285. FED. R. CIV. P. 23(b)(3).

286. See FED. R. CIV. P. 23(b)(2) (providing for "injunctive relief or corresponding declaratory relief with respect to the class as a whole").

287. See FED. R. CIV. P. 23(c)(3) (requiring that the judgment in an action under (b)(1) and (b)(2) describe those whom the court finds to be members of the class, whereas the judgment in an action under (b)(3) include "those to whom the notice provided in subdivision (c)(2) ['best notice practicable under the circumstances'] was directed, and *who have not requested exclusion*, and whom the court finds to be members of the class" (emphasis added)).

Many courts have held that a class member cannot opt-out of classes certified under (b)(1) and (b)(2). See, e.g., *In re A.H. Robins Co.*, 880 F.2d 709, 728 (4th Cir. 1989) (noting that "no member has the right to opt out in a (b)(1) or (b)(2) suit" (internal quotation marks omitted) (quoting 3B MOORE'S FEDERAL PRACTICE ¶ 23.31[3], at 236-37 (2d ed. 1987))); *In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1544 (11th Cir. 1987) ("Members of a (b)(3) class, but not those of a (b)(1) class, may choose to opt out and not be bound by the judgment."); *In re School Asbestos Litig.*, 789 F.2d 996, 1002 (3d Cir. 1986) (holding that all (b)(1)(B) class members must remain "members of the class because no opt out provision exists"); *Van Gemert v. Boeing Co.*, 590 F.2d 433, 438 n.11 (2d Cir. 1978) (en banc) (holding that "[n]o class member could have opted out of such a [23(b)(1)] suit even if he had desired to do so"), *aff'd*, 444 U.S. 472 (1980); *Larionoff v. United States*, 533 F.2d 1167, 1186 n.44 (D.C. Cir. 1976) (noting that "class members in Rule 23(b)(1) and Rule 23(b)(2) actions are not provided an opportunity by the rule to exclude themselves from the action as is true in Rule 23(b)(3) actions"), *aff'd*, 431 U.S. 864 (1977).

The opt-out provision is not constitutionally mandated. Indeed, at least one federal statute provides for opt-in class actions. See Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b) (1994 & Supp. 1996) (mandating that an employee give written consent filed in the court in which the action is brought to become a party eligible to recover damages against his employer under the Act).

Rule 23 is in its present form because the 1966 Rules Advisory Committee determined as a matter of policy in favor of the opt-out class action—which keeps all class members in the class unless they make a specific and timely declaration of noninvolvement in the proceedings. See Kaplan, *supra* note 220, at 397-98 (arguing on moral rather than legal grounds that "requiring the individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people—especially small claims held by small people—who for one reason or another, ignorance, timidity, unfamiliarity with business or

opt-out of an apparently mandatory class.²⁸⁸ Because of the opt-out feature of the (b) (3) class action, members of a class certified under

legal matters, will simply not take the affirmative step"). Apart from the committee's disturbing tone of paternalism ("small claims held by small people"), its decision to create opt-out as opposed to opt-in class actions has contributed to the meteoric rise in class action litigation. There can be little doubt that the opt-in form of the class action would substantially diminish the number of members in a class. See Bruce I. Bertelsen et al., Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L.J. 1123, 1150 (1974) (asserting that "[t]he opt in procedure has substantial effect in . . . reducing the number of class members" and noting three class actions in which the opt-in procedure reduced class size by 39%, 61%, and 73% respectively). Nor can there be doubt, even without empirical proof to support the proposition, that the increased number of class members—and a proportionate increase in recovery for class counsel—has fuelled the fire of class litigation in the past twenty or so years.

Some courts have attempted to create opt-in class actions under Rule 23. See, e.g., *In re U.S. Fin. Sec. Litig.*, 69 F.R.D. 24, 53 (S.D. Cal. 1975) (finding that "the language of Rule 23 and recent decisions pertinent thereto permit the establishment of an 'opt-in' class"). This attempt, however, is misguided. Rule 23(c)(3) makes clear that there are only two types of classes—mandatory (Rule 23(b)(1) and (b)(2) classes) and opt-out (Rule 23(b)(3) classes). Any interpretation of Rule 23(d) which would, in effect, contradict Rule 23(c)(3) would introduce an unwarranted ambiguity into the language of the Rule. Moreover, the legislative history of the 1966 amendments makes clear that the advisory committee specifically considered and rejected the concept of an opt-in class. See Kaplan, *supra* note 220, at 397-98.

288. See, e.g., *Eubanks v. Billington*, 110 F.3d 87, 94 (D.C. Cir. 1997) (holding that "the language of Rule 23 is sufficiently flexible to afford district courts discretion to grant opt-out rights in (b)(1) and (b)(2) class actions"); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1304-05 (2d Cir. 1990) (noting that "a district court, in a proper case and in the exercise of sound discretion, may allow a class member to opt out of a limited fund class action under Rule 23(b)(1)(B) in order to facilitate 'the fair and efficient conduct of the action'"). Courts have reached this result by finding that Rule 23(d)(5), allowing a trial court to make appropriate orders "dealing with similar procedural matters," authorizes such opting-out. See *County of Suffolk*, 907 F.2d at 1304 (using the "command of Rule 1 of the Federal Rules of Civil Procedure [on the construction of the Rules] . . . to construe the text of Rule 23(d) liberally to accomplish this end [of fair and efficient conduct of the action]" (citing 4 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1029, at 121 (2d ed. 1987))). The *County of Suffolk* court implicitly recognized that its holding created a circuit split with respect to opting-out of a Rule 23(b)(1)(B) class. See *id.* at 1303 (noting that "several cases cited by [defendant] do contain some language apparently supportive of its position" (citing *In re A.H. Robins Co.*, 880 F.2d at 728; *In re Dennis Greenman Sec. Litig.*, 829 F.2d at 1544; *In re School Asbestos Litig.*, 789 F.2d at 1002; *Van Gemert*, 590 F.2d at 438 n.11; *Larionoff*, 533 F.2d at 1186 n.44)).

The Supreme Court has displayed an interest on this point, twice granting but subsequently dismissing writs of certiorari to review this issue. See *Adams v. Robertson*, 520 U.S. 83 (1997) (per curiam) (holding that the petitioners failed to properly present the issue of whether all class members were afforded the right to exclude themselves from the class to the Alabama Supreme Court and therefore dismissing the writ as improvidently granted); *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 118 (per curiam) (dismissing grant of writ of certiorari as improvidently granted because "this case would require us to resolve a constitutional question that may be entirely hypothetical"). Justice O'Connor dissented from the Court's decision to dismiss the writ in *Ticor* on the ground that "[t]he decision below rests exclusively on a constitutional right to opt out of class actions asserting claims for monetary relief." See *id.* at 126 (O'Connor, J., dissenting).

this subdivision must be notified of the class certification and given time to request exclusion from the class litigation.²⁸⁹ Maryland Rule 2-231(e) also requires that (b)(3) class members be specifically notified of their class status and grants them the same right to opt-out as does Federal Rule 23(c)(3).²⁹⁰ The rule is less specific, however, in the form the notice must take, requiring only that notice must be given "in the manner the court directs" and not requiring "the best notice practicable under the circumstances" with individual notice when feasible.²⁹¹ In practice, however, a Maryland court is likely to order that type of notice most likely to alert as many class members as possible of the existence of the class action and of their right to opt-out of the class. Such notice is desirable in light of the due-process concerns inherent in class actions and the desire of both parties to secure a favorable conclusion to the litigation that binds all class members.

The party seeking class certification bears the expense of providing a Rule 23(c)(2) notice to the class.²⁹² Although some exceptions to this rule exist, most notably when the party opposing the class has a pre-existing fiduciary duty to the party seeking the class, as, for example, in a shareholder derivative suit,²⁹³ the general rule should apply in most cases.²⁹⁴ The refusal of a party seeking class certification to bear the cost of such notice is sufficient grounds to deny class certifi-

289. See FED. R. CIV. P. 23(c)(2) (requiring for a (b)(3) class that the court "direct to the members of the class the best notice practicable under the circumstances," and setting forth the content of this notice).

290. See MD. RULE 2-231(e) (requiring notice to (b)(3) class members, and noting that class members may "request exclusion").

291. Compare FED. R. CIV. P. 23(c)(2) with MD. RULE 2-231(e).

292. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (stating "[t]he usual rule . . . that a plaintiff must initially bear the cost of notice to the class"); *Johnson v. Chrysler Credit Corp.*, 26 Md. App. 122, 128, 337 A.2d 210, 213 (1975) (adopting *Eisen*).

293. Cf. *Eisen*, 417 U.S. at 178 & n.15 (noting the district court's view that the cost of notice in a shareholder derivative suit shifts, but declining to express an opinion on allocation of notice in such cases).

294. The trial court can, however, order the party opposing the class to perform a task necessary for the notification of the class if the class opponent can perform this task with less difficulty or expense than could the class proponent. See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 355-59 (1978). For example, where a class opponent has access to a list of the names and addresses of class members, a court can order the production of this list pursuant to Federal Rule 23(d), which permits the court to make appropriate orders concerning tasks necessary to send notice. *Id.* at 354-55. Accordingly, the court can order that the class opponent provide information in its possession or control necessary to identify class members for notice purposes. *Id.* at 355. Nonetheless, even in such cases, the expense of those tasks necessary to accomplish the notification of the class should be borne by the class proponents, as the parties who derive the benefit of the notice, rather than the class opponents. *Id.* at 358.

cation.²⁹⁵ Notice of a (b)(1) or (b)(2) class is not required, but might be ordered by the court under its discretionary powers.²⁹⁶ Regardless of the type of class certified by the court, however, the class members must receive notice before the class is dismissed or settled.²⁹⁷

K. Rule (b)(1)(A) Classes

The first of the non opt-out classes is that provided for in Federal Rule 23(b)(1)(A) and Maryland Rule 2-231(b)(1)(A).²⁹⁸ The language of this subdivision makes clear that this form of class action is for the benefit of the party defending itself against potentially multiple adjudications and not for the benefit of the potential members of the class.²⁹⁹ The fact that some plaintiffs may lose their suits against a defendant, while others may win, is insufficient to establish the inconsistency of verdict required by the rule, and therefore is an insufficient basis for certification of a (b)(1)(A) class.³⁰⁰

The drafters of the 1966 amendments to Rule 23 described the purpose of the (b)(1)(A) class action as follows:

One person may have rights against, or be under duties toward, numerous persons constituting a class, and be so posi-

295. See *Eisen*, 417 U.S. at 179 (remanding the case with instructions to dismiss the class action for petitioner's refusal to bear the cost of notice to the class members but noting that the dismissal of the class action is without prejudice to any efforts by petitioner to redefine the class).

296. See FED. R. CIV. P. 23(d); MD. RULE 2-231(f) (providing that a court *may* require that notice be given in order to protect members of the class).

297. See FED. R. CIV. P. 23(e) (providing that "notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs"); MD. RULE 2-231(h) (same).

298. FED. R. CIV. P. 23(b)(1)(A) provides as follows:

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class. . . .

The Maryland Rule incorporates identical language, except for inserting the clause "unless justice requires otherwise" at the beginning. See MD. RULE 2-231(b)(1)(A).

299. See, e.g., *In re Copley Pharm. Inc.*, 158 F.R.D. 485, 490 (D. Wyo. 1994) (stating that "Rule 23(b)(1)(A) is for the benefit of those adverse to the putative class, not those seeking the class" (citing *Pruitt v. Allied Chem. Corp.*, 85 F.R.D. 100 (E.D. Va. 1980))); *Pruitt*, 85 F.R.D. at 106 ("Subsection (b)(1)(A) is designed to protect the interests of the party opposing the class.").

300. See, e.g., *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 305 (6th Cir. 1984) ("The fact that some plaintiffs may be successful in their suits against a defendant while others may not is clearly not a ground for invoking Rule 23(b)(1)(A)."); *In re Copley Pharm.*, 158 F.R.D. at 490 (same).

tioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct. The class action device can be used effectively to obviate the actual or virtual dilemma which would thus confront the party opposing the class.³⁰¹

Neither this description, nor the advisory committee's examples, however, solve some tricky problems facing the proponent of a (b)(1)(A) class. In particular, the issue of the adequacy of the representation presents a considerable challenge.

The Supreme Court has indicated that conflicts of interest within a class can pose insurmountable problems for a class proponent.³⁰² Yet such conflicts are almost inherent in a (b)(1)(A) class, where, as contemplated by the advisory committee, the class proponent is facing two or more groups of putative class members which are seeking mutually irreconcilable relief. Although the (b)(1)(A) class is designed to solve this problem, such a class can only be certified after first satisfying Rule 23(a)(4)'s "adequacy" test, thus requiring the class proponent to clear the conflict of interest hurdle which is the reason for seeking class certification in the first place.³⁰³ Although subclassing pursuant to Rule 23(c)(4)(B) is almost mandatory for a (b)(1)(A) class, this will not solve the inherent contradictions of such a class.³⁰⁴

301. FED. R. CIV. P. 23 advisory committee note (b)(1)(A) (1966 Amendments). The committee offered two illustrations as instruction on the application of the (b)(1)(A) class action:

Separate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations. In the same way, individual litigations of the rights and duties of riparian owners, or of landowners' rights and duties respecting a claimed nuisance, could create a possibility of incompatible adjudications. Actions by or against a class provide a ready and fair means of achieving unitary adjudication.

Id.

302. *See, e.g., Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2251 (1997) (affirming a denial of certification due to a conflict between currently injured plaintiffs and exposure-only plaintiffs).

303. *See* FED. R. CIV. P. 23(a) (establishing the prerequisites to a class action, including that "the representative parties will fairly and adequately protect the interests of the class"); *see also supra* notes 264-283 (discussing Rule 23(a)(4) and adequacy of counsel).

304. *See* FED. R. CIV. P. 23(c)(4)(B) (providing that "a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly"); MD. RULE 2-231(d) (providing similarly, but omitting the final clause of the federal rule). This omission is not significant, however, because the extant language itself implies that the provisions of the rule apply to the subclasses. Thus, in both federal and Maryland class actions, each subclass individually must meet the numerosity, commonality, typicality, and adequacy requirements of the rule. This in turn

This conundrum is further complicated by the involuntary nature of a (b)(1)(A) class—it is not the class, but instead the class opponent, that is seeking class certification. This fact raises questions of the adequacy of class counsel, who might have had no intention of filing a class action but instead intended to represent the interests of an individual only. It is questionable whether the placing of the involuntary burden of class representation, both on the class representative and class counsel, can survive close constitutional scrutiny.³⁰⁵ For these reasons, it is likely that the (b)(1)(A) class will be the least frequently certified of the four types of class action available under the rule.

L. *The (b)(1)(B) Class*

The (b)(1)(B) class, more commonly and inaccurately referred to as the “limited fund” class,³⁰⁶ forms a counterpart to the (b)(1)(A) class.³⁰⁷ Whereas the (b)(1)(A) class protects the interests of the class opponent from the risk of incompatible standards of conduct being imposed on it by individual class members, the (b)(1)(B) class is intended to protect the class proponents from being deprived of a remedy against the class opponents.³⁰⁸

requires that each subclass have at least one representative. Subclassing, however, does not solve the problems of class conflict and class counsel conflicts of interest. See *supra* note 283 and accompanying text.

305. The due process problem identified by the Supreme Court in *Amchem*, and amplified in its recent decision in *Ortiz v. Fibreboard Corp.*, 119 S. Ct. 2295 (1999), would be difficult to resolve in the context of a Rule 23(b)(1)(A) class.

306. Although limited fund cases form the bulk of classes certified under this subdivision, actions that seek injunctive or declaratory relief could, for example, be certified as (b)(1)(B) classes where the effect of the relief could not reasonably be confined to plaintiffs in an individual action. See 5 JEREMY C. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 23.42[3][a], at 180 (3d ed. 1964) (“A class may be certified under Rule 23(b)(1)(B) in cases seeking declaratory or injunctive relief in which one member would be prejudiced through litigation pursued by other putative members of the class.”). It is important to note that, although limited fund cases are perhaps the most typical of those for which certification is sought under the (b)(1)(B) class action form, certification under this provision does not require the existence of a limited fund. See, e.g., *Ortiz*, 119 S. Ct. at 2312-13 (“Rule 23(b)(1)(B) . . . covers more historical antecedents than the limited fund.”); *White v. National Football League*, 822 F. Supp. 1389, 1411 (D. Minn. 1993) (noting that “classes under Rule 23 (b)(1) may also be certified in cases involving claims for money damages in which no ‘limited fund’ exists”).

307. See FED. R. CIV. P. 23(b)(1)(B) (providing for certification where the prosecution of separate actions by or against class members would create a risk of “adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests”); MD. RULE 2-231(b)(1)(B) (same).

308. Compare FED. R. CIV. P. 23 advisory committee note (b)(1)(A) (1966 Amendments) (noting the intent of this provision to protect a class opponent when “conflicting or vary-

The Advisory Committee noted that the limited assets of a defendant was one instance in which a (b)(1)(B) class could be utilized:

In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem.³⁰⁹

Although the (b)(1)(B) class is not solely for limited fund cases, these are the most common class actions brought under this subdivision of the rule.³¹⁰ In order to make a determination of whether the fund at issue is sufficiently limited, the trial court must conduct a factual inquiry during which class opponents must be given the opportunity to

ing adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct") with FED. R. CIV. P. 23 advisory committee note (b)(1)(B) (1966 Amendments) (noting the intent of this provision to protect class proponents from situations in which "judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter").

The (b)(1)(B) class form is a mandatory, non-opt out class. While it could be argued that the appropriate class type for resolution of monetary damage claims is the (b)(3) opt-out class, mandatory class actions have long been recognized in the United States as appropriate vehicles for resolving these claims. *See, e.g.*, Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 367 (1921) (noting, in a suit involving the disposition of a civic organization's funds, that "[i]f the decree is to be effective and conflicting judgments are to be avoided all of the class must be concluded by the decree"). Although many had expected the Supreme Court to rule on the question of whether mandatory class actions were appropriate vehicles for resolving monetary damage claims in its *Ortiz* opinion, the Court stopped just short of doing so:

We do not, it is true, decide the ultimate question whether Rule 23(b)(1)(B) may ever be used to aggregate individual tort claims. But we do recognize that the Committee would have thought such an application of the Rule surprising, and take this as a good reason to limit any surprise by presuming that the Rule's historical antecedents identify requirements.

Ortiz, 119 S. Ct. at 2314. Why the Committee would have found such a practice surprising is unclear—certainly mandatory class actions seeking monetary damages have been identified as early as 1751. *See Leigh v. Thomas*, 28 Eng. Rep. 201 (Ch. 1751) (involving a member of a ship's crew who brought an action in equity on behalf of all crew members to recover prize money allegedly owed to them).

309. FED. R. CIV. P. 23 advisory committee note (b)(1)(B) (1966 Amendments).

310. 1 NEWBERG & CONTE, *supra* note 12, § 4.09, at 31 ("The most common use of subsection (b)(1)(B) class actions is in limited fund cases.").

present evidence that a limited fund does not exist.³¹¹ Failure to conduct this inquiry renders class certification clearly erroneous as a matter of law.³¹² A simple declaration by the trial judge that "there is a risk that a limited fund may exist from which judgments can be satisfied" is not sufficient.³¹³

In order to establish the existence of a limited fund, the class proponent must establish the size of the fund available to pay all potential claims, and that the value of the potential claims will likely exceed the capacity of the fund to pay.³¹⁴ Courts have held that a limited fund class can be certified when a fixed asset or piece of property exists in which all class members have a preexisting interest, and an apportionment or determination of the interests of one class member cannot be made without affecting the proportionate interests of other class members similarly situated.³¹⁵ The potential or probable insolvency of a class opponent due to a large number of pending tort actions can create an appropriate scenario for a limited fund class.³¹⁶ Simply demonstrating the existence of a large number of plaintiffs and a large *ad damnum* clause in the complaint, however, is not sufficient to guarantee (b)(1)(B) certification.³¹⁷

Courts have differed over the appropriate test to use in order to determine whether a fund is sufficiently limited to warrant certification of a (b)(1)(B) class. One test requires the court to find that a limited fund exists which will "necessarily" affect the class proponents' claims.³¹⁸ Another test, first set forth in the *Agent Orange* case, requires that the court find that there is a "substantial probability" that

311. See, e.g., *In re Teletronics Pacing Sys., Inc.*, 172 F.R.D. 271, 285 n.9 (S.D. Ohio 1997) ("The Court cannot certify a limited fund class without making findings concerning the existence of a limited fund." (citing *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 306 (6th Cir. 1984))).

312. *In re Bendectin*, 749 F.2d at 306.

313. *Id.*

314. 3 NEWBERG & CONTE, *supra* note 12, § 17.15, at 37-88.

315. *In re Teletronics*, 172 F.R.D. at 285-86 (quoting 1 NEWBERG & CONTE, *supra* note 12, § 4.09).

316. *Id.* at 286 (citing *In re Asbestos Litig.*, 90 F.3d 963, 983 (5th Cir. 1996)).

317. See *Payton v. Abbott Labs.*, 83 F.R.D. 382, 389 (D. Mass. 1979), *vacated on other grounds*, 100 F.R.D. 336 (D. Mass. 1983).

318. See *In re Northern Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 852 (9th Cir. 1982) (holding certification of a 23 (b)(1)(B) limited fund class in a multiparty product liability action "proper only when separate . . . claims necessarily will affect later claims," and reversing a district court certification for lack of "sufficient evidence of, or even a preliminary fact-finding inquiry concerning" the defendant's assets and insurance coverage).

the limited fund will affect the class proponents' claims.³¹⁹ The standard for the "substantial probability" test has been set somewhat lower than the name of the test would indicate:

[T]he proper standard is whether there is a substantial probability—that is less than a preponderance of the evidence but more than a mere possibility—that if damages are awarded, the claims of earlier litigants would exhaust the defendants' assets.³²⁰

The mandatory nature of the (b)(1)(B) class has made it an appealing vehicle for both plaintiffs and defendants when trying to settle large scale, potentially ruinous, litigation. The Supreme Court, however, has substantially limited the utilization of creative solutions to mass tort problems. In *Ortiz v. Fibreboard Corp.*,³²¹ the Court reviewed a large scale asbestos settlement³²² and rejected the rationale accepted by both the district court and the Fifth Circuit, in an attempt to reduce a portion of what the Court has recognized as the "elephantine mass of asbestos cases."³²³

The Court's path in *Ortiz* was certainly one not often travelled. Sloughing off its well-articulated position that the language of a federal rule is the best indication of Congressional intent,³²⁴ the Court reviewed the historical antecedents of "limited fund" classes³²⁵ in order to determine the meaning of Rule 23(b)(1)(B)'s language. The paradigmatic "limited fund" class gleaned by the Court from these historical antecedents is one in which a fund, with a "definitely ascertained limit, . . . would be distributed to satisfy all those with liquidated claims based on a common theory of liability, by an equitable pro rata distribution."³²⁶ "The prudent course," the Court contin-

319. *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 728 (E.D.N.Y. 1983) (certifying a group of Vietnam War veterans, and members of their families, as a (b)(1)(B) class on the issue of punitive damages because there was a "substantial probability" that such damages would ultimately be allowed by a trial court, and the lack of a limited fund class would allow Rule 23(b)(3) opt-out class members to "receive all of the punitive damages" and therefore "be dispositive of the interests of the other members not parties to the adjudication[]" (quoting FED. R. CIV. P. 23 (b)(1)(B))).

320. *Id.*; see also *Coburn v. 4-R Corp.*, 77 F.R.D. 43, 45 (E.D. Ky. 1977) (finding a limited fund class certification proper where there was a "good reason to believe . . . that total judgments might substantially exceed the ability of defendants to respond").

321. 119 S. Ct. 2295 (1999).

322. It is interesting, and troubling, to note that both *Amchem* and *Ortiz* are asbestos cases, yet the intended scope of both Supreme Court opinions is substantially broader than such mass tort litigation.

323. *Ortiz*, 119 S. Ct. at 2302.

324. See, e.g., *Pavelic & LeFlore v. Marvel Entertainment*, 493 U.S. 120, 123 (1989).

325. *Ortiz*, 119 S. Ct. at 2308-2312.

326. *Id.* at 2312.

ued, "is to presume that when subdivision (b)(1)(B) was devised to cover limited fund actions, the object was to stay close to the historical model."³²⁷ Having established its fictitious *ex post facto* (and incomplete) legislative history of Rule 23 (b)(1)(B), the Court then reviewed the facts of the *Ortiz* case and found them to be insufficient to justify class certification.³²⁸

The Supreme Court was troubled by the unlimited nature of Fibreboard's assets³²⁹ and the conflict of interest inherent³³⁰ in having one set of attorneys representing class members with divergent interests.³³⁰ The Court was also concerned about the mechanics of the settlement before it, particularly the fact that "myriad claimants with causes of action . . . arising from exposure to Fibreboard asbestos" were excluded from the class.³³¹ The Court did, however, appear at least mildly receptive to one feature of the settlement—the fact that Fibreboard had retained some portion of its assets after the terms of the settlement were agreed to. Although Fibreboard's retention of virtually all of its assets was beyond the rule,³³² the Court seemed willing to entertain the possibility that some holdback of funds can be permitted:

327. *Id.* at 2313.

328. Certainly the facts of *Ortiz* are enough to raise the eyebrows of even the most ardent supporter of the class settlement device. Fibreboard was facing a costly battle on two fronts: the Western front consisted of California-based litigation against its insurance carriers; the Eastern front was the "unabated" flood of individual law suits. *Id.* at 2303. Fibreboard won the insurance litigation below, but the insurers appealed. *Id.* at 2304. (After the *Ortiz* settlement ended, but before the district court finally approved the settlement, a California appellate court reversed. *Id.* n.3.) Fibreboard then approached a group of plaintiffs lawyers in an attempt to negotiate a "global settlement" of its asbestos liability; these negotiations soon included the insurers as well. *Id.* After what appears to have been arduous negotiations, the parties agreed to a \$1.535 billion settlement, with Fibreboard contributing \$10 million and all but \$500,000 coming from other insurance sources. *Id.* Only after the consummation of the global settlement was a complaint filed. *Id.* at 2305.

329. In particular, the fact that the parties had simply agreed that the settlement fund was limited rankled the Court. "Assuming arguendo that a mandatory, limited fund rationale could under some circumstances be applied to a settlement class of tort claimants, it would be essential that the fund be shown to be limited independently of the agreement of the parties to the action" *Id.* at 2323.

330. *Id.*

331. *Id.* at 2318.

332. The Court explained:

A third contested feature of this settlement certification that departs markedly from the limited fund antecedents is the ultimate provision for a fund smaller than the assets understood by the Court of Appeals to be available for payment of the mandatory class members' claims; most notably, Fibreboard was allowed to retain virtually its entire net worth.

Id. at 2321.

One great advantage of class action treatment of mass torts cases is the opportunity to save the enormous transaction costs of piecemeal litigation, an advantage to which the settlement's proponents have referred in this case. Although the District Court made no specific finding about the transaction cost saving likely from this class settlement, estimating the amount in "hundreds of millions," it did conclude that the amount would exceed Fibreboard's net worth as the Court valued it. . . . If a settlement thus saves transaction costs that would never have gone into a class member's pocket in the absence of settlement, may a credit for some of the savings be recognized in a mandatory class action as an incentive to settlement? It is at least a legitimate question, which we leave for another day.³³³

Practitioners would no doubt wish that the Court would answer such questions, not raise them. Scholars will likely ponder how it is that, in one breath, the Court can create a "historical paradigm"³³⁴ of a Rule 23(b)(1)(B) class from which deviation is frowned upon, and in the next breath appear to condone, in principle, something which "departs markedly from the limited fund antecedents"³³⁵ of the Rule. Ultimately, however, it will be up to the district courts and the circuit courts—armed now with the discretion to grant interlocutory review under the new Rule 23(j)—to provide clarification of the Supreme Court's somewhat murky opinion.

One likely result of the Supreme Court's *Ortiz* opinion will be the stifling—at least in the short term—of creative attempts to resolve mass tort litigation problems. This is an unfortunate result, especially where the language of Rule 23 permits a broader interpretation than the somewhat cramped and artificially historical reading given to it by the Court.³³⁶ This is not to say, however, that no class presented for

333. *Id.* at 2321-22 (citations omitted).

334. *Id.* at 2323.

335. *Id.* at 2321.

336. The Court even acknowledged the restrictive nature of its analysis:

It is true, of course, that the text of Rule 23(b)(1)(B) is on its face open to a more lenient limited fund concept, just as it covers more historical antecedents than the limited fund. But the greater the leniency in departing from the historical limited fund model, the greater the likelihood of abuse in ways that will be apparent when we apply the limited fund criteria to the case before us. The prudent course, therefore, is to presume that when subdivision (b)(1)(B) was devised to cover limited fund actions, the object was to stay close to the historical model.

Id. at 2312-13. Why it is that the certification of a class consistent with the language of Rule 23 requires "leniency," or how such a class could be abusive, is unclear. Indeed, an argument could be made that the danger of abuse from a court which selectively creates an artificial historical paradigm of a limited fund class in order to compare it to the facts of a

certification under Rule 23(b)(1)(B) can be certified. The crucial distinction here seems to be whether or not a true "fund" can be defined for purposes of the (b)(1)(B) class. Where a class opponent is an ongoing concern, and therefore has access to a theoretically unlimited stream of continuing income, *Ortiz* now makes clear that a limited fund class cannot be certified.³³⁷ Where, however, the class opponent is no longer a going concern, and its income-flow has dried up, it is more likely that the court can properly find that a true "fund" can be created.³³⁸ In such a situation, it is possible that a settlement can be crafted, consistent with the requirements of *Amchem* and *Ortiz*, in which a mandatory class is certified in order to bring all litigation to a halt.³³⁹

case before it is far more substantial than the risks posed by parties seeking to craft a settlement. The spectre of such abuse is something of a straw argument set up by the Court for the purpose of knocking down the *Ortiz* settlement. Every district court has the ability to approve or not approve a class settlement presented to it. Strict adherence to the language of Rule 23, and careful scrutiny of the facts surrounding an individual case, should protect against any danger of abuse.

337. See *id.* at 2311 ("The first and most distinctive characteristic is that the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, demonstrate the inadequacy of the fund to pay all the claims.")

338. See *In re* Joint E. & S. Dist. Asbestos Litig., 982 F.2d 721, 742-43 (2d Cir. 1992) (accepting the establishment of a limited fund class because the underlying trust fund was established during defendant's bankruptcy reorganization), *modified on reh'g sub nom. In re* Findley, 993 F.2d 7 (2d Cir. 1993); *In re* Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 288, 292 (2d Cir. 1992) (holding the actual "fund" to be "limited" because defendant established \$350 million fund in settlement of SEC enforcement action and subsequently went bankrupt).

339. This possibility is significant in nationwide litigation. Although it is highly unlikely that a Maryland court would seek to certify a nationwide class action because of the practical problems inherent in applying so many state laws, see *Phillips Petroleum v. Shutts*, 472 U.S. 797, 821-22 (1985) (requiring significant contact or aggregation of contacts before state court can apply law of forum to nationwide class action), both state practitioners and state courts should be aware of certain issues when dealing with litigation that has both a federal and state court component. The paradigmatic situation is that of a nationwide mass tort action, where state court cases—either individual or state class actions—have been filed and are proceeding independently from the federal action. Indeed, state court practitioners will frequently seek to join nondiverse defendants, or plead an amount in issue slightly below the federal courts' jurisdictional amount, in order to preserve state court jurisdiction and maintain control of the litigation. When attempting to settle such a case, a defendant frequently will seek the cessation of all litigation facing it, including the nonfederal actions.

It appears that the federal court can, as part of the class settlement, issue an injunction in order to protect a lengthy and protracted settlement from disruption. See 28 U.S.C. §§ 1651-1659 (1994). An injunction preventing further prosecution of state court claims, however, appears to run foul of the Anti-Injunction Act. See 28 U.S.C. § 2283 (1994) (providing that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or when necessary in aid of its jurisdiction, or to protect or effectuate its judgments").

The paradigmatic situation described above does not involve an "Act of Congress," nor will the trial court have issued a judgment that requires protection under the third exception to 28 U.S.C. §§ 1651-1659. Thus, the ability of the federal court to issue an injunction to stay state court litigation, if it exists at all, must flow from the second, "necessary to aid its jurisdiction," exception. The Supreme Court, however, has long held:

[A]n action brought to enforce [a personal] liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of *res adjudicata*

Kline v. Burke Constr. Co., 260 U.S. 226, 230 (1922). The Court's position has caused at least one circuit court to hold that the certification of a mandatory class, when a bar on state court litigation, would be a violation of the Anti-Injunction Act. See *In re Federal Skywalk Cases*, 680 F.2d 1175, 1180-83 (8th Cir. 1982) (vacating a district court's mandatory class certification order on the ground that it acted to "enjoin [] pending state proceedings," and that such an injunction did not fall under the "necessary in aid of its jurisdiction" exception to the Anti-Injunction Act because "a simultaneous *in personam* state action does not interfere with the jurisdiction of a federal court in a suit involving the same subject matter").

The Eighth Circuit's analysis, however, is limited to cases involving *in personam* jurisdiction of the federal court; the rule in such cases is that there is concurrent jurisdiction in state court. See *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 641-42 (1977) (noting this traditional rule, and that "there is no evidence that the ["necessary in aid of jurisdiction"] exception to § 2283 was intended to alter this balance [between federal and state jurisdiction]").

By contrast to this rule concerning *in personam* jurisdiction, a (b)(1)(B) class, predicated on the class opponent's limited funds, arguably implicates the federal courts' *in rem* jurisdiction. The purpose of the (b)(1)(B) class is to protect the interests of class members in the event that a few claimants are able to prevail and drain the funds available to satisfy judgments. By certifying a (b)(1)(B) class, the court is, in effect, seizing control of the limited fund in order to preserve it for distribution to the class as a whole. Although, as a practical matter, the case does not proceed to litigation, presumably the fund is also being preserved for the class opponent's further use if the class proponents do not prevail at trial. Accordingly, this sort of case amounts to an exercise of *in rem* jurisdiction over the fund or *res*, and not an exercise of *in personam* jurisdiction over the class members. See, e.g., *In re Asbestos Litig.*, 90 F.3d 963, 987 (5th Cir. 1996) (holding that a 23 (b)(1)(B) class action is similar to an action *in rem* "because all claimants will recover from the fund or not at all" and thus the action "resemble[s] [an] action[] for interpleader, or for the accounting of a trustee"), *rev'd on other grounds sub nom.* *Ortiz v. Fibreboard Corp.*, 119 S. Ct. 2295 (1999).

This analysis of a limited fund in terms of *in rem* jurisdiction is consistent with the entire purpose of the class certification, namely, to preserve the fund from being drained by simultaneous state court litigation:

In the mass tort context, the claimants all have a potential stake in any finite fund out of which recovery is made. If a court does not protect the *res* by invoking its jurisdiction to force litigation of all the claims against the *res* in one proceeding, then any plaintiff's judgment in a court of concurrent jurisdiction would necessarily deplete the fund at the expense of all subsequent plaintiffs.

Bryan J. Schillinger, *Preventing Duplicative Mass Tort Litigation Through the Limited Resources Doctrine*, 14 REV. LITIG. 465, 471 (1995).

For these reasons, a federal court's injunction against concurrent state court litigation could be justified under the second exception to the Anti-Injunction Act, i.e., as necessary

M. *The (b)(2) Class*

The identical language of both the federal rule and the Maryland Rule makes clear that the (b)(2) class is for equitable relief only.³⁴⁰ The 1966 Advisory Committee noted that civil-rights litigation illustrates the kind of action contemplated by Rule (b)(2),³⁴¹ but that this subdivision was not limited to such cases.³⁴²

Because of the subdivision's emphasis on equitable relief, courts have held that, where monetary damages are the plaintiff's primary goal, certification is more appropriate under subdivision (b)(3).³⁴³ Class proponents who seek a combination of both injunctive relief and monetary damages should therefore be particularly cautious

in aid of the federal court's *in rem* jurisdiction over the limited fund. See *Vendo*, 433 U.S. at 641 (holding that the "necessary in aid of" exception to the Anti-Injunction Act "may be fairly read as incorporating this historical *in rem* exception"); *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 134-35 (1941) (acknowledging a historical exception to the Anti-Injunction Act where a federal court has jurisdiction over a *res*). But see *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877, 881 (11th Cir. 1989) (holding that the "proposition that the 'in aid of' exception incorporate[s] the historical 'in rem' exception to the Act[] is an opinion of only three justices of the Court and consequently is not binding precedent" (citing *Capitol Service, Inc. v. NLRB*, 347 U.S. 501 (1954))). In theory, there should be no distinction between an *in rem* resolution and an *in personam* one when evaluating the propriety of a unitary resolution of litigation. See, e.g., *Mullane v. Central Hannover Bank & Trust Co.*, 339 U.S. 306, 311-12 (1950) (rejecting this distinction as irrelevant to the question whether a unitary resolution is necessary). In a case of a true limited fund, as now defined by the Supreme Court in *Ortiz*, this analysis should be unchanged.

340. See FED. R. CIV. P. 23(b)(2) (providing that a class action can be maintained when "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"); MD. RULE 2-231(b)(2) (same).

341. See FED. R. CIV. P. 23(b)(2) advisory committee note (b)(2) (1966 Amendments) (stating that this type of class is appropriate for "various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration"); Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 J. L. REFORM 347, 351 (1988) (noting that Rule 23(b)(2) has proved "ideal for civil rights and antipoverty litigation").

342. See FED. R. CIV. P. 23(b)(2) advisory committee note (b)(2) (1966 Amendments) (discussing other examples of (b)(2) class actions, such as suits by retail purchasers against a seller alleged to have sold goods to that class at a higher price than some other group of purchasers, when such a difference in price was illegal). Although it is true that (b)(2) class actions are not exclusively for civil rights litigation, it is also true that there are many such actions. See 1 NEWBERG & CONTE, *supra* note 12, § 4.19 (discussing conflicting cases on whether the lack of need for a class is a bar to Rule 23(b)(2) certification and citing many civil rights cases).

343. See, e.g., *Castano v. American Tobacco Co.*, 160 F.R.D. 544, 552-53 (E.D. La. 1995) (refusing to certify a Rule 23(b)(2) class for plaintiffs "seeking primarily monetary damages" on the ground that "Rule 23(b)(3) is the 'preferred section [for certification] where monetary damages are the primary goal of plaintiff'" (alteration in original) (quoting *Day v. NLO*, 851 F. Supp. 869, 885-86 (S.D. Ohio 1994))), *rev'd on other grounds*, 84 F.3d 734 (5th Cir. 1996).

about seeking the certification of a (b)(2) class.³⁴⁴ They also should determine whether injunctive relief is an available remedy before seeking class certification.³⁴⁵

Litigants also should pay close attention to the nature of the remedy they are seeking. The remedy of medical monitoring,³⁴⁶ a staple of toxic exposure litigation³⁴⁷ and quickly becoming a feature in mass tort product liability litigation,³⁴⁸ presents an excellent laboratory for examining this issue.

The distinction between legal and equitable remedies is of paramount importance to the question of whether a jury trial is appropriate under the Seventh Amendment.³⁴⁹ In order to determine the

344. See, e.g., *Griffin v. Home Depot, Inc.*, 168 F.R.D. 187, 191 (E.D. La. 1996) (refusing to certify a class under Rule 23(b) because the "predominant relief sought by this class is economic and not injunctive and/or declaratory"); *Zapata v. IBP, Inc.*, 167 F.R.D. 147, 162 (D. Kan. 1996) (refusing to certify a 23(b)(2) class because class counsel conceded that injunctive relief would not suffice, and that monetary damages were also sought, so that the predominance of monetary damages required certification under 23(b)(3)). Where the presence of legal and equitable causes of action within the same litigation requires the selection between jury and nonjury determination of common issues, the discretion of the trial court is "very narrowly limited and must, wherever possible, be exercised to preserve jury trial." *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 510 (1959). As *Griffin* and *Zapata* indicate, this doctrine can pose a serious obstacle for class proponents.

345. See, e.g., *Goldberg v. Winston & Morrone, P.C.*, No. 95 Civ. 9282(LAK), 1997 WL 139526, at *3 (S.D.N.Y. Mar. 26, 1997) (denying certification of a Rule 23(b)(2) class in part because injunctive relief is not available in a private action brought under the Fair Debt Collection Practices Act).

346. See *Redland Soccer Club, Inc. v. Department of the Army*, 696 A.2d 137, 145-46 (Pa. 1997) (setting forth seven elements of a medical monitoring claim). Although traditionally Maryland courts have been unreceptive to this cause of action, see John J. Kalas, *Medical Surveillance Damages in Toxic Tort Litigation: A Half Hearted Embrace*, 2 U. BALT. J. ENVTL. L. 126, 144 (1992) (noting that Maryland courts have restricted toxic tort claims because of the difficulty in establishing the probability of harm), the Maryland Court of Appeals recently has held that plaintiffs can recover for the expense of testing for the HIV virus upon establishing that a physician performed surgery on them without first informing them that he had AIDS. See *Faya v. Almaraz*, 329 Md. 435, 455-56, 620 A.2d 327, 337 (1993) (noting that, because there is a 95% chance that one exposed to the HIV virus will test positive, if at all, for HIV within six months after exposure, plaintiffs could recover for the emotional injuries suffered within this six month window). Although *Faya* is not considered to be a medical monitoring case, the finding that the cost of HIV testing was recoverable could fairly be interpreted as allowing for recovery for medical monitoring.

347. See, e.g., *Ayres v. Township of Jackson*, 525 A.2d 287, 297-99 (N.J. 1987) (discussing the use of this remedy in such litigation); *Redland Soccer Club*, 696 A.2d at 145-47 (same).

348. See, e.g., *In re Teletronics Pacing Sys., Inc.*, 172 F.R.D. 271, 284-87 (S.D. Ohio 1997) (discussing the use of a medical monitoring remedy in mass tort product liability litigation under Rule 23(b)(1)(A), (b)(1)(B), and (b)(3)).

349. See *Beacon Theaters*, 359 U.S. at 501 ("Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." (internal quotation marks omitted) (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935))).

nature of the remedy sought, federal courts employ a two-pronged test: first, the court analyzes the nature of the issues involved; second, the court must analyze the nature of the remedy sought by the plaintiff.³⁵⁰ This test is weighted in favor of the second prong of the analysis.³⁵¹

In order to determine the nature of the issues involved in the litigation, the trial court must look, in the first instance, to the law of England in the Eighteenth Century prior to the merger of law and equity.³⁵² When this analysis does not end the inquiry—as, for example, in the case of medical monitoring, which was not recognized as a claim in the Eighteenth Century³⁵³—then the trial court must look for an analogous claim that did exist at the time.³⁵⁴ In performing the first prong of this analysis, at least one court has concluded that this cause of action is more closely analogous to a legal claim.³⁵⁵

The analysis under *Chauffeurs*'s second prong, however, is less obvious. The court must look to the relief being sought by the plaintiffs, which requires the court to determine what the plaintiffs truly are seeking.³⁵⁶ For example, the district court in *Barnes v. American Tobacco Co.* determined that if the plaintiffs were seeking monetary damages which they then would use to pay for their medical monitoring, then the relief was compensatory, and therefore legal in nature.³⁵⁷ If, however, the plaintiffs instead were seeking "the establishment of a

The Seventh Amendment provides that, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ." U.S. CONST. amend VII. A suit "at common law" is one in which the plaintiff asserts legal rights alone, in contrast to one in which he seeks equitable remedies. See *Chauffeurs*, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 564 (1990) (plurality opinion) (noting that suits at common law refer to ones in which legal rights are at stake, and not to the narrow class of common-law forms of action recognized in 1791) (quoting *Parsons v. Bedford*, Breedlove & Robeson, 28 U.S. (3 Pet.) 433, 447 (1830)); *Parsons*, 28 U.S. (3 Pet.) at 447 (defining common law suits as ones in which "legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognised").

350. *Chauffeurs*, 494 U.S. at 565.

351. *Id.*

352. *Id.*

353. See *Barnes v. American Tobacco Co.*, 989 F. Supp. 661, 664 (E.D. Pa. 1997) ("There is no dispute that a cause of action for medical monitoring did not exist in 1791."), *aff'd*, 161 F.3d 127 (3d Cir. 1998).

354. *Chauffeurs*, 494 U.S. at 566.

355. See *Barnes*, 989 F. Supp. at 664 (analogizing a medical monitoring claim to an 18th century negligence action at law for future medical expenses).

356. See *Chauffeurs*, 494 U.S. at 571-73 (inquiring into actual relief sought by plaintiffs in determining whether or not a right to a trial by jury exists under the Seventh Amendment).

357. *Barnes*, 989 F. Supp. at 665.

court-supervised medical monitoring program through which the class members will receive periodic examinations, then plaintiffs' medical monitoring claim can be properly characterized as [a] claim seeking injunctive relief."³⁵⁸ This ambiguity would remain despite the fact that the result for the defendant—the payment of a sum of money for medical monitoring—would be the same.³⁵⁹

The *Barnes* court noted that this ambiguity unfairly places the defendants' right to a jury trial in the hands of an artful pleading plaintiff.³⁶⁰ Moreover, the court also recognized the long-standing doctrine that a plaintiff cannot invoke the powers of equity where a legal remedy is adequate and available.³⁶¹ Although the court noted that the nature of the relief sought was "inherently both legal and

358. *Id.*

359. The *Barnes* court itself previously had concluded that the medical monitoring relief requested by the plaintiffs in the case was legal in nature. See *Arch v. American Tobacco Co.*, 175 F.R.D. 469, 485 (E.D. Pa. 1997) (refusing to certify a class under Rule 23(b)(2) because, "[a]lthough plaintiffs' request for periodic medical examinations pursuant to a court-supervised program could be properly viewed as 'injunctive' relief, the majority of relief sought by plaintiffs is compensatory"). Although the name is different, this is a previous decision in the same case. The named class representative, Steven Arch, subsequently decided to withdraw from the action and his place was taken by the next class representative in alphabetical order, William Barnes. See *Barnes*, 989 F. Supp. at 663 n.1.

The majority of state courts (or federal courts applying state law) that have considered the question have determined that medical monitoring is an element of legal damages that can be recovered only after legal liability has been established pursuant to an underlying theory of tort liability such as negligence or strict liability. See, e.g., *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1400, 1410-11 (W.D. Mo. 1994) (applying Missouri state law and finding that medical monitoring is compensable "in accordance with accepted legal principles," but also that such a cause of action "requires plaintiff to prove actual present injury"); *Ball v. Joy Techs., Inc.*, 755 F. Supp. 1344, 1371-72 (S.D. W.Va. 1990) (interpreting West Virginia state law to allow recovery of medical monitoring expenses when plaintiff has suffered an actionable injury under state tort law), *aff'd*, 958 F.2d 36 (4th Cir. 1992); *Fleming v. Knowles*, 130 So. 2d 326, 328 (Ala. 1961) (declaring medical monitoring to be "a proper element of damages in an action for injury to the person"); *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 33 (Ariz. Ct. App. 1988) (allowing medical monitoring and holding that "its cost is a compensable item of damages"); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 823 (Cal. 1993) (in bank) (concluding that "a reasonably certain need for medical monitoring is an item of damage for which compensation should be allowed" under traditional tort theories). New Jersey, by contrast, has concluded that medical monitoring relief is equitable in nature. See *Ayres v. Township of Jackson*, 525 A.2d 287, 314 (N.J. 1987) ("In our view, the use of a court-supervised fund to administer medical-surveillance payments in mass-exposure cases . . . is a highly appropriate exercise of the Court's equitable powers." (citing *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396, 1402-03 (E.D. N.Y. 1985))).

360. See *Barnes*, 989 F. Supp. at 667 (noting that a "defendant's constitutional right to a jury trial will rise or fall on the form of a plaintiff's pleading").

361. See *id.* (noting "the principle of law that requires plaintiffs to demonstrate that they have no adequate remedy at law before they can call upon the equitable powers of a court").

equitable,"³⁶² it concluded that, on balance, "this action [for medical monitoring] is a legal one for the purposes of the Seventh Amendment."³⁶³ Thus the *Barnes* court concluded that the Seventh Amendment required that the defendant be given a jury trial.³⁶⁴

Having reached the conclusion that the case should be tried to a jury, however, the *Barnes* court nonetheless certified the class under Rule 23(b)(2):

Under Rule 23(b)(2), certification is appropriate where equitable and injunctive relief is the sole or primary relief sought and "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." Thus, in order to establish a right to Rule 23(b)(2) certification, it need only be shown that the relief requested is not predominantly damages. This inquiry has nothing to do with whether one's constitutional right to a jury trial has been implicated by the underlying nature of the claim. Indeed, the bar for determining whether the nature of a claim is equitable or legal for Seventh Amendment purposes is much higher than it is under Rule 23(b)(2) analysis. Under Seventh Amendment analysis, the right to a jury trial must be upheld even if the legal issues are characterized as "incidental" to equitable issues. For this reason, decisions holding that medical monitoring claims may be certified under Rule 23(b)(2) are not dispositive for purposes of the right to a jury trial. In theory and practice, courts can certify a class pursuant to Rule 23(b)(2) and yet find that the parties are entitled to a jury under the Seventh Amendment.³⁶⁵

The *Barnes* court's conclusion is puzzling. Under its own analysis of the issue, a (b)(2) class is appropriate where equitable relief is the sole or primary form of relief sought. If, as the court held, medical monitoring relief is legal in nature, then certification under (b)(2) is inappropriate. On the other hand, if medical monitoring truly is equitable in nature, then the issue should not be tried before a jury.³⁶⁶

362. *Id.* at 668.

363. *Id.*

364. *Id.* at 668-69.

365. *Id.* at 668 (citations omitted).

366. See *Castano v. American Tobacco Co.*, 160 F.R.D. 544, 552 (E.D. La. 1995) (finding that plaintiffs' claim for medical monitoring was primarily for damages, so that "[c]ertification of the medical monitoring claim in this case under Rule 23(b)(2) would infringe on the constitutional right to a jury trial"), *rev'd on other grounds*, 84 F.3d 734 (5th Cir. 1996). Nonetheless, as the *Barnes* court noted, several courts have held that medical monitoring claims can be submitted to a jury. See *Barnes*, 989 F. Supp. at 668 (citing *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717 (3d Cir. 1994); *In re Paoli R.R. Yard PCB Litig.*, 916

Although rules of thumb are generally to be mistrusted in the law, and particularly in the area of class actions, where almost every "rule" has many exceptions, it nonetheless is true that a class proponent seeking certification for a (b)(2) class where monetary damages are the primary goal is facing a significant challenge.³⁶⁷ Thus, if a class proponent is looking for a mandatory class, and cannot craft an argument that the case falls within the confines of Rule 23(b)(1)(B), the more prudent course is to abandon the claim for monetary damages. Alternatively, if monetary damages are truly the most significant form of relief sought, the class proponent would be better served by abandoning the concept of a mandatory class and instead seeking certification pursuant to Rule 23(b)(3).

N. *The (b)(3) Class*

The class represented by Federal Rule 23(b)(3) and Maryland Rule 2-231(b)(3)³⁶⁸ is the most common type of class sought when

F.2d 829 (3d Cir. 1990); *Herber v. Johns-Manville Corp.*, 785 F.2d 79 (3d Cir. 1986); *Day v. NLO*, 851 F. Supp. 869 (S.D. Ohio 1994)). It is unclear from these opinions whether any of these courts directly confronted the legal/equitable issue.

The federal system presents one solution to the potential conundrum created by an attempt to certify a medical monitoring claim as a (b)(2) class within the context of a products liability class action for which class certification is presumably being sought under Rule 23(b)(3). A federal district court can impanel an advisory jury pursuant to Federal Rule 39(c), which provides:

In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been as a matter of right.

FED. R. CIV. P. 39(c). This alternative, however, is foreclosed in Maryland. See MD. RULE 2-511(d) ("Issues of fact not triable of right by a jury *shall* be decided by the court and *may not* be submitted to a jury for an advisory verdict." (emphasis added)).

367. See, e.g., *In re Copley Pharm., Inc.*, 158 F.R.D. 485, 490-91 (D. Wyo. 1994) (refusing to certify a class under Rule 23(b)(2) "where the declaratory relief sought is incidental to the larger claims for damages").

368. This subsection of the class action rule provides that a class may be certified if the prerequisites of subdivision (a) are satisfied, and in addition:

the court finds that the 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. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23(b)(3); MD. RULE 2-231(b)(3).

money damages are at stake.³⁶⁹ The (b)(3) class was “the most adventuresome’ innovation” of the 1966 Rules Advisory Committee³⁷⁰ and was intended to fill the gaps left by the replacements for the previous forms of class actions.³⁷¹

1. *Class Notice.*—One of the innovations called for by the (b)(3) class is the notification to class members that litigation is proceeding on their behalf.³⁷² There are subtle but significant differences in the notice requirements of the federal³⁷³ and state³⁷⁴ rules. The most important difference concerns the type of notice required. Whereas the federal rule requires “the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort,”³⁷⁵ Maryland requires only that notice “be given to members of the class in the manner the court directs.”³⁷⁶

As a practical matter, a Maryland court should order the best notice practicable, including individual notification where possible.³⁷⁷ A

369. See, e.g., *Day*, 851 F. Supp. at 885-86 (characterizing Rule 23(b)(3) as the preferred subsection where monetary damages are the primary goal of the plaintiff).

370. *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2245 (1997) (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969)).

371. See Kaplan, *supra* note 220, at 389-90 (discussing the intent of the (b)(3) class and noting that “[t]he object is to get at the cases where a class action promises important advantages of economy of effort and uniformity of result without undue dilution of procedural safeguards for members of the class or for the opposing party”).

372. See FED. R. CIV. P. 23(c)(2) (providing that notice shall be given to (b)(3) class members that the judgment “will include all members who do not request exclusion”); MD. RULE 2-231(e) (same).

373. The federal rule provides:

In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

FED. R. CIV. P. 23(c)(2).

374. The Maryland rule is identical, except that it states that “notice shall be given to members of the class in the manner the court directs.” MD. RULE 2-231(e).

375. FED. R. CIV. P. 23(c)(2).

376. MD. RULE 2-231(e).

377. The type of notice required is particularly important in light of the due process issues at stake in a class action, where those who do not opt out will be bound by the judgment. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319-20 (1950) (holding that publication in a newspaper that a trust would petition for a judicial settlement of accounts failed to satisfy the due process requirement that notice be reasonably calculated under the circumstances to inform affected parties); *Payton v. Abbott Labs*, 83 F.R.D. 382, 392-93 (D. Mass. 1979) (applying *Mullane* in the nonsettlement litigation context by noting that the “best notice practicable under the circumstances” must also meet

less stringent form of notice, although permitted by the Maryland rule, could lead to a due process collateral attack on any class verdict or settlement on the ground of inadequacy of notice. Because the (b)(3) notice is sent out either before the outcome of the litigation is known, or when a settlement has been reached, it is in the best interests of both plaintiffs and defendants to collaborate in order to insure that the best notice practicable under the circumstances is given.³⁷⁸

As noted, the federal rule requires that individual notice be sent to all class members who can be identified through reasonable effort.³⁷⁹ Although unstated by the rule, the cost of notice regarding the certification of an adversarial class must be borne by the party seeking class certification.³⁸⁰ Although such costs have, on occasion, been allocated between the parties,³⁸¹ this is not the common practice.³⁸² Additionally, the fact that a plaintiff cannot afford the notice

the requirements of due process, because “[c]utting off rights in a judicial proceeding may constitute a deprivation of property”), *vacated on other grounds*, 100 F.R.D. 336 (D. Mass. 1983).

378. While the Maryland rule sets out only a few basic requirements for the content of the notice and the mechanics of its distribution, in other jurisdictions local rules have been used to impose more specific notice requirements in the class action context. *See, e.g., Local Rules for the United States District Court for the Northern District of California*, Rule 23-2, (requiring, “in any civil action containing a claim governed by the Private Securities Litigation Act of 1995,” that all complaints, briefs relating to motions to dismiss and summary judgment, declarations, affidavits, expert reports, and filings related to settlement and attorneys fees, which are not filed under seal, to be posted on the Internet).

379. FED. R. CIV. P. 23(c)(2); *see Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) (interpreting Rule 23(c)(2) to require that individual notice “be sent to all class members whose names and addresses may be ascertained through reasonable effort”).

380. *See Eisen*, 417 U.S. at 178-79 (“Where . . . the relationship between the parties is truly adversary, the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit.”); *see also supra* notes 292-297 and accompanying text (discussing the class proponent’s responsibility for financing notice of certification).

381. *See, e.g., County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1477, 1484 (E.D.N.Y. 1989) (finding that considerations of cost and convenience made it appropriate for the defendant utility to use its computerized billing lists to mail notice, but that cost of notice would be reimbursed from class members’ settlement funds), *aff’d in part, rev’d in part*, 907 F.2d 1295 (2d Cir. 1990).

382. The cost of notice raises a number of issues of both fairness and professional responsibility. First, the cost of notice should be placed on the class proponent because this party is the one seeking the benefits of class certification. Although it might seem inequitable to require an individual to bear the cost of notifying a potentially large class consisting of passive litigants in a case involving, say, a large defendant corporation, it is more unfair to force this defendant to bear these potentially significant costs. This is especially true because, at this stage, there can be no proof that the defendant has committed a wrong. *See Eisen*, 417 U.S. at 178 (prohibiting a court from considering the merits of the case in determining class certification). Moreover, many attorneys are willing to advance the costs associated with class litigation, including the expense of class notice, in order to reap the financial benefits of successful class representation.

deemed to be the best practicable under the circumstances cannot influence the decision on what notice to provide.³⁸³

Several private organizations exist to help class proponents prepare and distribute notice; their services include identifying the relevant demographics of a class³⁸⁴ in order to achieve the most effective notice possible under the circumstances.³⁸⁵ Although the use of such services might be expensive and might, at least during the period of initial class certification, appear unnecessary, both parties must con-

Second, although permitted, the practice of advancing the costs of notice raises disturbing questions concerning legal entrepreneurship and even champerty. *Cf. County of Suffolk*, 710 F. Supp. at 1414 ("Rule 23 requires . . . that attorneys advance costs on a scale not reimbursable by any normal client. A federal court cannot allow outmoded and unrealistic concepts of ethics to inhibit it unduly in providing an effective forum to those persons of limited means who seek vindication of federal rights.").

The Model Rules of Professional Conduct suggest that it is not improper for a lawyer to finance the cost of notice:

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(e) (1995). At the same time, however, because the "adequacy" of a class representative is predicated, in part, on his or her ability to pay for the class notice required by a (b)(3) class, any class representative seeking such a class should be prepared for discovery concerning any agreements between the representative and class counsel. Assuming such an agreement exists, it is probably proper for the class opponent to inquire into the ability of plaintiffs' class counsel to pay for such notice. As a practical matter, however, such inquiries are unlikely unless the financial burden of class notice (and expenses related to the class litigation in general) is likely to be extreme. In the absence of such an agreement, the class representative should be prepared to demonstrate the ability to pay for expenses, including class notice, and the court should not certify the requested class, based on the inadequacy of the class representative, if it appears that this party has insufficient funds to pay for notice and other expenses.

383. *See Eisen*, 417 U.S. at 176 ("There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs.").

384. *See, e.g., Cox v. Shell Oil Co.*, Civ. A. No. 18844, 1995 WL 775363, at *6*8 (Tenn. Chancery Ct. Nov. 17, 1995) (detailing, as part of the court's approval of a settlement, a private firm's use of demographic data to identify class members in a class action involving polybutylene plumbing products used in mobile homes as adults aged 35 and older, with household incomes of less than \$45,000, and an educational level of high school or less); Katherine Kinsella, *The Ten Commandments of Class Action Notice*, 12 TOXIC L. REP. (BNA) 488, 489 (Sept. 24, 1997) (noting that "[o]nce a demographic profile is established, the media can be identified to reach the targeted audience [of class members]"); Wayne L. Pines, *Harvesting a Full Crop*, LEGAL TIMES, Nov. 21, 1994, at S11, available in LEXIS, News Library, Lgltime File (discussing use of media in legal notification process).

385. In addition, these organizations are often capable of functioning as class settlement administrators, including processing claims from class members, responding to queries regarding the settlement, and distributing checks.

sider the potential cost of due process challenges to the class, particularly if the class has been certified for settlement purposes.³⁸⁶

The notice required to notify the class of a settlement is not necessarily the same as that required after certification of a (b)(3) class.³⁸⁷ Specifically, for notification of classes certified for settlement, there is no requirement of individual notice, or that the notice be the best practicable under the circumstances. In practice, however, this should not deter the court from ordering notice to be distributed in the same manner as if the case were previously certified as a (b)(3) class.³⁸⁸ If the case was certified under a different subparagraph of the class action rule, individual notice might be impracticable. In any case, however, the court should order the best notice under the circumstances. Although some courts have permitted classes to be settled without class notification,³⁸⁹ this practice violates the clear language of the rule and should be discouraged.³⁹⁰

386. See generally FED. R. CIV. P. 23(e) ("A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."); MD. RULE 2-231(h) (providing similarly).

387. If the class is certified as a class under (b)(3) for the first time for settlement purposes, the requirements of Federal Rule 23(c)(2) or Maryland Rule 2-231(e) will apply; if the class has already been certified, then the requirements of Federal Rule 23(e) or Maryland Rule 2-231(h) will apply.

388. Courts should order such distribution of notice because the requirements of due process are just as applicable as in a (b)(3) certification. See FED. R. CIV. P. 23 advisory committee note (d)(2) (1966 Amendments) (stating that "notice pursuant to subdivision (c)(2) [concerning the certification of a (b)(3) opt out class] . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject").

389. See, e.g., *Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325, 1336-37 (1st Cir. 1991) (noting that, despite the mandatory language of Rule 23(e) concerning notice before dismissal or settlement, courts "have sometimes overlooked the absence of notice where there was clearly no prejudice to class members" (citing *Larkin Gen. Hosp., Ltd. v. American Tel. & Tel. Co.*, 93 F.R.D. 497, 502 (E.D. Pa. 1982))); *Tyco Labs., Inc. v. Koppers Co.*, 82 F.R.D. 466, 469 (E.D. Wis. 1979) (finding that no notice or hearing regarding settlement was necessary under Rule 23(e) because the basis for dismissal was refiling in state court so that all class members could be represented), *aff'd*, 627 F.2d 54 (7th Cir. 1980); 2 NEWBERG & CONTE, *supra* note 12, § 8.18, at 59 (noting that, while the language of Rule 23(e) suggests that notice is mandatory in the dismissal or compromise of a class suit, a survey of the case law reveals that "[t]he broad interpretation of the language that notice 'shall be given to all members of the class in such manner as the court directs' permits the court to approve a dismissal without notice . . . where no prejudice to the class members would result" (emphasis added)). To interpret the emphasized phrase to permit a court to dispense with notice is a tortured reading of the language of the Rule, which uses the mandatory "shall" both for the court's approval and the class notice. See FED. R. CIV. P. 23(e).

390. See FED. R. CIV. P. 23(e) (requiring that notice of the proposed dismissal "shall be given to all members of the class"); MD. RULE 2-231(h) (same).

The problem of notifying so-called "future" class members has caused at least one court concern.³⁹¹ Although individual notice is not required when not all class members can be individually identified,³⁹² it is advisable to make the class notice as comprehensive as possible in order to avoid subsequent collateral challenges to class judgments or settlements.³⁹³

The court can also issue notice to the class under Federal Rule 23(d)(2) or Maryland Rule 2-231(f)(2).³⁹⁴ This provision gives discretion to the court to order class notice for a variety of reasons, as well as giving the court discretion to order notice to the class in order to ensure "the fair conduct of the action."³⁹⁵ Although some of the examples given in the rule for class notice appear to be unnecessary or to contradict the purpose of the class action,³⁹⁶ the drafters of the

391. See *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (voicing "serious due process concerns about whether adequate notice . . . can be given to all class members" because "many potential members of the classes cannot know if they are part of the class"); *supra* note 235 and accompanying text (discussing *Valentino* and class definition problems in the certification context).

392. See, e.g., *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994) (arguing that *Phillips Petroleum Co. v. Schuttis*, 472 U.S. 797 (1985), requiring opt out procedures for absent class members, does not change "the traditional standard for class notice from 'best practicable' to 'actually received' notice"). But see, e.g., *Payton v. Abbott Labs*, 83 F.R.D. 382, 393 (D. Mass. 1979) ("Only women whose return receipts are received or who, if first-class mail is not used, otherwise record actual receipt of notice, will, on their fitting the class definition, be members of the plaintiff class and bound by judgments in this action."), *vacated on other grounds*, 100 F.R.D. 336 (D. Mass. 1983).

393. See MANUAL FOR COMPLEX LITIGATION, *supra* note 173, § 30.21, at 225-26 (recommending that, when individuals in a (b)(3) action cannot be identified through reasonable effort, notice be published in newspapers or journals likely to be read by class members). Also, even if records of affected individuals have been maintained and individual notification is possible, it is wise to consider giving notice in a national publication, such as *U.S.A. Today* or *The Wall Street Journal*, because a class can include personal representatives of deceased affected individuals.

394. See FED. R. CIV. P. 23(d)(2) (allowing the court to make an order "requiring, for the protection of members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action," including notice of such matters as the extent of the judgment, the opportunity to signify whether members consider the representation fair and adequate, and opportunity to intervene); MD. RULE 2-231(f)(2) (providing similarly, but using the phrase "requiring . . . that notice be given in the manner the court directs"). The language of providing notice "to some or all members of the class" presumably refers to the notification of all members of a subclass of the larger class. While the court certainly should not send notice to some but not all class members who share a common interest, notification to subclasses with respect to discrete issues that affect only the members of the subclass could save some expense to the class proponent.

395. FED. R. CIV. P. 23(d)(2); MD. RULE 2-231(f)(2).

396. See, e.g., FED. R. CIV. P. 23(d)(2) (providing that the court may order notice in order to permit class members "to intervene and present claims or defenses or otherwise come into the action"); MD. RULE 2-231(f)(2) (same). The problem, however, is that no

1966 amendments to Rule 23 were careful to give the trial court a great deal of flexibility in order to protect the interests of the class members.³⁹⁷ In any case, the Advisory Committee noted that, to the extent that there is cohesiveness or unity in the class and that representation is effective—both of which should be prerequisites for class certification in the first instance—the need for notice to the class under the discretionary provisions of (d)(2) should be minimal.³⁹⁸

2. *Requirements of a (b)(3) Class.*—The (b)(3) class action introduces a series of new considerations for the court during the certification process, as well as revivifying the (a)(2) “commonality” requirement.³⁹⁹ The (b)(3) analysis involves two parts, the first considering “predominance” and “superiority,” and the second requiring the consideration of at least four factors: individual control; current litigation; forum questions; and the manageability of class litigation.⁴⁰⁰

(a) *Predominance.*—The test for predominance is a pragmatic one,⁴⁰¹ and there is no calculus,⁴⁰² either in the rule or in the case law, that will enable the court or the parties to determine

order is necessary for class members to “intervene” in an action in which they are already litigants; their status as class members already insures that they are participants, albeit passive ones, in the litigation. Moreover, this individual “intervention” would frustrate the purpose of judicial efficiency for which the litigation was certified as a class action in the first place. If individual class member participation becomes necessary, the better course would be to decertify the class and permit class members to pursue individual litigation.

397. See FED. R. CIV. P. 23, advisory committee note (d)(2) (1966 Amendments) (“Notice is available fundamentally ‘for the protection of the members of the class or otherwise for the fair conduct of the action’ and should not be used merely as a device for the undesirable solicitation of claims.” (citing *Cherner v. Transitron Elec. Corp.*, 201 F. Supp. 934 (D. Mass 1962); *Hormel v. United States*, 17 F.R.D. 303 (S.D.N.Y. 1955))).

398. See FED. R. CIV. P. 23, advisory committee note (d)(2) (1966 Amendments).

399. See *supra* notes 249-256 and accompanying text (discussing the commonality requirement).

400. See FED. R. CIV. P. 23(b)(3) (describing these four factors as “matters pertinent to the [court’s] findings” whether common questions of law or fact predominate and whether a class action is superior to other methods in fairness and efficiency of adjudication); MD. RULE 2-231(b)(3) (same). As “matters pertinent,” these factors should be considered mandatory elements of the certification analysis; they are, however, “nonexhaustive.” *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2246 (1997).

401. 7A WRIGHT ET AL., *supra* note 175, § 1778, at 528.

402. *But cf. Amchem*, 117 S. Ct. at 2250 (appearing to lean toward a numerically-based “predominance inquiry by refusing to certify a class in light of the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions”). The Court’s remark on the “significance of the individual questions” makes it unlikely that the Court intended that the number of individual issues alone would be sufficient to defeat the rule’s requirement of predominant common issues.

whether the common questions of law or fact sufficiently predominate over individual issues in order to satisfy the predominance requirement.⁴⁰³ Instead, the predominance inquiry "trains on the legal or factual questions that qualify each class member's case as a genuine controversy, . . . [and] tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."⁴⁰⁴

One problem frequently encountered in products liability class actions is the plethora of individual factual issues arising from questions of causation and damages, and individual legal defenses that can be asserted against class members.⁴⁰⁵ For these reasons, the Advisory Committee has asserted that mass tort class actions ordinarily should not be certified.⁴⁰⁶ The Advisory Committee's position has been criti-

403. See 7A WRIGHT ET AL., *supra* note 175, § 1778, at 528-29 (asserting that, because the common questions need not be entirely dispositive of the entire action, "'predominate' should not be automatically equated with 'determinative' or 'significant'"). These authors, however, overstate the point. See *Amchem*, 117 S. Ct. at 2250 (refusing to certify a (b)(3) class in part because of the "significance of [the greater number of] uncommon questions"); *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986) ("In order to 'predominate,' common issues must constitute a significant part of the individual cases.").

404. *Amchem*, 117 S. Ct. at 2249 (citation omitted).

405. See *supra* note 260.

406. See FED. R. CIV. P. 23, advisory committee note (b)(3) (1966 Amendments) (citing *Pennsylvania R.R. v. United States*, 111 F. Supp. 80 (D.N.J. 1953)). This note provides:

A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

Id. One of the members of the 1966 Advisory Committee, Charles Alan Wright, appears to have distanced himself from this note. See *In re School Asbestos Litig.*, Master File 830268 (E.D. Pa.), Class Action Argument, July 30, 1984, Tr. 106, *quoted in* 3 NEWBERG & CONTE, *supra* note 12, § 17.06, at 20. Wright wrote:

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

Id. The value of this statement is limited, however, because Professor Wright made it during a hearing at which he was appearing on behalf of the class proponent in an asbestos case. See *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 n.19 (5th Cir. 1996) (noting that Professor Wright's change of heart must be viewed "with some caution"). The *Castano* court quoted a letter of Professor Wright's in which he appeared to have changed his position again:

I certainly did not intend by that statement to say that a class should be certified in all mass tort cases. I merely wanted to take the sting out of the statement in the Advisory Committee Note, and even that said only that a class action is "ordinarily not appropriate" in mass tort cases. The class action is a complex device that

cized as "shortsighted,"⁴⁰⁷ and for causing some courts to read and apply the class action rule too narrowly.⁴⁰⁸ Commentators have argued that strict adherence to the Advisory Committee's note would improperly restrict use of the class action device,⁴⁰⁹ and that a more expansive reading of the class action rule would achieve judicial economy and preserve resources.⁴¹⁰

The period between approximately 1975 and 1995 marked a movement away from the Advisory Committee's position. By 1989, the Fourth Circuit correctly noted, "It is obvious that there is a movement towards a more liberal use of Rule 23 in the mass tort context."⁴¹¹ It is all the more remarkable, therefore, that the period since 1995 has seen a dramatic reversal of fortune for the products liability class action.⁴¹² Although it is an overstatement to say that federal products

must be used with discernment. I think for example that Judge Jones in Louisiana would be creating a Frankenstein's monster if he should allow certification of what purports to be a class action on behalf of everyone who has ever been addicted to nicotine.

Id. (quoting Letter from Charles Alan Wright, member of Federal Rules of Civil Procedure Advisory Committee, to N. Reid Neureiter, Williams & Connolly, Washington D.C. (Dec. 22, 1994)).

407. COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS, *supra* note 11, at 28.

408. See, e.g., *In re Northern Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 852 (9th Cir. 1982) (noting that "[r]elying in part on that [Advisory Committee's] note and on the inherent obstacles to personal injury class actions, many courts have denied plaintiffs' motions for class certification in mass tort . . . actions"); *Ryan v. Eli Lilly & Co.*, 84 F.R.D. 230, 231 (D.S.C. 1979) (denying class certification in a toxic tort case and finding the Advisory Committee's note "most persuasive").

409. See, e.g., COMPLEX LITIGATION: STATUTORY RECOMMENDATION AND ANALYSIS, *supra* note 11, at 28 (noting that, despite "some weakening in the resistance to the certification of mass tort class actions," the "full procedural advantages of class actions have not been realized" (citations omitted)); Note, *Class Certification in Mass Accident Cases under Rule 23(b)(1)*, 96 HARV. L. REV. 1143, 1153-61 (1983) (arguing for a revised interpretation of Rule 23(b)(1) that would permit its application in mass accident cases).

410. 3 NEWBERG & CONTE, *supra* note 12, § 17.06, at 19-20 (noting that Rule 23 was "designed for judicial economy and unitary adjudication of legal rights").

411. *In re A.H. Robins Co.*, 880 F.2d 709, 734 (4th Cir. 1989).

412. This change of heart in the federal courts was initiated by the Seventh Circuit. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1304 (7th Cir. 1995) (overturning the district court's certification of a Rule 23(c)(4)(a) class of hemophiliacs suing on behalf of those infected with H.I.V.). This opinion was followed, in quick order, by decisions from several other circuits. See *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234-35 (9th Cir. 1996) (decertifying a class and subclass of plaintiffs in a products liability case against a drug manufacturer because requirements of typicality, adequacy, and commonality were not met); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 634 (3d Cir. 1996) (decertifying a class of plaintiffs claiming injury from asbestos exposure because the class failed to meet the requirements of either rule 23(a) or 23(b)), *aff'd sub nom.* *Amchem Prods. Inc. v. Windsor*, 117 S. Ct. 2231 (1997); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1074 (6th Cir. 1996) (granting writ of mandamus to decertify district court's certification of a class of

liability class actions are impossible to certify,⁴¹³ it is true that federal courts now look on such proposed classes with disfavor.⁴¹⁴

One way in which class proponents have, and no doubt will continue, to avoid the problems inherent in the "predominance" test is to seek certification only of certain issues, pursuant to Federal Rule 23(c)(4).⁴¹⁵ Because the purpose of this subdivision is to give the trial court "maximum flexibility in handling class actions, its proper utiliza-

penile implant patients because the class did not meet the requirements of either Rule 23(a) or 23(b)). The Supreme Court's affirmance of the Third Circuit's *Georgine* opinion punctuated this movement. See *Amchem Prods., Inc.*, 117 S. Ct. at 2252.

413. See, e.g., *In re* Electronics Pacing Sys., Inc., 172 F.R.D. 271, 295 (S.D. Ohio 1997) (recertifying as subclasses a products liability class which had been decertified); *In re* Copley Pharm., Inc., 161 F.R.D. 456, 460 (D. Wyo. 1995) (declining to follow *Rhone-Poulenc* and stating that "economic reasoning may carry substantial weight in the Seventh Circuit, but this court must look to [Rule] 23 and its interpretation by courts to determine the appropriateness of class certification"). The Sixth, Ninth, and Eleventh Circuits have expressly declined to adopt a per se rule against certifying class actions in products liability cases. See *Valentino*, 97 F.3d at 1233 ("[W]e reject Carter-Wallace's position that the law of this circuit should prohibit any class certifications in products liability litigation."); *In re American Med. Sys.*, 75 F.3d at 1089 (noting that "[this] is not to say that a class action in such a context will never be appropriate"); *In re Temple*, 851 F.2d 1269, 1273 n.7 (11th Cir. 1988) ("We do not hold that a products liability or mass accident suit could *never* be the proper subject of a class action . . .").

414. See, e.g., *In re American Med. Sys.*, 75 F.3d at 1089 ("[S]trict adherence to Rule 23 in products liability cases involving drug or medical products which require FDA approval is especially important."); *In re Temple*, 851 F.2d at 1273 n.7 (noting that, in a products liability or mass accident suit, "the prerequisites of commonality and typicality will normally be hard to satisfy").

415. See FED. R. CIV. P. 23(c)(4) ("When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."); MD. RULE 2-231(d) (providing similarly, but omitting the last clause of the federal rule).

To illustrate the application of this subdivision, the Advisory Committee noted that "in a fraud or similar case the action may retain its 'class' character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims." FED. R. CIV. P. 23, advisory committee note (c)(4) (1966 Amendments). This example is an odd choice in light of the Committee's comment, in another section, that "although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed." FED. R. CIV. P. 23, advisory committee note (b)(3) (1966 Amendments). This latter opinion is correct because the variation in the degree of reliance is an individual issue from one case to the next that predominates over any common issues. See, e.g., *Mehornay v. Pfizer Inc.*, No. CV 91-101-HLH, 1991 WL 540731, at *1 (C.D. Cal. June 3, 1991) (stating that, with misrepresentation claims, "the range of what the patients have been told must range from the full story to nothing at all"); *Rosenstein v. CPC Int'l Inc.*, Civ. A. No. 90-4970, 1991 WL 1783, at *6 (E.D. Pa. Jan. 8, 1991) (denying class certification where a fraud claim required proof of individual reliance); *Strain v. Nutri/System, Inc.*, Civ. A. No. 90-2772, 1990 WL 209325, at *8, *9 (E.D. Pa. Dec. 12, 1990) (noting that determination of liability would require individualized proof).

tion will allow a Rule 23 action to be adjudicated that otherwise might have been dismissed or reduced to a nonrepresentative proceeding because it appears to be unmanageable."⁴¹⁶

Although the preservation of precious judicial resources is a goal much to be desired, the reality of the situation should be considered by the court in making its determination. For example, claims of judicial inertia caused by the number of cases which will be faced by the courts if class certification is not granted should be carefully considered. While there is litigation which, if allowed to go unchecked, could cause an overload of judicial resources (asbestos, for example, although tellingly, asbestos litigation in Maryland has not been certified as a class), the parade of horrors presented by many class proponents does not withstand close scrutiny. It is particularly disingenuous for a class proponent to argue in favor of issue bifurcation while simultaneously arguing in favor of judicial economy. Such a class would inevitably augment, not diminish, congestion in court dockets for the simple reason that in no class has every potential class member already filed suit (were a class to be sought in a case where this was the case, it would inevitably fail to pass at least the "superiority" prong's subtests—the interest of class members in controlling their own litigation, the extent of previously-filed litigation, and the desirability of concentrating the litigation in one forum), yet, in order to recover, every class member would be required to file suit in order to establish the issues which were bifurcated out of class treatment.⁴¹⁷ A logical evaluation of many "judicial resource preservation" claims, therefore, will suggest that judicial economy would be better served by noncertification.

In fact, not all class members will bring their own litigation if a class is not certified.

There are numerous reasons why plaintiffs with positive-value suits opt out of the tort system, including risk aversion to engaging in litigation, privacy concerns, and alternative avenues for medical treatment, such as Medicaid. In a case where comparative negligence is raised, plaintiffs have the best insight into their own relative fault. Ultimately, a court

416. 7A WRIGHT, *supra* note 175, § 1790, at 269 (footnote omitted).

417. See, e.g., *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 426 (E.D. La. 1997) ("[F]ragmenting issues into a 'core liability' trial on manufacturer conduct, to be followed by mini-trials on causation, comparative fault, reliance, and others seem to defeat the purported economies of class treatment.").

cannot extrapolate, from the number of potential plaintiffs, the actual number of cases that will be filed.⁴¹⁸

In their search for efficiency, however, courts must be aware of the constitutional implications inherent in issue bifurcation.⁴¹⁹

In particular, courts should beware of following Wright and Miller's claim that "even if only one common issue can be identified as appropriate for class action treatment, that is enough to justify the application of the provision as long as the other Rule 23 requirements have been met."⁴²⁰ Doing so can sever the litigation from any semblance of a normal trial and cause the reversal of the class certification decision.⁴²¹ As the Fifth Circuit has noted:

This is the inevitable consequence of treating discrete claims as fungible claims. Commonality among class members on issues of causation and damages can be achieved only by lifting the description of the claims to a level of generality that tears them from their substantively required moorings to actual causation and discrete injury. Procedures can be devised to implement such generalizations, but not without alteration of substantive principle.⁴²²

418. *Castano v. American Tobacco Co.*, 84 F.3d 734, 748 n.26 (5th Cir. 1996) (citation omitted).

419. Although federal courts have "substantial inherent power to manage their dockets," they must exercise this power "in a manner that is in harmony with the Federal Rules of Civil Procedure." See *In re NLO, Inc.*, 5 F.3d 154, 157 (6th Cir. 1993) (holding that the court may not compel participation in a summary jury trial). Thus, any decision to bifurcate claims pursuant to Rule 23(c)(4) must be consistent with the Rules Enabling Act, under which all federal rules are promulgated. This Act provides that the federal rules "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b) (1994). As one commentator has noted:

Ultimately the essential elements of the tort claims of each plaintiff must be proven, and the plaintiff typically bears the burden of proof. Therefore, a court should not presume or infer commonality of an issue throughout the class and allow proof of a noncommon issue on a joint basis. The Rules Enabling Act prohibits federal courts from employing a class-wide standard of proof which differs from the standard of proof required of individual plaintiffs in individual cases because it would affect the substantive rights of the parties.

Even if all of the substantive elements of the plaintiffs' claims present only common issues of fact, the Rules Enabling Act may bar joint trial of the defendant's liability if it deprives the defendant of a fair opportunity to assert and prove affirmative defenses he may have against some, albeit not all, of the plaintiffs.

Roger Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 825-26 (1985) (footnotes omitted).

420. 7A WRIGHT ET AL., *supra* note 175, § 1790 at 271.

421. See, e.g., *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996) (decertifying a class and noting that "[a] district court cannot manufacture predominance through the nimble use of subdivision (c)(4)").

422. *In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990), *rev'd on other grounds sub nom. Ortiz v. Fibreboard Corp.*, 119 S. Ct. 2295 (1999).

Issue bifurcation in the context of class actions has Seventh Amendment implications.⁴²³ One right guaranteed by the Seventh Amendment is a litigant's right to have only one jury pass on a common issue of fact; thus, an issue separated for trial must be "so distinct and separable from the others that a trial of it alone may be had without injustice."⁴²⁴ Accordingly, where, for example, a class proponent seeks to set up a predominating common issue by proposing the bifurcation of the so-called "liability" issues of duty and breach from questions of causation and damages,⁴²⁵ the Seventh Amendment's bar on reevaluation of facts decided by one jury should prompt the trial court to deny class certification.⁴²⁶ "[I]nherent in the Seventh Amendment guarantee of a trial by jury is the general right of a litigant to have only one jury pass on a common issue of fact. . . . [I]f separate juries are allowed to pass on issues involving overlapping legal and factual questions the verdicts rendered by each jury could be inconsistent."⁴²⁷

Federal courts have also focused on disparities in substantive state law as a reason for holding that a proposed class failed Rule 23(b)(3)'s predominance test.⁴²⁸ Although courts have attempted to

423. See U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."); see also *supra* notes 349-367 (discussing the Seventh Amendment issue in the context of seeking injunctive class action relief).

424. See *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931) (holding that "the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independent of the latter without confusion and uncertainty, which would amount to denial of a fair trial").

425. See, e.g., *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995) (denying class certification because the proposed bifurcation of negligence and causation overlapped and could have resulted in multiple jury findings).

426. See *id.* But see *Arthur Young & Co. v. United States Dist. Court*, 549 F.2d 686, 697 (9th Cir. 1977) (permitting bifurcation of the trial of liability and damages issues in a securities fraud class action suit); *In re Copley Pharm., Inc.*, 161 F.R.D. 456, 461-64 (D. Wyo. 1995) (rejecting the *Rhone-Poulenc* analysis and discussing cases from the Third, Fourth, Fifth, Sixth, and Ninth Circuits that have permitted certification in mass tort cases for common issues of liability without finding a Seventh Amendment constitutional problem); *but cf. Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 474 (5th Cir. 1986) (holding that bifurcation of punitive and actual damages is not unconstitutional under Texas state law).

427. *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978) (footnote omitted); see *Caruso v. Celsius Insulation Resources, Inc.*, 101 F.R.D. 530, 538 (M.D. Pa. 1984) (rejecting bifurcation under Rule 23(c)(4) because noncommon issues were entangled with common issues).

428. See, e.g., *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2250 (1997) (noting that "differences in state law" compound disparities between exposure-only plaintiffs and those class members suffering a present injury, making it impossible for the class to satisfy the predominance test); *In re Rhone-Poulenc*, 51 F.3d at 1300 ("If one instruction on negligence will serve to instruct the jury on the legal standard of every state . . . one wonders what the Supreme Court thought it was doing in the *Erie* case when it held that it was *unconstitutional*

evade this problem by use of Rule 23(c)(4)'s "subclassing" provisions,⁴²⁹ such solutions do not explain how one jury will hear and evaluate the evidence relevant to all subclasses, and yet deliver individualized verdicts based *solely* on the law of the jurisdiction or jurisdictions in each subclass.⁴³⁰ It is unlikely that this is an issue that will confront Maryland courts on a regular basis, if at all,⁴³¹ and it should have no impact on a class in which all putative members are subject to Maryland law.

(b) *Superiority*.—In order to make a determination of the superiority of the class action, the court must evaluate other means of resolving the controversy.⁴³² The most obvious alternative—individual litigation by class members—raises one of the core policy considerations behind the 1966 amendments to the federal class action rule as well as the first factors to be considered by the court in its "superiority" analysis.

(i) *Class Members' Interest in Controlling Individual Litigation*.—The interest of class members in controlling their own litigation can vary with the type of case. For example, class members typically have a strong interest in controlling their individual products liability and

for federal courts in diversity cases to apply general common law . . ."); *Ilhardt v. A.O. Smith Corp.*, 168 F.R.D. 613, 620 (S.D. Ohio 1996) (noting that common questions of law do not predominate when the jury would need to apply "the varying and inconsistent laws of more than 40 states concerning what constitutes a product defect"); *Harding v. Tambrands*, 165 F.R.D. 623, 632 (D. Kan. 1996) (finding that the advantages of a class action do not outweigh the problems of applying the "law of 51 jurisdictions on nine different causes of action" and instructing the jury "to reconsider various burdens of proof, and in some cases, contradictory standards of conduct"), *motion to reconsider denied*, 168 F.R.D. 292 (D. Kan. 1996).

429. See, e.g., *In re Teletronics Pacing Sys., Inc.*, 172 F.R.D. 271, 293-94 (S.D. Ohio 1997) (permitting class certification because plaintiffs' subclass distinctions "adequately account for variations in the state law of strict liability").

430. See *supra* notes 274, 283, 304 and accompanying text (discussing inherent problems in the use of subclasses); see also *Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 656 (C.D. Cal. 1996) (criticizing the subclassing proposed by the district court in *Teletronics* litigation as "inherently complicated and incredibly inefficient").

431. It is not impossible, however. See *supra* note 6 and accompanying text (noting the possibility of a nationwide class action in state court under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985)).

432. See 1 NEWBERG & CONTE, *supra* note 12, § 4.27, at 106 (listing several alternatives to class treatment, such as joinder, intervention, consolidation, test cases and administrative proceedings). As Newberg recognizes, however, joinder is not a viable alternative if the class has survived Rule 23(a)(1)'s "numerosity" requirement, which should be the case if the analysis has progressed to this point. *Id.* at 107.

personal injury claims.⁴³³ Where there is an indication that class members have an interest in the litigation, and are able to defend their interests, a class action is inappropriate.⁴³⁴ Other considerations, such as embarrassment over the disclosure of personal information, can cause the court to deny certification.⁴³⁵

When the Advisory Committee drafted the current form of Rule 23, however, it was looking less at the cause of action asserted and more at the incentive to sue and the ability of the putative class member to maintain his or her own action:

“The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical; the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable.”⁴³⁶

The Advisory Committee was clear about the policy considerations underpinning its considerations. It “had dominantly in mind vindication of ‘the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.’”⁴³⁷ This policy justification for the class action—the creation of a

433. See, e.g., *Amchem*, 117 S. Ct. at 2246 (“Each plaintiff [in an action involving claims for personal injury and death] has a significant interest in individually controlling the prosecution of [his case]; each ‘ha[s] a substantial stake in making individual decisions on whether and when to settle.’” (alterations in original) (quoting *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 633 (3d Cir. 1996))); *In re Northern Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 856 (9th Cir. 1982) (noting that “[product] liability class members have a strong interest in controlling the prosecution of separate actions”); *Daye v. Pennsylvania*, 344 F. Supp. 1337, 1343 (E.D. Pa. 1972) (refusing to certify a class in a bus accident in part because of the class members’ interest in controlling the litigation individually), *aff’d*, 483 F.2d 294 (3d Cir. 1973).

434. See, e.g., *Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp.*, 149 F.R.D. 65, 74 (D.N.J. 1993) (holding that all class members were capable of litigating their individual claims); *accord In re Arthur Treacher’s Franchise Litig.*, 93 F.R.D. 590, 595 (E.D. Pa. 1982) (reasoning that class certification is inappropriate when it would hamper individual claims); *Causey v. Pan Am. World Airways, Inc.*, 66 F.R.D. 392, 399 (E.D. Va. 1975) (holding that class members would be better served by litigating the claims independently).

435. See, e.g., *Martin v. American Med. Sys., No. IP 94-2067-C-H/G*, 1995 WL 680630, at *8 (S.D. Ind. Oct. 25, 1995) (denying class certification in a products liability, penile implant case because, among other reasons, it could disclose personal information to strangers and possibly the general public).

436. *Amchem*, 117 S. Ct. at 2246 (quoting FED. R. CIV. P. 23, advisory committee note b(3) (1966 Amendments)).

437. *Id.* (quoting Kaplan, *supra* note 370, at 497). As the Supreme Court noted, this policy is intended “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.” *Id.* (internal

mechanism whereby essentially small-claim plaintiffs can have their day in court—has been cited often by the Supreme Court.⁴³⁸

Unfortunately, a crucial element of this policy rationale for class certification apparently has eluded most commentators and the Court. As William Schwarzer has pointed out, “the original purpose of the 1966 Rule primarily was to enable litigation of numerous related small claims, *such as those commonly found in consumer, securities, and antitrust actions*. The salient characteristics of these kinds of class actions [include] individual claims [that] are generally too small to permit plaintiffs to prosecute them individually.”⁴³⁹ Thus, the intent of the Advisory Committee must have been to enable small claims in class actions predicated on federal question jurisdiction. A corollary, also supported by the policy rationale setting a minimum jurisdictional amount for diversity jurisdiction in federal court, should follow: small claims class actions in products liability litigation have no place in federal court.⁴⁴⁰ To allow otherwise would be to accept that an individual can do in a class what she could not do were the action brought individually—have her case heard in a federal court. Despite the apparent incongruity, however, the Supreme Court continues to ignore Congress’s intent in establishing the jurisdictional amount for diversity jurisdiction, and maintains that small claims diversity-based class actions are appropriate in federal courts.⁴⁴¹ From the limited

quotation marks omitted) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

438. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (“Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually.”); *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1980) (“Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class action device.”); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972) (“Rule 23 . . . provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture.”).

439. William W. Schwarzer, *Structuring Multiclaim Litigation: Should Rule 23 Be Revised?*, 94 MICH. L. REV. 1250, 1255 (1996) (emphasis added) (footnote omitted).

440. It is questionable whether such cases even have a place in state court. This Author’s experience suggests that small-claims litigants in products liability and personal injury cases make ample individual use of state courts.

441. See, e.g., *Amchem*, 117 S. Ct. at 2246 (“The 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. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.” (internal quotation marks omitted) (quoting *Mace*, 109 F.3d at 344)). By doing so, the Court, somewhat imperiously, also ignores the availability of class actions in state courts in most, if not all, states. In fact, it is simply not true to say that, without the federal class action, small-claims litigants would be unable to

empirical evidence available, it certainly appears that the majority of class actions are, indeed, small-claim based cases.⁴⁴²

The effect of this federal court diversity jurisdiction debate on the Maryland class action rule is unclear. On the one hand, an argument could be made that the policy considerations are the same for individuals who seek to certify a class in federal and state court: the lower the value of the individual claim, the less is the individual's interest in controlling the prosecution or defense of the action.⁴⁴³ On the other hand, the availability of the federal court as, in essence, a glorified small-claims court lessens the desirability of concentrating the litigation in the state, as opposed to the federal, forum.⁴⁴⁴ Thus, a class proponent seeking to certify, for example, a nationwide class in Maryland state court should have difficulty persuading the state court that it is desirable to have such a class certified in state, as opposed to federal, court.⁴⁴⁵

The Court of Special Appeals has addressed the issue of an individual's interest in controlling his or her own litigation, albeit somewhat tangentially, in *Johnson v. Chrysler Credit Corp.*⁴⁴⁶ The *Johnson* court noted that a class action:

contravenes the more traditional notions of an individual's jurisprudential rights. As a potential and perhaps unwilling litigant, an individual must assert affirmatively his right to be left alone, the very articulation of which reveals its incongruity. While we recognize the procedural vacuum a class suit may fill, we commend care in applying such relief⁴⁴⁷

get their day in court. It is true, however, that their attorneys would make rather less in fees.

442. See Thomas E. Willging et al., *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*, in WORKING PAPERS, *supra* note 217, app. B, at 7 [hereinafter *Empirical Study*] (studying class actions in four federal districts between July 1, 1992 and June 30, 1994, and finding that the median range of individual recovery was between \$315 and \$528, with the maximum awards ranging from \$1,505 to \$5,331 per class member).

443. See *In re Tetracycline Cases*, 107 F.R.D. 719, 732 (W.D. Mo. 1986) (finding a minimal interest in individual control of litigation because the amount of damages alleged was "relatively small").

444. Cf. *Snyder v. Harris*, 394 U.S. 332, 340 (1969) ("To allow aggregation of claims where only one member of the entire class is of diverse citizenship could transfer into the federal courts numerous local controversies involving exclusively questions of state law.").

445. Cf. *supra* note 6 (noting choice of law barriers to prosecuting a nationwide class action in state court).

446. 26 Md. App. 122, 337 A.2d 210 (1975); see *supra* notes 70-87 and accompanying text (discussing *Johnson*).

447. *Id.* at 129, 337 A.2d at 214.

Class proponents in Maryland would, therefore, be advised to take special care to address why, in their particular case, the Court of Special Appeals' concerns regarding the individual's interest in controlling his or her individual litigation should not bar class certification.

(ii) *The Extent of Already Commenced Litigation.*—Federal Rule 23(b)(3)(B) and Maryland Rule 2-231(b)(3)(B) inquire into the extent and nature of litigation already commenced by or against class members.⁴⁴⁸ This inquiry considers the maturity of the litigation as well as the very practical issue of attorney control of the litigation.

One of the by-products of an increasingly complex world is the presentation of new litigation challenges. New products, new chemicals and new pharmaceuticals, for example, may all present legal, evidentiary, and/or management issues that previous litigation has neither confronted nor resolved.⁴⁴⁹ In such cases, there is a general consensus that the preferable route is to permit individual litigation, or at the most, small groups of cases, to proceed⁴⁵⁰ until the litigation has established its own legal track record—has become, in Professor McGovern's term, "mature."⁴⁵¹

In *Castano v. American Tobacco Co.*, the Fifth Circuit conducted an extensive analysis of the "mature tort" concept, and concluded that the class, as proposed, was insufficiently mature to satisfy rule 23(b)(3)'s "superiority" requirement.⁴⁵² "The district court's predominance inquiry, or lack of it, squarely presents the problems associated with certification of immature torts. Determining whether the common issues are a "significant" part of each individual case has an ab-

448. See FED. R. CIV. P. 23(b)(3)(B) (identifying "the extent and nature of any litigation . . . already commenced by or against members of the class" as pertinent to the findings of superiority and predominance); MD. RULE 2-231(b)(3)(B) (same).

449. See, e.g., *Castano v. American Tobacco Co.*, 84 F.3d 734, 748-49 (5th Cir. 1996) ("[M]ature" mass torts like asbestos or Dalkon Shield may call for procedures that are not appropriate for incipient mass tort cases, such as those involving injuries arising from new products, chemical substances, or pharmaceuticals." (internal quotation marks omitted) (quoting MANUAL FOR COMPLEX LITIGATION, *supra* note 173, § 33.26, at 322)).

450. See MANUAL FOR COMPLEX LITIGATION, *supra* note 173, § 33.26, at 322 ("Fairness may demand that mass torts with few prior verdicts or judgments be litigated first in smaller units—even single-plaintiff, single-defendant trials—until general causation, typical injuries, and levels of damages become established.").

451. See Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 659 (1989) (stating that litigation is "mature" where there has been (1) complete discovery, (2) verdicts indicating the range of claim values, and (3) "persistent vitality in the plaintiff's contentions").

452. *Castano*, 84 F.3d at 747-50.

strict quality to it when no court in this country has ever tried an injury-as-addiction claim.”⁴⁵³

Of course, not all class actions presented will contain immature issues. A court should carefully consider the issues sought to be certified for class treatment, however, and should look to what other litigation exists concerning the issues presented in the class case. Where there is an insufficient track record of litigation for the proposed class issues to be deemed “mature,” the court should deny class certification and should concentrate its attention on resolving individual cases. Such an approach is not a death-knell to potential class certification, but a pragmatic and sensible response to the “superiority” test.

The other principle issue raised by the (b)(3)(B) test—attorney control over the litigation—is a by-product of the management techniques employed by courts in complex litigation. The number of parties, the complexity of issues, and the inherent aggressiveness of attorneys frequently compel a court to appoint counsel to various positions in order to coordinate class representation.⁴⁵⁴ Typically, the court will appoint a “steering committee” of counsel of class proponents, as well as lead counsel and liaison counsel.⁴⁵⁵

As the *Manual for Complex Litigation* notes, a court has wide latitude in selecting the members of the steering committee, and “[a]ttorneys often engage in lively competition for the appointment.”⁴⁵⁶ The *Manual’s* decorous language disguises what can be a no-holds-barred scramble for a seat on the steering committee and, in particular, for appointment to the position of Lead Counsel. This role is so prized because control of the class litigation confers the ability to control assignments and to apportion fees at the end of the litigation.⁴⁵⁷

As criteria for appointment to class representative, the *Manual* lists “[t]he relative competence, experience, dedication, reliability, and resources of the attorneys who appear on behalf of the different persons seeking to become class representatives.”⁴⁵⁸ One way in

453. *Id.* at 749.

454. See MANUAL FOR COMPLEX LITIGATION, *supra* note 173, § 20.22, at 26 (“In some cases the attorneys coordinate their activities More often, however, the court will need to institute procedures under which one or more attorneys are selected and authorized to act on behalf of other counsel and their clients with respect to specified aspects of the litigation.”).

455. See *id.* § 20.22, at 27-30 (giving detailed descriptions of the activities expected of attorneys appointed to each of these functions).

456. *Id.* § 30.16, at 221.

457. *Id.* § 24.22, at 197.

458. *Id.* § 30.16, at 221.

which an attorney can display these virtues is by the prompt and effective filing of a class action. Thus, in nationwide or regional class litigation, there will often be many class actions filed in numerous different state and federal courts.

In making their evaluation of the (b)(3)(B) test, federal courts must be mindful of the various abstention doctrines that could require a denial of class status.⁴⁵⁹ Although similar constraints do not limit state courts, Maryland courts should look closely at any other class actions filed that, if certified, would encompass the class of individuals in the case before the court. If the court is convinced that these individuals would be adequately represented as class members in the distant litigation, and especially if it appears that the present class was filed primarily to provide a bargaining chip for the filing attorney to cash in his or her bid to be appointed to a steering committee in the other case, the court should consider denying the class certification motion on the basis of Maryland Rule 2-231(b)(3)(B)'s "other litigation" test.⁴⁶⁰

(iii) *The Desirability of the Forum.*—The (b)(3)(C) test analyzes the "desirability or undesirability of concentrating the litigation of the claims in the particular forum."⁴⁶¹ This test looks to the convenience of the parties and the witnesses. Thus, where potential plaintiffs, witnesses, and evidence are spread across the country, and where there was no particular connection with the forum for the majority of class members, class certification has been denied.⁴⁶²

The court's analysis should be broader than a mere geographical inquiry, however, and should also look at the desirability of concentrating the claims in *any* forum. In this respect, the analysis of the

459. See, e.g., *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 14-15 (1983) (emphasizing that judicial resources should be considered when invoking the abstention doctrine); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 818 (1976) (stating that a federal court may consider dismissing an action to avoid piecemeal litigation, or where a state court has previously acquired jurisdiction and is the more convenient forum); *Burford v. Sun Oil Co.*, 319 U.S. 315, 317-18 (1941) (abstaining when, in the interest of comity, federal litigation would impair state regulatory scheme); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501 (1941) (abstaining because pending state case involved a pivotal question of state law).

460. See MD. RULE 2-231(b)(3)(B) (noting that matters pertinent to a finding of pre-dominance and superiority include "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class").

461. FED. R. CIV. P. 23(b)(3)(C); MD. RULE 2-231(b)(3)(C).

462. See, e.g., *Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 653 (C.D. Cal. 1996) (refusing class certification when plaintiffs, evidence, and witnesses were scattered across the country, and the class proponents "failed to establish any particular reason why it would be especially efficient for this Court to hear such a massive class action law suit").

maturity of the issues presented for class certification,⁴⁶³ potential alternatives to class certification,⁴⁶⁴ the manageability of the proposed class,⁴⁶⁵ and the class members' interest in controlling separate litigation⁴⁶⁶ are all relevant areas of inquiry.⁴⁶⁷

(iv) *The Manageability of the Class Action.*—Many of the issues previously discussed are appropriate for consideration under the (b)(3)(D) “manageability” analysis. In particular, federal courts have examined the problems inherent in nationwide class actions involving application of numerous state laws.⁴⁶⁸

Class actions presenting products liability claims are generally held to be unmanageable because of the numerous individual issues involved.⁴⁶⁹ Where the effect of class certification is to bring in “thousands of possible claimants whose presence will in actuality require a multitude of minitrials . . . then the justification for class certification is absent.”⁴⁷⁰ In such a case, individual trials would be more effective and would resolve all issues as to individual litigants.⁴⁷¹

463. See *supra* notes 448-453 and accompanying text.

464. See *supra* note 432 and accompanying text.

465. See *infra* notes 468-471 and accompanying text.

466. See *supra* notes 433-447 and accompanying text.

467. See, e.g., *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1235 (9th Cir. 1996) (decertifying a class when alternative methods of adjudication, particularly when coupled with consolidation of pre-trial proceedings by the Judicial Panel on Multidistrict Litigation, equally achieve judicial economy).

468. See *supra* notes 428-431 and accompanying text.

469. See, e.g., *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996) (determining that single litigation addressing every modification in design, manufacturing, and representation over twenty-two year period, combined with unique problems of each plaintiff, would present an insurmountable burden on courts); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 421-26 (E.D. La. 1997) (holding that differences in factual predicates for proposed class members make certification of class patently inappropriate, and that fragmentation of issues into mini-trials on causation, comparative fault, reliance, and other issues defeats purported economy of class treatment); *Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 653-66 (C.D. Cal. 1996) (recognizing that manageability problems include variations in state law that require individual analysis); *Ryan v. Eli Lilly & Co.*, 84 F.R.D. 230, 233 (D.S.C. 1979) (stating that a class action is not efficient when individualized proof for each class member is required).

470. *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 328 (5th Cir. 1978).

471. See *Mertens v. Abbott Labs.*, 99 F.R.D. 38, 42 (D.N.H. 1983) (noting that, given the individual nature of the proof at issue, “judicial resources applied to each claim on an individual basis would doubtless be more effective than a general pronouncement applied to all cases without any real effect”).

O. *Settlement Class Actions*⁴⁷²

Although not originally contemplated by the drafters of the revisions to the class action rule,⁴⁷³ the settlement class action has become a ubiquitous part of complex civil litigation.⁴⁷⁴ This fact, however, has not diminished the controversy surrounding the settlement class as a means for resolving multi-party cases.

Pre-*Amchem*, the settlement class, as a device, was typically in contravention of Rule 23(c)'s provision that "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained."⁴⁷⁵ The lengthy negotiations necessary to resolve complex litigation mean that, as a practical matter, a litigation class determination could often have been made much sooner than the certification of a settlement

472. The warning that this Article can only scratch the surface of class action practice is particularly relevant in this brief introduction to class action settlements. The legal and ethical complexities involved in representation of both class proponents and opponents are such that counsel are cautioned to research these issues with care as they apply to the facts of particular class suits.

473. Of course, it is equally correct to note that there is nothing in the language of Rule 23 that expressly prohibits the use of the class action for settlement purposes. See Trangsrud, *supra* note 419, at 835 (arguing that the common question class action is appropriate for settlements because Rule 23 allows a court to "certify [such a] class action when it will prove 'superior to other available methods for the fair and efficient adjudication of the controversy,'" and because a judicially supervised settlement is a means of adjudicating the value of claims arising from a mass tort). This analysis is flawed by its assumption that courts will hear and determine the value of claims. In fact, although a so-called "fairness hearing" is typically held by courts prior to the acceptance of a settlement agreement between the parties in class action litigation, there is no requirement for such a hearing under Rule 23. Moreover, even where such a hearing is conducted, it is at least technically nonadversarial, because plaintiffs and defendants share a common interest as proponents of the settlement in having the court certify the settlement class. Thus, the most one can say from a review of the language of Rule 23 is that this rule is neutral on the issue of settlement classes; it neither endorses nor bars the concept of settling litigation through the class action device.

474. See *Empirical Study*, *supra* note 442, app. B, at 62 ("Across the four districts, a substantial majority of certified class actions were terminated by class-wide settlements. In the four districts, the percentage of certified class actions terminated by a class settlement ranged from 62% to 100%."); Bryant G. Garth, *Studying Civil Litigation Through the Class Action*, 62 IND. L.J. 497, 501 (1987) (noting that, once certification occurs, "most class actions, like most litigation, settle prior to trial").

475. FED. R. CIV. P. 23(c); see *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 786 (3d Cir. 1995) (noting that there is an "absence of clear textual authorization for settlement classes," and that, in spite of Rule 23(c)'s directive to certify actions as soon as possible, "a settlement class is a device whereby the court postpones the formal certification procedure until the parties have successfully negotiated a settlement, thus allowing a defendant to explore settlement without conceding any of its arguments against certification").

class.⁴⁷⁶ More importantly, however, a custom arose that actions could be certified as a settlement class, even when the same proposed class might not be certifiable for litigation purposes.⁴⁷⁷ This judicial doctrine was even accepted by the drafters of the *Manual for Complex Litigation*, which states, "Classes may be proposed and are sometimes certified in connection with a settlement that might not pass muster in the traditional litigation context."⁴⁷⁸

The rationale for this doctrine was simple: Settlement is always preferable to trial from the standpoint of judicial economy, and courts wanted especially to encourage "sweeping settlements of complex disputes."⁴⁷⁹ Moreover, the settlement class is a device which benefits all participants in litigation, whereas litigation classes favor the interests of plaintiffs (and the plaintiffs' bar) and, arguably, the courts over the interests of defendants.

The appeal of the class action to the plaintiffs' bar is readily apparent—by taking a limited number of individual clients and recasting them in the role of class representatives, plaintiffs' lawyers can transform individual, low-recovery litigation into a single case that can net millions of dollars in fees. Courts also benefit from the class device, in perception if perhaps not in reality. The theory is that one class action can take the form of hundreds, thousands or, in some cases, millions of individual lawsuits that could clog the court system of the country. Thus, consolidating all claims in one court, before one judge, can save millions of judge-hours that otherwise would be spent needlessly on issues which, if the class were properly certified, should be identical for each class member.⁴⁸⁰

476. The practice of delaying the class certification decision until a settlement was reached was criticized by several circuit courts that considered the issue. See, e.g., *In re General Motors Corp. Pick-Up Truck*, 55 F.3d at 787 ("Deliberately delaying a class certification determination so that settlement discussions can proceed clearly does not represent an effort to resolve the issue 'as soon as practicable.'"); *Mars Steel v. Continental Ill. Nat'l Bank Trust*, 834 F.2d 677, 680 (7th Cir. 1987) ("And, common though the practice of deferring class certification while settlement negotiations are going on is, it not only jostles uneasily with the language of Rule 23(c)(1) but also creates practical problems.").

477. See, e.g., *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 305 n.10 (6th Cir. 1984) (noting, but refusing to address, the district court's holding that "the standards for certifying a class are different depending on whether the class is for settlement or whether it is for trial"); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 159 (S.D. Ohio 1992) (noting that "the requirements of Rule 23 are more easily satisfied for settlement purposes than for litigation purposes").

478. *MANUAL FOR COMPLEX LITIGATION*, *supra* note 173, § 30.4, at 236.

479. *Bowling*, 143 F.R.D. at 158.

480. Whether class certification actually achieves any judicial economy is questionable. First, the number of cases actually filed by class members typically is low. Thus, although those cases that have been filed are aggregated, a number of other cases which have not

The benefits of class actions for class defendants are less readily apparent. Viewed purely as a device for aggregating litigation, of course, representative litigation has almost no value to defendants. Class actions are large, threatening, and unpleasant from a class defendant's perspective.⁴⁸¹ Class actions, defendants believe, typically have a few potentially viable claims at their core, around which have clustered numerous baseless and valueless claims. The instinctive reaction of class defendants, therefore, is to fight the litigation class certification battle as vigorously as possible, in order to focus all attention on the individual cases which actually have been filed. When this strategy is successful, the individually filed cases can typically be resolved swiftly and easily, either by settlement or by litigation.

When the defendant loses the class certification battle, however, settlement becomes difficult to resist. The downside of losing a class trial is so large that defendants, and their insurance carriers, are typically unwilling to face the risk.⁴⁸² This result led Judge Friendly to coin the emotive phrase "blackmail settlements."⁴⁸³ And yet the class action settlement also offers to class defendants the opportunity to resolve a number of claims, perhaps even all claims, quickly and, in

been, and would not be, filed also come before the court. Individual issues flowing from these cases, including damages calculations, can significantly increase the number of issues to be resolved by the court. Thus, it is at least possible for a class action to take a relatively small number of individual cases and transform them into a plethora of cases, all of which will require the attention of the court at some point during the litigation, thus significantly *increasing* the number of judge-hours spent on the case. Second, at least in federal court, class certification is not necessary in order to accomplish the goal of judicial economy. Consolidation and coordination of multiple cases filed in the various federal district courts, for all pre-trial purposes at least, can be accomplished by the judicial panel on multidistrict litigation. *See* 28 U.S.C. § 1407 (1994). Under this statute, this panel can order centralized case management of litigation, thus accomplishing many of the perceived benefits of class certification without any of its abuses. Unfortunately, multidistrict consolidation is regularly followed by a consolidated motion for class certification in the transferor district, thus rendering multidistrict consolidation little more than a waystation along the class action path.

481. Proponents of the class action would counter that the class action is merely an attempt to level the playing field in order to minimize the financial advantages that corporate defendants, and their attorneys, enjoy. *See* YEAZELL, *supra* note 12, at 18-20 (theorizing that the class action is the corporatization of individual interests—so as to gain strength and efficiency—in a manner similar to the aggregation of individual interests in the corporation).

482. The defendant's fear—and the decision to settle that it induces—gives the lie to the argument that a class action merely levels the playing field for both litigants. Instead, the class action replaces one potential abuse—an imbalance of power in favor of corporate defendants—with an equally abusive substitute—a case that places too much power in the hands of the class. If, as class proponents may argue, a tilted playing field is unfair, then the same rule must apply to both sides, and the class action does little, if anything, to make things even.

483. FRIENDLY, *supra* note 160, at 120.

the long run, more cheaply than could have been done by vigorously litigating each one individually.⁴⁸⁴ This realization led the defendants in the case which became *Amchem* to approach two prominent plaintiffs law firms with the unusual request to be sued.⁴⁸⁵

P. Georgine/*Amchem*

Settlement negotiations in *Georgine*⁴⁸⁶ began and lasted for a year.⁴⁸⁷ Only after a settlement was reached was suit filed.⁴⁸⁸ On the same day as the complaint was filed, the defendants answered, denying the allegations in the complaint, and the parties jointly moved for certification of a settlement class.⁴⁸⁹ Two weeks later, the district court "conditionally"⁴⁹⁰ certified an opt-out class.⁴⁹¹ After more than a year of what the Third Circuit confusingly referred to as "pre-trial proceedings,"⁴⁹² the court conducted an eighteen day fairness hearing and, after nearly six months of consideration, finally issued an opinion approving the settlement and confirming the certification of the settlement class.⁴⁹³ Objectors to the class settlement then filed an appeal with the Third Circuit.⁴⁹⁴

During the pendency of the appeal, the Third Circuit held in a different case that settlement classes must, contrary to previous cus-

484. See, e.g., Richard B. Schmitt, *The Deal Makers: Some Firms Embrace the Widely Dreaded Class-Action Lawsuit*, WALL ST. J., July 18, 1996, available in 1996 WL-WSJ 3110932 (discussing the advantages of class action settlements to corporate defendants).

485. See *id.*; see also S. 2083, 105th Cong. §§ 2-4 (1998) (proposing, as a reform to this practice, to drive virtually all class action litigation into the federal courts, and require litigants to give state attorneys general and the Department of Justice advance knowledge of all class action settlements).

486. *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997).

487. See Schmitt, *supra* note 484.

488. See *Georgine*, 83 F.3d at 619 (noting that global settlement negotiations commenced after transfer of all litigation to a single federal district by the MDL panel, and that suit was filed only after the two sides reached a settlement).

489. *Id.* at 620.

490. See FED. R. CIV. P. 23 (c)(1) (noting that a class certification order may be "conditional"); MANUAL FOR COMPLEX LITIGATION, *supra* note 173, § 30.18, at 223 (noting that "[r]econsideration under Rule 23(c)(1) may be on motion of any party or *sua sponte* by the court," and that "the court should consider not only the requirements of Rule 23(a) and (b) in the light of the facts and issues of the case, but also whether the parties or the class would be unfairly prejudiced by a change in the proceedings at that point").

491. *Georgine*, 83 F.3d at 621.

492. *Id.*

493. *Id.* at 621-22.

494. *Id.* at 622.

tom, meet the class requisites of Rule 23 to the same degree as litigation classes.⁴⁹⁵

In light of this holding, the *Georgine* court considered whether the class met Rule 23(b)(3)'s "predominance" and "superiority" requirements.⁴⁹⁶ Not surprisingly, the court decided that these requirements must be interpreted in the same manner, regardless of whether the class was cast as one for litigation or for settlement:

We now hold that, because the 23(b)(3) requirements protect the same interests in fairness and efficiency as the 23(a) requirements, and because "[t]here is no language in [Rule 23] that can be read to authorize separate, liberalized criteria for settlement classes," the 23(b)(3) criteria must also be applied as if the case were to be litigated. While the better policy may be to alter the class certification inquiry to take settlement into account, the current Rule 23 does not permit such an exception.⁴⁹⁷

The Supreme Court granted certiorari "to decide the role settlement may play, under existing Rule 23, in determining the propriety of class certification."⁴⁹⁸ Although primarily agreeing with the Third Circuit's analysis, the Court did note that settlement is not entirely irrelevant to the class certification decision; a district court, when considering settlement-only certification, "need not inquire whether the case, if tried, would present [under Rule 23(b)(3)(D)] intractable management problems."⁴⁹⁹ On the whole, however, settlement is not

495. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 800 (3d Cir. 1995).

496. *See Georgine*, 83 F.3d at 625; FED. R. CIV. P. 23(b)(3) (requiring class proponents to demonstrate that the common questions of law or fact "predominate over any questions affecting only individual members, and that a class action is superior for the fair and efficient adjudication of the controversy").

497. *Georgine*, 83 F.3d at 617-18 (alterations in original) (citation omitted) (quoting *In re General Motors Corp. Pick-Up Truck*, 55 F.3d at 799). At the time of this case, the Rules Advisory Committee was considering an amendment that would have permitted a liberal interpretation of the Rule 23 requirements in the context of a class settlement. *See CIVIL RULES ADVISORY COMMITTEE, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, RULE 23(b)(4)*, 117 S. Ct. 352-53 (1996) (permitting a class action to be maintained where "the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial"). After public hearings, the Committee decided to defer any decision on the proposed Rule until the Supreme Court had decided the *Georgine* appeal, now known as *Amchem*. Since the Supreme Court's decision, the Committee has not attempted to revive the proposed Rule 23(b)(4). Louisiana, however, has amended its class action rule in a manner consistent with proposed Rule 23 (b)(4). *See infra* notes 569-572 and accompanying text.

498. *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2247-48 (1997).

499. *Id.* at 2248.

relevant, and does not allow a more liberal interpretation of the requirements to certification. As the Court held, those parts of Rule 23(b)(3)⁵⁰⁰ “designed to protect absentees by blocking unwarranted or overbroad class definitions” require “undiluted, even heightened, attention in the settlement context [because] a court asked to certify a settlement class will lack opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold.”⁵⁰¹ Thus, *Amchem* makes clear that, manageability aside, there is no difference between litigation and settlement classes.

Q. *Post-Amchem Settlements*

There is no question that *Amchem* poses some significant problems for attorneys seeking to certify inherently divided classes. These problems are, however, also shared in part by those defending against a class action. Although *Amchem* might provide some tactical support in the battle over class certification, it can prove to be an impediment to the overall litigation strategy. If, for example, a defendant defeats a proposed litigation class, will that defendant be able to certify a class for settlement purposes at some later point? Whereas before *Amchem*, the answer was clearly “yes,” because of the lower standards applied to classes sought for settlement, the answer now is less obvious. Thus, both plaintiffs and defendants must consider carefully what it is that they want to achieve from class litigation, and how they can best accomplish those goals.

1. *When to Seek Class Certification.*—The issue of when to seek class certification appears, at first glance, relatively simple. Rule 23(c)(1) requires the court to determine, by order, whether a case

500. See FED. R. CIV. P. 23(b)(3)(A-C) (listing factors to be considered in determining whether common questions of law or fact predominate, and whether a class action is superior to other methods for the fair and efficient adjudication of the controversy); *supra* note 368 (setting forth text of rule). It is unclear why the Court excluded the manageability factor under Rule 23(b)(3)(D). While a district court will not have to try a settlement class, it can encounter difficult managerial tasks in administering distribution of funds to class members, or hearing objections to the allocation of funds in individual cases. Moreover, there is some tension in excluding this one factor while also asserting that the standards for certification are the same regardless of whether the class is for settlement or litigation.

501. *Amchem*, 117 S. Ct. at 2248. As with the decision to strip the “manageability” requirement from consideration in the settlement context, the Court’s remark that the other Rule 23(b)(3) requirements require “heightened” attention in the settlement context is puzzling. If there is no authority to minimize attention to the Rule 23 factors in this context, there is similarly no authority to devote “heightened” attention to them. The Court’s decision appears based on its own opinion regarding the practice of settling class actions, thus diminishing the value of the Court’s analysis.

brought as a class action should be so maintained.⁵⁰² This determination must be made “[a]s soon as practicable after the commencement of an action brought as a class action.”⁵⁰³ Thus, there appears to be little leeway for the plaintiff to bring an action as a class and then seek to have the court delay its certification decision until the parties decide that it is convenient for the court to rule.⁵⁰⁴

There are, however, other choices. Plaintiffs can, for example, initiate pre-litigation negotiations with the defendants. This tactic allows the parties at least to explore the possibility of reaching an appropriate resolution of the conflict without rolling the dice on a class certification motion that could prove fatal to one or the other side’s chances of achieving an acceptable result. Alternatively, plaintiffs might file a single suit, or a small group of individual, consolidated suits, and seek to use these suits to test the viability of the litigation.

The *Norplant* litigation provides a good example of how this strategy might work in practice.⁵⁰⁵ In this case, the district judge, relying in part on the Fifth Circuit’s treatment of a tort’s “maturity” in *Castano*,⁵⁰⁶ declined to grant the plaintiff’s motion to certify the proposed class; instead, the judge proposed a series of “bellwether” trials at which the issues relevant to the maturity of the tort could be tested.⁵⁰⁷ Although the *Norplant* trial plan was decided in the context of a denial of class certification, the better practice would be for plaintiffs to propose a similar bellwether scheme without filing a motion for class certification.⁵⁰⁸

502. FED. R. CIV. P. 23(c)(1).

503. *Id.*

504. Indeed, some jurisdictions have local rules that require filing a class certification motion within a specific period after filing of class action complaint. See MANUAL FOR COMPLEX LITIGATION, *supra* note 173, § 30.1, at 213 & n.65 (citing Local Rule 27 of the U.S. District Court for the Eastern District of Pennsylvania). Such rules are not, in the main, helpful to the process. See *id.* at 213 (observing that “[s]uch rules . . . may not allow sufficient time to develop an adequate record, particularly in complex cases”).

505. See *In re Norplant Contraceptive Prods. Liab. Litig.*, 168 F.R.D. 577 (E.D. Tex. 1996).

506. *Id.* at 578 & n.3 (citing *Castano v. American Tobacco Co.*, 84 F.3d 734, 740-41 (5th Cir. 1996)).

507. *Id.* at 578-79.

508. A similar bellwether scheme would require plaintiffs attorneys to fight against their instincts to move for class certification at the earliest possible stage in the litigation. For practical reasons, however, plaintiffs attorneys would be loath to delay the filing of a class motion. In particular, it is unclear whether the trial court would appoint a plaintiffs’ steering committee to oversee the prosecution of bellwether trials, and without such a device, plaintiffs attorneys would risk losing control over the litigation as a whole.

2. *Opposing a Litigation Class.*—One of the more significant problems facing a defendant in class litigation after *Amchem* is how vigorously to oppose the class action. The choices are stark: failure to defeat a proposed class virtually guarantees settlement; success in defeating a class means that class-wide settlement might be impossible to achieve, particularly where the court's decision not to certify centers on the Rule 23(a) factors which must be met in all forms of class action.⁵⁰⁹

There are no pat answers to this dilemma. It is intolerable for a defendant to attempt to preserve the possibility of settling with a class eventually when the class may yet be set aside on the motion of objectors who claim that they were inadequately represented by the class representatives, and that the certification process was insufficient to test the class representative's adequacy under Rule 23(a)(4). Perhaps the best that can be said is that counsel for defendants should be prepared to explain to their clients the advantages and disadvantages of defeating requests for class certification. Ultimately, a defendant's class strategy will likely be more a business decision than a legal one.

The same is probably true of the defendant's decision-making process to determine whether to appeal a decision to certify a class pursuant to the new Rule 23(f).⁵¹⁰ A successful appeal would, in all likelihood, extinguish all chances of a later settlement class. The appellate period, however, could provide both parties with an opportunity for careful evaluation of strategy and likely outcomes, thus resulting in settlement opportunities.

3. *Process of Class Settlement.*—As already noted, while it used to be the case that a class presented to a court for certification as a settlement class could be certified more readily for settlement purposes than it could for litigation purposes,⁵¹¹ the Supreme Court's *Amchem*

509. Of course, it might not be necessary for a defendant to seek class-wide settlement if a litigation class is defeated. The incentive for individual plaintiffs to pursue litigation without the advantages of a class might be sufficiently diminished to allow cost-effective individual settlements. Other factors, such as the expiration of statutes of limitations, might play into a defendant's desire to not settle on a class-wide basis.

510. FED. R. CIV. P. 23(f) (amended Dec. 1, 1998), 177 F.R.D. 530-31. This new rule, which became law on December 1, 1998, provides as follows: "Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders."

511. See *supra* notes 477-479 and accompanying text.

opinion made clear that this is no longer the case.⁵¹² While it may be difficult to certify a class for settlement purposes, it is still important to understand the mechanics of this process.

Federal Rule 23(e), and Maryland Rule 2-231(h), contemplate the use of the class action for purposes of settlement.⁵¹³ A court presented with a class for settlement purposes has only three options: "(1) to approve the proposed settlement in whole; (2) to reject the proposed settlement without recommendations for modification; and (3) to reject the proposed settlement, but with suggestions and recommended changes."⁵¹⁴

The process for seeking approval of a proposed settlement has two steps. First, the parties should submit the proposed settlement to the court for initial certification of a class for purposes of settlement; second, the court should conduct a "fairness" hearing on the terms of the settlement, permitting any objectors to express their opinions.⁵¹⁵ The initial certification of the class for settlement purposes, prior to the court's final certification and approval of the settlement, is necessary in order for the court to order class notice to be distributed to class members.⁵¹⁶ At this stage, the court should review the proposed settlement for obvious defects that will preclude final acceptance of the settlement; absent such defects, however, the court should initially certify the class and order notice to be sent.⁵¹⁷

Class settlements should be fair, reasonable, adequate, and should not be the product of collusion between the parties.⁵¹⁸ Courts

512. *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2248 (1997) (holding that a court may relax the manageability inquiry, but that the other specifications of Rule 23(b)(3) designed to protect absent class members by blocking unwarranted or overbroad class definitions "demand undiluted, even heightened, attention in the settlement context").

513. See FED. R. CIV. P. 23(e) (providing that "a class action shall not be dismissed or compromised without the approval of the court," and that "notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs"); MD. RULE 2-231(h) (same).

514. *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 151 (S.D. Ohio 1992) (citing *Bronson v. Board of Educ.*, 604 F. Supp. 68, 73 (S.D. Ohio 1984)).

515. See MANUAL FOR COMPLEX LITIGATION, *supra* note 173, § 30.41, at 237-38 (discussing the fairness hearing).

516. If the class has already been certified for litigation purposes, notice could be distributed to class members pursuant to Federal Rule 23(d) or Maryland Rule 2-231(f). However, to begin the process of approving the settlement, the settlement must be presented to the court. Accordingly, re-certification of the class for settlement purposes is appropriate.

517. MANUAL FOR COMPLEX LITIGATION, *supra* note 173, § 30.41, at 237.

518. See *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) (holding that the trial judge correctly administered a balancing test to determine whether the settlement terms of an employment discrimination class action were fair, adequate, and reasonable to the class members).

have articulated several factors by which to determine the fairness of a proposed class settlement, including:

- (1) the plaintiffs' likelihood of ultimate success on the merits balanced against the amount and form of relief offered in the settlement;
- (2) the complexity, expense and likely duration of the litigation;
- (3) the stage of the proceedings and the amount of discovery completed;
- (4) the judgment of experienced trial counsel;
- (5) the nature of the negotiations;
- (6) the objections raised by the class members; and
- (7) the public interest.⁵¹⁹

In reviewing class settlements, courts should focus on the fairness of the settlement and whether it is free from collusion, and not on whether, in the words of the Ninth Circuit, "the final product could be prettier, smarter or snazzier."⁵²⁰ Almost always, there will be class members who believe that they could have received more in individual litigation. This poses particular problems in mandatory, non-opt out, settlements. Nonetheless, "the best interests of the class as a whole must remain the paramount consideration even though some class members believe that they will not receive all the individual relief to which they believe they are entitled."⁵²¹

The comparative strength or weakness of the class's legal position should be a significant consideration for the court in reviewing the fairness, adequacy, and reasonableness of a class settlement. Where, for example, the class might not have a cause of action at all, the scales will tip strongly in favor of settlement.⁵²²

A frequent challenge to mandatory class action settlement is that the class member has been deprived of due process by the imposition of a non-opt out class structure.⁵²³ This is a difficult, and potentially

519. *In re Southern Ohio Correctional Facility*, 173 F.R.D. 205, 212 (S.D. Ohio 1997).

520. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998).

521. *Thomas v. Christopher*, 169 F.R.D. 224, 243 (D.D.C. 1996), *aff'd in part, rev'd in part sub. nom. Thomas v. Albright*, 139 F.3d 227 (D.C. Cir. 1998).

522. *See, e.g., DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1177 (8th Cir. 1995) (noting that, where plaintiff class had "a strong unlikelihood of success," then "virtually any benefit inuring to the class would be better than the prospect of an ultimately unsuccessful litigation"); *City of Detroit v. Grinnel Corp.*, 495 F.2d 448, 455 (2d Cir. 1974) (asserting that the adequacy of a settlement must be measured against the strength of plaintiffs' claims).

523. This objection is commonly founded on a mis-reading of *Phillips Petroleum Co. v. Shutts*, in which the Court held that "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing

self-defeating, objection to a class settlement. Where a class member objects to a settlement, the submission of memoranda to the court arguing a deprivation of due process leaves the class member open to the challenge that his or her due process objection has been waived.⁵²⁴

The due process problem can arise in the context of present class settlements that release claims of potential future injury. The future injury claims are somewhat controversial because a class member who has a fear of potential future injury may have neither standing nor a justiciable claim.⁵²⁵ Without analyzing the standing or justiciability questions, at least one court has expressed reservations as to whether a class notice can inform a class member of his or her right to opt out in a manner that will resolve finally any claims that the class member might have arising from an occurrence, even if those claims have not yet accrued.⁵²⁶ At least one other court, however, has held that the release of future claims is not a due process violation.⁵²⁷

In order to test the terms of the settlement, the court should permit any class member, as well as potential intervenors into the litigation, to speak at the fairness hearing and to air their objections to the proposed settlement.⁵²⁸ Class proponents should be prepared to

and returning an 'opt out' or 'request for exclusion' form to the court." 472 U.S. 797, 812 (1985). However, because *Shutts* involved an opt out class, *id.* at 801, this holding concerns only whether the state court lacked jurisdiction over out-of-state class members, and "not the different and broader question of whether, if a state court has jurisdiction over the plaintiffs, due process requires that all class members have the right to opt out of the class and settlement agreement." *Adams v. Robertson*, 520 U.S. 83, 88-89 (1997) (per curiam).

524. *See, e.g., DeBoer*, 64 F.3d at 1176 ("By submitting extensive memoranda to the district court on the issues of the fairness of the settlement, and again reaffirming their position to us on appeal, the [objectors] have waived any potential due process requirement that would allow them to pursue their claims again in another forum." (citing *White v. National Football League*, 41 F.3d 402, 407-08 (8th Cir. 1994))).

525. *See, e.g., Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 635-38 (3d Cir. 1996) (Welford, J., concurring) (contending that plaintiffs' claims of potential future injury were nonjusticiable because of a lack of a case or controversy).

526. *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (expressing "serious due process concerns" as to the adequacy of a Rule 23(c)(2) notice advising class members of a settlement and the right to opt-out where "many potential members of the class [] cannot yet know if they are part of the class").

527. *Williams v. General Elec. Capital Auto Lease, Inc.*, 159 F.3d 266, 274-75 (7th Cir. 1998) (rejecting both justiciability and due process arguments that plaintiffs' "opt-out rights were illusory since as holders of unterminated leases they lacked knowledge of what claims they held" on the ground that plaintiffs "were adequately equipped to make a reasoned decision, based on the likelihood of early termination and the costs/benefits of a separate legal challenge, regarding the relative merits of participating in the class or opting out" (quoting district court opinion)).

528. The fairness hearing is also crucial in order to satisfy due process requirements. Some commentators, however, are unconvinced that fairness hearings are adequate to pro-

meet their burden of proving fairness, reasonableness, and adequacy of the proposed settlement, even if no class members object.⁵²⁹

In order to minimize any challenges to the fairness of the proposed settlements, class counsel should not negotiate attorney fee issues until after a settlement for the class has been reached,⁵³⁰ even if this approach is not required.⁵³¹ Because of the impact that attorneys' fees can have on the class settlement, the upper limit of the proposed attorneys' fee award should be disclosed in the settlement agreement and should be available for comment by both the class members and the court.⁵³² The danger of the settlement foundering on the rock of attorneys' fees is particularly great in cases in which class recovery is small.⁵³³

R. Proposed Amendments to Rule 23

In 1990, the Advisory Committee on Civil Rules began an in-depth study of the class action rule and its procedures.⁵³⁴ The Com-

tect the interests of class members. See, e.g., Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1105-06 (1996) (comparing fairness hearings to ex parte proceedings because of the unity of interest between attorneys for plaintiffs and defendants).

529. MANUAL FOR COMPLEX LITIGATION, *supra* note 173, § 30.41, at 238.

530. See *Prandini v. National Tea Co.*, 557 F.2d 1015, 1021 (3d Cir. 1977) ("A reasonable solution, we suggest, is for trial courts to insist upon settlement of the damage aspect of the case separately from the award of statutorily authorized attorneys' fees.").

531. Cf. *Evans v. Jeff D.*, 475 U.S. 717, 732 (1986) (acknowledging, in the context of a civil rights class action, that attorneys' fees may figure into a settlement).

532. MANUAL FOR COMPLEX LITIGATION, *supra* note 173, § 30.42, at 240.

533. For an egregious example of attorneys' fees exceeding recovery in a settlement class action, see *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348 (7th Cir. 1996) (Easterbrook, J., dissenting from denial of rehearing en banc). This dissent reports the history of settlement litigation in *Hoffman v. BancBoston Mortgage Corp.*, No. CV-91-1880 (Ala. Cir. Ct. Jan. 24, 1994). In this case, a class was certified on behalf of mortgage holders who contended that the defendant did not promptly post interest to real estate escrow accounts. *Kamilewicz*, 100 F.3d at 1349. The class settled, and, in part because the maximum award to any class member was less than \$9, few class members objected or opted out of the class. *Id.* The award to class attorneys, however, was more than \$8 million, and although class members' accounts were credited with their calculated settlement amount, their amounts were also debited 5.32% of the balance in order to pay for the fees. *Id.* For many of the accounts, the debit exceeded the credit; for example, the plaintiff who subsequently brought the action in federal district court received a credit for \$2.19 and was debited \$91.33, for a net loss of \$89.14. *Id.* The Seventh Circuit affirmed the district court's dismissal of the action on the ground of the *Rooker-Feldman* doctrine, which limits review of a state court's judgment in civil litigation to the United States Supreme Court. *Id.* at 1350; see also Koniak & Cohen, *supra* note 528, at 1278-79 (arguing, in light of this case, that class members ought to be able to sue class counsel involved in abusive litigation).

534. See 1 WORKING PAPERS, *supra* note 217, at vii. The Working Papers are available from the Federal Judicial Center and offer a fascinating and comprehensive summary of the gamut of views on the class action rule from both academics and practitioners.

mittee commissioned the first large scale empirical study of class actions,⁵³⁵ circulated several draft proposals for revisions to the language of Rule 23,⁵³⁶ published a draft proposal for public comment, published written comments to the proposal, and conducted three public hearings in Philadelphia, Dallas, and San Francisco.⁵³⁷

The Committee submitted two proposed changes to the class action rule to the Committee on Rules of Practice and Procedure: a deceptively modest revision to Rule 23(c)(1)⁵³⁸ and a new rule 23(f).⁵³⁹ The change to Rule 23(c)(1) was rejected by the Committee, apparently because of one Committee member's concerns over a social welfare case in the Seventh Circuit in which a class certification decision had been much delayed.⁵⁴⁰ The new Rule 23(f), however, passed into law on December 1, 1998.⁵⁴¹

Rather than push ahead with its agenda of changes to Rule 23, the Advisory Committee has now decided to adopt a "wait and see" attitude.⁵⁴² The implementation of Rule 23(f), allowing discretionary appeals of certification decisions, should provide a body of case law from the circuit courts which should inform and shape the debate over future changes to the class action rule.⁵⁴³ In addition, the Com-

535. See *Empirical Study*, *supra* note 442. For other studies, see Bertelsen et al., *supra* note 287; Garth, *supra* note 474.

536. See 1 WORKING PAPERS, *supra* note 217, at vii.

537. *Id.*

538. The current rule provides that a class certification decision be made "[a]s soon as practicable after the commencement of an action." FED. R. CIV. P. 23(c)(1). The proposed revision would have altered this to "[w]hen practicable." 1 WORKING PAPERS, *supra* note 217, at 145. The proposed Advisory Committee Note accompanying this change shows that the Committee believed that this proposed change merely reflected the "common practice of ruling on motions to dismiss or for summary judgment before the class certification decision." *Id.* at 156. This revision would have codified a class opponent's pragmatic decision to trade the class-wide res judicata effect of a favorable post-certification decision for the successful resolution of an individual claim. While the effect of this decision might not be class-wide, it can often have a chilling effect on the prospects for class certification; because the rationale for granting the motion would, in many cases, extend to all class members, a dismissal would, practically speaking, end the prospects for class certification. Thus, in effect, this practice is an attempt to circumvent the *Eisen* bar on analyzing the merits prior to class certification. See *supra* notes 81-85 (discussing *Eisen*). Whether or not the Committee was correct in its assessment of the "common practice," this proposed change might have had a significant impact on class action practice had it been approved.

539. FED. R. CIV. P. 23(f). For the text of this Rule, see *supra* note 510.

540. Memorandum to American Bar Association Subcommittee on Revisions to Rule 23, Class Actions & Derivative Suits Committee, July 1, 1997, at 2.

541. FED. R. CIV. P. 23(f) (amended Dec. 1, 1998), 177 F.R.D. 530-31.

542. Telephone interview with Mark Shapiro, Staff Attorney, Advisory Committee on Civil Rules (Apr. 21, 1998).

543. Report of the Advisory Committee on Civil Rules and the Working Group on Mass Torts to the Chief Justice of the United States and to the Judicial Conference of the United

mittee has appointed a Mass Torts Working Group to continue its work on the class action rule.⁵⁴⁴ The Working Group's report was filed on February 15, 1999.⁵⁴⁵

The failure of the Advisory Committee to push forward on its already modest slate of proposed changes to Rule 23 is disappointing and marks a retreat from its efforts to create a class action rule that more adequately addresses the growing problem of mass torts in federal litigation.⁵⁴⁶ Nonetheless, the promise of relaxed appellate review of class certification decisions pursuant to new Rule 23(f) should insure that more case law is soon available that will aid both federal and state courts in interpreting the class action rule.

States, February 15, 1999. The report provides a useful summary of current thinking on mass tort litigation, but says little new in terms of practical solutions to the problems besetting practitioners and the courts.

544. Telephone interview with Mark Shapiro, *supra* note 542.

545. The Seventh Circuit has taken the lead in construing the new rule. In *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832 (7th Cir. 1999), the Seventh Circuit noted that it had the first Rule 23(f) appeal filed in the nation. *Id.* at 834. Whether the Seventh Circuit's method becomes the standard for the other circuit courts, however, remains to be seen. Because Rule 23(f) permits a discretionary appeal, the appellant must file, in the first instance, a petition for permission to appeal. Once this issue is fully briefed, then, if the petition is granted, the merits of the appeal should be considered in a separate round of briefing and argument. The Seventh Circuit conflated the process, granting permission to appeal, considering the merits of the appeal, and affirming the district court's decision to certify a class, all in one short opinion. *Id.* at 839. The Seventh Circuit determined the Rule 23(f) had three reasons for its existence: first, the death knell implications of the denial of class certification, *id.* at 834; second, the pressure which a decision in favor of certification can place on a defendant to settle, *id.*; and third, to facilitate the development of the law, *id.* at 835. After deciding that the case fell into the third of these rationales for an interlocutory appeal, *id.* at 837, the Seventh Circuit then went on to review the merits of the appeal. The danger here is that parties who fail to brief the merits of the appeal, concentrating (properly) on the issue at hand, might receive an adverse ruling without adequately stating their opinions on the merits. The alternative is almost equally unattractive—preparing and filing a brief not only on the reasons why a Rule 23(f) should, or should not, be accepted, but also a detailed analysis of the underlying merits of the appeal itself, all within the very tight time framework of a Rule 23(f) petition. Until more circuit courts have weighed in on this issue, however, and indicated that a Rule 23(f) is more appropriately seen as a two-step process, parties should consider the Rule 23(f) briefing as the only chance they have to address any pertinent issues.

546. See Paul V. Niemeyer, Memorandum to Members of the Standing Committee, in 1 WORKING PAPERS, *supra* note 217, at ix, ix [hereinafter Niemeyer Memorandum] (noting that many of the problems in mass torts "called for solutions falling well beyond the scope of rulemaking authority," and that the Committee's ultimate proposed changes were "modest").

IV. THE FUTURE OF MARYLAND'S CLASS ACTION RULE

The recent hostility to class actions displayed by the federal courts is likely to stoke interest in state court class actions.⁵⁴⁷ Because the Maryland class action rule is so closely allied with the federal rule, the recent federal opinions disfavoring class certification, in both settlement and litigation contexts, should also have an impact on class action litigation in Maryland state courts. There are some amendments to the Maryland rule that the Court of Appeals and/or the Maryland General Assembly⁵⁴⁸ ought to consider in order both to keep the Maryland rule in step with the federal rule and to insure procedural fairness to proponents and opponents of class certification.

A. *Appeal of the Class Certification Decision*

As soon as practicable, Maryland should adopt a rule allowing for the interlocutory appeal of a class certification decision.⁵⁴⁹ This rule is even more crucial in Maryland than it was in federal court, given the absence of interlocutory appeal at the state level⁵⁵⁰ and the absence of realistic mandamus review in the Court of Appeals.⁵⁵¹

The class certification decision is virtually case dispositive. The denial of class certification, at least of a class certified under provision (b) (3), means that many class members will not know that litigation is even possible⁵⁵² because class notice will not have been sent, and because these members will not have the desire or economic means⁵⁵³ to

547. See *supra* notes 4-5 and accompanying text.

548. In Maryland, the Court of Appeals has rule making power. MD. CODE ANN., CONST. art. IV, § 18(a) (1981 & Supp. 1998). The Attorney General has opined that this section confers "concurrent power" to promulgate rules of procedure to the Court of Appeals and the General Assembly. 66 Op. Att'y Gen 80, 82 (Md. 1981). In order to aid it in exercising its rulemaking power, the Court of Appeals has appointed the Standing Committee on Rules, pursuant to MD. CODE ANN., CTS. & JUD. PROC. § 13-301 (1995 & Supp. 1997).

549. The text of this new rule could mirror new Federal Rule 23(f), with appropriate changes being made with respect to the names of the various courts. FED. R. CIV. P. 23(f); see *supra* notes 510, 539, 545 and accompanying text (setting forth text of Rule 23(f) and discussing its application).

550. *Snowden v. Baltimore Gas & Elec. Co.*, 300 Md. 555, 563 n.7, 479 A.2d 1329, 1333 n.7 (1984) (noting that "Maryland has no statute or rule comparable to § 1292(b)" permitting interlocutory appeals).

551. See *supra* note 166 and accompanying text.

552. This is not to say, of course, that their cause of action has not accrued pursuant to Maryland's "discovery" rule. *Poffenberger v. Risser*, 290 Md. 631, 634 & n.2, 431 A.2d 677, 679 & n.2 (1981) (discussing the scope of the discovery rule in Maryland, noting that it applies to persons under a disability, ignorance induced by fraud, and professional malpractice, but omitting mention of class actions).

553. See *supra* notes 437-442 and accompanying text (discussing the intent of the federal class action rule to enable those with limited economic means to aggregate their claims so as to attract attorneys to represent their interests).

pursue litigation. In addition, to the extent that the *American Pipe* rule, which in some cases tolls the statute of limitations between the filing of a class action and the denial of class certification, is deemed to apply in Maryland, such tolling will cease at the time a class is denied certification.⁵⁵⁴ Accordingly, putative class members might find themselves time-barred from bringing a suit, even if they have the desire and means to do so.

If, on the other hand, the class is certified, then this decision can also have negative consequences. The certification order can be used to coerce a defendant into settling litigation that may be objectively meritless.⁵⁵⁵

Accordingly, in order to minimize unfairness to both sides in the class certification battle, and to encourage the Maryland appellate courts to develop a body of case law relevant to class action litigation, an amendment to the present rule, permitting an appeal from class certification decisions, should be enacted soon.⁵⁵⁶

554. See *supra* notes 205-213 and accompanying text (discussing the applicability of the *American Pipe* rule in Maryland).

555. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (describing such a situation as a "blackmail settlement" (quoting FRIENDLY, *supra* note 160, at 120)); *id.* at 1300 (noting that, with the stakes in the tens or hundreds of million, or even one billion dollars, "it is not a waste of judicial resources to conduct more than one trial, before more than six jurors, to determine whether a major segment of the pharmaceutical industry is to follow the asbestos manufacturers into Chapter 11"). But see *id.* at 1308 (Rovner, J., dissenting) (rejecting Judge Posner's economic-inspired analysis as at odds with Rule 23, which "expressly permits class treatment of such claims when its requirements are met, regardless of the magnitude of potential liability," and because the likelihood of success is not relevant to the certification decision). Courts outside the Seventh Circuit also have criticized Judge Posner's opinion in this case. See *In re Copley Pharm., Inc.*, 161 F.R.D. 456, 460 (D. Wyo. 1995) (arguing that Judge Posner's "economic reasoning may carry substantial weight in the Seventh Circuit, but this court must look to [Rule] 23 and its interpretation by courts to determine the appropriateness of class certification").

An empirical study of class actions may suggest that class certification exercises a coercive effect on defendants to settle. Compare *Empirical Study*, *supra* note 442, app. B, at 62-63 (noting that the settlement range for certified classes was between 62% and 100%, whereas the range for noncertified cases was between 20% and 30%, and that between 13% and 37% of certified classes were disposed of by motion, whereas between 45% and 62% of nonclass cases were disposed of by motion) with *id.* at 63 (arguing that "one should not rush to conclude that the cases settled simply because they were certified" because a settlement after summary judgment or before a trial "might be seen as primarily the product of the ruling or the setting of the trial date").

Whether or not this study's authors are justified in their hesitancy to accept the implications of their data, anecdotal evidence indicates that both plaintiffs and defendants continue to perceive the danger of settlement coercion.

556. The adoption of the language of new Rule 23(f) would solve the problem. Extending the already existing right to an interlocutory appeal, however, is simpler than creating such a right. See *supra* note 550 (noting that, unlike in federal court, Maryland has no procedure for interlocutory appeals). Nonetheless, given the importance of class certifica-

B. *Opt-Out or Opt-In*

The Court of Appeals and the Maryland General Assembly should consider following the lead of the federal courts by conducting a detailed reevaluation of the policy underlying the class action device.⁵⁵⁷ As a catalyst to that discussion, the Court of Appeals and the Maryland General Assembly should consider whether the Maryland (b)(3) class should take an opt-out or opt-in form.

This decision about the opt-out or opt-in form of the Rule is purely one of policy: there is no clear constitutional mandate requiring the current, opt-out, form.⁵⁵⁸ Indeed, due process considerations lean in favor of the opt-in class, which would at least provide confirmation that class members had received notice of the litigation and were willing to be bound by the result.

Both forms have advantages and disadvantages for both sides in a class dispute. Plaintiffs tend to favor the opt-out form because it keeps the number of class members high, thereby obtaining greater leverage over defendants.⁵⁵⁹ Plaintiffs should, however, favor the opt-in form, because it could reduce the choice of law problems that have pre-

tion decisions for both sides in class actions, the Maryland legislature and Court of Appeals should carefully consider this issue.

557. Maryland apparently has not engaged in a detailed consideration of whether the state needs a class action rule and, if it does, what form that rule should take. See *supra* notes 2, 30, 44-50, 56-59, 88-92, 111-146 and accompanying text (discussing the work of the Court of Appeals Standing Committee on Rules of Practice and Procedure). Maryland, however, is not unique in this regard. See *supra* note 546 and accompanying text (noting that the fundamental question of the nature of (b)(3) class actions has not been addressed by the Federal Rules Advisory Committee). In fairness, no one in 1966 could have anticipated the explosion of mass litigation that would result from the re-drafting of Rule 23, and particularly from the creation of the (b)(3) opt-out class. Even in 1983, when the current form of the Maryland rule was adopted, see *supra* notes 143-146 and accompanying text, there was insufficient information to conduct a complete and informed discussion of the nature of class actions. Such information exists today, however, and a careful consideration of class action policy is, at the least, due.

558. See *supra* note 287 (noting that the opt-in or opt-out nature of the Rule depends on statutory construction rather than constitutional mandate).

559. Cf. *Empirical Study*, *supra* note 442, app. B., at 54 (noting that, in four federal districts, the percentages of class actions in which no member opted out were, respectively, 79%, 81%, 89%, and 91%, and that, when notice of a class that was settled under b(3) was sent, the percentages of classes in which no member opted out was lower, namely, 64%, 64%, 56%, and 42%). These numbers probably tell us what we think we already know instinctively: most people look at class notices and think either (1) they are cleverly designed junk mail solicitations, and throw them in the trash; (2) they are in the incomprehensible language of class action lawyers, and throw them in the trash; or (3) they consider themselves as willing but passive class members, after which they throw the class notice in the trash. The remainder fail to get any notice at all. Whatever the motivation, however, the bottom line is that class members tend not to opt out of (b)(3) classes.

vented certification in several recent proposed classes.⁵⁶⁰ Of course, the smaller the class, the smaller its impact on the defendant, and the greater other certification problems, such as the (a)(1) "numerosity" test, could become.⁵⁶¹ Defendants, by contrast, would favor the reduction in size which an opt-in form would be likely to produce, although this form could pose the specter of a return to one-way intervention by permitting putative class members to monitor the progress of the class trial before actively prosecuting their individual cases and, if the class prevailed, seeking to preclude the defendant from re-litigating issues resolved at the class trial.⁵⁶²

Whatever advantage might accrue to one side or the other, the underlying consideration as to the form of the (b)(3) class must be whether the class action is, as its position in the Rules of Civil Procedure and its history tell us, a joinder device, or whether the class action has evolved into an engine of social reform.⁵⁶³ Judge Niemeyer has observed that the form of the Rule depends on the policies that the Rule is intended to serve:

If the rule is to serve only as a tool for the aggregation of claims, then its purpose is clearly undermined by policies that class members are *presumed* to be litigants unless they opt-out. If the rule is to serve as a tool of social policy, however, the size and membership of the class becomes irrelevant except as to the amount of pressure that can be exerted to enforce a statute or correct a wrong.⁵⁶⁴

560. See *supra* note 7 (noting recent cases in which appellate courts decertified classes on the grounds that choice of law problems made trial in the form of class actions impracticable). The notice could conceivably be crafted in such a way as to insure that class members were made aware that the case would proceed under the law of the court's forum state, and that by sending a notice to the court, the class member consented to have his or her case not only tried as part of the class, but also tried under the forum state's law.

561. See, e.g., Bertelsen et al., *supra* note 287, at 1150 (finding that the imposition of an opt-in form on certain class actions reduced class size by 39%, 61%, and 73% respectively).

562. See *supra* note 55 (discussing one-way intervention).

563. See Elizabeth J. Cabraser & Michael D. Hausfeld, *The Necessity of Class Actions in a Global Economy*, Paper presented at the National Institute on Class Actions C-26 (1997) (arguing that Rule 23 is a "tool of social policy" that can be used to enforce "ethical behavior on the part of businesses in today's global economy"). A necessary corollary to the position that the class action rule is a means whereby individuals can enforce their perceptions of proper behavior onto corporate entities is the proposition that opt-in classes cannot be permitted, because these would limit the effectiveness of the class device as a "tool of social policy." Whether such a sociological role is properly fitted to the state's procedural rules forms part of the policy debate that should inform any revisions of the Maryland class action rule.

564. Niemeyer Memorandum, *supra* note 546, at xii.

Intriguingly, Judge Niemeyer himself has addressed this question in the context of Maryland class actions. In his definitive work on the Maryland Rules, Judge Niemeyer describes the class action rule as "a device to facilitate procedurally the litigation of claims so numerous that it is judicially uneconomical to adjudicate the claims separately. . . . [The class action rule] is a joinder rule by which representative parties set themselves up as typical of an entire class of persons."⁵⁶⁵ This objective, results-neutral, position has both history and logic to support it and should receive careful consideration during any debate on the future of the class action rule in Maryland.

C. Settlement Classes

The Supreme Court's *Amchem* decision was not a ringing endorsement of the settlement class concept.⁵⁶⁶ In particular, the Court's decision that a settlement class must be certified under the same standards applicable to litigation classes,⁵⁶⁷ although consistent with the rule as currently drafted, will cause both plaintiffs and defendants to make difficult strategic decisions at an early stage in the litigation and might make settlement classes more difficult to obtain.⁵⁶⁸

Louisiana has decided to take a different approach, the merits of which may be a subject for debate by those who would revise the Maryland rule. Less than a month after the Supreme Court's *Amchem* decision,⁵⁶⁹ Louisiana amended its class action rule by, among other things, permitting a (b)(3) class to be certified for settlement purposes even if the class would not meet the (b)(3) test for litigation

565. NIEMEYER & SCHUETT, *supra* note 60, at 143.

566. *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2252 (1997) ("[C]lass actions may be endangered by 'those who embrace [Rule 23] too enthusiastically just as [they are by] those who approach [the rule] with distaste.'" (alterations in original) (quoting CHARLES ALAN WRIGHT, *THE LAW OF FEDERAL COURTS* 508 (5th ed. 1994))).

567. See *supra* notes 498-501 (discussing this holding).

568. In short, the dilemma facing class opponents is this: should they mount an initial opposition to class certification, in the knowledge that they may seek class certification themselves in order to effect a favorable settlement? If the opposition to the class is effective, and the trial court is persuaded that the requirements of the class action rule have not been met, it might prove difficult to argue exactly the opposite position to the same judge in order to seek certification for settlement. Class proponents, on the other hand, have their own dilemma: given the current prevailing hostile environment for class certification, should they move for the certification of a litigation class immediately, thus putting greater pressure on class opponents to settle if a class is certified, or should they initiate settlement negotiations before moving for class certification or even, in extreme cases, before filing suit?

569. *Amchem* was decided on June 25, 1997. *Amchem*, 117 S. Ct. at 2231. LA. CODE CIV. PROC. ANN. art. 591 (West Supp. 1998) was approved on July 10, 1997. La. Legis. 839, § 1 (1997).

purposes.⁵⁷⁰ Louisiana's new rule, which is virtually identical to that considered but subsequently abandoned by the Federal Rules Advisory Committee,⁵⁷¹ could make the state a Mecca for class actions in which settlement is the ultimate goal.⁵⁷²

There is nothing to prevent Maryland from following Louisiana's lead in making settlement classes easier to certify than litigation classes.⁵⁷³ Such a practice would allow parties to contest litigation classes vigorously, yet have the flexibility later to resolve the litigation in a mutually beneficial way. Although this result is highly desirable,⁵⁷⁴ a revision of Maryland's rule on the model of the Louisiana statute would probably increase the number of class suits brought in state courts by making Maryland a more desirable state for litigants to pursue such actions. The costs and benefits of such an amendment, as well as the costs and benefits of leaving the rule as currently drafted, should be analyzed by Maryland's rule making bodies in the near future.

570. See LA. CODE CIV. PROC. ANN. art. 591(b)(4) (providing that an action may be certified as a class action if the provisions of paragraph (A) are satisfied—tests of numerosity, commonality, typicality, and adequacy—and if “[t]he parties to a settlement request certification under Subparagraph B(3) for purposes of settlement, even though the requirements of Subparagraph B(3) might not otherwise be met”).

571. See 1 WORKING PAPERS, *supra* note 217, at 145 (setting forth the text of the rule considered by the Committee).

572. Assuming that the parties could overcome the choice-of-law obstacles to a nationwide class action, a Louisiana settlement class could dispose of all issues of both state and federal law in a single suit. See *supra* notes 6 (discussing *Schutts* and the choice-of-law problem) and 10 (discussing *Matsushita* and the proposition that a state class action settlement can also release federal claims). See also Henry B. Alsobrook, Jr., Fasten Your Seat Belt, It's Going to Be a Bumpy Ride, Paper presented at the International Association of Defense Council Annual Meeting 3 (July 1998) (“As a result [of the rule's amendment,] settlement class actions in Louisiana are likely to increase as a significant barrier to certification is now gone. . . . Louisiana is likely to be the forum of choice in pursuing state settlement class actions.”).

573. Indeed, there is nothing to prevent the Federal Rules Advisory Committee from redrafting the federal rule in order to circumvent the *Amchem* decision. It is unlikely, however, that this will happen.

574. While this result is desirable from a litigator's perspective, some academics disagree. See Letter from 129 Law Professors to the Honorable Alicemarie H. Stotler, Chair, Standing Committee on Rules of Practice and Procedure 1-5 (May 28, 1996), in 2 WORKING PAPERS, *supra* note 217, at 1, 1-5 (criticizing proposed Rule 23(b)(4), allowing settlement classes that may not be suitable for trial, on grounds that the proposal was open-ended and unable to guide the trial court's discretion, that it raised constitutional concerns of lack of justiciability, and that it invited collusion between parties). While these academics are correct to be concerned about the amount of discretion that proposed Rule 23(b)(4) would have conferred on the trial court, this amendment merely would have recognized, not increased, the already large amount of discretion vested in the trial court's certification decision.

D. Other Potential Amendments to the Rule

Although most of the proposals for amending Federal Rule 23 have not been adopted, the process undertaken by the Rules Advisory Committee, and the changes considered by them, are relevant to the Maryland class action rule. These changes, which include the addition of the "mature" tort concept,⁵⁷⁵ the so-called "just ain't worth it" factor,⁵⁷⁶ and the proposed revision to paragraph (c)(1),⁵⁷⁷ should be considered in the state law context, even if they do not become part of the federal rule. Although it is convenient to have a body of federal law available to aid in construing Maryland Rule 2-231, convenience should not interfere with Maryland's interest in having the most appropriate class action rule for its citizens.⁵⁷⁸

575. Compare FED. R. CIV. P. 23(b)(3)(B) (requiring the court to consider "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class") with Proposed Rule 23(b)(3)(B), 1 WORKING PAPERS, *supra* note 217, at 144 (requiring the court to consider the "extent, nature, and maturity of any related litigation involving class members"). See generally *supra* notes 449-453 (discussing the concept of maturity).

576. This colorfully nicknamed proposal would have been inserted into the (b)(3) class rule as an additional factor relevant to the court's certification decision. See Proposed Amendment to Rule 23(b)(3)(F), in 1 WORKING PAPERS, *supra* note 217, at 144 (proposing that the court consider "whether the probable relief to individual class members justifies the costs and burdens of class litigation"). This proposal generated a firestorm of debate on both sides. See, e.g., Public Hearing to the Proposed Amendments to the Federal Rules of Civil Procedure, Rule 23, San Francisco, California (Jan. 17, 1997), in 3 WORKING PAPERS, *supra* note 217, at 1, 38 (reporting the remark, in support of this proposal, by Lewis Goldfarb, Assistant General Counsel for Chrysler Corporation, that "the misuse of Rule 23 . . . has corrupted the legal profession" by failing to promote judicial efficiency, and instead becoming a "battering ram for nationwide cartels of self-serving lawyers to shake down large corporations for multimillion dollar legal fees in order to secure . . . trinkets for unknowing clients"). Whether the class action rule is such a "battering ram," or instead serves a useful social policy of policing global corporations, see Cabraser & Hausfeld, *supra* note 563, at least some cases would fail the test set forth by this proposed amendment. See, e.g., *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348 (7th Cir. 1996) (Easterbrook, J., dissenting from denial of rehearing en banc); *supra* note 533 (discussing this case).

577. Compare FED. R. CIV. P. 23(c)(1) (requiring the court to reach its certification decision "[a]s soon as practicable") and MD. RULE 2-231(c) (same), with Proposed Amendment to Federal Rule 23(c)(1), in 1 WORKING PAPERS, *supra* note 217, at 145 (requiring the court to reach this decision "[w]hen practicable"). See also Committee Note, Proposed Amendment to Federal Rule 23(c)(1), in *id.* at 156 (noting that the purpose of the amendment was to ratify the courts' "common practice of ruling on motions to dismiss or for summary judgment before the class certification decision").

578. In any case, the segmented nature of the class action rule means that much of the case law which has developed, and will continue to develop, around the federal class action rule will be applicable to the Maryland rule, even if the two become more distant cousins of one another.

CONCLUSION

Although representative litigation in Maryland had an interesting beginning, it has not been a significant feature of state law practice, even after the mass tort explosion in the 1970s and 1980s. It is impossible, however, to be confident that this will remain the case. Although Maryland's current class action rule is almost a verbatim adoption of the federal rule, it was adopted with apparently little substantive analysis or consideration for its place in state law.

Maryland now has the opportunity to benefit from the substantial experience of the federal courts, which have spent more than thirty years grappling with the implications, both legal and social, of mass representative litigation.⁵⁷⁹ Moreover, in analyzing the benefits and burdens of the rule, the Federal Rules Advisory Committee has amassed a significant body of opinions on almost every facet of class action theory and practice on which the Court of Appeals and the Maryland General Assembly can draw. Finally, class actions have generated a significant amount of secondary literature that is available for careful consideration of the place class action litigation should occupy in Maryland state courts.

The wealth of information now available on class action theory and practice should be used by Maryland's rule-making bodies in a comprehensive re-evaluation of the class action rule as it currently exists in the state. Of primary importance is the adoption of an interlocutory appeal provision which will facilitate the development of case law from within the state and provide guidance to courts and practitioners alike. The Maryland authorities should not stop here, however, as the Federal Rules Advisory Committee appears to have done, but instead should address other serious class issues as well. In particular, they should address whether the form of a class action should be opt-out or opt-in, the availability and nature of settlement classes, and issues of maturity, valuation, and the timing of the class certification decision. These issues should be addressed and answered in the context of state, not federal, law.

579. State courts also have spent the past thirty years addressing these issues, although with less intensity than the federal courts. Although they have not been addressed in this paper, state court decisions, especially those from states whose class action rule is identical to the federal rule or those which, like Maryland, have adopted sizeable portions of the federal rule, can also provide valuable insight into class action issues.

