

James F. Humphreys Complex Litigation Lecture: The Adversary System and Modern Class Action Practice

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This afternoon I would like to say a few words about our modern class action practice. I intend to leave ample time for questions at the end because this is law school and we have long been committed to dialogue—and not lecture—as the best format for approaching complex issues.

This afternoon I am absolutely delighted and deeply honored to give this lecture on the occasion of the first George Washington Law Day and with my new title as the James F. Humphreys Professor of Complex Litigation and Civil Procedure. I am flattered beyond words to have my name associated with that of Jim Humphreys. Jim is a personal friend of mine, but, more importantly, he is one of the best friends this law school has ever had. I know quite a bit about Jim and his family, and I greatly admire Jim as a professional and as a family man. We both grew up in blue-collar households and have both greatly benefited in different ways from our association with this law school, which has allowed each of us professional opportunities we never dreamed of as young men. As I said at a board of advisors dinner two years ago, Jim has devoted his entire professional life to championing the rights of working people seeking to find justice in their dealings with corporations and insurance companies. Moreover, he has pursued this passion not only by representing individuals and groups of individuals in court, but by entering elective politics to help working people in West Virginia and elsewhere find fair wages and working conditions, fair taxes, decent social services, and government support for those in need. To have my name associated with a man like this is—for me—the greatest professional honor of my life.

My topic today is modern class action practice and how Rule 23 of the Federal Rules of Civil Procedure has come to be interpreted in our federal courts in ways that I believe mask the proper criteria that should be used in deciding whether to certify a class action. There can be little doubt that the class action rule is the most controversial pro-

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vision in our procedure today, and that in many cases it has allowed a remedy to large groups of plaintiffs who would otherwise have had no other practical means of going to court, but that—at the same time—it has also been abused in some cases in ways that have proven unfair to absent class members or to the institutional defendants who must defend these civil juggernauts. My goal at the end of this talk is to suggest some fundamental ways we might reform class action practice to avoid the abuses, retain the benefits, and help class action litigation rest more comfortably within our adversary system.

To do this, I begin with an analysis of the revolution in the federal courts in the early twentieth century in the relationship of procedure to our substantive law, and the fateful decision of the Advisory Committee on Civil Rules in 1966 to add the modern class action rule as part of a sweeping set of changes to our federal joinder rules. After assessing how Rule 23 has come to be interpreted during its forty-year tenure, I argue that Rule 23 is badly in need of a complete rewrite and overhaul, and I suggest how that might be done.

A major impetus for the dramatic reform of federal civil practice began with Roscoe Pound's famous address to the American Bar Association in St. Paul, Minnesota, in 1906—just over 100 years ago.¹ He complained of the vices of the complex procedural rules of common-law pleading of his day and the “sporting theory of justice” which they helped facilitate between adversary counsel.² His proposed remedy for the widespread “popular dissatisfaction with the administration of justice” in our courts was to change our procedural rules to make it, as he said, “unprofitable to raise questions of procedure for any purpose except to develop the merits of the cause to the full.”³ To accomplish this, he urged in a law review article four years later that procedural rules should be general in character, that trial judges be given broad discretion in the interpretation and administration of these rules, and that they should be applied only to allow parties to present their own case and meet the case against them.⁴

¹ Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906), reprinted in 35 F.R.D. 241, 273 (1964). See generally Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513 (2006) (discussing the role of Pound's critiques in the procedural reforms of the past century and arguing that these critiques are still applicable today).

² Pound, *supra* note 1, at 281.

³ Roscoe Pound, *A Practical Program of Procedural Reform*, 22 GREEN BAG 438, 449 (1910).

⁴ Roscoe Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 388, 402–03 (1910).

Pound's critique of federal practice and those of others like him had immediate results. In 1912, for the first time in seventy years, the Supreme Court amended the Federal Equity Rules to reflect these views.⁵ These amendments abolished technical pleading requirements,⁶ allowed the liberal joinder of claims and parties,⁷ and permitted the pretrial disclosure of documents and, in some cases, depositions.⁸ If this approach sounds familiar to our ears, it should because the campaign to reform federal procedure continued apace. Finally, in 1934 Congress passed the Rules Enabling Act,⁹ and in 1938 the Supreme Court exercised the authority given to it by the Act to promulgate what we now know as the Federal Rules of Civil Procedure.

The 1938 Rules borrowed heavily from the 1912 Equity Rules.¹⁰ To curb excessive pre-trial gamesmanship by counsel, the pleading rules were greatly simplified and, for the first time, the same set of procedural rules was to apply to all types of civil actions. Under this trans-substantive code of procedure, the identification and definition of contested issues was left for the postpleading period and broad rights of discovery were extended to all parties. The rules were written using very general concepts and plainly contemplated that the trial judge would enjoy broad discretion in the application of these rules to particular cases. With few exceptions, these interlocutory procedural rulings by trial judges would be largely shielded from appellate review by the final judgment rule, which increased the trial judge's power over the development of cases dramatically. As the power and discretion of trial judges expanded under the new rules, the importance of judge-shopping to the litigants became that much more evident.

Buried in the middle of the 1938 Rules was a curious provision—the original Rule 23, which created three categories of class actions—true, hybrid, and spurious.¹¹ This old class action rule traced its history back to Federal Equity Rule 38, but was to be of little importance. The meaning of this rule proved “obscure and uncertain” to

⁵ See Rules of Practice for the Courts of Equity of the United States, 226 U.S. 649 (1912).

⁶ *Id.* at 653.

⁷ See *id.* at 655–56.

⁸ *Id.* at 662.

⁹ Rules Enabling Act, ch. 651, 48 Stat. 1064 (1934) (current version at 28 U.S.C. § 2072 (2000)). See generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (discussing the history of the enactment of the Rules Enabling Act).

¹⁰ Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 922–25 (1987).

¹¹ FED. R. CIV. P. 23(b)(1)–(3), reprinted in 39 F.R.D. 95, 96 (1966).

the practicing bar during the next thirty years,¹² and there were very few class actions brought in federal court under this badly drafted provision during this time.¹³

All of this changed in 1966 when the federal joinder rules were substantially revised. Amendments to Rules 13, 14, 18, 19, 20, and 24 were designed to cement the notion that the joinder of claims and parties should be liberally allowed if they were all connected to a “common transaction or occurrence.”¹⁴ But the joinder change that eclipsed all the others that year was the complete rewrite of the class action rule. The new class action rule was a revolutionary attempt to define when and in what circumstances group litigation should be allowed in the federal courts. It was largely written on a clean slate because there had been so little experience with class actions in the federal courts between 1938 and 1966. There was also little or no useful precedent to consult from other procedural systems in the state courts or abroad. Today we have over forty years of experience with group litigation in our state and federal courts and a much more informed basis for rethinking how the class action rule should be revised. For the reasons I turn to next, it is time we do so.

After specifying various prerequisites to group litigation, Rule 23 declared that there were four permissible types of class actions:

- (b)(1)(A)—Incompatible Standards Class Actions;
- (b)(1)(B)—Limited Fund Class Actions;
- (b)(2)—Equitable Class Actions; and
- (b)(3)—Common Question Class Actions.

To illustrate how far astray our federal courts have wandered from the key issues that should be considered in a class certification decision, allow me to share some examples of how the language in Rule 23(b) has come to be construed.

You may well be unfamiliar with the first two types of class actions—the (b)(1)(A) and (b)(1)(B) class actions. They have rarely been brought in federal court or in state courts that have adopted comparable language. These provisions borrow language from Rule

¹² FED. R. CIV. P. 23 advisory committee’s note, reprinted in 39 F.R.D. at 95, 98.

¹³ Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 786 (1993); Richard A. Chesley & Kathleen Woods Kolodgy, Note, *Mass Exposure Torts: An Efficient Solution to a Complex Problem*, 54 U. CIN. L. REV. 467, 472 (1985). But see Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem,”* 92 HARV. L. REV. 664, 670–76 (1979) (noting the dramatic increase in class actions filed after 1966 and arguing that it was attributable to civil rights legislation and broad social trends).

¹⁴ FED. R. CIV. P. 18 advisory committee’s note, reprinted in 39 F.R.D. at 85, 86–87.

19—the indispensable parties rule—and Rule 24—the intervention rule—but have proven of little use in the vast majority of class action cases. Whatever the drafters of this language sought to accomplish by these provisions has largely failed to come to pass. In recent years, some creative plaintiffs’ counsel have sought to use these provisions to justify class action suits in medical monitoring cases¹⁵ and for punitive damage claims¹⁶ and certain types of settlements,¹⁷ but with only occasional success. When classes have been certified under these provisions—as in the 1997 certification of a nationwide medical monitoring class for certain recipients of defective heart pacemakers¹⁸—trial courts have had to contort the language of the current rule to justify what they wished to do.

For most practical purposes, and for most practicing lawyers, the only two important kinds of class actions are the (b)(2) equitable class action and the (b)(3) common question class action. The former has been repeatedly used successfully in civil rights litigation to permit groups to seek injunctions forbidding future discrimination on the basis of race, sex, age, ethnic origin, sexual orientation, and the like.¹⁹ It has also been used successfully to vindicate various constitutional rights in suits to reform police practices,²⁰ to obtain access to abortion services,²¹ to desegregate public schools,²² to improve prison condi-

¹⁵ See, e.g., *In re Telectronics Pacing Sys., Inc.*, 172 F.R.D. 271, 284, 286 (S.D. Ohio 1997) (approving a (b)(1)(A) and (b)(1)(B) class action in a medical monitoring case), *rev’d*, 221 F.3d 870, 873 (6th Cir. 2000).

¹⁶ See, e.g., *In re “Agent Orange” Prod. Liab. Litig.*, 100 F.R.D. 718, 729 (E.D.N.Y. 1983) (certifying a (b)(1)(B) class action for punitive damages only in a mass tort case), *mandamus denied sub nom. In re Diamond Shamrock Chems. Co.*, 725 F.2d 858 (2d Cir. 1984). *But see In re Simon II Litig.*, 407 F.3d 125 (2d Cir. 2005) (reversing certification of a (b)(1)(B) class action for punitive damages).

¹⁷ See, e.g., *In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1545–46 (11th Cir. 1987) (reversing the district court’s certification of a (b)(1)(A) and (b)(1)(B) settlement class action in a complex securities fraud case).

¹⁸ *In re Telectronics*, 172 F.R.D. at 284–85 (“The medical monitoring claim here is an ideal candidate for class certification pursuant to Rule 23(b)(1)(A) because separate adjudications would impair TPLC’s ability to pursue a single uniform medical monitoring program.”), *rev’d on other grounds*, 221 F.3d 870 (6th Cir. 2000).

¹⁹ See, e.g., *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 762, 776–79 (1976) (holding that (b)(2) class members who were denied employment by a racially discriminatory employer were entitled to injunctive relief in the form of seniority based on the date of job application).

²⁰ See, e.g., *In re Cincinnati Policing*, 209 F.R.D. 395, 399–402, 404 (S.D. Ohio 2002) (approving a (b)(2) class for settlement of claims of race-biased policing where settlement terms included extensive reform of police practices and the gathering of detailed data on police activities, crime, and the relationships between the police and the communities they serve).

²¹ See, e.g., *Doe v. Kenley*, 584 F.2d 1362, 1365–66 (4th Cir. 1978) (reversing trial court’s dismissal of a pregnant Medicaid recipient’s class action challenging state policy limiting the circumstances under which the state would pay for an abortion); *Roe v. Crawford*, 439 F. Supp.

tions,²³ and to change abusive policies in mental health institutions.²⁴ The most important issue today in equitable class actions relates not to its use in obtaining injunctions, but whether and to what extent plaintiffs may recover monetary remedies in addition to their requested equitable relief. Rule 23(b)(2) was not originally drafted to provide a vehicle for obtaining compensatory damages and other forms of monetary relief, but seizing on certain language in the advisory committee notes to the rule,²⁵ the plaintiffs' bar was successful in persuading federal courts that monetary relief should be allowed so long as it is "incidental" to the requested equitable relief and not the "predominant" remedy the plaintiff class is seeking.²⁶

In my view, this interpretation of Rule 23(b)(2) has led lower federal courts to ask the wrong questions when deciding whether to certify an equitable class action. Let me give a recent celebrated example. Two months ago, in *Dukes v. Wal-Mart, Inc.*,²⁷ a panel of the Ninth Circuit, in a two-to-one decision, upheld the certification of the largest nationwide employment class action in history.²⁸ The complaint alleged discrimination against women by Wal-Mart in pay and promotion. Many issues were raised in the appeal to the Ninth Circuit. The court first held the class action for equitable relief to be appropriate because it challenged a nationwide decisionmaking policy by Wal-Mart that left too much subjectivity in personnel decisions, because there was evidence of gender stereotyping in the corporate culture, and because there was statistical evidence of gender disparities caused by discrimination.²⁹ The more controversial portion of the opinion, however, dealt with the question of whether the plaintiff class

2d 942, 946, 953 (W.D. Mo. 2006) (entering summary judgment for plaintiff in a (b)(2) class action on behalf of pregnant prisoners seeking access to nontherapeutic abortions).

²² See, e.g., *Freeman v. Pitts*, 503 U.S. 467, 472–74, 485 (1992) (filing of class action seeking desegregation of a Georgia school system resulted in judicial oversight of the school system for over twenty years).

²³ See, e.g., *Wilkinson v. Austin*, 545 U.S. 209, 213, 216 (2005) (affirming the due process rights of a class of prisoners to contest their transfer to a super-maximum-security facility).

²⁴ See, e.g., *Woe v. Cuomo*, 729 F.2d 96, 98–101 (2d Cir. 1984) (reversing the decertification of a (b)(2) class of civilly committed patients at mental institutions challenging the adequacy of their care on constitutional grounds).

²⁵ FED. R. CIV. P. 23 advisory committee's note, *reprinted in* 39 F.R.D. 95, 102 (1966) ("The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.").

²⁶ See, e.g., *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239 (3d Cir. 1975), *cert. denied*, 421 U.S. 1011 (1975).

²⁷ *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007).

²⁸ *Id.*

²⁹ *Id.* at 1231.

proceeding under Rule 23(b)(2)—the equitable class action provision—could also seek billions of dollars in monetary relief, including an unspecified amount of punitive damages from Wal-Mart. Citing language from the Advisory Committee notes to the Rule from 1966, the Ninth Circuit said this depended not on the amount of money the plaintiffs were seeking to recover, but on whether the plaintiffs' primary *motive* in bringing this action was to obtain injunctive relief or monetary relief.³⁰ Based on affidavits from some of the plaintiffs and the statements of plaintiffs' counsel, the court concluded that the equitable relief the plaintiff class sought predominated and that the billions of dollars in damages the class also sought were "incidental" to the equitable claim and thus allowable.³¹ In so holding, the Ninth Circuit noted that it was not necessary for the trial court to permit class members to opt-out of the class if they wished to pursue their monetary remedies individually.³² The Ninth Circuit's decision on this point was not aberrational—other circuits also so held.³³

But whether this plaintiff class should be allowed to seek billions of dollars from Wal-Mart for its employment practices should not turn on *why* the class brought the suit or which of the two important remedies the class sought *predominates* over the other. Surely it must be obvious that both requested remedies were enormously important to the class—both an injunction against future discrimination and a billion-dollar-plus damage award were central—not incidental—to the plaintiffs' case. Indeed, for those thousands of class members who were no longer employed by Wal-Mart, it is clear beyond dispute that the monetary award and not the injunction would be the most important remedy.

The more important point, however, is that the current class action rule, as it has come to be interpreted in such cases, has led our courts to ask the wrong questions. Whether the plaintiff class, or some portion of it, regard the injunctive remedy as more or less important than the monetary remedy cannot logically be the reason why the class action for money is appropriate or not. It also should not determine whether or not class members should be afforded the opportunity to opt-out or not. But under the current language of Rule 23 that is in fact the basis for (b)(2) equitable class action certification decisions today.

³⁰ *Id.* at 1234–35.

³¹ *Id.* at 1234, 1235 n.12, 1236.

³² *Id.* at 1236.

³³ *See, e.g.,* *Robinson v. Metro-N. Commuter R.R.*, 267 F.3d 147, 165–67 (2d Cir. 2001).

A second example of how (b)(2) has come to be interpreted illustrates the problem in a different context. Creative plaintiffs' counsel have sought to use this provision to justify the use of large class actions to obtain medical monitoring remedies for people injured by medical devices, pharmaceuticals, or environmental pollution. Although the federal courts are divided on this question, a number have held that such certification is improper if the defendant is ordered to pay a certain amount of money to the plaintiff class for the medical monitoring plan because that would be a form of damages and (b)(2) is proper only for equitable relief;³⁴ but other federal courts—such as in the Rocky Flats toxic tort case³⁵ in Colorado—have held that if the court issues an injunction establishing a medical monitoring plan and directs the defendant to pay the costs of the plan, then that is a proper basis for a (b)(2) class action.³⁶ Here class certification seemingly has come to depend on the technical issue of how the medical monitoring plan is funded and not on whether the class action is otherwise suitable or appropriate.

Even more important and more controversial has been the interpretation given to Rule 23(b)(3)—the common question class action. Here, the current version of the rule asks the court to decide, among other things, whether common questions “predominate” over non-common questions. In a famous asbestos case in 1986, the Fifth Circuit upheld certification of a class action where the only common question shared by the class was the “state of the art” affirmative defense asserted by the defendant.³⁷ All the other questions relevant to liability and damages were noncommon questions regarding the products the plaintiffs were exposed to, the duration and nature of the exposure, the injuries attributed to the exposure, and the like. If one common question can trump numerous noncommon questions in this way, it is difficult to know what meaning the word “predominate” has in this context.

By contrast, the Second Circuit applied this “predominance” test in a very different manner in a recent landmark securities fraud case involving six focus cases chosen by the district court out of the 310

³⁴ *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 131–32 (3d Cir. 1998) (stating that a court order directing a defendant to pay the medical monitoring expenses of a plaintiff is not injunctive relief, but “the establishment of a court-supervised program through which class members would undergo periodic medical examinations in order to promote the early detection of diseases . . . is the paradigmatic request for injunctive relief under a medical monitoring claim”).

³⁵ *Cook v. Rockwell Int'l Corp.*, 151 F.R.D. 378 (D. Colo. 1993).

³⁶ *Id.* at 387–88.

³⁷ *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986).

class actions brought against several of the nation's largest underwriters arising out of a series of initial public offerings (or "IPOs").³⁸ There, the Second Circuit reversed the trial court and decertified the class actions largely because it found one issue—the "reliance" issue—would require individualized proof, and thus common questions did not predominate, even though it appeared that the many other liability issues and damages could be proven by common proof.³⁹ Clearly the "predomination" test for common question class actions is not being applied in a literal or consistent way.

Rule 23 is not the only one of our federal rules of procedure that is replete with ambiguities and that has been given inconsistent interpretations by our lower federal courts, but it is far and away the most important example of this problem for several reasons. Unlike other preliminary rulings on pleadings issues or the scope of permissible discovery, the class action certification ruling is often the decisive moment in modern litigation. If certification is denied, the claims of the plaintiff class members may not be viable on an individual basis. Even if some are viable, the settlement value of the case from the plaintiffs' perspective has declined dramatically. On the other hand, if class action certification is granted, defendants are often unwilling to suffer the risks of trial—even in marginal cases—and face enormous pressure to settle the case for a very substantial amount.⁴⁰ There is an important irony in the fact that our current federal rules—which were inspired by Pound's goal of keeping procedural decisions from interfering with the substantive merits of the case—should have led in the case of Rule 23 to a world where the procedural decision dramatically drives the substantive outcome of most class action cases.

When so much turns on the discretion of trial judges in such cases we should not be surprised that judge-shopping has become so important to the practicing bar, especially in class action cases. Of course, judge-shopping has always been part of our adversary system to some degree, but it has always been cabined by our various rules on personal jurisdiction, subject matter jurisdiction, venue, and the role of juries and appellate courts in our civil cases. In the last decade, however, we have seen the curious phenomenon of major nationwide class actions being filed in obscure venues in rural Illinois, Texas, or Missis-

³⁸ *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006), *reh'g denied*, 483 F.3d 70 (2d Cir. 2007).

³⁹ *Id.* at 43.

⁴⁰ *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995), *cert. denied*, 516 U.S. 867 (1995).

sippi for reasons—one surmises—that are not related to convenience or local weather. The response of the business community to this phenomenon was to lobby Congress for the so-called Class Action Fairness Act of 2005,⁴¹ which gave the defense bar additional judge-shopping opportunities by expanding the removal rules in class action cases.⁴² But in the end, a satisfactory response to the issues that plague modern class action practice will not lie in giving plaintiffs or defendants more judge-shopping options.

So what should be done to better assure the fair and proper use of this most important procedural vehicle? I would assert that three changes would be most useful. One has already been accomplished, at least in part, but progress on the other two has not yet begun.

The first and easiest remedy is to increase appellate court oversight over the development of class action law. For the first thirty years of its life, the modern federal class action rule received insufficient appellate attention because the rule against interlocutory appeals and the prevalence of settlements in certified class actions kept many controversial cases from ever reaching an appellate court. In 1998, Rule 23 was amended to allow appeals from orders granting or denying class actions to be certified, but only when the relevant appellate court agrees to hear such an appeal.⁴³ I would go further and urge that such appeals by plaintiffs or defendants be of right—not discretionary—but even the current rule is resulting in some increased appellate oversight of lower court decisions that certify or fail to certify class actions. With increased appellate attention to Rule 23, the possibility of greater consistency and coherence in class action rulings is improved. I urge those states which have adopted Rule 23—or some version of it—to also allow interlocutory appeal of certification decisions.

But as the examples from the recent appellate cases I referenced earlier make clear, even our appellate courts have found it difficult to apply the current version of Rule 23 literally or consistently.⁴⁴ This leads me to my second recommendation. It is time—indeed the time

⁴¹ Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 5, 119 Stat. 4, 11 (codified as amended at 28 U.S.C. § 1453 (Supp. V 2005)).

⁴² *Id.*

⁴³ FED. R. CIV. P. 23(f).

⁴⁴ *See Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986) (“We similarly find no abuse in the court’s determination that the certified questions ‘predominate,’ under Rule 23(b)(3). In order to ‘predominate,’ common issues must constitute a significant part of the individual cases.”).

is long overdue—for a top-to-bottom redrafting of the federal class action rule.

Just as we abandoned the antiquated concepts of true, hybrid, and spurious class actions in 1966, it is time to replace the current categories of class actions—(b)(1)(A), (b)(1)(B), (b)(2), and (b)(3)—with a more functional definition of permissible class actions and a more pragmatic set of criteria for judging whether a given class action should be certified. There are three key issues that should be explicitly addressed in a revised rule. Let me discuss them in turn.

Class actions should be divided into two simple categories—mandatory class actions and voluntary class actions. The former would not allow class members the opportunity to opt out whereas the latter would require notice and an opt-out option. Mandatory class actions should be permitted when they would facilitate the purposes underlying the substantive claims in the case or when substantive unfairness would likely result to the plaintiff class or to the defendant if class members were allowed to litigate individually. They should also be allowed when the sole remedy the class seeks is equitable and certification will ensure that in the future all class members will have standing to challenge the defendant if it does not abide by the terms of the court's injunction. By contrast, mandatory class actions should not be ordered when individual class members have substantial individual damage claims which they may prefer to litigate on their own or where there are significant conflicts within the class over the nature of the proposed monetary remedy. In those situations, class members should be afforded notice and an opt-out opportunity as a matter of due process. Voluntary class actions should be certified only when they are superior to other available methods for the fair and efficient adjudication of the controversy and when it is not feasible to adjudicate the dispute using traditional joinder devices.

A new class action rule should also explicitly distinguish between litigation class actions and settlement class actions. In the former the court needs to consider whether it is fair and feasible to try the substantive claims of the plaintiff class in a unitary trial. In the latter we know no such trial will be needed and the issue should be whether settlement has been negotiated in a fair manner and whether the terms of the settlement are fair and reasonable. Settlement class actions are a very important part of modern practice and account for approximately one-third of all class actions today.⁴⁵ At present, Rule

⁴⁵ Thomas E. Willging et al., *Class Actions and the Rulemaking Process: An Empirical*

23, read literally, would apply the same criteria to settlement class actions as apply to litigation class actions, as the Third Circuit held in 1996 in *Georgine v. Amchem Products, Inc.*⁴⁶ when it overturned a major asbestos settlement class action.⁴⁷ The Supreme Court affirmed the Third Circuit on other grounds in that case but held that settlement class actions need not require proof that they would be manageable if tried to judgment.⁴⁸ That is the correct conclusion, I believe, but to reach it the Court had to ignore the literal language of Rule 23. Moreover, shoehorning negotiated settlements into the current categories of Rule 23 limits the abilities of plaintiff and defense counsel alike to reach acceptable settlements in complex cases. A new class action rule that explicitly defines when settlement class actions should be approved would be a significant improvement and would give counsel and trial courts options for resolving complex disputes without further litigation, which they now lack.

Third, a new class action rule should expressly distinguish between cases where the claims of class members are viable if pursued individually and where they are not. The current rule does not adequately reference this distinction, although a careful study of trial court class action decisions suggests that it is a major factor in the decision of some trial judges who certify classes and a factor that is seemingly ignored by other trial judges who deny certification.⁴⁹ When the claims of class members are not viable individually, the class action represents the only available procedural device for affording a day in court to the plaintiffs on their substantive claims. If, as Pound and others argued so long ago, the purpose of our federal rules should be to facilitate—not obstruct—a decision on the merits of the case,

Analysis of Rule 23 to Address the Rulemaking Challenges, 71 N.Y.U. L. REV. 74, 112 (1996) (finding, in a study of the federal courts of four districts, that 39% of class were certified for settlement purposes only).

⁴⁶ *Georgine v. Amchem Prods., Inc.*, 83 F. 3d 610 (3rd Cir. 1996), *rev'd sub nom.* *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

⁴⁷ *Id.* at 617–18.

⁴⁸ *Windsor*, 521 U.S. at 620.

⁴⁹ *Compare* *Gasperoni v. Metabolife Int'l, Inc.*, No. 00-71255, 2000 U.S. Dist. LEXIS 20879, at *25 (E.D. Mich. Sept. 7, 2000) (“Although [defendant] is technically correct that the named plaintiffs can still obtain their main objectives, . . . it misses the point—which is that it is highly unlikely that the members of the class would ever file suit individually. . . . Thus, denying certification would seriously inhibit an avenue of legal redress for the members of the class. . . .”), *with* *Clark v. Experian Info., Inc.*, 233 F.R.D. 508, 510, 512–13 (N.D. Ill. 2005) (denying class certification in a case alleging consumer fraud resulting in a single payment of \$79.95 or \$10.95 without discussing the practical viability of individual actions).

then we ought to strive to certify class actions whenever possible in such cases.

At the same time, we need to be mindful of the substantive rights of defendants. We must certify such class actions in ways that allow defendants a fair chance to meet the case against them and, if necessary, which limit the amount the class can recover to a reasonable sum. Making such adjustments in the criteria that govern the substantive claims and defenses of the parties in these types of class actions would seem to run squarely afoul of the Rules Enabling Act's prohibition on procedural rules that would "abridge, enlarge or modify any substantive right."⁵⁰ I disagree with that view for this reason. In class actions involving claims that are not individually viable, the decision to deny certification to the plaintiff class as a practical matter denies those class members their substantive rights. They have no other access to a judicial remedy. In such a situation, any procedural ruling the court makes on the class action issue will affect the substantive rights of one party or the other. The best approach in such cases is not to ignore the actual substantive impact of denying certification to the plaintiffs as the current rule and many trial courts have done, but to equitably balance the substantive rights of the parties by making whatever adjustments in proof or remedies are needed to yield an equitable outcome. For too long in such situations we have let the perfect be the enemy of the good.

Let me digress for a moment to develop a related point. In situations where our common law or statutory law affords a claim to plaintiffs, but where the amounts in dispute are too small to justify individual litigation, our lawmakers need to be mindful of how to define the substantive claim of the plaintiffs and the available remedy in such a way as to permit class action litigation. Otherwise they are effectively creating a right without a viable remedy. In the past, our courts have on occasion done this. For example, prior to the 1966 class action rule, actual reliance by the class member on the alleged material omission was required in a Rule 10(b)(5) securities claim.⁵¹ Since then, in some situations, federal courts have permitted such claims to be brought as a class action by allowing plaintiffs to prove actual reliance through the "fraud on the market" theory.⁵² In my

⁵⁰ 28 U.S.C. § 2072(b) (2000).

⁵¹ *See, e.g.*, *List v. Fashion Park, Inc.*, 340 F.2d 457, 462–63 (2d Cir. 1965) (stating that actual reliance was required and noting that a lower court had allowed a 10(b)(5) class action only because the court believed that all class members could prove reliance).

⁵² *Basic Inc. v. Levinson*, 485 U.S. 224, 224 (1988).

judgment, such adjustments in our substantive law are appropriate in cases where the claims of plaintiffs would otherwise not be viable on an individual basis.

If a revised federal class action rule were adopted that explicitly distinguished between the criteria applicable to mandatory class actions and voluntary class actions, between litigation class actions and settlement class actions, and between class actions involving viable and nonviable claims, we would have moved a long way toward our shared goal of a rule which asks our courts to answer the right questions when ruling on a certification motion. This revision would leave in the dustbin of history the question of whether a billion dollar monetary claim is incidental to an injunction claim and how one common question can predominate over many noncommon questions or how one noncommon question can predominate over many common questions.

As helpful as a new class action rule would be, there is more that should be done to improve modern class action practice for both plaintiffs and defendants. In the short amount of time I have left, let me quickly summarize my third recommendation for reforming class action practice. Class actions fit uncomfortably within the norms and incentives that typically apply in our adversary system. In ordinary litigation, a plaintiff has a much larger financial stake in the outcome of the case than his lawyer. In addition, the plaintiff is also an active decisionmaker on the key issues of whether to sue the defendant and whether to accept a settlement offer. Both of these attributes are not true of many class actions.⁵³ The decision to proceed as a class action is typically made by the lawyer and settlements may be reached by class counsel over the objection of individual class members.⁵⁴ The class action lawyer also has the prospect of recovering large legal fees in the case whereas individual class members can often only hope to recover a much smaller amount. These dynamics can dramatically change and distort the proper relationship between lawyer and client and the incentives that govern their behavior.⁵⁵

Other anomalies also exist in class actions. When different plaintiffs' counsel are competing to represent the class, the trial court is obliged to choose the lawyer for the class. That same judge will later

⁵³ See generally John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 879, 917 (1987) (discussing the lack of client control in large class action litigation).

⁵⁴ See FED. R. CIV. P. 23(e).

⁵⁵ See Coffee, *supra* note 53, at 881.

pass on the merits of plaintiffs' claims and—in many cases—on the amount of fees to be paid to plaintiffs' counsel. This relationship between plaintiffs' counsel and the trial judge can influence the behavior of the plaintiffs' counsel toward the trial judge in ways that are not part of ordinary litigation, where the plaintiffs' counsel is not dependent on the judge for future appointments or for his fee.⁵⁶

A structural problem with class action litigation is that when there are conflicts between the true interests of the class and the interests of class counsel it is often difficult for trial courts to gain access to the information needed to determine if this is the case. One notorious example of this is so-called coupon settlements where class counsel agrees to settle on terms which bring little actual value to the class, but which nevertheless result in a substantial fee to counsel.⁵⁷ Another almost amusing anomaly in an adversary system is that current practice looks to defense counsel to raise objections to a proposed class action on the grounds that the named plaintiff is not an adequate representative of the class or that plaintiff class counsel is not qualified to represent the class. Do we really believe that the defense counsel in this context can be trusted to serve as a guardian for the interests of absent plaintiff class members?

Finding a solution to these problems is not easy within the traditions of an adversary system governed by norms and incentives that operate reasonably well in traditional litigation with individual parties represented by individual lawyers. To address these issues and to preserve the usefulness of class actions we need to rethink, not only revise, the text of Rule 23, but reconsider how our judicial system manages class actions. For all the reasons noted above, I think the *Manual for Complex Litigation* should be revised to recommend certain best practices in the management of most federal class actions. In my view, in such cases a second judge or a judicial adjunct, such as a magistrate or master, should be appointed to assist the trial judge in the oversight of the class action. The original judge would make all the usual rulings that she does in an ordinary lawsuit. The judicial adjunct, however, would be assigned responsibility for the selection of

⁵⁶ See Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 358 (1986) (discussing the appointment of class counsel and the award of attorney's fees as incentives that a judge can manipulate to encourage and shape settlements).

⁵⁷ See generally James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 GEO. J. LEGAL ETHICS 1443 (2005) (summarizing the uses and abuses of coupon settlements and advocating that attorney's fees in coupon class actions be linked to the coupon redemption rate in coupon class action settlements).

plaintiffs' counsel if there is competition for that role, would be expected to confer with class counsel on important decisions regarding the class action, would be entitled to participate in and oversee all settlement discussions in the case, and would be responsible for recommending an appropriate fee for class counsel in the event of a settlement or judgment. In short, I contemplate that the judicial adjunct would serve as a judicial guardian ad litem for the class to protect the interests of absent class members and to be on alert for decisions or tactics that are not in the interest of some or all of the class members. Although the duties of this judicial adjunct may seem unfamiliar and may be in conflict with traditional adversary procedure, I believe they are justified in at least some kinds of class actions because of the conflicts of interest and anomalies I have cited.⁵⁸

Forty years of experience with modern class actions have taught us many things. This joinder device can be an enormous instrument for expanding the availability of justice in many kinds of civil claims. For this reason we need to rewrite Rule 23 to facilitate the certification of nonviable claims. But class actions are also capable of causing substantial injustice to defendants and absent class members when not used properly. For this reason we should insist on opt-out rights for absent class members in all or nearly all class actions involving substantial monetary claims, and we should expand judicial oversight over the litigation and settlement of class actions.

In recent years, Canada and Australia have begun experimenting with their own class action rules.⁵⁹ They have looked to our experience in drafting their rules. We should do the same and then revise our rule and expand judicial oversight over class actions in order to better accomplish the purposes for which this rule was intended.

Thank you. And I hope I have made enough controversial—or perhaps down-right outrageous assertions so that you have some questions or comments about what has been said. I recognize several nationally and internationally renowned class actions lawyers in this room who I am sure will have something to say about all this.

⁵⁸ See *supra* notes 53, 56–57 and accompanying text.

⁵⁹ See generally RACHAEL MULHERON, *THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS: A COMPARATIVE PERSPECTIVE* 145–65 (2004) (providing a discussion of class action practice in Canada and Australia).