Ending Class Actions As We Know Them: Rethinking the American Class Action

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ENDLESS CLASS ACTIONS AS WE KNOW THEM: RETHINKING THE AMERICAN CLASS ACTION

by Linda S. Mullenix*

ABSTRACT

Class actions have been a feature of the American litigation landscape for over 75 years. For most of this period, American-style class litigation was either unknown or resisted around the world. Notwithstanding this chilly reception abroad, American class litigation has always been a central feature of American procedural exceptionalism, nurtured on an idealized historical narrative of the class action device. Although this romantic narrative endures, the experience of the past twenty-five years illuminates a very different chronicle about class litigation. Thus, in the twenty-first century American class action litigation has evolved in ways that are significantly removed from its golden age. The transformation of class action litigation raises legitimate questions concerning the fairness and utility of this procedural mechanism, and whether class litigation actually accomplishes its stated goals and rationales. With the embrace of aggregative non-class settlements as a primary – if not preferred – modality for large scale dispute resolution, the time has come to question whether the American class action in its twenty-first century incarnation has become an disutilitarian artifact of an earlier time. This article explores the evolving dysfunction of the American class action and proposes a return to a more limited, cabined role for class litigation. In so doing, the article eschews alternative non-class aggregate settlement mechanisms that have come to dominate the litigation landscape. The article ultimately asks readers to envision a world without the twenty-first century American damage class action, limiting class procedure to injunctive remedies. In lieu of the damage class action, the article encourages more robust public regulatory enforcement for alleged violation of the laws.

INTRODUCTION

Americans seemingly love their class actions. The American class action has been a fixture in the federal procedural toolbox for over seventy-five years and has become a central feature of American procedural

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exceptionalism. This narrative of American procedural exceptionalism posits that the American justice system is not only the best in the world, but that American procedural rules and its jury system are superior to comparative civil and common law systems abroad. And until fairly recently, the class action device was a uniquely American innovation, resisted (if not rejected) by most foreign legal systems.

The modern American class action rule emerged during a period of celebrated liberal legislative initiatives intended to expand the civil rights and liberties of ordinary American citizens. President Lyndon Johnson’s historic first one hundred days during 1964 spearheaded his Great Society legislative program. These legislative initiatives created new substantive rights which would have been rendered nugatory without some procedural mechanism to enforce those newly-created rights. Thus, in the early 1960s the Advisory Committee on Civil Rules embarked on a contemporaneous initiative to liberalize the federal rules of civil procedure. The amendment of the class action rule in 1996 represented a unique convergence of the


2 See id.


creation of new substantive rights supported through a rulemaking that
provided a procedural mechanism for the enforcement of those new
substantive rights.\(^6\)

Modern American class action practice, then, emerged as a
consequence of the 1966 amendment to Federal Rule 23. The liberalized
modern American class action rule has long been imbued with an idealized
historical narrative in support of its merits. This narrative chronicles the
deployment of the class action device in the late 1960s and early 1970s, to
accomplish landmark social justice reforms. During this so-called golden
age of class litigation, public interest lawyers used the class action
mechanism to integrate school systems, deinstitutionalize mental health
facilities, reform conditions of confinement for inmates in prison systems,
challenge discriminatory housing and public accommodation laws, and
address various types of employment discrimination.\(^7\)

This golden age of class litigation lasted for approximately a decade
after the 1966 class action amendments went into effect.\(^8\) Not surprising,
the initial enthusiasm for class litigation eventually engendered a backlash,
with the Supreme Court issuing several restrictive decisions during the
1970s that constrained the ability of class counsel to vigorously pursue class
litigation.\(^9\) By the end of the 1970s, institutional reform litigation faded

\(^6\) Id.
\(^7\) See e.g., Hart v. Community School Bd. of Educ., 383 F. Supp. 769 (E.D.N.Y. 1974,
aff’d, 512 F.2d 37 (2d Cir. 1975)(ordering a integration plan for the Mark Twain middle
school in Coney Island, Brooklyn); Society for the Good Will to Retarded Children, Inc. v.
Cuomo, 572 F. Supp. 1300 (E.D.N.Y. 1983)(ordering corrective measures at state
institution for mentally handicapped children in violation of constitutional rights), vacated,
737 F.2d 1239 (2d Cir. 1984); Order, Manicone v. Cleary, No. 74 C 575 (E.D.N.Y. Dec.
12, 1977)(prisoner access to telephones); United States v. Kahane, 396 F. Supp. 687
(E.D.N.Y. 1975)(right of defendants to obtain food meeting dietary requirements); Wilson
v. Beame, 380 F. Supp. 1232 (E.D.N.Y. 1974)(tolerance for Muslim prisoners); see
generally Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv.
L. Rev. 1281 (1976)(discussing the new public law litigation paradigm).
\(^8\) See Richard L. Marcus, Public Law Litigation and Legal Scholarship, 21
Mich. J.L. Ref. 647, 648 (1988)(“Perhaps more basically, Chayse’s focus on
public law litigation seems ill-conceived because the incidence of the kind of
lawsuits he had in mind—school desegregation and prison conditions cases—was
waning even as he wrote.”).
\(^9\) Eisen v. Carlisle and Jacquelin, 417 U.S. 156 (1974)(allocating costs of
sending notice to class members on plaintiffs); Zahn v. Int’l Paper Co., 414 U.S.
291 (1973)(requiring that all class members in diversity class actions individually
satisfy the jurisdictional amount in controversy requirement).
somewhat from the litigation landscape, replaced by mass tort cases. In this period mass tort litigation emerged as the new paradigmatic complex litigation, and mass tort cases dominated class action litigation throughout the ensuing two decades until the end of the 1990s.

Spanning five decades, class action litigation has always been subject to a pendulum effect, with periods of expansion typically followed by periods of retrenchment. Thus, by the end of the twentieth century, federal appellate and the Supreme Court effectively put the brakes on innovative class action experiments, effectively ending the era of federal mass tort class litigation. As a consequence of judicial refinement of the threshold rigorous analysis standard and exacting application of Rule 23 requirements, federal class litigation has become more challenging to pursue. Reflecting on the Court’s series of increasingly restrictive decisions, commentators declared that class action litigation effectively is dead. Nothing, however, could be further from the truth. Instead, in the late 1990s the plaintiffs’ class action bar regrouped and retreated to state

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12 Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 519 (1997); Cimino v. Raymark Industries, Inc., 151 F.3d 297 (5th Cir. 1997); Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996); In the Matter of Rhone-Poulenc Rorer, 51 F.3d 1293 (7th Cir. 1995).


15 See Andrew J. Trask, Reactions to Wal-Mart v. Dukes: Litigation Strategy and Legal Change, 62 DePaul L. Rev. 791, 793 (2012)(“ . . . despite the many academics and lawyers who have written otherwise [the Court’s decisions] do not represent the demise of the class action,” but rather a trend over time of adjusting litigation standards).
courts, which experienced an onslaught of class litigation until Congress enacted the Class Action Fairness Act in 2005.16

Three signal features characterize complex litigation in the twenty-first century. First, contrary to naysayers and skeptics, federal class litigation remains vibrant and thriving. 17 Second, attorneys have shifted their efforts from class actions to other means to achieve collective redress, most commonly to non-class contractual settlements. 18 In addition, attorneys involved in complex, large scale litigation have shifted the procedural rhetoric from “class” litigation to “aggregate” litigation.19 And third, multidistrict litigation procedures have assumed new prominence in the litigation landscape.20

In this changed landscape — with the shift to non-class dispute resolution auspices — the continued fate of the class action rule in its current form takes on added significance. However, if it is true that non-class modalities to accomplish collective redress will prevail, then debates over the class action rule might seem useless exercises in moving deck chairs on the Titanic.

This article contends that, notwithstanding the advent of non-class aggregate litigation, Rule 23 class litigation remains a vital feature of the litigation landscape. However, class litigation in the twenty-first century has moved a very long way from the golden age of class litigation during the 1960s. Instead, class litigation now is dominated by Rule 23(b)(3) damage class actions, rather than the injunctive classes of the civil rights era. This tectonic shift to damage class actions, in turn, has exposed troubling fault lines in the pursuit and implementation of class action relief. This article suggests that class actions are not dead, but that they are just badly done and in compelling need for rethinking of the class action rule.

16 Class Action Fairness Act, PL 109-2, 119 Stat 4, 9 (February 18, 2005); codified at 28 USC 1332(d), 1453, 1711–1715, 2071 note, and 2074.
17 See Linda S. Mullenix, Aggregate Litigation and the Death of Democratic Dispute Resolution, 107 Nw. U. L. Rev. 511 (2013); see also Class Action Law 360 at news-alt@law.360.com (daily blog report of class action decisions).
19 American Law Institute, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010).
20 See 28 U.S.C. § 1407; see also Willging and Lee, From Class Actions to Multidistrict Consolidations, supra n. 18.
The evolution of class litigation in the United States might very well be analogized to the saga of common law pleading in England. As is well known, by the mid-eighteenth century, common law pleading in England had become so complex and arcane that it entailed endless traps for the unwary pleader. These impenetrable difficulties ultimately led to the great eighteenth-century reforms of common law pleading in England, followed by the Field Code reforms in the United States.

The original 1938 American class action rule was similarly opaque and difficult to apply, which led to the 1966 amendment of the rule. In the ensuing fifty years, the development of Rule 23 class action jurisprudence has paralleled the saga of common law pleading before the eighteenth-century reforms. Thus, the principles and standards governing Rule 23 have become increasing opaque, arcane, and difficult to apply, subject to considerable judicial discretion and inconsistency. Doctrinal nuances abound and appellate court disagreements pervade the class action arena. Indeed, it is not too far-fetched to suggest that current class action jurisprudence similarly creates traps for unwary pleaders and defenders, who frequently are able to find judicial support for any arguable position on either side of the class action docket. Moreover, similar to litigants subjected to eighteenth-century common law pleading, parties involved in class action litigation typically find their cases dragging on for years without reaching judicial consideration of the merits of the litigation.

This article argues that Rule 23 is broken and dysfunctional and in need of a wholesale root-and-branch reform. It suggests that the post-1966 class action rule, particularly the domination of the Rule 23(b)(3) damage class action, no longer serves the purported rationales justifying the rule. Furthermore, the negative consequences of certain types of class litigation offset any perceived benefits. This article advocates a return to a simpler class action rule limited to injunctive relief cases, with abandonment of the Rule 23(b)(3) damage class action. There was no damage class action prior to the 1966 amendments. The eighteenth-century reforms of common law pleading — including the basic precepts of the Field Code — provide an

22 Id. (noting that “[N]otice pleading developed in the 1930s as a reaction to arcane common law pleading rules and rigid code pleading.”).
24 See Marcus, supra n. 5; Kaplan, supra n. 5; Cohn, supra n. 5.
illuminating approach and useful model for drafting a rule that simplifies class action procedure.

Finally, in advocating for a reformed, simplified class action rule, this is not intended to endorse non-class aggregate settlement modalities as a substitute for class litigation. Moreover, it is not intended to slight the very real concerns implicated in small claims consumer harms. It is an argument, instead, for increased, robust public regulatory enforcement of laws and enhanced recourse to ombudsmen or similar auspices to resolve such small claims aggregate harms.

I. COMPETING CLASS ACTION NARRATIVES

A. THE ROMANTIC NARRATIVE OF CLASS ACTION LITIGATION

A romantic narrative permeates the debate over the desirability and efficacy of class action litigation. Plaintiffs’ class counsel and legal scholars consistently recite this romantic narrative, which accounts often are endorsed in any number of judicial decisions. As will be seen, while class

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26 Amchem, supra n.12, 521 U.S. at 617 (“...the Advisory Committee 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’”), citing Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (1997); Beattie v. Century Tel., Inc., 511 F.3d 554, 567 (6th Cir. 2007)(policy at core of class action mechanism is to overcome problem that small recoveries do not incentivize individuals to bring solo lawsuits); Smilow v. Southwestern Bell Mobile Sys., Inc.
action advocates repeatedly recount the romantic narrative, business associations that are the frequent objects of class litigation have their own darker counter-narrative.

There are several core elements that characterize the romantic narrative of the class action. First, class litigation always features helpless and hopeless plaintiffs in dire need of assistance, who are incapable of fending for themselves and exercising independent autonomy: the downtrodden, the exploited, the illiterate, the disarmed little-guy. 27 Correlatively, the narrative needs a villain, and corporations or other business entities fulfill this role. In the romantic narrative, corporations are powerful, evil, malevolent, bad-actors intent on profit-making at the expense of the health, safety, and well-being of individuals. 28 In extreme

323 F.3d 32, 41-41 (1st Cir. 2003)(discussing policy goals of class action litigation, with focus on consumer small claims actions); Allison v. Citgo, 151 F.3d 402, 427 (5th Cir. 1998)(J. Dennis, dissenting)(summarizing aims of class actions to promote judicial efficiency and economy; obviate need for multiple proceedings; aggregate small claims; enhance access to justice).

27 See generally Troy A. McKenzie, “Helpless” Groups, 81 Fordham L. Rev. 3213 (2003)(describing the important role of the helpless group in the history of modern class litigation; Helen Perry Grimwood, Lawyers as Leaders — Part II, 42 Oct. Ariz. Att. 6 (Oct. 2005)(describing plaintiffs’ class action attorney as a world of “sticking up for the rights of the poor and downtrodden; or representing the rights of people who, without [the attorney’s] help, would be left without hope.”).

28 See e.g. Winnie Chau, Something Old, Something New, Something Borrowed, Something Blue and a Silver Sixpence for Her Shoe: Dukes v. Wal-Mart and Sex Discrimination Class Actions, 12 Cardozo J.L. & Gender, 969, 970 n.4 (noting the trope that some view class actions as a way for noble crusaders to pursue evil corporations); James M. Finberg, Class Actions: Useful Devices That Promote Judicial Economy and Provide Access to Justice, 41 N.Y.L. Sch. L. Rev. 353, 354 (1997)(class actions allow claimants to aggregate claims “to fight rich and powerful corporations’); Alexandra Lahav, Fundamental Principles of Class Action Governance, 37 Ind. L. Rev. 65, 100-01 (2003)(class actions a significant protective mechanism “in a world where interactions with economically and politically powerful corporations are such a pervasive aspect of people’s lives”); Kathleen Flynn Peterson, Standing Up for Standards, 44 Apr. Trial 9 (2008)(noting comments that class action practitioners needed to fight efforts of powerful special interests to take away rights that give Americans an even playing field when it comes to holding powerful corporations accountable for misconduct that hurts people); Sachs-Michael, The Demise of Class Actions, supra n.14, 12 Cardozo J. Conflict Resol. at 671 (class action device levels playing field between aggrieved individuals and powerful corporations). See generally Elizabeth J. Cabraser, supra n. 25.
versions of the romantic narrative, these defendants callously, indifferently, and cynically plot to harm their own consumers.29

A second feature of the romantic narrative focuses attention on the problem of asymmetrical power and resources, which narrative thread is tied to the helplessness of the injured parties. Thus, in this telling, individual claimants lack sufficient power, resources, and information to seek relief from the bad actor.30 Especially in cases of small harms — so-called negative value suits — individual plaintiffs will be unable to pursue relief because the value of the claim is so small, recovery minimal, and therefore there is scant incentive for an attorney to undertake representation.31 On the other hand, it is urged that corporate defendants hold superior power and financial resources to prevail through a battle of attrition. In small claims cases, individuals simply will not pursue relief.32 Moreover, defendants defer, deflect, or defeat case development by impeding discovery of relevant information. In this view, the bad actor defendants hold all the litigation cards.33


31 *Jerry Enter., Inc. v. Allied Beverage Group, L.L.C.*, 178 F.R.D. 437, 445 (D.N.J. 1998) (“It must be understood that a class action plaintiff may not have very much incentive to contact an attorney or to investigate a potential claim where the claim may be tiny.... The whole mechanism of the class action recognizes this lack of incentive and the collective action problems inherent in many individuals having potentially small claims, and encourages lawyers to prosecute these actions on behalf of plaintiffs by holding out the promise of large fee awards.”).

32 David L. Shapiro, *Class Actions: The Class As Party and Client*, 73 Notre Dame L Rev 913, 916 (1998)(defining small claim class actions as “those cases in which the claim of any individual class member for harm done is too small to provide any rational justification to the individual for incurring the costs of litigation”).

33 See Klonoff, *The Decline of Class Actions, supra* n.14, 90 Wash. U. L. Rev. at 756-57 (suggesting that while courts have imposed stricter evidentiary burdens
A third feature of the class action narrative that plaintiffs recently have advanced contends that, in absence of the class action mechanism, individuals would have no effective means to vindicate their rights.34 The “effective vindication” argument posits that the cost and burdens of conducting some types of litigation is so great that individual claimants realistically have no means or incentive to pursue litigation.35 Thus, the judicial resistance to permitting aggregation of claims effectively denies individual claimants the ability to pursue redress from more powerful defendants.36 Antitrust litigation is a type of case that illustrates this effective vindication problem; plaintiffs recently contended that the cost of retaining expert witnesses to prove up elements of alleged antitrust violations were so prohibitive as to frustrate individual claimants from effectively vindicating their rights, unless they could proceed as a class and share costs.37

The fourth element of the romantic class action narrative shifts to an appreciation of the underlying purposes of class litigation. Here supporters contend that class litigation achieves an efficient resolution of claims, justly compensates injured parties, and deters defendants from further misconduct and harmful behavior.38 The authors of the efficiency rationale typically on class plaintiffs while at the same time permitting defendants to seek denial of class certification without submitting discovery, citing Pilgrim v. Universal Health Card, LLC, 660 F.3d 943 (6th Cir. 2011).

34 See Amchem, supra n.12 and other cited authorities; American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013)(declining to apply effective vindication doctrine to repudiate class action waiver provision in arbitration agreement); Ellen Merriweather, Class Action Waiver and the Effective Vindication Doctrine at the Antitrust/Arbitration Crossroads, 26 SUM Antitrust 67 (summer 2102)(describing the effective vindication doctrine); Linda S. Mullenix, The Practice: The Not-So-Effective Vindication Decision: The U.S. Supreme Court’s Ruling in Italian Colors and Its Aftermath are a Big Blow to the Class Action Bar, Nat’l L.J. 30 (Sept. 9, 2013); Linda S. Mullenix, Arbitrating Federal Antitrust Claims, Class Action Waivers, and the “Effective Vindication” Rule, 5 Preview of Supreme Court Cases 191 (Feb. 19, 2013)(American Express Co. v. Italian Colors Restaurant).


36 Id.; see also Brief for Respondent at 46 – 57.

37 Id.

38 See e.g. Mary J. Davis, Toward the Proper Role for Mass Tort Class Actions, 77 Or. L. Rev. 157, 169 (1998) (“The class action procedure thus evolved as a product of concern for the ‘convenient and economical’ provision of justice, coupled with the substantive concern of affording a meaningful remedy to large
allude to congested court dockets, noting that judicial delays in adjudicating individual cases effectively denies claimants their day in court. In this view, aggregating claims in a class accomplishes a speedier resolution of similar claims in one proceeding, rather than requiring that thousands of like cases languish on court dockets. Regarding compensation, advocates contend that class settlements return just compensation to class members more efficiently and swiftly than individual litigation. And finally, proponents of class litigation repeatedly argue that the mere threat of class litigation serves a powerful deterrent on potential corporate misbehavior, and for this reason alone, class actions are a laudatory mechanism for accomplishing justice.

numbers of otherwise disenfranchised victims of breached obligations.”); Finberg, Class Actions, supra n. 28, 41 N.Y.L. Sch. L. Rev. at 354 (class actions serve goals of judicial economy and access to justice); Klonoff, The Decline of Class Actions, supra n. 28, 90 Wash. U.L. Rev. at 729 (noting rationales for class action device as compensation, deterrence, and efficiency); Lahav, Fundamental Principles, supra n.28, 37 Ind. L. Rev. ay 70-71 (two substantive justifications for class actions: compensation and deterrence); and Viivi Vanderslice, Comment, Viability of a Nationwide Fen-Phen/Redux Class Action Lawsuit in Light of Amchem v. Windsor, 35 Cal. W. L. Rev. 199, 216 (1998) (noting that increased access and economic efficiency are among the goals of the class action).

39 Order, Cimino v. Raymark Industries, Inc., (E.D. Tex. December 29, 1989)(certifying an asbestos class action where claims had been pending for over three years and where claimants were ill or had died; concluding that the court “could see no justice in Denying the Plaintiffs their day in court in the interests of providing Defendants with a procedure for the repetitive assertion of their defenses”); See generally Robert G. Bone, The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions, 79 Geo. Wash. U. L. Rev. 577 (2011)(extensive analysis of the day-in-court theory as it intersects with class litigation).

40 Chavarria v. New York Airport Service LLC, 875 F. Supp.2d 164, 171 (E.D.N.Y. 2012)(upholding class action settlement; settlements are strongly favored as a matter of policy, because “[b]y lessening docket congestion, settlements make it possible for the judicial system to operate more efficiently and more fairly while affording plaintiffs an opportunity to obtain relief at an earlier time,” citing Evans v. Jeff D., 475 U.S. 717, 761 n. 15 (1986); Jenkins v. Raymark Industries, 782 F.2d 468, 470(5th Cir. 1986)(courts ill-equipped to handle the avalanche of asbestos litigation; the purpose of the class action is to conserve the resources of the courts and parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion).

41 See Order, Cimino, supra n.39.

The romantic class action narrative also turns attention to the role of attorneys. In this portion of the narrative, plaintiffs’ class counsel arrive on the scene as white-hatted knights (or cowboys) who are protectors of the down-trodden victims of corporate misfeasance and greed. In this telling, class counsel undertake considerable hardships at great personal expense, risking their own practices and livelihoods while foregoing other business in order to achieve justice for the helpless. These attorneys are motivated by idealistic sentiments to help the down-trodden, inspired by the great civil rights cases of the 1960s and Atticus Finch. They are benighted “private to class action lawyers in small-stakes actions is 100% of judgments to accomplish maximal deterrent effect of class litigation); Myriam Gilles & Gary B. Friedman, Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers, 155 U. Pa. L. Rev. 103, 105-07 (2006)(deterrence primary goal of class actions); Linda Sandstrom Simard, Fees, Incentives, and Deterrence, 160 U. Pa. L. Rev. PENNumbra 10 (2011)(endorsing the Fitzpatrick proposal to promote maximal deterrent effect of class litigation on corporate behavior); but see David Marcus, Attorney Fees and the Social Legitimacy of Class Actions, 159 U. Pa. L. Rev. PENNumbra 157 (2011)(disputing Fitzpatrick theory concerning maximal deterrent effect accomplished through incentivized attorney fee awards).

See e.g., Edward Brunet, Improving Class Action Efficiency by Expanded Use of Parens Patrie Suits and Intervention, 74 Tul. L. Rev. 1919, 1927 (2000)(discussing the class action cultural stereotype in which “plaintiffs’ class action lawyers were White Knights, enforcing the substantive law in order to right legal wrongs that, without their intervention, would go unpunished. These White Knights not only obtained compensation for their clients, but also were able to curb corporate abuse by deterring wrongful conduct. These policy implications were the stuff that plaintiffs’ class counsel dream about and form the plaintiffs’ “cultural stereotype” of a class action).

See e.g., Jay Tidmarsh, Rethinking Adequacy of Representation, 87 Tex. L. Rev. 1137, 1150 (2009)(discussing opportunity costs to plaintiffs’ attorneys in foregoing other legal work); Vaughn R. Walker, Class Actions Along the Path of Federal Rulemaking, 44 Loy. U. Chi. L.J. 445, 448 (2012)(describing class actions as “also expensive in opportunity costs for class counsel who could devote themselves to more productive endeavors if the social value of the relief obtained in class litigation fails to match the effort and resources put into it.”).

See Derrick A. Bell, Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 Yale L.J. 470, 493 (1976). Professor Bell describes the attorney–client tension between class clients and idealistic class attorneys during the civil rights era: This malady may afflict many idealistic lawyers who seek, through the class action device, to bring about judicial intervention affecting large segments of the community. The class action provides the vehicle for bringing about a
attorneys general” stepping into the breach of public regulatory enforcement, pursuing and vindicating justice where governmental enforcement is feeble or lacking.

On the other hand, in this narrative, defense counsel are portrayed as black-hatted desperadoes, willing to cynically defend awful clients in the name of corporate greed and callous big-law practice.\(^\text{46}\) These attorneys aggressively deploy power, money, and resources to frustrate individual claims and to impede class litigation.\(^\text{47}\) Defense attorneys are obstructionist with-holders of information engaging in various forms of discovery abuse.\(^\text{48}\)
The romantic narrative concludes with disparaging judgments concerning
the amoral defense attorneys who have sold out to protect and preserve the
prerogatives of corporate privilege.49

The final chapter in the romantic class action narrative reflects on
the Supreme Court’s recent class action jurisprudence, regarding litigation
classes50 and classwide arbitration.51 From the plaintiff’s vantage, this
collection of Supreme Court opinions evinces a deeply-held contempt for

Major corporations, like those comprising the tobacco industry, involved
in complex tort or product liability litigations have tremendous incentive to
withhold information; this incentive is directly proportional to the damages
available to successful plaintiffs in those actions. Typically in such cases,
the defendant is a tobacco company with greater wealth, expertise and
resources than the plaintiffs, who are typically individuals or, at most, a
class of individuals all seeking redress for a similar wrong. The defendant
in these cases also has exclusive possession of almost all of the
information necessary for the just adjudication of the claims filed against
it, forcing the plaintiff to rely on the defendant's good-faith compliance
with the discovery rules in order to prove her claims.

Consequently, over the past twenty years, discovery abuse has
become a standard defense tactic in litigating many of the most complex
tort and product liability cases. In particular, the tobacco industry has
developed several evasion strategies of choice, including, but not limited
to, delay, inundating an opponent with reams of useless information, use of
the court system to wage a war of motions and protective orders against an
adverse party, as well as filing patently false and misleading responses to
discovery requests. Every strategy is designed to force the massive
expenditure of frequently scarce plaintiff's resources in order to sort out
the data provided or fight for the enforcement of discovery orders. The net
result of these strategies is obstruction of the process of determining the
truth of a matter and prevention of fair and impartial justice.

See e.g., Michael McCann and William Halton, Review Essay, Ordinary
Heroes vs. Failed Lawyers — Public Interest Litigation in Erin Brockovich and
Other Contemporary Films, 33 Law & Soc. Inquiry 1045, 1052 (2008)(suggesting
that “four motifs add up to a characterization of civil justice that marshals
stereotypes to ridicule ‘civil justice’ as an oxymoron: . . . (1) innocent victims seek
corporate accountability but are stymied by (2) armies of amoral defense attorneys
who best (3) an overmatched and socially maladroit plaintiffs' attorney until (4) a
lay “outsider” ensures the eventual plaintiffs' victory — dramatiz[ing] a plucky
heroine's triumph over a biased, indifferent system of civil disputing.

See Comcast v. Behrends, supra n.13; Amgen Inc. v. Connecticut Retirement

See American Express Corp. v. Italian Colors Restaurant, supra n. 34; AT &
T Mobility LLC v Concepcion, 131 S. Ct. 1740 (2011).
and rejection of class action litigation, evidencing the Court’s support for corporate interests over the protection and well-being of the little guy. In this regard, class action advocates construe the Court’s recent pronouncements as denying access to justice to the poor, uneducated, and the least capable of society’s citizens.

**B. THE DARKER COUNTER-NARRATIVE**

The romantic class action narrative — perpetuated by the plaintiffs’ bar, judicial opinions, and academic adherents — has its counterpart in a darker narrative about class litigation advanced by corporate defendants, skeptical courts, and assorted defense-side interest groups. The defense-side narrative, of course, renders a bleaker portrait of class litigation that counters all aspects of the plaintiffs’ romantic narrative.

Thus, class action commentators have suggested that not all class members are helpless victims in need of assistance in asserting their rights, contending that such sweeping generalizations amount to a form of

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54 See e.g., Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 Notre Dame L. Rev. 1769, 1772 (2005)(describing historic judicial skepticism and hostility to class action litigation, with citation to authorities). An alignment of interest groups and organizations frequently appear as amici in major class litigation, supporting defense positions in these cases. These repeat-player litigants include the Business Roundtable, the Cato Institute, the Chamber of Commerce of the United States, the DRI — The Voice of the Defense Bar, the International Association of Defense Counsel; the National Association of Manufacturers, the Pharmaceutical Research and Manufacturers of America, the Products Liability Advisory Council; the Securities Industry and Financial Markets Association; and the Washington Legal Foundation. In most recent class litigation before the Supreme Court, combinations of these interest groups have filed amici briefs on behalf of the corporate defendants.
unattractive paternalism. In addition, class action critics contend that in many cases class members may not even know that they have been harmed, may not care about minor injuries, and may be entirely disinterested in pursuing litigation. In this version of the narrative, class counsel often are portrayed as stirring up litigation and/or impermissibly soliciting clients in order to pursue the attorney’s own class action agenda, ideological cause, or (more cynically) out-sized legal fees. In the worst version of this narrative, particular class action litigation is the consequence of an attorney’s own ideas and initiative, rather than that of any aggrieved individual seeking attorney advice and classwide relief.

Regarding the alleged problem of asymmetrical resources, defendants contend that it is not always the case that individual litigation is impaired or impeded because of an imbalance of financial resources or informational access. In this regard, individuals with high-value, meritorious claims usually are able to retain capable counsel willing to vigorously pursue relief based on contingency fee arrangements, undercutting the need for aggregation of claims. Thus, in individual litigation where there is likelihood of success on the merits with substantial

55 See e.g., Norman W. Spaulding, Reinterpreting Professional Identity, 74 U. Colo. L. Rev. 1, 71 n. 208(2003)(noting Professor David Luban’s defense of paternalism in public interest litigation, manipulating clients and putting interest of a cause above clients’ interests; citing David Luban, LAWYERS AND JUSTICE: AN ETHICAL STUDY 317-40 (1988)).

56 See Kelly Brilleaux and Stephen G.A. Myers, Attorney Advertising, Reevaluating the 401/403 Balance in Twenty-First Century Mass Torts, 56 No. 2 DRI for Def. 48 (Feb. 2014)(describing effects of broad media advertisement as influencing class litigation by claimants who may not have known about harms or cared about litigation; proposing introduction of evidence of such advertising as it effects class or mass litigation); Samuel M. Hill, Small Claims Class Actions: Deterrence and Due Process Examined, 19 Am. J. Trial Advoc. 147, 159 (Summer 1995)(small claims of class members and typical lack of interest or participation in the litigation places small claimant class action outside the realistic boundaries of the Article III “case or controversy requirement.”); Stacey M. Lantagne, A Matter of National Importance: The Persistent Inefficiencies of Deceptive Advertising Class Actions, 8 J. Bus. & Tech. L. 117, 134 (2013)(lack of interest in making claims, citing Walter v. Hughes Commc'ns, Inc., No. 09-2136 SC, 2011 WL 2650711, at *15-16 (N.D. Cal. July 6, 2011); In re Heartland Payment Sys., 851 F. Supp. 2d at 1047 (only eleven claims were filed from a class of over one hundred million people, “[d]espite a vigorous notice campaign”).

57 Id.
recovery, the playing field is leveled where counsel advance costs and expenses.\(^{58}\)

In addition, in the class action arena, the advent of third-party litigation financing has allowed, supported, and encouraged mass litigation.\(^{59}\) Moreover, it is not always the case that defendants control all relevant information that they withhold from plaintiffs; in some instances, plaintiffs either retain or have access to sufficient relevant evidence to prove up their claims without recourse to burdensome and expensive discovery. Finally, defendants contend that class action plaintiffs wield enormous power in their ability to make excessive and disproportionate discovery requests — sometimes conducting what amounts to “fishing expeditions” — which requests negatively affect ongoing business operations, imposing substantial costs and burdens on defendants.\(^{60}\)

In response to the recently-urged “effective vindication” argument, defendants counter (now supported by the Supreme Court), that the denial of use of the class action mechanism is simply not a denial of an individual’s ability to vindicate his or her rights.\(^{61}\) As such, the effective vindication argument is a rhetorical theory without jurisprudential or practical merit. This argument proceeds from the fundamental principle that no person has a “right” to pursue a claim as a class action; Rule 23 is a

\(^{58}\) See Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149, 162 (2003) (noting that persons with strong claims are most at risk from the monopoly power wielded by class counsel).


\(^{61}\) *American Express Co. v. Italian Colors Restaurant*, supra n.34, 133 S. Ct. at 2309-12.
procedural rule that creates no substantive right to its use. Moreover, judicial foreclosure of a class action does not result in an individual being denied access to court or adjudication of one’s claims; instead, it merely means that an individual must bring suit individually and not as a collective action.

The defense-side counter-narrative to the plaintiffs’ romantic account challenges the broad, conclusory assertions concerning the laudatory and beneficial effects of class litigation. Thus, critics of class actions contend that litigation or settlement classes fail to accomplish compensatory and deterrence goals or at least that these assertions are largely unsupported or unproven. With regard to deterrence, many corporate defendants view class judgments and settlements as a cost of doing business, which costs are subsidized by insurers or passed along to consumers. In addition, class litigation gives primacy to the efficiency rationale at the expense of litigant autonomy for both plaintiffs and defendants, with the sacrifice of fundamental constitutional rights. In this view, judicial interest in efficient docket-clearing through speedy class resolution of mass claims sacrifices defendants’ due process and jury trial rights.

62 Id. at 2309-10.
63 Id.
67 Id.
Perhaps most important, corporate defendants that typically are the target of class litigation repeatedly have argued that class litigation is a burden on ongoing business operations, wasteful, and generally harmful to the overall economy. In a variation of this argument, corporate defendants have long contended that class action litigation — especially the action of a court in granting class certification — amounts to unfair settlement blackmail. Thus, corporate defendants may capitulate to meritless or unsubstantiated claims rather than incur substantial ongoing litigation expenses with the risk of an adverse jury decision.

In their counter-narrative, defense counsel also paint an equally dark and caricatured portrait of plaintiffs’ class counsel, whom they clearly do not embrace as white-hatted heroes in the litigation landscape. Instead, class counsel are viewed as entrepreneurial bounty-hunters stirring up faux class actions in the attorney’s own primary interest of recovering large fees.

In this version of the narrative, class counsel often are portrayed as conflicted agents using poorly-informed plaintiffs as pawns for the attorney’s own ends. At worst, critics of class action litigation perceive plaintiffs’ attorneys to be ethically-challenged and riddled with agency problems. And where objectors intervene to challenge class settlements based on allegation of

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70 Castano v. The American Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996); In the Matter of Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1298-99 (7th Cir. 1995); see also Brief of Retail Litigation Center, Inc. as Amicus Curiae in Support of Petitioners, Comcast Corp. v. Behrend, No. 11-864 (2012) at 4, 2012 WL 3716867 (U.S.) (Appellate Brief).

71 See Redish, WHOLESALE JUSTICE, supra n.66 (class action plaintiffs’ attorneys characterized as free-ranging “bounty hunters”).

72 See Myriam Gilles and Gary B. Friedman, Exploding the Class Action Agency Myth, supra n.42, 155 U. Pa. L. Rev. at 103-4, 112-16 (reviewing arguments based on the agency costs of class litigation and ethical challenges to class representation; rejecting these arguments).
collusion, self-dealing, and selling out class members, class counsel are viewed as the source for breeding satellite litigation.

Finally, defense counsel reject the plaintiffs’ hyperbolic rhetoric concerning recent Supreme Court class action pronouncements, contending that no one is being denied access to justice as a consequence of the Court’s pronouncements. Thus, defendants construe the Court’s opinions as merely restating longstanding, fundamental class action principles, clarifying the application of those principles in particular factual contexts. In addition, the Court’s class action jurisprudence has not uniformly favored corporate interests; for example, the Court consistently has upheld the fraud-on-the-market presumption in securities class litigation, which is a plaintiff-favoring presumption. Moreover, the Court has not presumptively ruled against classwide arbitration, either. Thus, the plaintiffs’ over-heated protestations concerning the Court’s pro-corporate bias — as well as the end of class action litigation generally — is just that: over-heated, bombastic rhetoric designed to engage sympathies of those inspired by the romantic class action narrative.

II. RETHINKING THE ROMANCE AND OTHER DARK TALES

Fifty years of class action experience — since the 1966 amendments — has given rise to two competing extreme narratives of the value and efficacy of class litigation. Is there any way to evaluate and reconcile these Rashomon-like stories, so as to guide reasoned consideration of American class action practice? Each differing narrative contains elements of truth, but taken together, suggest a need for rethinking the class action.

Reformers should frame this debate by asking three questions: (1) whether the current rule effectuates the primary rationales for its existence; (2) whether the rule as implemented breeds satellite litigation problems that undermine its utility; and (3) whether the benefits accruing through the rule’s application outweigh its deleterious effects. If the rule fails to fulfill its purposes and is a litigation-breeding instrument that is not outweighed

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73 See Merriwether, Comcast Corp. v. Behrend: Game Changing, supra n. 34 (contending that recent Supreme Court class action jurisprudence has portended no major change in class action practice); but cf. John Campbell, Unprotected Class: Five decisions, Five Justices, and Wholesale Change to Class Action Law, 13 Wyo. L. Rev. 463 (2013)(contending major shift in class action jurisprudence).


by its benefits, then the need to reform the rule seems in order.

A. EVALUATING THE CLASS ACTION RATIONALES

Commentators and courts traditionally have justified the class action rule and procedure based on three primary rationales. These include the compensation of victims of alleged wrongdoing; deterrence of bad conduct by defendants; and judicial efficiency and economy. Arguably, if the rule as applied has failed to realize (or imperfectly realizes) these goals, then it is fair to question the continued utility of the current rule.

1. COMPENSATION OF VICTIMS OF WRONGDOING

A primary goal of the class action rule is to enable large groups of claimants to recover damages or to obtain injunctive relief as a consequence of alleged wrongdoing by defendants. The Supreme Court and lower federal courts have consistently indicated that this rationale is especially salient in negative value suits or small claims consumer class actions, where individual claimants might be discouraged or unable to pursue relief. Rule 23 permits aggregation of small claims in consumer cases and courts do certify such cases, which typically lead to mass settlements of class claims.

However, there is much that is not known about the actual, eventual compensation meted out to class claimants, either in small-claims consumer class actions or complex litigation based on other substantive theories, such as antitrust, securities, or employment discrimination cases. Although empirical studies report the total aggregate amounts of settlement funds resulting from various class litigation, there are no empirical studies that have drilled down to ascertain what class claimants actually are paid individually for their claims as a result of the class litigation. In reality, virtually all certified class action subsequently settle; very few certified

76 See supra nn. 38-62.
77 Amchem, supra n. 12.
class actions proceed to trial.\textsuperscript{80} Class notice communicates to class members the total class fund achieved by the settling parties; settlement notices do not typically contain information about the payment of individual claims.

Once a court judicially approves a settlement after a fairness hearing, commercial vendors usually handle claims processing. Studies suggest that very small percentages of class members actually file and receive compensation from settlement funds.\textsuperscript{81} In instances where claims rates are low, settlement funds may revert to the defendant or be applied to a \textit{cy pres} purpose, depending on the settlement terms. Clearly, reversionary settlements or \textit{cy pres} relief do not serve the purpose of compensating the actual victims of wrongdoing. In any case, it is difficult, if not impossible, to obtain information concerning payouts to individual class members.

Consequently, there is scant evidence upon which to conclude that class action litigation and settlement actually accomplishes the stated goal of compensating victims of wrongdoing. Published reports of global settlement funds fail to reveal the most crucial information that is needed to assess whether class litigation satisfies this rationale: \textit{i.e.}, whether individual class members actually are compensated adequately for alleged

\textsuperscript{80} Samuel Issacharoff and Richard A. Nagareda, \textit{Class Settlements Under Attack}, 156 U. Pa. L. Rev. 1649, 1650 (2008)(“Settlements dominate the landscape of class actions. The overwhelming majority of civil actions certified to proceed on a class-wide basis and not otherwise resolved by dispositive motions result in settlement, not trial,” citing Robert H. Klonoff et al., \textit{CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION} 415 (2d ed. 2006) (“Relatively few class actions actually go to trial; most settle, either after the certification decision or as trial approaches.”).

\textsuperscript{81} See, e.g., Buchet \textit{v. ITT Consumer Fin. Corp.}, 845 F. Supp. 684, 695 (D. Minn. 1994). In a class settlement with General Motors, “according to the marketing expert hired by \textit{class counsel}, because of the high cost of purchasing a vehicle, the short redemption period, and the restrictions on transfer, \textit{more than half of the class} would obtain no value at all from the settlement;’’ Fred Gramlich, \textit{Scrip Damages in Antitrust Cases}, 31 Antitrust Bull. 261, 274 (1986); Christopher R. Leslie, \textit{The Need to Study Coupon Settlement in Class Action Litigation}, 18 Geo. J. Legal Ethics 1395, 1396-97 (2005)(Many, if not most, coupon settlements have been marked by low participation rates by class members. In his study of antitrust class actions settled by coupon distributions to the class, Gramlich found an average redemption rate of 26.3%. The anecdotal evidence from class action litigation as a whole paints an even bleaker picture, with redemption rates as low as 3% or less\textsuperscript{85}; Brian Wolfman & Alan B. Morrison, \textit{Representing the Unrepresented in Class Actions Seeking Monetary Relief}, 71 N.Y.U. L. Rev. 439, 474 (1996) (discussing case in which one subclass reported a redemption rate of 0.002%).
wrongdoing. On the contrary, evidence from claim administrators suggests that a very high percentage of class members fail to be compensated at all.

2. Deterrence of Bad Conduct by Wrongdoers

The most often-repeated rationale justifying the class action rule is that the rule deters defendants — in the class action arena, most typically corporate defendants — from future bad conduct. Indeed, some scholars have urged that deterrence is the primary purpose of the class action rule, and consequently all class actions should be mandatory in order to maximize the impact of class litigation.\(^82\) The class action deterrence theory is based on the simple concept that the sheer size of a class and the defendant’s potential exposure to massive compensatory and punitive damages induces corporate defendants to refrain from engaging in wrongful conduct.

Similar to the compensation rationale underlying the class action rule, the deterrence theory suffers from a lack of empirical evidence and is based on conjectured hypotheses about corporate behavior. It is likely that in some cases prudent corporate counsel guide their corporate clients’ actions in the shadow of prospective class action litigation. However, it is equally likely that the prospect of future class litigation serves little or no deterrent function; that at least some (if not many) corporate clients view class litigation as a cost of doing business, with a cost pass-along to consumers. We do not know, and social scientists have not been able to empirically measure, the deterrent effect of class litigation on prospective defendants. Thus, judicial and scholarly arguments relating to the deterrent effect of class litigation are largely theoretical, conclusory pronouncements.

Moreover, the deterrence rationale undergirding class litigation also inadequately accounts for the realities of how class litigation evolves. Defendants, typically, will aggressively challenge plaintiffs’ class certification motions. If defendants succeed in opposing class certification, then the class action rule served no use (other than a nuisance purpose). If, however, a court certifies a class action, defendants usually bargain for the

\(^82\) See Fitzpatrick, Do Class Actions Lawyers Make Too Little, supra n. 42 at 2047 (arguing that small claims class actions serve only the function of deterrence); Gilles & Friedman, Exploding the Class Action Agency Myth, supra n. 42 at 136, 139 (same); David Rosenberg, Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss, 88 Va. L. Rev. 1871, 1879-82 (2002)(tort litigation should provide optimal deterrence); David Rosenberg, Class Actions for Mass Torts: Doing Individual Justice by Collective Means, 62 Ind. L.J. 561, 565 (1987)(same).
most financially advantageous settlement terms (i.e., a cheap settlement), and punitive damages typically are removed from the negotiation process. In addition, defendants admit no liability. Consequently, the combination of these settlement factors (cheap settlement funds, no punitive damages, no admission of liability, reversionary or cy pres provisions), significantly undercut the deterrence rationale for class litigation.

Finally, the deterrence rationale for class litigation carries little weight at the extreme margins of class litigation, where corporate defendants are happy to buy off class counsel for the cost of attorney fees, in return for quick and cheap dismissal of class claims. In sum, nuisance value class suits that are quickly compromised at discount rates are unlikely to serve any deterrent function.

3. JUDICIAL EFFICIENCY AND ECONOMY

A third rationale in support of the class action rule posits that class action procedures enhance judicial efficiency and economy, which is largely a utilitarian justification for the rule. In this view, class litigation benefits not only the parties to a massive dispute, but also serves the interests of the federal judiciary which otherwise might be burdened with hundreds or thousands of repetitive, similar claims.

Thus, it is argued, in situations where there are large numbers of claimants with similar injuries arising from common factual or legal questions, it is inefficient to insist that such claims be pursued on an individual basis. This is especially compelling in the instance of small consumer claims, where individuals might not be able effectively to vindicate their rights because of the asymmetrical risks and expenses entailed in individual litigation.

The aggregation of claims, then, helps to relieve docket congestion that might otherwise exist by virtue of the filing of hundreds or thousands of repetitive claims. In addition, aggregating claims allows for economies of scale, leveling the playing field between litigants, and lowering the cost and expense entailed in repeated individual litigation. Finally, it is contended

83 See Abdullah v. U.S. Security Assoc., Inc., 731 F.3d 952, 963-64 (9th Cir. 2013)(principal purpose of Rule 23 is to promote efficiency and economy of litigation); Jay Tidmarsh, Rethinking Adequacy of Representation, 87 Tex. L. Rev. 1137, 1147, 1156 (2009)(Rule 23 embraces rule-utilitarian approach and is primarily a utilitarian device); Note, Locating Investment Asymmetries and Optimal Deterrence in the Mass Tort Class Action, 117 Harv. L. Rev. 2665, 2666 (2004)(“ . . . the most prevalent benefit is administrative efficiency, meaning relatively quick and inexpensive resolution of similar claims”)


that class action litigation, by aggregating claims, contributes to the speedy
resolution of disputes because multiple claims may be resolved through one
proceeding. An often recited justification in favor of class litigation, as
opposed to individual proceedings, is that “justice delayed is justice
denied.” Thus, class litigation arguably serves the three stated goals of
Rule 1: the just, speedy, and efficient resolution of civil disputes.

Similar to the other justifications for the class action rule, the
problem with the efficiency rationale is that there is scant empirical proof
supporting this rationale. For example, we simply do not know whether
there is or would be massive docket congestion in the absence of a class
action rule. With regard to small consumer claims, it is most likely that
virtually no one would pursue these claims on an individual basis, thereby
flooding the courts. Arguably, large numbers of potential small consumer
claimants lack interest in the alleged injury, supporting the theory that these
cases — on a classwide basis — “just ain’t worth it.” Moreover, it is
difficult to assess whether the compensatory awards that eventually are
made to such claimants is worth the bother. If the deterrence rationale is not
compelling – meaning that corporate bad actors are not deterred by small
claims class actions — then it is difficult to understand the need for a class
action rule to pursue small consumer claims, which might be better handled
through robust regulatory oversight, penalties, or other similar non-
adjudicative means.

With regard to more substantial claims, there also is scant evidence
of docket congestion in absence of the class action rule. In the 1980s and
1990s federal courts were gripped by a “crisis mentality” with regard to
mass tort claims, which crises failed to materialize in many instances. In
fact, there has been little evidence that courts have been overwhelmed with
individual suits that might better be pursued on a classwide basis. Persons
with meritorious and substantial damage claims are more likely to pursue
individual litigation (or to opt-out of any certified class), leaving peculiar
aggregations of less valuable or dubious claims. Furthermore, federal judges
have demonstrated that the courts are capable of designing and
implementing case management programs to efficiently process large
numbers of claims individually, as Judge Eduardo Robrero established with

84 See Jamie S. v. Milwaukee Public Schools, 2009 WL 2225419 * 2 (E.D. Wis. July 22, 2009)(justice delayed is justice denied to student class members);
the asbestos docket bequeathed to him in the wake of the Court’s *Amchem*
decision.85

It is true that class action proceedings can achieve economies of scale regarding litigation resources, but the pertinent question is: compared to what? Thus, there is meagre empirical evidence that class litigation contributes to the speedy resolution of claims. Class proceedings are subject to multiple opportunities for litigation posturing and delay; parties can engage in considerable motion and discovery practice prior to class certification. It is not uncommon for class action complaints to be amended several times over the course of proceedings. Notoriously, many class actions drag on for years, including class litigation that eventually settles.

Moreover, class settlement may not result in the conclusion of proceedings, as objectors may pursue appeals from class certification orders or judicial approval of settlements. Furthermore, appellate review may result in reversals or remands of lower court determinations, effectively subjecting class members to further proceedings or putting them out of court altogether after years of contested proceedings. In the final analysis, empirical studies are lacking to show the relative temporal efficiency of class litigation as compared to individual suits arising from the same events, although this repeatedly is stated as a class action truism.

**B. PROBLEMS BRED BY RULE 23 CLASS LITIGATION: INTERPRETING AND APPLYING THE RULE**

Historically, procedural rules have become ripe for reform when their application has become so complex and arcane so as to render the rules intrinsically unfair or — as was the case with the old common law pleading rules — create “traps for the unwary” pleader. Rules should be simple and intended to achieve justice; interpretation and application of the current class action rule arguably does not achieve this goal. Over the span of five decades, the text of Rule 23 has lengthened by accretion and the class action jurisprudence interpreting the rule has mutated into an intricate doctrinal swamp that is often inconsistent and difficult to apply. A few of the problems (and by no means all) enmeshed in application of Rule 23 are suggested below.

1. **Doctrinal Elaboration Breeds Confusion and Inconsistent Principles**

Class action jurisprudence has become so complex that the Wright, Miller & Cooper standard treatise on federal practice and procedure now dedicates four entire volumes to class action practice.\(^{86}\) In addition, two other lengthy treatises separately are devoted to synthesizing class action doctrine.\(^{87}\) As most class action practitioners appreciate, the thousands of class action opinions and orders have created a body of decisional law in which advocates on either side of the docket may find support for virtually any proposition, however conflicting. Rather than clarifying doctrine, courts have instead engendered additional layers of confusion relating to basic principles that govern class procedure.

The problem with the doctrinal complexity and disarray in class action jurisprudence is that it presents litigators with multiple opportunities to submerge class proceedings with endless motions, briefing, and appeals, with consequent delay. In the same fashion that complicated common law pleading inspired endless rounds of reactive pleading that frustrated litigants' ability to reach the merits of the dispute, so too current class action litigation frustrates Rule 23's purposes. In addition, under the old complicated common law pleading rules, litigants could find themselves out of court for technical pleading mistakes. Similarly, doctrinal disputes present class litigants with multiple opportunities for deflecting or postponing engagement with the merits of the dispute, often provoking dismissal of class actions on technical procedural errors.

**a. Definitional Issues**

Current class action jurisprudence presents plaintiffs with arcane traps for the unwary pleader at the very outset of class litigation and concomitantly offers defendants with several opportunities for impeding such litigation in advance of addressing the merits. Among the many doctrinal quagmires that can ensnare prospective plaintiffs at the pleading stage are the implicit requirements that the plaintiff set forth an adequate class definition,\(^{88}\) including whether the class members are ascertainable\(^{89}\)

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\(^{88}\) See Wright, Miller & Kane, *supra* n. 86, 7A *FEDERAL PRACTICE* at § 1760.
and have standing.\textsuperscript{90} Problematically, the principles governing appropriate class definition, standing, and the ascertainability of class members are not consistent across federal courts,\textsuperscript{91} which doctrinal inconsistencies invite gamesmanship and satellite litigation.

In a similar vein, the jurisprudence relating to application of the explicit Rule 23 requirements is likewise complex, inconsistent, incoherent, ambiguous, vague, or muddled. Hence, assuming a pleader capably satisfies the implicit requirements for pleading a class, a plaintiff then carries the burden of satisfying the threshold Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation.\textsuperscript{92} In addition, a plaintiff must plead the type of class action the pleader seeks the court to certify under the Rule 23(b) categories.\textsuperscript{93}

With regard to the standards governing a court’s responsibility in evaluating the Rule 23(a) requirements, decisional law itself likewise is unclear. Thus, though the Supreme Court has endorsed the “rigorous analysis” standard for evaluating class certification motions,\textsuperscript{94} lower federal courts have diverged in their understanding of what the rigorous analysis test requires.\textsuperscript{95} Consequently, class advocates in different jurisdictions may be subject to more stringent or more lax consideration of their efforts to obtain class certification.

Moreover, the principles relating to satisfaction of the Rule 23(a) requirements are a muddle. Indeed, the Supreme Court has confessed that the separate Rule 23(a) requirements of commonality, typicality, and adequacy frequency overlap,\textsuperscript{96} giving rise to the question whether there is a need for these separate requirements. Nonetheless, over the span of five

\textsuperscript{89} See Carrera v. Bayer Corp., 727 F.3d 300, 306-06 (3d Cir. 2013); Marcus v. BMW of North America, LLC, 687 F.3d 583, 592-94 (3d Cir. 2012).
\textsuperscript{90} See Butler v. Sears, Roebuck and Co., 727 F.3d 796 (7th Cir. 2013); In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838 (6th Cir. 2013).
\textsuperscript{91} See authorities cited at Wright, Miller & Kane, supra n. 86; see also Wright, Miller & Kane, 7A FEDERAL PRACTICE at § 1761 (class representative must be a member of the class, addressing standing issues).
\textsuperscript{92} Fed. R. Civ. P. 23(a) – (d). See discussion infra at nn. 96-97.
\textsuperscript{95} See In re Hydrogen Peroxide, supra n. 13, 552 F.3d at 309, 315-320; but cf. Gooch v. Life Investors Ins. Co. of America, 672 F.3d 402, 418 n.8 (6th Cir. 2012)(declining to adopt Third Circuit’s requirement of a showing of class certification requirements by a preponderance of the evidence);  
\textsuperscript{96} Amchem, supra n. 12, 521 U.S. at 625 n. 20.
decades an elaborate, nuanced jurisprudence has developed parsing distinctions among these three threshold requirements, which definitions differ minutely across federal courts but may prove fatal to class certification.97

Finally, when plaintiffs seek certification of a Rule 23(b)(3) damage class action, which requires the court to make a finding of predominance of common questions,98 the Supreme Court and lower federal courts have indicated that the predominance requirement subsumes the Rule 23(a) commonality requirement,99 basically rendering the threshold commonality requirement nugatory in damage class actions.

b. CLASS CATEGORIES

Assuming that class proponents are able to satisfy threshold implicit definitional requirements and Rule 23(a) criteria, parties seeking class certification must plead the type of class action they are asking the court to certify. There are four possible class categories set forth in Rule 23(b),100 and this typography of class categories — that may have made some sense in 1966 — no longer makes sense today. Indeed, class action jurisprudence has progressively merged the different categories, resulting in a category creep that has significantly undermined the utility of these different class categories. Furthermore, the jurisprudence surrounding the appropriate circumstances for certifying the different class categories is in significant disarray.

To begin, the Rule 23(b)(1)(A) class category comparatively is rarely pursued and certified, so as to render it a kind of vestigial appendage to the class action rule. One rarely sees a plaintiff seeking certification of a Rule 23(b)(1)(A) class, and in the rare instances where it is pleaded, it is more often than not because of pleader’s confusion concerning the intended purpose of this class category.101 In addition, courts traditionally have indicated that Rule 23(b)(1)(A) classes were not intended to afford damage

97 See Wright, Miller & Kane, 7A FEDERAL PRACTICE & PROCEDURE at §§ 1763 – 1771 (application of Rule 23(a) criteria, with citation to authorities).
100 Fed. R. Civ. P. 23(b)(1)(A), (b)(1)(B), (b)(2), and (b)(3).
101 See Wright, Miller & Kane, supra n. 88, 7AA Federal Practice and Procedure at §§ 1762-64 (describing nature and purposes of Rule 23(b)(1)(A) and (B) sub-categories.)
or monetary relief to class members. Nonetheless, over time — and as an illustration of category creep — courts have permitted monetary relief to be awarded and have certified Rule 23(b)(1)(A) classes that include damage relief. Once courts began to certify Rule 23(b)(1)(A) damage classes, arguably there was no longer a need for a separate and confusing (b)(1)(A) class category.

The Supreme Court’s decision in *Ortiz v. Fibreboard Corp.* effectively rendered the Rule 23(b)(1)(B) class category largely irrelevant. That decision restrained the use of the limited fund class action to an extremely narrow set of historical antecedents. In addition, the principles governing certification of a Rule 23(b)(1)(B) limited fund class action are so difficult to satisfy that plaintiffs hardly ever seek certification of a (b)(1)(B) class action. Thus, in the intervening fifteen years since the *Ortiz* decision, virtually no courts have certified or approved Rule 23(b)(1)(B) classes.

Moreover, the 2003 amendments to Rule 23 provided discretion to judges to order that notice be given to prospective Rule 23(b)(1) and (b)(2) class members. Because notice can be provided to Rule 23(b)(1) and (b)(2) class members — a due process protection formerly reserved to Rule 23(b)(3) damage class members only — this added provision further eroded conceptual differences among the distinct class categories. Taken together, then, the Rule 23(b)(1)(A) and (b)(1)(B) class categories have essentially outlived their original purposes and currently serve scant useful function in

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102 Id., 7AA FEDERAL PRACTICE AND PROCEDURE at § 1763; see e.g., *In re First American Corp. ERISA Litig.*, 259 F.R.D. 610 (C.D. Cal. 2009)(class certification under Rule 23(b)(1)(A) not appropriate where participants and beneficiaries of employee pension-benefit plan primarily sought monetary damages under ERISA for alleged breach of fiduciary duties).

103 See e.g., *Harris v. Koenig*, 271 F.R.D. 383 (D.D.C. 2010)(class certification appropriate in suit against ERISA plan fiduciaries seeking monetary and injunctive relief since there was risk of inconsistent or varying adjudication with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class).

104 *Ortiz*, supra n. 12.

105 Id., 527 U.S. at 832 - 838.

106 Id., 527 U.S. at 838 - 842.

107 See Wright, Miller & Kane, supra n. 88, Vol. 7AA FEDERAL PRACTICE AND PROCEDURE § 1774 (citing sparse class certification for Rule 23(b)(1)(B) proposed classes post-*Ortiz*; failure of proposed classes to satisfy *Ortiz* criteria).

class action practice, other than to provide opportunities for satellite litigation challenging the improper pleading of such Rule 23(b)(1) classes.

While the Rule 23(b)(2) class action for injunctive and declaratory relief would appear to be the simplest class category to comprehend, it nonetheless also has become enmeshed in doctrinal controversy. Although the Supreme Court in its *Dukes* decision attempted to clarify the circumstances in which damages might or might not be appropriate in a (b)(2) setting, the Court failed to endorse any of the competing, conflicting lower court standards for cases in which damages are sought in the (b)(2) context. Consequently, the appropriateness of Rule 23(b)(2) damage classes remains an open question, subject to varying interpretations across the federal circuits.

Moreover, as indicated above, the 2003 amendments to Rule 23 provided discretion to judges to order that notice be given to prospective Rule 23(b)(2) class members, effectively rendering the (b)(2) similar to a (b)(3) damage class. In some instances, judges have ordered both notice and an opportunity to opt-out to Rule 23(b)(2) class members, where the court has certified a damage class. Arguably, there is no reason for a separate Rule 23(b)(2) class category that merges injunctive and compensatory relief, and also provides for notice and an opt-out right. In such cases, there is little difference between this type of class action and a Rule 23(b)(3) damage class action.

As further proof of class action category creep, evolving Rule 23(b)(2) class action jurisprudence has overlaid a “cohesion” requirement for certification of a Rule 23(b)(2) class. For all practical purposes, the Rule 23(b)(2) cohesion requirement mimics the Rule 23(b)(3) predominance requirement, in that the presence of individual issues among class members will defeat both Rule 23(b)(2) cohesion and Rule 23(b)(3) predominance. Thus, class action doctrine effectively has converged for the Rule 23(b)(2) and Rule 23(b)(3) class categories.

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111 *In re Monumental Life Ins. Co.*, 343 F.3d 331, 341 (5th Cir. 2003).

Finally, the jurisprudence applicable to the Rule 23(b)(3) damage class action, which accounts for the major portion of current class litigation, is riddled with conflicting doctrine relating to the rule’s predominance and superiority requirements.113 Courts are fairly split concerning whether predominance should be evaluated with reference to differences among class members, or reflective of a defendant’s uniform course of conduct.114 Consequently, whether a proposed Rule 23(b)(3) class will be certified or not, often depends on the particular forum in which relief is sought.115 The complicated expressions of tests for predominance and superiority likewise encourage forum shopping among class litigants.

c. **DUE PROCESS PROTECTIONS**

Class action jurisprudence expresses heightened concern for the due process protections of absent class members,116 but practical application of Rule 23 often falls short of accomplishing this lofty rhetorical goal. If the structural provisions of the current rule fail to accomplish this goal, then reform to encourage better protection for class members seems laudable.

As indicated above, the 2003 amendments to Rule 23 provided discretion to judges to order notice in the mandatory Rule 23(b)(1) and (b)(2) classes.117 However, the 2003 amendments did not make such notice mandatory, nor did the amendments require that such class members be provided with an opt-out option. Consequently, the 2003 amendments did not adequately deal with the question of the due process protection of Rule 23(b)(1) and (b)(2) class members, which problem has remained an open question since the Court’s decision in *Philips Petroleum Co. v. Shutts*.118

Moreover, judicial application of the Rule 23(a)(4) adequacy requirement, particularly as it relates to assessing the adequacy of proposed class representatives, often fails to ensure the due process protection of

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113 Fed. R. Cv. P. 23(b)(3); see generally Wright, Miller & Kane, *supra* n. 88, 7AA FEDERAL PRACTICE AND PROCEDURE §§ 1777 – 1779 (citing authorities).
115 *Id.*
116 *Amchem*, 521 U.S. at 625 - 628.
117 *See supra* nn. 108.
absent class members. If it is the case that courts fail to seriously enforce the Rule 23(a)(4) threshold adequacy requirement, it is legitimate to question the purpose of the requirement, other than as mere decoration in Rule 23(a). Similarly, the transposition of the adequacy requirement relating to counsel to Rule 23(g) has negligible effect on court’s cursory evaluation of proposed counsel.

In theory, the Rule 23(e) requirement that a court conduct a hearing to assess the fairness, adequacy, and reasonableness of proposed settlements ought to provide another layer of due process protection for absent class members. In practice, however, the hydraulic pressure for courts to approve settlements routinely leads courts to rubber stamp class action settlement such agreements. Thus, although the enactment of the Class Action Fairness Act in 2005 was intended to address settlement abuses, there is little evidence that courts have constrained dubious settlement practices. Hence, parties have circumvented the CAFA’s intent to eliminate notorious coupon settlements by creating surrogate remedies that mimic coupons but are not so designated, and controversial cy pres and reversionary provisions

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121 See e.g., Tanoh v. Dow Chemical Co., 561 F.3d 945, 952 (9th Cir. 2009)(“Congress enacted CAFA in 2005 to ‘assure the fair and prompt recoveries for class members with legitimate claims; [to] restore the intent of the framers . . . by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and [to] benefit society by encouraging innovation and lowering consumer prices.” CAFA § 2, 119 Stat at 5. As this description makes clear, CAFA was designed primarily to curb perceived abuses of the class action device which, in the view of CAFA’s proponents, had often been used to litigate multi-state or even national class actions in state courts. See id. at 4-5.” See also Lowery v. Alabama Power Co., 483 F.3d 1184 (11th Cir. 2007)(CAFA expanded federal diversity subject matter jurisdiction to combat perceived abuses in class litigation and abusive practices by the plaintiffs’ class counsel); Smith v. Nationwide Prop. & Cas. Ins. Co., 505 F.3d 401, 404 (6th Cir. 2007)(same); Mississippi v. Entergy Mississippi, Inc., 2012 WL 3704935 at *4 (S.D. Miss. Aug. 25, 2012)(same); Proffitt v. Abbott Labs., 2008 WL 4401367 (E.D. Tenn. Sept. 23, 2008)(same).

122 See David L. Aronoff and Saul S. Rostamian, Navigating the Minefield:
continue to be included in settlement agreements. Moreover, courts continue to routinely approve outsized and substantial fee awards, often over the protests of objectors.

Lastly, American class action jurisprudence has long resisted addressing due process concerns through a lens of participatory democracy, instead defaulting to the Rule 23’s preference for an opt-out procedure as a surrogate mechanism for consent to jurisdiction. The European Union countries recently have endorsed the opt-in principle for its model regime


for collective redress mechanisms.\textsuperscript{126} In American class litigation, then, it remains questionable whether Rule 23 as applied adequately protects the individual autonomy interests of absent class members.

\textbf{C. BALANCING BENEFICIAL EFFECTS AND DELETERIOUS CONSEQUENCES}

The question whether Rule 23 needs radical reform should be answered by balancing the rule’s beneficial effects weighed against its deleterious consequences. The class action rule does allow for aggregation of common claims and empower individual litigants through collective action. It does contribute to economies of scale in pursuing relief. The class action arguably is an especially powerful tool with regard to seeking relief for small consumer claims. But, on balance, class litigation as it is currently practiced has engendered an array of undesirable consequences that cannot be overlooked. Many of these adverse effects have developed because of the complex and arcane jurisprudence that has accreted to the rule, permitting strategic gamesmanship that undermines and subverts the rule’s utility. Some of these less than desirable consequences of the class action rule are discussed below.

\textbf{1. EFFECTUATING OR UNDERMINING THE GOALS OF RULE 1?}

As indicated above, class action procedure is lauded because it arguably supports the goals of Rule 1 to achieve the just, speedy and efficient resolution of large scale, complex litigation. In addition, class action procedure is lauded because, in theory, it exerts a powerful deterrent effect on potential corporate wrong-doers. While there is much to admire in the theory of class litigation, in practice, however, these lofty aspirations often fall short.

Securities class actions provide an interesting illustration of the sometimes perverse effects of class litigation. In many ways, securities class litigation presents the archetype of the much-praised small claims action. However, the practical pursuit of securities actions demonstrates

\begin{footnotesize}
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how doctrinal exegesis has contributed to gamesmanship and distortions in the class action arena. Arguably, securities class actions fail to effectuate the chief goals of the class action rule: compensation of victims, deterrence of wrongful conduct, and efficient resolution of disputes.

Securities class actions benefit from relatively easier class certification because of the fraud on the market presumption applicable to such actions. Consequently, the virtually routine certification of securities class actions exercises a strong *in terrorem* effect on defendants, often forcing settlement without regard to the merits of the underlying claims. In securities class actions, defendants will enter in questionable settlements even if they are faced with a small chance of devastating losses. This is true for other types of class litigation, as well.

The *in terrorem* effect of a certified securities class action is so powerful that virtually no securities class action ever goes to trial. Since 1995, of the 3,988 securities class actions filed, only 14 went to a trial verdict, representing one-third of 1% of the cases. In 2012, no securities class action went to a trial verdict.

The lopsided risks in the securities class arena, then, have inspired a nuclear-proliferation of such class actions. Industry observers indicate that in any five year period, there is a 10% chance that any publically-held corporation will be sued in a Rule 10(b)(5) class action. Ironically, advocates of the fraud on the market presumption believed that it would curtail securities fraud class actions, but this has proven wrong. In the period 1988-91, such lawsuits tripled. Moreover, since enactment of the Private Securities Litigation Reform Act in 1995, which was intended to rein-in abusive securities class litigation, the number of securities class actions has increased through 2012.

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127 See supra n. 74.
129 See *In the Matter of Rhone-Poulenc Rorer*, supra n. 12.
130 Brief for Petitioners, *Halliburton*, supra n. 128 at 41.
131 *Id.* at 41-42.
133 Brief for Petitioners, *Halliburton*, supra n. 128 at 40.
Securities class litigation, arguably, has failed to effectuate the rationale to compensate victims of wrong-doing. Evidence suggests that securities fraud settlements poorly compensate alleged victims. Thus, in the period 1996-2010 the median securities settlements returned only 2.8% of plaintiff losses; in 2012, the percentage was even lower, at 1.8%. Moreover, these compensation values represent gross returns before accounting for huge transaction costs, such as attorney fees, litigation expenses, officers and directors insurance, business interruption costs, as well as the adverse publicity and stigma that attaches to such litigation.

Moreover, securities class litigation arguably fails to deter culpable parties. Thus, the class deterrent effect is muted because the corporation and its insurers, rather than the corporation’s agents, pay settlements. It is extremely rare for executives or directors to personally pay for any wrongdoing; culpable individuals pay less than one-half of 1% of settlements. Instead, insurers pay approximately 68% of settlement judgments, and companies pay 31%. In the securities class action arena, then, investors themselves wind up paying judgments. It has been observed that this creates a perverse system where the innocent pay settlements and the guilty do not, and thus constitutes an arrangement that undermines deterrence.

Finally, securities class litigation offers a counter-example of the efficiency rationale undergirding class litigation. Hence, commentators have noted that securities class actions consume excessive judicial resources, observing that 60-70% of the cases that settle require more than

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136 Id. at 41-42.
137 Id. at 43.
138 Id. at 42-43 (noting that “The costs of class actions – in attorney fees and other expenses – constitutes a deadweight loss, simply rearranging shareholders’ own money, minus a cut for the lawyers;” and that is a “juicy cut”: with plaintiffs’ attorney fees constituting 23-32% of aggregated settlements and defendants fees rivaling that, no matter what the outcome).
139 Id. at 42 (noting that “The costs of securities class actions – both settlement payments and the litigation expenses of both sides – fall largely on the defendant corporation, which means that its shareholders ultimately bear these costs indirectly and often inequitably.”
140 Id. (concluding that “Expansion of private class actions leads to large judgments, payable in the last analysis by innocent investors, for the benefit of speculators and their lawyers.”).
141 Id. (noting that “most of the class will lose more as holders than they will gain as buyers;” that settlements are worse for undiversified shareholders, who have to share the cost of litigation, with no benefit).
142 Id. at 43-44.
three years to resolve. In addition, 20% of securities class actions take more than five years to resolve.

2. Invitation to Unethical Conduct; Principal Agency Problems; Champerty and Stirring Up Litigation

Briefly, another negative consequence of modern class action practice is that attorney fee incentives are so substantial as to invite unethical professional conduct, or old-fashioned champerty. Although class action litigation has inspired a considerable literature relating to the principal-agency problems that adhere in class litigation, in actual practice there are few constraints on unethical conduct. Because the primary checks on unethical practice are centered in adequacy requirements, lax judicial oversight often fails to detect, restrain, or otherwise chastise attorney misconduct at the expense of absent class members. In addition, objectors to dubious class settlements have proven to be relatively weak protectors of class interests, as most courts summarily dismiss objections to settlements.

In addition, the substantial fee incentives attached to class settlements have contributed to the stirring up of class litigation; thus, no sooner does any product defect or consumer issue emerge than attorneys file multiple, repetitive class actions across the country. The pervasiveness of modern social media outlets contributes to widespread dissemination of information about filed class litigation, with concomitant client solicitation urging joinder in such actions. In the romantic narrative of class litigation this is positively characterized as the exercise of private attorneys general vindicating the rights of injured claimants; in the counter-narrative, such

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143 Id. at 44-45 (characterizing securities class actions as “gluttonous consumers of judicial resources.”)
144 Id. at 45.
conduct represents private “bounty-hunters” engaged in entrepreneurial litigation.\textsuperscript{146} Similar to problems with lax judicial oversight of unethical attorney conduct in the class settlement arena, courts largely ignore claims of champerty or stirring up of class litigation.\textsuperscript{147}

3. PUBLIC CONFIDENCE IN JUDICIAL SYSTEM

In the end, those who would consider possible reform of the American class action rule might usefully question whether such current class action practice instills public confidence in the judicial system, or not. While there is much to admire in the concept of the class action rule, it is debatable whether actual class action practice contributes to public confidence in the legal system. We do not know. The answer to this question may depend on the extent to which any person places credence and has faith in the romantic class action narrative or instead embraces the counter-narrative of the darker side of class litigation.

Class action litigation is widely reported throughout modern media outlets, including huge class awards and attorney fees. Consequently, it seems likely that there is a fair measure of public awareness about this form of litigation. It is difficult to assess, however, whether citizens perceive class litigation as an effective vehicle for vindicating individual claims, or whether class litigation has instead bred some degree of cynicism about the legal profession. Moreover, there is a dearth of commentary regarding claimant satisfaction with the results of class litigation or satisfaction about the attorneys who engage in this practice. If it is the case that class litigation has become a focal point for cynicism about the profession and the judicial system, then reform to counteract the sources of this cynicism seem in order.


III. **ENVISIONING A MODIFIED CLASS ACTION RULE**

The Advisory Committee on Civil Rules is again considering amendment to Rule 23, a comprehensive project that it undertook in 1991, but abandoned by 1997. The Committee then amended the rule again in 2003, to add provisions relating to the appointment of class counsel and attorney fees and other minor revisions. The Committee is once more considering amending the rule to add a provision relating to settlement classes, an amendment that was withdrawn in the late 1990s after considerable debate within the practicing bar and academic community.

This article instead suggests a more radical revision of the class action rule because the rule arguably no longer serves its stated purposes, has proved inefficient and unfair, has inspired entrepreneurial litigation, and has engendered an arcane, complex jurisprudence that contributes to gamesmanship and traps for the unwary. In addition, a class action practice that is characterized by substantial attorney fee awards and slight returns to class members may have engendered cynicism about the legal system.

In 1991, at the outset of the Advisory Committee’s review of Rule 23, the Committee initially considered revamping the entire rule. That approach was rejected after considerable resistance from the practicing bar. This article invites the Advisory Committee to consider a wholesale rethinking of the Rule 23 in light of what we know about the actual practice of class litigation. These proposed principles are intended to simplify the rule, return it to original purposes, reduce doctrinal confusions, mitigate abusive practices, eliminate gamesmanship and traps for the unwary litigator, and instill faith in the legal system.

The following sets forth a set of guiding principles intended as a framework for considering a radical revamping of the class action rule and practice. Clearly, some of these concepts present challenges for

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148 See 1-4 Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23 (1997);
149 Fed. R. Civ. P. 23(g), (h).
150 See e.g., Fed. R. Civ. P. 23(c)(2)(A)(permitting discretionary notice to Rule 23(b)(1) and (b)(2) classes; Fed. R. Civ. P. 23(e)(requiring a fairness hearing for judicial evaluation of proposed settlements).
codification in a rule; some may be unsuitable for rule reform because of constitutional limitations imposed by the Rules Enabling Act.\textsuperscript{153} Instead, some suggestions might be more appropriate for statutory consideration.

A. \textit{“One Class Action” – Elimination of Class Categories}

As suggested above,\textsuperscript{154} the current Rule 23(b) class categories are either moribund artifacts of the 1966 amendments (the (b)(1) class categories), or doctrinally problematic (the (b)(2) and (b)(3) categories). In addition, the separate class categories have experienced substantial category creep or erosion, rendering class distinctions relatively meaningless. Thus, the introduction of discretionary notice for mandatory classes has essentially merged all class categories, while simultaneously retaining the conundrum that only (b)(3) class members are entitled to opt-out. In essence, the Rule 23(b) categories represent nothing so much as mindless formalism that affords litigants opportunities for gamesmanship, contributing to unnecessary expense and delay.

The current requirement that proposed class actions be pleaded under one or more of the Rule 23(b) categories brings to mind the old common law requirement that petitioners plead their causes through appropriate forms of action, based on appropriate writs. The complicated writ system, which served to frustrate rather than enhance justice, was famously abandoned by eighteenth century legal reformers. The centerpiece of the eighteenth century reforms was to abolish all pre-existing forms of action and the complicated writ system. In one fell swoop the reforms ended decades of legal obfuscation, a principle that was then embedded in the American Field Code,\textsuperscript{155} and the Federal Rules of Civil Procedure.\textsuperscript{156}

The class action rule might be revised to reflect the reality that, in essence, we have form of class action, and it should simply be called “a class action.” The Rule 23(b) categories should be eliminated entirely as cumbersome artifacts of the 1966 amendment process. However rule

\textsuperscript{153} 28 U.S.C. §§ 2071 - 72.
\textsuperscript{154} See supra nn.100-115.
\textsuperscript{155} See 1848 N.Y. LAWS ch. 379 § 62. The Field Code provided:

The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and, there shall be in this state, hereafter, but one form of action, for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action.

\textsuperscript{156} See Fed. R. Civ. P. 2 (Rule 2 (“One Form of Action”), which provides: “There shall be one form of action to be known as ‘civil action’”).
reformers might have intended the Rule 23(b) categories to be implemented, the separate class categories have outlived their functional usefulness in the twenty-first century. Instead, the class categories merely serve as formalistic impediments to resolving aggregate litigation disputes.

Ironically, rather than embracing the concept that the class categories essentially have merged, the Advisory Committee on Civil Rules is resuscitating the proposal to add a new class category for settlement classes. The proposal to add a new settlement class category was scuttled in the late 1990s, but may gain traction in this new round of rule reform. The proposal to add a settlement class provision reflects the lamentable trend to modify rules by gradual accretion, rather than to contemplate meaningful wholesale reform.

B. PROVIDE SOLELY FOR INJUNCTIVE RELIEF ACTIONS; ELIMINATE DAMAGE CLASS ACTIONS/NEGATIVE VALUE SUITS

Arguably — and controversially — the major driver of class action abuse since the 1966 amendments has centered on the Rule 23(b)(3) damage class action. The damage class action was the invention of the 1966 rulemakers; there were virtually no damage class actions prior to the 1966 revision of the Rule which added the (b)(3) provision. With the advent mass tort litigation crisis in the 1980s and 1990s, followed by the wave of consumer class actions in the twenty-first century, damage class actions now dominate the litigation landscape.

The ascendancy of the damage class action has been accompanied by the panoply of problems that bring class litigation into disrepute. The damage class action, carrying with it the prospect of substantial fees awards, has incentivized class litigation as big business. This, in turn, has engendered a litany of abusive class behavior, that has been the object of

157 See supra n. 151.
158 Id.
159 See generally Proposed Rules of Civil Procedure for the United States District Courts, 39 F.R.D. 69, 103 (1966) (discussing creation of Rule 23(b)(3) category); MANUAL FOR COMPLEX LITIGATION § 21, at 243 (4th ed. 2004) (“Since 1966, when Federal Rule of Civil Procedure 23 was amended to add the damages class action under Rule 23(b)(3), class action litigation has greatly expanded.”)
160 Brandon L. Garrett, Aggregation and Constitutional Rights, 88 Notre Dame L. Rev. 593, 614-15 (2012)(As one group of researchers concluded, “[t]he data tell us that the world of class actions . . . was primarily a world of Rule 23(b)(3) damage class actions, not the world of civil rights and other social policy reform litigation that . . . the 1966 rule drafters had in mind.”)(citation omitted).
much of the criticism of class litigation: entrepreneurial lawyering (Redish’s “bounty hunters”) stirring up class litigation; strike suits of dubious merit; self-serving counsel selling out class members (principal-agency problems); problematic settlements green-lighted by accommodating judicial officers (inadequate due process protections, reversionary provisions, coupon settlements, _cy pres_ awards); and insufficient or negligible compensation to class claimants. Perhaps the best evidence that the damage class action has been transformed into a lucrative business enterprise is the advent of third-party financing mechanisms to subsidize such litigation,\(^{161}\) with the prospect of substantial returns to litigation investors.

Many of the class action harms that have developed in the recent past would be avoided with elimination of the damage class action from the rule. This is not far-fetched: the damage class action did not exist before 1966. Lacking the fee incentives provided by the damage class action, much of the current entrepreneurial class litigation that now infuses the legal landscape would disappear. Thus, a reformed class action practice might return the class action to its primary function in the 1960s: the injunctive relief class only. Reformers are invited to envision a legal landscape without the damage class action, but that retains the injunctive relief class.

Advocates of the damage class action imbue it with almost religious-like qualities, as the major vehicle for seeking redress of small consumer claims that might otherwise go unrelieved. But if small claims consumer actions, in reality, serve a slight deterrent function and provide scant compensatory redress to class members, it is fair to question the continued legitimacy of a class action category that exists primarily to remunerate (and reward) entrepreneurial attorneys with outsized fee awards.

The corporate behavior that gives rise to small claim harms ought to be dealt with through regulatory action, including penalties, fines, product recalls or withdrawals, or criminal sanctions. The plaintiffs’ default argument against recourse to regulatory control contends that the United States has weak regulatory regimes. But the answer to this assertion is not to promote a class action system with its own egregious problems, but instead to advocate and labor for more robust regulatory oversight and enforcement systems.

\section*{C. Provide Notice and Opt-In Principle}

The current Rule 23 and accompanying class action jurisprudence provides for a mishmash of notice provisions, some obligatory and some

\footnote{\textit{See supra} n. 59.}
discretionary, depending on class category. In addition, notwithstanding the fact that notice may be ordered in (b)(1) and (b)(2) classes, the damage class is the only class category that requires that class members be offered the opportunity to opt-out or exit the class. Further muddling this terrain, at least some adventuresome judges have ordered that (b)(2) class claimants be afforded an opt-out right. These doctrinal inconsistencies have engendered the so-called Shutts due process question, which the Supreme Court has yet to resolve.

A revised class action rule could resolve and eliminate these doctrinal inconsistencies by requiring notice to claimants in any class action. In addition, in order to anchor class litigation in principles of participatory democracy and litigant autonomy, a revised class action rule would be based on the opt-in principle, rather than the current opt-out regime. Class jurisprudence would no longer have to rely on the artifice of implied consent doctrine; instead, class members would affirm their desire to join class litigation by assenting to the representation.

D. Preliminary Merits Review

A great deal of time, energy, and resources currently are devoted to the class certification process at the outset of class litigation. As indicated above, class certification proceedings are governed by an elaborate jurisprudence relating to implicit class requirements and Rule 23(a) threshold prerequisites. The entire class certification process has become the major, dysfunctional battlefield for protracted conflict among parties that has little to do with seeking justice on the merits of the underlying dispute. The class certification process, then, ought to be jettisoned in favor of a procedure that instead ensures that plausibly meritorious claims are adjudicated on an aggregate basis.
The implicit requirement for an adequate class definition has become a pleading minefield for plaintiffs, while the ascertainability requirement has inspired a peculiar game of hide and seek, which can now frustrate class certification at the pleading stage. The Rule 23(a) requirements fare no better. The Rule 23(a) numerosity requirement has become a quaint appendage in light of the size of most contemporary classes, accompanied by arcane jurisprudential eddies focusing on such oddities as geographic dispersion of the class. Rule 23(a)(2) commonality has been substantially written out of the rule in (b)(3) class actions where predominance subsumes the requirement; in (b)(1) and (b)(2) classes, the cohesion doctrine reintroduces the predominance principle into the commonality requirement. Moreover, courts disagree on the quality and nature of commonality sufficient to satisfy the requirement, opening substantial opportunities for legal contention.

Similarly, class action jurisprudence has long struggled with the Rule 23(a)(3) typicality requirement, often defining the concept in circular manner, or indicating overlap with commonality and adequacy. And, as indicated above, courts generally pay lip service to the Rule 23(a)(4) adequacy requirement, rendering this prerequisite a mere decoration on the rule. Finally, the requirement that class proponents request certification based on one or more Rule 23(b) class categories is bedeviled by the arcane jurisprudence that now attaches to these class categories, as indicated above.

The entire class certification process, then, frequently resembles a complex jousting exercise which results depend more often than not on the forum in which proponents seek class certification. In addition to the waste and inefficiencies engendered by the class certification process, one’s sense of justice ought to be offended by inconsistent certification orders that vary by venue. Thus, similar to the suggestion that the Rule 23(b) categories be eliminated, the Rule 23(a) standards likewise ought to be excised from the rule. These prerequisites — constituting an incoherent and conflicting body of principles — ought to be jettisoned in favor of a meaningful threshold judicial inquiry into the need for collective redress of grievances.

Proposed class litigation ought not to be bogged down at the outset with intricate arcane threshold inquiries that now require expensive pre-certification discovery, including expert witness discovery and Daubert evidentiary hearings.167 A threshold pleading of minimal commonality (not predominance) ought to be accorded presumptive validity and all that is needed to plead an action.168 Furthermore, class proceedings ought to

167 See e.g., Wal-Mart Stores, Inc., supra n. 13; In re Hydrogen Peroxide, supra n. 13.
168 See John Beisner, Karl Thompson & Allison Orr Larsen, Canadian Class
continue until validly challenged by parties opposing the class. To counter-balance this easy presumption, defendants ought to be afforded an early, preliminary opportunity to challenge the underlying theories and merits of the proposed action.

A major problem with current class action practice is the reluctance of courts to consider and rule on threshold dispositive motions prior to evaluating a class certification motion, even though the Federal Judicial Center has indicated that these motions should be addressed at an early stage in the case. The legal arena would be improved by the recognition that not all proposed class actions are meritorious, and that at least some are advanced as dubious, nuisance strike-suits.

A number of commentators, then, have suggested that courts should be empowered to make a preliminary determination of the merits of proposed class litigation at the certification stage. A possible revision to


class action proceedings would eliminate the current Rule 23(a) and (b) inquiries and instead focus a court’s attention on preliminary inquiry into the merits of a proposed class litigation, based on Rule 12(b)(6) or summary judgment-like motions. In this fashion courts could permit merits-based contentions to be advanced and evaluated at the outset of proposed aggregate litigation, in order to avert the inefficiencies generated by permitting non-meritorious or dubious actions to proceed.

E. FINANCING; ATTORNEY FEES; LOSER PAY RULE

In 2003 the Advisory Committee added a Rule 23(h) provision relating to attorney fees; the rule does not prescribe any particular fee award methodology, but the Advisory Committee Note suggests possible approaches to fee awards. The adoption of Rule 23(h) was intended to codify existing fee award practices, embracing both the lodestar and percentage of the benefit fund methodologies. The rule provision relating to prescriptions concerning attorney fee award raises Rules Enabling Act problems, to the extent that fee setting implicates substantive law. Thus, any reconsideration of attorney fee awards might appropriately be addressed by legislative action rather than rule reform.

A good deal of criticism of current class action practice centers on the often controversial, outsized fee awards that may bear little relationship to the time and effort expended by counsel, the nature of the underlying dispute, or the compensatory awards to class claimants. Needless to say, class action advocates are vocal defenders of the current system of fee awards. Nonetheless, attorney fee awards remain a lightening-rod for cynicism about class litigation and are the object of substantial disapproval abroad. In addition, as suggested above, the prospect of sizeable attorney
fee awards undoubtedly is the major driver of the exponential growth of Rule 23(b)(3) damage class actions in the twenty-first century, inspiring not only entrepreneurial litigation, but third-party financing schemes.

Reform of the attorney fee system and litigation financing would serve to filter out exploitative, non-meritorious class litigation. At the extreme of developing practices, third-party financing ought to be barred because it incentivizes class litigation by non-party actors who are prompted by a profit motive — and not necessarily the best interests of class members. In addition, third-party financing has introduced challenging ethical issues into class litigation, not the least of which is non-party control over litigation.  

Instead, based on various models abroad, class litigation beneficially might be publically financed.  

Revenue to finance class litigation might be generated by a minimal income tax check-off, similar to the current financing of election campaigns. In this manner, public-spirited individuals concerned about access to justice through class action litigation could support this conviction, while those opposing class litigation could decline. Furthermore, class action attorney fees might be based on legislatively determined fee schedules, to enable counsel to know in advance the reasonable range of fee awards for successful prosecution of a class action. Finally, a legislatively-enacted loser pay rule would serve to advance the 

arrangements for class action financing); Tina Leia Russell, Exporting Class Actions to the European Union, 28 B.U. Int’l L.J. 141, 150, 153, 179 (2010)(noting European criticism of American class action procedure with meagre returns to class members but large fee awards to class counsel).


adjudication of meritorious aggregate grievances, while tempering enthusiasm for marginal class action strike suits.

F. APPOINTMENT OF CLASS COUNSEL

Rule 23(g), added in 2003, sets forth standards for judicial appointment of class counsel.178 Similar to Rule 23(h), the class counsel provision was intended to codify existing principles relating to appointment of class counsel and adequacy of class counsel. In large scale, complex cases this has sometimes led to judicial review of multiple petitions for appointment as class counsel.179

In the twenty-first century, class action litigation has become a highly specialized practice, pursued by both experienced counsel as well as less-experienced novices lured by the siren-song of class litigation. In the class action arena, both clients and the judicial system are best served when committed, experienced class litigators with sufficient resources pursue such advocacy.

To this end, it might useful to create a national roster of veteran class litigators who are pre-qualified as class action specialists proficient to serve in the capacity of class counsel. Many states now certify attorneys in specialized practice areas; class litigation might be considerably improved by pre-screening mechanisms that assist courts and litigants with certified competent counsel to vigorously represent the interests of class members.

G. SETTLEMENT AND FAIRNESS HEARINGS

Rule 23(e) provides for the current practice of a fairness hearing when parties have reached a negotiated settlement. This is a good provision, and there seems little compelling need to create a new, separate settlement class provision to further complicate the existing rule. If the class action rule were revised to eliminate the Rule 23(a) and (b) requirements, then back-end scrutiny of class certification standards would be obviated. There would be no need to create a settlement class category subject to different standards than litigation classes.

Instead, class action practice would be improved by more robust judicial scrutiny of settlement agreements, rather than pro forma, rubber-
stamping reviews that simply endorse proffers by the settling parties. Institutionalizing a role for professional objectors or independent class guardians might assist in the process of objectively evaluating the fairness, adequacy, and reasonableness of proposed settlements. Obviously, the need for more meaningful judicial scrutiny of class settlements cannot be mandated by rule or statute, but must be generated by legal culture.

Moreover, current objections to class action settlements often center on inadequate compensation to class members; inadequate representation; reversionary and *cy pres* provisions; and dubious coupon-like remedies (among other criticisms). Many, if not most of these points of contention are generated as a consequence of the settlement of damage class actions, which problems would disappear if damage class actions were no longer permitted under the rule.

**Conclusion**

Consideration of class action litigation has largely degenerated into a partisan, ideological debate, with neither side listening to the other. Advocates for class action litigation persist in a romantic narrative, refusing to give credence to suggestions of class action abuse. In addition, class action proponents resist any change to class action practice or jurisprudence that, in their view, would deny access to justice. Critics of class action litigation, on the other hand, refuse to acknowledge the need for or benefits of some class litigation, instead broadly viewing class litigation as an unfair economic drag on the country’s welfare. Critics, then, applaud reform efforts that would constrain class litigation. Thus, the debate over class litigation reform often is reduced to hyperbolic, rhetorical posturing.

The class action rule has been amended several times and the Advisory Committee on Civil Rules has returned to a reconsideration of Rule 23. The Advisory Committee largely fashions rule reform through incremental accretion to the existing rules; boldness is not the signature quality of the Committee. Therefore, consistent with past practice, it is likely that the Committee will propose marginal changes to Rule 23 that will in turn inspire new doctrinal confusion, gamesmanship, and conflicting interpretation. And, inevitably, any proposed changes to Rule 23 are likely

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to encounter heated partisan resistance from both sides of the litigating docket.

What the Advisory Committee will not do is to consider any radical reform of the class action rule or practice. It might be useful, however, to recognize that class action practice under Rule 23 has become considerably dysfunctional; therefore, radical rethinking might be in order. The rulemakers recognized that the original Rule 23 had been rendered dysfunctional by the early 1960s; perhaps it is time to acknowledge this is true for the 1966 amended rule.

The class action rule is not a bad thing; it is just not working, or it is working poorly. The premise underlying this article is that there is scant evidence that class action litigation as practiced accomplishes the stated goals of compensation, deterrence, and efficiency. In addition, many of the alleged class action abuses that are the subject of criticism arise from the damage class action, a type of class action essentially invented in 1966. Moreover, current Rule 23 functions poorly because the web of accumulated class action jurisprudence serves as an inefficient impediment to the achievement of meaningful collective redress. Thus, to this end, the class action rule ought to be revisited to return it to a simplified form, to better serve the ends of justice.

As indicated above, class action litigation has now become a lucrative business with numerous stakeholders in the current system, including litigants, the courts, commercial notice vendors, and third-party financiers. Consequently, there is much in this set of proposals to raise the ire of every actor involved in class litigation. For example, plaintiffs’ attorneys will recoil at the prospect of the demise of the damage class action; corporate defendants will welcome this suggestion. Corporate defendants will recoil at the prospect of presumptive class proceedings based on easy commonality; plaintiffs will embrace such a proposal as advancing the interests of justice. Plaintiffs will object to any preliminary assessment of the merits of a proposed class action; defendants will view this as a sensible mechanism for screening dubious strike suits. Defendants will appreciate constraints on third-party financing and fee awards as rational modifications to a system of perverse litigation-inducing incentives; plaintiffs will abhor such constraints as violations of freedom of contract and denials of access to justice. Both sides of the docket and the judiciary are likely to rebel at the thought of an opt-in principle replacing the current opt-out regime.

There can be no illusion that the Advisory Committee on Civil Rules would even consider any of these proposals; moreover, virtually all such proposals would be dead on arrival were they to be proposed for notice and
comment. The proposals suggested here, then, are destined to be relegated to that densely populated realm of impractical ivory tower professorial musings. In the final analysis, powerful forces inevitably will converge to frustrate meaningful reform of class action practice: namely, stakeholders who have too much invested in the current system — however dysfunctional — to desire change, and an Advisory Committee that is timid, conservative, and constrained by political forces.

It is, then, nothing short of a wonder that the rule reformers in the early 1960s were able to create an entirely new class action rule. At best, this article invites consideration and debate concerning what the litigation universe would look like under a different collective redress regime.