

CLASS ACTION ADVICE IN THE FORM OF QUESTIONS

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The opportunity to offer advice to those who are considering the adoption or modification of class or group action procedures for other legal systems is both welcome and distracting. It is welcome because it forces a change of perspective in the attempt to contemplate adaptation of United States practice to different cultures, political structures, substantive laws, and courts with dissimilar surrounding procedures. It is distracting because there are so many different levels of possible comparison that the choice of perspective must be tailored to the immediate occasion. It is tempting to take on the most important

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* This essay is not a formal scholarly paper. It is a commentary provoked by reactions to the elegant scholarship embodied in this Symposium. The observations made in this essay about the recent evolution and proposed revisions of class-action practice in the United States are drawn from several years of work with the United States Judicial Conference Advisory Committee on Civil Rules, as it has studied possible changes in Federal Rule of Civil Procedure 23. The written accounts of this work are voluminous. The products more readily available include the following: 1-4 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23 (1997) [hereinafter WORKING PAPERS]; THOMAS WILLGING ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES (1996) [hereinafter EMPIRICAL STUDY]; 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 STATES, REPORT ON MASS TORT LITIGATION (1999) [hereinafter WORKING GROUP ON MASS TORTS]. Parallel empirical research is described in DEBORAH HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (2000). Additional materials include the agenda books of the Civil Rules Advisory Committee, the minutes of its meetings, and its reports to the Standing Committee on Rules of Practice and Procedure; these materials are available on the Judiciary Web Page.

Many of the observations made in this essay summarize, and at times translate, different comments made by many people on multiple occasions. This essay is the Author's synthesis. An attempt to adhere to scholarly convention by providing multiple citations to the underlying materials at every turn would be distracting. It would be unfair to attribute to any single person the composite views cohered by the Author. These observations are a personal distillation of vicarious experience, assimilated here with the hope of generating interest and providing useful commentary. As a result there is a comparative dearth of footnotes. The measure of success will often be that a reader wishes for the comfort of a footnote supporting an observation that has stimulated curiosity.

(The Author has been Reporter for the Advisory Committee on Civil Rules since October 1992. The obligatory disclaimer is by now redundant: the observations offered here are not to be attributed in any way to the Advisory Committee.)

sets of questions—for example, to ask if non-governmental individuals, organizations, or lawyers should replace individual litigants in larger scale litigation so as to facilitate efficiency or remedy wrongs that otherwise would go unredressed. These questions can be addressed only within the framework of a particular society and its political and governmental structures. There is little point in attempting to provide answers good for all settings. At the other end, however, there is no point in attempting to address matters of minute detail. A more suitable middle ground can be found in a series of questions raised by more than eight years of witnessing the work of the Advisory Committee on the Federal Rules of Civil Procedure as it has grappled with possible revisions of Civil Rule 23. These questions are more helpful than even provisional answers would be—the questions are much the same for most systems, while the answers often will be different.

I. FRAMEWORK QUESTIONS

A. Should We Do It at All?

The broad question is whether to create a procedural vehicle that authorizes a real person, private organization, lawyer, or public entity to conduct litigation that enforces or terminates the rights of someone who does not participate directly as a party. The common concept is that the party in court somehow “represents” the person who is not in court. Litigation by representation is a reasonably familiar concept: the trustee of an express trust represents the beneficiaries, the representative of an estate binds those who claim through the estate, and so on. The more specific issue within the broad question is whether representation can be justified by the number of people who may have similar rights (or duties) growing out of some factually related nexus of events and who are not otherwise related to each other or to the representative. The number may be small—examples include a class of seven or more in Australia,¹ and two or more in Canada.² In deciding on the need for representation in this setting, one must first determine what purpose is to be served.

1. See S. Stuart Clark & Christina Harris, *Multi-Plaintiff Litigation in Australia: A Comparative Perspective*, 11 Duke J. Comp. & Int'l L. 289 (2001).

2. See Garry D. Watson, *Class Actions: The Canadian Experience*, 11 DUKE J. COMP. & INT'L L. 269 (2001).

In determining purpose, a comparison to alternative means of enforcement is required. Why do we need representative group litigation at all? Much of the pressure for group litigation springs from the perception that more explicitly public means are not adequate to meet a society's felt needs for enforcement. Government agencies may lack resources or will to enforce public or private rights, or may be too closely aligned with wrongdoers, public or private.

Alternative means of private enforcement may also fail. The most basic comparison is to individual litigation, one plaintiff at a time. But this comparison extends to many alternative means of joining multiple claims: voluntary joinder of two or more plaintiffs in a single action, consolidation of separate actions separately initiated (a device that may include actions initially filed in different courts), intervention by new parties in litigation commenced by others, "test case" litigation, resort to "nonmutual preclusion," and bankruptcy.

When comparing representative group litigation with the alternatives, the numbers required to support group litigation should be examined. If the number may be as few as two or seven, the comparisons to voluntary joinder, consolidation, intervention, and other simple devices is different than when the number is 50, 500, or higher. If there are only two claimants, for example, it is difficult to know why it does not suffice for both to join in a single action. The less aggressive claimant can always cede full operating control to the other. If the second member of the class has notice and an opportunity to request exclusion, the "class action" seems little more than a convenient means of inviting voluntary joinder on terms that may reduce the fear of becoming involved.³

As the numbers grow, attention tends to focus on efficiency and enforcement. Efficiency in part reflects cost savings; it may be less expensive to litigate common issues once and for all than to litigate them repeatedly. At the same time, more resources can be devoted to common litigation than any single litigant could lavish on a unique claim, enhancing the quality of the competing presentations and the ultimate decision. This one decision not only is more trustworthy, but also—if it is the first and only resolution of the common issues—avoids the risk of inconsistent judicial pronouncements. The cost savings include judicial time and redound to the benefit of parties in

3. The Canadian practice described by Professor Watson, for example, protects a class member against liability for a successful adversary's attorney fees. *See id.* It is unclear whether the system is designed to protect against the risk that two would-be plaintiffs, one solvent and the other judgment-proof, might choose a "class action" brought by the judgment-proof class member for the purpose of shielding the solvent non-representative class member.

include judicial time and redound to the benefit of parties in unrelated litigation whose access to court is facilitated as judicial resources are freed by the class action efficiencies.

Efficiency justifications merge with enforcement concerns with respect to claims that would not—and often could not—be enforced by individual litigation. It is common to focus on “small claims” consumer litigation, but this phenomenon may extend well beyond such claims. Even sizable claims may go unredressed because of the cost, uncertainty, and fear of litigation. For example, individual claimants may reap millions of dollars in a U.S. antitrust class action, in circumstances in which few or none would have undertaken the burden of litigating alone. There may be other deterrents to litigation as well, particularly when minorities seek to enforce their rights to be protected from discrimination or when citizens seek to call government officials to account.

The enforcement concern extends beyond the desire to achieve relief for individual claimants. There is a parallel desire to achieve enforcement against lawbreakers. The most common expressions speak of disgorging the fruits of unlawful activity. Disgorgement is desired in part for its own sake, and in part to deter others from conduct that can yield large profits through the endless repetition of petty injuries that do not sustain individual enforcement. On this view, a class judgment would be desirable even if no relief were distributed to class members. These motives for class enforcement seem laudable enough. They do not, however, defeat the need for critical appraisal.

Many of the questions commonly raised about group litigation concern the possibility that the group claim will fail or will seem to be enforced on terms less favorable than might be won through alternative means of litigation.

Other questions arise from the problems that may grow out of successful enforcement of the group claim. The problem raised most frequently is the fear that the risks and costs of defending class litigation will coerce a settlement that rewards an unworthy claim. “Legalized blackmail” has become a routine phrase in the vocabulary of some critics. The fear can be expressed in terms of simple arithmetic: suppose 1,000 people hold identical claims that, litigated alone, would lead to 100 plaintiff judgments and 900 defense judgments. If the same probability holds for group litigation, there is a 10% risk that liability will be enforced as to all 1,000 group members. A narrow risk-neutral argument can be made that aggregation in a class action makes no difference: a 10% risk of losing all 1,000 claims has the

same value (cost) as a certainty of losing 100 of the 1,000 claims. This argument is unpersuasive because the probabilities are not the same. With the small claims, few or none would be brought in the first place—a win-loss ratio of 1 in 10 would quickly discourage any added attempts. With the large claims, there is a more subtle risk, even on the unrealistic assumption that each claim in fact would be asserted. The fact that so many people believe they have been harmed has a psychological impact, as does the prospect of mistakenly denying recovery to so many. Quite apart from the level of effort that is devoted to litigation on both sides, the aggregation of many claims changes the calculus of decision. The risks also are different. If the individual claims are small, the cost of defending a class action may couple with a small risk of losing to the entire class to coerce a “nuisance-value” settlement. If the individual claims are large, the risk may be seen as a “bet-your-company” risk that coerces settlement to avoid the prospect of bankruptcy.

Over-enforcement, another fear, is discussed less often. This fear focuses on substantive policies that are obscure or simply foolish. Well-intentioned legislators may address perceived problems in broad and general terms; in the United States, details often are filled in by administrative regulation. Those who are regulated often struggle valiantly to determine their obligations, but even the valiant may misjudge. The “injury” that is compensated by a class judgment may be an artifact of debatable interpretation of inscrutable law. The law itself, whether clear or obscure, may be simply ill-advised. The fear of class action judgments, moreover, may drive those who are regulated to avoid desirable conduct, harming the very people the law is intended to serve. Further, the disgorgement image seldom reckons with the prospect that defendants are not rewarded for conferring benefits beyond those mandated by law—the balance between the costs of beneficial over-compliance and the profits of good-faith violation may be even, but the defendant disgorges the profits and has no off-set for the benefits conferred on the same class.

More thorough enforcement raises real questions even without characterizing it as over-enforcement. Class action devices will change the real world effect of some existing substantive laws, and it may be difficult to predict which laws will be most affected. Some substantive laws have little meaning because little enforced. Providing an efficient procedural tool that leads to widespread enforcement changes, and may transform, the social, political, and economic reality. Not everyone will be pleased.

These concerns cannot be addressed in a generic way that transcends the boundaries of any particular legal system. These concerns are troubling in a society that has expensive procedure, institutions that encourage litigation of weak claims, and substantial areas of obscure or overreaching substantive law. They may seem inconsequential in a society where liability is visited only on those who in fact have violated clearly comprehensible and substantively worthy law.

B. Who Should Be Representative?

Once it is decided to create a procedure that binds nonparticipating group members by the litigating efforts of a group representative, the representative must still be identified.

Group representation by government officials is one possibility. Many forms of government litigation can be seen in this light, particularly when the government seeks a remedy on behalf of a relatively narrow group. Representation by private organizations is another possibility. In the United States, familiar examples include the “standing” of civil rights and environmental protection groups to seek remedies for injury to their members.

Another possibility is representation by a class member who takes the initiative, finds counsel, and launches litigation—the Civil Rule 23 model. This model may be fulfilled in practice, and procedural devices may be adopted (as in the Private Securities Litigation Reform Act) to encourage its fulfillment. Yet in practice it may be counsel rather than client who takes the initiative. Courts have become familiar with the gambit of showing that a would-be class representative has little or no understanding of the litigation, and have become comfortable with placing reliance for effective representation on class counsel rather than the representative class member. This phenomenon leads to common complaints that class actions fail the elementary condition of adversary litigation: there is no client, only a lawyer who determines the objectives and chooses the means of litigation without consultation or constraint.

The prospect of lawyer-driven group litigation need not chill enthusiasm. Private attorneys general may serve the public interest effectively and well. They may courageously pursue wrongs that elected or politically appointed officials ignore. They may devote resources that are simply not available to public officials. (Of course, the lack of public enforcement resources may reflect a political judgment that a particular law should not be fully enforced. Then private enforcement resources threaten over-enforcement.) Part of the process of shaping rules for

group litigation must be to account for the capacities and character of the private lawyers who will be taking on the enforcement responsibility.

C. Beware of the Unexpected

Much of the history of procedural reform in the United States suggests that devices designed with one set of expectations gradually grow to serve quite different purposes. The growth often results from the deliberate choice to craft open-ended rules that rely on the discretion of trial judges, and on a process of common law evolution that adjusts to the lessons of experience and to the new needs that emerge from new substantive law. Discovery is a familiar example that has not won much following in the rest of the world. The Rule 23(b)(3) opt-out class action is another example. During hearings on some of the recent proposals to amend Rule 23, three veterans of the process that yielded the 1966 amendment testified or commented that no one had anticipated the uses that actually have been made of the rule.⁴

The unexpected may be good. As noted, the Federal Rules often are deliberately drawn with knowledge that unexpected problems will arise and with faith that good judges, given adequate discretion, will achieve better solutions than those which could be captured in more detailed texts. This process is not always one-way. Although the text of Rule 23 has not changed since 1966, apart from adoption of a new appeal opportunity,⁵ many observers believe that administration of the Rule has changed significantly in recent years. Federal judges are regarded as increasingly reluctant to certify class actions. If that is so, it may reflect a self-correcting process in which the impetus of evolution has been carried too far, only to be reined in as experience shows the excesses. And if there is a self-correcting process, excesses of self-correction may lead in turn to a reaction that returns to freer class certification practices.

4. Testimony on the proposals published for comment in 1996 is gathered in Volume 3 of the WORKING PAPERS. *See generally* WORKING PAPERS, *supra* note *. Testimony by those who participated in framing the 1966 amendments that included present Civil Rule 23(b)(3) includes William T. Coleman, Jr., Esq., a member of the Advisory Committee, Philadelphia hearing, and Professor Arthur R. Miller, who assisted the Advisory Committee Reporter, San Francisco Hearing. *See* WORKING PAPERS, *supra* note *, at 63-64, 204. Written comments are gathered in Volume 2 of the WORKING PAPERS. An extensive statement on the origin of Rule 23(b)(3) was provided by John P. Frank, Esq., a member of the Advisory Committee who reports that some dissented from its adoption. *See* 2 WORKING PAPERS, *supra* note *, at 262, 264-270.

5. Rule 23(f) took effect December 1, 1998. *See* Fed. R. Civ. P. 23(f).

The unexpected may also be not good. Another part of the task of framing group litigation rules is to assess the prospect that undesirable developments can be corrected. Where do the rules come from—legislation or a judicial rulemaking process? What are the realistic opportunities for relatively neutral evaluation of experience? Can the lessons of experience—including rigorous empirical investigation—be translated into rule amendments when needed?

A system that has not had experience with procedures similar to modern class actions may reasonably proceed with caution. The more detailed questions described below deserve close attention. Even closer attention is required if unlucky drafting is not easily cured by judicial creativity and if mistaken choices are not readily cured by amendment.

D. Character of Litigation, Bench, and Bar

The questions already described were framed by the role litigation generally plays in a society, by the character of judicial institutions in both structure and procedure, by the character of judges and the view they have of their role, and by the character and role of the bar. Is it generally accepted that litigation should be used to right broad social wrongs? Should courts be free to displace unresponsive legislatures? How responsible are judges for developing specific litigation? An “umpire-like” judge in a lawyer-directed system who follows the lead of adversary advocates to profound social change may seem to be less responsible, and acting more within a judicial role, than a judge in a more judge-directed system who assumes responsibility for framing the litigation that then calls for resolution of profound social questions. The adversary class action bar that has emerged in the United States is able to devote boundless imagination, millions of dollars, and thousands of hours to discovering (the doubters would say creating) and pursuing wide-scale wrongs. How long will it take for the bars of other countries to follow this example, and how well will such activity fit within their other professional traditions and roles?

An especially complex set of questions arises from the relationship between the court and lawyers defined by a particular legal system. The greater the responsibility assumed by the court for investigating and developing the action, the less concern may be felt for preserving individual participation by the parties through their lawyers. Concerns for conflicting interests among class members may be transmuted. The judge does not represent any class member, and to the extent that the judge directs the lawyers on the matters to be developed and presented, it may be possible to trust the judge more than we trust lawyers in a sys-

tem that relies on lawyers to develop the case to serve the best interests of their clients. The importance and role of representative parties may be subtly shaped by the increased responsibility the judge has for guiding case preparation. This sense of responsibility may at times make it more difficult for the judge, as both inquirer and decider, to “let down” the class by rejecting its claims. A judge, on the other hand, may find it difficult to muster the enormous energies and creativity that class action lawyers often have demonstrated in the United States.

Other differences as well arise from systems that assign to the judge substantial responsibility for directing the development of litigation, often through a series of stages that substitute for the single-event trial that characterizes common law tradition. To anticipate a more particular point, this involvement may affect such issues as consideration of probable merit in deciding whether to certify a class. In a judicially directed proceeding, for example, it may be so difficult to fence out preliminary views of the merits that open consideration should be permitted.

Another difference of traditions is relevant to shaping class action rules. Rule 23 has been developed to rely heavily on trial judge discretion, not only in administering a class proceeding, but also in the very determination of whether there is to be a class proceeding—whether to certify a class. Avowed discretion characterizes most aspects of the Federal Rules of Civil Procedure. The first question is whether judges in a particular system are familiar, or can be made comfortable, with comparable levels of discretion. Reliance on discretion may not be possible in a procedural system that relies on detailed and controlling rules: “Inflexible is simple.”⁶ Judges and lawyers not accustomed to procedural discretion may not be well served by open-ended rules in this most complex area. Development of detailed rules that preclude discretionary decisionmaking, however, may place more trust in foresight than most rulemaking processes can bear. It may be difficult to substitute rules for discretion. In any event, the shape of class action practice governed more by rules and less by discretion will be quite different from Rule 23.

E. Traditions of Individualism

It is fair to say that there is currently no coherent theory to reconcile Rule 23 of the Federal Rules of Civil Procedure with U.S. traditions

6. Antonio Gidi, Remarks at the Duke/Geneva Conference on Debates over Group Litigation in Comparative Perspective: What Can We Learn from Each Other? (July 21-22, 2000).

of individualism. It is individualism—and perhaps a reluctant recognition of litigation’s fallibility—that underlies our abiding tradition that each person is entitled to a personal day in court. Rule 23 sharply reduces individualism when a mandatory class is certified, denying any opportunity to request exclusion and drastically limiting the role of non-representative class members. Rule 23 also reduces individualism when an “opt-out” class is certified, given the difficulties of conveying meaningful notice and prompting careful attention to the decision whether to request exclusion. These concerns are not fully allayed by the justifications that class adjudication achieves efficiency, enforces rights whose holders desire but cannot afford enforcement, and achieves the social good of enforcing the law. They are little allayed by the same justifications when the outcome rests not on adjudication but on privately negotiated settlement, even though court approval may be given.

The abstract traditions of individualism translate into more specific concerns with litigation. The selection of time, court, co-parties, and adversaries can have important effects on outcome. Litigation choices made within the action likewise have important effects. One person may make different choices than another, perhaps because different choices are better for each, but perhaps because one understands the choices better or is luckier. Being forced to surrender these choices in the name of group efficiency can have a profound impact on the eventual result. It may also have an impact on a party’s subjective experience, on what are now called “process values.” It is easier to accept the result after responsible participation in the process.

Individualism presents particularly pointed problems when a class is defined in terms that include members with conflicting interests. The more ambitious attempts to bring mass torts into class form have illustrated multiple and obvious conflicts among members with different forms of injury, different histories of exposure, different opportunities to seize alternative forums and choices of law, differently urgent needs for prompt relief, and so on. Equally apparent conflicts may emerge in the familiar forms of injunction class actions. For example, members of a class seeking to desegregate a public school system not only may have different ideas, but different interests for the shape of the remedy. The theory that well-intentioned class representatives, often supported by prominent organizations, can adequately decide which interests to subordinate may be necessary, but we should not be comfortable with it.

The questions of individual participation and control cannot be answered generally. Abstract theory may lead to conclusions that bear little relation to reality. It may be appropriate, for example, to recognize a

pragmatic distinction between actions on claims that are not likely to be pursued individually and actions on claims that are likely to be pursued individually by a significant number of class members. If there is no individual litigation, the loss of individual control means little. However, a theoretical articulation and implementation of this perception is not easy. Abstract theory may also be pushed too far in seeking out conflicts of interest that might require an endless proliferation of classes or subclasses. Members of a class affected by a petty consumer fraud, for example, might have different interests in the remedial choices between restitution, damages, discounts on future purchases, or injunctive relief.

Individual participation and control may indicate a point at which inquisitorial systems have an advantage over adversarial systems. Each increase in the level of the judge's responsibility for directing and defining the litigation reduces the importance of party participation and the significance of conflicting interests. In time, class-based litigation may prove more suitable to civil law systems than to the common law systems that have fed its early growth.

F. Interjurisdictional Reach

Class action practice in the United States encounters problems of parallel, duplicating, and often competing class actions. Duplication occurs among federal courts, among the courts of different states, and between state and federal courts. State courts often define classes that include nonresidents, and with some frequency define nationwide classes. It would not be difficult to reduce the resulting problems by legislation. The most likely approaches, however, would require that a single court be given control, defined in reference to a broad class. Almost inevitably, the controlling court would be a federal court, although a more complex system could be drafted. Effective limits on state courts most likely would limit state-court classes to members connected to the state. State citizenship or injury in the state are likely to be effective, while focus on "conduct" in the state is less likely to be effective. State courts would remain free to enforce state law, but probably not in all the circumstances in which they would choose to enforce their own law if left free from federal control. The prospect for such legislation is clouded; some current legislative efforts go so much further toward defeating any state class actions that they are likely to fail due to their own overreaching.

Other countries may not encounter parallel problems soon, but they may arise and they deserve present consideration. Countries that have federal systems including both state and national courts are obvi-

ous candidates. Countries that join regional unions—now, prominently, the European Union—will soon come to be seen as equally obvious candidates. But countries with unitary governments will not be immune. Environmental pollution, an atomic energy accident, distribution of investment securities, a defective product, questionable trade practices, and many other acts—including government acts—may have pervasive effects that disregard political borders. Outside a federation or union, public international law (particularly in the form of treaty or convention) can address these problems. But it will be difficult to stem the burgeoning interest in group litigation as an alternative mode of regulation.

Many of the problems of inter-jurisdictional class litigation could be reduced dramatically by resort to opt-in classes. But if opt-out or mandatory classes are preferred, difficult questions must be addressed. Should a single country undertake the adjudication of claims held by citizens of other countries? What nexus to the forum should be required? What limits on choice of law may be essential? Is there any satisfactory way, short of explicit convention, to ensure that other countries will recognize the *res judicata* effects of the judgment?

The familiar problems of meshing the substantive and procedural laws of different jurisdictions will be aggravated by the question whether to recognize differences in institutional realities. The same injury, inflicted in violation of identical substantive rules and pursued to a favorable judgment, may have quite different values in different legal systems. A personal injury tort recovery is likely to be predictably different among different courts within the United States, but the meanest of them all is likely to be more generous than most of the other judicial systems in the world.⁷ Similar disparities surely exist among other pairs of judicial systems. Should this reality defeat transnational aggregation? Should a court attempt the implausible task of justifying different remedies that distinguish among the plaintiffs before it according to the likely outcome in their “home” tribunals? Or do the advantages of aggregation support uniform recoveries for all class members without regard to the leveling effect?

To the extent that these problems can be avoided, effectively confining class actions to events within a single legal regime and avoiding overlapping actions, it may be possible to adopt stronger class procedures. At a minimum, peripheral problems will be avoided. The re-

7. See Lord Denning, *quoted in* 15 C.A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: JURISDICTION 2d § 3828, 284 n. 20 (1986) [hereinafter WRIGHT ET AL.].

sulting undistracted focus on a single action may improve the result. The risks that competing classes may lead by “reverse auction” to settlement on terms that traduce class interests may be dramatically reduced. Competing class member interests in choice of law, choice of forum, and tactics are similarly reduced. It may be a dream, but a unitary system that can reasonably confine class proceedings to domestic events may be in the best position to develop a truly rational procedure.

G. Not All Classes Are Alike

A simple reminder is in order. Class actions cover an enormous span of events and substantive law. They include enforcement of small dollar claims that yield little significant relief to any individual class member, and that entail little risk of individual loss but have the hope of enforcing significant social policies; enforcement—or defeat—of vitally important individual claims, as seen in contemporary efforts to address mass torts; restructuring social institutions such as public schools or prisons; policing the markets, as in the now virtually routine securities and antitrust litigation; and expanding the effective reach of anti-discrimination legislation.

It is far from clear that a single rule of procedure can sensibly address all of these different circumstances. The forms of group litigation that have emerged in civil law systems seem to be tailored to relatively specific substantive areas.⁸ In framing new rules, it should be asked whether to begin with one or a few uses, whether to address different uses through separate rules, and whether to leave the way open for new and perhaps unanticipated uses to emerge as the new rule matures in practice.

H. The American Jury

It is not possible to sketch the differences that separate U.S. experience from the rest of the world without noting the American Jury. The impact of class certification on subsequent events, particularly settlement, can be affected both by predictability and unpredictability. In some circumstances the parties and lawyers may feel confident about predicting a jury’s verdict, accounting for the impact that a trial on behalf of a class will have on presentation of the case and on jury reactions. It may be easier to be confident in predicting the impact of certification on the course and cost of preparation. A nonjury trial, for

8. See, e.g., Gerhard Walter, *Mass Tort Litigation in Germany and Switzerland*, 11 DUKE J. COMP. & INT’L L. 369 (2001).

example, can more easily be managed in separate stages, although asbestos trials in particular have produced many examples of separating injury, causation, and liability by bifurcation, trifurcation, and “reverse trifurcation.” In many circumstances, the jury will be viewed as a willfully unpredictable element whose potential capriciousness dramatically escalates the uncertainties of the proceeding. Certification in those cases multiplies the risks of the litigation, with a corresponding increase in the pressure to settle.

Jury trial has another limiting impact. Many events that affect large numbers of people generate claims that require that both common and individual elements be decided. Proof of a common fraud or misrepresentation, for example, may be followed by the need to prove actual reliance. In the mass tort context, proof that a product was defective because it generally increases the risk of a particular injury may be followed by questions of individual causation, comparative responsibility, and damages. There can be enormous advantages in resolving the general causation question and any related element of fault once and uniformly for all claimants. The resolution can be submitted to a jury. The difficulty comes at the next stage. No single jury could resolve the common class issue and then continue to sit until all individual issues for all class members were resolved. But submitting the individual issues to other juries may defeat the class action enterprise. It is difficult to imagine a coherent determination of the specific cause of a particular person’s injury without reexamining the evidence of general causation. It is impossible to imagine a coherent determination of comparative responsibility without reexamining the responsibility of all parties. Mutilating the later jury’s inquiry by directing it to find general causation and defendant responsibility may distort determination of the remaining issues, and may confront the jury with an impossible task if it disagrees with the mandatory assumptions. The direction may be required, however, by the Seventh Amendment prescription that “no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”⁹

A procedural system that relies entirely on judges may be able to avoid these problems in large part. Without a jury, a single judge may be able to establish procedures that enable disposition of vast numbers of individual issues without delegation. And if delegation is required, it may be better managed—it is easier to communicate foundation as-

9. U.S. CONST. amend. VII; see generally *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1302-1304 (7th Cir. 1995).

sumptions to other judges, and easier for professional judges to resolve related issues without reexamining the foundations.

It would be difficult to formulate any general statement of the ways in which U.S. class action procedure has been shaped by jury trial. But it is clear that other countries are free to develop their procedures without this constraint. Jury trial provides one more reason for caution in transporting Rule 23 into other systems.

II. MORE SPECIFIC QUESTIONS

A. Categories of Classes

U.S. practice recognizes three categories of classes: mandatory (b)(1) and (b)(2) classes; opt-out (b)(3) classes; and—under at least two statutes—opt-in classes.¹⁰ During the earlier phases of the current Advisory Committee studies, a draft was prepared that eliminated the categorical distinctions between these forms. In place of defined categories, the court would be directed to consider the reasons for certifying a class and to determine, in light of those reasons, whether to permit exclusion, or whether to limit the class to those who expressly seek to be included.¹¹ The proposal reflected concern that the necessarily broad language of Rule 23(b) does not provide much guidance in distinguishing between mandatory and opt-out classes, and a parallel concern that some group actions might better be limited to those who seek to be included. It is reasonable to suppose that the opportunity to opt out should be denied only when, apart from the difficulties arising from sheer numbers, individual class members would become mandatory individual parties under Civil Rule 19.¹² It is more than reasonable to suppose that a rule that includes all class members who do not request exclusion is not functionally equal to a rule that includes only those class members who do request inclusion. Accommodation of the interests served by class litigation with the interests of individual class members may be advanced by directing case-by-case balancing of the class action advantages of effective enforcement, efficiency, and consistency against

10. See Fair Labor Standards Act, 29 U.S.C. § 216(b); Age Discrimination in Employment Act, 29 U.S.C. § 626(b).

11. See 1 WORKING PAPERS, *supra* note *, at 3 (reprinting the Nov. 1992 draft); see also Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. Rev. 13, 64-67 (1996) (setting out a later draft).

12. See STAFF OF ADVISORY COMMITTEE ON CIVIL RULES AND WORKING GROUP ON MASS TORTS, REPORT ON MASS TORT LITIGATION app. § F-8(e) (1999) (setting out a draft Civil Rule 23(b)(1)).

the dangers of mistaken class definition, the importance and realistic prospect of individual litigation, the burdens and risks imposed on the class adversary, and the costs of judicial administration.

The range of choices is apparent. Opt-in classes provide assurances that opt-out classes do not. A class member who requests inclusion knows of the litigation and has an opportunity to reflect on potential conflicts of interest and the probable adequacy of representation. The opt-in member also has some wish to enforce the underlying right; there is no risk that the action will “enforce” the “right” of a person who disagrees with the underlying theory and prefers that the claim be rejected. Opt-in classes may also support simplified notice procedures—the object of notice is to enable class litigation, not to protect against unknowing loss of rights.

Opt-out classes are likely to include more members than an opt-in class chosen for the same dispute. The force of inertia is augmented by the sensible reaction of many people that reading the notice and deciding whether to become involved in a legal proceeding is not worth the effort. An opt-out class also changes the purpose of notice. It becomes more important to explain the underlying dispute, the consequences of remaining in the class or requesting exclusion, and the means of requesting exclusion. The need to bring notice home to class members is likely to seem greater, engendering greater expense. Beyond these mechanical concerns, it becomes more important that the court assume responsibility for monitoring the adequacy of class representation and for defining a class whose members have no significantly conflicting interests.

A mandatory class raises still higher the importance of class definition and adequate class representation. The elimination of any opportunity to request exclusion reduces in some measure the importance of providing notice to all members, but notice to a significant number of members is important to provide opportunities to challenge certification and class definition, and to monitor the adequacy of representation.

In the United States there are several major obstacles to rethinking the categorical approach to class definition. Some class action students no doubt believe that they understand the role of (b)(1) classes, notwithstanding the recent failed flirtation with “limited fund” classes in mass tort litigation.¹³ Many continue to share the primary concern that motivated adoption of (b)(2) classes in the 1966 revision—the vital advances made in civil rights litigation through class-based injunctions

13. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

must be preserved. Advocates of consumer class actions greet with cries of horror any prospect that a judge hostile to the underlying legal theory might effectively scuttle a (b)(3) class by choosing an opt-in class over an opt-out class. Fundamental restructuring at this level is not likely to occur soon.

There is little indication that any other system, however close to or distant from U.S. procedure, has even considered adoption of the basic categorical distinctions that shape much of U.S. practice. That is reassuring. But the choice between mandatory, opt-out, or opt-in approaches still must be made in some fashion. If more than one approach is adopted, some means of selection must be framed.

B. Certification Decision

At least one country—Australia—has apparently devised a class procedure that does not require court certification of the class.¹⁴ It is difficult to believe, however, that a group action can be maintained on any basis other than pure opt-in without some measure of court control. The risks of sloppy class definition are too great, including fundamental conflicts of interest and indeterminate *res judicata* consequences. The risks of indifferent or incompetent representation both by the named class member parties and by class counsel are also great. The dangers of a purely representative-defined class are particularly acute when the action is resolved by settlement. In settling, the class adversary is interested in spreading the *res judicata* net as wide as possible. The class representative may not have adequate incentive to resist, and the court has had no prior encounter with the class definition question to guide its review of the settlement.

To suggest strong reasons for court definition of the class and for court assurances of adequate representation is not to say that all systems should adopt the Rule 23 requirement that the court rule on class certification “[a]s soon as practicable.” Actual practice under Rule 23 is to decide on certification when practicable.¹⁵ The decision often is deferred for ruling on a motion to dismiss or for summary judgment; de-

14. See S. Stuart Clark & Christina Harris, *supra* note 1. Legislation proposed for Sweden also dispenses with any certification requirement. See Roberth Nordh, *Group Actions in Sweden: Reflections on the Purpose of Civil Litigation, the Need for Reforms, and a Forthcoming Proposal*, 11 *DUKE J. COMP. & INT'L L.* 381 (2001).

15. This point was made in the proposal to amend Rule 23(c)(1) to require certification “when practicable.” PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, CIVIL, AND CRIMINAL PROCEDURE, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 39-40, 43, 53-54 (1996), *reprinted in* 167 *F.R.D.* 535, 557-565 (1996).

fendants, recognizing that pre-certification victory will bind only the representative plaintiffs, prefer such relatively efficient disposition to the risks and burdens of class litigation. Other systems, particularly those that proceed through fact inquiry on a rolling basis that does not sharply divide pretrial and trial events, may find it desirable to adopt greater flexibility for timing of the certification decision, but some analogue to certification still seems essential.

The importance attached to the class certification decision is reflected by the only amendment that has so far emerged from the ongoing Advisory Committee Study. New Rule 23(f) provides for interlocutory appeal, with discretionary permission of the court of appeals, from a decision that grants or denies class certification.¹⁶ The circumstances that make this provision desirable may be unique to U.S. federal court practice. Perhaps the most important elements are the “final judgment” rule that ordinarily defeats interlocutory appeals, the strong prospect that once a class is certified the outcome will be a settlement that defeats any review of the certification, and the corresponding difficulty of generating any developed body of precedent on many class action questions.¹⁷ Other systems that in form do not rely on precedent and that have built quite different relationships between trial courts and appellate courts may find this provision simply quaint.

C. Notice

The role of class notice has been noted in discussing the choice among mandatory, opt-out, and opt-in classes. The U.S. model merits improvement; Canada provides a useful model.¹⁸

The first question of notice is universal. The attempt to frame notice in plain language is frustrated at almost every turn. Cogent explanation of the nature of a dispute that arises under uncertain facts and vague or developing law is a nearly insurmountable challenge. Even the routine matters that could be covered by uniform language in every notice defy easy explanation: for example, the opportunity to monitor the effectiveness of representation; class participation (which must necessarily be affected by the size of the class, the nature of the dispute, the personalities of counsel, the organization chosen for coordinating counsel, the reality of class representation by any member, and still other fac-

16. See Fed. R. Civ. P. 23(f).

17. The developing administration of Rule 23(f) is described in 16 WRIGHT ET AL., *supra* note 7, § 3931 (Supp. 2001).

18. See Garry D. Watson, *Class Actions: The Canadian Experience*, 11 DUKE J. COMP. & INT'L L. 269 (2001).

tors); objections to a proposed settlement; and the consequences of deciding whether to request exclusion. In the U.S. system of rulemaking, these questions may not yield readily to a rule-based answer. An admonition to use plain language can be added to the rule. Beyond that, more may be accomplished by accumulating and publishing models of good notices for various types of actions, in the hope that parties and courts will be inspired to copy the good rather than reinvent the bad.¹⁹

Other notice questions are in part general and in part more system-specific. Civil Rule 23 integrates notice requirements with the mandatory/opt-out class categories, a system-specific approach. But the underlying questions arise in any system. The Advisory Committee has long had before it a notice proposal that addresses some of the problems that are well-entrenched in current practice.²⁰ For the first time, there would be a specific notice requirement for mandatory classes; notice would be required to reach a sufficient number of class members to ensure a reasonable prospect that some will monitor the class definition, choice of class representatives, and the ongoing adequacy of representation. The requirement that individual notice be directed to all (b)(3) class members who can be identified with reasonable effort would be reduced for small-claims classes, requiring individual notice only for a sampling of members.²¹ The draft also opened up the possibility that the class adversary might be directed to pay part or all of the costs of class notice, but it was prepared at a time when this feature could be connected to a proposal that the court consider the probable success of the class position in deciding whether to certify a class. In current practice, defendants often pay the cost of notifying a plaintiff class because certification and notice are coupled with a settlement agreement. There may be some way to reframe this proposal. At any rate, these questions must be addressed in any form of group litigation.

Several countries contemplate notice to class members of major events in the progress of the action.²² The cost of postal notice, in relation to the probable benefit, may seem high. But as electronic communication has exploded, this idea seems much more attractive. A web page could be established for any class that includes members with individually substantial claims, or that concerns matters of general public importance.

19. The Federal Judicial Center is working on a project to develop model class-action notices. See Civil Rules Advisory Committee Agendas for October 2000 and April 2001.

20. 1 WORKING PAPERS, *supra* note *, at 55, 58-60 (discussing February 1996 draft Rule 23(c)).

21. *See id.*

22. *See, e.g., Nordh, supra* note 14.

D. Preliminary Evaluation of Merits

The recent reconsideration of Civil Rule 23 included several versions of a proposal that would allow the court to consider the probable merits of a class claim in deciding whether to certify a (b)(3) class.²³ The underlying idea was simple enough: class certification can have great consequences, not only in shaping the burdens and risks of the litigation but also in capital markets and perhaps elsewhere. It may seem unfair to inflict these costs on the party opposing the class without a preliminary showing that the class claim has some plausible substance. Plaintiffs and defendants united, however, in opposing the proposal. Defendants expressed several concerns. The most prominent began with the view that no matter how carefully the rule might be phrased, litigation of the class-certification question would approach full-scale litigation of the merits, including demands for sweeping discovery. The next most prominent was linked to the first—particularly following so much effort, certification after a supposedly preliminary finding of colorable merit would have a devastating impact both in real-world reaction to the litigation and in the pressure to settle. It might seem surprising that an idea so unpopular with defendants should also be unpopular with plaintiffs but—perhaps because plaintiffs’ representatives were thinking of different types of class actions than defendants’ representatives were contemplating—plaintiffs also objected. Support was lacking even for a draft that called for consideration of the merits only if requested by the party opposing class certification.

An idea so broadly unpopular may indeed be bad. It is widely believed, however, that many U.S. judges exercise the broad discretion built into present Rule 23 to deny certification on this basis. The idea may not be entirely bad. In other systems, built around different substantive rules and different surrounding judicial institutions and procedures, some preliminary view of the merits may remain a useful element of class certification. This prospect seems particularly promising in systems that, under direction of the court, permit staged inquiry into the merits. It may prove easier in such systems to achieve a preliminary sense of the probable outcome without bearing the costs feared in the U.S. system.

23. 1 WORKING PAPERS, *supra* note * at 55, 56-57 (discussing the Feb. 1996 draft Rule 23(b)(3)). Rejection of the proposal is reflected in Draft Minutes Apr. 18, 1996, Civil Rules Advisory Committee, 167 F.R.D. 540, 548-551 (1996).

E. Classes That Help Lawyers, Not Members

At least one part of popular culture in the United States believes that class actions are driven by the greed of attorneys, not the prospect of real benefit to class members. Attorney fees may exceed the tangible benefits to class members, and some “coupon” settlements may actually benefit defendants more than class members when the coupon is redeemed with a discounted purchase from the defendant. The perception, and the results that feed it, often are linked to class actions that arise from small-scale injuries to many consumers.

Attempts to address this concern have proved difficult. The proposed Civil Rule 23 amendments published for comment in 1996 included a new factor for determining whether to certify a (b)(3) class: “whether the probable relief to individual class members justifies the costs and burdens of class litigation.”²⁴ The draft Committee Note suggested a particular view of class actions: “The prospect of significant benefit to class members combines with the public values of enforcing legal norms to justify the costs, burdens, and coercive effects of class actions that otherwise satisfy Rule 23 requirements. If probable individual relief is slight, however, the core justification of class enforcement fails.”²⁵ Substitution of private enforcement for public enforcement is therefore not enough alone to justify resolution by a court. Adversary litigation requires meaningful individual injury and the prospect of meaningful individual relief. The spirit was captured in the phrase that came to characterize this draft as the “just ain’t worth it” proposal. As was expected, the proposal drew heavy opposition. The “just ain’t worth it” proposal has gone no further, and does not seem likely to be pressed in the near future. The proposal does, however, serve to frame a question that should be asked by every system developing a class action practice. Does our system of law really need to supplement public enforcement of public values by private enforcement? Always? No matter how trivial the injury and how uncertain the wrong? The Swedish proposal would provide for a class proceeding if it “is not otherwise

24. 1 WORKING PAPERS, *supra* note *, at 143, 144 (discussing Proposed Rule 23(b)(3)(F)); *see also* 167 F.R.D. 559 (1996). The February 1996 draft, then Rule 23(b)(3)(G), looked to the public interest as well: “whether the public interest in—and the private benefits of—the probable relief to individual class members justify the burdens of the litigation. . . .” 1 WORKING PAPERS, *supra* note *, at 55, 57.

25. 1 WORKING PAPERS, *supra* note *, at 143, 152; *see also* Committee Note on Proposed Rule 23, Civil Rules Advisory Committee, 167 F.R.D. 563 (1996).

considered to be inappropriate.”²⁶ Open-ended language like this might accomplish what the “just ain’t worth it” proposal failed to achieve.

An answer to this question will turn in part on the motivations that drive private class action litigation. Some observers in the United States fear that much of this litigation is driven by a desire for attorney fees and nothing more. Not as much attention is directed to another possible concern that interest groups will pursue agendas that are against the public interest by taking advantage of vaguely worded laws that responsible public officials would not seek to enforce against the challenged conduct. Other countries may share this concern. Much will turn on the broad factors described above: what is the nature of the substantive law that may be enforced through a class action, and what are the interests of those who drive the litigation, whether they be lawyers or citizens with an agenda?

An alternative response to the fear that class litigation may not reflect any concern for class members would be to shift to an opt-in class. Intervention by class members demonstrates a genuine class interest; lack of intervention defeats class litigation. The difficulty with this approach is that it is likely to work—if at all—only on a generalized basis. It is difficult to identify in a rule the circumstances of suspect motivation that justify a choice to certify an opt-in class rather than an opt-out class. One approach would be to assume that individual class members do not care about very small monetary recoveries, relying on opt-in procedure to identify the class members who do care. This approach, however, could easily defeat many consumer class actions, without a clear justification for the assumption that class members do not care about the money or about vindicating the public interest.

F. Selecting Class Representatives

One current Advisory Committee question is whether courts should assume greater responsibility for selecting class representatives.²⁷ As noted earlier, some observers believe that class representatives are often tokens. The class lawyers recruit representatives who, for inability or lack of interest, do not take on any meaningful role as clients. One response might be to accept as the class representative the person who initiated the inquiry and litigation, and who has the resources of experi-

26. See Nordh, *supra* note 14.

27. An early draft class action attorney appointment rule was included in the October 2000 Advisory Committee Agenda.

ence, intellect, interest, and mettle to be a real client. That approach might be attacked as an untoward intrusion on the private-attorney-general role of class actions. An alternative response is to focus, as adequacy of representation inquiries now tend to, on the qualifications of class counsel. The current draft would make the court responsible for appointing class counsel, and would require an application procedure that details the elements needed for effective representation.²⁸ In addition, independent investigation and development of the class position would be substituted for “first to file” as an important element. The draft, by requiring disclosure of “the terms proposed for attorney fees and expenses,” is compatible with the auction procedures that have been used by a few courts.²⁹ The potential disadvantages of an auction procedure are real, however, and may deserve a cautionary note.

It is difficult to guess whether these questions are relevant in other systems. The systems that call for registration of organizations that wish to launch group actions, for example,³⁰ look to procedural vehicles that are rather different from class actions in the United States. Even if something closer to the U.S. class action procedure is introduced, the traditions of the bar may not soon develop to a point that generates concern over “entrepreneurial lawyering.” Different relationships between court and counsel may change the character of the questions, already awkward under the adversarial traditions of the United States, that arise from making the court responsible for selecting the advocates that pursue the case. Perhaps it is sufficient to note that this is a specific point at which differences in the roles played by lawyers in different systems must be taken into account.

G. Pretrial Dependence

U.S. Pretrial procedure has been often studied in other countries, and—particularly with respect to discovery procedures—often shunned. Development of a system of group litigation requires consideration of the role of pretrial procedure or the absence of any particular distinction between pretrial and trial. Discovery may be particularly important. The opportunity to capture information by discovery is vitally important to the success of many claims pursued through class litigation in the United States. The opportunity to impose enormous burdens by seemingly valid discovery requests may create pressure to settle class

28. See Rule 23(h), Apr. 2001 Agenda.

29. See *id.* See also *In re Auction House Antitrust Litigation*, 197 F.R.D. 71 (S.D.N.Y. 2000).

30. See Walter, *supra* note 8.

claims. This pressure is particularly troubling when it coerces settlement of weak claims. General opportunities to pursue discovery against individual class members, on the other hand, might become an effective tool to coerce requests for exclusion or favorable settlement.³¹ Even entirely legitimate discovery may become so invasive as to raise serious questions, particularly as the full reaches of discovering computer-based information come to be explored. These general discovery problems, however, do not seem peculiar to class litigation; they only establish part of the framework for measuring the net social costs of encouraging class litigation.

The need for caution is obvious. Other countries, in assessing the development of class action practices in the United States, must bear in mind the significant impact of underlying discovery practices. Different discovery practices may reduce the costs of class actions, but also may reduce the benefits. The calculations are complex and uncertain.

H. Settlement

Only a tiny fraction of civil litigation in the United States persists to trial. Actions disappear before trial for many reasons. One common reason is settlement. Failure to settle a healthy portion of the cases that now settle could bring most courts to a grinding halt. If it were not possible to settle class actions, it might be necessary to adopt drastic restrictions on present class action practice.

Although settlement is a necessary option, it also is fraught with risks. The central problem is plain enough. Actual adjudication of class claims or defenses makes the class representative responsible only for effective adversary presentation. Decision by a judge provides broad reassurance that the issues of fact and law have been considered and fairly resolved. Matters stand much differently when a class representative, ordinarily self- (or counsel-) selected and court-blessed, assumes responsibility for compromising the class position without adjudication. The representative, under the aegis of class certification, then disposes of class members' rights without their consent. Court review of the reasonableness of the settlement provides some reassurance, but a court cannot be expected to recreate a settlement process, explore all alterna-

31. Professor Watson describes a Canadian procedure that *prima facie* limits discovery to the named parties, requiring leave of court to seek discovery from other individual class members. See Watson, *supra* note 18.

tives, and determine whether the compromise is an optimal balance of competing forces.³²

This central problem is aggravated by potential conflicts of interest between class counsel and class members. Settlement virtually assures compensation. Proceeding further toward trial, and trial itself, may impose great burdens and the risk of losing everything. Particularly when representative class members are ill-equipped for the client role, the court's responsibility in reviewing the proposed settlement becomes even greater. Matters can be still worse when there are competing class actions, or the prospect of competing class actions. Counsel then face the threat that some other lawyer will be prepared to resolve the same class claim on terms more favorable to the defendant. The result is a "reverse auction" in which the defendant plays one team against another until a satisfactorily low settlement offer is reached.

The continuing work of the Advisory Committee includes a settlement proposal that seeks to respond to these concerns.³³ The first premise is that settlement must remain possible. The most controversial element of the present draft reflects a second premise that settlement by representation, not by individual class member consent, cannot be favored. This element would protect class members by creating an opportunity to opt out after the terms of settlement are announced, without regard to the mandatory or opt-out character of the class. This proposal has met vigorous opposition. Some opposition rests on the belief that the essential character of a mandatory class must be protected. Much of the opposition, however, rests on the belief that effective settlement would too often become impossible. To be persuasive, this opposition must be bolstered by a satisfactory explanation of the reasons why initial failure to request exclusion must come at the cost of establishing the class representative's authority to agree to a compromise that many class members reject. Initial evaluations of effective representation are chancy enough; actual proof arising from the terms of settlement is more persuasive evidence. Another problem facing the opponents arises from recognition that quite often class members do have an opportunity to opt out of a proposed settlement because class certification, conditional approval of the proposed settlement, and notice all occur at the same time. If it is possible to negotiate a settlement acceptable to class members before certification and the opportunity to request exclusion, why is it not possible to do so later? This feature of the proposal

32. See generally Edward H. Cooper, *Aggregation and Settlement of Mass Torts*, 148 U. PA. L. REV. 1943, 1969-1999 (2000) (exploring the difficulties of reviewing class action settlements).

33. See Agenda, Civil Rules Advisory Committee, Oct. 2000.

may not long survive in its most sweeping form, but it deserves serious consideration as part of any class action system.

A second difficulty with judicial review of a proposed settlement in an adversary system is that the court seldom supervises an adversarial contest over the terms of the settlement. Class representatives and class adversaries have joined in settlement, and join in presenting the settlement to the court as a desirable accomplishment. Only objectors provide the adversary presentation that the system depends upon, but objectors commonly labor at severe disadvantages. Ordinarily objectors have not been privy to the course of settlement negotiations. They have not developed the familiarity with the facts that class representatives and class counsel should have developed. Their individual stakes in the outcome are likely to be relatively modest. Objectors may fill an essential role, but they may be poorly positioned to do so. At the same time, experience suggests that objections can be misused for improper tactical purposes. Objections cause delay and expense. It may be important to carry out the settlement promptly, particularly if some individual class members have urgent needs for relief. It may even be important that the settlement stand or fall quickly, so that effective trial preparation can continue if need be. An objector may seize these tactical advantages for the purpose of winning personal advantage, not improving the class position. There are, in short, “good” objectors and “bad” objectors. It has not seemed possible to define the difference by rule.

An early draft of the Advisory Committee sought to bolster the position of good objectors in several ways.³⁴ The draft would require proponents of a settlement to disclose (or, alternatively, submit to discovery of) the terms of any agreements incidental to the settlement.³⁵ Discovery on the merits of the class claims would be permitted to the extent necessary to formulate meaningful objections, and successful objections might be compensated by an award of attorney fees.³⁶ The draft attempted to address bad objectors, including a provision invoking Rule 11 sanctions for frivolous or bad-faith objections.³⁷ Court approval would be required for settlement of an objection on terms that favor the objector over the settlement terms available to the class.³⁸ These are small steps.

34. *See id.*

35. *See id.*

36. *See* Fed. R. Civ. P. 11.

37. *See* Civil Rules Advisory Committee, *supra* note 33.

38. *See id.*

The draft included still another provision that brought review of a proposed settlement closer to the procedure in judge-directed systems. The court could authorize an “independent investigation and report to the court on the fairness of the proposal.”³⁹ This provision would depart from the ordinarily exclusive reliance on adversarial presentations to the court.

Other approaches also have been considered, but have yet to win favor. A court might undertake to regulate the structure of settlement negotiations: appointment of a guardian for the class, designation of additional class representatives, creation of a “steering committee” of class members who are not designated representatives, or even direct participation by a judge, are all possible. Various experiments have been made along these lines, and experience over time may yet revive consideration of such devices.

Finally, it may be useful to create a rule text that catalogues many of the factors that merit consideration in reviewing a proposed settlement. The draft provides such a list, including factors that may generate some dispute.⁴⁰ One calls for consideration of the existence and the probable outcome of claims by other classes and subclasses.⁴¹ From one perspective, the comparison seems natural: if the deal seems inadequate in comparison to what others are likely to receive, rejection may be appropriate. From another, however, the comparison suggests concern that the settlement may be too favorable to the class, or that it will divert resources that should be husbanded to compensate other victims of the same wrong or even victims of different wrongs. The most obvious concern is for future claimants, those who may suffer injury in the future but who do not now have recognizable claims. Authorizing judicial consideration of this problem steps outside ordinary concepts of the adversary system. It does not seem plausible to theorize that the defendant has failed an obligation to represent its adversaries, whether future or present. It may barely be plausible to theorize that representatives of a defined class have some obligation to consider the interests of people who are not class members. But the essential responsibility seems to fall to the court, with the aid of such non-class objectors as may appear.

It seems likely that settlement plays an important role in most judicial systems. For example, the attorney-fee provisions in Canada have

39. *Id.* at R. 23(e)(6).

40. *See id.* at R. 23(e)(5)(A), 23(e)(5)(K).

41. *See id.* at R. 23(e)(5)(H).

not been much explored because most actions settle.⁴² Any class action rule should go as far as possible to address the role of settlement.

I. Settlement-Only Classes

The role of settlement is emphasized by certifying a class exclusively for settlement and not for trial. Settlement-only classes were a familiar part of practice in the United States before the attempt was made to extend them to mass-tort actions.⁴³ Currently, it is proper to certify a class for settlement, but only when the sole barrier to certification for trial is “manageability.”⁴⁴

The Advisory Committee has considered three alternative approaches to settlement-only classes.⁴⁵ One would extend the use of these classes beyond their present limits. The second would seek to capture current practice in express rule language. The third monitors developing lower-court experience for indications whether there is any need to amend Rule 23. The third approach has prevailed, at least for now.

Certification only for settlement changes negotiating advantages, but the effects are complicated. It may seem that a class that cannot threaten to go to trial as a class has lost an important bargaining threat. But the alternatives to class action trial—such as a large number of individual trials—may be worse for the defendant than a settlement favorable to the class, or for that matter, worse than a class action trial. Much depends on the alternatives available to the claimants by other means of aggregation or—particularly with mass torts—individual litigation. The lure of “global peace” can be strong.

Apart from negotiating positions, settlement can claim real advantages over litigated disposition. Saving the transaction costs of trial or multiple trials is obvious and important. Avoiding inconsistent outcomes, assuring consistent treatment on liability and at least roughly comparable remedies, is equally important. These benefits accrue under a unitary legal system. In a federal system, there are additional benefits. Differences in outcomes that derive from differences in courts

42. Watson tells us that imposition of cost sanctions on an unsuccessful plaintiff class representative has been rare because most cases are settled rather than dismissed. *See* Watson, *supra* note 18. Gidi, on the other hand, tells us that settlement is not at all common in Brazil. Antonio Gidi, Remarks at the Duke/Geneva Conference on Debates over Group Litigation in Comparative Perspective: What Can We Learn from Each Other? (July 21-22, 2000).

43. *See* WILLGING ET AL., EMPIRICAL STUDY, *supra* note *, at 34-35 (1996).

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

45. *See* Civil Rules Advisory Committee Agenda Apr. 2000 (<http://www.uscourts.gov/rules/comment2001/text-0101.pdf>).

are reduced. Finally, when claims are governed by state law, choice-of-law difficulties are avoided.

Settlement class questions provide yet another illustration of issues that are important, that are not readily resolved even in a system that has developed substantial experience, and that are not likely to yield to the same resolution in different systems.

J. Future Claimants

Asbestos litigation provides the classic example of future injury. Widespread exposure to asbestos has been followed by widespread injuries that become manifest over the course of several decades. Even today, there are untold tens of thousands of people who have been exposed, who have no measurable present impairment or even signs of incipient impairment, and who will suffer injury in the future. Some present remedies are possible: medical monitoring, compensation for the fear of future injury, and compensation for the risk of future injury are the leading contenders. Each of these remedies remains uncertain or unavailable for many claimants. The important injuries and the important remedies lie in the future.

It might seem sufficient to leave future problems to future disposition. There are at least two major difficulties with this approach. One, amply demonstrated by asbestos experience and potentially applicable in other mass torts, is that providing present remedies for present injuries may exhaust the resources available for compensation. Present victims take all at the expense of future victims. The other, less poignant, is that it is desirable to achieve a single disposition of common issues; the basic elements of liability are established (or refuted) and need not be continually relitigated.

These difficulties may be addressed by bringing future claimants into a single proceeding with present claimants. Representation becomes more important because there is little prospect that effective notice can be given to future claimants. The representatives must be free from conflicting interests, a problem that has derailed the most prominent attempts to bring future claimants into class proceedings.⁴⁶ There may be some need to demonstrate the prospect that taken together, present and future claims exceed the assets available for payment. The present structure of Civil Rule 23 has emphasized the difficulty on this score when a “limited fund” class justification has been attempted.⁴⁷

46. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

47. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

There is a serious proposal intended to address these contingencies by providing for discharge of future claims through bankruptcy procedures, thereby providing independent representation for future claimants without requiring a demonstration of probable insolvency.⁴⁸

The possibility that future claims might be resolved does not tell us how to do it. It may be that bankruptcy-like procedures are better than class action-like procedures, although an evaluation of that prospect requires intimate familiarity with the tribunals that would administer each set of procedures. Yet again, the answers that prove suitable to one country cannot be adopted for any other country without careful reflection.

K. Fluid Recovery

One of the difficulties encountered frequently in class actions is the actual delivery of individual remedies to all class members. This problem is particularly evident in actions yielding very small individual recoveries. Even if this difficulty can be overcome, the cost of distribution may exceed the benefits conferred. The best way to apportion remedies to wrongs may be to bypass any individual relief, or to direct unclaimed individual relief to other uses. This might enforce the public interest without over- or under-deterrence. For example, a defendant that has misled consumers might be ordered to support a consumer education program, or to deliver goods to a worthy organization. Such measures are commonly referred to as “fluid” or “cy pres” remedies.

Deliberate development of fluid recoveries through Civil Rule 23 may lie beyond the reach of the Rules Enabling Act, the statute that authorizes the Supreme Court to adopt and amend the Civil Rules.⁴⁹ Enabling Act rules are not to abridge, enlarge, or modify any substantive right. Rule 23 does not authorize actions to enforce the public interest on behalf of the public and perhaps cannot do so. Within the Rules Enabling Act or not, there is no apparent disposition to draft a rule to regulate fluid recoveries. Courts that experiment with such remedies must find implied authority from the statute being enforced or the development of common law principles. Even with such substantive roots, the result is at least slightly removed from the traditional view that courts in the United States act at the behest of private litigants to resolve private disputes. And justification must be found for the awk-

48. *See* Bankruptcy: The Next Twenty Years, Report of National Bankruptcy Review Commission, at 315-350 (1997).

49. *See* Rules Enabling Act, 28 U.S.C.A. § 2072 (1988).

ward complication that the fluid remedy either cuts off individual enforcement by class members—as a class action should—or leaves the defendant subject to double liability.

Other countries, looking to different rulemaking procedures and different traditions of the judicial function, may find these questions less difficult. The issue again is the social role of class actions, and different answers are easily possible.

L. Attorney Fees

The sensitivity of attorney fee issues in the United States may result in part from the unique “American Rule” that fees are not required to be shifted from victor to vanquished. Several statutes, however, have identified circumstances in which fee shifting between parties is appropriate.⁵⁰ And class fee awards often do not take the form of fee shifting. It has long been accepted that members of a successful class should compensate the class attorneys out of their gains just as an individual plaintiff must subtract the attorney’s fees from the award. It is also recognized, although reluctantly by some, that class attorneys bear risks, and devote time and talent, to advance many worthy causes. Even a large class fee award, moreover, may transfer less money to lawyers than would be transferred by alternative means of disposition. It is commonly reported, for example, that vast numbers of individual asbestos claims continue to settle on the terms established by the failed Georgine settlement, subject only to the difference that the contingent fees are greater than would have been permitted by the settlement.

Sensitivity to fee awards thus tends to be expressed directly by focusing on the amount of the award, or by focusing on the amount of the award in relation to the value recovered by the class. Some part of the debate may be fueled by jealousy or resentment that even highly skilled, hard working, and public-spirited professionals should command handsome fees. Another part may derive from the belief that more of the money should go to the class. But common criticism seems to reflect a view of class action lawyers as buccaneers who command rates far above market levels by seizing the coercive opportunities of ill-founded class claims. It is very difficult to know whether this view is supported by a significant number of real-world instances. It persists nonetheless and suggests that it is important that courts rigorously attend the duty to review fee awards.

50. A convenient list of 119 fee-shifting statutes is attached to Justice Brennan’s dissent in *Marek v. Chesney*, 473 U.S. 1, 44-51 (1985).

These pressures have led the Advisory Committee to consider a rule that would express and to a limited extent regulate judicial responsibility to review class attorney fees.⁵¹ Only a tentative beginning has been made, and the current view is that no attempt should be made to choose between the “lodestar” approach based on hourly compensation and the “percentage-of-class-recovery” approach.

Given the differences in context, it is unlikely that other countries will find much practical benefit in observing these struggles. Our problems may be irrelevant in face of the nearly universal principle that the loser should pay at least a significant portion of the winner’s legal fees, long experience in administering the principle, and the different levels of professional compensation.

Different rules for attorney fees, however, may present quite different questions to other countries. Canada, for example, adheres to the rule that named representatives of a losing plaintiff class must bear responsibility for the defendant’s “party and party costs.” Canada has tempered this approach by creating a “Class Proceedings Fund” that is liable for the defendant’s costs if the Fund provides assistance to the class plaintiff.⁵² This reduced exposure reflects an apparent appreciation for the public role assumed by the class plaintiff and a desire to encourage actions of the sort deemed worthy of Fund support. Other countries that believe in the general social utility of privately initiated class actions would do well to consider similar devices.

III. WHAT ELSE?

This brief and eclectic survey has not attempted to describe a comprehensive theory of class or group litigation. There is no attempt to compare any variation on such representative litigation to alternative modes of aggregating private enforcement or relying on public enforcement. The issues that are addressed are presented as sketches, without extended elaboration or documentation. Perhaps the greatest omission is any observation on the overall value of class actions. The omission is deliberate. An academic observer easily can be caught in a painful bind. U.S. practice can, on reasonably close observation, offer vast theoretical difficulties. Nothing more than assertion and ongoing practice justify the working conclusion that an individual can lose valid rights by a judicial decree provoked by a complete stranger who has volunteered to “represent” a class of others. Discomfort with this situa-

51. See Civil Rules Advisory Committee Agenda, Oct. 2000.

52. See Watson, *supra* note 18.

tion increases when the decree rests on settlement, not adjudication. A strong theoretical argument could be made that class representation is justified only when ordinary principles of mandatory joinder direct inclusion of numerous parties who share virtually indistinguishable interests and who cannot feasibly participate directly in the litigation.

These direct theoretical doubts may be supplemented by other theoretical troubles. Class actions demand much of adversary litigation, perhaps too much. Class actions support the full enforcement and over-enforcement of substantive principles that are desirable, if at all, only when enforced selectively. These doubts arise from concern for the class adversary, not for class members; for that reason, class actions may lack principled justification as to any of the participants.

The trouble with such theorizing is that it overlooks the enormous positive contributions that class actions can make and have made. When there is clear and convincing proof that a clear and sensible rule of law has been violated, causing more than *de minimis* injury, the advantages of class enforcement can be enormous. In some settings, particularly the settlement of mass torts, the advantages may go beyond the direct advantages of efficient and consistent enforcement of the law. Terms may be achieved that are authorized by no law, but that achieve better justice for most class members than could be accomplished under any law. It would be a tragic mistake to allow abstract theorizing to defeat the accomplishments of class action litigation.

The conclusion, in short, is that Civil Rule 23 is a work in progress. To some significant extent it has been adapted to the needs of U.S. legal institutions: the substantive law, the complications of a federal system, the judicial institutions, the attendant procedure and joinder alternatives, and perhaps even the jury trial. The practical successes, the workaday shortcomings, and the theoretical troubles of the U.S. approach to the class action can all provide food for thought as other countries develop their own systems. There is, however, very little beyond the general idea of group litigation that can be borrowed without thorough reconsideration and adaptation to local needs and capacities. U.S. examples are interesting, provocative, sometimes useful, and sometimes amusing. Consider them in that spirit and the U.S. system has much to offer.