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## Federal Class Action Reform in the United States: Past and Future and Where Next?

Edward H. Cooper

*University of Michigan Law School*, [coopere@umich.edu](mailto:coopere@umich.edu)

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# Federal Class Action Reform in the United States: Past and Future and Where Next?

*If the past is prologue, then there will be many proposals, some tinkering, some substantive, some legislative, to change class action practice*

By Edward H. Cooper

**P**REDICTING the likely future developments in class action practice in the federal courts of the United States must begin in the past.

## THE PAST: OR WHERE WE'RE NOT GOING NEXT

### A. The 1966 Class Action

The beginning point is the complete revision of Rule 23 of the Federal Rules of Civil Procedure that took effect in 1966. This revision instituted the familiar Rule 23(b)(1) and (b)(2) "mandatory" classes and the much more pervasive (b)(3) "opt-out" class. There has been little excitement about the (b)(1) class, apart from the currently unsuccessful attempts to adapt it to "limited fund" mass tort litigation. The (b)(2) class was a central focus of the 1966 revisions, which were designed to entrench the then-growing use of class actions to enforce civil rights through injunctions. Although there is some concern today about efforts to expand (b)(2) class actions to embrace individual damages claims as "incidental" to class-based injunctive relief, there is no general dissatisfaction with it. Broad class-based injunctions, often involving "institutional reform," are widely accepted.

The opt-out Rule(b)(3) class is a different story. It was invented in a moment of inspiration. Several participants in the process that developed (b)(3) tell us today that they had not the slightest idea what it would become. That may be in part because it has become many things.

One common description of the variety of (b)(3) class actions focuses on the ap-

*Edward H. Cooper is the Thomas M. Cooley Professor of Law at the University of Michigan Law School and has served as reporter for the U.S. Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure since 1992. A graduate of Dartmouth College and the Harvard Law School, he is co-author of Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction.*

*Nothing in this article should be attributed to the Advisory Committee.*

parent monetary value of individual class member claims. The "consumer" class action is often described as one needed to ensure enforcement of rights that involve sums too small to support effective enforcement through individual actions. The "mass tort" class action is described as one that brings together large claims that could and often would support individual actions. In between lie "mixed" actions that include in one class both members whose claims would and others whose claims would not support individual litigation.

Another description of the variety of (b)(3) class actions focuses on the subject matter involved. Antitrust and securities litigation are most frequently mentioned as examples of well-developed class action practice, where this procedural device is working well. Much greater problems are seen in attempts to bring class action procedure to bear on mass torts.

It did not take long for Rule 23(b)(3) class actions to make an impression. Lawyers and courts worked together to make "class action" a household word. The potentially neutral observation that they had multiplied "like the leaves of the green bay

tree” was followed by more darkling observations about “legalized blackmail” and “Frankenstein monsters.”

Some areas of the law were transformed, if not in substantive meaning, then in real-world meaning. Much of the reaction to class actions flowed from this impact. Enthusiasts lauded the opportunity for more effective enforcement of “public interest” legislation. Detractors, perhaps unwilling to voice directly their displeasure with the substantive law, talked instead of the compulsion to settle unfounded class claims. Settlements are coerced, they complain, by at least two major factors. One is the staggering cost of defending class litigation. The second is the risk that even a completely unfounded claim will be sustained in litigation—a risk, they say, that arises not only from the prospect of an occasional aberrant result but also from a subtle pressure exerted by the class action itself. On this view, it is more difficult to say “no” when a claim is advanced on behalf of many people. Together, the cost of defending and even a small risk of a very large loss exert powerful pressure to settle.

Substantive law objections also were voiced. The most direct expression is that much modern regulatory legislation is drafted in deliberately broad and ambiguous terms. Teams of lawyers may work unceasingly at the task of complying but still guess wrong as to the eventual judicial decision. The consequence is not only an occasional undeserved loss but also routine over-compliance that imposes costs on the persons intended to benefit from the regulation.

### **B. Reform Efforts: 1970s**

By the early 1970s, calls were made to reform class action practice. The Civil Rules Advisory Committee of the United States Judicial Conference, after flirting with some of the proposals, deliberately put the subject aside. It returned to Rule 23 only in 1991, when the Judicial Conference reacted to the report of an ad hoc committee on asbestos litigation by asking that the rules committees consider the possible ad-

aptation of class action procedure as a means to address the tens of thousands of asbestos claims.

The first response was the drafting of a complete revision of Rule 23 that collapsed the conceptual distinctions that had divided Rule 23 into the (b)(1), (b)(2) and (b)(3) categories. The formulas that had defined these categories were incorporated into a longer list of factors to be considered in determining whether to certify a class. The court was authorized to permit or instead to prohibit opting out from any class and to impose conditions on opting out. As an alternative, the court could define an “opt-in” class to include only those who affirmatively request inclusion. This bold proposal was at first recommended for publication but then retracted for further consideration.

### **C. Reform Efforts: 1996**

The next phase considered more modest changes in the criteria for class certification. Some of the proposed changes were put aside. Two deserve mention. One would have retained opt-out classes, but created an opt-in class that might be used as an alternative. Another would have permitted a preliminary evaluation of the merits in deciding whether to certify a class. This proposal, initially supported by some defendant representatives, collapsed when plaintiffs and defendants joined in opposition. Defendants expressed two major concerns—that even a preliminary consideration of the merits would inevitably lead to complete discovery on the merits before a certification decision could be made, and that a certification based on a prediction that the plaintiffs have a good chance of winning would exert irresistible pressure to settle. Many other changes also were considered, including a reconsideration of the conceptual foundations of class litigation.

The culmination of this second phase came with the publication for comment of several relatively modest proposals that included revisions of the class certification criteria for Rule 23(b)(3). The list of matters pertinent to determining whether a

class action is a superior method of fair and efficient adjudication was expanded to include factors with an obvious bearing on mass tort claims: the practical ability of individual class members to pursue their claims without class certification, class members' interests in maintaining or defending separate actions, and the maturity of related litigation.

These factors drew much attention, but even greater attention was attracted by the final factor, a proposed Rule 23(b)(3)(f), which authorized the court to consider "whether the probable relief to individual class members justifies the costs and burdens of class litigation." This factor—dubbed by some with affection and by others with scorn as the "just-ain't-worth-it" approach—was assailed in much of the public testimony and comments as an open invitation to defeat the public enforcement interest whenever countered by the individual predilections of a particular judge. But this factor also was supported vigorously by others who saw it as an opportunity to win some relief from class actions brought only to benefit the class lawyers.

The opposition included frequent arguments that public enforcement of the public interest through the private attorney general provisions of Rule 23(b)(3) has become so much a part of our substantive law that only Congress can change it, and that Congress, far from wishing change, has relied on the provisions of present Rule 23(b)(3) in enacting much post-1966 legislation.

In any event, these proposals were abandoned.

Another 1996 proposal also was put aside for an indefinite period. This would have created a new category, Rule 23(e)(4), permitting a class action to be maintained if "the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial."

Opponents of this proposal argued that it would limit settlement-class certification to the most dangerous form of all, involving a

"deal" ready-made between defendants and representative plaintiffs who would have nothing unless they bargained down to terms more favorable to the defendant than any other plausible representative might concede. Soon after this proposal was published the Supreme Court addressed the subject of settlement classes. The Advisory Committee decided to withhold further consideration pending further development of the Supreme Court's approach in lower court practice.

The only reform that actually emerged from the 1996 proposals was adoption of a new Rule 23(f) that authorizes a court of appeals to permit an interlocutory appeal from an order granting or denying class certification. This rule appears to be working well. Several courts of appeals have announced detailed criteria guiding their discretion in determining whether to permit an appeal. A steady stream of appeals seems to be providing greater clarity in certification doctrine and greater uniformity in practice.

#### **D. Mass Torts**

The next step involved creation of an ad hoc working group on mass torts composed of representatives from several Judicial Conference committees under the leadership of the Civil Rules Advisory Committee. The chair of the working group, Judge Anthony J. Scirica, was then a member of the Advisory Committee and now chairs the Judicial Conference Standing Committee on Rules of Practice and Procedure, to which the Advisory Committee submits its proposals.

The working group held four large-scale conferences that drew participation from a large number of the most experienced class action practitioners, judges, and academics. It produced a lengthy report and a thick appendix of possible reform approaches. Many of the approaches would require action by Congress, and many of the possible changes in court rules would be more easily accomplished in conjunction with legislative reform. These topics may come back to the civil rules committee.

## WHERE WE ARE NOW: CURRENT RULE 23 PROPOSALS

Several Rule 23 amendments were published by the Advisory Committee for comment in August 2001. Two public hearings produced several hundred pages of testimony from more than three dozen witnesses. Nearly 100 written comments were provided. Many of the written comments came from bar groups and even collections of bar groups; the total number of lawyers involved surely runs into multiples of 100.

If these proposals survive in the Judicial Conference itself, and then the Supreme Court, which must promulgate them, and then are not interdicted by Congress, they will take effect on December 1, 2003. Many of them, however, can be implemented by emulation before they take effect. Many of them, indeed, represent the surest form of rulemaking by adopting—and perhaps clarifying and regulating—the best current practices. The settlement review provisions in particular may have salutary effects in engendering careful review within the present framework, and thus encouraging worthy settlement agreements.

All of these proposals aim at the procedures for conducting class litigation, not at the criteria for determining whether to certify a class. In common with many recent proposals, they have been informed by empirical work. The Federal Judicial Center did a study of class actions in four high-activity courts and is carrying out another study now. The Rand Institute for Civil Justice did an empirical survey and an in-depth analysis of 10 class actions. The Rand study, in line with a great amount of less rigorously assembled empirical information, emphasizes the importance of class counsel, including fee practices, and of judicial review of class action settlements. Many of the current proposals were shaped by these studies.

### A. Rule 23(c)

The changes to Rule 23(c) are relatively modest. The time for making a certification

decision is changed from “as soon as possible” to “at an early practicable time.” The Advisory Committee note addresses the need to adjust the timing of a certification determination to the need for sufficient information about the nature of the claims and issues that actually will be tried. There should be sufficient discovery about the merits to illuminate the probable nature of the action without courting undue delay and without wastefully detailed discovery.

As published, the proposal would have required notice to a reasonable number of class members in a (b)(1) or (b)(2) class. Multiple protests were made that this requirement would cripple many civil rights class actions. In response, the notice provision was reduced to a statement that the court may direct notice in a (b)(1) or (b)(2) class action. The note emphasizes the need to balance the value of notice against the practical impediment to maintaining the action and suggests consideration of inexpensive means of notice.

### B. Rule 23(e)

Rule 23(e) is completely rewritten to emphasize the court’s responsibilities in reviewing a proposed settlement. The first paragraph establishes criteria for notice to class members and for approval. The published version explicitly required court approval for a voluntary dismissal, withdrawal or settlement before a certification decision. Many comments reinforced initial doubts about the court’s ability to do anything effective by way of refusing approval when the only parties before it join in refusing to pursue the litigation further. The amended version proposed for adoption explicitly limits the approval requirement to a dismissal or settlement that would bind a certified class.

### C. Rule 23(e)(2)

Rule 23 (e)(2) is entirely new. As published, it authorized the court to direct the parties to file a summary or copy of any agreement or understanding made in connection with a proposed settlement. The concern was that “side deals” may trade off

class relief for other advantages. Many of the witnesses and comments urged that the parties to a settlement be required to inform the court of these agreements, arguing that a court is least likely to learn of the agreements it would most want to have filed.

The amended version directs the parties to identify any agreement made in connection with a proposed settlement. The determination whether an agreement is made “in connection with” a settlement will not always be easy; any reasonable doubt should be resolved in favor of identifying the agreement. The parties who identify an agreement are free to argue that in fact it did not affect the settlement terms. The Advisory Committee note observes that the court has discretion whether to direct filing and to protect interests of confidentiality or privilege.

#### **D. Rule 23(e)(3)**

Rule 23(e)(3) also is entirely new and represents a significant innovation. It authorizes a court to refuse to approve settlement of a Rule 23(b)(3) class action unless the settlement affords class members a second opportunity to request exclusion from the class after a settlement is proposed, even though an initial opportunity to request exclusion has expired. This provision may make it more difficult to settle some cases, although settlements have been reached in many cases before certification and thus with the certain knowledge that class members must be afforded an opportunity to request exclusion. The purpose is to permit exclusion at a time when class members have clear information on the consequences of remaining in the class and a real incentive to think about the matter.

There is some prospect that competing counsel will mount concerted campaigns to solicit exclusions, but it is difficult to predict how often that will happen or what the consequences might be.

#### **E. Rule 23(e)(4)**

Rule 23(e)(4) is quite modest. It simply confirms the right of a class member to ob-

ject to a proposed settlement and requires court approval to withdraw an objection. The published Advisory Committee note explored in some detail the prospect that a court might wish to ensure adequate procedural support for objectors. These comments descended from early drafts that expressly provided discovery and attorney fee support for objectors. Those drafts met substantial resistance; objectors tend not to be popular with either plaintiffs or defendants. Even as reduced to general note observations, much concern was expressed about these note passages. They will be substantially reduced.

Another deletion from the settlement review provisions may be noted. Early drafts included a provision explicitly authorizing appointment of a court adjunct to investigate and report on a proposed settlement. In substance, this officer would perform the role of dispassionate objector. This proposal met several objections, chief among them being concern that this investigatory function might not be compatible with the court’s neutral role as umpire, and fear that appointments would degenerate into a “buddy” system.

#### **F. Rule 23(g)**

Rule 23(g) is entirely new. It confirms the court’s responsibility to appoint class counsel, separating this function from its present place as part of the Rule 23(a)(4) assurance that the class representative will represent class interests fairly and adequately. Changes made after publication illustrate the variety of concerns addressed. The criteria for appointment were expanded to ease the way for appointment of good lawyers with little or no class action experience.

The Advisory Committee note discussions of the need for counsel to act on behalf of the putative class before a certification determination is made were adopted as a new rule provision authorizing designation of interim counsel to act on behalf of a proposed class. A provision expressly authorizing the court to allow a reasonable period for applications to represent the

class was deleted in response to protests that it would encourage courts to stir up competition for appointment where competition is not useful. These changes leave the heart of the proposal intact.

Rule 23(g) also anticipates the attorney fee provisions of new Rule 23(h) by providing that the order appointing class counsel may include provisions about the award of attorney fees.

### G. Rule 23(h)

Rule 23(h) is not dramatic. It confirms the authority to award reasonable attorney fees “authorized by law or by agreement of the parties.” It does not attempt to establish any new basis for fee awards, nor does it take sides in the continuing struggle between “percentage” and “lodestar” methods for calculating fees. It does establish a regularized procedure that provides greater detail than the general attorney fee procedure of Civil Rule 54(d), and it requires separate findings of fact and conclusions of law under Civil Rule 52(a).

### WHERE WE MAY BE GOING: LEGISLATION ON MULTIPLE CLASS ACTIONS?

The next steps should be divided between Congress and the rule-making process. Congress has taken a renewed interest in class actions, as exemplified by bills to change the allocation of jurisdiction over class actions between state and federal courts. Changes such as this cannot come through the rule-making process. Other changes might address the relationship between state and federal class actions through court rules, but the course of wisdom may be to defer to Congress.

A look at the most prominent issues illustrates the point.

Many defendants have protested that the states have established a “universal venue system” for nationwide class actions. It is not just that plaintiffs are free to bring a single action in the most promising court; nor is it just that a single court may choose to inflict its own view of the law on all other states, no matter how tenuous its con-

nection to most of the claims or events and no matter how eccentric its view of the law may be. It is that multiple actions can be brought.

At least three major variations are commonly identified. In one, the same attorneys or a cooperating group of attorneys file several actions at more or less the same time, intending to press forward in the court that seems most favorable as the actions progress. In another, rival attorneys file in different courts, hoping to seize control. In the third, failure in one court is followed by a second attempt in another court, and perhaps on through several courts until success is achieved.

One approach to these problems is simple: the Supreme Court was wrong to permit state courts to assert “personal” jurisdiction as to members of a plaintiff class who have no meaningful connection to the forum. Congress might be well advised to adopt a statute limiting state court class actions to members who are citizens of the state or who suffered tangible injury to person or property in the state. (An expansion to include persons injured by “conduct in the state” might prove too difficult to enforce.) That approach has not yet appeared to commend itself to Congress.

Another approach is more sweeping. Many of the bills in Congress, including some passed by the House of Representatives, transfer jurisdiction of most class actions to federal courts. The basic method is simple: original and removal federal jurisdiction are established if there is “minimal” diversity, defined in terms of diversity between any single class member and any single defendant. There are some qualifications. Thresholds are established to require a minimum class size—100 is a common figure—and a total amount in controversy—\$2 million is a common figure—and, more dangerously, jurisdiction is ousted if a “substantial majority” of class members and the “primary” defendants are citizens of the state in which the action is brought and the claims asserted will be governed primarily by the laws of that state.

It seems risky to make the existence of

subject matter jurisdiction, with all of the attending superstitions, depend on such elusive determinations as the choice of law. There is a further difficulty that a federal court must dismiss an action removed from a state court if the federal court denies certification. Then the plaintiffs can start again in state court, but the new action can be removed again, and dismissed again, and so on in a circle without end.

Variations are easy to imagine. One of the more attractive approaches may be to rely on the federal Judicial Panel on Multidistrict Litigation, which could be given discretionary authority, based on minimal diversity, to determine whether to remove, and whether to consolidate, state court class actions.

Another approach would be to lodge authority in any federal court that has jurisdiction of a class action under present jurisdiction rules. That court could enjoin rival state actions, or else abstain in favor of a rival state action.

It is possible that some help could be found in court rules. The Advisory Committee prepared draft rules that would do several things. A federal court that refused class certification could direct that no other court should certify substantially the same class unless changes of law or fact create a different certification issue. Once a federal court has refused to approve a class action settlement, no other court could approve substantially the same settlement on behalf of substantially the same class. And a federal court with a pending class action could enjoin class members from pursuing class actions (or, in one variation, individual actions) in any other court.

These proposals raise substantial questions of authority under the Rules Enabling Act,<sup>1</sup> and they also must confront the statute that limits federal power to enjoin state court proceedings.<sup>2</sup> They were widely distributed for informal comment. The Advisory Committee comment stressed the

question whether court rules can properly address these problems as between federal courts and state courts. It is not likely that these proposals will be taken up by the Advisory Committee in the near future.

The prospect for legislation remains uncertain. For those who seek change, that is more encouraging than the prospect for rulemaking. But there is another and perhaps still more encouraging prospect. It has become commonplace to say that the problem is not a problem identified by states. Rather, it is a problem identified by counties. And the problem county courts shift as appellate courts take control and bring some measure of order in one state after another. It is possible that in a few years the most glaring excesses will disappear without any federal intervention.

### WHERE WE MAY BE GOING: MORE RULES?

The Advisory Committee does not regard its Rule 23 duties as discharged. The topics that remain on the agenda, however, may prove more controversial than any of those that have advanced to the formal publication stage in the past.

#### A. Settlement Classes

Settlement classes will be the subject of active consideration. The Federal Judicial Center is conducting a study that aims to measure the effects of the Supreme Court's decisions in *Amchem Products Inc. v. Windsor*<sup>3</sup> and *Ortiz v. Fibreboard Corp.*<sup>4</sup> It seems clear already that courts continue to certify classes for settlement only. It is not clear whether it will be desirable to adopt an express rule, either to capture and express the best developing practices or to establish new directions.

The conflicting pressures are obvious. Settlements can resolve many claims, cutting across many of the problems that would make litigated resolutions uncertain, expensive, and, if not managed on a class basis, inconsistent. Settlement classes are attractive not only to plaintiffs and courts, but also, when the right terms are achieved, to defendants who seek "global peace."

1. 28 U.S.C. §§ 2071-2077.

2. 28 U.S.C. § 2283.

3. 521 U.S. 591 (1997).

4. 527 U.S. 815 (1998).



At the same time, a settlement is simply one deal negotiated in a setting that could support many different deals. A settlement may obscure conflicts of interest within a class. In many ways, the things that make a settlement most attractive can be re-described by saying that they also make a settlement lawless. Settlements also raise the specter of the “reverse auction,” in which defendants play on the fear of any given set of class representatives that if they do not make the deal, someone else will.

It is too early to predict whether there will be any settlement class rule, much less what it might look like.

### **B. “Futures” Claims**

Perhaps the most poignant—and also intractable—questions arise from the subset of settlement classes that involves “futures” claims on behalf of tort victims who, “amorphous and unselfconscious,” have no present injury, may not be aware of a past exposure that creates a risk of latent injury, and may not yet even have been exposed. There may be no plausible means of giving notice that has meaning to many of these potential plaintiffs. Even those with notice may have little incentive to seek to monitor whatever means of representation is provided for them. The prospect of finally disposing of their “rights,” relying only on court-approved representation, is obviously unsettling, but in some circumstances there may be no other way to protect their rights.

There is a strong incentive to do something for future plaintiffs in circumstances that threaten exhaustion of all available compensation before the future claims are addressed. The “limited fund” class action has been made virtually unavailable in this setting as a matter of present Rule 23(b)(1).

The difficulty with the limited fund theory mirrors the intrinsic difficulty that must be confronted by any proposal: how to make a workable estimate of the number, severity, and cash value of future claims? The National Bankruptcy Review Commission has made a proposal to bring these problems into the bankruptcy system,

with appointment of a mass future claims representative, but the proposal does not offer any advance in thinking about the problem of making a meaningful “estimation” of the future claims.

The Advisory Committee will continue to study these problems, but they may elude any workable answer.

### **C. Binding Class Members**

A more familiar question also remains on the agenda. Rule 23(b)(3) seems to rely on the theory that a class member who has notice of a class action and who fails to request exclusion has made an intelligent choice to be represented in, and bound by, the action. Perhaps it relies only on the lesser theory that any class member who would seriously think about bringing an individual action has made an intelligent choice, while others need be of no concern because their “rights” have no meaning anyway. Anyone who has been a class member can testify to the obscurity of class action notices. Perhaps due process requires notices that few can understand and that very few will attempt to understand.

An opt-in class offers quite a different alternative. The Advisory Committee has studied several versions of an opt-in rule. The most aggressive approach would be to convert all Rule 23(b)(3) actions to opt-in classes, discarding the opt-out approach. A more moderate approach would authorize creation of opt-in classes when the requirements for certifying a (b)(3) opt-out class are not met. This approach might seem to expand the reach of Rule 23 without any offsetting limit, but class action proponents have regularly challenged the assumption that the availability of an opt-in class alternative would not affect administration of Rule(b)(3). Their view is that a court faced with a difficult (b)(3) certification question, or a court hostile to the rights asserted in a (b)(3) action, would fall back on an opt-in certification as a less worrisome alternative.

Again, it is easy to predict that these questions will stir vigorous controversy, and it is too early to venture any prediction

whether any opt-in alternative will be proposed, much less what it might be.

### **THERE'S NO END**

The book is not closed. Other Rule 23 proposals might be revived or imagined for the first time. But 1991 is already a long

way back, and the pace of revision since then does not suggest that further changes will come soon. Three and a half years would be the earliest time possible for a new rule to take effect. The very deliberate approach to Rule 23 suggests that five years is a more realistic minimum estimate.