

# NEW YORK UNIVERSITY LAW REVIEW

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VOLUME 71

APRIL-MAY 1996

NUMBER 1

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## *FOREWORD*

### FEDERAL CLASS ACTIONS AFTER 30 YEARS

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The papers collected in this volume were presented at an April 21-22, 1995 Research Conference on Class Actions and Related Issues in Complex Litigation, sponsored by New York University School of Law's Institute of Judicial Administration. The Conference brought together the leading jurists, lawyers, and academics in the field for two days of sustained dialogue to address whether the modern class action, as it has evolved in the thirty years since the 1966 amendments to Rule 23 of the Federal Rules of Civil Procedure, is in need of reform and, if so, what shape reform should take. The gathering included the members of the Advisory Committee on the Civil Rules of the United States Judicial Conference and Judges Patrick Higginbotham and Sam Pointer, the Committee's present and former chairs, respectively; this provided a special opportunity for public input into the federal rulemaking process.

Class actions are an important but ever more controversial vehicle for private litigation. Supporters offer a picture of "shining knights"—to borrow a term from Professor Arthur Miller's influential 1979 article<sup>1</sup>—performing functions indispensable to a meaningful

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<sup>1</sup> Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 Harv. L. Rev. 664 (1979).

system of justice.<sup>2</sup> The class action in this view solves a problem of collective action: violations of the law causing small harms to large numbers of people otherwise would go unredressed because the costs to individuals of mounting a lawsuit would exceed any conceivable benefits to those individuals.<sup>3</sup> Class actions are also thought to provide a less costly alternative for claims that would support individual lawsuits. A good example would be a single-event disaster, like a plane crash, where separate lawsuits risk repetitive adjudication of common issues and inconsistent outcomes; minimization of such costs would yield benefits for the parties and the public.

Class actions also have their dark, "Frankenstein monster" side, to use again a phrase from Professor Miller's article. One source of criticism is that class actions allow lawyers—acting essentially as entrepreneurs without real clients—to engage in a form of "legalized blackmail."<sup>4</sup> This is due to the fact that the sheer costs of defending against class actions create nontrivial settlement values irrespective of the underlying merits of the claims. A second group of critics emphasize the problem of agency costs: lawyers and their selected class representatives are viewed as agents without principals ready to settle claims that sacrifice the welfare of passive members of the class.<sup>5</sup> While present in litigated dispositions, the risk of conflict of interest is heightened when class claims are settled and especially when courts certify class actions for settlement purposes only.<sup>6</sup>

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<sup>2</sup> For an excellent history of the evolution of the class action, see Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* (1987).

<sup>3</sup> This "private attorney-general" model of the class action was much influenced by Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 *U. Chi. L. Rev.* 684 (1941).

<sup>4</sup> Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 *Colum. L. Rev.* 1, 9 (1971) ("Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure—it is a form of legalized blackmail.").

<sup>5</sup> See, e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 *Colum. L. Rev.* 1343, 1346 (1995) (observing that "individual plaintiffs have weak to nonexistent control over their attorneys across the mass tort context for reasons that are inherent to the economics of mass tort litigation"); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 *U. Chi. L. Rev.* 1, 6 (1991) (proposing auction in which attorneys could bid for right to litigate plaintiffs' claims, thereby restoring proper balance between client and attorney interests).

<sup>6</sup> The class action settlement that has triggered perhaps the most controversy in this regard is the asbestos settlement in *Georgine v. Amchem Products, Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994), vacated and remanded, Nos. 94-1925 et al., 1996 U.S. App. LEXIS 11191 (3d Cir. May 10, 1996). The *Manual for Complex Litigation, Second* urged "great caution" in certifying settlement class actions because of the difficulty in assessing the fairness of a settlement when "[n]o one may know how many members are in the class, how large their

Does the experience of thirty years suggest a need to reexamine the legal framework for class action litigation? Consider some of the developments during the intervening period that might have been beyond the prescience of the framers of the current version of Rule 23:

- the use of the (b)(1) category to certify nationwide classes without notice or opt-out rights because of a concern that a defendant's assets would be insufficient to satisfy all projected claims;<sup>7</sup>
- the availability of individualized recoveries in civil rights litigation also seeking classwide injunctive relief under the (b)(2) category, again without notice or opt-out rights;<sup>8</sup>
- the enactment in 1968 of the Multidistrict Litigation Act,<sup>9</sup> enabling federal courts to consolidate suits across the country into one proceeding for pretrial purposes, including motions for summary judgment and nationwide settlements;<sup>10</sup>
- the possible certification of (b)(3) class actions not only in single-event mass-disaster cases but also in "mass torts"<sup>11</sup> like asbes-

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potential claims are, what the strengths and weaknesses of the parties' positions are, or how much the class members will benefit under the settlement." Manual for Complex Litigation, Second § 30.45, at 243 (1985). The current version of the manual, however, noting the efficiencies such settlements can produce, contains a milder cautionary note: "settlements involving settlement classes [require] closer judicial scrutiny than approval of settlements where class certification has been litigated." Manual for Complex Litigation, Third § 30.45, at 243 (1995). The current draft of Rule 23 revisions promulgated by the Advisory Committee of the Civil Rules proposes creation of a new subdivision of the Rule to deal with certification of settlement classes. See *infra* note 26 and accompanying text.

<sup>7</sup> See, e.g., *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505, 526 (E.D. Tex. 1995) (finding that defendant's potential loss of insurance coverage and possible loss of assets through individual adjudications "demands a unitary resolution" under Rule 23(b)(1)(B)). The Supreme Court bypassed the opportunity to decide whether certifications under (b)(1) and (b)(2) can dispense with opt-out rights under the Federal Rules and the Fifth Amendment's Due Process Clause by ultimately declining to hear the appeal from the Ninth Circuit's decision in *Brown v. Ticor Title Insurance Co.*, 982 F.2d 386 (9th Cir. 1992). See *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359, 1360 (1994) (dismissing writ of certiorari as improvidently granted).

<sup>8</sup> For the argument that civil rights actions should be bifurcated into (b)(2) and (b)(3) classes, see George Rutherglen, Notice, Scope, and Preclusion in Title VII Class Actions, 69 Va. L. Rev. 11, 27-28 (1983).

<sup>9</sup> 28 U.S.C. § 1407 (1994).

<sup>10</sup> Where transfers also occur pursuant to 28 U.S.C. § 1404(a) (1994), or by consent of the parties, the transferee district court designated by the Judicial Panel on Multidistrict Litigation has the additional authority to try the case on the merits. See Richard L. Marcus, Confronting the Consolidation Conundrum, 1995 B.Y.U. L. Rev. 879, 885 & n.28 (noting that although the Multidistrict Litigation Act was originally intended to allow district courts to resolve only pretrial issues, transferee courts used authority under 28 U.S.C. § 1404(a) to conduct trials in transferred cases).

<sup>11</sup> The Advisory Committee Note accompanying the 1966 amendments to Rule 23 cautioned against the use of class actions for "mass accident" claims:

A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant ques-

tos,<sup>12</sup> silicone gel breast implants,<sup>13</sup> and nicotine-dependency<sup>14</sup> that often present a range of claims arising from exposure to toxic substances, including claims of present injury and claims of enhanced risk unaccompanied by present symptoms;

- the emergence of settlement-only class actions, often involving in-kind relief rather than cash distributions to class members;<sup>15</sup>
- the growing perception on the part of federal judges that burgeoning dockets require a greater receptivity to techniques for aggregating claims and consolidating lawsuits even in the “mass tort” context;<sup>16</sup> and

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tions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

Fed. R. Civ. P. 23 advisory committee’s note, reprinted in 39 F.R.D. 69, 103 (1966).

<sup>12</sup> See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994), rev’d, Nos. 94-1925 et al., 1996 U.S. App. LEXIS 11191 (3d Cir. May 10, 1996) (vacating order certifying plaintiff class and remanding case with directions to decertify class action).

<sup>13</sup> See *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, Civ. A. No. CV94-P-11558-S, 1994 WL 578353, at \*1 (N.D. Ala. Sept. 1, 1994) (approving \$4.23 billion settlement of personal injury claims arising from breast implants). The settlement has unraveled because it vastly underestimated the number of claimants, which by March 1996 totaled approximately 430,000. In May 1995, the principal defendant—Dow Corning—filed for bankruptcy. While the Dow Corning bankruptcy proceeding continues, the remaining defendants have entered into a proposed settlement. Tamar Lewin, *Judge in Dow Implant Bankruptcy Ousts Lawyers on Panel*, N.Y. Times, Mar. 23, 1996, at 7.

<sup>14</sup> See *Castano v. American Tobacco Co.*, 160 F.R.D. 544, 548, 560 (E.D. La. 1995) (conditionally certifying nationwide (b)(3) class action of nicotine-dependent cigarette smokers against various tobacco companies in regard to liability issues of fraud, breach of warranty, intentional tort, negligence, strict liability, consumer protection, and punitive damages), rev’d, No. 95-30725, 1996 U.S. App. LEXIS 11815 (5th Cir. May 23, 1996). As of this writing, the Liggett Group, the smallest of the nation’s five major tobacco companies who were defendants in the *Castano* litigation, preliminarily agreed to a comprehensive settlement with private claimants, as well as with five states seeking reimbursement for state Medicaid expenditures on tobacco-related illnesses. Barnaby J. Feder, *Liggett Group Reaches Pact with 5 States*, N.Y. Times, Mar. 16, 1996, at 6; Suein L. Hwang, *Tobacco Settlement: Will Liggett Deal Split Big and Small Rivals?*, Wall St. J., Mar. 14, 1996, at B1.

The *Castano* litigation also raises the question of the extent of the district court’s authority to certify issues-only class actions under Rule 23(c)(4)(A) (“When appropriate . . . an action may be brought or maintained as a class action with respect to particular issues . . .”). For the Seventh Circuit’s effort at grappling with this question, see *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1295-97, 1304 (7th Cir.) (granting writ of mandamus vacating district court judge’s partial certification of class action brought by HIV-infected hemophiliacs), cert. denied, 116 S. Ct. 184 (1995).

<sup>15</sup> See, e.g., Judge Becker’s comprehensive opinion in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995) (vacating settlement of class action arising out of alleged defect in vehicle fuel tanks); see also Note, *In-Kind Class Action Settlements*, 109 Harv. L. Rev. 810, 812 (1996) (identifying “unique dilemmas” that in-kind class action settlements pose for reviewing courts).

<sup>16</sup> In September 1990, Chief Justice Rehnquist created the Judicial Conference’s Ad Hoc Committee on Asbestos Litigation to investigate the asbestos litigation crisis. The Ad

- the development of alternatives to federal class actions such as separate suits utilizing the doctrine of offensive nonmutual issue preclusion,<sup>17</sup> and state-court actions providing a nationwide forum for class claims.<sup>18</sup>

The papers in this volume provide a valuable starting point for assessing whether these (and other) changes in the legal landscape make out a case for reform.

The opening session of the conference dealt with "Class Actions and the Rulemaking Process."<sup>19</sup> We begin with an essay by University of Michigan Professor Edward Cooper, the Reporter to the Advisory Committee on the Federal Civil Rules, canvassing the considerations that federal rulemakers must keep in mind in deciding whether to amend Rule 23.<sup>20</sup> Professor Cooper discusses an early proposal, initially developed during Judge Pointer's tenure as the Committee's chair, that would have collapsed the Rule's categorization scheme in favor of granting trial judges broader discretionary authority to consider, as part of the certification inquiry, whether to provide or dispense with notice and opt-out rights.<sup>21</sup> That approach appears to have been abandoned.

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Hoc Committee issued a report in March 1991, urging a national asbestos dispute resolution scheme that would permit consolidation in a single forum. See Ad Hoc Committee on Asbestos Litigation, in Reports of the Proceedings of the Judicial Conference of the United States 33 (Mar. 1991). The Ad Hoc Committee also recommended that the Advisory Committee on Civil Rules consider "whether Rule 23, F.R.C.P., should be amended to accommodate the demands of mass tort litigation." *Id.*

<sup>17</sup> The Supreme Court recognized a federal common law of offensive, nonmutual issue preclusion in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 (1979).

<sup>18</sup> See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 799, 814 (1985) (rejecting due process challenge to authority of Kansas state court to resolve claims of owners of rights to leases of land located in 11 different states, provided that claimants beyond the personal jurisdiction of Kansas courts were given notice of class action and opportunity to opt out of proceedings). For the implications of *Shutts* for federal class actions, see *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 198-201 (3d Cir. 1993); *In re Real Estate Title and Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 769 (3d Cir.), cert. denied, 493 U.S. 821 (1989). The best article on *Shutts* remains Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 *Yale L.J.* 1 (1986).

<sup>19</sup> The commentators for this session were Judge William W. Schwarzer of the United States District Court for the Northern District of California, former director of the Federal Judicial Center; Professor Stephen B. Burbank of the University of Pennsylvania; and John P. Frank, a distinguished lawyer who served on the Advisory Committee on Civil Rules that produced the 1966 amendments. New York University School of Law's Vice-Dean Oscar Chase, also secretary of the Institute of Judicial Administration, served as moderator.

<sup>20</sup> See Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 *N.Y.U. L. Rev.* 13 (1996).

<sup>21</sup> The text of this proposal is included as an appendix to Robert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action*, 14 *Rev. Litig.* 79, 109-112 (1994).

At its meeting in April 1996, the Advisory Committee voted to forward to the Judicial Conference's Standing Committee on Rules and Practices a somewhat different set of revisions to Rule 23.<sup>22</sup> The proposal would alter the framework for bringing class actions in a number of important respects. First, as part of the (b)(3) certification inquiry, the district court would be required to consider several additional factors not presently contained in the Rule: (1) "the practical ability of individual class members to pursue their claims without class certification";<sup>23</sup> (2) the "maturity" of any related litigation involving class members;<sup>24</sup> and (3) "whether the probable relief to individual class members justifies the costs and burdens of class litigation."<sup>25</sup> The thrust of these additions is to tighten the availability of (b)(3) certifications both in cases where class members have individually viable claims and in cases where the value of probable individual relief is outweighed by the costs and burdens of class proceedings. Second, the Committee recommends a new (b)(4) category authorizing certification of settlement-only classes. Trial courts could certify class actions where "the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for trial."<sup>26</sup> Also,

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<sup>22</sup> See Memorandum from Honorable Patrick E. Higginbotham, Chair, Advisory Committee on Civil Rules, to Honorable Alicemarie H. Stotler, Chair, Standing Committee on Rule of Practice and Procedure (May 17, 1996) (on file with the *New York University Law Review*) (forwarding Report of the Advisory Committee on Civil Rules).

<sup>23</sup> Fed. R. Civ. P. 23(b)(3)(A) (Proposed Draft, Apr. 1996) (on file with the *New York University Law Review*).

<sup>24</sup> Fed. R. Civ. P. 23(b)(3)(C) (Proposed Draft, Apr. 1996) (on file with the *New York University Law Review*).

<sup>25</sup> Fed. R. Civ. P. 23(b)(3)(F) (Proposed Draft, Apr. 1996) (on file with the *New York University Law Review*).

<sup>26</sup> Fed. R. Civ. P. 23(b)(4) (Proposed Draft, Apr. 1996) (on file with the *New York University Law Review*). This provision could not be more timely in view of the Third Circuit's decision in *Georgine v. Amchem Prods., Inc.*, Nos. 94-1925 et al., 1996 U.S. App. LEXIS 11191 (3d Cir. May 10, 1996), holding that before a settlement class may be certified, the requirements of both 23(a) and 23(b)(3) must be satisfied from the standpoint as if the case were to be tried. The Advisory Committee's Note explains:

Although subdivision (b)(4) is formally separate, any class certified under its terms is a (b)(3) class with all the incidents of a (b)(3) class, including the subdivision (c)(2) rights to notice and to request exclusion from the class. . . . Subdivision (b)(4) serves only to make it clear that implementation of the factors that control certification of a (b)(3) class is affected by the many differences between settlement and litigation of the class claims or defenses. Choice-of-law difficulties, for example, may force certification of many subclasses, or even defeat any class certification, if claims are to be litigated. Settlement can be reached, however, on terms that surmount such difficulties.

Fed. R. Civ. P. 23 (Proposed Draft, Apr. 1996) advisory committee's note (on file with the *New York University Law Review*).

appeals from an order granting or denying class certification would be permitted at the sole discretion of the court of appeals.<sup>27</sup>

The authority of the rulemakers is limited by the Rules Enabling Act,<sup>28</sup> which provides that the rules “shall not abridge, enlarge or modify any substantive right.”<sup>29</sup> There is a substantial question as to whether the rulemakers can take account of problems in particular substantive areas and carve out special class action procedures for different subject matters. The type of change wrought by the Private Securities Litigation Reform Act of 1995<sup>30</sup>—which requires, among other things, that the “lead plaintiff” in private class actions under the federal securities laws be the “most adequate plaintiff” and establishes a rebuttable presumption that those coming forward with “the largest financial interest in the relief sought by the class” should occupy the lead plaintiff role<sup>31</sup>—in all probability could not be accomplished by rule in the absence of enabling legislation.

The rulemakers’ horizon—even if limited to “transsubstantive” rules—is further constrained by procedural policies embodied in federal legislation. Duke University Professor Thomas Rowe, also a member of the Advisory Committee, considers areas of transsubstantive procedural reform beyond the rulemakers’ powers that Congress might wish to undertake.<sup>32</sup> Professor Rowe’s objective is to enhance the authority of federal courts to consolidate into a single proceeding dispersed lawsuits that raise some common factual or legal questions.

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<sup>27</sup> Fed. R. Civ. P. 23(f) (Proposed Draft, Apr. 1996) (on file with the *New York University Law Review*). For statutory authorization of such an amendment, see 28 U.S.C. § 1292(e) (1994) (granting Supreme Court power to promulgate rules “to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under” § 1292(a)-(d)); 28 U.S.C. § 2072(c) (1994) (providing that Supreme Court’s rules “may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title”). This proposal would obviate the need to petition for a writ of mandamus, as was sought in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1294 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995).

The Committee did not recommend adoption of its earlier proposal that district courts be authorized to conduct a preliminary review of the merits as part of a (b)(3) certification decision. The Supreme Court in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), rejected a trial court’s authority to shift notice costs to the defendant even after holding a preliminary hearing and finding that the plaintiff class was likely to prevail on the merits. *Id.* at 177. Justice Powell’s opinion emphasized that under Rule 23, certification decisions must precede an inquiry into the merits. *Id.* at 177-78. However, *Eisen* involved an interpretation of the rule in its current form and would not prevent an amendment of the rule expressly authorizing some review of the merits prior to certification.

<sup>28</sup> 28 U.S.C. § 2072(a)-(c) (1994).

<sup>29</sup> *Id.* § 2072(b).

<sup>30</sup> Pub. L. No. 104-67, 109 Stat. 737.

<sup>31</sup> 15 U.S.C.A. § 77z-1(a)(3)(B) (West Supp. 1996).

<sup>32</sup> See Thomas D. Rowe, Jr., *Beyond the Class Action Rule: An Inventory of Statutory Possibilities To Improve the Federal Class Action*, 71 N.Y.U. L. Rev. 186 (1996).

The article endorses legislation that would accomplish the following goals: overturn *Zahn v. International Paper Co.*<sup>33</sup> and thus expand supplemental jurisdiction over diversity-only class actions where representative parties but not all class members can allege good-faith claims in excess of the jurisdictional requirement;<sup>34</sup> add explicit trial authority to the multidistrict litigation statute;<sup>35</sup> and remove doubts raised by the Anti-Injunction Act<sup>36</sup> as to a federal court's ability to stay lawsuits in state courts involving claims that will be adjudicated or settled in a parallel federal class action.<sup>37</sup>

Lawyers are most comfortable with anecdotal evidence, but the policymaking process needs good systematic data on the actual experience of courts and litigants. We are indebted to the careful study conducted by Federal Judicial Center researchers Thomas Willging, Laural Hooper, and Robert Niemic of class action filings terminated between July 1, 1992 and June 30, 1994 in four federal district courts.<sup>38</sup> Their study is brimmed full of interesting findings, including the following: the overwhelming number of federal class actions involved claims arising under federal law; 75% of individual class member recoveries ranged from \$645 to \$3341; and under 6% of the cases came from interdistrict consolidations.

The second session of the conference turned to issues of "Aggregation and Individual Justice."<sup>39</sup> Harvard University Professor David Rosenberg's article offers a spirited defense of controversial class ac-

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<sup>33</sup> 414 U.S. 291, 301 (1973) (declining to permit aggregation or to recognize "pendent" jurisdiction in Rule 23(b)(3) class action where representative plaintiffs but not all class members alleged claims in excess of jurisdictional amount).

<sup>34</sup> Judge Higginbotham for the Fifth Circuit has held that 28 U.S.C. § 1367(b) overruled *Zahn*, despite legislative history eschewing such a reading. In re Abbott Lab., Inc., 51 F.3d 524, 529 (5th Cir. 1995) (noting that "the statute is the sole repository of congressional intent where the statute is clear and does not demand an absurd result").

<sup>35</sup> Others have urged giving the transferee court designated by the Multidistrict Litigation Panel authority to coordinate for pretrial purposes actions pending in state as well as federal courts. See William W. Schwarzer et al., *Judicial Federalism: A Proposal To Amend the Multidistrict Litigation Statute To Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts*, 73 *Tex. L. Rev.* 1529, 1533 (1995).

<sup>36</sup> 28 U.S.C. § 2283 (1994).

<sup>37</sup> Compare In re Federal Skywalk Cases, 680 F.2d 1175, 1182 (8th Cir.), cert. denied, 459 U.S. 988 (1982) with *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 204 (3d Cir. 1993).

<sup>38</sup> See Thomas E. Willging et al., *An Empirical Analysis of Rule 23 To Address the Rulemaking Challenges*, 71 *N.Y.U. L. Rev.* 74 (1996).

<sup>39</sup> The commentators for this session were Judge Jack B. Weinstein of the United States District Court for the Eastern District of New York, and distinguished practitioners David I. Shapiro and Theodore Shaw. Professor Mark Geistfeld of New York University served as moderator. University of Michigan Professor Kent D. Syverud's contribution is not included in this volume because it focused on an early proposal of the Advisory Committee on Civil Rules that now appears to have been abandoned. See *supra* text accompanying note 21.



tion settlements that provide truncated recoveries for exposure-only claimants in favor of enhanced recoveries for class members with serious injuries.<sup>40</sup> Whether the objective of the tort system is optimal deterrence, compensation, or some combination of the two, Professor Rosenberg contends that such settlements properly create an "insurance-fund remedy [that] represents the actuarially fair premium for an insurance policy that would supply tort-level damages for the ultimate harm and loss."<sup>41</sup>

The article by University of Virginia Professor George Rutherglen maintains that, because of due process strictures and the limits of the Rules Enabling Act, the substantive rights of class members cannot be affected without affording meaningful notice and opportunity to opt out of the proceedings.<sup>42</sup> Current decisions, in Rutherglen's view, improperly dispense with notice in (b)(1) and some (b)(2) class actions and provide notice too soon in most (b)(3) actions. Individual notice should be provided when it is both feasible and effective in protecting the rights of individual class members, usually shortly before trial or a proposed settlement. Courts also need to recognize broader opt-out rights where individual claims are involved. Consolidation of such claims by means of (b)(1) certification even in "limited fund" cases should be confined to "collection proceedings" in place of the current judicial tendency to view (b)(1) as a substitute for bankruptcy. With respect to (b)(2) actions, opt-out rights can be dispensed with only where the class seeks injunctive or declaratory relief that must be adjudicated on a classwide basis; class members have a substantive right to opt out of any class action that includes their individual claims. Claimants in (b)(3) actions similarly have a right to opt out "when they are most likely to receive information about how well their interests have been protected by the class action: either after a proposed settlement or just before trial."<sup>43</sup>

Professors Judith Resnik, Dennis Curtis, and Deborah Hensler of the University of Southern California argue for greater recognition of the interests of class members in participating in proceedings and communicating with counsel even in cases where classwide treatment of claims is thought desirable.<sup>44</sup> A variety of techniques are sug-

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<sup>40</sup> See David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass Exposure Cases*, 71 N.Y.U. L. Rev. 210 (1996).

<sup>41</sup> *Id.* at 234.

<sup>42</sup> See George Rutherglen, *Better Late Than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. Rev. 258 (1996).

<sup>43</sup> *Id.* at 295.

<sup>44</sup> See Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. Rev. 296 (1996). Professor Hensler is also director of the Institute for Civil Justice at RAND.

gested, including orders that require class counsel to communicate directly with class members, establish "clients' committees," or provide some allocation of class counsel fees to reimburse the costs of attorneys retained by passive class members.

The third session of the conference focused on "Problems of Representation in Class Actions."<sup>45</sup> Professor Nancy Morawetz of New York University urges that, while courts have addressed the problem of overinclusive class actions,<sup>46</sup> they have neglected the issue of underinclusive actions.<sup>47</sup> Where lawyers' compensation is not based on the recovery obtained in a suit, lawyers face institutional and other pressures to limit the scope of the class actions they bring, and defendants generally have no incentive to raise these issues to the court. Professor Morawetz maintains that these factors argue for greater judicial scrutiny of the scope of class filings during the certification process.

Brian Wolfman and Alan Morrison of the Public Citizen Litigation Group contend that recent settlement-only class actions fail to protect the interests of unrepresented class members and offer a series of proposals to address these representational problems.<sup>48</sup> Procedures need to be revamped, in the authors' view, to ensure separate representation of the future injury claims of class members—and perhaps other distinct subgroups in the class—early enough in the litigation to permit representatives to play an active role in the settlement negotiation process; to provide for an early preliminary hearing on a proposed settlement with notification to interested plaintiffs' lawyers, state attorneys general, and advocacy groups, as well as to provide disclosure of evidence in support of the fairness of the settlement; and to allow for proper discovery and time to prepare objections for a fairness hearing to be held at the conclusion of the notice and opt-out period. In general, Wolfman and Morrison argue, courts should vigorously scrutinize the fairness of settlements that appear to trade off the claims of one distinct subgroup in the class in favor of other groups or that exclude pending litigation from the settlement terms.

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<sup>45</sup> Commentators for this session included Judge Sam Pointer of the United States District Court for the Northern District of Alabama, who is the former chair of the Advisory Committee on Civil Rules; Professor Susan Koniak of Boston University; and distinguished practitioners John D. Aldock and Elizabeth Joan Cabraser. Professor Rochelle C. Dreyfuss of New York University served as moderator.

Professor Coffee's paper, "Reverse Auctions" and the Corruption of Class Actions, has been published under a different title in another journal. See *supra* note 5.

<sup>46</sup> See, e.g., *General Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982) (decertifying class where representative party not shown to have issues common to entire class).

<sup>47</sup> See Nancy Morawetz, *Underinclusive Class Actions*, 71 N.Y.U. L. Rev. 402 (1996).

<sup>48</sup> See Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. Rev. 439 (1996).

The final session considered "Class Actions and Jurisdictional Boundaries."<sup>49</sup> Issues of federal-state tensions have become even more salient after the Supreme Court's recent decision in *Matsushita Electric Industrial Co. v. Epstein*,<sup>50</sup> which allows state courts to approve settlements that include claims that can be adjudicated only in federal courts.

Professor Geoffrey Miller of New York University argues that large-scale class actions fit uneasily within a "parallel litigation model" that allows parallel federal and state actions to proceed simultaneously and limits the ability of courts in either system to issue injunctions in support of eventual judgments.<sup>51</sup> In Professor Miller's view, efficiency concerns are paramount and separate sovereignty considerations less weighty in such cases because of the "inherently interstate nature" of this category of litigation.<sup>52</sup> The paper urges courts to move toward an "exclusive forum model," perhaps through use of litigation auctions that would reduce conflicts of interest between lawyers and class members and would centralize the conduct of litigation in a single litigation manager.

Professor Larry Kramer of New York University takes up the issue of choice of law in large-scale class actions.<sup>53</sup> He criticizes the view held by some courts and commentators that federal courts should develop a federal common law rule to govern choice of law in complex cases only and questions whether the courts are properly applying existing jurisprudence in finding the same law applicable under all relevant choice-of-law approaches. Professor Kramer argues that the virtues of uniform law are overstated and that techniques are available to minimize manageability problems without sacrificing the substantive right of class members to have their claims adjudicated in accordance with the applicable law.

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The papers in this volume offer a cornucopia of information and insights for all who care about the ability of our courts to do justice in

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<sup>49</sup> The commentators for this session were Judge Frank H. Easterbrook of the United States Court of Appeals for the Seventh Circuit, Justice Helen E. Freedman of the New York Supreme Court, and Professor Martin H. Redish of Northwestern University. Professor Linda J. Silberman of New York University served as moderator.

<sup>50</sup> 116 S. Ct. 873 (1996).

<sup>51</sup> See Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. Rev. 514 (1996).

<sup>52</sup> *Id.* at 517.

<sup>53</sup> See Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. Rev. 547 (1996).

cases that stretch the traditional boundaries of the civil lawsuit. They are essential reading for judges, lawyers, and policymakers in the field.

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#### EDITORS' NOTE

The papers in this Symposium were written prior to the recent decisions by the Third Circuit in *Georgine v. Amchem Products, Inc.*\* and the Fifth Circuit in *Castano v. American Tobacco Co.*\*\* Consequently, while the circuit court dispositions have been added to the subsequent histories of the cases, the papers themselves do not discuss those dispositions.

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\* 157 F.R.D. 246 (E.D. Pa. 1994), vacated and remanded, Nos. 94-1925 et al., 1996 U.S. App. LEXIS 11191 (3d Cir. May 10, 1996).

\*\* 160 F.R.D. 544 (E.D. La. 1995), rev'd, No. 95-30725, 1996 U.S. App. LEXIS 11815 (5th Cir. May 23, 1996).