“It’s standing room only here. . . . It must be a matter of some interest to provoke this kind of attendance.”

*Senator Christopher Dodd, at the opening of the U.S. Senate Hearings on Securities Class Actions, June 17, 1993*

Whether and when to enable large numbers of individuals to bring claims collectively against a single or a few defendants has long been a subject of debate in the civil law. The language of the debate is the language of civil procedure: the formal rules that govern when and how plaintiffs may bring suits against defendants; how those defendants may contest the plaintiffs’ claims; and how the adversaries may bring to bear the facts and law that are relevant to their dispute, so as to ultimately reach a resolution of the case. But underlying disagreements about procedural rules rests the sometimes unspoken but widely shared understanding that procedural rules have important effects on litigation outcomes. Nowhere in the law is this truth more evident than in the battle over the class action rule, which empowers plaintiffs to bring cases that otherwise either would not be possible or would only be possible in a very different form.

At times, the protagonists in the class action debate have focused on “big questions,” such as securing civil rights and protecting consumers, and at times they have focused on narrow technical issues, such as when the decision to permit a class action can be challenged. But the larger social and political conflicts of the day always echo in the rooms in which the proper uses of class actions are debated.

To understand the current controversy over class actions, and the important public policy issues that it implicates, it is useful to step back and consider the evolution of the class action procedure in the United States. The story of that evolution involves powerful committees charged with drafting procedural rules; the U.S. Supreme Court and other federal and state courts that have shaped class action practice through their rulings; Congress, which has enacted some statutes that facilitate class actions and others that restrict them; and lawyers, as practitioners and scholars, who have influenced all of the preceding through
their writings and oral testimony. The record of controversy and change in the class action rule and its implementation signals the complex dilemmas posed by class actions and the powerful political forces at play whenever reform is in the air.

A. THE HISTORICAL ROOTS OF CLASS ACTIONS

By the late 1990s, the term “class action” conjured up images of tobacco, silicone gel breast implant, and securities litigation, along with memories of discount coupons for air travel, blue jeans, and other products offered to consumers in settlements. As a result, some may imagine that the class action lawsuit is a recent invention of the American civil justice system. In fact, the United States has always provided a means for groups of plaintiffs with similar claims against a defendant to come together to bring a single lawsuit.

For many years, legal historians placed the origin of class actions in seventeenth century England. In their telling, class actions were born as something called the “Bill of Peace” that enabled multiple plaintiffs or defendants to resolve common questions in a single legal action brought in the Courts of Chancery. Generally, all plaintiffs had to be physically present in court and legally joined together in the action. However, when the number of plaintiffs was so large that it was not practical to require them all to come forward (physically and legally), the courts allowed representative plaintiffs to present the case for all potential plaintiffs, present or absent. The representative plaintiffs were required to show that they adequately reflected the interests of the entire group because the judgment would be binding on all plaintiffs, whether or not they were actually involved in the proceedings.

Professor Stephen Yeazell challenged this version of English legal history, arguing instead that group litigation arose in multiple forms several hundred years earlier. For our purposes, the key teaching from Yeazell’s work is that there was a long tradition in medieval England of both formally organized and more loosely associated groups of individuals bringing complaints about communal harm—merchants manipulating the marketplace, church officials disturbing religious peace, powerful families intimidating juries—and being granted both a hearing and remedies by government institutions. Over the years, the use of representative actions for collective harms diminished in England, as the idea of an individualized justice system, rooted in concepts of individual rights and remedies, took hold.

Early American courts incorporated the notion of collective action in their codes of civil procedure. In 1833, the first provision for group litigation in federal courts was set forth as Equity Rule 48. This rule allowed for a representative suit when the parties on either side were too numerous for convenient
administration of the suit; unlike the Bill of Peace, however, at first the outcomes of such group litigation were not binding on similarly situated absent parties. Ten years later, in a case arising out of the pre–Civil War tensions between North and South, the U.S. Supreme Court held that absent parties could be bound by the outcomes of cases brought under Equity Rule 48.6

The Equity Rules were overhauled in the beginning of the next century, but the representative action device remained on the books as Equity Rule 38. The new rule clearly stated that a representative action would bind absent plaintiffs. Equity Rule 38 was probably the most straightforward of all the rules adopted to date to provide for class or representative actions, stating simply:

When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.7

For about 25 years, this language provided the basis for class actions in federal courts. Representative actions could also be brought in many state courts, under various state court rules.8

B. THE BIRTH OF RULE 23

The end of the early history of class actions in the United States was marked by the adoption of the Federal Rules of Civil Procedure in 1938. The new rules, drafted by an advisory committee appointed by the Chief Justice of the U.S. Supreme Court, provided a significantly different structure for civil litigation. The rules changed the requirements for initiating lawsuits, provided for regularized exchange of information prior to adjudication (i.e., “discovery”), and did away with the distinction between Equity and Law cases. They also changed the ground rules for class actions.9

The new Rule 23, like the earlier rules, required that the lawsuit present an issue or issues common to multiple parties, and that the number of parties be so numerous that it would be difficult and inefficient to bring them all into court. But after that, things got complicated.

The 1938 version of Rule 23 provided for three types of class actions, dubbed “true,” “spurious,” and “hybrid.” The bases for differentiating the categories were various features of the litigation that provided a rationale for allowing the parties to proceed jointly, rather than singly. The most important difference among the three types of class actions, however, was whether the outcome would bind “absent” (i.e., represented) parties, as well as those who came forward in their own name. Only “true” class actions could bind absent parties. “Spurious” class actions bound only the class representatives and those absentees who explicitly chose to be bound. “Hybrid” class actions were binding on
absent parties in some respects, but not all. Because the degree to which it binds class members is a class action lawsuit’s most consequential feature, the category to which it was assigned was critically important. Parties seeking permission to proceed on a class basis had to choose a category for their lawsuit and argue for that categorization before a trial court judge, who then would decide whether to grant class status.\textsuperscript{10}

For more than 20 years, the federal rules of civil procedure remained essentially the same.\textsuperscript{11} In 1960, the Chief Justice appointed a new Advisory Committee on the Civil Rules, which took a fresh look at all of them. The records of its deliberations indicate that class actions captured a great deal of the committee’s attention, and in 1966 the Supreme Court issued a new version of Rule 23.\textsuperscript{12}

Practitioners and scholars have told different stories about the forces that motivated the 1966 revision of Rule 23. According to John Frank, a member of the Advisory Committee, the committee’s deliberations were powerfully affected by the social upheavals of the 1960s:

\ldots the race relations echo of that decade was always in the committee room. If there was [a] single, undoubted goal of the committee, the energizing force which motivated the whole rule, it was the firm determination to create a class action system which could deal with civil rights and, explicitly, segregation. The one part of the rule which was never doubted was (b)(2) and without its high utility, in the spirit of the times, we might well have had no rule at all.

The other factor is that 1964 was the apogee of the Great Society. President Johnson was elected with the most overwhelming vote ever, as of that time, achieved by anyone. A spirit of them versus us, of exploiters who must not exploit the whole population, of a fairly simplistic good guy–bad guy outlook on the world, had its consequences.\textsuperscript{13}

Others believe that the committee was engaged primarily in technical revision. According to Professor Arthur Miller, who was present as an assistant to Committee Reporter Benjamin Kaplan, the committee “had few, if any, revolutionary notions about its work product.” It sought to clarify the ground rules for class actions and to deal with some specific issues, such as how to inform absent parties that a lawsuit was proceeding on their behalf.\textsuperscript{14} According to Professor Judith Resnik, who has examined the records of the Committee’s deliberations and correspondence with its members, the Committee was responding to judges’ and lawyers’ “impatience” with the confusing tripartite classification of class actions as true, spurious, or hybrid.\textsuperscript{15}

While revising Rule 23, the Advisory Committee considered doing away with the tripartite classification and adopting a unitary standard for class actions instead. But it ultimately decided to maintain the idea of separate grounds for
class actions, albeit in different form.16 Like its predecessors, Rule 23, as revised in 1966, begins with a specification of the requirements for maintaining a class action: large numbers of parties (often termed the “numerosity” requirement), brought together by common issues of law or fact (“commonality”), represented by individuals or entities whose claims or defenses are typical of those they represent (“typicality”), and who may be relied on to protect the interests of the latter (“representativeness”). Section (a) of the rule, which sets forth these requirements, echoes the text of Equity Rule 38, adopted at the beginning of the twentieth century.

Although it maintained the tripartite structure of the 1938 Rule, the committee rewrote the requirements for each type of class action (and thankfully did away with the old language of true, spurious, and hybrid classes). Section (b) of the revised Rule 23 provided for four situations in which litigation would be permitted to proceed in class form:

(1)(a) when requiring claims to proceed individually would yield outcomes that might impose inconsistent obligations or standards of conduct on defendants;

(1)(b) when requiring claims to proceed individually would allow plaintiffs who get to court first to take all the funds available for compensating losses, leaving nothing for other meritorious plaintiffs who might appear subsequently (often called a “limited fund” class action);

(2) when the defendant has behaved in a manner that affects an entire group (by commission or omission), and the plaintiffs seek an order to prevent such behavior or to require the defendant to act in a particular matter (often called an “injunctive class action”); or,

(3) when, as a practical matter, it would be more efficient for litigants with similar interests (usually in securing money damages) to proceed collectively, led by representative parties.

Examples of category (1)(a) are lawsuits whose outcomes define statutory rights or obligations that affect large groups of people, such as taxpayers or welfare recipients—what are sometimes termed “indivisible” rights, because all members of the group share the rights and would be affected by their denial. An example of category (1)(b) might be a lawsuit brought by a few representative victims of a hotel fire, on behalf of all individuals who were injured, when the hotel owners had extremely limited resources. Examples of category (2) are lawsuits brought by prisoners to require the prison authorities to improve conditions, or by female employees to require a corporation to cease discrimination in promotion and salary decisions.
In all of these circumstances, group litigation seems to pose clear benefits when compared with individual litigation. Hence, if representative plaintiffs come forward in such situations seeking to bring a class action, judges are empowered to grant class action status (i.e., “certify a class”) without consulting the wishes of the absent parties, and the outcomes of the litigation are binding on all class members. Absent parties’ rights, under the rule, are protected by ensuring that the plaintiffs who bring the class action are truly representative of those who are absent—a responsibility given to the judge, who must agree that the plaintiffs who have come forward may act on behalf of the class.

In situation (3), where—absent a class action—litigants might be able to proceed individually without affecting the rights of other plaintiffs or creating problems for defendants, certifying a class seemed like a trickier matter to the committee. In such situations, the committee thought, judges should not have unlimited discretion to take away the rights of individuals to proceed independently. Hence, Rule 23(b)(3) sets forth two additional requirements in this situation: (1) that common issues must “predominate” over individual differences, and (2) that collective litigation must be “superior” to individual litigation in the given circumstances. This provision of the rule also lists a set of factors that judges should weigh in making their decision, including the potential interest of class members in proceeding individually, the existence of related individual litigation (which a class action might interfere with), and how difficult it might be to manage the litigation in a class format.

In order to further protect the absent plaintiffs in a (b)(3) action, Rule 23 permits potential class members to exclude themselves from the action (usually termed “opting out”) and pursue an individual action on their own. To inform them of this choice, Rule 23 requires that all potential (b)(3) class members receive some form of notice of the pending class action. (The rule does not specify who should pay for this notice, or exactly what it needs to say.) If a plaintiff remains silent, then he is deemed to have chosen to be a member of the class, and the outcome of the class action (whether in favor of plaintiffs or defendants) is binding on him. This provision is a significant departure from the rule governing the old spurious class action, which (b)(3) class actions most resemble; under the old Rule 23, litigants were required to opt in to a spurious class action, in order to secure the benefits of its outcome.

As in (b)(1) and (b)(2) class actions, in a (b)(3) class action, the judge is responsible for ensuring that the absent class members (i.e., those who did not opt out) are adequately represented by the named plaintiffs. Moreover, if the representative plaintiffs and defendants settle the lawsuit, the judges must review and approve the settlement agreement. This requirement is notable because, as a matter of public policy, parties to other private civil lawsuits generally are free to decide to settle it at any time, and on any terms that they desire (as long
as they do not violate the law), without judicial approval. In class actions, the rule-drafters were worried that representative parties might be tempted to make agreements that would not serve absent class members well, in exchange for personal gain. They therefore instructed judges to interpose their judgment in the settlement process, to assure that the settlement agreement would be in the interests of absent as well as present class members.\textsuperscript{19}

C. THE “HOLY WAR” AGAINST CLASS ACTIONS\textsuperscript{20}

From the earliest stage of its drafting, the revised Rule 23 was enmeshed in controversy. The deliberations of the Advisory Committee were not then open to the public, but its records include written testimonials about the potential uses and abuses of class actions. When the rule took effect, the controversy sprang into public view.

Some critics were reacting primarily to the use of Rule 23(b)(2) to clarify and extend the reach of the new civil rights legislation.\textsuperscript{21} But much of the controversy centered on (b)(3) suits for monetary damages. Under the revised rule, the scope of such suits—and therefore their potential financial worth—increased dramatically: Whereas, previously, individuals desiring to share in the benefits of such a class had to come forward and declare themselves class members (i.e., “opt in”), now all those who shared a particular characteristic—for example, all purchasers of a particular product—were automatically considered members of the class unless they came forward and asked to be \textit{excluded} (i.e., “opt out”). Because the incentives for so excluding oneself were often modest or nil, classes certified under the revised Rule 23(b)(3) were almost certain to be larger—and the sum of their potential damages, therefore, much larger—than classes certified under the old rule.\textsuperscript{22}

Moreover, judicial decisions in cases brought soon after the adoption of the revised Rule 23 came down on the side of a liberal application of the class action rule. “If there is to be an error made, let it be in favor of and not against the maintenance of the class action,” seemed to be the catchword of the day.\textsuperscript{23}

The popular and business presses were soon replete with complaints of excessive litigation under Rule 23(b)(3) imposing unreasonable burdens on courts and corporations (and therefore, on taxpayers, shareholders, and consumers). Critics charged that attorneys were creating litigation where no reasonable grounds for it existed in order to generate generous fees for themselves. They claimed that too many lawsuits resulted in too few benefits for class members, certainly not enough to justify the public and private expense of the litigation. They called for judges to apply the requirements for class action certification more strictly. Ultimately, they called for the Advisory Committee to reconsider and revise Rule 23.
An article in the April 1973 *Fortune* magazine illustrates the tone of the commentary. “There was a time,” the article began,

... and it was not so very long ago, when the legal departments of many sizable corporations led relatively low-pressure lives. The chores they handled were remote from the major decisions of policy, and the legal staff was, accordingly, somewhat remote from the chief executive. That was, of course, before the great legal explosion—before class-action suits became a kind of popular sport, before consumerism, environmentalism, and other forms of Naderism, before Americans in general became so litigious.24

Quoting Joseph Weiner, identified as a law professor and consultant, the article continued: “Corporations in the early Thirties may have felt that they were living through the French and Russian revolutions combined, but that wasn’t a patch on what is going on now.”25 And quoting William May, the chairman of American Can Company: “We are fighting for our lives.”26

The *Fortune* journalist pointed to 1966, and the revision of Rule 23, as the beginning this new era. For support, she turned to Abraham Pomerantz, then dean of the plaintiff class action bar, who said:

Everyone who deals with the public today is open to brand-new areas of litigation. This is driving many corporations to something bordering on hysteria. The big problem for them today is not so much increasing legal expenses—it’s the enormously increased legal exposure. That class suit really strikes at the pocketbook. In some cases, the corporation’s very existence is at stake.27

Although most of the journalist’s sources saw Rule 23 itself as the source of their problems, one focused on the role of the judge in administering the rule:

A class action lawsuit is much like a game of Russian roulette. It depends almost entirely on the philosophy of the judge trying the lawsuit. If he thinks class action suits serve a useful social purpose, then he will find grounds for continuing the action. If, on the other hand, he thinks the particular case deals with a nit-picking problem of no social consequence, and if he joins that with a view that class action lawsuits unnecessarily clog court calendars, then he will probably dismiss the action.28

But it was Congress—as much as, or in addition to, the 1966 Advisory Committee and the federal judges who implemented its ideas—that was responsible for much of the increase in litigation that corporate representatives were railing against. In 1969, the Supreme Court held that members of a prospective consumer or other (b)(3) class could not add together their monetary losses to satisfy the dollar requirement for federal court jurisdiction for cases brought under state law (then $10,000)—a move widely perceived to preclude many types of suits that the 1966 Rule had newly enabled.29 Congress responded by proposing a new federal cause of action (i.e., basis for a lawsuit) for consumers alleging
unfair trade practices, with a minimum dollar threshold for individual class members in such suits of ten dollars. Support for strengthening the statutory basis for consumer class actions was bipartisan. A package of consumer legislation including class action provisions was sent to Congress by Attorney General John Mitchell “in pursuance of President Nixon’s consumer message of February 24, 1971.” Wrote the Republican Attorney General: “The enactment of this legislation will constitute a significant step in protecting American consumers from fraud and deception.”

Senate hearings on the legislation, held later that spring, were chaired by Democratic Sen. Frank E. Moss. Summarizing the critical testimony at hearings on consumer class actions held during the previous congressional session, Sen. Moss said,

Even the most vigorous opponents to class action [sic] last year did not dispute the basic premise of the bill—that the deceived or defrauded consumer has no effective legal remedy. Despite his many rights in the law, the consumer is shut out of the courthouse by economic realities.

Neither was it disputed that consumers are cheated out of tremendous sums of money nor that they should have a remedy. Nonetheless, opponents of class action argue that the doors of the courthouse in the main should remain closed. Staunch defenders of the right to make a profit worry about profits for consumers’ attorneys.

They argue that the legal system cannot bear the burden of handling consumer claims. Ever solicitous to ease the burdens of administering justice, they would summarily deny even the possibility of justice to consumers.

To counter claims that class actions were already placing excessive burdens on the courts, Sen. Moss quoted District Court Judge Gus Solomon:

Rule 23 of the Federal Rules of Civil Procedure gives ample authority to the trial judge to direct a flow of class actions efficiently and expeditiously and to police actual and incipient abuses of the class action mechanism. I have experienced no substantial difficulty in managing such cases.

Within a few years of the adoption of the new Rule 23, Congress had created statutory bases for (b)(3) consumer class actions alleging violations of standards for “truth in lending,” “fair credit reporting,” and warranties. By 1973, *Fortune* was citing five types of class actions as targets of corporate critics—antitrust, securities, consumer, environment, and fair-employment—all of which resounded in “Great Society” concerns.

State courts responded to the U.S. Supreme Court’s decisions limiting individuals’ ability to bring federal class actions for small monetary damages by opening their doors to consumer class actions brought under state statutes and common law, and conducted according to state class action rules. In 1976, the National Conference of Commissioners on Uniform State Laws adopted a
model class action rule, which dropped some of the more restrictive features of the federal rule. Although most states did not adopt the model rule promulgated by the National Conference, the rule provided a touchstone for state courts that wished to interpret their own class action rules more liberally than the federal courts of the 1970s had interpreted Rule 23.

The 1970s controversy over class actions generated a significant amount of empirical research.38 Some of this research was commissioned by congressional committees, some by interested professional associations, and some was performed by academic researchers, apparently at their own behest. All of the research dealt only with federal class actions. Some studies focused exclusively on securities class actions (and derivative suits) or antitrust litigation, and others were more comprehensive. The research focused on the principal charges against class actions: that they were too numerous, too burdensome for courts, and that they too often benefited plaintiff attorneys more than class members. The research was hampered by the lack of any registry of class actions, and by the fact that many of the data of interest—particularly information on case outcomes—were not readily available, since cases were usually resolved privately, by settlement.

The quality of the 1970s research varied, and the authors of research reports differed in their willingness to draw strong conclusions from incomplete data. But, considered together, the empirical studies generally did not support claims that federal courts were deluged with class actions in the decade following the revision of Rule 23. For example, one study found that about five percent of civil cases filed in the Southern District of New York from 1966 through 1971 included class allegations.39 Another study found that about 2 percent of civil cases filed in the District of Columbia over roughly the same period were class actions, of which about 40 percent were (b)(3) damage classes.40 But some of the reported data suggest that the numbers of class action filings were increasing at a dramatic rate. From 1966 through 1973, the number of class action filings in the District of Columbia grew at an average annual rate of 46 percent.41 This rapid rate of growth, coupled with the much increased financial exposure associated with (b)(3) damage suits, probably explains the urgency of the corporate community’s cries for reform.

The 1970s research also did not support the assertion that class actions imposed especially high burdens on court administration. The additional costs associated with class actions, the researchers found, were a result of the factual and legal complexity of the cases, and of the number of parties. Whether such cases moved forward as class actions or in some other form, the researchers argued, made little difference. Only some of this research noted that at least some of the litigation would not be in court at all, were it not for class actions.42
The 1970s empirical research was inconclusive with regard to the outcomes of cases. Researchers found cases that yielded substantial financial rewards for class members, as well as substantial fees for plaintiff attorneys. Some found cases in which fees appeared quite disproportionate to remedies, including some cases where it appeared that little had been gained by the litigation except for fees. Because so much of the relevant data was missing, drawing conclusions about the net benefits of class litigation generally was difficult.43

Throughout the 1970s, controversy over class actions continued to mount. Articles on class actions appearing in the New York Times and Wall Street Journal suggest a peaking of interest mid-decade (see Figure 2.1). The records of the 1974 Advisory Committee meeting include an unsigned typed memorandum raising the question of whether the committee should revise Rule 23 yet again. The memo summarized the now familiar criticisms of Rule 23(b)(3), saying damage class actions "place an intolerable burden on the federal courts; . . . force defendants into settlement regardless of the merits of the claims because the cost of defense and the size of potential recovery is intimidating; . . . result in procedural unfairness and change the substantive law that is applicable to individual actions; [and], . . . do not benefit the claimant class, but benefit only [the] lawyers who represent it."44
The Advisory Committee declined to act. However, in that same year, the U.S. Supreme Court handed down an opinion that was widely seen as putting brakes on the expansion of class actions over small monetary damages. In *Eisen v. Carlisle & Jacquelin*, the Court ruled that plaintiff attorneys had to bear the costs of providing individual notice to all prospective (b)(3) class members who can be identified with reasonable effort, which under a strict interpretation of the rule must be done early in the litigation—before the attorneys have realized any financial gain from the lawsuit. The huge cost of mailing notices to many class members was expected to sharply reduce the number of large class actions that could be brought because few law firms were likely to have the resources to invest up front, especially when they ran the risk of not recovering these expenditures if the suit were unsuccessful.45

Predictably, the *Eisen* decision produced new controversy; to some it appeared that the Supreme Court had undone the work of the 1966 rule-makers. In 1979, acting on the advice of the Advisory Committee, the Judicial Conference called on Congress to decide whether and how to respond to small damage claims brought by individuals and small businesses.46 In his 1979 address to Congress on civil justice reform, President Carter also urged that Congress:

> give serious consideration to improving procedures for litigating class actions, especially for those cases where the alleged economic injury is widespread and large in the aggregate, yet small in its impact on each individual. The Justice Department will continue to have my support in working with Congress to devise class action procedures which will . . . [enable the] courts to handle these complex cases more effectively and at less cost to the taxpayers and the parties involved.47

In fact, the Carter administration had been considering alternative statutory approaches to small damage class actions for at least two years, in an attempt to respond not only to the business community’s opposition to Rule 23(b)(3) but to the complaints of consumer advocates and judges. Businesses were concerned that Rule 23(b)(3), as implemented, was cumbersome, expensive, and dilatory.48 Consumer advocates and judges objected to the new tasks assigned to judges which were not accompanied by new appropriations for additional staff or equipment. In the words of Judge Walter Mansfield, then Chair of the Advisory Committee on the Civil Rules:

> The average judge is not suited to perform the gamut of new and unusual administrative duties thrust upon him by Rule 23. His function is to decide rights between individual claimants rather than acting as a repository of time-consuming nonjudicial tasks. There is hardly anything judicial or adversarial involved in determining the contents of notices, maintaining communication with individual class members, scrutinizing and classifying notices of claims filed by members, processing such claims, supervising distribution, inquiring into fraudulent claims, and rendering an accounting. These activities require
staffs, resources, equipment, and facilities not possessed by the Federal courts.49

Reflecting on the diverse views they heard, Justice Department staffers concluded that “Current procedure, which appears to defendants to encourage overdeterrence, tends ultimately to create pervasive underdeterrence.”50

The remedy proposed by the Carter administration was to provide a new statutory basis for consumer class actions brought under federal law, and to do away with Rule 23(b)(3) entirely.51 The proposed legislation granted the federal courts exclusive jurisdiction over claims alleging financial damages due to a manufacturer or service provider’s violation of federal statutes. It provided for two new kinds of civil actions: one a public suit, intended for situations in which individual damages were small and the primary objective was to deter illegal behavior; the other a private suit, intended for situations in which individual damages were larger and compensation was an important objective.

The public action could be brought either by the Attorney General, or, if the Attorney General declined to act, by an individual acting on behalf of the government, when individual damages were less than $300. The individual who stepped forward to play this role could obtain attorney fees and expenses and a monetary incentive that was capped at $10,000. If the government prevailed, damages would be paid into a public fund that the Administrative Office of the Court would administer.

The private action, dubbed a “class compensatory action,” was limited to situations involving 40 or more individuals or entities (the act specified “small businesses”) with individual damages of $300 or more, resulting from the same transaction or event. A judge would determine whether these prerequisites were met and would decide whether the class would be defined on an “opt-in” or “opt-out” basis. As in a Rule 23(b)(3) action, any settlement would require judicial approval.

Notwithstanding Judge Mansfield’s exhortations, the Carter administration proposed that judges, under the new scheme, take on a wide range of responsibilities concerning notice and damage estimation. The Department of Justice called for heightened scrutiny of the fairness of any settlement, including discovery on the merits and hearings in which “dissatisfied parties should be encouraged to participate.” The department noted that, because of concerns about conflicts of interest between class members and the class action attorney, the bill “does not follow current law which accords a settlement a favorable presumption. Parties favoring the settlement must demonstrate its fairness.”52

The central question about the administration’s bill was, of course, whether it would fix the problems perceived to flow from Rule 23(b)(3) without sacrificing
its perceived benefits. “But that will probably turn out to be a purely academic question,” said the author of an analysis prepared for Class Action Reports, noting the failure of other legislative reform efforts.53

The newsletter’s analyst was prescient: Less than two years later, Ronald Reagan was elected President. As the new conservative era got underway, the idea of providing a statutory basis for consumer class actions was put aside. But Rule 23(b)(3) remained in force.

D. A NEW CONTROVERSY

During the next decade, the controversy over class actions seemed to die down. Although the business community remained attentive to the issue, reports of class actions in the general press declined (see Figure 2.2). As artfully depicted by Arthur Miller, class actions under the new rule had proved to be neither the “shining knights” that their champions hoped for nor the “Frankenstein monsters” that their critics feared. Class action practice, as Miller had predicted, entered a period of relative tranquility.54 Like it or not, parties, practitioners, and judges had learned to live with Rule 23. By the mid-1980s, the business community, which had led the charge against class actions, had turned its attention

![Figure 2.2—Tracking the Controversy over Class Actions
(Number of Articles on Class Actions, 1981–1989)](image)

NOTE: Number of mentions of “class action(s)” in online full-text articles from the New York Times and abstracts from the Wall Street Journal.
to substantive legal reform—the package of proposed limitations on jury awards, including punitive damages, that has come to be known as “tort re-form.”

But a new controversy over Rule 23 was brewing. The 1980s saw the rise of a new form of litigation, the mass tort suit. Consumers of drugs and medical devices, and workers and others exposed to toxic substances, sued manufacturers for injuries allegedly associated with these products. Typically, these cases were brought against one manufacturer that produced a particular device or a group of manufacturers that produced products containing a particular substance. Because these products were widely marketed, they had been used by thousands of people—or sometimes hundreds of thousands—many of whom came forward once litigation began, claiming injury to themselves or their children. In some instances, thousands of lawsuits alleging the same facts and legal violations were brought in a single jurisdiction, where the exposure had taken place. For example, tens of thousands of asbestos lawsuits were filed during the 1970s and 1980s, many of them in a few jurisdictions where the workers who had been exposed to asbestos had worked. Courts found it difficult to handle this rapid increase in their caseloads, which was rarely accompanied by proportionate increases in judicial resources to manage the cases. In other instances, the lawsuits were dispersed because the product’s consumers were spread across the country, and the companies that were sued were forced to respond to large numbers of claims in many different state and federal courts.

The federal court system has a device for collecting cases in such instances called “multidistricting.” Under the multidistrict rules, a panel of judges appointed for this purpose can order that similar cases that have been filed in different federal courts be collected together and transferred to a single federal judge. But under the statute that authorizes the transfer, the transferee judge is supposed to manage the cases only through the pretrial period; if the cases are not settled, they are to be sent back to their original districts for trial, and plaintiff and defense attorneys must bear the burden of trying them in multiple, dispersed locations. Moreover—and more important, since multidistricted cases are usually settled and therefore not dispersed again—this federal law cannot be used to collect cases that are filed in state courts. As a result, multidistricting does not bring together all mass tort cases, but only those filed in federal courts.

Even if a federal judge to whom cases have been transferred under the multidistricting rules could try them, she might find herself trying the issues that the cases have in common over and over again in individual trials. For example, asbestos litigation has issues that are common to every case, such as whether exposure to asbestos causes certain diseases and when manufacturers knew or should have known that such causal links exist. But if these cases are
tried, evidence on those issues must be presented to each jury, in each case, so that it can decide whether the manufacturer should be held responsible for the plaintiff’s injuries. The Federal Rules of Civil Procedure include a provision—Rule 42—for consolidating cases for trial, but the rule drafters did not anticipate using it to try hundreds or thousands of cases together.

The class action seems to offer a mechanism for resolving this problem. Under Rule 23(b)(3) and its state law counterparts, a plaintiff could bring a class action against a manufacturer on behalf of all other users of the product (or those exposed to it), seeking damages for all members of the class. Then common issues, such as whether the product can cause the diseases claimed, could be tried by a single jury. Those who did not want to be bound by the outcome of a single class action could opt out after receiving notice of certification.

But the drafters of the 1966 rule believed that class actions would generally not be appropriate for mass tort litigation because any common issues of fact and law in these cases would be outweighed by differences in the victims’ injuries and injury circumstances. Moreover, because there is no federal tort law, victims’ claims might be subject to different state tort doctrines. The rule drafters did not expressly forbid class actions for mass torts, but they included an advisory note that said,

A “mass accident” resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances, an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

If the Advisory Committee could imagine such disparity of fact and law in a “mass accident”—typically a single catastrophic event, such as an airline crash or a building collapse, occurring in a single legal jurisdiction—then it seemed probable that it would have rejected class action status for the far more variegated situation of individuals who had used or been exposed to a product in different circumstances at different times, and to whom different state laws might apply. For almost two decades following the rule’s adoption, virtually no mass tort cases were successfully certified as class actions.

By the mid-1980s, however, as the number of mass tort cases mounted, trial and appellate courts had begun to reconsider the wisdom of the Advisory Committee’s admonition. It was the Agent Orange case, brought by Vietnam veterans alleging injuries resulting from their exposure to dioxin during the war, that proved to be the watershed event in the use of Rule 23 for mass personal injury litigation. For the first time, a trial judge certified, and an appellate court upheld, the certification of a huge class—potentially millions of individuals—
who alleged injuries of varying severity and types, incurred under similar but not identical circumstances. The settlement of the veterans’ claims in 1984, for $180 million, attracted widespread attention from the bench and bar. In 1986, after more than a decade of asbestos litigation, the Fifth Circuit Court of Appeals for the first time upheld class certification of asbestos personal injury claims brought in Texas. In 1988, the Sixth Circuit Court of Appeals, which had previously denied class certification for personal injury claims, upheld certification of a toxic tort case, saying,

. . . the problem of individualization of issues is often cited as a justification for denying class action treatment in mass tort accidents. While some courts have adopted this justification in refusing to certify such accidents as class actions, numerous other courts have recognized the increasingly insistent need for a more efficient method of disposing of a large number of lawsuits arising out of a single disaster or single course of conduct. . . [When] the cause of the disaster is a single course of conduct which is identical for each of the plaintiffs, a class action may be the best suited vehicle to resolve such a controversy.

As plaintiff attorneys filed for class certification in other asbestos cases as well as other personal injury suits, it appeared that the barrier to class certification presented by the 1966 Advisory Committee’s Note was at last about to fall.

E. THE ADVISORY COMMITTEE STEPS BACK IN

Throughout the years of controversy over the new Rule 23, the Advisory Committee had declined to act. But late in 1990, the committee agreed to take up the question of whether Rule 23 needed revision, and, if so, what sorts of changes were in order. The impetus for revision was the report of a special judicial committee on asbestos litigation, which had been appointed by Chief Justice Rehnquist to consider strategies for managing the rising tide of asbestos litigation in the federal courts. Acting on the recommendation of this special committee, the Judicial Conference asked the Advisory Committee to “study whether Rule 23 of the Federal Rules of Civil Procedure should be amended to accommodate the demands of mass tort litigation.”

As a basis for its deliberations, the Advisory Committee turned to a report published in 1986 by the American Bar Association Litigation Section, which had recommended significant changes in the structure of Rule 23. Although the Litigation Section explicitly rejected “radical revision” of class action procedure, its members believed that the requirements of the 1966 rule led to “unnecessarily time consuming and expensive” practices. Believing that the tripartite structure of the rule, which required parties and lawyers to decide whether their proposed class was most appropriately labeled a (b)(1), (b)(2), or (b)(3) action, was a major source of problems in implementing it, the section proposed substituting a “unified standard governing all class actions.”
Taken up by the Advisory Committee, the ABA Litigation Section’s proposal became the basis for an effort to revise the rule, directed primarily at facilitating class certification of mass torts. In place of the cumbersome tripartite structure, the proposal set forth circumstances under which judges could certify class actions. The new structure seemed likely not only to facilitate class certification of mass torts, but also to make certification more widely available for a range of other civil litigation—which may have been attractive to the committee’s new chair, Judge Samuel C. Pointer, who had presided over a number of controversial class actions seeking to desegregate public and private employers in his home state of Alabama.

During 1991–1992, drafts were circulated for informal comment and discussed briefly at the regular periodic meetings of the Advisory Committee. But the committee’s attention during this period appears to have concentrated more on proposed revisions to other civil rules, which were then a source of considerable controversy. At its November 1992 meeting, the Advisory Committee discussed the status of Rule 23 revision. Several members supported the substitution of a unitary standard for the old tripartite division, and the committee discussed a new provision for opt-in classes and more flexible notice requirements for all classes. The committee also discussed language contained in the then-current draft, emphasizing the “fiduciary duty” of class representatives, noting that this was a “first attempt to emphasize the nature of the representation responsibility.” The proposed new language seems to have been a response to the concern that class representatives and their attorneys favor their own interests over those of class members. The discussion ended with committee members agreeing to circulate a draft of proposed revisions to law faculty members and practicing lawyers for informal comment.

A year later, when the committee resumed its discussion of Rule 23 revision, its members seemed to have become wary of changing established practices. The informally circulated draft revisions had met with less than enthusiastic support. Although many of the law professors who had seen the draft were favorably inclined, neither plaintiff nor defense attorneys were sanguine about the outcome of Rule 23 revision. In his minutes, the committee reporter noted: “A very common reaction is that lawyers have learned to live with the present rule, and do not need to devote ten years to educating themselves and judges in a new rule.” With a new Chair, Judge Patrick Higginbotham, and several other new members, the committee decided that further deliberation was necessary before formally proposing revisions to the rule.

As the Advisory Committee continued its slow, deliberative process, the world of class actions was changing once again, as was the political environment in which the committee’s deliberations were taking place. In 1993, attorneys in the federal district courts in east Texas and eastern Pennsylvania filed a new
kind of (b)(3) class, comprising solely individuals who had been exposed to asbestos but who had not, to date, filed suit against the defendants targeted in these suits—so-called “future claimants,” or “futures.” Both courts certified the class actions at the time of settlement, rather than earlier in the litigation process, as seemed to be anticipated under the rule. Under the proposed settlements, future asbestos claimants would be precluded from suing these defendants except under certain restrictive conditions. In return, they would have access to compensation through administrative facilities. Although some viewed these settlements as salutary examples of judges and lawyers rising to the procedural challenges posed by mass torts, the cases soon were embroiled in controversy. Critics charged that binding future claimants—who arguably were not even aware at the time of notice that they might some day have a legal claim—to the terms of the settlement would be a violation of due process. Some legal ethicists argued that the plaintiff attorneys who negotiated the “futures settlements” had discounted the value of the claims of future asbestos litigants in return for more generous payments to current asbestos litigants, whom these attorneys also represented. That the classes were certified at the time of settlement heightened concerns about possible collusion between the plaintiff attorneys and defendants, because it suggested to some that the defendants had agreed to the certifications only because they had been able to find plaintiff attorneys who were willing to negotiate attractive deals with them.

Meanwhile, mass personal injury class actions seemed to be growing in number and scope. In 1994, Judge Pointer, sitting in the federal district court in Alabama, conditionally certified a nationwide class of women claiming compensation for injuries associated with silicone gel breast implants. Soon more than 400,000 women had stepped forward to claim damages. In that same year, Judge John Grady of the Federal District Court for Northern Illinois conditionally certified a class of hemophiliacs who alleged that their HIV infection resulted from contaminated blood products. Other trial judges followed suit, certifying classes in personal injury cases involving pharmaceutical products and medical devices. Still other class actions, in which consumers were promised coupons in compensation for their claimed losses, received widespread attention from critics who argued either that such coupons were inadequate compensation for the alleged wrongdoing of defendants, or that the acceptance of “coupon settlements” by plaintiff attorneys indicated that the underlying litigation was nonmeritorious. And, in February 1995, a district court judge in Louisiana certified a nationwide class action on behalf of smokers seeking damages for addiction. The Castano class action, raising the specter of massive damages against the tobacco industry, electrified Wall Street.
By 1995, the political environment had also changed dramatically. For the first time in 40 years, both houses of Congress were in the hands of the Republican Party. Civil justice reform was a key provision of the House Republicans’ congressional platform, dubbed the “Contract with America.”92 H.R. 10, the Common Sense Legal Reforms Act of 1995 that was introduced early in the new congressional session, contained a provision aimed at restricting securities class actions.93 Although most of the proposals included in the Common Sense Legal Reforms Act were not enacted into law, Congress overrode a presidential veto in 1995 to pass the Private Securities Litigation Reform Act.94 U.S. Senate hearings on securities litigation, held in 1993, provided a high-profile forum for charges and countercharges regarding the costs and benefits of class litigation.95

From 1994 through 1995, the Advisory Committee continued to debate Rule 23 revision. To assist in its deliberations, the Committee invited leading practitioners to address its members96 and provided the impetus for three law school conferences at which scholars and practitioners discussed the evolution of Rule 23 practice and its consequences. As the reform clock continued to tick, the mood of the committee and those it invited to join in its deliberations shifted away from interest in facilitating mass tort class actions toward interest in curbing perceived class action abuses, particularly in the consumer domain.97 The old ABA Litigation Section proposal to substitute a unitary standard for the (b)(1), (b)(2), and (b)(3) categories looked less attractive.98 The desire to facilitate mass personal injury class actions was diminished if not extinguished.99 Some even questioned whether any revision to Rule 23 was appropriate at that time.100

In late 1995, with its chairman seemingly concerned about moving the revision process to some sort of conclusion before the end of his tenure, the Advisory Committee turned its attention at last to formal consideration of proposed changes in the language of Rule 23. At a meeting at the University of Alabama at Tuscaloosa, the members tentatively approved three changes: adding a requirement that certification of a (b)(3) class be “necessary” (instead of merely “superior”) for “fair and efficient adjudication” of the case; adding a requirement that judges in certifying (b)(3) classes consider both the “probable success” of the case if it went forward as a class action and the “significance” of this success; and adding a provision for interlocutory (i.e., interim) appeal of class certification.101

Although the three proposed changes appear narrow and technical, they all had significant potential to make bringing and winning (b)(3) class actions less likely. A necessity standard for certification surely would be harder for plaintiffs to meet than the original superiority standard, thereby promising to reduce the number of lawsuits that would be certified as class actions. Considering the
likely success and significance of a proposed class action would require trial judges to determine, in a preliminary way, the merits of the underlying allegations. For defendants who believed that many class actions were nonmeritorious, this proposed change also held promise of reducing the number of certifications.

The import of adding a provision for interlocutory appeal is more complicated to explain. The traditional legal rule holds—in the interests of economy—that parties cannot appeal any decision that a judge makes during the course of litigation until the litigation has reached a conclusion. Under this rule, a class action had to proceed all the way to verdict before a defendant could argue against the initial certification, or a plaintiff against its denial. Defendants’ representatives had told the committee that not knowing whether an appellate court would overturn the certification decision was sufficient to drive them to settle a class action even when they thought it was certified in error. By the time of the Advisory Committee’s deliberations in Tuscaloosa, defendants believed that federal appellate courts were beginning to turn against class actions, and they were anxious to expedite access to the appellate process. Allowing a party to appeal the class certification decision early in the litigation process—by creating a limited right to interlocutory appeal—would facilitate defendants’ achieving this goal.

The Advisory Committee also discussed adding a provision to Rule 23 that would explicitly permit certification of classes for settlement purposes only, even in circumstances where collective adjudication might be difficult or improbable. By the time of the committee’s discussion, the alleged dangers of such “settlement classes” had become a central theme in the class action controversy. But, perhaps reflecting the divided views about settlement classes within the judiciary and the bar, the committee could not reach consensus on this issue.

In sum, in its first formal step towards Rule 23 revision—a process begun five years earlier in pursuit of facilitating (b)(3) class actions—the Advisory Committee proposed to heighten judicial scrutiny of requests for certification. Although this was not clear at the time, the tentative votes taken at the November Tuscaloosa meeting created the framework for the debate about class actions that would ensue over the next two years.

On April 18–19, 1996, the Advisory Committee met again in Washington, D.C., to decide whether to formally recommend these, or other, revisions in Rule 23 to the Judicial Conference Standing Committee on the Rules. Approval from the Standing Committee would initiate a formal comment period, including hearings before the Advisory Committee. Only after considering the comments received during this period, and deciding whether to stand by its proposed re-
visions or reconsider them, could the Advisory Committee launch the final stage of Rule 23 revision, which would require approval by the Standing Committee, the Judicial Conference (the executive body of the federal judiciary), the U.S. Supreme Court and, ultimately, Congress.¹⁰⁶

For the Washington meeting, Professor Edward Cooper, who had served as Advisory Committee Reporter through all the gyrations of the rule revision process since 1991, prepared a package of alternative approaches to revising Rule 23 (b)(3). The starting point was a master draft that included virtually all the ideas that had been brought before the committee in the preceding five years. To explain the reasoning behind the proposed revisions, Cooper drafted 18 pages of notes.

The master draft had the familiar tripartite approach to class certification, and most of the proposed changes addressed (b)(3) damage classes. It would have required that class certification be “necessary” as well as “superior.” It instructed judges, when making certification decisions, to take into account the probable success on the merits of the plaintiffs’ claims, and to weigh the likely costs and benefits of allowing the litigation to proceed in class form. It provided for settlement classes, for “opt in” as well as “opt out” classes, and for interlocutory appeal. Unlike the 1966 version of the rule, the rule envisaged in the master draft would have explicitly recognized the fiduciary duties of representative parties and their attorneys to protect the interests of the class members they represent. It included more detailed notice provisions and—in contrast to the U.S. Supreme Court’s decision in Eisen¹⁰⁷—would have allowed judges to order defendants to advance all or part of the costs of notice. In the accompanying Notes, the draft also appeared to sanction the use of class actions for “futures” claims in mass torts.¹⁰⁸

The alternative drafts variously excluded different elements of the master draft, apparently in response to concerns expressed by some Advisory Committee members and to critical comments received from outsiders.¹⁰⁹ Finally, Cooper prepared a “minimum changes” draft, which, as the name suggests, made relatively few, seemingly modest, changes in the rule.

The Washington debate over the proposed revisions echoed the concerns raised in previous committee meetings, in the scholarly conferences that the committee had stimulated, and in the halls of Congress over the decades following the 1966 amendments to Rule 23. Perhaps predictably, given the controversy already boiling around the Advisory Committee’s proceedings, the committee adopted the minimalist approach.

After two days of lively discussion, interspersed with occasional informal testimony from practitioners and others attending as observers (including some on-the-spot drafting in response to suggestions from the latter),¹¹⁰ the Advisory
Committee recommended eight revisions to Rule 23. One of the proposed revisions created a basis for interlocutory appeal, as discussed in Tuscaloosa. Two other proposed changes spoke to the twin controversies about contemporary use of class actions: that too many cases for very small monetary losses were being brought, and that too many larger personal injury claims were being aggregated in mass tort class actions. To remedy the first, the committee proposed a new factor (F) for judges to consider when deciding whether to certify a Rule 23(b)(3) class action: “Whether the probable relief to individual class members justifies the costs and burdens of class litigation.” To remedy the second, the committee proposed to revise factor (A), instructing judges to take into account: “The practical ability of individual class members to pursue their claims without class certification.” A third change, proposed to respond to uncertainty about the application of Rule 23 to settlement classes, added a new category (b)(4) that explicitly mentioned settlement classes and provided authority for judges to certify such classes in response to the parties’ joint request. In addition, the committee proposed four other minor changes in wording.

The proposed revisions were sent on to the Standing Committee, with the recommendation that they be approved for formal circulation and public comment. The chair of the Advisory Committee and its reporter characterized the proposed changes as “modest.” “Rule change should proceed with caution, in increments,” they wrote. “We think it unwise to attempt broad changes in Rule 23, given the large uncertainty of cause and effect, laced throughout this subject.”

F. A RETURN TO WARFARE?

The Advisory Committee may have believed that its recommendations were modest, but others in the legal community disagreed. The committee’s proposals unleashed a storm of controversy. The first volley was fired, within weeks, by a group of 129 law professors who wrote to the Standing Committee urging that it reject, without further circulation and review, both (b)(4), the proposed settlement class provision, and factor (F), which was quickly dubbed the “cost-benefit” or “it just ain’t worth it” test. The law professors’ initiative was spearheaded by Professor Susan Koniak, whose passionate critique of asbestos futures settlement classes had attracted widespread attention in the legal academic community. The law professors opposed settlement classes because they believed them to be highly susceptible to conflicts of interest between plaintiff attorneys and class members, and to collusion between defendants and plaintiff attorneys. They opposed the new factor (F) because they believed it would raise the barrier for class actions involving small individual damage claims, which they viewed as essential to deterring corporate misbehavior.
Apparently concerned that this initial controversy might derail the Advisory Committee’s proposals even before they had been circulated for formal public comment, Judge Higginbotham submitted a letter to the Standing Committee urging that it release the Advisory Committee’s proposals for review and comment. At its June 1996 meeting, the Standing Committee voted to take the proposed changes public.

Like the Advisory Committee’s own deliberations, public commentary on the proposed revisions, delivered in writing and at three public hearings held in different parts of the country, was largely a replay of the 1970s debate. But there were two notable differences: First, securities class actions played a secondary role in this controversy because Congress had passed legislation in 1995 to restrict federal securities litigation.117 Second, mass tort class actions, including the futures settlements, played a role that would have been inconceivable during the 1970s, when the Advisory Committee’s note warning against certification of personal injury suits still held sway.

About 140 individuals submitted written testimony and almost half of these appeared at one or more of the hearings.118 Many of these individuals formally represented corporations, bar associations, plaintiff or defense trial lawyers’ associations, trade associations, or consumer or other advocacy groups; others who came forward were informally aligned with one or another of these interest groups. Many of the law faculty members who have contributed to the scholarly debate on class actions in recent years also testified. The committee now had a new chair, Judge Paul Niemeyer from the Fourth Circuit Court of Appeals.

Much of the testimony before the Advisory Committee was strident in tone. Proponents of class actions, who generally argued against any rule revision, hailed the (b)(3) class action as a mechanism for compensating individuals for modest but significant losses, and for protecting consumers, employees, and the general public from corporate malfeasance. They strongly opposed factor (F), as illustrated by these excerpts from hearing testimony:

The proposed cost-benefit analysis runs directly afoul of the bedrock of class litigation, the ability of individuals or business entities with relatively small claims to band together to seek redress. Without class actions, nearly all individuals and most small business could not afford or attempt the intimidating task of litigating complex antitrust or securities or other commercial cases involving widespread activity, multiple wrongdoers and large corporate defendants. It is the history of class actions to ‘take care of the smaller guy.’119

The assumption that recoveries of one hundred or several hundred dollars are ‘trivial’ is entirely unwarranted. For many low income class members... recoveries of such amounts can make an enormous difference in the quality of their lives, while also providing them with a sense that justice has been done and that our system of justice works.120
Few can dispute that class actions generally deter corporate misconduct so that honest business can compete. As a result, class actions also foster the confidence that is so necessary for a capitalist economy to function. By ensuring both accessibility and the intangible benefits of contractual trust required for efficient transactions, class actions provide concrete and specific deterrents to commercial abuses without the threat of broadened criminal enforcement or the need for expanded regulatory bureaucracies.121

Opponents of class actions focused on perceived excesses of class litigation that they hoped factor (F) might remedy:

What critics of [factor F] miss, when they invoke social policy, is that lawyers’ lawsuits (which the present Rule tends to encourage) are themselves a social evil. Such lawsuits result in expenditure for litigation costs of large sums of money that could be better spent on product or pricing improvements beneficial to consumers.122

The class action has become “an opportunity for a kind of legalized blackmail.” The courts have described class actions as “judicial blackmail” and inducements to “blackmail settlements”. . . [The class action] “has become a racket—that is the simple truth of it”. . . “The use has gone miles beyond what was anticipated.”123

The unpredictability of trial in the face of the claimed aggregate damages, as well as the cost of defense, ordinarily makes litigating to the end an imprudent alternative. The class action device provides disproportionate leverage in favor of the plaintiffs’ attorney, which is why almost no class actions ever get tried.124

The critics inveighed against settlements in which lawyers obtained multi-million dollar fees, while class members on whose behalf the cases were purportedly brought received little or nothing in recompense:

In many instances, the value of recovery to the individual class member is so negligible that it fails to offset the associated cost imposed on the defendants and the judicial system. Those types of claims only enrich the few counsel whose fees are based on the total aggregation with little or no benefit for the individual class member.125

But the battle lines in the holy war against class actions were not as clear as they had once been. True, corporate counsel generally opposed consumer class actions, while consumer organizations and consumer class action attorneys championed them. But consumer advocates had also emerged as the leading critics of certain class action settlements:

The primary problem with coupon settlements is that it [sic] flies in the face of the sound precepts upon which our capitalist economy is based. Rather than punishing a wrongdoer for its wrongful actions, it instead rewards that wrongdoer with additional business from the very persons it caused harm.126
Such critics rejected the proposed provision for settlement classes and called for increased judicial scrutiny of settlement agreements and attorney fee requests:

There have been too many settlements made where the attorneys took far too much of the proceeds, and the aggrieved consumers received but a pittance. . . We urge the committee [to withdraw the settlement class provision and engage in] further study of how collusive settlement can be avoided and how the interests of absentee class members can be adequately represented.\textsuperscript{127}

The battle lines with regard to mass tort class actions were even harder to discern. Some corporations and defense attorneys who represent them argued against certifying mass torts, echoing the concerns of the 1966 Advisory Committee:

The proposed revisions, although encouraging, do not go far enough to eliminate many of the most problematic applications of the class action device. Most importantly. . . disparate mass tort litigation should not be permitted at all under (b)(3).\textsuperscript{128}

There is an unavoidable constitutional difficulty in using (b)(3) class certification in the mass tort context, particularly where punitive damages are an issue . . . In the mass tort context, there are uniquely individual issues essential to each proposed class member’s claim.\textsuperscript{129}

Most importantly, we maintain that mass tort litigation class actions should not be permitted under Rule 23(b)(3) at all. Indeed, in many such cases there is no actual injury or loss, with the result that in far too many cases the litigation no longer serves the litigants, the courts, or the ends of justice.\textsuperscript{130}

But other defense attorneys, particularly those who had represented defendants in the now notorious asbestos futures class actions, defended the use of class actions to settle mass torts:

\textit{Georgine} [the asbestos futures class action brought in the Eastern District of Pennsylvania] in fact is a compelling example of the virtues of settlement classes. . . The concerns about the supposed lack of perfect structural protections for absent class members in connection with settlement classes pale in comparison to the demonstrated structural failings of the tort system. . . in handling certain types of multi-claimant disputes.\textsuperscript{131}

Some \textit{plaintiff} attorneys railed against class certification of mass torts:

[S]ettlement classes constitute the single greatest existing threat to the due process rights of tort victims unfortunate enough to be harmed in large numbers.\textsuperscript{132}

But other plaintiff attorneys defended it:
Moreover, many of those with experience litigating class actions gave conflicting testimony, attesting both to the uses and abuses of class actions.

Although the experiences of the 1980s and 1990s had brought new ingredients to the debate over damage class actions, the thousands of pages of comment and testimony on the Advisory Committee’s proposals echo the three decades of controversy that preceded its efforts to revise Rule 23. Over the years, much had been learned about the consequences of using Rule 23. The new rule had been stretched to cover an ever increasing range of civil litigation. But the debate over class actions had only become more complicated and the way out of the controversy was no clearer. Reflecting on the Advisory Committee’s seven-year effort at revision, John Frank, a member of the 1966 Advisory Committee, aptly summed up the class action dilemma:

[For all our efforts, we do not know whether [the (b)(3)class action] is a good or a bad thing. The great big question is whether the social utility of the large class action outweighs the limited benefits to individuals, the aroma of gross profiteering, and the transactional costs to the court system.

On this ultimate question, we are no wiser than we were in the beginning. We know that the defendants think that they have been blighted, that the plaintiffs’ bar thinks it has done much good and not charged a nickel too much, and that courts have been busy. We know an important negative: the wit of man has not devised a better method for compensating large dispersed losses.

In May 1997, the Advisory Committee reassembled to assess the import of the hearings and written submissions. The committee members were divided and uncertain about moving forward with the proposed revisions. In a memorandum prepared as background for this meeting, the committee chair wrote,

[I sense . . . that we may not be finished; rather we find ourselves at a crossroad . . . [W]e have reached the point anticipated earlier by Professor Ben Kaplan, the Committee’s reporter in 1966—“it will take a generation or so before we can fully appreciate the scope, the virtues, and the vices of new Rule 23”—I think we must now discuss the broader issues.

Criticism of so-called settlement class actions had been a persistent theme of the hearings, and the committee had received many unfavorable comments on the proposal to add a specific provision for such classes. But in the previous year, the U.S. Supreme Court had taken up the question of the legality of such classes and had not yet handed down its decision. It was clear that the committee should not act on the settlement class provision before hearing from the
Court, and as the committee’s meetings progressed with a lack of consensus about what actions, if any, were necessary, the pending Court decision became a rationale for postponing action on the other proposed revisions as well. After two days of meetings, the committee had approved only two revisions: the provision for interlocutory appeal, and a small change in the wording of Rule 23(c)(1) indicating that the judge may certify a class “when practicable” (instead of “as soon as practicable”) in the course of litigation. The following month, the Standing Committee voted to recommend the interlocutory appeal provision to the Judicial Conference, but postponed the “when practicable” recommendation.

In July 1997, the U.S. Supreme Court handed down its decision on settlement classes. The issue was presented to the Court in the asbestos futures class action that had originated in the federal district court in eastern Pennsylvania. Now named Amchem v. Windsor, the case provided the Supreme Court with its first look at a vast mass tort personal injury class action, in what many believed to be the most problematic context for review: a class solely comprising prospective plaintiffs with currently unknowable future injuries and losses, represented by plaintiff attorneys who were widely perceived to have interests conflicting with those of the class. The Court dealt briskly with the question of whether it is possible to certify a class for settlement when a class trial might not seem feasible—as long as other prerequisites are met, a judge may certify a class for settlement. But the certification of settlement cannot by itself satisfy Rule 23’s requirement that common issues of fact and law predominate. The Court took strong exception to the shape of the futures settlement, questioning the feasibility of finding representative plaintiffs for any such class and providing adequate notice. It therefore upheld the rejection of the settlement by the Third Circuit Court of Appeals and remanded the case to the trial court.

The Supreme Court’s decision striking down Amchem heightened perception of sharp controversy over the very purposes of Rule 23(b)(3) and took the wind out of the Advisory Committee’s sails in its long effort to reform the rule. In October 1997 it agreed to table Rule 23 revision.

And what of the issue that had begun the long process of reviewing Rule 23(b)(3), the need to find some means of handling mass torts? The committee proposed that the Judicial Conference appoint a special committee to develop recommendations for improving the management of mass personal injury litigation; months later a new committee, appointed by the Chief Justice, began deliberations. The debate over Rule 23 revision had come full circle.

But the proponents of Rule 23(b)(3) revision had not given up. At its first public meeting, the new mass torts committee was presented with some proposals incorporating ideas for reforming consumer class actions that had been tabled by
the Advisory Committee less than a year before. And, in the waning days of the 109th Congress, proposals for reforming class action procedures were said to be high on the Republican Speaker of the House’s list of priorities. As the decade drew to close, the battle over the uses of damage class actions continued.

NOTES

1In the Anglo-American common law tradition, the adversaries themselves are responsible for developing the facts and the law; the judge serves as umpire; and the judge or jury decides the case, unless the parties are able to negotiate a compromise among themselves. In other legal systems, the judge plays a more prominent role in shaping the case.

2This point was forcefully made by Judge Jack B. Weinstein more than 25 years ago, and a decade before he presided over the Agent Orange class action brought by Vietnam veterans. See Jack B. Weinstein, “The Class Action Is Not Abusive,” New York Law Journal, May 1–2, 1972, 2, 4.

3This depiction of the origins of class actions is usually traced to Zechariah Chafee, Some Problems of Equity (Ann Arbor, Mich.: University of Michigan Press, 1950).

4Stephen C. Yeazell, From Medieval Group Litigation to the Modern Class Action (New Haven, Conn.: Yale University Press, 1987).

542 U.S. (1 How.) LVI (1843).

6In Smith v. Swornstedt, 57 U.S. (16 How.) 288 (1853), a group of Southern preachers pressed suit against an organization of Methodist preachers to recover their pension funds. Northern preachers had refused to administer pensions for Southern preachers after the country became divided over the use of slavery in the South. The court held that the group of Southern preachers could sue on behalf of all Southern preachers, present and absent.

7226 U.S. 659 (1912).


10Curiously, the import of the three categories was not spelled out in the rule, but rather was set forth in the leading text of the day, Moore’s Federal Practice. The courts tended to follow Professor Moore’s interpretation of the categories. See “Developments in the Law: Multi-Party Litigation in the Federal Courts,” 71 Harvard Law Review 874, 930 (1958).

11Minor technical changes to the rules were made in 1939 and 1948. Resnik, supra note 9, at 7 n.5.

12Id. at 8–9.

13John P. Frank, “Response to 1996 Circulation of Proposed Rule 23 on Class Actions: Memorandum to My Friends on the Civil Rules Committee,” (Dec. 20, 1996), in Administrative Office of the U.S. Courts, 2 Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Rule 23 266 (1997) (hereinafter Working Papers of the Advisory Committee). Another member of the 1966 Committee, William T. Coleman, rejects the implication that the 1966 Committee intended to facilitate “private attorneys general” class actions for the purposes of regulatory enforcement: “I respectfully submit that back in 1966, that was not an intended purpose of Rule 23(b)(3). If there is interest in deputizing all attorneys everywhere to enforce our laws, that’s a matter that should be decided by Congress, not through the class action provisions in the Federal Rules of Civil Procedure.” 4 Working Papers of the Advisory Committee, at 456. The use of private class actions for regulatory enforcement is discussed further in Chapter Three.

14Arthur Miller, “Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the ‘Class Action Problem,’” 92 Harvard Law Review 664, 669 (1979). In legal practice, committee and task force “reporters” are not only responsible for recording a group’s deliberations and polishing its output, but also may play a critical role in shaping its thinking and guiding its deliberative process.
Professor Benjamin Kaplan, reporter of the 1960s Advisory Committee, was a leading procedural scholar and is widely cited as the moving force behind that committee’s endeavors.

The Advisory Committee was concerned that the unitary standard articulated in former Equity Rule 38 was too vague, and would require judges to determine which cases should go forward as class actions on a case-by-case basis. Committee members decided, instead, to use the already large body of class action case law as a basis for drafting a more specific rule. They reviewed the many cases that had been treated as class actions, considering which of those cases had been appropriate circumstances for class treatment and which would have been better handled in another manner. See Benjamin Kaplan, “Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I),” 81 Harvard Law Review 356, 386 (1967).

John Frank says that the committee was not thinking of the problem of notifying potential members of a very large class when it drafted that rule: “The concept of thousands of notices going ceremonially to persons with such small interests that they could not conceivably bring their own action was still in the future.” See Frank, supra note 13.

According to Professor Kaplan, the committee considered requiring prospective class members to opt in to the new Rule 23(b)(3) damage classes. It rejected the opt-in strategy, in part, in recognition of the fact that judges, in practice, were already using an opt-out approach for some class actions, notwithstanding the language of the old rule. See Kaplan, supra note 16, at 397.

See Appendix A for the full text of Rule 23.

In an influential article reflecting on public controversy over class actions, Professor Arthur Miller wrote: “For more than a decade segments of the bench and bar have been waging a holy war over Rule 23 of the Federal Rules of Civil Procedure.” Miller, supra note 14, at 669.


No one has done an empirical analysis of the relationship between the size of a b(3) class and whether class members are required to opt in or out. But social scientists have found that requiring individuals to consent to a procedure—for example, participation in a research project—is markedly higher when consent is measured passively, by failure to file an objection, rather than actively, by explicitly registering agreement to participate. See, e.g., Phyllis Ellickson, “Getting and Keeping Schools and Kids for Evaluation Studies,” Special Issue, Journal of Community Psychology 102 (1994).

Espilin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968). The mood of the courts concerning class actions is summarized in Miller, supra note 14, at 678. Prof. Miller notes that some cases anticipated the adoption of revised Rule 23, which had circulated in the legal community for several years before formal action by the committee.


32 Id.
33 Id.
34 Miller, supra note 14, at 674–75 & nn.51–54.
35 Carruth, supra note 24, at 68.
36 See note 13, supra.
39 American College of Trial Lawyers, supra note 38.
40 Bertelson et al., supra note 38. The largest proportion of suits were seeking declaratory or injunctive relief under Rule 23(b)(2).
41 Id. Calculated from data presented in unnumbered chart at 1129.
43 DuVal, “The Chicago Experience,” supra note 38; DuVal, “The Chicago Study Revisited,” supra note 38; Kennedy, supra note 38; Bertelsen et al., supra note 38; Rosenfield, supra note 38.
44 Quoted in Resnik, supra note 9, at 17 & n.44.
46 Miller, supra note 14, at 684 & n.86.
48 Id. at 10 nn.5–7.
49 Id. at 19.
50 Id. at 13.
52 U.S. Department of Justice, supra note 47, at 24–25.
53 Id. at 27. Class Action Reports is a newsletter primarily supported by and directed to the plaintiff class action bar.
54 Miller, supra note 14, at 665, 682.

For discussions of the tort reform debate, see, e.g., Steve Brill and James Lyons, “The Not-So-Simple Crisis,” American Lawyer, May 1, 1986, at 1; Marc Galanter, “The Tort Panic and After: A


58In some instances, federal transferee judges kept cases for trial. See Blake Rhodes, “The Judicial Panel on Multidistrict Litigation: Time for Rethinking,” 140 University of Pennsylvania Law Review 711 (1991). However, in a 1998 decision, the U.S. Supreme Court held that a transferee judge must return cases to their original courts after pretrial proceedings are complete. Lexecom Inc. v. Milberg, Weiss, Bershad, Hynes and Lerach, 523 U.S. 26 (1998).

59Under the doctrine of issue preclusion, retrying the same issue against the same defendant might not be necessary. But in asbestos litigation, appellate courts circumscribed the application of issue preclusion. See Deborah Hensler et al., Asbestos in the Courts, supra note 56.


63In re ‘Agent Orange’ Product Liability Litigation, 100 F.R.D. 718 (E.D.N.Y. 1983) (certifying the class), aff’d, 818 F.2d 145 (2d Cir. 1987) (upholding the certification and rejecting other grounds for appeal). Defendants attempted to overturn Judge Weinstein’s certification immediately after he issued it, using a special review procedure known as mandamus, in which parties claim abuse of discretion by the trial judge, but the appellate court rejected this request. In re ‘Agent Orange,’ 725 F.2d 858 (2d Cir. 1984). The Agent Orange case was not the first mass tort certified as a mass action. After a fire killed 162 people and injured 100 more at the Beverly Hills Supper Club in Kentucky in 1977, federal district court judge Carl Rubin certified a class of injured plaintiffs. See Hensler & Peterson, supra note 56, at 970–72.

64The story of Agent Orange litigation is told in Peter Schuck, Agent Orange on Trial: Mass Toxic Disasters in the Courts (Cambridge, Mass.: Belknap Press, 1987). Judge Jack B. Weinstein, who presided over the class action, has played a leading role in mass tort litigation. Judge Weinstein’s
many essays on the issues associated with aggregate litigation are collected in Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations and Other Multiparty Devices (Evanston, Ill.: Northwestern University Press, 1995).

65Jenkins v. Raymark Industries, 782 F.2d 468 (5th Cir. 1986).


67In 1990, a class of asbestos workers was certified in the Eastern District of Texas, Cimino v. Raymark Industries, 751 F. Supp. 649 (E.D. Tex. 1990), which had certified the first asbestos class action, Jenkins v. Raymark Industries, 109 F.R.D. 269 (E.D. Tex. 1985), aff'd, 782 F.2d 468 (5th Cir. 1986), five years earlier. The Fifth Circuit ultimately rejected the trial plan in Cimino, although not the class certification. Cimino v. Raymark Industries, 151 F.3d 297 (5th Cir. 1998). Four years after Cimino was certified, plaintiff attorneys filed a 23(b)(3) class action in eastern Pennsylvania against a different group of asbestos defendants, on behalf of all future asbestos personal injury claimants, Georgine v. Amchem Products, 157 F.R.D. 246 (E.D. Pa. 1994). A year later, the same attorneys filed a Rule 23(b)(1)(B) class action in east Texas, against yet another defendant, on behalf of all present and future asbestos personal injury claimants. Ahearn v. Fibreboard Corp., 162 F.R.D. 505 (E.D. Tex. 1995). Subsequently, the class was redefined to exclude previously filed claims. The history of these cases is discussed in Chapter Three.

68In 1988, a mass tort class action alleging property damages due to a Shell Oil company explosion was filed in state court in Louisiana. Removed to federal court, it was certified in 1991. In re Shell Oil Refinery, 136 F.R.D. 588 (E.D. La. 1991). The Fifth Circuit Court of Appeals upheld the certification. Watson v. Shell Oil Co., 979 F.2d 1014 (5th Cir. 1992). Noting difficulties in organizing other mass tort cases for a class trial, the circuit court wrote: “We express our admiration for the manner in which [federal district court] Judge Mentz. . . has woven our mass tort case law into an acceptable and workable trial plan.” This was the same circuit that had denied aggregative status to asbestos cases throughout the 1980s. See Hensler et al., Asbestos in the Courts, supra note 56.


70Miller, supra note 14, at 684.

71Most references cite 1991 as the beginning of the contemporary Rule 23 revision process. However, the minutes for the Advisory Committee’s meeting of November 30 and December 1, 1990, read, “It was agreed to take up Rule 23, to enlarge the opportunity for mass tort litigation, to provide for defendant class actions, perhaps to specify the fiduciary duties of the class representative, and to consider the ABA Litigation Section report.” 1 Working Papers of the Advisory Committee, supra note 13, at 162 (minutes of May 1997).

72In the early 1980s, about 10,000 asbestos personal injury suits were filed in the federal courts. In the latter half of the decade, the number of annual filings nearly quadrupled. In 1990, the filings for a single year topped 10,000. See Hensler, “Fashioning a National Resolution,” supra note 56, at 197. See also Ahearn v. Fibreboard, 162 F.R.D. 505, 509 (E.D. Tex. 1995) (“By 1990, the [asbestos litigation] situation had reached critical proportions”).

73The Judicial Conference of the United States, Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation (Mar. 1991). The committee wrote, “There is no reason to conclude that current Rule 23 exhausts potential procedural techniques for appropriately facilitating class actions. And. . . there may be other mass tort situations in which the use of an enlarged class action device would be desirable. . . The informal moratorium declared many years ago on possible revision of Rule 23 should be lifted, with serious study given to some modification.” Id. at 38–39.

The Judicial Conference serves as the governance body for the federal courts. Its committee structure includes the Advisory Committee on the Civil Rules, which reports to a Standing Committee on the Rules, which reports to an Executive Committee; which is chaired by the Chief Justice.
Although the Ad Hoc Committee’s report was dated 1991, it must have been circulating before that, because the Advisory Committee agreed to take up Rule 23 revision at its meeting on November 29–December 30, 1990. See note 71, supra.

The Litigation Section’s report was prepared in response to the legislative revisions to Rule 23 proposed by the Carter administration in the late 1970s. See American Bar Association Section of Litigation, Report and Recommendations of the Special Committee on Class Action Improvements (1986). The ABA committee began its work in 1981. Its report was never adopted as a formal position of the ABA, but rather was transmitted to the Advisory Committee on the Civil Rules on behalf of the Litigation Section.

Id. at 199.

Id.

Id. at 170–72.

Id. at 175 (Minutes of Oct. 21–23, 1993).

Id. at 177.

Both class actions were filed subsequent to the settlement of pending asbestos claims in each district. See note 67, supra. Judge Robert Parker appointed a plaintiffs’ steering committee to organize the futures class in 1993, and approved the settlement in 1995. Ahearn v. Fibreboard, 162 F.R.D. 505 (E.D. Tex. 1995). A futures asbestos personal injury class against a different set of defendants was filed in 1993, and was conditionally certified two weeks later. Carlough v. Amchem Products, 834 F. Supp. 1437 (E.D. Pa. 1993). Subsequently another individual was substituted as the representative plaintiff and the case became known as Georgine v. Amchem Products.


In re Silicone Gel Breast Implant Products Liability Litigation, No. CV 92-P-10000-S, 1994 WL 578353 (N.D. Ala. Sept. 1, 1994). All federal silicone gel breast implant cases had been transferred to Judge Pointer by the Judicial Panel on Multidistricting. The settlement subsequently collapsed when more than 400,000 women applied for current or future benefits. The silicone gel breast implant settlement is discussed further in Chapter Three.

Wadleigh v. Rhone-Poulenc Rorer, 157 F.R.D. 410 (N.D. Ill. 1994). All federal hemophiliac HIV-infection cases had been transferred to Judge Grady by the Judicial Panel on Multidistricting. Class certification was subsequently rejected by the appellate court on a writ of mandamus. In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995).

See, e.g., Valentino v. Carter-Wallace, No. CV-94-02867-EFL (N.D. Cal. 1994) (certifying class of individuals alleging injuries associated with Felbatol, a drug used to treat epilepsy), vacated, 97 F.3d 1227 (9th Cir. 1996); In re Copley Pharmaceutical, 158 F.R.D. 485 (D. Wyo. 1994) (certifying class of


89 The case that received the most attention involved G.M. pickup trucks, which were alleged to have faulty fuel tanks. In the settlement of a class action brought by pickup truck owners who had not sustained physical injuries but who claimed that the value of their trucks had been diminished by the allegedly faulty design, consumers were offered coupons to buy new G.M. trucks. In *re General Motors Corp. Pick-Up Truck Fuel Tank Product Liability Litigation*, 846 F. Supp. 330 (E.D. Pa. 1993). The Third Circuit rejected the settlement on appeal. 55 F.3d 768 (3d Cir. 1995). See *Wolfman and Morrison*, *supra* note 85, at 439–513. But a similar nationwide class settlement was later approved by a Louisiana state trial court. *White v. General Motors Corp.*, No. 42,865 (La. Dist. Ct. 1996). Chapter Three discusses the issue of competing state and federal class actions.


93 For evidence that the Advisory Committee was attentive to the legislative process during this period, see 1 *Working Papers of the Advisory Committee*, supra note 13, at 196–98, 222 (minutes of Feb. 16–17, 1995, and Apr. 20, 1995).


95 *Hearings Before the Subcommittee on Securities of the U.S. Senate Committee on Banking, Housing, and Urban Affairs*, 103d Cong., 1st Sess. 1 (1993). Predictably, those who appeared at the hearing had widely differing views about the value of securities class actions; more surprisingly, perhaps, they presented vastly different assessments of the facts. In his opening statement at the second day of the hearing, after the committee had received written and oral testimony and written
responses to questions from committee members, Sen. Dodd said: “After a long hearing that lasted well into the afternoon, we found no agreement on whether there is in fact a problem, the extent of the problem, or the solution to the problem. In my experience with this subcommittee, I’ve never encountered an issue where there is such disagreement over the basic facts. We often argue about policy, we argue about ideology, we often argue about politics, but it is rare that we spend so much time arguing about basic facts.” Id. at 280.

981 Working Papers of the Advisory Committee, supra note 13, at 182–92 (minutes of Apr. 28–29, 1994).

97 For example, the minutes of the April 1994 meeting summarize comments by John Frank (a member of the 1966 Advisory Committee) as follows: “Subsequent history [after 1966] has been a story of expansion and excesses. . . . The fear that defendants would rig plaintiffs classes has not materialized. They have not had to. The ‘take-a-dive’ class has been arranged by plaintiff attorneys who settle out class claims for liberal fee recovery. . . . Abuses of Rule 23 are rising.” Id. at 187, 189.

98 See, e.g., id. at 204 (minutes of Feb. 16–17, 1995): “It was noted that the distinctions between b(1), (2), and (3) class need not be dissolved to pursue changes in notice and opt-out requirements. . . . Some participants believed that it is better to maintain the now ‘traditional’ division among different forms of classes, in part because the different classes have markedly different histories and purposes. The (b)(1) class has an ancient lineage that helps to legitimate class practice in general. . . .” The last draft revisions to include the unitary standard date from April 1995. 1 Working Papers of the Advisory Committee, supra note 13, at 43–53.

99 Summarizing the February 1995 discussion at the University of Pennsylvania Law School conference and meeting of the Advisory Committee, the reporter notes: “A topic that recurred repeatedly throughout the day [was] whether problems of mass tort actions are so distinctive that a separate rule should be developed. One advantage might be to address the problem of ‘futures’ claimants that seem to be unique to this setting. . . . Doubts were raised in response. A specific mass torts rule may seem so laden with substantive overtones as to raise legitimate doubts about the wisdom of invoking regular rulemaking procedures.” Id. at 206. After a discussion of mass torts that are certified for settlement, but not trial, the minutes note, “. . . it was suggested that it is premature to deal with these settlement questions in Rule 23, that settlement classes should be dealt with in the Manual for Complex Litigation [a judge’s bench book that does not carry the authority of the Rules of Civil Procedure].” Id. at 213.

100 See, e.g., the minutes for February 1995: “Whether Rule 23 changes are needed at all remains uncertain. The mass tort phenomenon seems to be driving the process. If that is so, it must be asked whether asbestos and breast implant litigation are an isolated phenomenon—and, perhaps, when more is known, may be quite different from each other. . . . is all of this discussion an attempt to design a system for asbestos? And isn’t that foolish, in part because too late?” Id. at 214.

101 Id. at 223 (minutes for Nov. 9–10, 1995). Deborah Hensler attended this meeting and made a brief presentation to committee members.

102 A preliminary merits determination in class actions was explicitly rejected by the U.S. Supreme Court in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). For a discussion of the applicability of Eisen to class certification, see Castano v. American Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996).

103 Defendants were torn between the attraction of drawing trial judges’ attention to the merits of proposed class actions and the possibility that such an early merits determination would simply provide more opportunity for adversarial procedure at a time when the record had not yet been sufficiently developed to support a sound judicial assessment. Defendants’ disagreement among themselves on the issue of a preliminary merits determination subsequently led the Advisory Committee to abandon this proposal.

104 28 U.S.C. § 1291. Some state courts do not follow federal final judgment doctrine. For example, New York state has an active interlocutory appeal practice.

Controversy over class actions during the 1990s led to a spate of interim appeals in the federal courts, some of which were allowed to go forward under the procedure of mandamus. See, e.g., In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995).

105 Working Papers of the Advisory Committee, supra note 13, at 261–66. Certification of settlement classes had become controversial after the trial courts’ approval of settlements in such cases as Georgine, Ahearn, and G.M. Pick-Up Trucks. See notes 85, 89, supra. After the Third Circuit Court of Appeals’ rulings in G.M. Pick-Up Trucks and Georgine that such certification was not allowed under
the then-current wording of Rule 23, some mass tort practitioners, on both the plaintiff and defense
sides, sought to settle the issue through rule revision.

If Congress chooses not to act on a rule that has been adopted by the U.S. Supreme Court, the
rule takes effect. But in recent years, Congress has become more assertive in exerting its authority to
reject rules proposed through this rulemaking process. Because of the high profile of the class
action controversy, few involved in the rule revision process expected Congress to adopt a passive
stance in the event that amendments to Rule 23 were proposed.


The alternatives variously excluded the “necessity” element; diminished the extent to which
judges would be asked to assess the probable success of the class action; deleted references to the
“public interest” from the proposed new requirement that the judge balance the costs and benefits
of certifying a class; deleted references to defendants paying for notice; and deleted references to
settlement classes. Id.

This description of the April 1996 meeting is based, in part, on the observations of Deborah
Hensler, who attended as an observer.

The complete list of changes included:

• A provision for interlocutory appeal
• Two new factors to be considered by the judge in deciding whether to certify a class: (A) “The
practical ability of individual class members to pursue their claims without class certification; (F)
“Whether the probable relief to individual class members justifies the costs and burdens of class
litigation.”
• Modifying the language of a third factor to read: “class members’ interests in maintaining or
defending separate actions.”
• An admonition that the judge also consider the maturity of any related litigation
• A new category (b)(4) of settlement classes which a judge could certify in response to the parties’
joint request
• A formal requirement of notice and hearing before judicial approval of any settlement
• A small change in the instructions to the judge on when class certification should be decided,
increasing judicial discretion with regard to timing.

Memorandum from Judge Patrick Higginbotham and Prof. Edward Cooper to the Standing

Letter from Steering Committee to Oppose Proposed Rule 23 to Judge Alicemarie Stotler, Chair
The steering committee circulated drafts of the May 28 letter by Internet, beginning within days of
the April meeting in Washington, D.C.

Several other noted law professors, including Janet Alexander, Robert Bone, Paul Carrington,
Samuel Estreicher, Arthur Miller, Judith Resnik, and David Shapiro, wrote separately to the
Standing Committee variously expressing concerns about both settlement classes and Factor (F).
Some felt that the Advisory Committee’s proposals overstepped the boundaries of the procedural
rulemaking process, because the proposed revision would have the effect of changing substantive
law. Public Citizen, a consumer advocacy organization, submitted a letter in opposition to the
changes (June 3, 1996), and Sheila Birnbaum, a noted defense attorney, submitted a letter in
support (June 14, 1996). Both Public Citizen and Birnbaum had extensive experience litigating class
actions; Public Citizens’ lawyers had appeared as objectors to some of the most widely criticized
class settlement agreements. 2 Working Papers of the Advisory Committee, supra note 13 passim.

See note 94, supra.

Written testimony was submitted on behalf of 135 law school professors and on behalf of 18
state attorneys general. Counting these multiple signatories to written testimony, more than two
hundred people made their views known to the committee. 2, 4 Working Papers of the Advisory
Committee, supra note 13, passim.

Patricia Sturdevant, National Association of Consumer Advocates. 4 Working Papers of the Advisory Committee, supra note 13, at 156.

Michael D. Donovan, Vice Chair, National Association of Consumer Advocates, id. at 433–34.

Theodore J. Fischkin, Chair, Litigation Committee, American Corporate Counsel Association, 2 Working Papers of the Advisory Committee, supra note 13, at 584.

Nicholas J. Wittner, Assistant General Counsel, Nissan North America, 4 Working Papers of the Advisory Committee, supra note 13, at 755 (citing various sources for the views quoted).

William A. Montgomery, Vice President and General Counsel, State Farm Insurance Companies, 2 Working Papers of the Advisory Committee, supra note 13, at 559.

D. Dudley Oldham, Lawyers for Civil Justice, 4 Working Papers of the Advisory Committee, supra note 13, at 505.

Howard Metzenbaum, Chair, Consumer Federation of America, 2 Working Papers of the Advisory Committee, supra note 13, at 91.

Oldham, supra note 125.

G. Luke Ashley, 4 Working Papers of the Advisory Committee, supra note 13, at 548–49. Mr. Ashley was the lead appellate counsel in the Cimino asbestos class action, which is discussed in Chapter Three. Cimino v. Raymark Industries, 751 F. Supp. 649 (E.D. Tex. 1990).

Barry Bauman, Executive Director, Lawyers for Civil Justice, 2 Working Papers of the Advisory Committee, supra note 13, at 181–82. Mr. Bauman noted that mass tort class actions might be appropriate in a single catastrophic accident, such as an airplane crash.

John D. Aldock, National Counsel for the Center for Claims Resolution, 4 Working Papers of the Advisory Committee, supra note 13, at 329, 349. The Center was the defendant in the Georgine asbestos class action. See also comments supporting the use of settlement classes in mass torts by defense counsel Steven Glickstein and David Klingsberg, id. at 480 et seq., and defense counsel Robert Dale Klein, id. at 808, 810.

Frederick Baron, Baron & Budd, id. at 507. Mr. Baron is a leading asbestos plaintiff attorney.

Stanley M. Chesley, Waite Schneider Bayless & Chesley Co., L.P.A., id. at 823. Mr. Chesley is a leading plaintiff class action attorney.


Memorandum from Judge Paul V. Niemeyer to the Standing Committee and Civil Rules Advisory Committee (Mar. 15, 1997) (on file with the authors).


In introducing the “when practicable” revision, Judge Niemeyer noted that its adoption would conform to current practice. But some Standing Committee members argued that it would cause judges to delay certification, and others worried more generally about the impact of certification on absent parties. With many members assuming the Advisory Committee would present an additional package of recommendations for changes in Rule 23 the following fall, the Standing Committee voted against sending that recommendation on to the Judicial Conference at that time. See Advisory Committee on Civil Rules, Standing Committee Meeting and Report to the Judicial Conference (minutes of June 19–20, 1997).


In a preface to the Advisory Committee’s and Working Group on Mass Torts’ report to the Chief Justice and Judicial Conference, issued in February 1999, the Advisory Committee Chair Judge Paul Niemeyer wrote: “In August 1996, the Committee published proposed changes to Rule 23. The public hearings and comments persuaded the Committee that the proposals would not solve the most serious of the identified problems and might raise troubling collateral issues. It also became
apparent that rulemaking might not be adequate to solve some of the more serious problems. During this same period, Congress...began to conduct its own hearings. This activity increased to the point that the House was prepared to pass a bill to address some of the perceived problems before time ran out. Many believe that some final action may be taken by the current Congress.” Administrative Office of the U.S. Courts, Report of the Advisory Committee on Civil Rules and the Working Group on Mass Torts to the Chief Justice of the United States and to the Judicial Conference of the United States iv (Feb. 15, 1999).

140 The working group on mass torts completed its work and issued its report and recommendations in early 1999. See note 139, supra. The working group and Advisory Committee recommended that the Chief Justice appoint a new Ad Hoc Committee on Mass Torts, charged with recommending legislation, rule revision, changes in case management and practice, and judicial education. Id. at v.