Michigan Law Review

Volume 94 | Issue 5 Article 3

1996

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STRUCTURING MULTICLAIM LITIGATION: SHOULD RULE 23 BE REVISED?

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Class actions have become a prominent feature of the litigation landscape. The class-action device is now employed in a wide variety of types of litigation, including consumer, securities, antitrust, employment, civil rights, and institutional-reform litigation, and increasingly in mass-accident, product-liability, and toxic-tort litigation. But as class actions have become more prominent, they also have come under increasing scrutiny because of their impact on parties and others and because of the magnitude of the stakes. As courts confront the difficult issues class actions raise, scholarly comment and criticism abound, and political controversy rages. All of this has led to close examination of the fountainhead of class-action jurisprudence, Rule 23 of the Federal Rules of Civil Procedure, and has raised the question whether it should be revised.

The question can be approached from diverse perspectives. For example, those whose interests are in mass-tort litigation likely will take an entirely different approach from others who are interested in consumer litigation or civil rights litigation or securities litigation. As Professor Edward Cooper has observed, the arguments for and against amending Rule 23 rest on assumptions about how well it works, or does not work, now.[1] But judgments about how well the Rule works necessarily turn on one's expectations, and the expectations of those litigating in different fields differ greatly.

The question whether Rule 23 should be revised therefore is not susceptible to a global answer unless revision is stylistic only, limited to making the text more elegant — and even stylistic revision is likely to have some substantive impact, even if unintended. But if the argument for revision is that the Rule is in some respect deficient and should be made to work better, one must begin by answering the question how it *should* work. That in turn depends on defining the Rule's purpose — what it is intended to accomplish.

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1. *See* Edward H. Cooper, Rule 23: Challenges to the Rulemaking Process 3 (Apr. 21-22, 1995) (unpublished paper prepared for Research Conference on Class Actions, on file with the New York University School of Law).

This paper examines briefly the purposes for which the Rule was adopted in 1966 and the purposes to which it since has been put. It then discusses how different purposes call for different class-action regimes, that is, how the regulation of a class action must reflect the objectives for which it is invoked. It concludes by considering how these differences may be best accommodated: whether by revising the Rule or by greater reliance on the existing structuring devices under the Federal Rules of Civil Procedure and improved practices under the Rule.

I. PURPOSES OF RULE 23

Before deciding whether to fix the Rule, one should determine whether it is broken — is it working as it should? That, of course, depends on what its purpose is — and that is a question not susceptible of a simple and inclusive answer.

The present Rule is the product of the revision adopted in 1966. The purpose of that revision, as reflected in the Advisory Committee's note, was to clarify the availability of class actions in various situations and simplify the Rule's application.[2] Professor Benjamin Kaplan, the Advisory Committee's reporter, wrote that the revision of Rule 23 was prompted by "[d]espondency over the inadequacies of [the] rule."[3] According to Kaplan, "[t]he class action device . . . had become snarled," and the "essential task" of the Advisory Committee "was to redefine the conditions for maintaining the fully effective action."[4] The members of the Committee were of the opinion that some litigation "affecting numerous persons 'naturally' or 'necessarily' called for unitary adjudication."[5] To this end, the

2. *See* FED. R. CIV. P. 23 advisory committee's note (Proposed Amendments 1966) [hereinafter Advisory Committee's Note], *reprinted in* 39 F.R.D. 69, 98 (1966).

> The categories of class actions in the original rule . . .
> . . . proved obscure and uncertain. . . .
> Nor did the rule provide an adequate guide to the proper extent of the judgments in class actions. . . .
> . . .
> [In addition,] the original rule did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness, particularly giving notice to the members of the class . . . .
> *The amended rule* describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class . . . and refers to the measures which can be taken to assure the fair conduct of these actions.

39 F.R.D. at 98-99.

3. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 386 (1967).

4. *Id.* at 385-86.

5. *Id.* at 386.

Committee attempted to "rebuild the law on functional lines responsive to those recurrent life patterns which call for mass litigation through representative parties."[6]

Professor Judith Resnik has characterized the Advisory Committee's motivation, as evidenced by unpublished correspondence exchanged by the members of the Committee, as "permeated by 'pragmatism.' Memos and letters invoke the need or absence of need for class actions in the context of specific cases."[7] Of these, one of the most clearly described in the Committee's note is the 23(b)(2) action for injunctive relief in cases of racial discrimination. As Committee member John Frank has put it in his historical overview of the Rule, "If there was a single, undoubted goal of the [Advisory Committee on Civil Rules], the energizing force which motivated the whole rule, it was the firm determination to create a class action system which could deal with civil rights and, explicitly, segregation."[8]

The available evidence strongly suggests that the dominant purpose of the 1966 amendment was to "enable" litigation both by creating an effective enforcement mechanism under 23(b)(2), primarily for civil rights cases, and by facilitating the prosecution of small claims susceptible of group adjudication but otherwise uneconomical to litigate, such as consumer and environmental claims. Professor Kaplan indicated that the two aims of the class-action device were to reduce duplicative actions and "to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."[9] Professor Charles Joiner, another member of the Committee, spoke approvingly of Rule 23 as providing "additional safeguards to the unrepresented."[10] As the Supreme Court later explained in *Deposit Guaranty National Bank v. Roper:*

> The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unreme-

6. Benjamin Kaplan, *A Prefatory Note,* 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969).

7. Judith Resnik, *From "Cases" to "Litigation,"* LAW & CONTEMP. PROBS., Summer 1991, at 5, 13 n.32.

8. John P. Frank, Thirty Years of Class Actions in Historical Prospective 3 (Apr. 28, 1994) (unpublished paper, on file with the Advisory Committee on Civil Rules, United States Judicial Conference).

9. Kaplan, *supra* note 6, at 497. According to former Judge Marvin Frankel, Kaplan emphasized the class action's "historic mission of taking care of the smaller guy." Marvin E. Frankel, *Amended Rule 23 From a Judge's Point of View,* 32 ANTITRUST L.J. 295, 299 (1966).

10. Charles Joiner, *The New Civil Rules,* 40 F.R.D. 359, 367 (1966); *see also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) (describing Rule 23's ability to facilitate effective representation for absent plaintiffs).

> died by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.[11]

One purpose the drafters did not have, however, was to create a device for the aggregation of multiparty litigation. That type of litigation still lay largely in the future.[12] Even mass-tort cases — or "mass-accident" cases as they were known then[13] — such as airplane-crash and hotel-fire cases, were thought to be beyond the Rule. As the Advisory Committee's note put it, "[a] 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways."[14] Far from wanting to facilitate aggregation, the members of the Committee were concerned lest defendants use the Rule to create a collusive class and, by settling, largely escape liability.[15]

Nevertheless, with the passage of time, the Rule acquired a new gloss. Lawyers and judges, many of the latter initially quite hostile to class actions,[16] began to look to Rule 23 to meet a felt need for an aggregation device as mass litigation proliferated. Judge Joseph Weis observed in 1986 that "[a]lthough that [Advisory Committee]

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11. Deposit Guar. Natl. Bank v. Roper, 445 U.S. 326, 339 (1980). In a footnote, the Court added:

> A significant benefit to claimants who choose to litigate their individual claims in a class-action context is the prospect of reducing their costs of litigation, particularly attorney's fees, by allocating such costs among all members of the class who benefit from any recovery. Typically, the attorney's fees of a named plaintiff proceeding without reliance on Rule 23 could exceed the value of the individual judgment in favor of any one plaintiff.

445 U.S. at 338 n.9.

12. Although the electrical-equipment antitrust litigation involving numerous substantial individual claims against equipment manufacturers was then underway, there is no indication that class-action treatment was considered as a means for aggregation of those cases. That litigation, instead, provided the impetus for the multidistrict coordination statute, 28 U.S.C. § 1407 (1968).

13. *See* Resnik, *supra* note 7, at 9.

14. Advisory Committee's Note, *supra* note 2, 39 F.R.D. at 103. Professor Kaplan explained that the point was not

> that after determination of common questions the individual claimants might have to come in and prove their damages, [but rather] that in accident cases the realities of litigation will often suggest that the class action device is not "superior" to more commonplace devices; in some of these cases, moreover, individual questions of liability and defense will overwhelm the common questions.

Kaplan, *supra* note 3, at 393 (footnote omitted).

15. *See* Frank, *supra* note 8 (manuscript at 4-5).

16. *See, e.g.,* Kline v. Coldwell, Banker & Co., 508 F.2d 226, 236-39 (9th Cir. 1974) (Duniway, C.J., concurring), *cert. denied,* 421 U.S. 963 (1975).

statement continues to be repeated in case law, there is growing acceptance of the notion that some mass accident situations may be good candidates for class action treatment."[17] Use of Rule 23 to aggregate claims that could be litigated economically on an individual basis and where estoppel was less significant than in civil rights and small-claims actions, such as claims arising out of mass torts, however, was remote from the drafters' purpose to enable and facilitate litigation. It also posed the very danger of collusive actions and settlements the drafters feared. Still, the inexorable pressures of mass-tort litigation on courts and parties have legitimated to some degree the application of the class-action device.

An additional purpose of class actions, probably implicit in what the revisers said and did, was to promote efficiency and economy. The class action became a case-management device for minimizing duplicative activity in the adjudication of related claims, for example, in institutional-reform or discrimination cases, involving claims more limited in scope and potential impact than mass-tort litigation.[18] As such, it also serves as an effective vehicle for public-interest litigation, furthering the enforcement of statutory policies heavily dependent on private initiative.[19]

While this enumeration of purposes is not necessarily exhaustive,[20] it suffices to make the point. Rule 23 is being used to serve a range of different purposes, and, as discussed below, different pro-

17. *In re* School Asbestos Litig., 789 F.2d 996, 1008 (3d Cir. 1986), *cert. denied sub nom.* Celotex Corp. v. School Dist., 479 U.S. 852, *cert. denied sub nom.* National Gypsum Co. v. School Dist., 479 U.S. 915 (1986); *see also* Central Wesleyan College v. W.R. Grace & Co., 6 F.3d 177, 181-82 (4th Cir. 1993) (arguing for liberal application of Rule 23 to mass-tort cases); *In re* A.H. Robins Co., 880 F.2d 709, 725-38 (4th Cir.) (same), *cert. denied,* 493 U.S. 959 (1989); Bruce H. Nielson, *Was the 1966 Advisory Committee Right?: Suggested Revisions of Rule 23 to Allow More Frequent Use of Class Actions in Mass Tort Litigation,* 25 HARV. J. ON LEGIS. 461, 462-83 (1988) (reviewing instances of applications of Rule 23 to mass-tort litigation).

18. *See, e.g.*, Califano v. Yamasaki, 442 U.S. 682, 701 (1979) (approving class action for attack on the recoupment procedures used by the Department of Health, Education and Welfare and commenting that "the class-action device saves the resources of both the courts and the parties by permitting an issue . . . to be litigated in an economical fashion under Rule 23").

19. *See* Frank, supra note 8 (manuscript at 3); *see also* Six Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301 (9th Cir. 1990) (enforcing the Farm Labor Contractor Registration Act).

20. The purposes of the Rule have been summarized as

> the efficient resolution of the claims or liabilities of many individuals in a single action, the elimination of repetitious litigation and possibly inconsistent adjudications involving common questions, related events, or requests for similar relief, and the establishment of an effective procedure for those whose economic position is such that it is unrealistic to expect them to seek to vindicate their rights in separate lawsuits.

7A CHARLES A. WRIGHT ET. AL., FEDERAL PRACTICE AND PROCEDURE § 1754, at 49 (2d ed. 1986). An additional purpose, according to one court, was to function as a "deterrent for those who engage in complicated and imaginative rather than straightforward schemes to

cedures are necessary and appropriate to serve those purposes. This leads to confusion and even conflict in the application and administration of the existing Rule. If the Rule were revised to serve one purpose well, say, to facilitate aggregation in mass-tort cases, it could not be expected to serve as well when invoked for a different purpose, say, consumer-claim litigation.

One problem with much of the current scholarly comment and critique of the Rule is that it ignores this reality. Authors tend to focus on the application of the Rule to meet their particular needs or interests, disregarding the impact of their proposals on the Rule's ability to accomplish other purposes.[21] They tend to disregard the generic character of the Rule in its present form and the multiplicity of interests and needs it must be made to serve. Most importantly, they ignore the risk that accommodating particular interests will likely diminish the utility of the Rule to serve other interests.

II. Conflicting Purposes

It is not necessarily objectionable for a rule of procedure to serve a number of different purposes. But the unique character of class-action litigation, in which named parties represent the interests of members of a judicially authorized class, creates a potential for conflicts among those interests that needs to be accommodated. Depending upon the nature of the class and its claims, this accommodation may need to be done in a variety of ways. Thus expectations of the class-action device will vary with the nature of the particular litigation in which it is employed.

As noted, the original purpose of the 1966 Rule primarily was to enable litigation of numerous related small claims, such as those commonly found in consumer, securities, and antitrust actions.[22] The salient characteristics of these kinds of class actions are:

(1) Individual claims are generally too small to permit plaintiffs to prosecute them individually.

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inflate stock prices." Blackie v. Barrack, 524 F.2d 891, 903 n.19 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976).

21. *See, e.g.*, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343 (1995); Nancy Morawetz, Underinclusive Class Actions (Mar. 31, 1995) (unpublished paper prepared for Research Conference on Class Actions, on file with the New York University School of Law); Alan B. Morrison & Brian Wolfman, Representing the Unrepresented in Class Actions Seeking Monetary Relief (Mar. 23, 1995) (unpublished paper prepared for Research Conference on Class Actions, on file with the New York University School of Law).

22. *See supra* note 9 and accompanying text.

(2) Common questions predominate strongly over any individual issues permitting adjudication of liability and damages in a single-class trial even if a mechanism for allocation of the proceeds from a judgment must be devised.

(3) Opt-out rights and protection against claim preclusion are therefore relatively unimportant as are elaborate notice provisions that would ensure that every potential class member is notified; indeed, because their cost may be an obstacle to maintaining such an action, they may be counterproductive and frustrate the enabling purpose of class treatment.[23]

These kinds of class actions, on the other hand, present a greater need for control against overenforcement because costs, especially attorneys fees, may become disproportionate to the amounts at stake and the benefits to individual class members. Since individual plaintiffs have little to gain from the action, there is also a risk that lawyers, rather than clients (who may only be nominal clients), will control the litigation with the ethical problems that can follow.[24] These problems are of particular concern in the context of settlement when the benefits to lawyers may appear wholly out of proportion to those received by individual class members. On the other hand, judicial oversight of the settlement may be less urgent here; because the exposure is generally less threatening to the defendant than in mass-tort litigation and because the predominance of common over individual issues makes a class-action trial feasible, trial is a realistic alternative to settlement for the parties.

Application of Rule 23 for the purpose of claim aggregation occurs in an entirely different context, usually in multiparty litigation involving substantial claims, frequently but not always mass-tort claims. The salient characteristics of such class actions are:

(1) Claims are large enough to permit individual plaintiffs to prosecute them separately; moreover, significant issues often may affect individual plaintiffs in different ways.

(2) Because individual autonomy is a significant interest, protection against preclusion and of the choice to litigate individually is important; effective notice procedures and opt-out rights are therefore critical.

(3) Because the size, number, and complexity of claims will strain the resources of the parties and the court, duplicative activity — discovery, motions, and rulings on common issues — needs to be reduced by class treatment of common questions. At the same time, courts must avoid precipitous and premature resolution of issues that would

23. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161-69, 173-76 (1974).

24. *Cf.* Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 502-05 (1994). Such considerations contributed to the recent adoption of the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737.

> dispose of the entire litigation. Pretrial procedures need to allow for the development of a record adequate both to assess the bases for claims and defenses and to resolve the complexities presented by this kind of litigation, whether they be questions of scientific evidence or choice-of-law or jurisdiction issues.[25]

The precise impact of these features on the use of Rule 23 will vary with the particular nature of the litigation. Mass-tort actions range across a wide spectrum, differing in their manageability and susceptibility to class-action treatment. On one end are those arising out of a single event, where the class is clearly defined, its members (more or less) identifiable, and common issues predominate. Next are actions based on the use of a defective product, where the nature of the harm is readily ascertainable, but the separate events and the membership of the class are not. Manageability here will turn on the number and ascertainability of claimants and the degree of information about the characteristics and effects of the product. The most problematic type of class action involves toxic-tort claims, where uncertainty surrounds both the fact and effect of exposure; the manifestation of injury may be long delayed, and the potential appearance of future claimants makes it impossible to ascertain the membership of the class.[26]

In applying Rule 23 to multiclaim litigation such as mass-tort actions, the critical question is whether common issues predominate sufficiently to support class treatment. Because proof of individual injury is an essential element, class-wide adjudication may be problematic, and class actions may be more suitable as vehicles for settlement than for adjudication. As a result, in applying Rule 23 to mass-tort litigation, the principal concern has been over settlement classes and the issues they raise: the adequacy of representation of the various interests on the plaintiffs' side, the protection of the defendants' interests and those of the public, and the standards and procedures for court approval of settlements.[27]

Finally, class actions play a role in litigation that can benefit from the economies and efficiencies class treatment offers, even if

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25. *See, e.g., In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir.), *cert. denied,* 116 S. Ct. 184 (1995); *In re* Copley Pharmaceutical, Inc., 161 F.R.D. 456 (D. Wyo. 1995).

26. *See generally* Francis E. McGovern, *An Analysis of Mass Torts for Judges,* 73 TEXAS L. REV. 1821 (1995).

27. *See, e.g., In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir. 1995) (holding that certification of the settlement class requires compliance with all provisions of Rule 23); *see also* William W Schwarzer, *Settlement of Mass Tort Class Actions: Order out of Chaos,* 80 CORNELL L. REV. 837 (1995) (suggesting a possible revision of Rule 23(e) to spell out factors relevant to whether a class-action settlement should be approved).

neither the enabling nor the claim aggregation rationale apply. In some types of litigation, such as institutional-reform or discrimination cases, common questions may predominate enough to permit quicker and more economical adjudication by means of a class action, especially when the only relief sought is injunctive. Opt-out rights and protection against claim preclusion are relatively unimportant here, while res judicata and consistency of outcomes are desired objectives. Public policy favoring private enforcement of regulatory schemes may reenforce the rationale for the use of class actions in such cases and also in others, including securities, antitrust, environmental, and statutory-benefits litigation.

III. Revising Rule 23

This brief overview suggests that for optimum results, a class-action rule should function differently depending on the purpose for which it is invoked. A rule that works well as an enabling device would not necessarily work well as an aggregation device, and one designed for aggregation would not necessarily further efficient litigation management. That is not to say that an effective class-action rule cannot be transsubstantive. But the preceding discussion suggests that in light of the different characteristics of class actions, essential components of a class-action regime may differ, without regard to the underlying substantive law.[28]

It seems fair to ask, therefore, whether a single, generic class-action rule can be expected to serve such diverse purposes well. A class-action rule is not simply a rule of the road; it is a means for allocating power and responsibility among the participants in the litigation — imposing a system of checks and balances. Thus, a named plaintiff has the power to litigate the claim as the representative of the class members and the responsibility to act as a fiduciary for the class. The class members, in turn, have some power to frustrate the representative litigation, at least to exit from it. Attorneys have the power to act for a large group of unseen clients, with little or no consultation, but bear commensurate responsibility to represent them fairly and adequately. The court has extensive power to structure and manage the litigation and also large responsibilities in looking after the interests of absent, albeit represented, parties. For best results, the way in which powers and responsibilities are allocated and checks and balances imposed perhaps ought

28. I do not mean to suggest that bright lines create distinct categories of class actions, but, in most instances, the characteristics of the litigation will be sufficiently clear to point toward the appropriate treatment.

to differ depending on the nature of the class action. The more specifically the Rule is written to address an intended purpose, the better it will serve that purpose — not only because of the explicit direction it will provide the participants in the process, but also because the drafters, to write specifically, will have had to think in specifics rather than in generalities. At the same time, however, the more specifically the Rule is designed for one purpose, the less utility it will have for others.

At least three approaches to the revision of Rule 23 have been discussed, to which a fourth more modest alternative is added here:[29]

1) A set of different, substance-based rules for different kinds of class actions.
2) A single rule specifying different procedures for different kinds of actions.
3) A single, management rule for the structuring of multiclaim litigation.
4) An elaboration of the Advisory Committee's note to provide more specific guidance for the appropriate application of the existing Rule 23.

The first approach would entail the adoption of different rules for different categories of actions. Rules specifically tailored for use in particular kinds of actions would increase the rules' utility and efficiency. But the downside of a multiplicity of class-action rules is the potential for satellite litigation over the selection of the applicable rule; the different kinds of class actions will never be so clearly distinguishable as to preclude all controversy, and some actions will fall into gray areas between the rules.

The second approach would be to adopt a single rule specifying procedures for different categories of actions, taking into account their distinct features. Putting aside the existing 23(b)(1) and (b)(2) categories of mandatory class actions, one could envision creating perhaps three categories for (b)(3) actions corresponding to the three purposes of class actions discussed here. The Rule then would require the judge first to determine the applicable category by applying the specified criteria and standards prescribed for use in connection with the particular category and then to make findings supporting the determination.[30] The Rule would offer gui-

29. *See, e.g.*, Nielson, *supra* note 17, at 483-97. Much of the motivation for the suggestions was to make the Rule more user friendly for mass-tort litigation.

30. One commentator, pointing out that certification could have a number of different goals, such as creating "the most 'manageable' litigating unit, the most efficient process for resolving multiple cases, the maximally fair and just set of outcomes consistent with resource constraints, or some combination of these," has called for a rule that would "articulate princi-

dance for establishing procedures, such as those for notice and opt out, appropriate for each category.

A third approach essentially would create a management rule for multiclaim litigation as a companion to the present Rule 16. Such a rule would call for the judge to establish an appropriate structure for the litigation as part of a case-management order in multiclaim litigation. In doing so, the court and the parties would consider and select from among a range of available alternatives. These would include use of representative parties (as under present Rule 23), lead cases (to provide information about outcomes suitable to create formulae or grids for the resolution of related claims), various forms of consolidation (as under present Rule 42(a)), intervention or joinder, some form of coordination, or other innovative alternatives.[31] The Rule could provide guidance for the selection from among alternatives, identifying their purposes and the factors to be considered in making the selection. It could identify appropriate safeguards, protecting relevant interests, to be included in a case-management order establishing a particular structure. It could specify the requisite findings to support selection of a structure. The Rule thus would enable a judge, with the assistance of the parties, to fashion a structure-and-management program best suited for the circumstances of the litigation. Its aim would be to use the existing rules to make an integrated system for the fair and efficient resolution of multiclaim litigation.

Finally, a more modest approach might be to revise only the Advisory Committee's note for Rule 23. The note could explicate the different purposes the Rule could serve and the ways in which class-action procedures could be adapted to serve best the particular litigation, as discussed above. The note could assist courts and counsel by identifying relevant factors for consideration in making discretionary decisions. It could, for example, spell out factors for consideration in the determination of whether to approve class-action settlements.[32] It could provide guidance for the application of the notice requirement. It might clarify the respective obligations of counsel in the different roles in which they act in class actions.

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ples of general application that will guide trial judge discretion and support meaningful appellate review of class determinations, but that will also leave room for adapting class actions to the circumstances of specific cases." Robert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action,* 14 REV. LITIG. 79, 97, 107 (1994).

31. *See generally* Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation,* 70 CORNELL L. REV. 779 (1985).

32. *See supra* note 27.

Under any of these approaches, the judge of necessity would retain broad discretion, perhaps even broader than now. A rule intended to further litigation management is most useful when it is founded on the court's inherent power to manage the litigation before it and contemplates the liberal exercise of that power. But a rule under which the court exercises that power to structure multiple claims and design a process for their resolution will tend to have a greater impact than rules that are purely procedural "rules of the road," not only because of the cumulative effect of multiclaim litigation but also because of the way in which it will affect the resolution of claims and defenses.[33] The consequent dilemma is that as the need for judicial discretion — and for creativity and innovation — increases with the complexities and demands of multiclaim litigation, the risk of harm from its unguided exercise increases as well.

Rulemaking must confront this dilemma, which is perhaps greatest in the class-action area, regardless of what shape the class-action rule eventually takes. Rule 23's shortcoming in this respect is illustrated by recent decisions in which one court certified a 100-million-member class of nicotine-dependent smokers while another court vacated a certification of a much smaller and more clearly defined class of HIV-infected hemophiliacs as a usurpation of power.[34] A rule of such ambiguity and lack of predictability may well increase rather than lighten the burdens of complex litigation. To work well, the rule not only must be suited for its intended purpose but also must be capable of being soundly and efficiently administered. The trial judge's discretion needs to be complemented by guidance defining the bounds within which his orders may operate; those bounds must be reasonably clear yet also flexible enough to permit the court to deal effectively with the litigation. At the same time, appellate oversight of the trial judge's exercise of discretion must be appropriately provided for. Just as the exercise of trial-court discretion needs to be guided by discernable standards, so appellate review needs objective reference points based on compliance with those standards. Unless rulemaking in this sensitive area is informed by these considerations, confusion will reign and additional cost and delay will be generated.

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33. *See In re* Repetitive Stress Injury Litig., 11 F.3d 368, 374 (2d Cir. 1993); Malcolm v. National Gypsum Co., 995 F.2d 346, 350-52 (2d Cir. 1993) (granting consolidation under Rule 42(a)).

34. *Compare* Castano v. American Tobacco Co., 160 F.R.D. 544 (E.D. La. 1995) *with In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir.), *cert. denied,* 116 S. Ct. 184 (1995).

Revision of Rule 23 offers opportunities as well as challenges. It could result in opening Pandora's box, leading to new uncertainties, unintended consequences, and expanded litigation. Attempts to adapt the Rule to current circumstances can launch an unending process of change as those circumstances keep changing. Yet the process of considering possible revisions can be productive, generating better understanding and useful analysis. So the idea ought not to be rejected out of hand without discussion.

IV. Improving Practice Under Rule 23

One way such discussion could be useful is if it leads to an examination of the practice under present Rule 23 and consideration of ways in which it might be improved. Two approaches to improvement suggest themselves: first, avoiding reliance on generalities in the application of the Rule and second, more creative use of the superiority analysis under Rule 23(b)(3).

A. *Avoiding Reliance on Generalities in the Application of the Rule*

Class-action jurisprudence is guided — and burdened — by generalities. Generalities, derived from the text of the Rule and court decisions, tend to control such matters as the timing of certification motions, the treatment of motions to dismiss, the availability of discovery, the nature and timing of notice, and the approval of class-action settlements.[35] But class actions are not fungible and the pretense that they are impairs the utility of Rule 23 and can impose unnecessary burdens on the litigation. Although to a limited extent, the Rule requires the court making a class determination to consider the differences among class actions, such as the interest of class members in individually controlling the prosecution or defense of the actions,[36] the general principles governing the conduct of class actions are not sensitive to those differences. That is not to say that courts apply these principles inflexibly. But they tend at least to pay lip service to them and often permit them to stand in the way of more incisive analysis leading to more effective use of the Rule. One way in which practice under Rule 23 could be

35. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974) ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."); Simer v. Rios, 661 F.2d 655, 678 (7th Cir. 1981) (requiring identification of class members before giving of class notice), *cert. denied*, 456 U.S. 917 (1982).

36. *See* Fed. R. Civ. P. 23(b)(3)(A)-(D).

improved is by frankly acknowledging the differences in the purposes served by different categories of class actions whenever they are relevant to procedure under the Rule and adapting that procedure to serve best the purpose of class-action treatment in the particular litigation. Here are some illustrations:

(1) Timing of certification motions: Rule 23(c)(1) directs the court to make the class-action determination "as soon as practicable." Courts often read this as requiring that it be made at an early date. Courts ought to consider a less wooden approach, taking into consideration relevant factors that should control timing, such as whether deferring certification would prejudice putative class members, whether it could lead to substantial duplicative activity and unnecessary expense, whether it could interfere with consideration of preferable and less costly alternatives to a class action, and whether instead it would permit further development of the record leading to a more informed decision.[37] The impact of such factors will vary depending on the kind of class action.

(2) Conduct of discovery: The general principle that discovery normally should not be directed at class members, particularly before certification, does not apply with equal force to all class actions. While it has merit in small-claims actions, it may be inappropriate in mass-tort litigation or when the typicality of claims may be in question, as in discrimination cases. Thus, in some cases, before the court can decide whether common issues predominate, it may need extensive information obtainable only through discovery of plaintiffs.

(3) Precertification consideration of the merits: The related principle that the court should not assess the merits of the action before acting on certification similarly ought to be regarded as flexible.[38] One of the emerging realities of class-action practice is that it focuses largely on the pretrial phase, with little attention to trial and adjudication. It is doubtful whether most parties to class actions, especially in mass-tort cases, seriously contemplate a trial, viewing the Rule mainly as a vehicle for settlement.[39] As a result, practice under the Rule can become distorted and lead to abuse of the Rule. Superiority analysis under Rule 23(b)(3) would be more focused and class-action practice more orderly if courts, in making decisions on certification and procedure, took into account the merits of the action when doing so would be helpful and appropriate.

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37. *See* Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir.), *cert. denied,* 419 U.S. 885 (1974) (postponing class certification until trial of lead plaintiff's individual claim); Perez v. Government of Virgin Islands, 109 F.R.D. 384 (D.V.I. 1986) (same).

38. *Cf. Eisen,* 417 U.S. at 177. *But see* Alabama v. Blue Bird Body Co., 573 F.2d 309 (5th Cir. 1978) (holding that certification ruling premature when necessary discovery had been precluded).

39. Few mass-tort class actions have gone to trial as class actions. *Cf. In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir.), *cert. denied,* 116 S. Ct. 184 (1995) (contemplating a trial of common issues eventuating in special verdicts, not final judgments, that might then be used in later filed actions in various state or federal courts).

(4) Precertification motion practice: Closely related is the reluctance of many courts to entertain dispositive motions before certification. While care must be taken to protect the rights of putative class members, early motions can assist in the efficient handling of class actions and should not be ruled out.
(5) Notice and opt out: As previously discussed, the importance of notice and opt-out rights differs depending on the nature of the class action. Courts should look at the circumstances of each case in fashioning an appropriate procedure.
(6) Considering alternatives to a class action: Though the Rule requires that the court, before certifying a 23(b)(3) action, find that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy," courts rarely if ever give much consideration at the certification stage to how class-action treatment compares with other structuring alternatives available under the Federal Rules. Reference to superiority necessarily calls for an answer to the question: Superior to what? As discussed below, courts should look, not only at the alternative of denying class certification, but also at the range of alternatives available for structuring multiclaim litigation.

B. *Creative Use of the Superiority Analysis Under Rule 23(b)(3)*

Taking seriously the requirement of a finding that class-action treatment would be "superior" to other available methods of adjudication may improve the administration of the Rule. As the court said in *Katz v. Carte Blanche Corp.*, "The superiority finding requires at a minimum . . . an informed consideration of alternative available methods of adjudication of each issue."[40] These alternatives "are hardly confined to the class action, on the one side, and individual uncoordinated lawsuits, on the other."[41] The earlier discussion of a litigation-management rule as an alternative to the present Rule noted the various structuring alternatives available under the Federal Rules. Greater attention to the "superiority" analysis under the existing Rule might help turn Rule 23 into a "virtual" management rule, encouraging consideration by the judge of

40. *Katz*, 496 F.2d at 757.

41. Kaplan, *supra* note 3, at 390-91 (citing Judge Jack Weinstein's discussion in *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF. L. REV. 433, 438-54 (1960)).

alternatives to class actions for the optimum structuring of the particular litigation.[42] Here are alternatives a court might consider:

(1) Consolidation of claims and selection of lead or test cases for trial under Rule 42(a).[43]

(2) Severing common issues for trial under Rule 42(b).[44]

(3) In mass-tort litigation, limiting classes to a single state (to avoid choice-of-law and due-process problems) and excluding plaintiffs in actions pending in state courts (to avoid interference with those actions).

(4) In small-claims class actions, calibrating the notice requirement and providing a procedure for opt ins or one-way intervention, either postjudgment or postsettlement.

(5) Permitting intervention, for example, by a government-enforcement agency, in an individual plaintiff's case (avoiding the need for class treatment).[45]

(6) Limiting the remedy to injunctive relief rendering class action superfluous.[46]

These are examples. They reveal no stunning innovations; to the contrary, they may represent a return to basics, reflecting the intellectual underpinnings of the current Rule. They may help remind courts faced with a motion to certify a class that they are not limited to an up-or-down response nor are they bound by the format counsel has presented or by perceived rigid rules governing the class-action regime. Whether the purpose is facilitation, aggregation, or efficiency and economy, the Federal Rules, taken as a whole, offer opportunities for sound and creative management.

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42. The Advisory Committee's note recommends that "the court with the aid of the parties ought to assess the relative advantages of alternative procedures for handling the total controversy." Advisory Committee Note, *supra* note 2, 39 F.R.D. at 103.

43. Test cases were found to be superior in Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir.), *cert. denied,* 419 U.S. 885 (1974) (involving a truth-in-lending claim where a defendant was bound by one-way estoppel); Perez v. Government of Virgin Islands, 109 F.R.D. 384 (D.V.I. 1986) (involving insureds of defunct insurance company who sued government for negligent supervision); *see also Rhone-Poulenc Rorer,* 51 F.3d at 1293; Cimino v. Raymark Indus., Inc., 751 F. Supp. 649 (E.D. Tex. 1990) (using statistical sampling to determine awards in cases); Advisory Committee Note, *supra* note 2, 39 F.R.D. at 103; Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts,* 44 STAN. L. REV. 815 (1992).

44. *See* Maenner v. St. Paul Fire & Marine Ins. Co., 127 F.R.D. 488, 490-92 (W.D. Mich. 1989) (severing liability issues for separate trial before adjudication of class members' individual damage claims); Coca-Cola Bottling Co. v. Coca-Cola Co., 98 F.R.D. 254, 268-69 (D. Del. 1983) (severing dispute over interpretation of decree for trial before adjudication of class members' individual claims).

45. *See* Stuart v. Hewlett Packard Co., 66 F.R.D. 73 (E.D. Mich. 1975) (finding intervention by the Equal Employment Opportunity Commission to avoid manageability problems of class action).

46. See Ferguson v. Housing Auth., 499 F. Supp. 334 (E.D. Ky. 1980) (involving an action by public-housing tenants challenging eviction policy of a housing authority).

CONCLUSION

Where then should we go from here? One is reminded of a saying: If you don't know where you are going, all roads lead there. Rule 23 is not perfect, but it makes little sense to revise it unless one first identifies the defects that need fixing and determines how to fix them without creating new ones. Trying to make the Rule work better for one purpose may impair it for others.

That is not to say that a close study of the Rule is not in order. Such a study might well begin with a searching examination of how the Rule is now being used. The results of such an examination might lead to the conclusion that the need for revision is not pressing. It might show, for example, that recent decisions provide adequate guidance for the appropriate administration of class-action settlements.

Perhaps the most serious problem with the present Rule is its lack of predictability. How the Rule is applied from case to case seems largely to be a matter of the length of the chancellor's foot. Indeed, some see Rule 23 as a rule of equity. It is inevitable that the management of multiclaim litigation calls for a large measure of judicial discretion; it surely invokes the judge's experience, judgment, and, one hopes, common sense. But a lack of unifying principles in the administration of the Rule undermines its effectiveness and public confidence in the system. While these issues ought to be faced frankly, there is no obvious answer. It would certainly help, however, if judges supported their rulings with clearly articulated reasons.

In the end, what is done about Rule 23 should be informed by the overall objective of the Federal Rules of Civil Procedure: "[T]o secure the just, speedy, and inexpensive determination of every action."[47] If the rising cost of resolving individual claims in federal courts and the pressures of mass litigation are not to frustrate this worthy objective, wise use should be made of the available range of litigation structures, of which class actions are only one. Adapting such structures and making them work requires resolution of the tensions between the interest in individual justice and the interest in efficiency. While individual justice ought not to be sacrificed to efficiency, without efficiency individual justice may be lost.[48]

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47. FED. R. CIV. P. 1.

48. *See generally* JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION (1995); Judith Resnik et al., Individuals Within the Aggregate: Representation and Fees (Apr. 6, 1995) (unpublished paper prepared for Research Conference on Class Actions, on file with the New York University School of Law).