
**ACHIEVING THE OBJECTIVES OF RULE 23(b)(3)
CLASS ACTIONS**

Admittedly, the dimensions of certain class actions are beyond anything previously seen in Anglo-American courts in terms of size, complexity, and longevity. Some of these cases obligate federal judges to undertake supervisory tasks requiring enormous expenditures of time and effort, converting their role from one of passive adjudicator of a dispute staged by opposing counsel to that of active systems manager. Yet, imaginative judicial management by district judges willing to control, shape and expedite these can go far toward achieving the objectives of the class action.

*Professor Arthur Miller, writing of class actions in 1979*¹

At the heart of the long controversy over damage class actions is this dilemma: The litigation derives its capacity to do good from the same feature that yields its capacity to do mischief. That feature, of course, is the opportunity damage class actions offer lawyers to secure large fees by identifying, litigating, and resolving claims on behalf of large numbers of individuals, many of whom were not previously aware that they might have a legal claim and most of whom play little or no role in the litigation process. The central question for public policy-making is how to respond to this dilemma.

To those who believe that the social costs of damage class actions outweigh their social benefits, it seems as if the best possible response is to abandon entirely the notion of using private collective litigation to obtain monetary damages. We should rely, say these critics, on administrative agencies and public attorneys general, not private litigation, to enforce regulations. We should rely on individual litigation to secure financial compensation for individuals' financial losses, accepting that some losses that were wrongfully imposed by others will go uncompensated because they are simply too small to be worth the cost of individual litigation.

But those who believe that the social benefits of damage class actions outweigh their costs say that this response is unacceptable. They have less faith in the

capacity of regulatory agencies and public attorneys to enforce regulations. And they argue that some federal and many state consumer protection statutes were enacted with the understanding that claims brought under the statutes would be so small that the only practical way for individuals to assert the rights granted by the statutes would be through collective litigation.

How to respond to the dilemma at the heart of damage class actions is a deeply political question, implicating fundamental beliefs about the structure of the political system, the nature of society, and the roles of courts and law in society. As we discussed in the previous chapter, this political question is unlikely to be resolved by more empirical research. Without a fundamental realignment of political interests, it is also unlikely to be resolved soon.

But there is a third possible response to the dilemma posed by damage class actions. This response recognizes the powerful capacity of class actions to do good *and* ill. And it recognizes that, at present, there is not a consensus that the mix of good and ill consequences of damage class actions requires public policymakers to do away with this form of litigation entirely. Hence, we need to invest more of the legal system's energy and resources in regulating damage class action practices, seeking to improve the balance between public good and private gain whenever their use is sanctioned. Our examination of recent and past controversies over damage class actions, review of the scholarly literature on representative litigation, interviews with attorneys and parties who bring class actions and defend against them, and case studies of consumer and mass tort class actions lead us to this third response.

Achieving agreement on how to better regulate damage class actions without resolving the fundamental disagreement about whether they should be permitted at all, and, if so, in what circumstances, is difficult. Many possible rule changes would shift the balance in favor of or against using damage class actions in certain substantive domains. Hence, debates about proposed changes segue seamlessly into debates about the social value of damage class actions, and opportunities to improve practice may be lost. Moreover, the consequences of changing rules and practices may differ for consumer class actions involving small individual losses and mass tort class actions. This interplay of debates and consequences sometimes confuses the discourse about proposed changes and may impair the ability of those interested in reforming practice to form coalitions in support of change. All these difficulties are amply reflected in the record of the Civil Rules Advisory Committee's hearings and in congressional debate.

Notwithstanding the difficulties, we think much can be gained by seeking a consensus on improving class action practices, even while the larger political debate continues. In this final chapter we review the leading proposals for

damage class action reform that have been put forward in recent years. Although some of these proposals have been put aside for the moment, they illustrate approaches to reforms that have been proposed over the past several decades and hence are likely to remain on the reform agenda as long as the debate over damage class actions continues. Our goal is to identify those changes that are most likely to improve the balance between public good and private gain without either restricting or expanding the use of damage class actions in particular substantive domains. In so doing, we hope to help those who are on opposite sides of the broad policy debate about the social value of damage class actions but who share concerns about current damage class action practices to find common ground.

We begin by reviewing five class action reform proposals that have been subjects of sharp political controversy.

A. ADDING A COST-BENEFIT TEST TO THE RULE 23(b)(3) CERTIFICATION CRITERIA

The focus of the Civil Rules Advisory Committee's effort to reform Rule 23 in the 1990s was providing clearer guidance to judges on when, and when not, to certify damage class actions. In the committee's final deliberations, no issue occupied more time than the so-called "just ain't worth it" rule (proposed Factor (F)), and no proposed change better reflected the belief of some class action critics that a prime way to curb perceived abuses in class action practice is to change the criteria for certification.²

The proposed new provision of Rule 23(b)(3) would have encouraged judges to deny certification when they believe the possible benefits of class action litigation are not worth the likely costs. The proposal clearly implicated the broad policy question at the heart of the damage class action controversy because it called for judges to define the relevant benefits and costs. The "just ain't worth it" rule was a primary focus of debate during the period of public comment on the proposed revisions, arousing strong support from the business community and strong opposition from consumer public interest advocates and consumer class action attorneys. It was only after multiple committee discussions, hours of oral testimony, and hundreds of pages of written commentary that the committee put aside the proposal to include such a "cost-benefit" test among the criteria for certification.

The effort to amend Rule 23 to include a cost-benefit test for certification foundered on disagreement about the social value of class actions, particularly lawsuits involving small losses to class members. But the committee also stumbled over the difficulty of crafting language that would provide clear guid-

ance to trial court judges on how to implement such a test. Our case studies illuminate the problems associated with adding a cost-benefit test to the 23(b)(3) certification criteria. For it seems to us that, depending on what one believes are the appropriate benefits to consider—a substantive decision—and depending on what features of the class action claims one focuses on, any one of the class action lawsuits we studied might or might not pass a “just ain’t worth it” test.

For example, some readers may think that marketing identical lenses under different labels at significantly different prices is an example of wrongdoing that should not go uncorrected. These same readers may believe that consumer class members who incurred additional charges for lenses as a result of Bausch & Lomb’s policy deserved reimbursement for those charges, which we estimate may have totaled \$200–\$300 per lens user. Other readers may believe that Bausch & Lomb’s policy, which did not violate any FDA regulation, was well within the law, and that consumer class members were simply paying different prices for different products, among which they were free to choose. Still others may believe that the proper recourse for consumer protection advocates was the enforcement actions by the state attorneys general that yielded fines against Bausch & Lomb but did not provide reimbursement to lens users.

Similarly, some readers may believe that the additional premium charges of about \$3 per motorist per year, resulting from Allstate and Farmers’ insurance companies’ premium-rounding formula, were so small as not to be worth *any* amount of litigation costs, much less the millions that were spent on the lawsuit. These readers may also believe that because the companies’ behavior was consistent with advice from regulators regarding rounding, the social value of class litigation was negligible. Other readers, however, may point to the possibility of additional charges per consumer amounting to as much as \$140 over a ten-year period and to the insurance commissioner’s post hoc holding that the companies’ rounding formula violated Texas regulations, and conclude—as did a host of law professors—that clear benefits accrued from certifying a class and allowing the litigation to go forward. A third group might believe that consumer advocates should have relied on administrative processes for regulatory enforcement, rather than on class action litigation.

In sum, once one moves beyond the rhetoric surrounding these class action lawsuits to a close analysis of their facts, which cases “just ain’t worth it” and which are becomes a lot less distinguishable. Without adjudication of the *legal merits*—not part of the certification decision under current law³—we do not think it is at all certain that we could depend on judges who have different social attitudes and beliefs to arrive at the same assessment of the likely costs and benefits of lawsuits such as these.

Arguing against a cost-benefit test for certification is not the same as arguing that all class actions have substantive merit and ought to be decided in favor of class members. Courts already have procedures for deciding the legal merits of putative class actions early in a litigation, apart from the certification decision. Defendants in any civil case may request that the case be dismissed by the judge when, even if the facts are construed in the most favorable way possible for the plaintiffs, the defendants should win as a matter of law. Defendants can also move for summary judgment on the argument that the factual evidence, as demonstrated by documents, depositions, and so forth is not sufficient to sustain the complaint.

In its study of class actions in four federal district courts, the Federal Judicial Center (FJC) found that judges ruled on dismissal in more than half of the cases,⁴ suggesting that this procedure is widely used in class action lawsuits. (Defendants also filed motions to dismiss or for summary judgment in five of the ten class actions that we studied.) Among cases in which judges considered dismissal, the FJC found rates of dismissal ranging from 15 to 34 percent across the four courts,⁵ suggesting that motions to dismiss have real bite in class action litigation, as in other forms of civil litigation. (Because we deliberately selected cases for study that survived legal challenges, the fact that none of those cases was dismissed is not an indicator of the true rate of dismissal in the population of all class action lawsuits that are filed.)

Asking judges to review the merits of a lawsuit preliminarily when deciding whether to certify it as a class tempts class action reformers primarily because of the impact the certification decision itself has on the litigation: Depending on whether a judge decides *yea* or *nay* on certification, the litigation may live or die. What is sometimes termed the *in terrorem* effect of the certification decision (literally, its terrorizing effect) seems to many to justify strong efforts at the inception of the litigation to assure that the decision is a correct one. But the FJC found that, in three of the four courts it studied, judges generally ruled on defendants' motions to dismiss *before* deciding whether or not to certify.

Asking judges to review the merits of a lawsuit preliminarily when deciding whether to certify it is also attractive because of the substantial transaction costs associated with this litigation. Although dismissals may occur early in the litigation process, normally we would expect a motion for summary judgment to occur after substantial discovery (with attendant costs) has taken place. Across the four courts it studied, the FJC found that judges ruled on motions for summary judgment in 5 to 10 percent of cases with class action allegations. In three of the four courts, these rulings usually were made *after* the certification decision.⁶

Rule 23 currently instructs judges to decide whether to certify a class action based on the *form* of the litigation, rather than its substantive merits: its scale, the extent of common features among claims, the representativeness of the individuals who have come forward to litigate on behalf of the class, and the superiority of class treatment over other forms of litigation. Preserving the line between certification based on the form of the litigation and dismissal and summary judgment based on the substantive law and facts seems more likely to send consistent signals to parties as to what types of cases will be certified than conflating the two decisions. Moreover, attempting to craft a standard that incorporates substantive judgments about the merits of claims into the certification criteria strikes at the heart of the damage class action controversy.

B. REQUIRING RULE 23(b)(3) CLASS MEMBERS TO OPT IN

Some contemporary damage class action critics have proposed amending Rule 23 to require that those who wish to join a damage class action proactively assert that by opting in. This requirement would be a return to prior practice, because plaintiffs in damage class actions were required to opt in before the 1966 revision to the rule.⁷ Among the proposed revisions to Rule 23 discussed by the Advisory Committee in 1996 (but not formally proposed for review and comment) was a provision for opt-in classes, and even after the revision process foundered, some spokesmen for the business community continued to advocate such a change.

Proponents of opt-in classes reason that many individuals become involved in damage class actions simply because they do not pay attention to class action notices or do not take the time to register their desire to opt out. Damage class action critics suggest that this undercuts the validity of many class actions.

Requiring those who want to be bound by class action outcomes to opt in at the inception of the lawsuit would inevitably reduce the scale of class actions in which the underlying individual claims involve modest amounts of money. Common sense tells us that when little is known about the consequences of joining a lawsuit, smaller numbers of individuals will come forward than would appear later in a litigation when more is known about the defendant's behavior and when the consequences for individuals are clearer. Social science research tells us that in many circumstances, when individuals are required to assent actively (rather than passively) to some procedure, fewer will do so although many of those who do not take action do not disagree with what is proposed. The social science research on active versus passive assent also suggests that minority and low-income individuals might be disproportionately affected by an opt-in requirement, a worrisome possibility.⁸

Requiring class members to opt in is another reform proposal that implicates the broad policy question at the heart of the damage class action controversy. In consumer class actions involving small individual losses, requiring class members to opt in would lead to smaller classes, which would probably obtain smaller aggregate settlements, which would probably result in smaller fee awards for class counsel.⁹

Reduced financial incentives flowing from smaller class actions would discourage attorneys from bringing suit.¹⁰ How one feels about this result depends on one's judgment about the social value of small-dollar consumer class actions. Hence, proposals to substitute an opt-in provision for the current opt-out provision of Rule 23 lead to sharp political debate, arraying consumer advocates and class action attorneys on one side of the question and business groups on the other.¹¹

C. PROHIBITING SETTLEMENT CLASSES

One of the most hotly debated issues pertaining to class action procedure during the 1990s was whether judges should be permitted to certify classes *for settlement purposes only*. Rule 23 makes no provision for such classes, although it provides for certification to be conditionally granted and to be withdrawn if a judge subsequently decides it is inappropriate.¹² In practice, however, it appears that certification for settlement purposes only was common in federal and state courts in the 1990s. In its 1996 study of class actions in four federal district courts, the FJC found that about 40 percent of all certified lawsuits were certified conditionally for settlement.¹³ Among the ten class actions that we studied, four were certified conditionally for settlement only. Settlement classes have attracted two types of criticism, the first implicating the broad social policy question about when damage class actions should be permitted, and the second focusing on class action practices.

Certifying settlement classes may have the effect of expanding the use of damage class actions if judges certify classes for settlement that they would not certify for trial purposes—for example, on the notion that settlement itself creates sufficient common interests to outweigh differences in fact or law among claims. The issue of whether judges can certify cases for settlement when the criteria for trial class certification are lacking was decided by the U.S. Supreme Court in *Amchem Products, Inc. v. Windsor*, a case involving a class action on behalf of future asbestos plaintiffs. The Court held that neither the fact that the parties have agreed to a settlement, nor that the judge has approved of such a settlement, is sufficient to satisfy Rule 23 criteria for certification. But the Court did not reject the concept of settlement classes when the criteria are satisfied.¹⁴

Prior to the *Amchem* case, the question of whether damage class actions could be certified for settlement purposes had been raised in consumer class actions.¹⁵ But when the U.S. Supreme Court decided to consider this issue in the context of an asbestos “futures” class action, the issue of settlement classes became entwined with the issue of certifying a class action limited to or including claims of individuals who have not yet identified themselves as injured. The Court’s holding in *Amchem* and in a subsequent asbestos futures class action, *Ortiz v. Fibreboard Inc.*,¹⁶ imposed limitations that some practitioners believe will either severely restrict or eliminate the situations in which a damage class action can be certified for mass tort claims. But the Court’s restrictive holdings spoke to the shape of a class—and in particular to the question of conflicts of interest among class members and between some class members and class counsel—and not to the question of the legitimacy of settlement classes.

Settlement class actions might increase the use of damage class actions for another reason as well. When the U.S. Supreme Court ruled in 1974 that plaintiff attorneys must bear the costs of notifying class members of the pendency of a damage class action (so that they can decide whether to opt out),¹⁷ some class action supporters worried that this ruling would deter the filing of suits by plaintiff attorneys who could not be certain, so early in the litigation, that they would recover these costs. Initial notice costs can be substantial: In the *contact lens pricing* class action, the estimated costs of initial notice were about \$150,000.¹⁸ We expected that plaintiff attorneys would have to bear such costs whenever class actions were certified for trial. But defendants bore these upfront costs in eight of the ten class actions we studied, including class actions certified for trial and those certified for settlement only.¹⁹

The primary criticism of settlement classes is that they facilitate collusion between plaintiff class action attorneys and defendants. This perception fed the firestorm of controversy that erupted when the Civil Rules Advisory Committee proposed to add a provision to Rule 23(b) that would explicitly provide for settlement classes.

When the parties are not certain that a judge would certify a class for trial (i.e., unconditionally), settlement class critics say, class counsel negotiate from a weaker position than when they and the defendant know that the alternative to settlement is trial. Moreover, the critics say, if the parties negotiate a settlement before a court has made *any* ruling in the case—as happens in some settlement class actions—then class counsel are in an even weaker position. (In its study of class actions, the FJC found that in about half of the cases that were certified for settlement purposes only, a tentative settlement was presented to the court along with the initial motion for certification.²⁰)

In our interviews, some plaintiff class action attorneys disputed the notion that uncertainty about certification has unilateral effects on class counsel. In some cases, they claimed, uncertainty about whether a case will be certified works to the advantage of class members, rather than to that of defendants. Moreover, some plaintiff class action attorneys and some defense counsel argued that even when settlement negotiations precede formal certification, the parties have often had an opportunity to assess the likelihood of prevailing in a certification battle. In the four settlement class actions that we studied, there was no significant discovery before the settlement. But two of the four cases followed years of individual litigation, and a third was one of many similar class action lawsuits. In these cases, class counsel and defendants probably had considerable information for evaluating the likelihood that either side would prevail in a certification battle.

Another concern about settlement class practice that we examined in our study is that when judges are simultaneously presented with a motion for certification and an already-negotiated settlement, the appropriateness of the settlement may not receive proper scrutiny. In our early interviews with class action practitioners, both plaintiff and defense attorneys told us about settlements reached early in the litigation process before the parties had conducted much legal research or discovery. They asserted that attorneys in these cases could not have arrived at a proper evaluation of the factual and legal merits of the lawsuit before settlement, and that judges who approved these settlements had insufficient grounds for their approval. Among our ten cases, we found no evidence that settlement quality—evaluated in terms of the ratio of class-member benefits to lawyer fees—correlated with whether the class had been certified for settlement only or unconditionally.

A third practice-oriented criticism of settlement class certification is that it diminishes the opportunity for class-member participation and monitoring of the process. If class members first hear about a case when a settlement has already been reached, critics say, they have little likelihood of influencing the outcome.²¹ Currently, this concern is more theoretical than real, since there is little evidence that class members participate in class litigation regardless of its formal certification status. But tying initial notice of a class action's pendency to a settlement's having been reached precludes the development of strategies to expand the role of class members in monitoring and shaping settlement negotiations.²²

As written, Rule 23(b)(3) requires class members to decide whether to opt out of a damage class action or bind themselves to its outcome before they have any knowledge of that outcome. For example, in the New Orleans toxic chemical factory litigation, which was certified for trial, class members were required to opt out sixty days after the class was certified—a year and a half before either a

settlement amount, or a formula for allocating any fund that might be established, was negotiated.²³ In ordinary civil litigation, where we presume that individual plaintiffs (unlike class members) have some control over the litigation process, we do not require plaintiffs to agree at the onset to accept any settlement that the attorneys negotiate. On its face, requiring class members to decide whether to bind themselves to a class action's outcome before they know what it is seems unfair to them. But a rule that allows individuals to opt in *after* a settlement has been negotiated might be regarded as unfair to defendants. In settlement class actions, class counsel and the defendant may negotiate a combination of opt-in and opt-out provisions that they perceive to be in their joint interests.

Our analysis of the controversy over settlement class actions and the evidence pertaining to their use leaves us uncertain about the wisdom of prohibiting certification for settlement only in every circumstance. The available qualitative and quantitative evidence suggests that in some instances when judges certify class actions for settlement purposes, class counsel and defendants have not fully investigated the legal and factual merits of the case and have negotiated settlements that better serve class counsel and defense interests than those of class members. When coupled with indifferent judicial management and the absence of publicity about the circumstances surrounding the litigation, settlement classes offer significant opportunities for collusion and self-dealing. But we are not persuaded that these opportunities flow from the formal character of certification rather than from the circumstances of a case.

When the individual claims underlying a damage class action are small, when defendants would rather settle quickly than contest the certification or the merits, and when class counsel do not have sufficient resources or desire to accept the risks of litigating aggressively, judges need to exercise special care in scrutinizing settlements and assessing the basis for attorney fee requests. In such circumstances, settlement class certification may enhance the risk that class counsel and defendants will negotiate settlements that are not in class members' best interests, but certifying a class unconditionally (i.e., for trial) will not automatically eliminate this risk. In these circumstances, whatever the form of certification, there is a particularly strong need for judges to open up the process to objectors and intervenors, to utilize neutral experts, and to require that all transactions be disclosed, as we discuss later in this chapter.

On the other hand, when a lawsuit has been fiercely contested by the defendant, when a significant amount of factual investigation has taken place in this or prior litigation, and when class counsel have and are willing to spend resources to obtain a fair settlement, settlement class certification may facilitate settlements that are in the best interests of class members as well as those of defendants. A judge who is paying careful attention to the class action litigation

process then might properly decide to certify a class for settlement purposes only. Of course, such certification does not absolve the judge of responsibility for assuring that the settlement is reasonable, adequate, and fair, and for properly assessing the value of class counsel's work to the class, using the full range of tools that are available.

D. BROADENING FEDERAL COURT JURISDICTION

A fourth proposal for class action reform that has attracted considerable attention from Congress in recent years would broaden federal court jurisdiction over class actions so that many class actions that are now subject to state class action rules would be governed by federal rules, practices, and judges. Proposals to expand federal court jurisdiction over class actions reflect views about the social value of class actions and about strategies for improving practice.

Some critics of class actions believe that federal judges scrutinize class action allegations more strictly than state judges, and deny certification in situations where a state judge might grant it improperly.²⁴ Currently, defendants cannot remove a lawsuit from state to federal court unless *all* of the class representatives are citizens of states different from *all* of the defendants—a condition that is quite easy for class counsel to avoid.²⁵ Moreover, defendants cannot remove a class action to federal court unless the monetary value of each class member's claim satisfies the diversity jurisdiction threshold, currently \$75,000.²⁶ In consumer class actions involving claims for modest losses, this standard cannot be satisfied unless claims for punitive damages, if any, are considered.

A bill introduced in the 106th Congress would change this situation dramatically. It would permit plaintiffs to file a class action in federal court and defendants to remove a class action from state to federal court whenever a class includes *any* member who is a citizen of a state different from *any* defendant, the total amount in controversy exceeds the diversity threshold, and the circumstances that gave rise to the action occurred in more than one state.²⁷ Predictably, the bill evoked opposition from consumer class action advocates who viewed it as an attempt to limit the use of class actions. Those who opposed the bill questioned the perception that the social costs of state class actions outweigh their benefits, which they attributed to the bills' sponsors. The opponents also raised concerns about the consequences of the proposed change for our federal system of courts and law.²⁸

Although proposals to expand federal jurisdiction have been embraced by some who favor doing away with damage class actions entirely,²⁹ the jurisdiction issue has important implications for class action practice in whatever circumstances they are used. For example, some argue that state court judges, who

historically have had far fewer resources at their command, are ill-equipped to provide the kind of close attention that class actions require (and which we recommend later in this chapter). These critics say that providing for easier removal of lawsuits to federal court would have salutary effects on class action practices.

Because there is so little systematic data on state court class actions, we have no empirical basis for assessing the argument that federal judges generally manage damage class actions better than state court judges. But the current situation, in which plaintiff class action attorneys can file multiple competing class actions in a number of different state and federal courts, has other negative consequences. First and most obviously, duplicative litigation drives up the public and private costs of damage class actions. Second, and perhaps more important, class action attorneys and defendants who negotiate agreements that do not pass muster with one judge may simply take their lawsuit to another jurisdiction and another judge. Under most circumstances, none of the judges in the different courts in which the case is filed has the authority to preclude action by another judge as long as all cases are still in progress.³⁰ A class action settlement approved by a judge in one court usually cannot be overturned by another court (which might disapprove of the terms of the settlement), even if the claims settled in the first court are subject to the jurisdiction of the second court.³¹

How to stop “end-runs” around judges in our system of state and federal courts is one of the most difficult dilemmas facing those interested in reforming class action practice. In the federal courts, duplicative class actions can be assigned to a single judge by the judicial panel on multidistrict litigation.³² However, under the MDL statute, transferee judges do not currently have the power to *try* all the cases assigned to them, but may only manage them for pretrial purposes.³³ Although MDL transferee judges can and do preside over settlements of aggregate litigation, the fact that MDL judges cannot try cases that were not originally filed in their court may undercut their ability to regulate their outcomes.

Congress could amend the statute that authorizes multidistricting to give the panel authority to assign multiple, competing federal class actions to a single federal judge for all purposes, including trial.³⁴ Some states have developed procedures for collecting like cases within their states for pretrial purposes, analogous to the federal multidistricting procedure.³⁵ States could adapt these mechanisms, or develop new ones, to assign multiple competing class actions within their state to a single judge for all purposes.

But consolidating cases *within* federal or individual state courts would not solve the problem of competing federal *and* state class actions, which may be filed

within a single state or in different states by the same or competing groups of class action practitioners. Since the early 1980s, largely in response to increasing mass tort litigation, numerous bills have been introduced in Congress to create a basis for federal court jurisdiction over multiple lawsuits arising from a “mass accident.”³⁶ Various task forces and individuals have also proposed devices for collecting cases across federal and state courts.³⁷ Some have even proposed a national mass disaster court.³⁸ Most of these proposals envisaged consolidating individual lawsuits, but they could extend to damage class actions.

A key problem for federal and state class actions that involve allegations that multiple state laws were violated by defendants’ practices is how to apply these laws to the case. In some class actions, defendants have argued and judges have agreed that because multiple states’ laws are implicated, the lawsuit cannot meet the Rule 23(b)(3) criterion that common issues predominate.³⁹ Some past proposals for consolidating multistate claims include provisions for dealing with choice-of-law problems.⁴⁰ But recent proposals to expand federal jurisdiction over damage class actions do not address this issue. Perhaps the ingredients for a consensus approach to the problems of multistate class actions could be found by incorporating a solution to the choice-of-law problem in a proposal that expands federal jurisdiction over such litigation and provides additional resources for federal judges who preside over such lawsuits.

E. PROHIBITING MASS TORT CLASS ACTIONS

The 1990s debate over revising Rule 23 began with a concern about how best to manage mass tort litigation.⁴¹ By the end of the decade, the popular debate had broadened to include securities class actions and consumer class actions, but the procedural questions raised by mass tort litigation continued to engage the legal academic community and to shape the policy discourse over class actions. Yet, when the Civil Rules Advisory Committee’s lengthy review process ended, little was left of earlier proposals to revise Rule 23 to incorporate mass torts into its framework. Moreover, recent U.S. Supreme Court opinions dealing with asbestos futures class actions are likely to restrict the use of class actions in mass torts.⁴²

Arguments over the costs and benefits of mass tort class actions have been hampered by the apparent belief of many legal scholars that, absent class certification, mass product defect and mass environmental exposure claims would proceed as individual lawsuits. Empirical research indicates, to the contrary, that whenever claims of mass injury exist, litigation either proceeds in aggregate form or dies on the vine.⁴³ The important public policy question relating to mass torts is not *whether* to aggregate litigation, but *how* and *when*.

Rule 23 provides a framework for courts to control the disposition of aggregate litigation that is currently missing from multidistrict litigation and that does not exist when cases are informally aggregated. Judges hold fairness hearings and approve settlements under the provision of Rule 23, but are not required to do this in the MDL context or in informally aggregated cases. Judges award attorney fees when a settlement creates a common fund, as in a class action or a settlement of multidistrict litigation. But when cases are informally aggregated, plaintiff attorney fees are governed by private contracts between the attorneys and their clients, and whatever economies of scale the attorneys may realize in aggregating cases need not be passed on to their clients.

As we have seen, judges do not always exercise their full authority to scrutinize proposed class action settlements, and they do not always closely examine the rationale for class counsel fee requests. However, the formal requirements of Rule 23 provide a shield against self-dealing on the part of attorneys that is missing in informally aggregated cases and not as clearly defined in multidistrict litigation.

Class action certification often puts class action attorneys in control of mass tort litigation, and these attorneys often adopt a strategy of settling the largest possible number of claims early in the litigation process according to a formula that only roughly distinguishes among claimants with injuries of differing severity.⁴⁴ But, in mass tort litigation, significant numbers of claimants often would be better served by lengthier litigation (to develop a stronger factual basis for negotiation) and more individualized damage assessment. Plaintiff attorneys who aggregate mass tort cases informally argue that they are better able than the class action attorneys to achieve these ends. Although conducted in the lofty terminology of due process, the public debate over mass tort class actions actually reflects a power struggle between these two groups of attorneys. To date, there is insufficient empirical evidence to indicate whether mass tort claimants are better served by formal aggregation through class certification, by informal aggregation, or by the somewhat ambiguous middle-ground that MDL provides.

Mass tort class actions present yet another dilemma for private and public decisionmakers: Classwide resolution of large-scale litigation offers an opportunity for courts and parties to stem the flow of resources required to litigate cases individually or in small groups. But the potential for large-scale resolution stimulates claiming by large numbers of individuals who might not otherwise have come forward. The expansion of the claimant population not only drives the cost of global resolution skyward, it also dilutes the value of claims that are arguably more deserving of compensation.

To defendants in mass product defect and mass exposure cases, class certification is a double-edged sword. When aggregate litigation is inevitable, class certification and settlement may offer a vehicle for controlling costs. But few companies—and few corporate counsel—are comfortable accepting the “bet the company” risk associated with a single classwide trial. Moreover, early certification of a mass tort class may short-circuit the process of testing the strength of the plaintiffs’ factual and legal case, and testing the plaintiffs’ attorneys’ willingness to invest the necessary resources to litigate successfully. Informal aggregative procedures provide more avenues to test plaintiff attorneys’ resolve and more ability to craft different settlements for different groups of claimants and their attorneys.

Class certification of mass torts *after* the facts and law underlying the litigation have been fully developed might best balance the competing interests of mass tort claimants and defendants, by providing both court scrutiny of settlement and fees and an efficient means of resolving large-scale litigation once the merits of the plaintiffs’ case have been demonstrated. The proposal to add a “maturity” factor to the criteria for class certification⁴⁵ was based, in part, on this intuition. But once informal aggregation of cases proves successful for them, individual plaintiff attorneys are unlikely to find any classwide resolution attractive because it would stem the flow of fees from individually negotiated contingency-fee agreements. Finding that elusive moment when global settlement is in both sides’ interest may be nigh impossible. But before we can find that moment—or any other solution to the problems of mass tort litigation—we need to abandon the myth that mass tort cases, absent class certification, proceed as individual lawsuits, with a full panoply of due process.

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Our review of the leading class action reform proposals is sobering. History suggests that some of these proposals are unlikely to garner sufficient support for adoption because they involve the political disagreement at the heart of the class action controversy. And the likelihood that other proposals will improve class action practice is uncertain at best. What avenues for reform remain?

We think it is judges who hold the key to improving the balance of good and ill consequences of damage class actions. It is what the judge requires of the attorneys, parties, and process that determines the outcome of a damage class action. And it is the outcome of one class action that determines whether another similar class action will be brought. If judges approve settlements that are not in class members’ interest and then reward class counsel for obtaining such settlements, they sow the seeds for frivolous litigation—settlements that waste

society's resources—and ultimately disrespect for the legal system. If more judges in more circumstances dismiss cases that have no legal merits, refuse to approve settlements whose benefits are illusory, and award fees to class counsel proportionate to what they *actually* accomplish, over the long run the balance between public good and private gain will improve. In the final section of this chapter we discuss how this might be accomplished.

F. INCREASING JUDICIAL REGULATION OF DAMAGE CLASS ACTIONS

Judicial regulation of damage class actions has two key components: settlement approval and fee awards. Judges need to take more responsibility for the quality of settlements. And they need to reward class counsel only for achieving outcomes that are worthwhile to class members and society. For assistance in these tasks they can sometimes turn to objectors and intervenors. But because intervenors and objectors often are also a part of the triangle of interests⁴⁶ that impedes regulation of damage class actions, judges should also turn for help to neutral experts and to class members themselves.

1. Settlement Approval

Rule 23(e) requires judges to approve settlements of class actions, but does not specify the criteria that judges should use in deciding whether to grant such approval. Case law requires that class action settlements be fair, adequate, and reasonable⁴⁷—elastic concepts that do not, on their face, offer much guidance as to which settlement elements judges should approve, and which they should reject.⁴⁸ The federal judges' reference manual on complex litigation offers more guidance, suggesting that judges should question settlements that appear to offer unduly preferential treatment of class representatives or particular subgroups of class members, or excessive compensation for attorneys, or that involve monetary amounts that are much less than the amounts sought initially by plaintiffs' attorneys or are indicated by preliminary discovery.⁴⁹ The manual also suggests that judges question settlements to which there are many objectors or to which apparently cogent objections have been raised.⁵⁰

Neither case law nor the judicial reference manual offers much help to judges in determining what the settlement is actually worth, and hence how adequate, reasonable, or fair it really is. Outcomes of damage class actions are often intended both to compensate class members' losses and to deter the defendant and others from engaging in illegal practices. In the ten class actions we studied, the information presented to judges for the purpose of determining

whether settlements fairly, adequately, and reasonably met these objectives was very uneven.

According to case law, judges may only approve or reject proposed class action settlements; they may not themselves devise a settlement that is to their liking.⁵¹ In practice, however, judges may signal what features of settlements will and will not meet their approval, as Judge Robert Jones did in a series of meetings with counsel in the *home siding* class action.⁵²

To give meaning to the objectives of damage class actions, before approving a settlement, a judge ought to inquire what the estimated losses were and how these losses were calculated. In some instances, such information might be more readily provided in the form of aggregates, as in the *brokerage products case*, where class counsel retained experts who calculated aggregate losses to class members under two different theories of loss estimation, and compared the total negotiated settlement amount to these aggregate loss estimates.⁵³ In other instances, it may be more practical to estimate losses to individual class members, as in the *cable TV late fee* case, in which the alleged loss was the monthly late fee, and the settlement offered reimbursement of up to ten late-fee charges.⁵⁴ In some instances, providing loss estimates in support of settlement requires fairly significant factual investigation (i.e., discovery), and may lead to disputes over the proper method of loss estimation, as occurred in the *brokerage products* litigation.⁵⁵ But approving a settlement without *any* information on aggregate *or* individual losses, which seems to have happened in the *collateral protection insurance* case,⁵⁶ raises serious questions about how the judge determined the settlement's adequacy, reasonableness, and fairness.

The issue is *not* that class members should always be fully compensated for their losses. Because the legal merits of the lawsuits have not been adjudicated, judges quite properly expect settlements to reflect compromises between the parties that take into account the strengths and weaknesses of the class members' case. However, judges should be suspicious of settlements that fall far short of reasonably estimated losses, and of plaintiff class action attorneys whose advocacy is directed toward persuading the judge of the weaknesses of the very case that they were eager to have that same judge certify not many months before.⁵⁷

The judge's assessment of the adequacy and reasonableness of a class action settlement should not rest merely on the amount of money it is putatively worth. If few class members come forward to claim compensation, then the settlement is, in reality, worth much less than it appears. Case law on attorney fees (which we discuss further below) does not require judges to distinguish between the total *potential* liability of defendants and their actual payments to

settle a class action.⁵⁸ We think that ignoring this important distinction encourages collusion between plaintiff attorneys and defendants.

Judges ought to require settling parties to lay out their plans for disbursement, including proposed notices to class members, information dissemination plans, whether payments will be automatic (e.g., credited against consumers' accounts) or class members will be required to apply for payment, and, in the latter instance, what class members will be required to do and to show in their applications. Generally, in consumer class actions involving small individual losses, automatic payments to class members should be favored when lists of eligible claimants (e.g., subscribers) are available from defendants and when a formula can be devised for calculating payments. Among the consumer class actions we studied, settlement funds were more likely to be fully disbursed to class members when payments were automatic—for example, when defendants credited the accounts of *current* policy holders in the *insurance premium double rounding* litigation⁵⁹—rather than requiring class members to file a claim against the fund.

Settlement plans presented to the judge should always indicate what will be done with any funds that are not claimed by class members. If the settlement includes a provision to return any residual funds to the defendant, the parties should disclose their estimates of the projected total disbursement by defendants. In cases in which unclaimed funds revert to defendants, the actual size of the settlement may be very different from the amount negotiated. For example, because less than 1 percent of *past* policy holders filed claims against the settlement fund in the *insurance premium double rounding* class action, the true value of the settlement turned out to be about \$24 million, rather than the \$39.6 million negotiated by the parties and approved by the judge.⁶⁰

Coupon settlements, in which class members receive coupons for free or discounted products and services—often the same products or services whose alleged flaws led to the litigation—have been the subject of sharp controversy.⁶¹ Coupons can be an efficient way of delivering compensation to class members when defendants do not have available lists of eligible claimants—as when the class comprises all purchasers of a common product, such as orange juice—or a ready means of making direct cash payments to class members. But coupons that are not redeemed impose no real cost on the defendant, and a settlement composed wholly or largely of such coupons is not worth its face value. For example, half of the negotiated settlement amount in the *contact lens pricing* case was to be paid in the form of coupons. Was the true value of that settlement the \$67 million amount negotiated, or the \$34 million promised in cash payments? Or was it the smaller but unknown amount of cash paid and coupons redeemed by lens users who came forward to claim compensation?⁶²

Judges who are reviewing coupon settlements ought to ask defendants for estimates of the rate of coupon redemption and projected payouts. Since many defendants use coupons as marketing devices, such information ought to be available to them and would, at least, provide some guidance to judges as to the probable monetary value of a coupon settlement. When direct cash payments to class members are feasible, a judge ought to assume that coupons are proposed in lieu of cash payments because they will cost the defendant less than to pay cash, and therefore the judge ought to closely scrutinize the parties' claims about the monetary value of the settlement and the appropriateness of using coupons at all.

Currently, many damage class actions are justified by their presumed regulatory enforcement effects. Particularly when individual payments to class members are small, so that the claim of a compensation objective being met is weak, judges should take regulatory enforcement effects into account in assessing the quality of the settlement. Judges should ask whether the class litigation contributed to changes in defendants' practices or in government regulations. But judges need to be wary of unsubstantiated claims that such changes occurred, and should be skeptical when large dollar values are assigned to alleged injunctive effects. For example, the parties initially assigned a value of \$11.7 million to the "injunction" component of the settlement in the *collateral protection insurance* lawsuit⁶³ even though the evidence suggests that the defendants' practices contested in that lawsuit had ceased some time before, either in response to previous class actions or simply as a result of a change in corporate policy. In inquiring about changes in practice, judges should also ask whether the instant class action is the first such suit against the defendant, or is one in a long chain of such suits, because later suits are less valuable as regulatory enforcement tools.

Judges' responsibility for the fairness, adequacy, and reasonableness of class action settlements should not end with their formal approval of those settlements. In two of the ten class actions we studied, no public record exists of the amounts of money ultimately paid out by defendants.⁶⁴ Judges should require that settlement administrators (including defendants, organizations retained by defendants to administer the settlement, and individuals or organizations acting on behalf of the court) report, in a timely fashion, both the total amounts of disbursements to class members and the total costs of administration. Judges should review these reports to determine whether rates of claiming and coupon redemption are in line with parties' projections at the time the settlement was proposed; they also, as we discuss below, should adjust class counsel fees when the true value of the settlement falls substantially below the value asserted during the settlement approval process.⁶⁵

When settlements are structured to provide payments over lengthy periods, judges should require, at least, annual reports of disbursements and costs as well as reports on the process of claims administration—including the numbers of claims accepted and denied, reasons for denial, use and outcome of appellate procedures (where provided) and time to disposition. When settlements provide for *cy pres* remedies, the beneficiaries of those remedies and the amount of disbursement to them should also be reported. When alternative dispute resolution procedures, such as arbitration or mediation, are utilized in the claims administration process, judges should require reporting on the selection and training of the arbitrators or mediators, payment provisions, and quality control procedures. These regular reports on claims administration should be available to the public for review.

2. Attorney Fees

The private gains that accrue to plaintiff class counsel in damage class action litigation are the engine that drives the litigation. *The single most important action that judges can take to support the public goals of class action litigation is to reward class action attorneys only for lawsuits that actually accomplish something of value to class members and society.*

Currently, judges award fees to plaintiff class action attorneys using either the percentage of fund (POF) approach (a judge-determined percentage of the common fund) or the lodestar approach (reported hours multiplied by a judge-determined hourly rate multiplied by a judge-determined factor reflecting lawyers' skill, success, or the risk they incurred in litigating). The POF approach has been criticized as rewarding class action attorneys without regard for how much effort they actually invested in obtaining a particular monetary award or settlement—for example, when defendants agree to pay a large amount to settle the lawsuit early in the litigation to contain their own costs and avoid publicity. The lodestar approach has been criticized for its potential to overpay attorneys who invest unnecessary time in the litigation (or pad their bills), and for requiring excessive attention from judges to attorneys' billing practices to avoid such overpayment.⁶⁶ In practice, neither approach may achieve the proper social objective, which is to reward class action attorneys for bringing litigation that delivers value for class members and society.

In theory, the POF approach ought to result in the right level of reward for class action attorneys, because we should be able to rely on defendants to ensure that class action attorneys work hard to achieve substantial monetary rewards for class members. But in class action litigation, defendants may have an interest in plaintiff attorneys' receiving significant rewards for substandard settle-

ments: Such settlements leave defendants, on net, better off than they might have been had the class action attorney worked harder (or more skillfully), thereby forcing the defendant either to try the case to verdict or settle for a larger amount. If judges do not strictly scrutinize the quality of settlements, plaintiff attorneys may get paid too much for what they accomplish and defendants may pay too little for closing off future litigation.

We do not think the solution to this problem is to rely on the lodestar approach. Rather, we think judges ought to calibrate POF awards more carefully to reflect the benefits actually produced by the class litigation. To avoid rewarding class action attorneys for dubious accomplishments, judges should award fees in the form of a percentage of the fund *actually disbursed* to class members or other beneficiaries of the litigation.⁶⁷ When settlements include coupons, judges should award fees based on the monetary value of coupons *redeemed*, not coupons offered.

In an important case decided in 1980, the U.S. Supreme Court held that class action attorney fees could be awarded on the basis of the negotiated size of a settlement fund, without regard to how many class members came forward to claim shares of the fund.⁶⁸ We think this rule has perverse effects in damage class actions and ought to be overturned. When defendants keep any dollars not collected by class members, the rule gives class action attorneys and defendants an incentive to collude in negotiating settlements whose actual monetary value is less than their face value.

Awarding fees on the basis of dollars paid out, rather than dollars that *might* be paid out, poses a practical problem: Plaintiff class action attorneys have a legitimate concern about collecting their fees as soon after the close of litigation as possible, since they have to pay salaries and expenses as they accrue and have often accumulated a large financial burden by the time the lawsuit is settled. Judges may, however, award a portion of the projected fee immediately and award the remainder, as a percentage of disbursements, over time. For settlements with long disbursement tails, such as the *polybutylene pipes* litigation, judges can use annual reports of disbursements as a basis for making sound projections of ultimate disbursements and pay the remainder of attorney fees over time based on those data. An added benefit of linking class action attorney fees to disbursements is that it would give the attorneys an interest in ensuring expeditious and effective delivery of compensation to class members. In the *home siding* litigation, Judge Jones decided that the class counsel fees would be paid out over the first four years of the claims administration process.⁶⁹ Judges have held back portions of attorney fees in other cases, where disbursements were to be made over a long period of time or where there was uncertainty about what the total payout would be.⁷⁰

Class counsel *expenses* could be paid out as soon as the judge has assessed these expenses, before disbursements have been completed. As is common today in other areas of legal practice, class action attorneys ought to be required to provide detailed expense reports.

In awarding fees, judges ought to award attorneys a lower percentage of any dollars that are not collected by class members, but instead are awarded to other beneficiaries—so called *cy pres* remedies—except in instances where direct compensation to class members is clearly impracticable. Some damage class action proponents argue that when class counsel succeed in negotiating a settlement that requires defendants to pay a substantial amount to resolve the lawsuit, they have served a regulatory enforcement purpose that merits a fee award. From the perspective of economic theory, it does not matter who collects the defendant's money. As a social matter, however, having the defendant pay shareholder funds to attorney- or judge-selected charitable organizations whose mission may have little to do with the defendants' alleged wrongdoing is hard to justify.⁷¹ For example, class counsel in the *cable TV late fee* litigation proposed awarding \$250,000 to the California State University in Sacramento (where the representative plaintiff was a member of the faculty), \$25,000 to a local TV station, and \$12,000 to the "Legal Community Against Violence," among others.⁷² Moreover, when plaintiff class action attorneys know that they will receive fees as a result of a settlement, without regard to whether class members come forward to claim disbursement or payments are made to other organizations, they have less interest in designing and administering effective disbursement processes.

To assure that they themselves do not have an improper interest in the settlement of a class action, judges should refrain from making *cy pres* awards to organizations with which they have some personal connection—for example, the law school from which they graduated or an organization on whose board they serve.

As long as the use of damage class actions for regulatory enforcement is sanctioned, judges should be prepared to award fees, as well, for changes in defendants' practices and other regulatory consequences. But judges should not readily make awards for practices that were changed in the past in response to enforcement actions by public attorneys general or other public officials, individual litigation, or previous class actions. Conversely, judges *should* consider the public regulatory consequences of the class action litigation that is before them: statutory or rule changes and public enforcement actions undertaken as a result of the class action.

All of the issues considered so far pertain to the calculation of the *amount* that class counsel should receive in fees. Another question is when that amount

should be decided, and by whom. In practice, when class counsel submit attorney fee requests to a judge, the amount of fees often has been negotiated with the defendant simultaneously with negotiating other aspects of the settlement agreement. Class counsel and the defendant may agree to a specific amount—as in the *credit life insurance* class action, where the settlement agreement submitted for judicial approval specified the fee but not the size of the compensation fund⁷³—or a defendant may agree not to object to a fee request, up to some specified amount.⁷⁴ In 1985, the U.S. Supreme Court upheld the right of parties to include a fee stipulation in settlement agreements, seemingly paving the way for plaintiffs’ attorneys and defendants to include understandings about fees in settlement agreements. A judge who does not approve of such a fee understanding, the Court held, can refuse to approve the entire settlement agreement under Rule 23(e).⁷⁵

The impetus for defendants to know the maximum amount of fees that they might have to pay class counsel before agreeing to other terms of a settlement is clear: They need to know what the bottom line of any proposed agreement will be. But because of the conflict of interests posed for class counsel, such fee agreements deserve close scrutiny.⁷⁶ In cases where the potential for self-dealing and collusion is high—consumer class actions involving small losses to individuals; actions where defendants have chosen not to contest certification or the legal merits; where class counsel do not appear to have either the resources or the will required to appropriately investigate the facts; and where the case has received little or no attention from intervenors or objectors, government regulators, or the press—we think judges ought to consider alternative approaches. For example, in a report issued more than a decade ago, the Third Circuit Task Force on Attorney Fees recommended that judges negotiate a percentage fee arrangement with class counsel at the *outset* of the case or “as early as practicable.” In complex cases, the Task Force recommended that the judge appoint an attorney to negotiate the fee arrangement on behalf of the class; that attorney would then submit a fee recommendation to the judge.⁷⁷ More recently, the National Association of Consumer Advocates recommended that class counsel and defendant negotiate the total amount to be paid by the defendant, without discussing fees; the judge would then award fees as a share of this amount.⁷⁸

3. Sources of Assistance

One reason some judges may not currently engage in close examination of settlement quality and fee requests is that they do not have information or expertise available to assist them. Judges could enhance their capacity to evaluate settlements and fee requests by inviting others to assist them. A key question

for judges is how to identify and obtain advice from knowledgeable but disinterested parties.

Intervenors and objectors are sources of assistance to judges. But intervenors and objectors require timely information about a proposed settlement and access to case information. When there is little time provided between notice of settlement and the date for filing a motion for leave to intervene, or between notice and a fairness hearing, intervenors and objectors are hard-pressed to effectively assist a judge in investigating the background of the settlement and its provisions.

Judges need to ensure that the opportunity for interested parties to come forward to identify and argue what they perceive as demerits of a proposed settlement is a real one. This opportunity is particularly important when the individual claims underlying a damage class action are small, when defendants have settled quickly without contesting the certification or the merits, and when class counsel do not appear to have sufficient resources or desire to accept the risks of litigating aggressively.⁷⁹

The value of intervenors was sharply demonstrated in the *collateral protection insurance* class action. In that case, class counsel and the defendants initially proposed a settlement in which class counsel would receive 80 percent of the common fund, class members would submit forms to collect modest shares of the remaining 20 percent, and defendants would receive any portion that was not claimed by class members; also, one of the three subclasses that were defined under the agreement was to be certified as a non-opt-out class. After Trial Lawyers for Public Justice entered as intervenors, the settlement was revised so that the entire class was certified on an opt-out basis, payments were made automatically to class members with any residual left in the fund to be paid to charitable organizations, and attorney fees were reduced to not more than 20 percent of the common fund—about \$3.5 million less than their original share.⁸⁰

Intervenors and objectors, however, are not disinterested parties. Judges need to be wary of lawyers who claim to represent a particular set of parties, but whose real motivation is to negotiate a fee with defendants and plaintiff class action attorneys at the price of disappearing from the scene. To help guard against collusion among class counsel, defendants, intervenors, and objectors, payments made by one set of lawyers to another or by defendants to intervening or objecting lawyers ought to be disclosed to the judge,⁸¹ and arguably to class members as well.

Public interest lawyers may be a source of more impartial advice to judges. As advocates for groups that have their own policy agendas, these lawyers are not

wholly disinterested, either. But public interest organizations like Public Citizen have played an important role in recent years in calling attention to questionable class action practices, even while they advocate the continued use of damage class actions in a wide range of circumstances. Public interest lawyers are perennially strapped for resources, and unless they have a chance to recover their expenses for intervening, they can come forward in only a relatively small number of cases. Hence, we think judges ought to award fees to intervenors representing nonprofit organizations who significantly improve the quality of a settlement. These payments should also be a matter of public record.⁸²

The need for vigilance when dealing with intervenors should not be an excuse for judges to exclude outsiders from the process. Nor should judges automatically reject the notion of paying public interest intervenors out of a concern about increasing transaction costs: With so much money at stake, in payments to beneficiaries and class counsel fees and expenses, properly assessed intervenors' fees are a small price to pay for assisting the judge in assessing the value of a settlement. When a judge determines that intervenors merit fees because their efforts have contributed to a significant improvement in the quality of a settlement, their fees should be split evenly between the defendant and class counsel (from the latter's *already-decided* share of the settlement).

Judges should also seek assistance in evaluating the quality of settlements from neutral experts. Experts can provide independent analyses of loss estimation, assess the reasonableness of disbursement plans, and project the probable value of the settlement to class members and other beneficiaries. However, judges need to be wary of experts obtained by plaintiff class action attorneys or defendants who may have a financial interest in securing the judge's approval of a settlement. Under Rule 706 of the Federal Rules of Evidence, federal judges have the authority to appoint their own neutral experts. Judges should appoint neutral experts to assist them in assessing claims of regulatory enforcement to assure that such claims are real. When nonmonetary benefits are included in a settlement, judges should appoint neutral experts to assess the value of these benefits before making their fee award. Judges also should appoint neutral accountants to audit attorney expense reports before making a final award of expenses. These additional costs should be divided between the defendant and class counsel, as described above.

Currently, federal judges are advised to limit post-settlement discovery, particularly when a settlement occurs early in the litigation, to avoid increasing attorney fees and expenses.⁸³ But these settlements are often the most questionable in terms of benefits achieved for class members. Avoiding expert fees seems a foolish economy when millions of dollars will be spent by defendants to settle the litigation. Because settling parties share an interest in convincing the judge of the reasonableness of the settlement, judges have

particular reason to use their authority to appoint their own experts in class action litigation.

Many judges presently ignore a potentially large group of helpers: the class members themselves. Typically, class members are brought into the litigation late in the process, when the deal has already been done. They may not be told the details of the proposed settlement, or may be told the details in some fashion that is intelligible only to lawyers. However much they are told, class members are always told that they should not approach the court directly for information. They are told that they may object to a settlement, but sometimes they are not told much about how to go about doing that, and often what they are expected to do—e.g., appear in some place miles away or secure a lawyer to appear on their behalf—is infeasible. Whatever the notices say, the real message to class members is “stay away.”

It is time for courts to rethink the role of class members in damage class actions, and to bring methods of communication with class members into the twentieth, if not the twenty-first, century.⁸⁴ Defendants who routinely hire marketing experts to develop media campaigns and write advertising copy, and plaintiff class action attorneys who have begun to do the same, know how to secure assistance to write notices to class members that can be understood by most citizens. Judges ought to require that the parties secure the assistance of communication experts in planning and implementing notice campaigns, and that all notices are written in plain English rather than lawyerese.

In notices of the pendency of class actions, potential class members should be told what the class action is all about: what defendants are alleged to have done, to whom, and with what effects. In notices of settlement, class members should be told, in some detail, the provisions of proposed settlements: what eligible claimants will receive on average; what they will have to do to receive payments; what defendants are projected to pay, in the aggregate; what other activities defendants have agreed to undertake, if any; what plaintiff attorneys will receive, if fees have been negotiated during the settlement process; and whether any plans are made for residual or supplementary payments to other organizations.⁸⁵

Rather than distancing themselves from class members, judges ought to invite questions from potential class members via “800” telephone numbers, electronic mail, and more traditional correspondence. Judges presiding over large complex class actions should have sufficient staff to monitor such communications. Information about the pendency of a class action and about its proposed settlement ought to be available on a court Web site, and comments by potential class members ought to be solicited on that Web site. Judges also should facilitate class members’ participation in fairness hearings.⁸⁶ In mass tort class

actions, where class members frequently include represented and unrepresented parties, judges ought to consider appointing a committee of unrepresented class members to serve as spokespeople for the latter. Claimant support groups, which often are established during the course of mass tort litigation, can help in this regard. All of these techniques have been used successfully by some judges in some class actions.⁸⁷

Historically, judges have refrained from direct communication with represented parties in civil litigation. And some judges may fear that opening the doors to direct communication with class members will offer new opportunities for other actors to manipulate the litigation. But a core concern in class actions is that class members' interests may not be adequately represented either by the representative parties or by class counsel. Comment from class members would provide an additional source of information for judges who share that concern.

G. THE ROAD TO REFORM

If judges already have the power to regulate damage class actions but not all judges use this power in all circumstances, what stands in the way of stricter regulation? We see three obstacles: a discourse about judging that emphasizes calendar-clearing above all other values, a belief that court efficiency is measured in terms of dollars spent rather than dollars spent *well*, and a failure to expose what occurs in ordinary damage class actions to public light.

1. Judicial Education

For more than two decades, federal and state judges have been lectured that efficient use of public and private resources compels them to settle cases quickly and cheaply in whatever fashion “works.” Judges (and parties) have been told that civil litigation is rightfully understood as “problem solving,” rather than adjudication of rights and remedies.⁸⁸ Public policy favors settlement over adjudication, and views lawyers, acting on parties' behalf, as the appropriate people to decide when to settle, and for what. Notwithstanding concerns about the incentives for self-dealing provided by representative litigation, much of the guidance judges are given about presiding over class actions echoes this understanding about the role of judges and lawyers and the purposes of civil litigation.⁸⁹

To promote stricter regulation of damage class actions, we need to change the discourse about the role of judges in collective litigation. Judges need to be told that damage class actions are *not* just about problem solving, that the rights of plaintiffs *and* defendants are at stake, that responsibility for their outcomes lies

not just with the class counsel and defendant but with the judge as well, and that what is deemed acceptable in one case sends important signals about what will be accepted in another.

Judges presiding over their first damage class action need somewhere to turn for guidance, not just about the steps of the process, but also about the incentives for self-dealing inherent in representative litigation and the strategies available to them for countering these incentives. Judges should be reminded of their authority to dismiss cases and grant summary judgment, whenever appropriate. At conferences of state and federal judges, participants should be asked to share with their colleagues not just techniques for “getting rid of cases,” but techniques for ensuring that the settlements that they approve are appropriate, given the law and facts, and that fee awards are proportionate to real outcomes. Questions about how Rule 23(b)(3)’s certification criteria apply to various types of lawsuits, at what stage of the process certification is appropriate, and whether to certify cases conditionally for settlement should be debated at these conferences. Most important, judges should be celebrated for *how* they carry out their responsibilities in damage class actions, not just for how fast or how cheaply, from the court’s perspective, they resolve these lawsuits.

2. Resources

Our recommendations for judicial management of damage class actions might require an increase in public expenditures for the courts. Inviting greater participation in the litigation process by class members and intervenors, requiring and assessing additional information about disbursement plans, inviting and hearing neutral testimony on the value of purported changes in defendants’ practices and the appropriateness of class counsel’s fees and expenses, would probably extend the litigation process and increase judicial time spent on class action lawsuits. However, unlike traditional commentators, we are not persuaded that judicial time-savings should be a primary objective in resolving class actions. The question ought not to be what amount of court resources was spent managing a class action lawsuit, but rather whether court resources were used wisely. Saving money on damage class actions by limiting judicial scrutiny is a foolish economy that has the long-term consequence of wasting society’s resources.

In the short run, our recommendations might also increase the *private* costs of individual damage class actions. The price to settle the class actions that survive a more rigorous judicial approval process might well be higher than the current average cost to settle damage class actions. But if plaintiff class action attorneys had to weigh more carefully the risks of not earning anything for

nonmeritorious lawsuits, and if they and defendants had to work harder to achieve settlements acceptable to judges, class action attorneys' threshold for deciding whether or not to pursue a case would rise, the ratio of appropriate to inappropriate class action certifications would increase, and the proportion of appropriate to inappropriate settlements would increase. To the extent that the current costs of damage class actions reflect significant amounts of frivolous litigation and worthless settlements—as critics allege—these costs would diminish, benefiting both defendants and consumers.

3. Opening Class Action Practice and Outcomes to Public View

Except in a few notorious cases, what happens as a result of class actions—who gets what, with what consequences, and at what costs—is rarely a subject of public commentary. Notwithstanding the requirement that judges approve settlements, the key ingredients of settlements are not always recorded publicly. What class members obtained, at what cost to defendants and what benefit to class counsel, are also not always available for public reporting. Shining more light on damage class actions would enhance judges' incentives for regulating class actions.

To increase public information about class action outcomes, judges should require a public record of the final disposition of damage class action lawsuits, including the total value of any monetary settlement, number of class members who claimed and received compensation, total funds disbursed to class members, amounts of disbursements to other beneficiaries and who these beneficiaries are, and amounts paid to class counsel in fees and expenses. Courts and legislatures should consider ways of facilitating broad public access to such data, for example, by making electronically readable case files available through the internet.⁹⁰ Requiring comprehensive reporting of class action litigation would provide a rich resource for policymakers concerned about class action reform; it would also provide an unbiased information source for print and broadcast reporters.

The lack of such information currently leaves the public with, at best, an incomplete picture of class action litigation. But the failure to monitor and systematically report the outcomes of class actions also means that judges and lawyers cannot learn from their experiences how better to serve the public goals of class actions. Widely published reports on the results of different sorts of notice campaigns and different approaches to disbursement would help practitioners devise better strategies and provide more information for judges in assessing the strategies that are proposed to them. Widely published reports on the distribution of settlement funds—to class members, other beneficiaries, or the defendants themselves—and on fees paid to class action attorneys would

provide data for assessing how well different class actions serve their stated purposes.

* * *

Notwithstanding the controversy they arouse, history suggests that damage class actions will remain a feature of the American civil litigation landscape. Whether and when to permit specific types of damage class actions will be decided by Congress and the fifty state legislatures. But it is judges—by their willingness or unwillingness to certify cases, to approve settlements, and to award fees—who will decide the kinds of cases that will be brought within whatever substantive legal framework emerges. Educating judges to take responsibility for class action outcomes and providing them with more detailed guidance as to how to evaluate settlements and assess attorney fee requests, ensuring that courts have the resources to manage the process and scrutinize outcomes, and opening up the class action process to public scrutiny will not resolve the political disagreement that lies at the heart of the class action controversy. But these actions could go a long way toward ensuring that the public goals of damage class actions are not overwhelmed by the private interests of lawyers.

NOTES

¹Arthur Miller, “Of Frankenstein Monsters and Shining Knights: Myth, Reality and the Class Action Problem,” 92 *Harvard Law Review* 664 (1979) at 667–68.

²See *supra* Chapter Two at 31–33. The Advisory Committee also considered, but did not propose for formal review, a new provision of Rule 23 (b)(3) that would have required a preliminary hearing on the merits prior to certification. *Id.*, at 29 and fns. 102 and 103. That provision encountered opposition from both plaintiff and defense bars. The thrust of our analysis of the “just ain’t worth it” provision applies to this and other proposals for incorporating substantive review into the class certification criteria.

³*Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

⁴Thomas Willging, Loral Hooper, and Robert Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* 171 table 24 (Washington, D.C.: Federal Judicial Center, 1996).

⁵*Id.* at 171 table 22.

⁶*Id.* at 171 tables 23–24.

⁷See *supra* Chapter Two, at 14 and fn. 18.

⁸See, e.g., Phyllis Ellickson, “Getting and Keeping Schools and Kids for Evaluation Studies,” Special Issue, *Journal of Community Psychology* 102 (1994).

⁹Some critics of the proposal to return to an opt-in regime also argue that in Rule 23(b)(3) employment class actions, an opt-in requirement might scare off class members who fear reprisals from a defendant.

¹⁰In a speech to the National Press Club in Washington, D.C. on May 20, 1998, the then-chair of the Civil Rules Advisory Committee, Judge Paul V. Niemeyer, observed: “The inertia of not responding [to notice] has been identified as the cohesive force behind the viability of plaintiff class actions. [Requiring individuals to opt in] is . . . the change to the rule that could be made to eliminate most of the class actions or radically reduce their size.”

¹¹Opt-in provisions play a different role in mass tort class actions, where individual losses are generally larger and class counsel and defendants share an interest in determining how large the class will be and what the likely aggregate settlement value will be under a tentative settlement agreement. Judges have approved combinations of opt-out and opt-in provisions that are tailored to the special characteristics of mass torts.

¹²Rule 23(c)(1).

¹³Willging et al., *supra* note 4, at 35.

¹⁴*Amchem Products, Inc., v. Windsor*, 521 U.S. 591 (1997).

¹⁵*In re General Motors Corp. Pick-Up Truck Fuel Tank Litigation*, 55 F.3d 768 (3d Cir. 1995).

¹⁶119 S. Ct. 2295 (1999).

¹⁷*Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

¹⁸See *supra*, Chapter Five.

¹⁹See *supra* Chapter Fifteen, at 449 (Table 15.10). Costs of noticing class members of settlement ranged into the millions of dollars.

²⁰Willging et al., *supra* note 4, at 35. Not all of these cases were damage class actions, however. From additional information appearing in Tables 30 and 31, about half were apparently 23(b)(3) certifications, a majority of which were securities class actions. *Id.* at 174.

²¹Judith Resnik, Margaret Berger, Dennis Curtis, and Nancy Morawetz, Comments on Proposed Changes to Federal Rules of Civil Procedure 23 (Oct. 30, 1996), in Administrative Office of the U.S. Courts, 4 *Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Rule 23* 124-31 (1997) (hereinafter *Working Papers of the Advisory Committee*).

²²Public Citizen lawyers have suggested that one way to broaden participation of interested parties in settlement classes would be to require public notice of the preliminary hearing at which the judge considers certifying the class, preliminarily evaluates the settlement, and approves the notice plan. See Brian Wolfman and Alan Morrison, "Representing the Unrepresented in Class Actions Seeking Monetary Relief," 71 *New York University Law Review* 439, 480-85 (1996). Another approach was adopted by Congress in the Private Securities Litigation Reform Act of 1995 that requires class counsel to publish notice of the pendency of the action within 20 days after a complaint is filed. 15 U.S.C. § 78u-4.

²³In the *chemical factory* lawsuit, those who wanted to be bound were also required to *opt in*. See *supra* Chapter Eleven.

²⁴See, e.g., E. Donald Elliott, Summary of Key Points: Testimony Before the Subcommittee on Administrative Oversight and the Courts of the Senate Committee on the Judiciary Concerning S. 353, the Class Action Fairness Act of 1999 (May 4, 1999) (on file with the authors); Stephen Morrison, Statement Before the Subcommittee on Administrative Oversight and the Courts of the Senate Committee on the Judiciary, S. 353: the Class Action Fairness Act of 1999 (May 4, 1999) (on file with the authors).

²⁵*Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921). For a discussion of diversity jurisdiction in the context of class actions and other dispersed litigation, see Thomas Rowe and Kenneth Sibley, "Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction," 135 *University of Pennsylvania Law Review* 7 (1986).

²⁶This interpretation of the application of the jurisdictional threshold to class actions dates back to the period before the adoption of the 1966 amendments to Rule 23. After 1966, some proponents of damage class actions argued that the jurisdictional requirement could be met by aggregating individual class members' claims. The Supreme Court rejected this interpretation first in *Snyder v. Harris*, 394 U.S. 332 (1969), and then again in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). At the time when *Zahn* was decided, the jurisdictional threshold was \$10,000.

Since 1990, the applicability of *Snyder* and *Zahn* has been questioned in the light of the supplemental jurisdiction provision of the Judicial Improvements Act of 1990, 28 U.S.C. § 1367(a). Some circuits have held that the amendment to § 1367 effectively overruled *Zahn*; others disagree. See, e.g., *Daniels v. Philip Morris Companies*, 18 F. Supp. 2d 1110 (S.D. Cal. 1998).

²⁷Class Action Fairness Act of 1999, S. 353, 106th Cong., 1st Sess. (1999). H.R. 1875, 106th Cong., 1st Sess. (1999) passed the House in 1999. Similar bills introduced in the 105th Congress did not con-

tain the multistate restriction. See, e.g., Class Action Jurisdiction Act of 1998, H.R. 3789, 105th Cong., 2d Sess. (1998).

²⁸See, e.g., Eleanor Acheson, Assistant Attorney General, U.S. Department of Justice, Statement to the Courts Subcommittee on S.B. 353 (May 4, 1999) (on file with the authors).

²⁹See, e.g., John Frank, Statement to Courts Subcommittee on S.B. 353 (May 4, 1999) (on file with the authors).

³⁰The Anti-Injunction Act, 28 U.S.C. § 2283, prohibits federal courts from enjoining state court action, with certain exceptions specified by statute and case law. See Diane Wood, "Fine-Tuning Judicial Federalism: A Proposal for Reform of the Anti-Injunction Act," 1990 *Brigham Young University Law Review* 289. Legal doctrine pertaining to the preclusive effects of substantive legal decisions varies across jurisdictions. See Stephen Burbank, "Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach," 71 *Cornell Law Review* 733 (1986).

³¹*Matsushita Electrical Industrial Co. v. Epstein*, 516 U.S. 367 (1996) (holding that a settlement of a securities class action in the state court of Delaware must be given full faith and credit, even though some of the claims settled were subject to exclusive federal court jurisdiction). But see *Epstein v. MCA*, 156 F.3d 1235 (9th Cir. 1997), *withdrawn on rehearing*, 179 F.3d 641 (9th Cir. 1999).

³²28 U.S.C. § 1407.

³³The transferee judge can try cases that were filed in her district court. Hence, once the MDL has issued a transfer order, attorneys seeking an aggregative disposition may file claims in that court, knowing that, under the MDL panel's order, they will automatically be assigned to the transferee judge. In the past, some district court judges have claimed authority to try other cases as well. For example, Judge Carl Rubin, sitting in the Southern District of Ohio, consolidated for trial all Bendectin cases filed in the Northern and Southern Districts, on the rationale that (since these were diversity cases) Ohio state law would apply to all. Judge Rubin also allowed attorneys who had filed cases outside these districts to voluntarily join the consolidated trial. See Michael Green, *Bendectin and Birth Defects: The Challenges of Mass Toxic Substances Litigation* 195 (New York: University of Pennsylvania Press, 1996). In *Lexecon Inc. v. Milberg, Weiss, Bershad, Hynes and Lerach*, 523 U.S. 26 (1998), the U.S. Supreme Court held that transferee judges must return all unsettled cases filed outside the transferee judge's district to their original jurisdictions for trial.

³⁴A provision amending 28 U.S.C. §1407 to allow MDL transferee judges to decide liability and punitive damages, and remand cases in which defendants were held liable to the district court in which they were filed for determination of damages, has been included in some versions of the "multiparty multiforum" bills that have been introduced in Congress over the past ten years. See, e.g., Multiparty Multiforum Jurisdiction Act of 1993, H.R. 1100, 103d Cong., 1st Sess. (1993). Under this bill, choice of law was to be determined by the transferee judge. Versions of this bill passed the House in 1989, 1991, and 1998. In 1999, the House of Representatives passed a bill that broadens the transferee judges' authority to include trial. H.R. 2112, 106th Cong., 1st Sess. (1999).

³⁵See Mark Weber, "The Federal Civil Rules Amendments of 1992 and Complex Litigation: A Comment on Transsubstantivity and Special Rules for Large and Small Federal Cases," 14 *Review of Litigation* 113 (1994).

³⁶See *supra* note 34.

³⁷See, e.g., American Bar Association, *Commission on Mass Torts* (1990); American Law Institute, *Complex Litigation: Statutory Recommendations and Analysis* (Philadelphia, Pa.: American Law Institute, 1994); Rowe and Sibley, *supra* note 25; William Schwarzer, Alan Hirsch, and Edward Sussman, "A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts," 73 *Texas Law Review* 1529 (1995); Wood, "Fine-Tuning Judicial Federalism," *supra* note 30. The ALI's 1990s project was preceded by a much earlier proposal to create a new federal jurisdiction for litigation involving dispersed parties. See American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* (1969). Rowe and Sibley provide a historical overview of proposals relating to multiforum litigation. Rowe and Sibley, *supra* note 25, at 11–14. Judge Schwarzer et al.'s proposal would authorize consolidation of state and federal cases for pretrial purposes only. Judge Wood's proposal would broaden federal court authority to enjoin state court proceedings. Many of these efforts were driven by concern about increasing numbers of mass tort cases, although not all of the proposals were limited to mass torts.

³⁸Ralph Lancaster and Catherine Connors, "Creation of a National Disaster Court: A Response to Judicial Federalism in Action," 78 *Virginia Law Review* 1753 (1992).

³⁹See, e.g., *In re American Medical Systems, Inc.*, 75 F.3d 1069 (6th Cir. 1996) (reversing certification of nationwide state law-based class action on mandamus, holding that "variations in state law may swamp any common issues and defeat predominance"); *Osborne v. Suburu of America, Inc.*, 198 Cal. App. 3d 646 (1988) (affirming denial of class certification, on the grounds that "the sheer magnitude of the task of construing the various laws will compel a court not to certify [a] multistate class").

⁴⁰This was a central concern of the American Law Institute project, *supra* note 37. For a discussion of the difficulty of the task and the complexity of the ALI's approach, see Linda Mullenix, "Unfinished Symphony: The Complex Litigation Project Rests," 54 *Louisiana Law Review* 977 (1994).

⁴¹See *supra* Chapter Two.

⁴²*Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard, Inc.*, 119 S. Ct. 2295 (1999).

⁴³See, e.g., Deborah Hensler and Mark Peterson, "Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis," 59 *Brooklyn Law Review* 961 (1993).

⁴⁴See *supra* Chapter Three, at 104–05.

⁴⁵See *supra* Chapter Two, at fn. 111.

⁴⁶See *supra* Chapter Three, at 97.

⁴⁷*Cotton v. Hinton*, 559 F.2d 1326 (5th Cir. 1977); *Grunin v. International House of Pancakes*, 513 F.2d 114 (8th Cir. 1975).

⁴⁸To provide clearer and more consistent guidance to judges, Judge William Schwarzer proposed an amendment to Rule 23(e) calling for the judge to consider and make findings with respect to 11 factors, including class definition, treatment of class members with possibly diverse interests, opt-out rights, attorney fees, benefits to class members, and costs to defendants. William Schwarzer, "Settlement of Mass Tort Class Actions: Order Out of Chaos," 80 *Cornell Law Review* 87 (1995). Judge Schwarzer's proposal was put forward in the context of the debate over certifying mass tort class actions.

⁴⁹*Manual for Complex Litigation* 237, 239 (3d ed. 1995).

⁵⁰*Id.*

⁵¹*Evans v. Jeff D.*, 475 U.S. 717 (1986).

⁵²See *supra* Chapter Thirteen, at 357–60.

⁵³See *supra* Chapter Six, at 181–82.

⁵⁴See *supra* Chapter Eight, at 218.

⁵⁵See *supra* Chapter Six, at 181–82.

⁵⁶See *supra* Chapter Seven, at 241–42.

⁵⁷The *Manual for Complex Litigation* advises judges to consider comparisons of the proposed settlement amount with the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, and suggests that expert testimony may be helpful in this analysis. *Id.* at 238.

⁵⁸*Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980).

⁵⁹See *supra* Chapter Fifteen, at Table 15.13.

⁶⁰See *supra*, Chapter Ten, at 282–83.

⁶¹See *supra* Chapter Three, at 82–84.

⁶²See *supra* Chapter Five, at 163–67.

⁶³See *supra* Chapter Seven, at 199.

⁶⁴In the *contact lens pricing* litigation, class counsel and defendants agreed not to release information on the amount of cash and coupons collected by class members. See *supra* Chapter Five. In the *credit life insurance* litigation, the judge did not even require the parties to tell *him* how

much money was to be disbursed and no reporting of disbursements was required; we obtained the information with the defendant's cooperation. See *supra* Chapter Nine.

⁶⁵The National Association of Consumer Advocates (NACA), which comprises both attorneys who bring individual lawsuits and consumer class action attorneys, has proposed that class counsel should submit to the court and all counsel of record detailed information about redemption rates and coupon transfers during the entire life of the coupon, so as to create an informational base for assessing the circumstances in which coupons "work." See National Association of Consumer Advocates, "Standards and Guidelines for Litigating and Settling Consumer Class Actions," 176 F.R.D. 375 (1997) (hereinafter NACA, "Standards").

⁶⁶See *supra* Chapter Three, at 76–78.

⁶⁷Attorney fees based on a percentage of the amount of damages and prejudgment interest actually paid to the class are required under the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C. (Supp. II 1996)).

⁶⁸*Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980).

⁶⁹See *supra* Chapter Thirteen, at 359.

⁷⁰See, e.g. *Duhaime v. John Hancock Mutual Life Insurance Co.*, 989 F. Supp. 375 (D. Mass. 1997) (court awarded fee requested provisionally, ordered partial payment immediately and reserved balance for payment in full or to be adjusted in light of the actual funds disbursed); *Bowling v. Pfizer*, 102 F.3d 777 (6th Cir. 1996) (rehearing denied) (upholding district court fee award of 10 percent of the amount paid into the common fund to date, plus up to 10 percent of annual payments to be paid into one of the funds established by the settlement over a period of ten years).

⁷¹NACA has proposed limiting *cy pres* payments to organizations that have some connection to "the interests the underlying litigation sought to protect." NACA, "Standards," *supra* note 65, at 393.

⁷²See *supra* Chapter Eight, at Table 8.2.

⁷³See *supra* Chapter Nine, at 238–39.

⁷⁴Sometimes termed a "clear sailing" agreement. See, e.g., *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518 (1st Cir. 1991).

⁷⁵*Evans v. Jeff D.*, 475 U.S. 717 (1985).

⁷⁶See, e.g., *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518 (holding that "clear sailing agreements" must receive close judicial scrutiny).

⁷⁷"Court Awarded Attorney Fees Report of the Third Circuit Task Force," 108 F.R.D. 237, 255 (1985).

⁷⁸NACA, "Standards," *supra* note 65, at 397.

⁷⁹NACA has proposed that class counsel "consider notifying persons and groups who have an interest in the proceedings that a tentative settlement has been reached and that a preliminary hearing will be scheduled to consider the fairness and adequacy of the settlement." *Id.* at 386.

⁸⁰See *supra* Chapter Seven, at 197–205.

⁸¹See, e.g., *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 216 (2d Cir. 1987), *cert. denied*, 484 U.S. 926 (1997) (holding that fee-sharing agreements need to be disclosed to the judge since "only by reviewing the agreement prospectively will the district courts be able to prevent potential conflicts from arising"). *Id.* at 226.

⁸²An interesting question with regard to public interest lawyer-intervenors is whether and how to reward them when their intervention results in the collapse of a class action settlement and lawsuit. If their activities helped a judge decide that certification and settlement were *inappropriate*, do they deserve fees? If so, who should pay them? The fact that fees are currently available to intervenors only if a settlement is ultimately approved by a judge has the unfortunate consequence of drawing intervenors into the "triangle of interests" that promotes settlement when it is not in class members' or society's best interests.

⁸³*Manual for Complex Litigation* at 238–39.

⁸⁴Judge Jack B. Weinstein, who presided over the Agent Orange mass tort class action, the second asbestos Manville Trust reorganization, DES product liability litigation, and other large-scale litigation, has written about how judges might relate to individual plaintiffs in aggregative litigation. See Jack B. Weinstein, *Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations, and Other Multiparty Devices* (Evanston, Ill.: Northwestern University Press, 1995).

See also Judith Resnik et al., "Individuals Within the Aggregate: Relationships, Representation, and Fees," 71 *New York University Law Review* 296, 381–401 (1996).

⁸⁵Under the provisions of the Private Securities Litigation Reform Act of 1995, notice of a proposed settlement must include information on the aggregate and average amount proposed to be distributed to class members; the amount of fees and expenses class counsel will seek, in total and on average per claimant; and a brief statement explaining the reasons why the parties are proposing the settlement. The NACA Guidelines propose that notices include information about how to determine whether one is a member of the class, the size of the class, the total amount "to be granted" to the class, individual shares or estimates thereof, the total amount of attorney fees, the basis for their calculation and their source, and what will happen to any unclaimed funds. NACA, "Standards," *supra* note 65, at 400.

⁸⁶Recall that in the *chemical factory* class action, fairness hearings were held in the New Orleans Superdome! See *supra* Chapter Twelve. In the Agent Orange class action, Judge Jack B. Weinstein held fairness hearings in Brooklyn, Chicago, Houston, Atlanta, and San Francisco. See Peter Schuck, *Agent Orange on Trial: Mass Toxic Disasters in the Courts* 173 (Cambridge, Mass.: Harvard University Press, 1987).

⁸⁷For example, in the silicone breast implant class action, claimants and lawyers had access to Websites and "800" telephone numbers to obtain information about the progress of the litigation and claim submission. Judge Samuel C. Pointer appointed a silicone breast implant claimant advocate to the plaintiffs' steering committee.

⁸⁸On federal judges' incentives to expedite resolution of civil cases, see James Kakalik et al., *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act* (Santa Monica, Calif.: RAND, 1996).

⁸⁹See *supra* Chapter Three, at 91.

⁹⁰Some legislatures and courts have required collection and publication of litigation data, including settlement. The Health Care Quality Improvement Act of 1986 established a national data bank of information on judgments and settlements paid by businesses and professional corporations in medical malpractice litigation. 42 U.S.C. § 1320a-7e. Under California law, the state Judicial Council is charged with providing for the uniform entry, storage, and retrieval of court data relating to civil cases, including nature and amount of settlement. Cal. Govt. Code § 68513. In the Northern District of California, under Local Rule 23-2, securities class action attorneys are required to post documents filed in connection with private securities litigation claims at a designated internet site.