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The Class Action Rule

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ARTICLES

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The class action has many uses. The most compelling occurs when someone inflicts a small harm on each member of a large group of people. In such a case, any one victim would have to spend more money to hire a lawyer than he could recover by winning the lawsuit, so he would not sue. The class action enables the claims of all the individual victims to be aggregated, thereby spreading the lawsuit's costs among all class members and creating a potential recovery that is large enough to make the suit economically viable. Although each individual who is harmed wins only a small amount, the public benefit is substantial. The costs of the large public harm are borne by the person or firm responsible for it, and incentives to commit future transgressions are removed.

In this way, the class action provides for the private enforcement of laws that are aimed at protecting the public. Yet it contains a risk: If the named plaintiff loses in court, then all of the members of the class have lost and cannot relitigate their claims. Some people who might never even have known about the lawsuit and who certainly never participated in it will suddenly find themselves denied access to the court system, on the theory that they were already represented by the named plaintiffs who litigated the action on their behalf.

Admittedly, it is common for one individual to represent others in a lawsuit, but those represented typically appoint their representative or at least consent to the representation. This ordinary form of representation entails an agency relationship: It is premised on the theory that the representative is acting as the agent of those he represents. In the class action, however, there is no consensual tie between

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the represented and the representative. In fact, the named plaintiff appoints himself as representative of the class, and most of those represented do not know the representative or even that they are being represented. Accordingly, in a class action the named plaintiff cannot be said to be the agent of the class, but rather invokes another theory of representation altogether—interest representation. The named plaintiff represents the interests of the class.

Some might view the class action as entailing agency representation whenever class members are notified of the lawsuit and given an opportunity to withdraw from the class. Under this theory, the failure of a class member actively to withdraw from the suit is claimed to supply the requisite consent. But we should never treat inaction as a form of consent when consent is not the most likely explanation for the inaction. Consumed with matters that impinge on ordinary life, most people throw out notice letters without reading them, much less understanding them. It would therefore be unreasonable to assume that class members' failure to withdraw results from their considered choice to be represented by the named plaintiffs. There is no consent and no agency relationship in a class action, and as a consequence interest representation is the only justification for conceiving class actions as representative lawsuits. Although the class action is often said to be a substitute for joinder, it is not a form of joinder because the members of the class do not participate in the suit in any meaningful sense, nor have they chosen to be represented in the suit.

Some might seek to construct a consensual tie between the named plaintiff and the members of the class by introducing the idea of hypothetical consent: The claim is that the members of the class *would* have consented to the representation if they were fully advised of the suit and the consequences that flow from it. They have something to gain if the named plaintiff wins, and very little to lose if the judgment goes the other way. Granted, the argument continues, they will lose their chance to relitigate their individual claims, but in the situation of dispersed harm—in many respects, the paradigm of the class action—the dollar value of that claim is so small as to make the possibility of ever prosecuting the claim remote. Yet hypothetical consent is not the same as consent.[1] We bind individuals to the representational arrangements to which they agreed as a way of holding them responsible for the consequences of their considered choices; but because by definition there is no choice with hypothetical consent, it

1 *See* Ronald Dworkin, *The Original Position*, 40 U. CHI. L. REV. 500, 519–33 (1973).

cannot be treated as the same as actual consent. There is no exercise of will.

The named plaintiff is not the agent of the other class members, and as a result class members will be bound by the result of the lawsuit on the theory that their interests were represented by someone who happened to appoint himself as a representative of those interests. Obviously, such a method of appointment and the system of representation it sets into motion are inherently suspect and grate against even a minimum regard for allowing individuals to be in charge of their own destiny. The willingness of the legal system to tolerate interest representation and the method of appointment it implies might stem from two considerations.

One is the social importance of the class action. In some instances, most notably where great social harm is dispersed among countless individuals, the class action is the only mechanism by which our legal system can redress a large-scale public wrong. There, although permitting interest representation denies absent class members formal access to the courts, rejecting that form of representation renders the legal system powerless to perform its most important function—holding accountable the party responsible for a great social harm.

The second, and subsidiary, consideration is that in many situations in which interest representation is employed—paradigmatically, where the dollar loss to each individual is small, though the aggregate social harm is great—not much would be lost by the individual putatively represented if the representation proves inadequate. Each individual member of the class would lose the chance of litigating his claim (a day in court), but because his individual stake is so small he would probably never have utilized the opportunity. The loss would be more formal than practical. Consent cannot be inferred from that fact, but the lack of concrete harm is a relevant consideration in deciding whether to permit a representative lawsuit to go forward in the absence of consent.

Rule 23 recognizes the value of the class action. It aims to permit class actions in order to redress significant public wrongs, and for that reason it accepts the concept of interest representation. At the same time, the rule is mindful of the risks of abuse, and therefore it establishes requirements aimed to make certain that the named plaintiff—this self-appointed representative—adequately represents the interests of the absent class members. Largely the product of a series of revisions to the Federal Rules of Civil Procedure promulgated in 1966, Rule 23 has remained virtually the same for thirty-five years. In September 2002, the Advisory Committee on Civil Rules proposed

amendments to the rule, which were passed on by the Judicial Conference to the Supreme Court in December 2002, and then by the Court to Congress in March 2003, but in truth those amendments amount only to small adjustments.[2] They leave the basic architecture of the inherited rule intact. From our perspective, however, the design of the rule is flawed. We contend that the reform process set in motion by the 2003 amendments should be continued and that the basic structure of Rule 23 should be reconsidered.

Rule 23 is perfectly symmetrical: No distinction is made between plaintiffs and defendants in class actions. In this way, the rule authorizes defendant class actions, although they are, as Jack Coffee put it, about "as rare as unicorns."[3] We believe, however, that the rule should be amended to permit only plaintiff actions. This reform would conform the rule to practice, but more fundamentally would reflect the fact that the underlying theory of interest representation is too tenuous to justify the consequences of the class format for members of the defendant class. Unlike plaintiff classes, in which the representative appoints himself, with defendant classes the adversary—the plaintiff—appoints the defendant class's representative. The plaintiff has an obvious and powerful incentive to choose someone who will poorly represent the class's interests. Moreover, the unnamed members of a defendant class risk not just the opportunity to relitigate a claim—the downside of a plaintiff class action—but also the imposition of a liability for being on the wrong end of a judicial directive. Placing such a burden on an individual without his participation, or that of his agent, is grossly unfair. Joinder of all the defendants, even a large number, is always possible, and thus it is difficult to think of some weighty social purpose that might tempt the law to risk the unfairness presented by relying on interest representation in the context of the defendant class action.

The plaintiff class action does, in contrast, serve a great social purpose: The private enforcement of public laws. We believe it important, however, to revise Rule 23 to make certain that it is used only in those situations where that social purpose is served. Even then, special provisions must be made to acknowledge the anomalous theory of representation that is employed in the plaintiff class action and to prevent its abuse.

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2 *See* COMM. ON RULES OF PRACTICE & PROCEDURE, AGENDA F-18: REPORT OF THE JUDICIAL CONFERENCE 8–21 (2002) [hereinafter REPORT OF THE JUDICIAL CONFERENCE].

3 John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 388 (2000).

I. REQUIREMENTS FOR A CLASS ACTION

A court should not permit a plaintiff to bring suit on behalf of unnamed class members unless the class lawsuit is necessary to vindicate important public rights and the named plaintiff satisfies the court that he will adequately represent the interests of the other class members. To achieve this goal, Rule 23 presently requires a class action to meet at least four, and sometimes six, requirements, and also to fit into one of four descriptive categories. The 2003 amendments leave this structure of Rule 23 untouched. We can well understand the decision to preserve the six requirements, and we also essentially leave this feature of the rule in place. These requirements help insure that a class action is being used only when necessary and that there is adequate interest representation. The descriptive categories, by contrast, serve no relevant purpose that we can discern, and we would abolish them.

A. The Six Requirements

The first four requirements of the current rule—dubbed "numerosity," "commonality," "typicality," and "adequacy"—appear in section 23(a) and apply to all class actions. The fifth and sixth requirements—"predominance" and "superiority"—are listed in subsection 23(b)(3) and apply only to class actions that fall under that subsection, which defines the last of the four descriptive categories of section 23(b).

"Numerosity" means that "the class [must be] so numerous that joinder of all members is impracticable." This requirement has value if it is properly understood. The requirement's focus must be the size of the class, not the practicality of joinder. Joinder is often impracticable for reasons other than the number of class members, the main reasons being the small size of each claim and the fact that the group is dispersed and disorganized. "Numerosity," however, reflects the fact that only when there are many small individual claims is their aggregation likely to constitute a social harm of sufficient magnitude to warrant a class action and its anomalous form of representation. The numerosity requirement thus helps limit class actions to circumstances in which they are necessary to uphold a value that is important enough to justify the dangers to absent class members inherent in any class action.

The same may be said of the requirement—applicable, under the rule, only to certain types of class actions—that a class action be superior to other available methods for the fair and efficient adjudication of the controversy ("superiority"). Although the legal system accepts

interest representation and the services of a self-appointed representative to create a private instrument for the enforcement of public laws, it also must account for the conflict between such a form of representation and the ideal that each person has a right to his day in court. Accordingly, class actions should be allowed only when there is no good alternative. The current rule errs by confining this requirement to class actions that fit within the descriptive category of subsection 23(b)(3), and we urge that it be made an explicit requirement of all class actions.

As it now stands, subsection 23(b)(3) provides a non-exhaustive checklist of factors for the judge to consider when she makes the superiority determination. This list points judges to several relevant considerations and should be retained. Its four factors are: (A) class members' interests in bringing individual suits; (B) other litigation already announced by class members; (C) the desirability of concentrating the claims in the particular forum; and (D) the likely difficulties in managing the class action. By considering these and other factors, a judge will, as she should, make a judgment about the need to use the class format.

The other four requirements—commonality, typicality, predominance, and adequacy—are aimed not at policing the importance of bringing the lawsuit as a class action, but instead at insuring that the named plaintiff can be trusted to represent the interests of his fellow class members. This determination is essential because the named plaintiff has appointed himself the representative of the class, and has no special justification for that self-election other than that he has an interest in common with those who will be represented.

Typicality makes explicit the central idea underlying the theory of interest representation: The named plaintiff is not permitted to represent the class unless his interest is essentially the same as those of the unnamed members of the class. Or, in the words of the present rule, the named plaintiff's claim must be typical of those of the class.

The commonality requirement serves the same purpose, though it might also aid the judgment about the superiority of the class format. At present, it provides that there must be "questions of law or fact common to the class." We propose making the commonality requirement stricter, first by changing "or" to "and," then by combining it with what is now the "predominance" requirement found in subsection 23(b)(3). That is, we would insist that in every class action "the questions of law and fact common to the members of the class predominate over any questions affecting only individual members." The commonality requirement's purpose is to insure proper interest

representation, and such representation is impossible if either legal or factual questions vary widely from one class member to another.

Even more than commonality and typicality, the adequacy requirement makes concerns about interest representation explicit. At present it reads: "The representative parties will fairly and adequately protect the interests of the class." At the very least, this provision directs the court, which is charged with the responsibility of determining whether the class action should proceed, to search for conflicts within the class that might exist even if the requirements of commonality and typicality are applied rigorously. For example, people with identical interests might have radically different views as to how those interests would best be furthered.[4] Such differences do not necessarily preclude interest representation, but if they are deep enough and pervasive enough it might be inappropriate to allow the proceeding to go forward on a class basis.

The adequacy requirement also enables the court to examine the adequacy of the class's counsel. Although the named plaintiff is the representative of the class, he is likely to be dwarfed by his attorney in providing the representation of the class.[5] Because of technical expertise and specialization of function, lawyers often tend to lead or even dominate their clients in any type of litigation; but this leadership role is magnified considerably in the class action setting because the harm is dispersed and each individual class member's claim is small. Granted, the lawyer's gain is less than that of the class as a whole, but it is likely to be significantly greater than that of the named plaintiff, or any individual member of the class. Indeed, the entire idea of the lawsuit is likely to emanate from the lawyer who, skating on the edge of the prohibition against soliciting clients, locates the person who will serve as the named plaintiff. On a formal level, the named plaintiff appoints himself as the representative of the class. On a practical level, he is appointed by the attorney who then represents him and the class.

None of this lessens the social importance of the class action or its public function. Lawyers gain, but the assumption is that private gain is being harnessed for public purposes. It does mean, however, that when a court inquires into the adequacy of representation, the judge must decide not only whether the named plaintiff's interest is

4 *See* Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1186–91 (1982) (identifying a number of schisms that may develop among members of a class).

5 *See, e.g.*, Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 927 (1998); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 354.

more or less the same as that of the class and his views consonant with those of the bulk of the class, but also whether the attorney is sufficiently capable and dedicated to the interests of the class.

The adequacy requirement of Rule 23 authorizes and requires such inquiries. The 2003 amendments wisely make that explicit: They separate the inquiries relating to the adequacy of the named plaintiff (for example, commonality and typicality) from those relating to the adequacy of the class counsel. Not only does the amended rule require the court to monitor class fees, but more importantly it requires the court to treat the named plaintiff's choice of counsel as nothing more than a proposal as to who shall constitute counsel for the class. The new rule requires the court to assume responsibility for appointing that lawyer as counsel for the class, and it includes a nonexhaustive list of factors for a court to consider in evaluating the competence of the lawyer and his loyalty to the class.[6] The pre-amendment rule did not contain this checklist, but like the 2003 amendments presumed that the standards for judging the adequacy of counsel would evolve on a case-by-case basis, as in the Sixth Amendment context.[7]

As with the other requirements (numerosity, superiority, commonality, typicality, and predominance), adequacy requires the judge to make a judgment before she allows the case to proceed on a class basis. However, if the judge initially finds the lawyer adequate, she should have the power to reconsider this judgment once the case begins to unfold and she has a better sense of the lawyer's capacity and loyalty. Given the centrality of the adequacy requirement to the idea of the class action, the judge should have every opportunity to make an informed decision.

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6 The proposed Rule 23(g)(1)(C) reads,

> (C) In appointing class counsel, the court
>
> (i) must consider:
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> —the work counsel has done in identifying or investigating potential claims in the action,
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> —counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
>
> —counsel's knowledge of the applicable law, and
>
> —the resources counsel will commit to representing the class;
>
> (ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class.

REPORT OF THE JUDICIAL CONFERENCE, *supra* note 2, at 276.

7 *See, e.g.*, Strickland v. Washington, 466 U.S. 668 (1984).

B. *The Descriptive Categories of Section 23(b)*

The current rule requires that every class action meet the so-called prerequisites of numerosity, commonality, typicality, and adequacy. In addition, it requires that the class fit into one of the four descriptive categories or pigeonholes set forth in section 23(b). (Those class actions falling into the fourth category, 23(b)(3), are subject also to the requirements of predominance and superiority.) Satisfying the prerequisites is thus merely necessary, not sufficient, to bring a suit as a class action. The four categories, like the six requirements, are left unchanged by the amendments proposed by the Advisory Committee in September 2002, and sent to Congress by the Supreme Court in March 2003.[8]

As explained above, we believe that in addition to numerosity, commonality, typicality, and adequacy, the predominance and superiority requirements should apply to all class actions. However, we see no reason that a class action satisfying the six requirements should be compelled in addition to fit into one of the descriptive categories listed in section 23(b). Unlike the six requirements, these four categories do not serve the purpose of directing a court to scrutinize either the adequacy of interest representation or the social value and practical necessity of bringing a lawsuit as a class action. Indeed, we find difficulty imagining any relevant purpose served by the categories, and we therefore urge their abolition.

1. Section 23(b)(1)(A): The Risk of Inconsistent Adjudications

The first descriptive category—section 23(b)(1)(A)—permits class actions when separate individual actions might result in inconsistent adjudications. The assumption is that inconsistent adjudications are an embarrassment for the law and can oppress a defendant by imposing incompatible standards of conduct. All of this is true, but it is not a reason to make the danger of inconsistent adjudications into a separate class action requirement.

This point is best illustrated by two examples. First, imagine that one taxpayer sues a municipality to prevent it from building a dam. He loses, and then another taxpayer brings the same suit and wins. There is a risk of this unfortunate result whenever a class action is possible. Indeed, this risk must exist for a class action to satisfy the typicality requirement. Whenever the claim of the named plaintiff is typical of the claims of the members of the class, there would be a risk of inconsistent adjudications if the class members' lawsuits were

8 REPORT OF THE JUDICIAL CONFERENCE, *supra* note 2, at 8–21.

brought separately. Thus the risk of inconsistency should not in itself be a separate requirement, because in the context we are now considering this adds nothing to typicality.

In *Eisen v. Carlisle & Jacquelin*,[9] the Supreme Court referred approvingly to a decision of the lower court requiring that the risk of inconsistent adjudications be examined from a practical perspective: Is it likely that the individual members of the class would bring separate suits?[10] If each class member's claim is small, then individual suits are unlikely, and the practical risk of inconsistent adjudications is therefore low. This reading of 23(b)(1)(A) makes the requirement more specific than typicality, but the reading is deeply problematic because in the most compelling instance for the use of the class action, namely, that of dispersed harm, the requirement will not be satisfied and thus (b)(1)(A) will never be available. The class actions that the legal system most needs to permit are those in which the overall harm is great but that suffered by each individual is small. A requirement that those actions by definition cannot satisfy would be a cruel irony.

A second example arises when one taxpayer sues to prevent a municipality from building a dam while another sues to compel the municipality to build the dam. If these suits are allowed to proceed on an individual basis, then there is a risk of inconsistent outcomes in still another sense: Both plaintiffs might win. This example adheres more strictly to the language of (b)(1)(A) than the initial example because the individual lawsuits directly and explicitly establish incompatible standards of behavior for the municipality: Should it build the dam? But in such cases the risk of inconsistency cannot be a class action requirement, for precisely the opposite reason that applied to the first example. Where one group of taxpayers seeks one result, and another seeks the opposite, it is hard to imagine the typicality—the identity of interest—that is presumed by the concept of interest representation. If the ranchers oppose the dam and the manufacturers support it, then it is unacceptable for one rancher to represent both the ranchers and the manufacturers.

Without a class action, how can our legal system solve the problem of inconsistent adjudications that create incompatible standards of conduct for the defendant? In the case of the ranchers and manufacturers, the separate lawsuits could be consolidated and adjudicated together. Or, less satisfying, the cases could be brought separately and the principle of stare decisis might prevent inconsistency. Or, the

9 417 U.S. 156 (1974).

10 *Id.* at 177–79.

manufacturers could intervene in the ranchers' class action and appoint their own separate representative (perhaps aligning themselves on the side of the defendant). This third option, like dividing the class into two subclasses (ranchers and manufacturers), eliminates the conflict of interest between the ranchers and manufacturers but at the same time precludes justifying the class action on the basis of avoiding the risk of inconsistent adjudications, for that risk must be assessed from the perspective of the class (the ranchers) represented by the named plaintiff (a rancher).

But even if these solutions were insufficient to solve the problem of inconsistent adjudications that create incompatible standards of conduct, that insufficiency would not justify broad use of the class action to solve the problem. The danger of incompatible standards might be a genuine problem, but it cannot be conceived as a justification for bringing suit as a class action—as Rule 23 currently casts it—because it is actually a reason to discourage the use of a class action. When there is a danger of incompatibility, there is less typicality and worse interest representation. Far from being a requirement for class actions, this type of case should make a court skeptical of a class action.

2. Section 23(b)(1)(B): The Limited Fund

The second descriptive category of section (b)—(b)(1)(B)—consists of cases in which an individual action "would as a practical matter be dispositive of the interests" of other individuals. By way of example, the 1966 committee notes for Rule 23 identify the situation where policyholders attack an association's proposed financial reorganization. A court cannot, the 1966 Advisory Committee reasoned, "confine the effects of a validation of the reorganization to the individual plaintiffs," and thus the other members of the association would have their rights "practically concluded" despite having had "no representation in the lawsuit."[11] The Advisory Committee saw the class action as the means of providing the necessary representation, but as with (b)(1)(A) actions ignored the form of representation—interest representation—involved in the class action. Because the interests of all the members of the association are by definition in competition with one another, the named plaintiff is not likely to be an adequate representative of the interests of the members of the class. Devices need be found to obtain representation of all the members of the association

11 FED. R. CIV. P. 23(b)(1)(B) advisory committee's note (1966) (citing Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); Waybright v. Columbian Mut. Life Ins. Co., 30 F. Supp. 885 (W.D. Tenn. 1939)).

in the reorganization, but the class action rests on too attenuated a concept of representation to serve that purpose.

A similar point applies to the other example—when "claims are made by numerous persons against a fund insufficient to satisfy all claims"—offered by the 1966 Advisory Committee.[12] Although the needs of all claimants to protect their interests is genuine, having the named plaintiff appoint himself as the protector of those interests is suspect because each claimant's interest is at odds with that of the other claimants. The more money one claimant recovers, the less is left for the others. Although the current rule makes the limited fund situation a justification for a class action, the limited fund should be viewed the opposite way—as something antithetical to the principle on which class actions are based. Just as the rancher/manufacturer case presents reasons to avoid a class action, not to use one, the same can be said of limited fund cases. Sections (b)(1)(A) and (b)(1)(B) of the current rule strangely characterize these types of cases as requirements for a class action on the theory that they constitute a justification for a class action, but just the opposite is true.

Section (b)(1)(B) seems to contemplate a fixed fund, and, in such cases, joinder will often be a viable alternative to a class action. Imagine, however, a product that severely injures millions of people. Here the harm is widespread but, unlike the prototypical class action, not dispersed in small amounts. Each person suffers great harm. The victims could bring the suit individually because the prospect of recovery is great enough to make the suit economically viable. A number of victims could join together as plaintiffs to increase the fund available for the attorney fees and thus increase the quality of representation—still no class action. The litigation portrayed in *A Civil Action* involved twenty-one plaintiffs, enlarging the war chest available to Jan Schlichtmann, but it was not a class action.[13] Imagine, however, that in the style of recent asbestos or tobacco litigation a few victims and their attorney created a class of all persons injured by the product. That would vastly increase the potential award against the defendant manufacturer. The greater recovery would enlarge the resources available for securing the most able lawyers and funding the preparation of their case (for example, expert witnesses and extensive discovery).

Lawyers have tried to bring this type of suit within 23 (b)(1)(B) on the theory that the total exposure of the defendant firm greatly

12 *Id.*

13 *See* JONATHAN HARR, A CIVIL ACTION (1995); *see also* A CIVIL ACTION (Touchstone Pictures 1999).

exceeds its assets.[14] This means that if each person in the class individually prosecuted his suit, and these cases were tried seriatim, a risk would be created that some victims would be left without an economically viable enterprise from which to recover. A de facto limited fund might be said to exist. To a degree, we have the same concern as we did with the true limited fund case—the interests of the members of the class are in competition.[15] There is, however, an additional factor: A class action benefits all members of the class by increasing the resources available for successfully litigating the action.

This benefit might be sufficient to justify the maintenance of the suit under the superiority requirement, but no hint of it can be found in (b)(1)(B). Indeed, (b)(1)(B) points in the wrong direction. That section identifies the class members' competing interests in the limited fund as a basis for bringing the lawsuit as a class action, when in fact that competition between class members gives the court a reason to deny class certification. In the final analysis, the court must weigh the class members' competing interests against the class members' common interest in increasing their litigation resources through aggregation of their claims (because that increase in resources improves their chances of success in the lawsuit).

3. Section 23(b)(2): Injunctive Proceedings

The third category of class action is established by section 23(b)(2). It has two requirements. First, it requires that the defendant have acted on grounds generally applicable to the class. This requirement is certainly sensible—it goes to the heart of interest representation—but it is fully subsumed under the commonality and typicality requirements. How can the named plaintiff have a claim that is typical of the members of the class unless the defendant acted on grounds generally applicable to the class?

The second requirement does not appear as a requirement but was made one by judicial construction. After stating that the defendant must act on grounds generally applicable to the class, the rule continues: "thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." In

14 *See, e.g., In re* Drexel Burnham Lambert Group, 960 F.2d 285, 292 (2d Cir. 1992).

15 *See generally* Mark W. Friedman, *Constrained Individualism in Group Litigation: Requiring Class Members To Make a Good Cause Showing Before Opting Out of a Federal Class Action*, 100 YALE L.J. 745, 753–55 (1990); *see also id.* at 753 (noting the "widely accepted fact that any one person's monetary recovery (where available) is often greater in individual than in group actions"); *id.* at 755 (referring to "the litigation dynamic that individual suits yield higher per-person damage awards than class actions").

the context of explaining why a certain class action had to be brought under (b)(3) as opposed to (b)(2), the Supreme Court in *Eisen* construed (b)(2) to be applicable only when the relief sought was exclusively or predominantly injunctive or declaratory.[16]

Even with this narrowing construction there is an obvious overlap problem. Injunctive actions can also fit under (b)(1) (remember the example of the dam) and (b)(3). The rule provides no guidance in these situations where multiple categorizations are possible. *Eisen* might be read as providing guidance in such situations, for it construed the requirements of (b)(2) and (b)(1) in such a way as to require that most class actions be brought under (b)(3).[17] That resolution seems similar in a way to the reform urged here, as both in effect make (b)(3) the only type of class action. Yet our reasons and method differ. The Supreme Court prioritized (b)(3) in order to insist upon stringent notice requirements, and it achieved this result by reinterpreting (b)(1) and (b)(2) in such a way as to make them virtually unavailable in the paradigmatic situation of dispersed harm.[18] As we will develop later, our reform broadens notice, but that is a consequence of, not the reason for, the change, which stems from an appreciation of the limits of interest representation; and we proceed not through a narrowing construction of the (b)(1) and (b)(2) categories, but through a direct consideration of their underlying theory.

In addition to the overlap problem, it is hard to understand why the remedy alone—injunctions as opposed to damages—should become a basis for authorizing class actions independent of any assessment as to whether the class action is superior to other means available for the fair and efficient adjudication of the controversy. As an illustration, imagine an employment discrimination lawsuit against a firm with hundreds of thousands of employees, scattered throughout the nation. The named plaintiff, trying to correct for past discrimination, asks for a remedy that puts the class members in the position they would have been in if there had been no discrimination. If the remedy were an injunction, requiring, for example, the firm to give the victims of discrimination additional promotional rights, then under the current rule the suit could be brought under (b)(2) and the superiority requirement (which now applies only to (b)(3) class actions) would be avoided. If, on the other hand, the suit sought monetary compensation—not just back pay, but actual compensation—(b)(2) would become unavailable, and in all likelihood the ac-

16 Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 163 n.4 (1974); *id.* at 177 n.14.

17 *Id.* at 173.

18 *Id.*

tion would be treated as a (b)(3) action. As a consequence, the court would have to reflect on the manageability of the class action, the appropriateness of individual control over the prosecution of the action, and the wisdom of concentrating the litigation in a single forum. Whether or not the court would allow the action to proceed on a class basis, we see no basis for the differentiation between the two cases: The judicial inquiry should not vary depending on the remedy sought.

The Advisory Committee responsible for the 1966 amendments explained that (b)(2) was inspired by the civil rights litigation then taking shape.[19] We fully embrace the civil rights cases but find no reason within them that would make an injunction more deserving of class action treatment than a lawsuit seeking damages. Indeed, the most compelling case for a class action comes in the damages context—dispersed harm. In fact, when the named plaintiff seeks an injunction, as in the typical school desegregation case, it is not even clear what is to be gained for him or the class by casting the suit in terms of a class action. If the named plaintiff brings suit individually and wins, then the defendant will be bound to act in a way that confers benefits on the entire class—to desegregate the schools—and that obligation can easily be enforced by all the members of the class. They can either intervene or bring a new suit and hold the defendant, who had participated in the prior proceeding, to that initial judgment. But if the named plaintiff brings a class action and loses, the members of the class will be bound by that defeat. This would make the class form advantageous to the defendant, but neither we nor Rule 23 contemplates giving defendants the power to compel plaintiffs to bring a suit in class form. It is one thing to tolerate a self-appointed representative, but another to allow for compulsory service as a representative.

Some might defend the use of the class action in the injunctive context as a device to mitigate the dangers of mootness, occasioned, for example, by the graduation of the named plaintiffs in a school desegregation case. But the class action is not the only method of overcoming this problem. If the suit were brought on an individual basis, the lawyer for the named plaintiff would find a substitute or bring the individual action on behalf of a number of individuals. Thus, rather than finding a reason to exclude injunctive actions from the superiority requirement (as the current rule does), we are at a loss

19 FED. R. CIV. P. 23(b)(2) advisory committee's note (1966) ("Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class . . . .").

to explain why plaintiffs seeking injunctions would even want to utilize the class action form.

4. Section 23(b)(3): The Catchall

The fourth descriptive category, section 23(b)(3), is less a category than a catchall for those class actions that do not fit into one of the first three pigeonholes. Under the current rule, any such action must satisfy the requirements of predominance and superiority. Because of these requirements and the additional obstacles placed on 23(b)(3) class actions, above all the costs of notice, plaintiffs struggle to stay out of that category and defendants anxious to defeat the class format push in the opposite direction. As a result, the certification hearings often turn into a classification game. Our proposal would end that game. We would apply the predominance and superiority requirements across the board and would subject each class action to the full set of six requirements that now applies only to (b)(3) actions. In that sense, we want every class action to be treated as a (b)(3) action.

II. THE SPECIAL PROTECTIVE DEVICES: NOTICE, INTERVENTION, AND OPT-OUT

The six requirements currently found in sections 23(a) and 23(b)(3) help to protect absent class members against the threat of inadequate representation of their interests by the named plaintiff. But as the rule recognizes, those requirements are not enough; the absent class members must in addition receive an opportunity to protect themselves. Rule 23 imposes on the class actions that it permits three protective devices—notice, intervention, and opt-out rights—that enable unnamed class members to guard against the dangers present in interest representation. Section (b), which we have said we would abolish, plays an important role in the current scheme by assigning different protective measures to class actions falling within subsection (b)(3) than to those falling within subsections (b)(1) and (b)(2). Indeed, it might well be that the linkage between the section (b) categories and the notice, intervention, and opt-out provisions accounts for the persistence of section (b) and its categories, which, as just explained, lack any intrinsic logic.

A. Notice

Notifying absent class members of the lawsuit is meant to solve some of the problems caused by the anomalous character of represen-

tation in a class action. Within that framework, however, a distinction needs to be drawn between two different purposes of notice. One is to check on the adequacy of representation being provided to the class, and the other is to render viable the right of unnamed class members to take certain protective measures, specifically to intervene or to opt out of the lawsuit.

When a judge rules that a lawsuit fulfills the six requirements, she renders what is best described as a preliminary or conditional decision to certify the class—to permit the lawsuit to go forward on a class basis.[20] This initial decision is made without the benefit of input from unnamed class members, who are unaware that they are being represented. Because such input often provides crucial aid in assessing the adequacy of interest representation—the best judge of a person's interests is usually the person himself—the court must, in our view, then require that notice be sent to absent class members. Notice would give them some opportunity to complain about the adequacy of representation likely to be provided by the individual who appointed himself to represent their interests. Upon hearing objections from class members, the judge may then affirm her original decision to certify the class; or alternatively, she may rule that the six requirements have not, after all, been satisfied and may therefore revoke the preliminary certification.

The current rule gives the judge complete discretion to decide what, if any, notice the named plaintiff must provide to absent class members in actions that fall under the categories of (b)(1)(A), (b)(1)(B), and (b)(2). By contrast, it requires the named plaintiff in any (b)(3) class action to furnish "the best notice practicable under the circumstances, including individual notice to all [class] members who can be identified through reasonable effort." The 2003 amendments leave this structure unchanged (other than to insist that the language of the notice be "plain" and "easily understood"),[21] but we

20 The pre-amendment rule permitted the judge to certify the class "conditional[ly]," i.e., pending further developments that might affect her decision. FED. R. CIV. P. 23(c)(1). The 2003 amendments delete this provision, directing "[a] court that is not satisfied that the requirements of Rule 23 have been met" to "refuse certification until they have been met." REPORT OF THE JUDICIAL CONFERENCE, *supra* note 2, at 249 (proposing FED. R. CIV. P. 23(c)(1)(C) advisory committee's note). The court "may designate interim counsel before determining whether to certify the action as a class action." *Id.* at 277 (proposing FED. R. CIV. P. 23(g)(2)(A)). Both the pre-amendment rule and the 2003 amendments authorize the judge to revisit her initial decision: "An order [to certify] may be altered or amended before" final judgment. *Id.* at 243 (proposing FED. R. CIV. P. 23(c)(1)(C); FED. R. CIV. P. 23(c)(1)).

21 *See* REPORT OF THE JUDICIAL CONFERENCE, *supra* note 2, at 243 (proposing FED. R. CIV. P. 23(c)(2)(B)).

think it is flawed. The rule should not permit, in some cases, a judge to dispense entirely with notice. Nor should it require, in an entire category of cases, judges to insist upon individual notice. The factors that are relevant in determining what kind of notice is required for the class have little to do with the descriptive categories of 23(b).

In every class action, notice will be valuable as an instrument for checking the adequacy of interest representation. Rule 23 should take account of this fact by requiring notice in all class lawsuits. But because the appropriate form and extent of notice vary from one case to the next, the rule should grant judges the flexibility to tailor notice to the needs of the particular case. The Supreme Court recognized the principles underlying these views in its decision in *Mullane v. Central Hanover Bank*,[22] a case in which it held that some beneficiaries in a common trust could be bound by a court judgment settling their accounts, even if they had not participated in the proceeding that resulted in the judgment and had no knowledge of the proceeding. What mattered was that their interests were adequately represented.[23] To insure such adequacy, it was necessary that some, though not all, members of the class of beneficiaries be given actual notice—which the Supreme Court judged was more likely to be effectuated by individual letters than by publication in a newspaper. Those who received notice would have an opportunity to scrutinize the adequacy of representation being provided for the class of beneficiaries in general. The touchstone of due process was adequate representation. Notice was thus required in *Mullane* as a matter of due process, but only in a derivative sense and only for instrumental purposes—namely, to serve as a means of checking the adequacy of the representation being afforded.

One might think that if notice has only instrumental value, then like any instrument it sometimes can be dispensed with. Indeed, in his opinion for the Court in *Eisen*, Justice Powell made a comment to this effect.[24] Yet this proposition possesses only an analytic truth and disregards the practicality of class actions. Given the dangers of interest representation and self-election of a representative, any proceeding to examine the adequacy of representation would greatly benefit if some members of the class were notified that they were being represented and were allowed to voice their opinions as to the adequacy of

22 339 U.S. 306 (1950).

23 *Id.* at 316–17.

24 Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176–77 (1974) ("[P]etitioner's argument proves too much, for it quickly leads to the conclusion that no notice at all, published or otherwise, would be required in the present case.").

that representation. So much so that it would be hard to think of situations when there would be no notice at all to any members of the class. Because this would be true of all class actions, it makes no sense to distinguish among the types or categories of classification—(b)(1), (b)(2), or (b)(3)—for purposes of determining whether notice to absent class members is mandatory.

The notice we would require to absent class members is actual notice. To give class members an opportunity to assess the quality of representation being provided, they must actually be informed of the lawsuit and the claimed representation. A letter mailed to them that goes astray might be a valiant effort, but it does not provide the addressee with the opportunity that due process mandates. A question can be raised, however, whether the notice is selective or universal: Must every single member of the class receive notice? As presently structured, Rule 23 approaches the universal ideal only with (b)(3) class actions. For (b)(3) actions, subsection (c)(2) requires "individual notice to all members who can be identified through reasonable effort." We say that this requirement—referred to as individual, as opposed to collective, notice—merely *approaches* universalism because it does not protect those members of the class who cannot be identified through reasonable effort. Nor does it protect those who do not receive actual notice, because it has been understood to require the sending, but not the receipt, of individual letters.

Although the notice requirement for (b)(3) actions is prefaced by the *Mullane* formula, specifically requiring "the best notice practicable under the circumstances," the rule in fact departs from the principle of that case by appending to it the particular result reached in *Mullane*. The rule does not permit the judge to fashion the kind of notice required by considering crucial practical factors such as the cost of the notice, what consequences expensive notice might have for the members of the class action, the homogeneity of the interest among class members, and the size of the claims. We propose a return to the *Mullane* principle unqualified, and we would apply it to all class actions. The rule should require, in every class action, the best notice practicable under the circumstances. Oddly, the *Eisen* Court thought it was bound by the ill-advised wording of (c)(2) and thus was unable to pursue the *Mullane* principle and approve the collective notice at issue in that case (random notice).

Even more oddly, the 2002 Advisory Committee, fully aware of the dilemma the Court created for itself, failed to propose amendments that would have changed the language of (c)(2) so as to make it more nearly in accord with the principle of *Mullane*, which, as we

said, would require notice to the class in all class actions, but only the best notice practicable under the circumstances.

In addition to requiring the best notice practicable under the circumstances, Rule 23 would be further improved if it specified—in much the style of the superiority checklist[25]—the factors a court should consider in making that judgment. One such factor is the cost of providing notice to the entire class. Costs vary depending on the size of the class and the means available for reaching the entire class. New advances in computer technology have created new ways of cutting the costs of notice to vast numbers of people. The court should always pursue the least costly notice.

The second factor is the importance of reaching every member of the class. Here both the magnitude of the interest of each member of the class and variations in their interests are relevant. In *Eisen*, which involved price-fixing by stockbrokers in odd-lot transactions, the interests among the members of the class were relatively homogeneous and small. The named plaintiff's claim was valued at seventy dollars, so responses to the notice or protests about inadequate representation were very unlikely.[26] In such a case, extensive notice is relatively unimportant. By contrast, in an asbestos class action, the claims of individual members of the class might be vast (each might seek millions), and there would be differences among individuals in the etiology of the illness, the causal chain, and even the type of asbestos-related injury.[27] There, extensive notice would be of great importance.

The third factor involves the consequence of the notice requirement on the maintainability of the class action, and the importance of the class format. In analyzing this factor we operate on the assumption—though we do not necessarily endorse it—that the responsibility for paying the costs of notice requirements shall be on the shoulders of the plaintiff as opposed to the defendant or the court system. Although the Supreme Court has expressed the view that in some instances courts may justifiably require a defendant to share notice costs with the plaintiff,[28] this practice rarely occurs. Accordingly, some consideration should be given to the capacity of the plaintiff to raise the funds necessary to defray the costs of notice. If the necessary funds cannot be raised, then the judge must further consider whether the

25 *See* FED. R. CIV. P. 23(b)(3).

26 *Eisen*, 417 U.S. at 161.

27 *See* Amchem Prods. v. Windsor, 521 U.S. 591, 624–25 (1997).

28 Oppenheimer Fund v. Sanders, 437 U.S. 340, 350 (1978) ("[W]e think that where a defendant can perform one of the tasks necessary to send notice, such as identification, more efficiently than the representative plaintiff, the district court has discretion to order him to perform the task under Rule 23(d).").

underlying claims might be prosecuted on an individual basis. In the imagined asbestos case, the answer might be yes; whereas in cases of dispersed harm like *Eisen*, the answer would be no. Where expensive notice would cripple a class action that could not be brought as separate individual suits, a judge should try to avoid imposing such a notice requirement. A less expensive alternative will virtually always be a better way to balance public justice with the demands of interest representation in such cases.

B. Intervention

Upon receiving notice or otherwise learning of the class action, a class member may contest the representation provided by the named plaintiff. If the judge decides there is merit to the contesting party's claim, she will revoke her conditional certification of the class or possibly allow the disgruntled class member to serve as the representative of the class. If, on the other hand, the judge decides that there is no merit to the claim and determines that the other requirements for a class action are satisfied, then the judge will allow the suit to proceed as a class action. At that point, the disgruntled class member might seek to intervene for purposes of representing his own interest. Despite the social value of interest representation and of allowing the named plaintiff to appoint himself the representative of the class, courts will justifiably be prone to give an individual class member the opportunity to represent himself if that individual is unhappy with the quality of his representation in the class action. This too, like many of the proposed reforms, acknowledges the anomalous quality of interest representation.

The Federal Rules treat intervention fully in Rule 24, separating it from the class action rule. We are of the mind, however, that Rule 23 should include its own section on intervention because Rule 24 is not fully responsive to the needs of class actions. Section (a) of Rule 24, the provision that authorizes intervention as a matter of right, requires the would-be intervener to demonstrate that his interest is not being adequately represented. Unless we draw a distinction between the meaning of adequate representation in Rule 23 and its meaning in Rule 24, the prospective intervener would encounter a barrier to intervention in the class action setting. Intervention would be sought after the class had been certified and the judge had made the determination that the named plaintiff was adequately representing the class. That judgment should always be open to reconsideration, but we imagine that intervention by a disgruntled class member may be appropriate even when the named plaintiff is an adequate representative of

the class (of which the would-be intervener is a member). The concept of interest representation may be sufficient to sustain the class action, but it should not prevent someone who is unhappy with the person claiming to be his representative from speaking for himself. Relying on Rule 24(a), as Rule 23 now does, might obscure this point. Admittedly, section (b) of Rule 24, referred to as "permissive intervention," does not require the would-be intervener to demonstrate inadequate representation, but it is not a solution to the problem. Rather than recognizing a right of intervention, it gives the judge unfettered discretion to grant or deny the request to intervene.

Intervention is fleetingly mentioned in Rule 23, but the rule should address it more fully. Rule 23(c)(2)(C) dictates that the notice sent to class members shall advise them that "any member [of the class] who does not request exclusion may, if the member desires, enter an appearance through counsel." We endorse the idea of a special intervention provision for class actions. We also believe that it should be sufficiently generous to account for the anomalous character of interest representation, and therefore it should be a right. Subsection 23(c)(2)(C) is a step in the right direction, but only a step. Two changes are needed.

First, intervention should not appear as an appendage to notice, but should be recognized more directly. Currently, the intervention right is created indirectly by reference to what a notice letter must include; subsection (c)(2) states that notice must inform class members that they have a right to intervene. We propose that the rule declare that "class members have a right to intervene." Second, intervention rights should apply to all class actions, not merely those that fall into the current (b)(3) category. Any class action involves the possibility that certain class members will be dissatisfied with the class representative and will want to represent themselves. This dissatisfaction is no less likely to occur—and no less important when it does occur—in class actions that seek injunctions instead of damages, or in limited fund cases, or in cases that involve a risk of inconsistent adjudications.

Although we recognize a right of intervention for the individual class member, and do so out of recognition of a person's right to speak for himself, we do not believe that a system of notice need be created to apprise fully each and every member of the class of this right. Such a second round of notice, which would have to be individualized because the right it seeks to protect is highly individualized, would unduly encumber the class format. The right to intervene is important, but not important enough to defeat the social purposes served by this procedural device.

We also acknowledge that exceptional circumstances might justify denying the application to intervene of some of those individual class members who happen to learn of the suit. Intervention is not of the discretionary character of Rule 24(b), but neither is it an absolute entitlement: It is a right, but only a qualified one. Sometimes there might be hundreds of separate intervention requests, many of which could clearly be rejected without diminishing the adequacy of interest representation of the class. Of course, the individual interest of those wanting to speak for themselves is still present, but honoring that interest by granting every request to intervene might cause the litigation to become unmanageable and spin out of control. A narrow manageability exception should be recognized in such cases, but doing so should not detract from the general point: Given the inherent limits of the form of representation involved in a class action, a request for intervention by an absent class member typically should be honored by the court.

C. Opt-Out

The option of intervening existed prior to 1966. In the 1966 revisions to Rule 23, another option was created: The opt-out (which, like the rule's provisions about intervention, is left untouched by the 2003 amendments). An absent class member who is dissatisfied with the named plaintiff's representation may exclude himself from the class and preserve his right to litigate his claim separately. Opt-out is a right that can be exercised either in anticipation of or after class certification, and like intervention it is highly individualistic and stems from a recognition of the intrinsic limits of interest representation. It differs from intervention, however, in one important respect. When an absent class member intervenes, he not only protects his own interests but, by participating in the case and making his views known, he also protects the interests of similarly situated absent class members who do not intervene. The individual who opts out might be signaling his unhappiness with the suit, but he is essentially protecting himself.

The opt-out, like recognition of intervention in Rule 23, is confined to (b)(3) class actions. This linkage is more an accident of history than a rationally defensible design. Between 1938 (when the Federal Rules first came into effect) and 1966, the practice of categorizing class actions emerged.[29] The structure of section (b) reflects

29 *See generally* DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS 9–37 (2000); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 391–93 (1967).

that practice: Section (b)(1) attempts to define what were then referred to as true or hybrid class actions, and section (b)(3) can be understood as giving preclusive effect to what were then referred to as spurious class actions—class actions that provided great benefit to class members if the plaintiff won, but that did not preclude the absent class members from further litigation if the defendant won. Section (b)(3) sought to render the spurious class real by binding absent class members when the defendant won, and in order to accomplish this it was thought necessary to make such class actions the object of special protective devices such as opt-out. Yet the justification for the opt-out right could apply to any class action. It is premised on the idea that a class member can better represent his own interests in a separate lawsuit, or by not suing at all, and the legitimacy of that wish does not turn on the type of class action involved.

Linked to the (b)(3) category of class actions, the opt-out right was sometimes seen as a justification for individual notice of a universal character: The right was individualized, so the notice had to be individualized as well. We believe, however, that opt-out should be kept distinct from notice, which, as we explained, should be tailored to help insure the adequacy of representation. Admittedly, only those who receive notice will have the information necessary to exercise their right to opt out (notice informs people that there is a lawsuit to opt out of), but this fact should not count as a reason for extending or universalizing notice. The extensiveness of notice should be determined independently of opt-out, which then should be perceived as a protective device available to the disgruntled class member. Opt-out rights tend to be important when individual stakes are high and interests begin to diverge, and that is precisely the situation that requires the most extensive notice—not to serve the opt-out right, but rather to test for the adequacy of representation.

As in the case of intervention, some might perceive a tension between, on the one hand, our insistence on acknowledging the opt-out right, and on the other, our refusal to require notice that is sufficiently extensive to give effect to that right for every class member. However, we view that tension as a natural outgrowth of the accommodation of values inherent in the class action. We permit interest representation to make economically viable private enforcement of public laws in the situation of dispersed harm, but we place limits on how far this form of representation may be stretched. In striking such an accommodation of values, it is essential to check the adequacy of interest representation, and that check is the main purpose of notice. Honoring a person's request to opt out of an action in which his interests are being represented adequately is far less important, and courts

typically should be unwilling to impose, for that purpose, the expensive notice requirements that so often cripple class actions seeking redress for dispersed harm.

In some cases opt-out can be abused, and the right to opt out can be denied. For example, when a class seeks an injunction, a class member whose interests are identical to those of the named plaintiffs might opt out solely for the purpose of preserving his chance for "a second bite at the apple." That is, if the plaintiff class prevails and the injunction is granted, then the person who opts out shares in the benefit. If the class loses, then the person who opts out has preserved his right to bring a suit seeking the identical injunction that the class unsuccessfully sought—perhaps before a more sympathetic judge. He would have to overcome stare decisis, but the first decision would not be res judicata. In such a situation, a judge in the initial action should deny the class member's opt-out request.

III. SETTLEMENT

All litigation is prone to settlement, and class actions are no exception to this rule. Sometimes the agreement between the named plaintiff and the defendant is reached even before the class is certified. The prospect of settlement does not lessen the need for a court to make certain that all the requirements for certifying class actions are satisfied, including the sending of notice to absent class members. In fact, we believe that the prospect of settlement increases the court's responsibility to make certain that the class meets the conditions for certification.

In any class action, the named plaintiff decides to bring a suit on a class basis and appoints himself as the class's representative. As a consequence, the named plaintiff will always argue in favor of class certification: He will argue that the requirements for bringing a suit as a class action have been met and will try to keep notice to the class at a minimum. Who is arguing against class certification? In some cases the defendant is—for example, when he knows that the claim can be prosecuted only on a class basis and there is little danger of individual suits. In such a case, the defendant, oddly enough, acts as a surrogate representative of the absent class members, disputing the named plaintiff's claim that he is an adequate representative of the class. Even here, however, no one can fully trust the defendant's representation of the interests of the absent class members. The defendant hopes to be confronted by a wholly inadequate representative of the class, and he will not challenge the claim of representation or demand the kind of notice that will provoke such a challenge when it is most

needed. The defendant may also endorse the class format when, due to the magnitude of individual losses, individual lawsuits by class members are a real threat, and the defendant sees the class action as a way of foreclosing those suits altogether.

Every certification proceeding, therefore, presents a risk that the interests of the absent class members, even as to the certification issues, will not be fully pressed. The judge must seek to minimize that risk, and in the certification proceedings she must assume an independent responsibility for testing the adequacy of representation provided. The need for such judicial oversight is compounded when, as is sometimes the case, the named plaintiff and the defendant reach a settlement of the underlying substantive claim before the case is certified. Such an agreement creates an adversarial void, and the responsibility is placed wholly on the shoulders of the court to make certain that the requirements of class actions are satisfied. An adversarial void does not make the class action requirements any less important; it simply makes it difficult for the judge to apply them.

Section 23(e) dictates that no class action may end in settlement unless the court approves the settlement. The court's obligation to scrutinize the settlement of the underlying substantive claim does not, however, supplant its obligation to certify the class action and thus to determine whether the requirements for maintaining a class action are satisfied. Of course, the judge may peek at the terms of the agreement to help her determine, for example, whether the named plaintiff is providing or will provide adequate representation to the class. Yet neither the agreement's existence nor its terms reduce the need for the judge to make certain that the requirements for class actions are satisfied, including the requirement that the class members be adequately represented. Not every fair agreement is the best agreement that the absent class members could legitimately expect.

To some extent, this view accords with the Supreme Court's position in the recent *Amchem*[30] and *Ortiz*[31] cases. These cases arose from asbestos litigation and involved "settlement classes"—classes seeking to be certified for settlement even though they could not be certified for trial. At issue was the question whether the requirements of a class action might be adjusted downward when the parties reach agreement before certification. With respect to the adequacy requirement, the Court answered emphatically in the negative and underscored the special need to scrutinize the adequacy of representation.[32] It made

30 *Amchem*, 521 U.S. at 591.

31 Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).

32 *Id.* at 832–37; *Amchem*, 521 U.S. at 613–19.

that ruling in a case in which the defendant had a great interest in precluding individual lawsuits and thus favoring the class format, but it was not confined to such a context. For the reasons just given, we endorse that view, although we disagree with another aspect of the Court's ruling.

Amchem was a (b)(3) class action. That section requires a court to find that a "class action is superior to other available methods for the fair and efficient adjudication of the controversy." It also directs a court, in making this judgment, to consider (among other factors) "the difficulties likely to be encountered in the management of the action." The particular class action before the Court in *Amchem* posed enormous problems of manageability if the case were tried. The class was vast, consisting of victims of asbestos-related diseases, some of whom had not yet manifested symptoms. At the very minimum the trial of this suit would have required the application and thus coordination of the tort laws of all the states. To isolate the precise issue raised by settlement classes, we need to assume that these problems would have led a court not to certify the class action if it were to be tried. The named plaintiffs and the defendant, however, insisted that this and perhaps other manageability problems would disappear if the case were settled. The Supreme Court agreed with them and held that the manageability criterion should be applied on the assumption that the action would be settled, not tried, since that is what the parties contemplated.[33] The named plaintiffs thus were not required to show that the class was manageable for trial.

We appreciate the distinction the Court drew between the manageability factor and the adequacy of representation requirement. Adequacy of representation seeks to protect the absent class members, while manageability primarily protects the interests of the judiciary. Nevertheless, disregarding the manageability factor on the assumption that the case will never be tried runs counter to a basic principle of our legal system. Courts sit to try cases, and their power to settle cases is only ancillary or incidental to that activity. If a case is so unmanageable that it cannot be tried, then the court's power to approve or police a settlement ceases. Put another way, if the case cannot go to trial, then court approval of a settlement falls outside the bounds of the judiciary's power to resolve cases and controversies; a case that cannot go to trial is not a case.

The 2003 amendments do not touch the issue of settlement classes at all; after all, the recommendations of the Advisory Committee had, in the end, to be passed on by the Supreme Court and the Com-

33 *Amchem*, 521 U.S. at 619–22.

mittee might have thought it foolhardy to attempt a revision of *Amchem* along the lines we have indicated. Admittedly, our proposal might be seen as a criticism of the Supreme Court's position, but because that position was partly (though, we think, wrongly) defended as an act of deference to the rules as written, we imagine a more robust Advisory Committee might take up the issue and reverse *Amchem* on the manageability issue. Although we have proposed that the classification scheme of section (b) be abolished altogether, we retain the predominance and superiority requirements of (b)(3) and apply them to all class actions. Accordingly, we propose that Rule 23 require courts to consider manageability in determining whether the class action is a superior mechanism for the fair and efficient adjudication of a controversy, and that they make that judgment on the only assumption that vests them with power—that they will be called upon to adjudicate the matter.

Once certified, the class action can then proceed to discovery, pretrial, and trial. Even then, somewhere along the way the parties might agree to settle the substantive claim, and if so, a further question arises: Who will be bound by the settlement? When a class action is fully litigated and judgment is rendered, all class members are bound by the decision. None of the class members can go back to court to relitigate the issue—even those who received no notice of the lawsuit. We accept this preclusion as a consequence of interest representation. We see, however, a central difference between adjudication and settlement, and we therefore propose to limit a settlement's binding effect to those members of the class who affirmatively agree to the settlement—that is, those who opt in. This proposal, if accepted, will deprive the debate over settlement classes of much of its practical importance, since the incentive to settle class actions will be greatly reduced. We appreciate the practical consequences of a rule disfavoring settlement, yet we are driven to it by elemental principles of justice and a clear appreciation of the nature of interest representation.

In *Phillips Petroleum Co. v. Shutts*,[34] the Supreme Court addressed the issue of an opt-in, but in a different context. *Shutts* involved a class action in a state court in Kansas. The plaintiff class consisted of approximately 30,000 persons, scattered throughout the United States, whose individual claims were worth an average of about $100. The defendant argued that the Kansas court lacked personal jurisdiction over the unnamed members of the class unless those members opted in. To advance this theory, the defendant drew an analogy be-

34 472 U.S. 797 (1985).

tween unnamed members of a plaintiff class and out-of-state defendants who have no minimum contacts with the forum in which a case is litigated. The Supreme Court rejected this analogy, explaining that the purpose of requiring minimum contacts is "to protect a defendant from the travail of defending in a distant forum,"[35] a purpose inapplicable to plaintiffs because the "burdens placed by a State upon an absent class-action plaintiff are not of the same order or magnitude as those it places upon an absent defendant."[36] The Court, of course, acknowledged the downside risk that unnamed members of the class experience in any class action (an unfavorable judgment against the plaintiff), but it rejected the need for an opt-in to justify exposing them to that risk. Individual notice, the right to opt out, and an inquiry about the adequacy of representation were sufficient, the Court concluded, to allow the judgment of the Kansas Court to bind the absent class members to an unfavorable judgment.[37] In reaching this conclusion, the Court in effect held that for unnamed members of the class there is no independent personal jurisdictional requirement over and above the due process requirements for maintaining a class action in the first place. The *Shutts* Court spoke to the bare requirements for maintaining a class action at all, not to the distinction between settlement and adjudication or to the special requirements—such as opt-in—that might be imposed in the context of settlement.

Our opt-in proposal stems from an emphasis upon the public character of adjudication as opposed to settlement. Adjudication requires a public officer—the judge—to listen to the formal presentations of facts and law, to decide who has the better of the arguments, and then to justify her decision in terms of publicly acknowledged principles. A judgment entered on the basis of this process is endowed with the authority of the law and is binding upon the parties. Sometimes the litigants abort this process and enter into an arrangement—a settlement—with each other that makes both parties happier than they would have been if the case were fully litigated. This arrangement is simply a contract between the parties. The authority of this contract, like that of any contract, is based on the parties' consent. In some instances, the settlement may be effectuated by a judgment of the court, but such a judgment's authority derives from the consensual arrangement from which the judgment arises. We refer to this form of settlement as a consent judgment or consent decree.

35 *Id.* at 807.

36 *Id.* at 808. Such burdens include bearing the costs of discovery and potentially paying damages to the plaintiff. *Id.*

37 *Id.* at 809.

In a class action, the named plaintiff acts as a representative of the unnamed members of the class, but there is no consensual tie between the two. Class actions entail interest, not agency, representation, and though interest representation might have its place in the world, we would never endow it with the power to form contracts. A self-appointed representative, even one who fully represents my interests, can never enter legally binding contracts on my behalf. So, even after a class is certified, an agreement between the named plaintiffs and the defendant cannot bind the members of the class. Even though the named plaintiff has been certified as an adequate representative of the class's interests, we know there is no consensual tie between the representative and those represented. True, a self-appointed representative can initiate a lawsuit and can play a leading role in a trial that will result in a judgment binding the unnamed members of the class, but that judgment's binding effect arises not from consent but from the power vested in the public process of adjudication. A settlement dispenses with that public process, in full or in part.

Although courts review class settlements for fairness under Rule 23(e) and conduct "fairness hearings" for that purpose, this review is no substitute for the adjudicatory process.[38] The void created by settlement is not filled. When a court adjudicates a case, it hears the arguments and evidence on both sides, and it chooses the remedy that justice requires. The responsibility for the decision on the merits and for the remedy belongs to the judge and thus to the law. When a court reviews a settlement, however, it gives great deference to the parties' choices in the bargaining process and does not exercise its independent judgment for the remedy. It essentially decides only whether the settlement is manifestly unjust. In the context of a school desegregation consent decree, for example, a court of appeals dictated that when a trial court decides whether a settlement is fair, the trial court must make sure only that the settlement "did not initiate or authorize any clearly unconstitutional activities [and] is thus not per se inappropriate."[39] Fairness review circumscribes the options available to the people at the bargaining table—the named plaintiff and the

38 This is even more true in practice than in theory. *See* Coffee, *supra* note 3, at 389 ("[O]nce a potential settlement of complex litigation is in view, federal trial courts tend to tolerate almost any conflict in order to achieve a settlement that brings litigation peace—but at a cost paid by the class members."); *id.* at 438 ("Although many reforms are possible and could succeed, only one is sure to fail: reliance on trial court scrutiny of the settlement.").

39 Armstrong v. Bd. of Sch. Dirs., 616 F.2d 305, 322 (7th Cir. 1980).

defendant plus their lawyers—but the agreement's authority still arises from consent, not adjudication.

The 2002 Advisory Committee addresses these problems, but none of its proposals for amending Rule 23(e) solves them. The amendments require an explicit finding by the judge that the settlement is, to use the standard formula, "fair, reasonable, and adequate," and they require disclosure of any side agreements made by the parties. The 2003 amendments also require, in the context of (b)(3) actions, that a second round of notice of the proposed settlement be sent to all members of the class who are to be bound by the agreement. The judge reviewing the settlement and directing the notice is even allowed to confer on the absent class members a right to opt out of the settlement. Such changes might well prod the courts toward a closer scrutiny of settlements, and for that reason might be entirely commendable; but such scrutiny of a settlement cannot convert the approval of the settlement into a judgment on the merits of the case. The conceptual gap between settlement and judgment persists.

Because the authority of a settlement arises from the consent of those who agree to it, such people are the only ones who should be bound by a settlement. One consents to a settlement in a class action by the same method that one consents to other contracts—signing on the dotted line. A person cannot become bound by a contract merely because he was sent a letter and failed to respond. The same should be true for settlements in class actions, even if, as the 2003 amendments provide, the members of the class have a second chance to respond and thus to opt out. Even more obviously, persons cannot be bound by a contract merely because other persons—even if they are members of the same class—have agreed to it. Consent in contracts is an individualized matter, and so too should it be in settlements. A settlement, after all, is nothing more than a contract. As a practical matter, this means that after notice of the settlement is sent, the settlement will bind only those who reply to the notice and affirmatively consent to the agreement—those who opt in.

We recognize that such a change in the default rule would have profound effects on the prevalence of settlements because most people will not reply to any letter they might receive about a proposed settlement. If the default rule were to exclude the non-responders from the settlement, then settlement would appeal less to plaintiffs' lawyers, who would be reaping a percentage of a much smaller pie. Many fewer class members would be included in the settlement, so the amount recovered would be much lower. Settlement would also appeal less to defendants, because they could not use it as a shield to preclude all class members from suing in the future. Only those who

opt in would be precluded. The only way that defendants could achieve the preclusion they seek, and the only way that plaintiffs' lawyers could reap huge monetary rewards for their efforts, is by fully litigating the cases.

We do not recoil at creating such obstacles to class action settlements. Even though settlement can conserve the resources of courts and parties, it has led to intractable problems in the class action context. For one thing, it heightens the risk of collusion between defendants and the named plaintiff's lawyers.[40] Because of the adversarial void, it is very difficult for courts to monitor the settlements and weed out collusion. This is true under the pre-amendment rule and will remain true under the 2003 amendments, which for the most part, though not entirely, codify existing practice. Second, defendants complain that they settle many frivolous class lawsuits because a loss would be too costly to risk. They often find themselves paying large amounts in settlement even though they did nothing wrong. Plaintiffs exploit this advantage by filing lawsuits that are not likely to prevail on the merits, but that they count on being settled. If settlements were confined to those who opt in, plaintiffs would lose their incentive to bring class lawsuits that are unlikely to prevail at trial. Trials are costly, and plaintiffs' lawyers, engaged on a contingent basis, would invest their time and cover the ongoing costs of discovery and trial only if they had a reasonable chance to win. This would reduce the number of meritless class lawsuits.

CONCLUSION

Rule 23 is not a statute. Although the rule was promulgated under a scheme set in place by a congressional statute (the Rules Enabling Act),[41] the rule itself was not passed by both houses of Congress and signed by the President and thus did not comply with the minimum constitutional requirements for the enactment of a statute.[42] Under the enabling statute, Congress has an opportunity to reject whatever rules are transmitted before they become effective, but the Constitution does not permit legislation by inaction.

Rule 23 is not a judicial decision, either. Although the Supreme Court transmitted the rule's 1966 revisions to Congress, the Court did not engage in the usual procedures—briefs, arguments, opinions—

40 *See, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 852–53 (1999); Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 827–30 (1997).

41 Rules Enabling Act, ch. 646, 62 Stat. 961 (1948) (codified as amended at 28 U.S.C. §§ 2071–2074, 2076 note, 2077 (2000)).

42 *See* INS v. Chadha, 462 U.S. 919 (1983).

that surround the exercise of the judicial power. Indeed, out of respect for the case-and-controversy requirement of Article III of the Constitution, some of the Justices on the bench in 1966 refused to pass on the merits of the proposed rules and treated their transmission of the rules to Congress as purely ceremonial.[43]

There is language in a recent Supreme Court decision suggesting that Rule 23 might be viewed as an administrative regulation,[44] but that strikes us as far fetched. To view Rule 23 in this way would require us to conceive of the Judicial Conference of the United States—the institution charged by Congress with the review of the rules, and the one that transmitted the 1966 revisions to the Supreme Court—as an administrative agency. The Judicial Conference consists of the Chief Justice of the United States, the chief judge of each circuit, and a representative of each district court. These officials do not possess the attributes associated with the persons traditionally empowered to promulgate administrative regulations—persons such as the Commissioners of the FTC or FCC or members of the NLRB. The members of the Judicial Conference are not members of, or in any way tied to, the Executive Branch. They are judges, appointed to exercise power under Article III. As a result, no one thought it remotely appropriate for the Judicial Conference to follow the procedures prescribed by the Administrative Procedure Act[45] when it considered the 1966 revisions. Neither the public nor any interested party had any opportunity whatsoever to participate in the deliberations of the Judicial Conference, much less in those of the Advisory Committee.

For these reasons, Rule 23 lacks the force of law, as that term is ordinarily understood. The rule is but a guideline or rule of thumb whose force derives only from consistent practice and the wisdom that the rule embodies. As a product of the 1966 revisions, Rule 23 represents a substantial advance over the 1938 rule. Still, given its formal legal status, it should be open to more thoroughgoing and recurrent revision than it has been. We are struck by the fixity of Rule 23.

Over the last thirty-five years, use of the class action has provoked heated debates in political and professional circles. Those debates have not produced any changes of note. As a result of the 1998

43 Some Justices were explicit in their opposition to the procedures used in promulgating the rules. *See* Amendments to Rules of Civil Procedure for the United States District Courts, 374 U.S. 861, 865–66 (1963) (Black & Douglas, JJ., dissenting). Others, like Justice Brennan, acquiesced in the procedures, but understood the Court's transmission to Congress as purely a formal gesture.

44 *See* Mistretta v. United States, 488 U.S. 361, 386–93 (1989).

45 Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C. (2000)).

amendments, a new section was added to grant the courts of appeals the discretion to review district court orders granting or denying certification. This amendment might result in the development of a fuller body of appellate decisions on class actions, but it is unlikely to result in a reconsideration of the fundamental structure of the rule.[46] In September 2002, the Advisory Committee placed a set of proposals for reform before the Judicial Conference of the United States. They have cleared the Judicial Conference and the Supreme Court and may well eventually go into force, and though they have much to recommend them, they never address the fundamental questions of structure. The 2003 revisions thus represent a missed opportunity for reconsideration of the architecture of Rule 23. It is our hope, however, that they might open the possibility of a process of reconsideration and ultimately permit reform of the existing structure of the 1966 rule.

At the heart of our proposed revision is an emphasis on the unique form of representation entailed in a class action—interest representation. We embrace interest representation but at the same time appreciate its inherent dangers and anomalous character. In cases like *Eisen*, class actions are necessary for private enforcement of laws

46 Aside from the 1998 amendment, on only one other occasion over the last thirty-five years, namely the 1996 amendments, has the Advisory Committee proposed revision, and those amendments never made it through the Judicial Conference. COMM. ON RULES OF PRACTICE & PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, CIVIL, AND CRIMINAL PROCEDURE 19–56 (1996). The 1996 amendments (1) permitted appeals of class action certification decisions, *id.* at 44, 55–56; (2) allowed courts to certify under (b)(3) class actions that were to be settled even though the requirements of (b)(3) could not be satisfied if the case were to be tried, *id.* at 43, 51–53; and (3) added two factors to the checklist provided in (b)(3) to determine whether a class action was a superior mechanism for adjudicating the claim. *Id.* at 41–42, 45–51.

The first proposal was renewed in the 1998 amendments and now is embodied in Rule 23(f). The second proposal, aimed at accommodating the "settlement class," provoked an outcry in the profession, largely for the reason set forth in this Article. The third proposal moved Rule 23 in two contradictory directions and arguably was rejected for that reason. One revision would have required the trial judge, in trying to assess the advantages of proceeding on a class basis (as required by (b)(3)), to determine "whether the probable relief to individual class members justifies the costs and burdens of class litigation." *Id.* at 42 (proposing FED. R. CIV. P. 23(b)(3)(F)). Unfortunately, this would have given power to judges to deny certification in situations where the public as opposed to the individual value of the class proceeding was great (because of the magnitude of the harm to the class as a whole). That directive was to some extent at odds with another directive to be added to the (b)(3) checklist, which required judges to favor class actions when "the practical ability of individual class members to pursue their claims without class certification" was limited. *Id.* at 41–42 (proposing FED. R. CIV. P. 23(b)(3)(A)).

aimed at protecting the public, and there is virtually no risk of inadequate representation. But in other contexts, class actions are unwarranted. Specifically, we disavow defendant classes and also classes in which members have opposing interests, as is true of class actions now contemplated by (b)(1). Mass tort cases pose some of the most difficult questions because the public value of the class action is great, but so is the danger of inadequate representation. They should be evaluated on a case-by-case basis, according to the new class action rule we have proposed.

Our new rule would drop the categorization scheme of the current section (b), as well as the scheme's linkage of notice, intervention, and opt-out provisions to the (b)(3) category of class action. We endorse a set of requirements for all class actions, including the predominance and superiority requirements now part of (b)(3). We also apply to all class actions the special protective devices currently applied only to (b)(3) suits—notice, opt-out, and intervention. Although we explicitly acknowledge that notice need not be sent to every class member, we make notice a mandatory requirement in all class actions and do not restrict opt-out and intervention to particular categories of class action. The purpose of these devices is not to construct a consensual tie between the named plaintiff and the members of the class—none exists—but to insure the adequacy of the interest representation provided by the named plaintiff. In further acknowledgment of the special character of the representational tie between the named plaintiff and the absent class members—it arises from identity of interest, not consent—we require class members to assent affirmatively to a settlement (to opt in) before it can become binding on them and foreclose their right to a day in court.