It will take a generation or so before we can fully appreciate the scope, the virtues and the vices of new Rule 23.

 Professor Benjamin Kaplan
 Reporter, Advisory Committee on the Civil Rules, 1966

After more than 30 years of controversy, the U.S. legal system seems to have reached an uneasy accommodation with class actions seeking affirmation of rights—of children, taxpayers, prisoners, and other groups in society. There is political disagreement about which and whose rights we should honor, and Congress has enacted legislation forbidding the federally funded Legal Services Corporation to assist in bringing rights-based (or any other) class actions.¹ But these actions reflect fundamental arguments about individual and group rights more than disagreement about the appropriateness of providing a vehicle, such as the class action, for collective litigation of these issues.

The history of the debate over Rule 23 shows that we have not reached a similar consensus on the appropriate uses of Rule 23(b)(3) damage class actions. Is the Rule 23(b)(3) class action primarily an administrative efficiency mechanism, a means for courts and parties to manage a large number of similar legal claims, without requiring each litigant to come forward and have his or her claim considered individually? Or is it primarily a means of enabling litigation that could not be brought on an individual basis, in pursuit of larger social goals such as enforcing government regulations and deterring unsafe or unfair business practices? As we have seen, clashing views on the objective of Rule 23(b)(3) are at the heart of past and present controversy over revising the class action rule.²

But the distinction in the public debate between the efficiency and enabling goals of class actions for money damages is illusory. In practice, any change in court processes that provides more efficient means of litigating is likely to enable more litigation. Greater efficiency can lower the costs of bringing lawsuits, making it more attractive for litigants to sue and for lawyers to take their cases. Moreover, because Rule 23(b)(3) requires telling people that they may have a claim of which they were previously unaware, but does not require them to take
any initial action to join in the litigation, virtually every damage class action has
the potential to expand the pool of litigants beyond what it would have been
without class litigation. In other words, whatever efficiencies it may achieve,
Rule 23 is inherently an enabling mechanism.

When we take a closer look at the controversy over damage class actions, we can
see that it is, in fact, a dispute about what kinds of lawsuits and what kinds of
resolutions of lawsuits the legal system should enable.

Business representatives from diverse sectors of the economy argue that Rule
23(b)(3), in practice, enables large numbers of lawsuits about trivial or nonexis-
tent violations of statutes and regulations that govern advertising, marketing,
pricing and other business practices, and about trivial losses to individual con-
sumers. They claim that such suits, in reality, are vehicles for enriching plaintiff
class action attorneys, not mechanisms for ensuring that important legal rules
are enforced or for compensating consumers. In the end, they say, consumers
pay for this litigation in the form of increased product and service costs without
receiving commensurate benefits.

Manufacturers argue, as well, that Rule 23(b)(3) enables massive product defect
suits that rest on dubious scientific and technical evidence. Because of the
huge financial exposure associated with these mega-lawsuits, manufacturers
say they feel forced to settle damage class actions, rather than contest them.
The end result, they claim, is to drive good products from the market and to
deter investment in developing other beneficial products.

Consumer advocates counter that a prime purpose of Rule 23(b)(3) is to enable
just the kind of regulatory enforcement suits—sometimes termed “private at-
torneys general suits”—that businesses complain about. They say that the
public cannot rely on regulatory agencies to adequately enforce consumer
protection statutes, because these agencies are often underfunded and some-
times subject to influence by the businesses that they regulate. They also be-
lieve that consumers ought to have a vehicle for obtaining compensation for
losses that result from corporate wrong-doing, even when these losses are
small. In addition, they support mass product defect litigation, which they be-
lieve provides a powerful incentive for businesses to invest in designing safer
products.

But some consumer advocates and other public interest lawyers worry that, in
practice, Rule 23(b)(3) enables otherwise good cases to produce bad outcomes—settlements that they say serve plaintiff class action attorneys and busi-
ness defendants better than they serve consumers and the general public. As a
result, these advocates argue, injured consumers get less compensation than
they deserve and corporations do not pay enough in damages to deter future
misconduct.
All these arguments revolve around questions of what injuries ought to be compensated and what behaviors ought to be deterred. A different argument about the enabling effects of Rule 23(b)(3) concerns the right to individualized consideration of one’s legal claims. When class members’ claims involve such small losses that they could not realistically be pursued through individual litigation, few people worry that class actions abrogate class members’ rights to individual treatment of those claims. But legal scholars and some personal injury lawyers believe that creating a single product liability class action, by combining individual cases claiming significant damages, results in lawyers and courts running roughshod over individual litigants’ rights.

A. THE SCOPE OF CLASS ACTIONS

The public debate about the sorts of class actions that should and should not be enabled by Rule 23(b)(3) generally takes the form of a critical discussion of specific cases. The hundreds of pages of testimony before the Advisory Committee on Civil Rules in 1996 and 1997 are peppered with references to Georgine and Ahearn, the two controversial settlements of asbestos workers’ future claims; to the GM Pick-Up and Ford Bronco cases, where discount certificates for new vehicle purchases were offered to settle claims that truck-owners had suffered a monetary loss because of allegations of defective design; to the airline price-fixing case, where ticket purchasers were offered discounts on future travel; and to more esoteric cases, even including one class action over catfish processing. It is not surprising that lawyers and judges, whose professional lives are devoted to specific cases, would rely on their case-based experience when assessing claims about class action litigation. But if each decisionmaker is thinking about a different type of case when he or she decides about a proposed rule change, and if no one of those cases is representative of the broad scope of class action activity, then rule reform could bring unanticipated results because any rule change will apply across all class actions brought under that provision.

What kinds of class actions would be affected by any rule change? Public policymakers and those who testify before them have little data available to answer that question. For various reasons (which we discuss in Appendix B), there is no national registry of class action activity. In the 1990s, at the request of the Advisory Committee, the Federal Judicial Center (the research arm of the federal judiciary) conducted an empirical analysis of class actions in the federal district courts. But that study was limited to four federal district courts (out of 94 in the federal system) and dealt with cases terminated in 1992–1994. Some observers thought that those data were too limited to use as a basis for policy reform. Although the Advisory Committee could propose revisions only to the federal class action rule, many participants in the debate over rule revision be-
lieved that any federal revisions would inevitably lead to similar revisions in state class action rules; hence, these individuals wanted to bring information about state class actions to the Committee’s attention as well.

Can we develop a better picture of the scope of class actions? In the absence of comprehensive court record data on class actions, we conducted a series of searches of electronic databases to find evidence of class action activity—case filings and settlements reported by the general and specialized news media, judicial decisions in state and federal courts, virtually any news that could be specifically traced to a class action lawsuit in the past several years. More precisely, we turned to LEXIS, an authoritative source of all published federal and state court appellate opinions and selected federal trial court opinions; NEXIS, a database comprising general newspapers for virtually every metropolitan area in the United States, as well as news magazines; and a subset of NEXIS, comprising all major business news media, and the Wall Street Journal database, which together form what we term our “business” database. We developed a method for searching these databases to find reports of class action lawsuits, eliminating duplicate reports of the same lawsuit, and recording information about the lawsuits, which we describe in detail in Appendix B. None of the databases provides a comprehensive report of all class action activity in the United States, and each reflects the preferences of its creators—reporters who choose to report only certain news, judicial opinion archivists who report only some decisions. Together, however, these data help us to paint a broad-brush picture of the class action landscape thirty years after the adoption of Rule 23.

The data tell us that the world of class actions in 1995–1996 was primarily a world of Rule 23(b)(3) damage class actions, not the world of civil rights and other social policy reform litigation that John Frank tells us the 1966 rule drafters had in mind. The data also tell us that the landscape of class actions probably looked different to judges who were deciding cases, ordinary newspaper readers, and business persons (see Figure 3.1). Civil rights cases accounted for 14 percent of reported judicial opinions and 12 percent of the cases reported by the general media, and only 4 percent of cases reported by the business press (which we might expect to be less interested in this type of litigation). Other rights-based suits accounted for 11 percent of the reported judicial opinions and the general press, and 1 percent of the business press database. Securities class actions were a major preoccupation of the business community in 1995–1996, accounting for close to 40 percent of cases reported by that press—not surprising at this time, when Congress had just adopted legislation to rein in securities cases. Securities cases figured less prominently in the general press and in reported judicial opinions, accounting for about one-fifth of the cases in each. Tort cases accounted for only 9 percent of reported judicial opinions, but accounted for 14 percent of cases reported by the general press and almost 20
percent of the cases reported by the business press. Consumer cases accounted for about 25 percent of each of the three databases.

Rule 23(b)(3) cases are generally brought against corporations, and it is the business community that has been the source of the lion’s share of criticism of class actions over the years. To more precisely discern the contours of the class action landscape as it appears to America’s businesses, we next look solely at cases brought against business defendants (see Figure 3.2). When we exclude cases with other types of defendants, the numerical significance of consumer class actions is underscored. Roughly one-third of cases with business defen-
dants that were reported in all three databases arose out of consumer transactions outside the securities domain.

Figure 3.3 provides detail on the kinds of transactions that give rise to consumer class actions. Two-thirds of the consumer cases resulting in reported judicial opinions involved either allegations of improperly calculated or excessive fees or more general allegations of “fraudulent business practices.” A much smaller fraction (13 percent) involved charges of antitrust violations. “Fee cases” comprise claims concerning charges by service providers, including disputes over computer services’ billing and television cable company late fees; ATM, credit
card, and other banking fees; insurance premium calculations (for everything from automobile accident insurance to insurance tied to mortgages and installment credit purchases); and airline and other travel industry charges. These cases are generally brought on behalf of individual consumers. “Fraud” cases comprise claims alleging deceptive sales practices, false advertising, and deceptive labeling. The “antitrust suits” we identified were primarily private class action suits. However, there is often public involvement in these suits, because some follow on the heels of state attorneys’ general investigations and legal actions, and others attract the attention of attorneys general, who may then pursue public actions. These cases may be brought on behalf of individual

Figure 3.3—Consumer Class Action Cases (1995–1996)
consumers, professional service providers, or small businesses or corporations. (The “other” cases shown in the figures are a miscellany of suits alleging unfair trade practices and other contract-based claims, brought mainly by professional service providers and businesses rather than individual consumers.)

The general and business press present a somewhat more divided picture of consumer class action litigation. Antitrust cases are prominent in business reporting, followed by cases alleging fraud and improper or excessive fees. Consumer class actions reported by the general press are fairly evenly divided among antitrust, fraud, fee, and other cases (see Figure 3.3).

Consumer class action activity does not show up as prominently in the Federal Judicial Center’s 1995 report on class actions. Although the fact that the FJC relied on court records while we used other sources might be expected to produce some differences in results, we think that another important explanatory factor is that our data include class actions filed in state courts as well as federal courts. Newspapers and news magazines did not consistently report the jurisdictions where class actions were filed, so we could not use those databases to determine the division of class action activity in 1995–1996 between state and federal courts. LEXIS reports federal court decisions more comprehensively than it reports state court decisions. By adjusting for these reporting differences, however, we could get a rough approximation of the division of state and federal class action activity; as shown in Figure 3.4, we found that almost 60 percent of reported decisions in 1995–1996 arose in state courts.

Figure 3.4—Federal and State Division of Class Action Activity (1995–1996)
A comparison of the state and federal judicial decisions reported in LEXIS in 1995–1996 suggests some important differences in the types of class actions brought in federal and state courts (see Figure 3.5). Consumer cases, citizens’ rights cases, and tort cases accounted for larger fractions of reported state court decisions; securities lawsuits, employment, and civil rights cases accounted for larger fractions of the reported federal court decisions. Consumer cases accounted for half of all reported state judicial decisions in class actions against business defendants, and less than one-third of the reported federal judicial decisions. Fee cases comprised almost half of all reported state court consumer cases; fraud cases comprised the largest fraction of reported federal judicial decisions. Hence, the federal judge- and lawyer-members of the Advisory Committee may have had a distorted picture of the universe of class actions that...
would be affected directly (federal cases) or indirectly (state cases) by any rule changes.

To test the consistency of our findings over time, we replicated our database compilation and analysis for 1996–1997. (Because of resource constraints, we collected less detailed information about this period.) We found a larger number of class actions resulting in reported judicial opinions and covered by the general press, compared to the previous year. Consumer cases accounted for a somewhat larger fraction of class actions in all three databases than they did in the previous period; the data also suggest that the proportion of employment cases increased from the previous year (see Figure 3.6). Among consumer cases, it appears that a larger fraction involved allegations concerning fees in the more recent year (see Figure 3.7). The reported judicial decisions suggest that the increase in proportion of fees cases occurred in both federal and state courts (see Figure 3.8). Because the reported decisions shown here are by the appellate courts, year-to-year differences may reflect changes that took place at the trial court level some time earlier. Differences in press reports may reflect shifts in the interest of reporters rather than real changes in the pattern of class action activity.

A persistent claim among class action critics is that plaintiff attorneys “shop” for judges who are more favorable to class actions, and therefore more likely to certify cases; the anecdotal wisdom is that state judges in the Gulf States are more favorable towards class actions. We ordered states according to the number and rate (i.e., number per 100,000 population) of class actions we found among reported judicial decisions and covered by the general press (see Figures 3.9 and 3.10). As we would expect, states with larger populations—California, Florida, Illinois, New York, Ohio, Pennsylvania, and Texas—were among the highest-ranked states by total number of class actions. (Rankings also differ depending on whether we use reported judicial decisions or the general press database, probably reflecting both differences in reporting criteria and differences in press coverage across states.) But when we consider the rate of reported class actions some surprises appear: Alaska, the District of Columbia, and Delaware appear among the top five in the reported judicial decisions, and Alabama makes it onto the 1996–1997 top five list in the general press database.

Tables 3.1 and 3.2 provide explanation for these rankings. Some types of cases are particularly prevalent in certain jurisdictions. For example, Delaware leads in the rate of securities class actions in both databases, because it is the place of incorporation for many businesses and has long been a popular venue for business litigation. Louisiana leads, by number and rate, in tort class actions
Figure 3.6—Class Action Activity from Year to Year (1995–96; 1996–97)
Figure 3.7—Consumer Cases from Year to Year (1995–96; 1996–97)
that resulted in reported judicial decisions and is among the top five in the tort area, by number and rate, in the general press database. The fact that many petrochemical factories are located in that state, stimulating considerable toxic exposure litigation, probably helps explain these rankings. Other rankings are less easily explained: Alabama was among the top three states, by number and rate, in consumer class actions that led to reported judicial decisions in both time periods and among the top five, by number and rate, in consumer class actions covered by the general press in 1996–1997. Later in this chapter, we discuss how lawyers’ choices of where to file cases affect class action litigation dynamics.
B. IS THE NUMBER OF CLASS ACTIONS GROWING?

Contemporary critics of class actions claim that the number of class actions has grown significantly in the past few years. An increase in class action litigation, by itself, might not justify reforming Rule 23, since more class action lawsuits could simply reflect a surge of legitimate suits. But some policymakers might regard a constant level of class action litigation as demonstrating that reform was unnecessary—the familiar “if it ain’t broke, don’t fix it” rule—and arguments about trends in the number of class actions have been a feature of the controversy over class actions for the past three decades. Hence, the question
of whether there has been a surge of class action activity recently is of some interest.

Our data search did not provide quantitative data for determining whether class actions are growing in number or whether the distribution of class actions by case type has changed in recent years, because we only compiled data for two years. Our best information on litigation trends is qualitative, and is based on the interviews we conducted at 15 major corporations (mostly Fortune 100 companies) and a dozen plaintiff law firms with nationwide practices.\textsuperscript{16}

We conducted interviews at automotive, chemical, financial service (banks, life insurance, personal and commercial property and casualty insurance), petro-
chemical, and pharmaceutical corporations. In all but one of these interviews, corporate representatives claimed that their caseloads of “putative” class actions (cases where plaintiffs had requested or were expected to request class action certification) had risen significantly over the past three to five years. Most of these corporate representatives told us that, while five years ago they might have expected to defend themselves in at most a couple or a half-dozen class action lawsuits, they were now defending one or two dozen. A few large corporations reported as many as 60 pending putative class actions in 1997; one reported as many as 100 in 1998. The largest numbers of class action lawsuits were reported by those in the financial services industry.

Table 3.1

Hot States for Class Action Cases by Case Type (Reported Judicial Decisions)

1995–1996

<table>
<thead>
<tr>
<th></th>
<th>Consumer</th>
<th>Torts</th>
<th>Securities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number</td>
<td>Rate*</td>
<td>Number</td>
<td>Rate*</td>
</tr>
<tr>
<td>Illinois</td>
<td>D.C.</td>
<td>61</td>
<td>0.73</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Illinois</td>
<td>24</td>
<td>0.52</td>
</tr>
<tr>
<td>Alabama</td>
<td>Alabama</td>
<td>15</td>
<td>0.35</td>
</tr>
<tr>
<td>New York</td>
<td>Connecticut</td>
<td>14</td>
<td>0.21</td>
</tr>
<tr>
<td>California</td>
<td>Rhode Island</td>
<td>13</td>
<td>0.2</td>
</tr>
</tbody>
</table>

1996–1997

<table>
<thead>
<tr>
<th></th>
<th>Consumer</th>
<th>Torts</th>
<th>Securities</th>
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<tbody>
<tr>
<td>Number</td>
<td>Rate*</td>
<td>Number</td>
<td>Rate*</td>
</tr>
<tr>
<td>Illinois</td>
<td>D.C.</td>
<td>74</td>
<td>0.73</td>
</tr>
<tr>
<td>New York</td>
<td>Alabama</td>
<td>46</td>
<td>0.63</td>
</tr>
<tr>
<td>Alabama</td>
<td>Illinois</td>
<td>27</td>
<td>0.63</td>
</tr>
<tr>
<td>Florida</td>
<td>Delaware</td>
<td>25</td>
<td>0.55</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Louisiana</td>
<td>18</td>
<td>0.41</td>
</tr>
</tbody>
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NOTE: *Number of cases per 100,000 population.
Because of the financial stakes of these suits and the legal expenses associated with such litigation, the corporate representatives whom we interviewed regard this growth as highly significant; in some instances, the corporations perceive the need to be so great that they have established special "class action defense practice groups" within their corporate legal departments. (Similarly, some law firms that serve corporate clients now advertise that they have specialized class action practice groups.) The representatives of chemical and pharmaceutical manufacturers reported fewer class action lawsuits, but reported instead hundreds and thousands of product defect claims, brought in large consolidated litigations—what one corporate lawyer graphically termed a “Bataan death march.”
Corporate representatives told us that they were now being sued more frequently in state courts than in federal courts. They said that many of the class action lawsuits brought against them were filed by plaintiff class action firms that had previously concentrated on securities litigation. These corporate representatives believed that the recent federal statute that restricted federal securities class actions had encouraged class action practitioners to broaden their practices to include more diverse consumer and product defect class action litigation.

Because claims of increasing litigation figure in the policy debate over class actions, we were mindful of the fact that corporate representatives had an interest in depicting their caseloads as growing. Hence, we would have been reluctant to place too much weight in these qualitative reports of growth had not they been confirmed by plaintiff class action attorneys. We interviewed attorneys at eight leading national class action firms, including those that are most widely known. Generally these attorneys did not share information on the number of class actions they had pending, but most said that their caseloads were growing. One attorney noted that the number of lawyers in his firm had increased about 60 percent in the last four years. Another told us that he was “turning away” ten potential lawsuits per month. (“They go elsewhere,” he said.) Another said he could take only “one-tenth” of the cases that were referred to the firm by state attorneys general offices and consumer groups.18

Several of the plaintiff class action attorneys whom we interviewed noted that they were filing more state than federal class actions, in response to perceived animus toward class actions on the part of federal judges. Several class action attorneys whose firms had previously focused on securities class actions told us that they were now turning their attention to other consumer lawsuits. Some of these attorneys cited the recent federal securities class action reform legislation as the incentive for them to broaden their practices; others said they had simply come to recognize that the skills they had learned in prosecuting securities class actions could be put to use on behalf of other consumers.19 A number of interviewees observed that more firms were moving into the class action field, increasing competition.

We also interviewed four personal injury attorneys with national practices who have not historically been associated with class action litigation. All told us that they are increasingly involved in class action or other aggregative litigation. Many of the plaintiff attorneys whom we interviewed said they believe that the trends in their own practices were representative of trends in plaintiff class action and mass tort practices nationwide.

We discussed the evolution of class actions with attorneys in myriad practice settings. In addition to the corporate counsel and plaintiff attorneys noted
above, we talked to outside defense counsel, public interest lawyers, and staff in offices of attorneys general. Although these lawyers had different perspectives on class action litigation, they had a shared sense that class action practice is changing rapidly, and that class actions are at “the cutting edge” of civil litigation. As one practitioner told us: “The ground is moving under us as we speak.”

The qualitative data we collected in our interviews suggest that damage class actions are growing in number and diversity. Moreover, the perception of growth is widely shared among representatives of large corporations in different sectors of the economy and among lawyers in different practice areas. However, there are not sufficient caseload data available publicly to validate the qualitative evidence or the perception.

But the policy controversy over class actions is not just a controversy over numbers and growth. The business community argues that what is growing is the number of nonmeritorious suits that are filed. Others dispute this. But many—on all sides of the controversy over class actions—worry that the outcomes of class action lawsuits do not serve class members and the public well. To understand these twin concerns, we must look at how Rule 23(b)(3) shapes plaintiff attorneys’ incentives to file class actions, how it influences plaintiffs’ and defendants’ decisions to settle cases and the amount of money paid out by defendants, and how, in turn, the likelihood of settlement and the financial rewards to class action attorneys drive filing practices. As we shall see, both the “virtues” and the “vices” of class action practice derive from the incentives created by the rule as it is implemented in federal and state courts around the country.

In analyzing incentives, it is helpful to distinguish between cases that arise initially as representative actions, brought on behalf of a large, undifferentiated group of individuals, and cases that arise initially as individual litigation and are subsequently aggregated. The former are what were traditionally seen as damage class actions, and are epitomized by securities fraud suits and consumer class actions. The latter are what the 1966 Advisory Committee warned against certifying as damage class actions; they are epitomized by mass personal injury and property damage suits—so-called “mass torts.” While these two types of damage class actions share many features, they are distinguishable by the nature of the claims underlying them, the organization of the lawsuits themselves, and—to some extent—by the characteristics of the practices of the plaintiff attorneys who bring them.20 Too often, protagonists in the class action debate assume that what is true of the first type of class action is necessarily true of the second. As we shall see, this is not the case. Whatever social policy problems
are raised by damage class actions, solutions to them may differ for these different types of lawsuits.

Our discussion of how procedural rules shape litigants’ and lawyers’ incentives—and how those incentives, in turn, shape damage class action practices and outcomes—draws on the interviews we conducted with more than 70 corporate representatives, outside defense counsel, class action and mass tort plaintiff attorneys, and public interest and government attorneys. (Appendix C describes how we selected individuals for these interviews.) The discussion also draws on the vast scholarly and practitioner commentary on damage class actions and on our own previous research on mass tort litigation.

C. THE TRADITIONAL PARADIGM: REPRESENTATIVE ACTIONS FOR MONEY DAMAGES

Typically, representative class actions for money damages arise when someone believes that a violation of statutory, regulatory, or case law has caused economic harm to a large number of individuals or entities. This person could be a stockholder who finds herself with a suddenly less valuable portfolio, or a consumer who believes that he has been overcharged for a transaction or service, or a small business that believes that a competitor has engaged in unfair practices. If the loss is large and apparent to the individual consumer or business, that party may seek legal advice and, eventually, bring an individual lawsuit. But if the loss is small, it is less likely to be recognized by those affected, and it is less likely that anyone will come forward to claim compensation even if many individuals or businesses are affected by it. Most individuals are too preoccupied with daily life and too uninformed about the law to pay attention to whether they are being overcharged or otherwise inappropriately treated by those with whom they do business. Even if they believe that there is something inappropriate about a transaction, individuals are likely just to “lump it,” rather than expend the time and energy necessary to remedy a perceived wrong.21

Moreover, in some circumstances, courts have recognized grounds for claims that are inherently collective, rather than individual. For example, in securities law, the “fraud on the market” theory asserts that when a publicly traded corporation engages in behavior that artificially inflates or deflates the value of its stock, it can be held liable for the excess costs or losses incurred by those who purchased or sold stocks during the period after the corporation engaged in this behavior and before the behavior was brought to a halt.22 This sort of collective harm is unlikely to be detected by an individual stockholder, whose involvement in actual purchases and sales may be minimal.
1. The Class Action as a Tool for Compensating Small Losses and Enforcing Regulations

In theory, individual consumers and small businesses should be able to rely on public agencies charged with enforcing statutory law, such as the Securities and Exchange Commission (SEC), Federal Trade Commission (FTC), and state attorneys general, to take action against businesses that violate legal rules. But, in practice, public agencies lack sufficient financial resources to monitor and detect all wrongdoing or to prosecute all legal violations.

A series of articles on outbreaks of illness due to salmonella, cyclospora, and E. coli contamination of food products, published by the New York Times in 1998, illustrates this problem. Wrote the Times reporter:

Federal officials acknowledge they have paid little attention to farms and many small-scale processors because they have been overwhelmed by their responsibilities. The Food and Drug Administration has only 700 inspectors for 53,000 processors of everything from canned soup and [sic] frozen seafood, meaning, on average, only one inspection every 10 years.

The reporters quoted one California food processing company representative—whose facility had been found wanting—as saying state regulators had been “pretty lenient with us.” And they quoted the responsible state regulator as saying “there’s a lot out there we haven’t seen.” The head of the consumer division in a state attorney general’s office whom we interviewed echoed this observation, saying “no government agency has resources to bring [all] the cases that should be brought.”

Regulatory agencies’ decisions may be constrained also by political influence. The same government attorney who complained of scarce resources for enforcement also told us that his office’s decisions on enforcement were influenced by the political priorities of its head, who was an elected public official.

In addition, public officials generally do not bring actions that secure compensation for those who are affected by such wrongdoing. For example, SEC Chair Arthur Levitt has noted that private litigation is “the primary vehicle for compensating defrauded investors.”

As a consequence of all these factors, many believe that private class actions add an important dimension to regulatory enforcement. As Levitt put it when testifying before the U.S. House subcommittee considering securities class action reform in 1995:

Private actions. . . provide a necessary supplement to the commission’s own enforcement activities by serving to deter securities law violations. Private ac-
tions are crucial to the integrity of our disclosure system because they provide a direct incentive for issuers and other market participants to meet their obligations under the securities laws.28

But the notion that Rule 23(b)(3) was intended to be used for regulatory enforcement was sharply contested in the 1990s debate over damage class actions. Two members of the 1966 Advisory Committee that drafted current Rule 23(b)(3) have disputed this publicly. In testimony before the Advisory Committee in 1996, William T. Coleman, Jr. said:

I respectfully submit that back in 1966, [regulatory enforcement] 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. The courts’ tolerance for this vigilante-style use of class actions is a root cause of the abuses that must be corrected.29

Similarly, in testimony before Congress in 1998, John Frank said:

. . . the class action rule, wholly without regard to its original purpose, has become something of a device for social administration, which should never have been the product of the rules at all. These are matters which should be handled by the Congress and by the administrative agencies, and not by attempted efforts to govern various parts of the economy by lawsuits. . . (Italics added.) 30

Nonetheless, there is evidence that at least some of those involved in the 1966 process had inklings that the rule sometimes might be used as a substitute for administrative process. For example, Benjamin Kaplan, the Advisory Committee’s reporter (writing about whether individuals with small claims ought to be required to opt in affirmatively to class actions) observed:

[Requiring an opt-in procedure] would result in freezing out the claims of people—especially small claims held by small people—who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step. The moral justification for treating such people as null quantities is questionable. For them the class action serves something like the function of an administrative proceeding where scattered individual interests are represented by the Government.31 (Italics added.)

Moreover, scholarly commentary on class action litigation suggests that the notion of using collective litigation for regulatory enforcement arose long before the 1966 Advisory Committee’s deliberations. Writing in 1941, Harry Kalven and Maurice Rosenfield said:

Modern society seems increasingly to expose men to such group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all. This re-
sult is not only unfortunate in the particular case, but it will operate seriously to
impair the deterrent effect of the sanctions which underlie much contemporary
law. The problem of fashioning an effective and inclusive group remedy is thus
a major one.32

Kalven and Rosenfield went on to note that administrative law is one answer to
this problem:

Administrative law removes the obstacles of insufficient funds and insufficient
knowledge by shifting the responsibility for protecting the interests of the indi-
viduals comprising the group to a public body which has ample funds and ade-
quate powers of investigation.33

But administrative law and private class actions each had weaknesses, as well as
strengths, the authors concluded. Hence, "The best solution . . . is to draw upon
both systems of enforcement, permitting both to develop side by side to check
and complement each other."34

In sum, the historical record includes evidence for and against the notion that
regulatory enforcement is an appropriate objective of damage class actions.

2. The Class Action Attorney as “Private Attorney General”

If regulatory enforcement is a goal of damage class actions, then the question is:
Who will bring this litigation? If each individual or entity is harmed only a small
amount—even though the aggregate harm is large—or if individuals are not
aware of what corporations may and may not do under the law, none is likely to
come forward.

One alternative is to turn to nonprofit consumer advocacy groups and other
public interest lawyers to monitor corporate behavior, and ask them to identify
legal violations, locate individuals who have been harmed by these violations,
and bring class actions on behalf of all those consumers or businesses affected
by the behavior. And, indeed, organizations such as the American Civil Liber-
ties Union (ACLU), NAACP, and the National Organization for Women (NOW)
do bring class actions. But, in practice, most public interest organizations also
have insufficient resources to engage in systematic monitoring of corporate be-
behavior and extensive class action litigation.

As a result, over the years, private attorneys have taken on the role of spotting
potential legal violations, identifying individuals or businesses to serve as repre-
sentative plaintiffs, and filing class actions on behalf of a group of similarly situ-
ated individuals or businesses. These attorneys’ incentive is the fee that they
will earn if their suit is successful and, perhaps, a desire to assist the wronged
and deter future wrongdoing. As a result of judicial rulings (and, in some in-
stances, statutory provisions), plaintiff attorneys who win class actions can
expect to obtain either a percentage of the total sum paid by defendants or their actual hours and expenses, sometimes multiplied by a number intended to reflect special features of the litigation. If they lose, however, these attorneys have to cover their expenses out of their own pockets, and will receive no compensation for their time.

Public interest lawyers who are successful in winning class actions can earn these same fees, but they too have to incur the risk of going uncompensated—and having to find some other means of paying expenses—if they lose. Generally supported by limited private contributions, most nonprofit public interest organizations do not have the financial wherewithal to incur such risks frequently. Unlike public interest attorneys, private class action lawyers who have amassed some financial capital are able and willing to assume the risk of losing.

Relying on private attorneys to bring litigation on the public’s behalf has important consequences. Unlike other attorneys, who expect clients to come to them, class action attorneys must identify potential lawsuits. Hence, it is advantageous for them to specialize in particular types of litigation, for which different kinds of marketplace monitoring are appropriate, and to develop monitoring routines. As a result, some firms specialize in securities class actions, which requires understanding and following stock market dynamics, while others specialize in employment litigation or other areas of the law. Increasingly, these attorneys use regulatory, media, and other electronic databases to identify instances of possible corporate wrongdoing. Specialization and ever-more-available information on financial markets, business transactions, and corporate decisions improve class action attorneys’ ability to detect situations that might be attractive grounds for litigation. The attorneys may be spurred on, as well, by a desire to spread the costs of developing a particular line of litigation by finding opportunities to litigate multiple class action lawsuits alleging the same type of harm by different defendants or in different jurisdictions. Success in previous suits provides the wherewithal for exploring the potential for new suits, so the most successful firms are in the forefront of identifying new opportunities for litigation. They are also most able to accept the risks of litigating new issues, by testing the boundaries of existing law. In sum, the financial incentives provided by damage class actions to private attorneys tend to drive the frequency and variety of class action litigation upwards.

The key public policy question is whether the entrepreneurial behavior of private attorneys produces litigation that is socially beneficial. Whereas public attorneys general may be reluctant to bring meritorious suits because of financial or political constraints, private attorneys general may be too willing to bring nonmeritorious suits, if these suits produce generous financial rewards for them. The goal of class action law is getting the balance right between attorneys’ private incentives and the public purposes of class actions.
3. The Legal Framework for Damage Class Actions

A. Filing Suit

Plaintiffs alleging violations of federal statutes, such as the Securities and Exchange Act, the Magnuson-Moss Warranty Act,\textsuperscript{37} and the Federal Fair Debt Collection Practices Act,\textsuperscript{38} have a right to bring their class actions in federal as well as state courts. Generally, however, plaintiffs alleging violations of state law may bring suit in federal court only if they are citizens of different states than the defendants.\textsuperscript{39} In order to protect the federal courts from being inundated by lawsuits that could otherwise be brought in state courts, Congress also sets a monetary threshold for such “diversity” suits, which is increased over time to keep pace with inflation. Currently, a plaintiff must claim over $75,000.\textsuperscript{40} The U.S. Supreme Court has long held that each plaintiff in a damage class action must satisfy the monetary jurisdictional limit to file in federal court.\textsuperscript{41} This holding has effectively precluded most class actions comprising small dollar claims from being filed in the federal courts, even when the claims add up to more than the legislated threshold.\textsuperscript{42}

However, consumers can bring state court class actions for violations of state law. In the 1970s, as states adopted class action rules modeled after Rule 23, and state legislatures and courts articulated pro-consumer class action doctrines, state class actions began to proliferate.\textsuperscript{43}

But what happens when a corporation that markets its goods and services nationwide allegedly violates state law in multiple jurisdictions? In an important decision in 1986, the U.S. Supreme Court held that individual states may have jurisdiction over plaintiffs from other states who are joined in a class action brought in a single state.\textsuperscript{44} The results of this holding are that California and New York consumers may—to their surprise—find themselves members of class actions brought in Alabama and Mississippi, and that a state judge or jury in Alabama or Mississippi may be asked to interpret California and New York law.

The availability of state courts for nationwide class actions also means that different plaintiff attorneys may file duplicative nationwide suits, naming different representative plaintiffs in different states at the same time. Since state judges normally manage their cases without regard to whether or how similar cases are being filed elsewhere, the potential for duplicative parallel class actions can create a “race to the courthouse.” Whichever plaintiff attorney is able to settle a nationwide class suit first will obtain the fees associated with that case; only those who opt out of the class (usually only a small number) may bring suit against the defendant for the same alleged wrongdoing and harms.\textsuperscript{45} Plaintiff
and defense attorneys whom we interviewed frequently cited such duplicative class actions as a source of complexity and expense. They also said that duplicative lawsuits create an incentive for a plaintiff class action attorney to step forward to negotiate a settlement with the defendants that may not be in class members’ best interests, in order to be the one who claims the fees.

Once plaintiff attorneys identify potential wrongdoing and appropriate representative plaintiffs and file class actions in appropriate jurisdictions, they must conduct investigations to develop more fully the factual basis for the suit. The defendant may seek to have the court dismiss the case out of hand—for example, by arguing that even if the facts alleged by the plaintiff were correct, the defendant would prevail on the law. The defendant may contest the class certification itself, the definition of the class (e.g., its breadth) or other features of the suit, such as the representativeness of the prospective class plaintiffs. When plaintiff attorneys seek certification of a nationwide class action, whether in federal or state court, the defendant may argue that the suit does not satisfy the “commonality requirement” of the rule, because class members’ transactions were governed by diverse state laws, or that certification should be denied on the grounds that it will be impossible to manage at trial, because the jury will—in effect—have to assess the liability of the defendant under multiple legal standards.

B. Notifying Class Members

Under Rule 23(c)(2), potential (b)(3) class members must be notified that the litigation is proceeding and be given an opportunity to opt out. In an important 1974 ruling, the U.S. Supreme Court held that individual notices must be sent to all individuals who might be members of the class who could be identified with “reasonable effort,” and that the costs of the notices must be borne by the representative plaintiff(s), even where this requirement would effectively prevent the class action from going forward. As a practical matter, it is the plaintiff law firm, rather than the representative plaintiff(s), that must front these expenditures—which can total hundreds of thousands of dollars—and assume the risk of not recovering the expense if the defendant prevails. So, strictly applied, this interpretation of the Rule 23(c)(2) notice requirement has the effect of providing an advantage to the well-capitalized, risk-seeking plaintiff class action law firms that have the greatest capacity and the greatest incentive to increase the frequency and variety of damage class actions.

The rule does not specify when notice of the pendency of a class action should take place, but the wording of the rule suggests that this should follow soon after certification. The Manual for Complex Litigation, the leading reference
book for federal judges, encourages early notice. Such early notice means that at the time they learn of the case, potential class members cannot know how it will be resolved and whether, or how much, they might be recompensed for the alleged harms. If they do not opt out at this stage, they will be bound by the outcome. If prospective class members’ claims are very small they are not put at any real risk by this procedure, since without the class litigation they would not be able to gain anything. And, by agreeing to be bound—i.e., not opting out—they secure an opportunity to share in any monetary award. On the other hand, in securities and other class action litigation where recoveries might be substantial, early notice requires prospective class members to decide whether to opt out or remain in the class without knowing what the consequences of either strategy will be. Early notice may also pose risks for defendants. Informing the public of a pending class action—for example, if notices are published or broadcast, as well as sent through the mails—may attract media publicity, which may in turn affect stock prices or sales (if a product or service is involved), and attract regulatory attention. Early notice is also likely to lead to duplicative class action lawsuits, filed by other law firms seeking financial opportunities.

C. Resolution

If the judge certifies the class and defendants cannot win a dismissal, they will mount a defense on the facts and law and the case will proceed to a resolution by settlement or verdict. Most of the time, class actions—like other civil lawsuits—do not go to verdict.

When the number of class members can, in theory, be estimated—because it is known, for example, how many shares were traded during the period of the alleged fraud on the market, or how many ATM transactions took place, or how many insurance policies were sold—the plaintiff attorney and defendant can negotiate a settlement of the class action by arriving at a formula to calculate the total damages. Typically, when parties negotiate a compromise resolution of a civil case, the defendant does not admit to any liability but agrees to pay some amount to avoid additional litigation costs and the risk of a large verdict; the plaintiff agrees to accept less than the maximum amount she thinks she might win at trial in order to avoid the possibility of losing entirely or winning less than the defendant was prepared to offer before trial. So, too, when the plaintiff attorney and defendant agree to settle a class action, they arrive at a compromise value for the class members’ claims. For example, they may agree that the defendant should pay a specified number of cents per dollar of claimed loss.
In principle, the settlement value of a civil case reflects the strength of the factual and legal claims underlying it, adjusted by such factors as the attorneys’ beliefs about the propensities of judges in a particular jurisdiction to rule in favor of civil plaintiffs or defendants, and the sympathy a plaintiff might elicit from a jury, and by the parties’ risk preferences. In practice, plaintiff and defense attorneys who are well versed in a particular area of the law frequently settle cases according to “rules of thumb”—for example, in an automobile accident case, the plaintiff will get two to three times the amount of his medical bills, work loss and other documented damages—without too much differentiation on account of the characteristics of the claim.\(^{53}\) In a widely noted article, Professor Janet Alexander has suggested that plaintiff attorneys and defendants settle securities class actions in a similarly formulaic fashion.\(^{54}\) Although her analysis has been questioned because of its slim empirical base,\(^{55}\) her notion that experienced class action litigators, just like other experienced civil litigators would, over time, develop “rules of thumb” for settling financial injury cases seems sound.\(^{56}\) We might expect that different types of rules would emerge for settling deceptive advertising cases, transaction fee cases, and sales practice cases, but within a “family” of cases we might see similar strategies applied to different class action suits. Such strategies would have the effect of reducing transaction costs for plaintiff attorneys and defendants, but might also result, over time, in increasing divergence between the merits of individual cases and their outcomes. The emergence of easily applied and generally accepted “rules of thumb” might also have the effect of encouraging litigation, since plaintiff attorneys would anticipate that they could reach settlements relatively easily without substantial discovery or pretrial negotiation. This is an example of how the efficiency gains from damage class actions may have enabling consequences.

**D. Judicial Approval**

In most civil litigation, settlement between the parties is a private affair. But because class actions have the power to bind class members who are not present in court—precluding them from coming forward on another occasion to claim a remedy for the harms alleged in the class action lawsuit—Rule 23(e) requires the judge to approve agreements between the plaintiff attorney and defendants to settle the case. Although the rule does not state either the criteria for assessing the settlement or the procedure that the judge should use, standards have been articulated in case law.\(^{57}\) Settlements must be “fair, adequate and reasonable,”\(^{58}\) and judges are expected to hold hearings on the fairness of the settlement.

Rule 23(e) requires that class members receive notice of a proposed settlement of the litigation; the notice allows class members (and possibly others) to come
forward to object to the settlement’s terms if they so desire. Rule 23(d)(2) also permits judges to require notices of other key steps in the litigation process. Courts have interpreted these rules liberally to allow for combining notice of the certification of a class action with notice of the provisions of a proposed settlement of that class action. In such instances, at the time they decide whether to opt out, class members know the features of the overall settlement, although they may not know precisely how it would affect them.

E. Attorney Fees

In ordinary litigation, we expect the parties themselves to negotiate fee arrangements with their attorneys. But in damage class actions, class members typically do not have an agreement with the class attorney. Under long-established legal doctrine concerning the creation of a “common fund” through litigation, judges decide what fees the plaintiff attorneys will receive. (Some statutes also call for judges to award fees to prevailing plaintiff attorneys.) The underlying principle is that all who share in the fund should share in paying the class attorney, even though they have not entered into any prior agreement to hire and pay this attorney. In deciding what fees should be paid, the court assumes a fiduciary role on behalf of class members. Their interests concerning the amount of fees are adverse to the class attorney’s, since the size of the fees will often affect the amount of money available for class members themselves, but they have little ability, as a practical matter, to make those interests known.

Historically, courts have adopted one of two methods for calculating attorney fees in class actions. The “percentage of fund” (POF) method, as its name implies, calls for the judge to set aside a percentage of the dollars paid by defendants for the class attorney. (The judge may make a separate award to cover the attorney’s expenses, based on records submitted by the attorney to the court.) For many years, this was the standard method for judges to award fees in common fund cases.

In the 1970s, in response to criticism that the POF method led to excessive fees that were unrelated to the actual effort expended by plaintiff class attorneys, courts turned increasingly to the “lodestar” method, which calls for the judge to award fees that are the product of “reasonable” hours expended and “reasonable” hourly fees. However, in the belief that hours would not always accurately reflect effort, courts often applied a “multiplier” to the product of hours times fees (e.g., twice the product) to reflect the riskiness of the case when the attorney took it on or the quality of the attorney’s efforts. Hence, the lodestar method required a higher level of judicial effort than the straightforward application of the POF rule. The judge had to review voluminous
lawyers’ records, assess the risk the lawyers faced in taking the case, evaluate the quality of the lawyers’ work, and take into account any other factors that should enter into setting a multiplier. Faced with the difficulties of implementing the lodestar approach, courts began in the 1990s to turn back to the POF method for awarding fees in damage class actions.64

But the POF method is also subject to interpretation: In deciding what percentage of the fund to award to plaintiff class attorneys, a judge may take into account the effort expended by the attorney (for example, was this groundbreaking litigation or one of a long line of suits, requiring only modest new effort?), the absolute size of the fund (even 10 percent of a large fund amounts to a substantial fee), and other value created by the suit, such as forcing the defendant to change its business practices or provoking regulatory or legislative action. In practice, then, the lodestar and POF methods may converge, as judges rely on both the lawyers’ hourly records and their subjective evaluation of the outcome of the class action—sometimes termed the “hybrid” approach. Whatever the approach, it is not uncommon for lawyers to challenge judges’ fee awards.65

Looking to something other than the monetary fund created by the resolution of a class action as a guide for setting fees may be normatively attractive,66 but it raises knotty questions for the judge. Assessing the additional value of a consumer class action—where plaintiff class attorneys may assert that the litigation changed defendant practices in important, but hard-to-monetize, ways—may be difficult. In practice, it is simpler for judges to award a standard percentage of the monetary fund created by the class action. The most widely cited standard is 25–30 percent,67 a figure that most likely derives from the practice of tort attorneys who charge one-third contingency fees. But both plaintiff and defense attorneys whom we interviewed said that the percentage awarded is often much smaller when the settlement fund is large.68

Assigning the judge responsibility for awarding fees suggests that the size of the fees should not be a part of any settlement negotiations between the plaintiff attorney and the defendant, and that the fee decision should come after a settlement is reached, rather than before. Some scholars have argued, and some judges have held,69 that allowing the plaintiff attorney to negotiate fees in the course of settlement negotiations would inevitably place the attorney in the position of having to choose between her own financial interests and those of her clients. Defendants could use their ability to determine the size of the fee, the scholars argue, to drive a better overall bargain for themselves, one that would not necessarily be in the interests of class members. But, in 1985, the U.S. Supreme Court upheld the right of parties to include a fee stipulation in settlement agreements, seemingly paving the way for plaintiff attorneys and defendants to include understandings about fees in settlement agreements. If a
judge does not approve such a fee understanding, the Court held, he can refuse to approve the entire settlement agreement under Rule 23(e).70

4. The Temptation to Collude

The role of plaintiff attorneys in damage class actions has long attracted scrutiny. The central fear of critics is that these attorneys, unregulated in any real way by clients, and subject to the attractions of large fee awards, will fail to prosecute claims fully and will agree to settlements that better serve their own interests—and the defendants who should be their adversaries—than those of class members. A related fear is that if plaintiff attorneys secure settlements that are financially attractive without having to engage in serious investigation and vigorous prosecution of their claims, then, over the long run, they will bring increasing numbers of nonmeritorious suits, knowing they are likely to benefit from them. Over the long run, a process that encourages and rewards filing nonmeritorious suits and that permits settlement of meritorious suits for less than their true value will undercut the potential deterrence value of litigation and bring the legal system into disrepute.

To understand the fear of collusion, we need to take a closer look at how class action settlement dynamics may tempt plaintiff attorneys and defendants to collude in cases involving small individual losses. If a plaintiff attorney were to take on only one class action lawsuit, it would clearly be in his interest to pursue that case to its maximum advantage, taking into account the costs and risks of litigating, thereby simultaneously serving his own and the class members’ interests. Similarly, the defendant contesting such a class action would have every reason to properly assess its liability exposure and to base its decisions concerning how much to invest in litigating the case, and whether and when to settle it, on a rational cost-benefit analysis. (The defendant’s attorney, typically charging on an hourly basis, might have an incentive to overinvest in the case and prolong it. But because the typical defendant to a damage class action is a large corporation—small businesses being unattractive financial targets—the defendant has incentives to monitor its attorneys to minimize the likelihood of overinvestment occurring, and it also has access to the expertise necessary to carry out such monitoring, if it chooses to do so.)

But, as we have seen, the successful plaintiff class action firm will have an inventory comprising many class actions, not just one. The costs and risks of litigating these suits may be such that it is more attractive to the firm to achieve a less-than-optimal resolution for class members in each of these suits, and take on a larger number of suits, than to pursue each suit to the maximum and take on a smaller number. This same pressure exists in ordinary civil litigation, such as automobile accident personal injury cases, where there are economies of
scale associated with maintaining a high-volume practice. But in auto accident cases, we expect individual clients to exert pressure to prevent their attorneys from settling for less than full value (although experiential and research data suggest that few clients assert this control\(^{71}\)). In damage class actions involving small value claims, there are usually no real clients to make demands.

The defendant in a class action suit, facing a plaintiff class action attorney who is pursuing an inventory-oriented litigation investment strategy, might expect to pay less than it would to resolve a similar class lawsuit brought by a plaintiff firm pursuing a single-lawsuit-at-a-time investment strategy. If the defendant and the plaintiff attorney can reach an agreement to settle the case early, they both can save significant amounts of money—for example, by not undertaking full discovery and not engaging in time-consuming pretrial motion practice. As a result, significant wrongdoing on the part of the defendant—the sort of thing discovery is intended to ferret out—may never come to light. In this instance, the defendant will pay less to settle the case than it would if the information had been discovered, but it will pay enough for the plaintiff attorney to derive a satisfactory amount in fees. Conversely, without discovery, the fact that the defendant did not do anything for which it may be held accountable under law will not come to light. In this instance, the defendant will actually pay more to settle the case than it might have if exculpatory information had been discovered, but it believes that settling early is still cheaper than moving forward, because doing so saves litigation costs. Neither outcome is in the interest of consumers, who only benefit when defendants pay for real harms imposed by defendants’ illegal behavior.

Suppose that a plaintiff law firm decides that it can do well financially by bringing class actions against “deep-pocket” corporations and offering to settle them very early in the litigation process—perhaps before any discovery has taken place—for an attractive price to the defendant. The defendant obviously would prefer not to be sued, but if it is going to be sued, this plaintiff firm is a better one to deal with than other plaintiff class action firms that have a policy of investing more in the litigation to better determine the merits of the case and obtain commensurate settlements. In fact, the preemptive settlement might be such an attractive proposition that if a corporation knew that it had done something that could attract class action litigation, it might take the initiative itself and contact a plaintiff firm willing to engage in such practices and offer to settle a lawsuit, if the plaintiff firm would bring it. If it were sued, even a corporation that believed it had done nothing that could reasonably result in liability for class damages might decide it was cheaper to settle all class action lawsuits against it early in the litigation process, for negligible amounts, rather than incur the direct and indirect costs of litigation, including lost executive time and negative publicity. In all these instances, consumers ultimately lose, as the
costs of litigation are passed on to them in the form of higher prices without commensurate benefits.

Independent of their timing, settlement negotiations offer additional opportunities for plaintiff attorneys and defendants in class actions involving small claims to collaborate in ways that may not be in the interests of class members. At the time they negotiate, the plaintiff and defense attorneys may not know exactly how large the class is—e.g., how many shareholders bought shares during the period of the alleged fraud, how many individuals accessed the ATM machine, how many consumers bought orange juice with misleading labels. In consumer class actions, the class is often gigantic: for example, under the terms of a widely reported settlement of a 1980s class action lawsuit against Levi Strauss & Co., an estimated 7 million households were eligible to collect a maximum of $2.00 per pair of blue jeans purchased. Almost 9 million individual and commercial checking account holders were eligible to collect refunds under the terms of a 1988 settlement of a consumer class action against Bank of America.72

Even if plaintiff attorneys and defendants know how many individuals will satisfy the criteria for class membership, they still do not know precisely how many will come forward to claim their share of the settlement. It was estimated that somewhere between 14 and 33 percent of all eligible consumers filed claims in the Levi Strauss suit. But, in a 1988 suit against Wells Fargo, less than 5 percent of eligible account holders came forward to claim refunds. Because there is no public registry of claiming rates in class action settlements, there are no universally accepted benchmarks for estimating the proportion of claimants who will come forward to claim their share of a settlement under different circumstances.

A significant issue in reaching agreement on a monetary amount to settle the case is whether that amount should be based on the (estimated) number of eligible class members—e.g., all mortgage holders or all insurance policy holders—or only on the much smaller number of class members who probably will come forward to claim their settlement. Assuming a constant value per class member, calculating the settlement on the basis of the total number of eligible class members will yield a larger dollar settlement. Under the POF rule, a larger settlement will likely result in a larger fee award to the plaintiff attorney.

Suppose the plaintiff attorney and the defendant both know (or believe) that the total class size is one million consumers, but based on previous experience with class action litigation, they believe that only 20 percent of the consumers will come forward to claim their share of the settlement. If the attorneys agree to a per-consumer share of $1.00, the value of the settlement based on total class size is $1 million, even though class members will claim only $200,000.
Suppose further that the plaintiff and defense attorneys agree to present the settlement to the judge as worth $1 million; that the defendant agrees, informally, not to dispute a plaintiff attorney fee request to the judge for a contingency fee of 30 percent, based on the $1 million value; and that the plaintiff attorney agrees to settlement terms that provide for any money not collected in claims payments to revert to the defendant (sometimes called a “claims-made” settlement). In this scenario, the class members collect $200,000, the plaintiff attorney pockets $300,000, and the defendant’s total cost to settle the suit is $500,000. If the defendant were to insist on valuing the settlement at $200,000, the plaintiff attorney likely would not settle the case, since the fee (calculated at 30 percent) would be only $60,000. If the plaintiff attorney insisted on settlement terms that required the defendant to pay the difference between the total value, based on class size, and the actual amount claimed, to a trust fund (that could donate the residual to a worthy cause), the defendant might not settle the case, since its total cost would now be $1 million (or even $1.3 million, if the lawyer fees were added on to the total settlement value, as they sometimes are).

What the right settlement amount is in these circumstances is not clear. Recall that, in both scenarios, the threshold question of whether the defendant has broken the law is not answered because the case has not been decided by a judge or jury, and the defendant has not admitted liability. Moreover, there may have been little discovery, so both the deterrence value of the litigation and the class members’ entitlement to compensation are unknown. In the first scenario—where the class members collect $200,000, plaintiff attorneys collect $300,000, and defendants pay $500,000—those consumers who choose to come forward receive reimbursement for the economic harms they have allegedly incurred, and the defendant incurs the risk of having to pay an amount that arguably equals the total cost of its alleged legal violation (which is the theoretically correct amount to deter it and others from future misbehavior) although it ultimately pays only half that amount. In 1980, in *Boeing v. Van Gemert*, the U.S. Supreme Court held that plaintiff attorney fees can properly be calculated based on the total fund created by a class settlement, notwithstanding the fact that some of the monies may go unclaimed by class members. In the second scenario, where there is no settlement, class members might ultimately get nothing (the plaintiffs could lose at trial or the class action attorney might drop the case, for lack of funds to prosecute further), and the defendant might pay only its litigation expenses, which could be considerably less than the amount necessary to deter future misbehavior. Whether this is a good or bad outcome depends on whether the defendant has actually broken the law.

Should we care how the amounts defendants pay to settle class actions are divided between the class action attorney and the class members? If, in fact, the defendant should not be held liable (for example, when it has agreed to settle
just to avoid bad publicity, transaction costs, etc.), then the class members and their attorney are sharing what might be regarded as ill-gotten gains, and it is not clear who has the greater entitlement to those gains. If the defendant should be held liable, and a primary goal of the class action is regulatory enforcement, then, from the perspective of economic theory, the distribution of that payment is not important as long as the defendant pays a sufficient amount to deter bad behavior.

But, to some observers, it seems inappropriate in most, if not all, circumstances for the plaintiff attorneys to pocket more in fees than the class members receive in the aggregate. Moreover, when—as is the case in small damage class actions—the attorneys pocket much more than any one individual class member receives as a result of the suit, many feel that it is a clear indication that something has gone awry in the process. John Frank, who describes himself as a “blatant ‘liberal’ and old New Dealer,” has written:

The disproportion of the returns to members of the class and the returns to the lawyers who represent them is often grotesque. In many cases, the individual members of the class are entitled to receive at most a dollar or two, while the attorney who secured this benefaction for them can retire on his share of this victory.75

Others have even more scathing responses to such settlements, as illustrated in Figure 3.11, a cartoon depicting plaintiff attorneys, which appeared in an opinion column of the San Francisco Daily Journal (a legal publication), under the title “class clown.”

Plaintiff attorneys are not insensitive to such attacks. One plaintiff attorney told us that his firm had just decided not to take on a consumer class action on the grounds that, while the case appeared to be meritorious, it would inevitably yield large fees to the attorneys, and small dollar awards to class members—and, in the process, make the firm “look bad.”

The propriety of large fees for settlements is even more susceptible to question, many feel, when plaintiff attorneys agree to terms that offer class members nonmonetary rewards, such as coupons to purchase products and services at a discount. Valuing these nonmonetary offers is even more difficult than simply estimating the number of class members who will come forward to claim shares of a monetary settlement, because some coupons have restrictions on their use and are designed not to be easily transferable. As a result, “coupon settlements” offer greater opportunity for plaintiff attorneys and defendants to collaborate in inflating the true value of the settlement when they present it to the judge for his approval.76 Moreover, some critics are offended by the notion of remedying alleged harms to consumers by offering them discounts to buy more
products or services from the alleged harm-doers. Some plaintiff lawyers whom we interviewed pointed to settlements for what one dismissed as “scrip” as a primary source of public opprobrium concerning class actions. However, some plaintiff and defense attorneys whom we interviewed argued that coupons are sometimes an appropriate vehicle for compensating class members—for example, when the class is so large and the agreed-upon remedies so small that the costs of administering a cash payment program would dwarf the amount paid to class members.

Others whom we interviewed said that all nonmonetary components of settlements, such as promises to invest in public information campaigns and alleged changes in defendant business practices, ought to be viewed skeptically by judges charged with approving such settlements. Such qualitative aspects of
settlements, these critics charged, are highly subject to manipulation; defendants may agree to perform something as part of the settlement that they have already done or promised to do in response to previous regulatory action.

For those who look to damage class actions for regulatory enforcement, the key issue posed by coupon settlements is whether they permit culpable defendants to pay less than the amount necessary to deter improper practices. In principle, the value of coupons could be set high enough, and the procedures for distribution and redemption could be designed, to maximize the probability that culpable defendants pay the theoretically optimal penalty. The question is how well the value of coupon settlements matches this theoretical value in practice. If coupon settlements simply provide an easy means of settling damage class actions, without regard to underlying merit and with few—if any—gains to class members or consumers generally, then such settlements tilt the scales on the side of private gain, rather than public good.

Less visible to the public than coupon settlements are settlements of proposed damage class actions in which the plaintiff attorney agrees to drop a suit filed as a class action for settling the representative plaintiffs’ claims and for larger fees than the attorney would have obtained by filing and settling the representative plaintiffs’ claims as individual lawsuits. (A variant of this strategy is to threaten to file a class action suit, unless the defendant settles the individual claim(s) expeditiously and for an attractive amount.) If the proposed class action appeared at first to have merit, and the attorney only subsequently discovered through investigation that the case was too weak to prosecute, then settling the individual claims is better than investing additional private and public resources in pursuing the class action. From a regulatory enforcement perspective, allowing the plaintiff attorney larger fees in this case might be viewed as a proper incentive for attorneys to investigate potential wrongdoing. But if the plaintiff attorney filed or threatened a class action merely to leverage a higher settlement for nonmeritorious individual claims and higher fees, then rewarding the attorney encourages frivolous litigation and imposes costs on the defendants that ultimately will be passed on to consumers. On the other hand, if there were a reasonable basis for a class action lawsuit, and the plaintiff attorney dropped the claim in return for a higher settlement and higher fees for meritorious individual cases, then, from a regulatory enforcement perspective, settling the individual cases might result in underdeterrence.77

Collusion between plaintiff attorneys and defendants—when it occurs—offends the sensibilities of many observers. Its importance from a societal point of view is that it dilutes the regulatory enforcement effect that is often claimed as a chief benefit of class actions for small-dollar losses.
5. Barriers to Collusion and Self-Dealing—and Weaknesses Therein

Notice requirements, fairness hearings, provisions for class members to object to a proposed settlement and for non-class members to intervene in the litigation for the purpose of objecting, and—most importantly—assigning judges the responsibility for approving settlements and fees, are all intended to counteract the incentives for plaintiff attorneys and defendants to collaborate in negotiating inappropriate settlements. But there are many reasons for believing that these rules and practices do not provide sufficient obstacles to self-dealing by those who want to engage in it.

In consumer class actions, where individual damages are small, class members are unlikely to avail themselves of the proffered opportunities to influence the litigation. Notices that require prospective class members to decide whether to opt out or not without knowing what the outcome of the case might be, and notices that indicate the aggregate terms of a settlement without indicating what an average class member might receive, do not offer strong incentives for absentee plaintiffs to come forward and state their preferences. Fairness hearings may be held at a time and place that make it unlikely that an average class member could appear. In any event, class members have little to gain from participating when the individual damages are small.

Figure 3.12 reproduces a typical published notice informing consumers of a scheduled fairness hearing on the settlement of a statewide class action in California. The hearing is scheduled for the morning of a workday in the county courthouse in downtown Los Angeles—not easily accessible to many in far-flung Los Angeles County, much less to residents of other parts of California. Of course, it is not expected that individual class members will want to attend the hearing themselves. If they are distressed by the proposed settlement, they should secure counsel to represent them, or so the theory goes. But what would motivate an individual to do this? From the notice, it is uncertain whether the defendant actually violated a law, the import of the alleged violation is unclear, and what individual class members have to gain from the settlement cannot be precisely calculated from the information given.

In securities class actions and some antitrust actions, some class members have incentives to participate in the litigation, and may attempt to do so by forming committees that prod plaintiff attorneys to negotiate more vigorously on their behalf. Class members sometimes appear at fairness hearings to object to the terms of proposed class action settlements. But objecting class members may not hold sway; on occasion, district courts have approved settlements to which even the representative plaintiff—in theory, the class attorney’s client—objects.78
NOTICE OF PENDENCY OF CLASS ACTION
AND SETTLEMENT HEARING

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES
MEYER SCHWARTZ, DECEASED, ETC., PLAINTIFF, ROCHELLE C. LINDEE,
PLAINTIFF IN INTERVENTION VS. UNITED STATES SHOE CORPORATION, ET AL.
CASE NO. BC090615

If you made a credit card purchase in California between December 23, 1992,
and the present, at any of the following retail stores, your rights may be affected
by this lawsuit and you should read this notice. The stores are those doing
business in California under the trade names “August Max,” “August Max
Woman,” “Casual Corner,” “Casual Corner Outlet,” “Casual Corner Woman
Outlet,” “Petite Sophisticate,” “Petite Sophisticate Outlet,” “Casual Corner
& Company” and “Caren Charles.”

Description of the Lawsuit. A lawsuit is pending against United States Shoe Corporation ("U. S. Shoe"),
which has operated various stores named above in California. The suit claims U. S. Shoe has violated
California law by requesting that its customers in credit card transactions provide personal identification
information, the telephone number of the cardholder, as a condition of the customer making a credit card
purchase. Plaintiff alleges that this conduct violated California Civil Code Section 1797.3. U. S. Shoe denies
liability. The court has not ruled on the merits of plaintiff’s claims or U. S. Shoe’s defenses.

Class Definition. Unless you opt out of the Plaintiff Class in the manner described below, you are a
member of the Plaintiff Class if you are a person included within the following definition:

All issuers of a VISA, MasterCard, American Express, Discover Card or any
non-U. S. Shoe credit card who, using one of the aforesaid non-U. S. Shoe credit
cards, made a credit card purchase at any U. S. Shoe store located in the State of
California during the period commencing December 23, 1992, through and
including the effective date of the Settlement Agreement in this action.

Description of the Proposed Settlement. The parties have entered into a Settlement Agreement, which
provides in substance that: U. S. Shoe agrees not to utilize in any U. S. Shoe store located in the State of
California, as referenced above, credit card sales forms containing preprinted spaces specifically designated
or indicating a place on the form for filling in any “personal identification information” (as defined in California
Civil Code § 1797.8) of the cardholder; U. S. Shoe agrees not to request or require, in any of the above-
described U. S. Shoe stores in California, as a condition to accepting credit cards as payment in full or in part
for goods or services, that the cardholder write or provide any personal identification information, except upon
making reasonable disclosure that the information solicited is not required as a condition of use of the credit
card, unless otherwise permitted by law; U. S. Shoe agrees not to utilize in any way, unless required by contract
or law, any personal identification information pertaining to any cardholder which was acquired in any U. S.
Shoe store located in the State of California and which was entered into records maintained by U. S. Shoe,
including computer memory, through use of credit card sales forms containing preprinted spaces specifically
designated or indicating a place on the form for filling in any personal identification information of the
cardholder; U. S. Shoe will mail by first class mail one Discount Coupon each to approximately three hundred
forty thousand (340,000) California residents, based on a random selection process from the current customer
list or lists of U. S. Shoe, and honor every valid Discount Coupon so issued; the Discount Coupon will entitle
the bearer to a twenty-five (25%) percent discount on all regular price items purchased during a single
transaction, before taxes, at any U. S. Shoe store located in the State of California; the Discount Coupons are
not redeemable for store credit or cash, are not valid with other discount offers or promotions, or on a purchase

Figure 3.12—Notice of Pendency of Class Action and Settlement Hearing
The judge’s ability to assess the value of the settlement is constrained because a case that settles before trial has, by definition, not been the subject of a full-fledged, comprehensive evidentiary hearing involving fact and expert witnesses, cross-examination, and documentary evidence. Rule 23 does not instruct judges as to how they should go about assuring a fair and reasonable settlement in the absence of trial. Drawing on case law and experience, the Manual on Complex Litigation suggests that the judge consider whether the lawyers had enough information to arrive at an “informed evaluation” (for example, how much discovery did they conduct?), the likelihood that plaintiffs would succeed at trial, and the “range of possible recovery.”79 In assessing the latter two fac-
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tors, judges must rely on the information presented by the lawyers, plus their own experience in trying cases. Some judges have had extensive experience presiding over complex cases, including class actions, but because class actions arise relatively infrequently in most jurisdictions and are usually settled, a judge may not have had previous experience trying a similar case. And, because—in sharp contrast to their usual roles—the plaintiff attorney and defendant are united in wishing to persuade the judge to approve the settlement, the attorneys’ assessment may be a slim reed upon which to rely.

To help judges make an assessment, the Manual notes that they may wish to request further discovery or expert testimony, particularly where "settlement is proposed early in the litigation." But the language of the Manual captures the dilemma facing the judge: On the one hand, it tells the judge

\[\text{[C]ourt review must not be perfunctory; the dynamics of class action settlement may lead the negotiating parties—even those with the best intentions—to give insufficient weight to the interests of at least some class members.}\]

On the other hand, requiring further discovery "will increase attorneys’ fees and expenses—the avoidance of which was an inducement for settlement." And because the parties bringing the information before the judge have a shared interest in persuading the judge of the reasonableness of the settlement, discovery "may produce evidence whose trustworthiness is suspect." Hence, "[discovery] should be kept to a minimum."

Independent parties, who request permission to "intervene" in the litigation so that they may register objections to a settlement, provide one possible means of bringing information that is contrary to the information offered by the settling parties before the judge. Public Citizen and Trial Lawyers for Public Justice are two nonprofit organizations that have objected to a number of proposed class action settlements in recent years. From 1990 to 1997, Public Citizen appeared on behalf of objectors or as an amicus curiae ("friend of the court") in about 20 damage class actions, more than half of which were consumer cases. Some individuals have also appeared on the class action scene, representing themselves as independent objectors. Objectors may petition the courts for fees separate from the fees paid to class counsel. But objecting requires a substantial expenditure of resources, and sometimes judges presiding over class actions do not provide enough time or access to case information to facilitate objectors’ involvement. Describing their involvement in a case in which plaintiffs sought damages from Ford Motor Corporation for allegedly faulty Mustang construction and accepted coupons in settlement, Public Citizen’s attorneys noted: “The judge was not hospitable to our objections at the fairness hearing, which lasted less than 30 minutes.” In another class action, this one dealing
with toxic exposure, the federal magistrate judge who approved the settlement “denied [Public Citizen’s] clients the right to take discovery.”

Moreover, objectors are not disinterested parties. Public Citizen is a consumer advocacy group; Trial Lawyers for Public Justice is supported by contributions from the plaintiff trial bar. And other objectors are not nonprofit organizations. In our interviews, we heard from defense and plaintiff counsel about individual lawyers who appear as objectors to a settlement, in pursuit of fees for themselves; we also were told of attorneys who threaten to appear as objectors unless class counsel agree to share some portion of the fees that will be awarded to them. Some of these objectors may be plaintiff attorneys who have filed duplicative class actions in other jurisdictions. By threatening action in those jurisdictions, which might impair the ability of attorneys in other jurisdictions to secure acceptance and approval of a proposed settlement, these “objecting” attorneys may be able to secure significant fees.

Judicial control over plaintiff attorney fees offers a means of promoting faithful adherence to class members’ interests by plaintiff attorneys. But judges’ ability to assess the value of the plaintiff attorney’s effort is constrained in the same way as their ability to assess the fairness and reasonableness of settlements. Although defendants need not be part of the fee decision—and some have argued that they should not be part of it—our interviews with plaintiff and defense counsel suggest that understandings about plaintiff fees are often part of the settlement negotiations. In any event, settling defendants, along with the plaintiff class attorney, have promoted the value of the settlement to the judge in order to gain approval of the deal, and are therefore not in the best position to dispute plaintiff attorney fee requests.

Plaintiff attorney fees have been a source of contention in some class actions, and the particular target of public interest objectors. But, as in the case of objections to settlements generally, the process for objecting to fees is itself rife with conflicts. Intensive scrutiny of attorney fee requests, particularly submissions of hours and expenses, is an expensive and time-consuming business for objectors as well as judges. A further complication is that some courts have held that plaintiff attorneys are not required to disclose fee arrangements among themselves, once the settlement has been approved by the judge. Some objectors believe that these arrangements contain information that is germane to assessing the merits of the settlement, as well as the reasonableness of the fee requests.

Many of these obstacles to judicial control over settlements of damage class actions have been the subject of scholarly commentary, particularly concerning securities class actions. Another constraint on judicial control has received less attention: Plaintiff attorneys and defendants who cannot obtain judicial
approval for settlements from one judge may be able to secure approval from another, simply by filing the same or a similar lawsuit in a different jurisdiction.

The history of litigation over alleged deficiencies in the G.M. pick-up truck fuel tank design illustrates this problem. In the early 1990s, numerous truck owners filed lawsuits in state courts alleging that the value of their vehicles had been diminished by alleged defects in fuel tank design, which had received widespread publicity as a result of a high-profile personal injury lawsuit and subsequent television coverage. General Motors removed the cases to federal court, and then successfully moved to collect them in a single federal district court under the multidistricting rules. Subsequently, plaintiff attorneys and defendants sought and obtained certification of a settlement class, and judicial approval of a settlement under which the main benefit provided to truck owners would have been a certificate (or “coupon”) offering a discount on specified future G.M. truck purchases. The settlement (and proposed attorney fees) proved controversial, and was eventually rejected by the Third Circuit Court of Appeals. Although the basis for the Third Circuit’s rejection of the settlement was that the district court had not established that the proposed class met Rule 23(b)(3) requirements for certification, the court also identified numerous deficiencies in the proposed settlement.

Instead of attempting to renegotiate the settlement in the federal district court, the plaintiff attorneys and defendants shifted their attention to a state court in Louisiana, where a similar nationwide class action was pending. They modified some of the features of the proposed settlement, including extending the period during which the discount certificates could be used, allowing for the certificates to be transferred to other potential purchasers of trucks (so that a secondary market could be established), and creating a fund for “auto safety.” The original objectors to the federal class action settlement, with some reluctance, agreed to support the new settlement, and the state trial court in Louisiana certified the class and ultimately approved the settlement.

Following the conditional certification of the nationwide class in Louisiana, a new set of objectors sought both to intervene in the state proceedings and to mount a challenge to them in the federal district court to which the federal lawsuits had earlier been transferred. The federal district court rejected their efforts, and they appealed to the same federal circuit court that had rejected the initial settlement proposal three years before. This time, noting various legal doctrines that constrain federal courts from interfering with state courts—and noting, as well, that the settlement had already secured final approval from the Louisiana state court—the Third Circuit rejected the appeal.

Finally, in addition to these class action-specific factors, other features of the judicial environment militate against judges aggressively investigating the fair-
ness and reasonableness of settlements. Over the past three decades, in re-
response to perceived increases in the judicial workload and decreases in court
funding, judges have moved away from their traditional role as adjudicators to-
ward a more management-oriented perspective. As managers, judges are ex-
horted to “clear their dockets” expeditiously, and the rate at which they dispose
cases is monitored. Promoting settlement is widely viewed as an effective
means of clearing dockets, and judges are now schooled in methods of per-
suading parties to settle, rather than adjudicate, their disputes. In the rhetoric
of settlement, legal cases are not about wrongs and rights and legal remedies,
but are rather problems to be solved by the parties in a businesslike fashion. In
this environment, some judges may feel that closely questioning parties who
have agreed to settle a class action expeditiously is out of step with the times.

To distance themselves somewhat from the settlement process—and thereby
preserve their ability to independently assess the value of the deal that the at-
torneys have struck—some judges ask other judges to preside over settlement
negotiations, or appoint “special masters” (independent experts) to assist the
attorneys. Some attorneys are widely known for their negotiation skills and
have served in the special-master role in numerous large-scale litigations, and
some judges have long experience working with particular special masters.
But we were told by one plaintiff attorney that even special master appoint-
ments are subject to manipulation; attorneys and parties who want room to ne-
gotiate certain deals may propose to the judge that she appoint a special master
whom they expect will support their preferred settlement strategy.

As an alternative to judicial scrutiny of class action settlements, Professors
Jonathan Macey and Geoffrey Miller have proposed that judges “auction” off
class action lawsuits to the highest bidder as soon as litigation is initiated. Un-
der their proposal, once a judge was satisfied that the essential elements for a
class action were present, she would request financial bids from attorneys and
others who were willing to pay for the right to litigate against the defendant.
The winning bid would be paid into court, which would promptly distribute the
funds to class members. Receipt of the funds would extinguish the class mem-
ers’ claims against the defendant. The successful bidder would then be free to
litigate as aggressively as he saw fit, and to pocket whatever amount he was able
to obtain from the defendant through settlement or trial. Macey and Miller ar-
agree that competitive bidding will lead to class members’ receiving maximum
financial rewards, and that assigning the case to the winning bidder will elimi-
nate defendants’ and plaintiff attorneys’ ability to collude in negotiating a set-
tlement that enriches the latter at the expense of class members. To our
knowledge, no judge has adopted this auction idea, but Judge Vaughn Walker
has adopted a less radical version of Macey and Miller’s proposal, and used
competitive bidding to determine the appointment of lead counsel in a major securities class action.103

6. Is There a Basis for the Fears About Collusion?

How often are representative damage class actions filed indiscriminately? How often do plaintiff attorneys engage in self-dealing? How often do defendants ward off more aggressive litigation with “sweetheart deals”? Are plaintiff attorney fees excessive? Do judges vigorously exercise their authority to review and approve settlements and fees?

In the securities litigation arena, plaintiff attorneys have sharply disputed the notion that they file cases whenever a stock drops in value, settle without regard to the merits, and obtain disproportionate fees.104 But some defense and in-house corporate counsel whom we interviewed asserted that what John Frank has called the “take a dive” plaintiff attorney105 typifies damage class action practice. One attorney claimed that in 75 percent of the cases in which he was involved, there was no discovery and plaintiff attorneys offered to settle immediately after filing the class action; other defendant attorneys did not put a number on the proportion of cases involving what they termed “quickie settlements,” but said they were common. Still other defendants, however, said that, in their experience, there was always some discovery, if only to ensure that judges ultimately would approve the proposed settlement and fee requests.

No corporate counsel whom we interviewed said that he or she had ever searched out a plaintiff attorney with whom to negotiate a cheap and easy settlement. But some corporate counsel said they had negotiated settlements with plaintiff attorneys who approached them with such offers in return for agreements not to challenge the latter’s fee requests; in those cases the corporate counsel said they were simply behaving as “intelligent litigants.” One defendant reviewed with us records of settlements in which some class action lawsuits had been dropped in exchange for settlements of the representative plaintiffs’ claims and higher-than-average fees for the plaintiff attorney. One consumer class action attorney with a small rural practice in the southwest said that a majority of class lawsuits that he had filed in the previous year or two had ended in individual case settlements. In some instances, this attorney said, he had agreed not to pursue further class litigation; in others, the class representatives had simply decided to settle on their own.

No plaintiff class action attorney whom we interviewed said that he or she adopted an early classwide settlement strategy, but some claimed that other plaintiff class action attorneys do engage in such practices. One plaintiff attor-
ney related how he had been approached by a defendant offering an early settle-
ment, who told him, when he demurred—saying he would not settle without
engaging in discovery to determine the merits of the case—that he did not un-
derstand "how the game is played." Public Citizen’s lawyers described one case
in which "[plaintiff lawyers] employed no experts, took no discovery, and put in
no affidavits about the value of the settlement."106 A corporate counsel told us
that he had been involved in a case in which the plaintiff attorney claimed that
he had an expert ready to testify that the product was dangerously faulty if the
litigation moved forward—but who was prepared to testify, conversely, that the
product was not dangerous if the defendant would agree to a modest settle-
ment. Public interest lawyers and state attorneys general staff claimed that
plaintiff attorneys and defendants often collaborate on settlements that do not
serve the class members’ or the larger public’s interests.

No one we interviewed provided an objective basis for quantifying the relative
frequency of practices that all said they regarded as inappropriate: knowingly
bringing frivolous cases in the hope of achieving quick and easy settlements;
negotiating larger class counsel fees in exchange for less favorable terms for
class members; using coupons and other noncash factors to inflate the per-
ceived value of settlements; joining forces to persuade judges that settlements
will yield more benefits to class members and others than either plaintiff or de-
fense attorneys believe to be true; objecting to settlements simply to secure
fees; and so on. The corporate representatives we interviewed believed that a
large proportion of cases involve such practices, whereas plaintiff class action
attorneys more frequently said that the proportion of such cases is small. But
there was a consensus that such practices characterize some fraction of damage
class action lawsuits.

There are no comprehensive data that permit us to determine the overall ratio
of dollars collected by class action claimants to settlement value claimed in
submissions to judges. The data assembled on recovery ratios in securities
class actions are inconsistent,107 some studies showing relatively high ratios,
and others showing negligible recovery rates. There are no comparable pub-
lished data for other consumer class actions.108

A memorandum from Public Citizen describing cases in which it appeared on
behalf of objectors to settlements or fees illustrates the kinds of settlements that
attract criticism. Many of these involve auto manufacturers, but financial
organizations and other industries are also represented among the defendants
of suits in which Public Citizen has intervened. Brief glances at these cases and
their proposed (and sometimes accepted) settlements suggest that some pro-
portion of class actions are resolved with little benefit to class members and
large fees for class counsel.
One such case—brought in federal district court in northern California—was settled with an agreement that an auto manufacturer would replace a faulty part and mount an advertising campaign concerning the replacement; the defendant also agreed to pay up to $5 million in fees to the class counsel. Public Citizen charged that the defendant had already promised the National Highway and Traffic Safety Administration (NHTSA) to replace the part and fund the advertising in response to a regulatory investigation. Moreover, Public Citizen said, at the time of settlement, the retrofit had not yet been designed. Hence, “class counsel apparently agreed to something it could not have properly assessed and which the government had already obtained.” Public Citizen lawyers said that the judge approved the settlement on the grounds that it was enforceable in court, whereas the manufacturers’ agreement with NHTSA was not, and approved the fees on the grounds that they were negotiated with the help of a retired-judge mediator. On appeal, the Ninth Circuit upheld the settlement and fee award.

Public Citizen also objected in another case seeking repair costs or retrofit of a different vehicle. In this instance the settlement offered a $1000 coupon, good for 15 months, towards purchase of a new vehicle. The coupon was transferable, but only at a reduced value. The federal district court for eastern Pennsylvania approved the settlement, and awarded $9.5 million in fees and another $500,000 in expenses—without holding any hearing on the fee award—according to Public Citizen. That settlement was subsequently rejected by the Third Circuit. Later, the same plaintiff attorneys filed a nationwide class action based on the same facts in a Louisiana state court, where they negotiated a settlement that offered coupons that could be used to purchase a wider range of vehicles for a longer period of time, plus contributions to a fund for auto safety.

Later, a case described by Public Citizen as a duplicate of the original eastern Pennsylvania case was brought in state court in Texas, and applied only to consumers there (whereas the former applied to all consumers in the U.S. except for Texans). Two law firms that were not involved in the eastern Pennsylvania case negotiated the same deal for Texas consumers as was offered in the nationwide settlement, and then asked for the same amount of fees and expenses—$10 million—that more than a dozen firms involved in the earlier case had planned to share. This settlement was ultimately rejected by the Texas Supreme Court, in part, on the grounds that class members had not been informed about the amount of fees attorneys had requested.

Yet another settlement described by Public Citizen involved a case brought in California state court on behalf of a different nationwide class of automobile owners. The judge asked a retired judge to help mediate a settlement, which was reached about eight months after the judge certified the class. The
settlement offered class members a nontransferable $400 coupon towards the purchase of a new vehicle, good for 12 months, and—over the defendant’s objection—up to $1.5 million for plaintiff class action attorneys’ fees and expenses. The trial judge approved the settlement, but reduced attorney fees to just under $1 million, over objections. The settlement was upheld by a California appellate court despite its expressed reservations about coupon settlements, but the appellate court ordered the trial court to reconsider its fee award, taking into account the attorneys’ actual hours and expenses.

In another case brought against an auto manufacturer, this time in federal court in the Eastern District of Louisiana, plaintiff attorneys negotiated a settlement of claims alleging that a vehicle was dangerously defective for what Public Citizen described as an inspection, a warning sticker, and safety information—and $4 million in attorney fees. The district court judge twice rejected the settlements to which Public Citizen objected, and subsequently denied class certification and dismissed the plaintiffs’ claims on summary judgment.

Auto manufacturers were the defendants in all these class actions. In another suit in which Public Citizen appeared, plaintiffs sued a financial corporation in the federal district court in northern Illinois, alleging that the firm misled consumers about auto leasing fees, and negotiated a settlement that provided a $75 discount towards a new car lease from the same firm. Class counsel and the defendant asked the court to certify a settlement class and approve the settlement and attorney fees of $75,000. The district court denied certification.

In yet another case, plaintiffs brought a Rule 23(b)(2) non-opt-out class action in state court in Minnesota against a mortgage company, alleging that the company was withholding more money in mortgage escrow accounts for taxes and insurance than is permitted under federal law. The case was removed to federal court, where it was settled on a nationwide basis for a total of $105,000—which Public Citizen estimated amounted to 35 cents per class member—plus $290,000 in attorney fees. The basis for granting non-opt-out status to the action was apparently the defendant’s agreement to comply with the federal statute, which the district court treated as injunctive relief. On appeal, the Eighth Circuit upheld the non-opt-out class and the settlement.

Another settlement Public Citizen objected to attracted nationwide press attention as well. In 1995, the California attorney general, along with a number of county district attorneys, negotiated a settlement with computer companies in which the companies agreed to disclose the actual viewable size of their monitors, rather than the somewhat larger size that companies had historically advertised. An uproar arose when a group of private class action attorneys subsequently filed a nationwide lawsuit in state court and negotiated a settlement with 58 computer makers and retailers. The controversial settlement terms of-
ferred consumers a $13 rebate off their next purchase of a computer or $6 if consumers had not made such a purchase by September 2000. For their efforts, the attorneys requested $5.8 million in fees and $300,000 for expenses. The judge approved the settlement and cut the fees to $5.075 million.

The settlement of a class action lawsuit against a cereal manufacturer, alleging that the cereal contained trace amounts of a pesticide, also drew the fire of the nation’s press. Filed in state court in Cook County, Illinois, this case was settled with an offer of coupons to class members to buy more of the same cereal, plus an opportunity for those who had saved the box tops of cereal purchased more than a year prior to the settlement’s announcement to obtain a refund. Defendants agreed to pay $1.75 million to class counsel in fees and expenses. The judge approved the settlement and fees as negotiated.

Of course, the settlements to which Public Citizen objected had features that caught its attention and motivated its lawyers to intervene, and its memorandum reflects its own perspective on the settlements. We do not know how representative or unrepresentative these settlements are, and since we did not interview parties in these cases, we do not have the benefit of others’ perspectives on their outcomes.

The only empirical analysis of “coupon settlements” conducted to date concerns 127 class actions for which notices of settlement were published in the New York Times from 1993 to 1997. Geoffrey Miller and Lori Singer categorized these class actions by case type (securities, consumer, antitrust, employment, tort, and other), and categorized the settlements according to whether they principally promised cash, coupons, or other nonmonetary awards (such as stock warrants in securities cases, or “monitoring” in consumer and personal injury cases). About 60 percent of the cases Miller and Singer identified were securities suits; the next largest number were consumer actions. Among securities settlements for which the researchers could obtain information, the overwhelming majority were principally for cash. Among the consumer class settlements for which they obtained information, about half were principally for cash and half involved coupons or the monitoring of defendants’ future practices.

There is no registry of attorney fee requests in class actions, no comprehensive record of judges’ decisions regarding fees, and no systematic documentation of contention around fees. Public Citizen described cases in which fees were arguably disproportionate to the settlement value and largely unsupported by documentation. In one case, they wrote, “The fee application was wholly inadequate—no time records, no expense record, and much of the work for which compensation was sought was from another case, not the class action.” In another case they reported challenging the fee request “on the grounds that it
was excessive and that it was unsupported by any fee and expense records.”

In a third, their request to appear in opposition to a fee request was not granted, “since there was no hearing on fees and [they] were never served with the fee application.”

In the case where plaintiff attorneys negotiated a settlement comprising warning stickers and a safety campaign, “in a one-page fee request, class counsel asked for a $4 million fee to be paid by [the defendant]. No time records or expense records were submitted.”

The issue of inappropriate fees arose in virtually every interview we conducted. For corporate and defense counsel, plaintiff attorney fees are the prime source of cynicism about the value of class actions. For plaintiff class action attorneys, the fees of other attorneys (sometimes including those of the partners in their own firms, or co-counsel) are a worrisome source of public disrepute, with the potential to bring damage class actions to a halt, thereby closing off access to the courts for what they believe are meritorious cases.

The failure of judges to vigorously exercise their responsibility to monitor settlements and lawyer fees was a theme in a number of interviews. “If judges would do their job,” said one plaintiff attorney, “we could solve the problems that exist with class action practices. We do not need rule changes to do this.” Another plaintiff attorney drew a triangle (see Figure 3.13) to represent the confluence of interests among plaintiff attorneys, defendants, and judges in allowing some settlements to go forward that should not. The plaintiff attorney, he said, settles too early or too cheaply in order to obtain fees; the defendant profits from the plaintiff attorney’s greediness by settling a case for less than it is arguably worth; and the judge goes along with the plaintiff attorney and defendant, to remove the case from his calendar. The class members’ interests—and the public’s—lie outside the triangle.

Figure 3.13—The Triangle of Interests in Damage Class Action Litigation
The challenge of damage class actions, this attorney said, is how to “break the triangle,” and bring the public’s interest back into the process.

In the final chapter of this book we propose some strategies for breaking the triangle of interests that present barriers to achieving the public goals of damage class actions. We now turn to a discussion of another aspect of the controversy over class actions: suits arising out of mass product use or exposure.

D. THE NEW PARADIGM: AGGREGATIVE ACTIONS FOR PERSONAL INJURY AND PROPERTY DAMAGE

The potential for self-dealing and collusion posed by traditional damage class actions is often attributed to their “headless” nature and the fact that in many such actions, individual class members have little to gain or lose, in an immediate sense, from the case. It is only when there are “real” plaintiffs, with “real” losses, some critics charge, that incentives for abuse are curbed. Moreover, those are the cases, say critics of consumer class actions, where Rule 23(b)(3) can best serve its efficiency objective. But other class action critics say that situations where individuals could successfully pursue individual claims—such as personal injury lawsuits—are exactly those that should not be certified as class actions. Although collecting such cases might be more efficient than litigating them individually, say the critics, it will deny these individuals the right to decide whether and when to litigate, to control the course of their litigation, and to obtain individually crafted case outcomes. If both sets of critics were correct, then, arguably, there would be no role for Rule 23(b)(3) damage class actions.

Much has been written about the problems associated with mass personal injury class actions—so-called “mass torts”—over the past several years. To understand the challenges posed by this type of class action lawsuit, we need to consider the history of mass tort litigation during the past several decades.

1. The Evolution of Mass Torts

Historically, mass tort litigation has begun as individual litigation, and has grown only when individual lawyers, representing individual plaintiffs, were able to win substantial awards against defendants. Until the 1980s, the instances of mass litigation were relatively few.

The early years of tobacco litigation and asbestos worker injury litigation provide two apposite examples, albeit with different outcomes. Plaintiff attorneys’ early lawsuits against tobacco manufacturers, on behalf of sick smokers, were unsuccessful. The manufacturers were willing to spend virtually any amount to defend themselves, and absolutely refused to settle claims brought against
them. Plaintiff attorneys could not match their resources, and could not afford the risk associated with taking such expensive lawsuits to trial and losing. Over time, plaintiff personal injury attorneys came to see this litigation as futile. Although individual suits were brought from time to time, a massive wave of smoker personal injury litigation did not appear.\textsuperscript{138}

Asbestos personal injury litigation also began with a small number of plaintiff attorneys pursuing individual claims against asbestos manufacturers.\textsuperscript{139} For years, these attorneys were unable to breach the legal barriers to winning these lawsuits. Then, in 1973, the Fifth Circuit Court of Appeals held that asbestos manufacturers could be held liable for injuries associated with asbestos exposure.\textsuperscript{140} Because workers who were heavily exposed to asbestos tended to be concentrated in a few industries, which, in turn, were concentrated in a few regions of the country, the plaintiff attorneys who were successful in bringing these individual lawsuits soon found themselves representing other asbestos workers. In each of these regions a handful of firms emerged, comprising the plaintiffs' asbestos bar. In the early phase of the litigation, these law firms faced little competition from other firms for asbestos cases, which continued to be regarded as risky and expensive to litigate.\textsuperscript{141}

Proving that the workers' injuries were caused by asbestos exposure, and that particular corporations had manufactured the asbestos products to which the workers were exposed, required considerable investment of attorney resources, but the results of researching these issues could be used in every case the attorney represented. So, as time passed, it became clear that the litigation could be pursued more efficiently by plaintiff attorneys who had large numbers of asbestos worker clients, and hence, could spread the costs of litigating across all of them. Unions referred large numbers of their members to successful plaintiff attorneys; workers already represented by the attorneys referred their friends; and some attorneys held mass meetings and advertised to attract new clients. Even when clients were directed to attorneys en masse, the attorney signed a separate agreement with each individual worker to represent him or her.\textsuperscript{142}

Although some of these workers had diseases that were clearly linked to asbestos exposure (so-called "signature diseases"), others had diseases—such as lung cancer—that have multiple causes. Some workers were dying of their diseases at the time that they sought legal representation; others retained lawyers when they had only minor impairments, or no impairment at all. Under the statutes of limitations in most jurisdictions, workers needed to file their lawsuits expeditiously once they knew they might have been injured by asbestos exposure. As time passed, attorneys with large asbestos caseloads came to represent workers with vastly different degrees of injury whose legal claims to damages from asbestos companies were of varying strength.
Asbestos worker injury suits usually were brought against multiple corporations that had supplied differing amounts of their products to different markets. As a result, in a single geographical area, some manufacturers arguably were responsible for greater amounts of worker exposure than others. Plaintiff attorneys sometimes negotiated settlements with corporations that had contributed lesser amounts to the asbestos product supply, under whose terms each of the attorney’s clients would get a specified (usually modest) amount of damages. For administrative efficiency, these damages might not vary significantly from worker to worker. Payments from these peripheral defendants provided resources for these plaintiff attorneys to pursue full-blown litigation against major suppliers, whose shares of damages were arguably much greater.

In time, judges in jurisdictions where many asbestos-worker injury cases were filed began to encourage plaintiff attorneys and defendants to enter into similarly formulaic agreements. Sometimes judges helped the plaintiff attorneys and defendants settle large numbers of cases at a single time for an aggregate amount of money, which the plaintiff attorney would then allocate among his clients. Whether and how plaintiff attorneys kept their clients informed about the progress of settlement discussions, and what they told them about the details of the overall settlement that they had negotiated with defendants, were not subject to judicial review. Sometimes the judge oversaw the development of an allocation plan, and sometimes not. How payments to workers with differing degrees of injury and differing legal claims to damages varied was not a matter of public record.

After a decade of asbestos-worker injury litigation, most asbestos lawsuits were pursued in these aggregative fashions. But attorneys representing asbestos workers continued to view themselves as traditional personal injury attorneys. They signed individual representation agreements with their clients and continued to charge these clients a contingency fee, taking their traditional fraction of the amount of money each client received in settlement.

The pattern of individual plaintiff attorneys representing a large number of clients in formally individual (but practically aggregative) litigation was soon replicated in other mass tort litigation. Plaintiff attorneys pursued different strategies in deciding whom to represent in these litigations. Some attorneys were highly selective; they only agreed to represent plaintiffs with serious injuries and with reasonably strong proof that those injuries were associated with their use of or exposure to the defendant’s product. These plaintiff attorneys invested substantial resources in developing those cases and made it clear to defendants that they were willing to pursue the cases all the way through trial. Because they were careful in selecting cases and clients to represent, they were often successful at trial. Once they were successful, defendants were likely to be
eager to settle their other cases—which the defendants expected to be equally meritorious—for goodly amounts of money.

Other plaintiff attorneys, however, were less selective. They advertised widely in the press and on television and radio, agreeing to represent many individuals who had used the same product—some of whom had much less serious injuries and weaker legal claims than others. These attorneys’ strategy was to leverage the value of the individual claims by the number of claims they represented. Because it cost defendants less to litigate when they settled a large number of claims all together (rather than defending each individually), they were often willing to pay more, in total settlement value, than they would have paid had they settled the cases individually. From the plaintiff attorney’s perspective as well, it was cheaper to resolve cases in large numbers than to litigate each individually, meaning that each case’s profit margin was higher. Defendants who offered aggregate settlements demanded that strong cases, which would have likely been settled for large amounts individually, be included in the aggregate. Plaintiff attorneys, in turn, demanded that weak cases, which might have been settled for very modest sums, if at all, be included in the aggregate. As a result, some plaintiffs got more than they would have received had their cases been pursued individually, and some got less—possibly considerably less—than if they had been represented by one of the more selective attorneys.

Sometimes trial judges actively encouraged such aggregate settlements, and helped to shape their substantive details. Some judges felt that they should take responsibility for assuring the fairness of settlements in these aggregative situations, but no special rules were adopted—such as those that apply to class actions—to require informing plaintiffs that their cases were being handled collectively, to invite objections to aggregative settlements, or to subject attorney fees to judicial scrutiny. As in the case of asbestos litigation, the plaintiffs signed individual representation agreements with their attorneys, and the plaintiff attorneys charged each of them a standard contingency fee. In theory, if not in reality, mass personal injury litigation was individualized, regulated by private agreements between plaintiffs and their individual attorneys.

As time passed, many plaintiff attorneys acquired reputations as mass tort specialists. They took on series of cases that had similar characteristics—for example, cases arising out of the use of different contraceptives, or out of the use of different implantable medical devices. Their chances of success in each successive litigation increased, because, having reaped large fees in previous cases, they could invest more money in developing new cases—finding evidence, hiring medical experts, funding scientific research to try to prove that the product caused the relevant diseases. They found clients not only through client references and advertising, but also through other attorneys, who referred cases to them and, in return, took a percentage of the specialist’s fee. Judges also ac-
quired reputations as mass tort specialists, and when cases were collected through the federal multidistricting procedure, these judges were viewed as prime candidates to manage the litigation.147 Some judges also developed long-term relationships with attorneys whom they appointed as special masters in case after case, to help them manage these large litigations and fashion settlement plans.148

Increasingly, all of the litigation against a manufacturer or set of manufacturers arising out of the same product use or exposure came to be viewed as interdependent. A trial verdict in a case in one jurisdiction increased or decreased the value of other cases in other jurisdictions: Within the community of plaintiff and defense attorneys specializing in this litigation, the verdict was taken as a signal of the likely success of other cases. A trial judge’s decision to admit or not to admit key evidence in a particular case—for example, a disputed document concerning corporate liability, or a controversial research study on the link between the targeted product and the plaintiffs’ alleged injuries—was viewed as a sign that other judges would rule likewise, hence increasing or decreasing the value of all of the cases. Experts moved from case to case, and their statements in one case influenced whether and how they would be used in another case. A million-dollar or higher award of punitive damages would dramatically increase the value of each case, and hence of all of the cases in an attorney’s caseload, because punitive damages can be awarded in each case and (depending on the jurisdiction) may not have any cap. Any award for the plaintiff that attracted great media attention would raise the value of the litigation inventory, because defendants are naturally averse to negative publicity about their products and brands. Discussing mass personal injury litigation, one plaintiff attorney told us, “These really aren’t independent cases anymore.”

Because of these interdependencies, the fate of a large-scale litigation could be determined by one or a few significant litigation events. Litigation related to Bendectin, an anti-nausea drug prescribed for pregnant women that allegedly caused birth defects, first increased dramatically when a trial court judge ordered a consolidated trial (which promised reduced litigation costs for plaintiff attorneys), and then collapsed when the jury that heard the consolidated case decided that plaintiffs had failed to prove that the drug caused the birth defects.149 Litigation related to Copper 7, an intrauterine device that allegedly caused pelvic inflammatory disease, collapsed when the defendant settled a large number of lawsuits with the leading plaintiff attorney in the case. Without his leadership, other plaintiff attorneys could make little headway against a determined defense.150 Conversely, when a couple of plaintiffs won large verdicts, including punitive damage awards, in separate silicone gel breast implant cases tried in California and Texas, the number of breast implant case filings soared.151
The interconnectedness of mass personal injury claims, and the aggregative nature of procedures for managing and resolving them, were further enhanced by assigning all claims arising from use of or exposure to a particular product—as well as catastrophic accident claims—to a single judge, under the federal multidistricting rules. Although this procedure could not also collect claims filed in state courts, the latter could be collected within single states under formal and informal state court procedures. And, over time, federal and state court judges who presided over such groups of cases began to coordinate among themselves. They held joint pretrial conferences, established centralized discovery depositories, jointly set trial schedules (sometimes in an effort to ratchet up settlement pressure), and sometimes even sat together in a single courtroom.

The bankruptcies of major asbestos defendants and A. H. Robins, the manufacturer of the Dalkon Shield intrauterine device, also contributed to the aggregative trend of mass personal injury litigation. Under Chapter 11 of the bankruptcy code, all claims against a bankrupt defendant must be collected in a single court. Under the aegis of the bankruptcy courts, many mass personal injury lawyers learned how to design large-scale aggregative settlements and administrative processes for allocating damages to hundreds of thousands of claimants.

In sum, although federal and state personal injury cases could not easily be collected together as a matter of law, the informal practices of defendants, plaintiff attorneys, and judges produced huge nationwide networks of litigation in mass product liability and toxic exposure cases. In effect, the separate and coordinated practices of plaintiff attorneys, defendants, and judges created virtual class actions, without any of the procedural safeguards—or hurdles—required by Rule 23(b)(3).

Judges who presided over these large-scale litigations were advised to appoint “lead counsel” or “steering committees” on the plaintiffs’ side, so that they would not have to deal with large numbers of plaintiff attorneys making potentially inconsistent requests. Putting one or a few plaintiff attorneys in charge of key aspects of the litigation held the promise of reducing total lawyer fees and expenses and expediting the litigation process. Although these attorneys did not have the formal status of “class counsel” accorded to plaintiff class attorneys in securities, antitrust, and consumer litigation, their role was much the same. The lawyers appointed to lead counsel positions or membership on steering committees stood to earn additional fees beyond those they realized from representing their own clients. These additional fees could be negotiated with the lawyers who represented individual plaintiffs, in return for the services that lead counsel provided. Or the judge—under the “common fund” doctrine—would decide how to distribute the fees among the various attorneys.
For example, the judge might order that each attorney representing individuals in a multidistrict litigation pay half of her contingency fee to the lead counsel. Then, rather than receive one-third of the amount received by the client, the personal injury attorney would receive one-sixth of the amount, and pay one-sixth to the lead counsel. As a result, attorneys involved in cases in which judges awarded fees to lead counsel and steering committees not only faced the risk of losing the case to the defendant, but also faced the risk of making little or no profit on their investment in their individual cases when they won. Not surprisingly, once the litigation was resolved, there were often battles over fees and expenses, which sometimes erupted into new litigation, this time among the lawyers.156

As long as litigation was aggregated only within jurisdictions, competition among lawyers for cases was moderate. A mass tort practice was accurately perceived to be high-risk, and the costs of entry also high. Mass tort attorneys nurtured metropolitan or regional practices—in which they competed with but a handful of other local firms—and did not compete on a nationwide basis. But as the agglomerations of individual claims grew, partly as a result of multidistricting and partly as a result of major bankruptcies, the mass tort bar became more competitive. Competition for lead counsel positions was often fierce. Lawyers generally believed that the more clients they represented, the more likely they were to receive other lawyers’ backing—and, ultimately, the judge’s assent—for their appointment as lead counsel in multidistrict litigation. As a result, lawyers vied to see who could sign up the most clients. In normal circumstances, the pool of possible injury claims is substantially larger than the number of individuals who come forward on their own to claim compensation. In mass tort litigation, when attorneys publicized the possibility of securing compensation for possible injuries, a larger fraction of claimants stepped forward.157 Hence, aggregation not only changed the shape of personal injury litigation, but increased its scale, often enormously.

2. Enter the Class Action Attorneys

Over time, the scale of mass tort litigation grew158 in response to lawyers’ aggregative litigation practices and judges’ aggregative management practices. Still, this litigation was regarded as individual. Then, in the mid-1980s, Stanley Chesley, a personal injury attorney, began to promote the use of Rule 23 as a tool for resolving mass torts.159 Chesley had served as lead counsel in the Beverly Hills Supper Club fire case, the first mass tort litigation where class action status was granted and sustained. As lead or cocounsel in the most widely known mass product defect cases, including the Agent Orange, Bendectin, and Shiley heart valve litigations, as well as a number of high-profile mass accident cases, Chesley advocated a strategy of early certification, expeditious settle-
ment, and formulaic allocation of compensation among class members—a strategy similar to that of some securities and consumer class action attorneys. Soon, other tort attorneys, including some asbestos plaintiff attorneys, were participating in class actions to resolve large numbers of product defect claims. When federal silicone gel breast implant cases were transferred to Judge Samuel C. Pointer by the Judicial Panel on Multidistrict Litigation in 1992, individual and class action tort attorneys were joined by class action attorneys who previously had confined their practice to securities and consumer cases.

The advent of class actions changed the dynamics of already-aggregated mass tort litigation, exacerbated old controversies, and created new ones. Mass tort practitioners had already learned that large numbers of cases, collected together, create intense pressure for settlement, and many had adopted strategies for finding substantial numbers of clients. But individual practitioners expected to invest in developing the facts underlying the litigation, as they had in asbestos and Dalkon Shield litigation. In their experience, plaintiffs needed to win some cases at trial—as in the litigation over the Copper 7 intrauterine contraceptive device, the Shiley heart valve, and the silicone gel breast implant—in order to demonstrate that mass tort cases had real monetary value. In contrast, class action specialists were accustomed to filing class actions soon after they detected possible wrongdoing; they did not expect to invest several years in developing individual lawsuits before moving into an aggregative mode. The arrival of class action practitioners on the mass personal injury scene meant that some attorneys—the class action specialists—were initiating lawsuits and sometimes even talking settlement soon after news of a defective product or a catastrophic event appeared, while other attorneys were still in the process of initiating relationships with individual clients and developing their cases.160

Speedy class certification led to charges that cases were being aggregated before their time. The idea that mass torts “mature” as they are litigated in different jurisdictions by different practitioners, to a point where the monetary values of claims with varying characteristics become clear to practitioners on both sides, was first articulated by Professor Francis McGovern. McGovern, who has served as a special master in numerous mass torts, argued that maturity was a necessary precondition for fair settlement of mass litigation.161 The indicia of maturity, however, are not clear. McGovern’s notion was that, after some amount of litigation, the settlement value of cases would stabilize as the facts and application of law became clear to parties and lawyers. During the decades of asbestos mass tort litigation, however, values of similar cases have risen and fallen, more in response to changes in the configuration and strategies of defendants than from any shift in the nature of the cases. Despite the ambiguity of the concept and uncertainty over its application, whether cases were mature enough to aggregate became a subject of controversy in certain cases. In some
instances, trial courts declined to certify mass torts; in others, appellate courts reversed class certification of mass torts, partly on the grounds that the litigation was not yet “mature.”

Mass tort class actions also fed an already lively controversy over the use of scientific evidence in courts. One reason mass torts exist is that problems associated with product use and exposure may take a considerable time to manifest themselves. These injuries are referred to as “latent.” Unlike immediate injuries, such as food poisoning—which almost invariably lead to quick removal of injurious products from the marketplace—latent injuries often go long undetected. As a result, a product may be used by thousands or even millions before warning signs appear and the product is withdrawn. Even when the injuries are detected, there may be controversy over whether a particular product is the culprit, or whether the population of users simply includes many people with a variety of unrelated injuries. Some lawyers and scientists have argued that courts too often base decisions in such cases on “junk science”—unsubstantiated claims of causal links between products and injuries.

The validity of the scientific research underlying specific mass torts is a question that is beyond the scope of our study. But the question of whether class certification increases the likelihood that defendants will settle cases based on so-called junk science is a key aspect of the controversy over the use of class actions for mass torts.

Defendants say that, whereas they might be willing to assume the risk of trying an individual case where the science is weak—and take the chance that a jury will decide that there is sufficient evidence to support the plaintiff’s claim—they cannot afford to take the risk of losing a class action trial verdict, which would determine the outcomes of thousands or even hundreds of thousands of claims. Even in aggregated cases, where an individual verdict will affect the settlement value of thousands of claims, the risk of going to trial is less than in a class action (according to defendants) because the verdict does not conclusively determine the fate of those aggregated claims.

Defendants’ behavior in past cases is consistent with these claims. The science underlying the Agent Orange class action was so weak in the eyes of Judge Jack B. Weinstein that he dismissed the claims of veterans who opted out of the class action. But the class action itself had already been settled for $180 million. In the litigation over Bendectin, a case in which the scientific controversy loomed so large that it led to a landmark U.S. Supreme Court decision, defendant Merrill-Dow placed a $120 million settlement on the table for a proposed class of victims, notwithstanding its strongly held views that there was no scientific basis for their injury claims. When the appellate court reversed the class certification, the judge tried some 1200 claims in a single “consolidated” trial.
The jury’s decision that Bendectin did not cause the plaintiffs’ injuries effectively ended the mass litigation. Corporate counsel whom we interviewed for this study pointed to the $4.2 billion settlement placed on the table by Dow Corning and other defendants in the silicone gel breast implant litigation—at a time when the scientific evidence of a link between most of the alleged injuries and the implants was generally viewed as weak—as another example of how class certification creates pressures to settle cases with a weak or uncertain scientific basis.

Of course, the risks of trial for plaintiff class counsel—and class members—are also huge. As a result of the single consolidated (but nonclass) trial of Bendectin claims, hundreds of Bendectin users lost their lawsuits.

The argument about the validity and strength of the scientific evidence underlying mass torts is often intertwined with the argument about the lack of maturity of mass tort litigation—and hence, its inappropriateness for class certification. For example, because the scientific record concerning silicone gel breast implants was still being developed, some argued that class certification of the breast implant suits was improvidently granted.

3. The Lure of “Global Settlements”

Class certification also complicated the management tasks of judges presiding over mass tort litigation. Now, a judge assigned to handle all federal cases associated with a particular litigation, or a state court judge assigned to handle all cases in that litigation brought in a single state, found herself dealing with a mix of cases, all arising out of the same circumstances. Some plaintiffs were represented by more selective tort attorneys whose clients numbered in the scores or hundreds; some were represented by more inclusive tort attorneys whose clients numbered in the thousands; and some were represented only by class action practitioners who sought a resolution that would cover all individuals claiming injury from that product or substance. In certain cases, some attorneys formed alliances, but others were fiercely competitive. In contrast to a “headless” class action lawsuit, the judge found herself dealing with a multi-headed hydra of a litigation.

Most important, though, class certification changed the nature of the mass tort settlement process. Certification created opportunities for “global settlements,” settlements that could end the litigation once and for all, for defendants and for courts. It also raised questions, however, about how to handle, in a class action context, the claims of individuals whose latent injuries might not yet have become apparent. Over time, plaintiffs and defendants came to recognize as well the expansionary powers of class actions in mass tort situations—powers that
had been only dimly perceived before and that proved threatening to defendants’ and plaintiffs’ interests alike.

To defendants facing nationwide mass tort litigation, the opportunity to settle all litigation against them is enormously attractive. Prior to the advent of mass tort class actions, the only vehicle available to defendants for achieving such overall settlements was bankruptcy. During the 1980s, the Manville Corporation and about a dozen other asbestos manufacturers chose that vehicle over continuing to defend multiple lawsuits in multiple jurisdictions;\textsuperscript{166} the Dalkon Shield litigation also ultimately landed in the bankruptcy courts.\textsuperscript{167}

But bankruptcy has significant costs for defendants, who stand to lose control over their companies during the bankruptcy process. Class actions not only provided a possible vehicle for achieving global settlements outside the bankruptcy courts, they also provided practitioners who were skilled at designing such settlements.

Both defendants and plaintiffs faced numerous challenges in negotiating global settlements.\textsuperscript{168} First, in all but a few instances, if an argument were to be made for class certification, it had to be made on the grounds relevant to Rule 23(b)(3), and the (b)(3) notice and opt-out provisions would apply. Whether defendants and attorneys were able to negotiate a global settlement, using the class action as a vehicle, would depend critically on two questions: How many prospective class members would opt out?\textsuperscript{169} How many of those who did not opt out would come forward to claim their share of the settlement? In small damage consumer class actions, the number of opt-outs is likely to be negligible, and the number of class members who come forward to claim damages is likely to be smaller than the estimated total class size. Hence, class counsel and defendants often can negotiate settlements before class members either opt out or file claims for compensation, knowing approximately how many class members will ultimately come forward. In contrast, in mass tort class actions, there is a significant likelihood that either the number of opt-outs or the number of claimants could be so large as to scuttle the settlement.

Opt-outs are an obvious threat to global settlements; if large numbers of individuals exclude themselves from a settlement and proceed individually, the defendants will not secure global peace. Defendants may then not be willing to settle at all. If they are willing to settle on less-than-global terms, they will not be willing to put as much money on the table as they would to achieve global peace. A cheaper settlement proposal diminishes the attractiveness of settling for plaintiff personal injury attorneys, who therefore may prefer to continue litigating informally aggregated cases.

In mass tort litigation involving many represented individual plaintiffs with claims of sizable value, the threat of opt-outs is substantial. Personal injury
attorneys who fear that a class settlement will not serve their clients or themselves well may advise their clients to opt out; they may even attempt to scuttle the settlement altogether by mounting large-scale print or broadcast advertising campaigns urging prospective class members to opt out. To minimize opt-outs, it is essential that class action attorneys and defendants gain substantial support from personal injury attorneys.

The threat posed by opt-ins may be less obvious to students and practitioners of small damage class actions, where total settlement amounts are typically negotiated on a formulaic basis (x number of claims at so many dollars per claim). In mass tort class actions comprising claims of varying injury severity and legal strength—and often, an injured population whose size is unknown—settlement amounts may be negotiated on an aggregate basis. Essentially, what plaintiff attorneys and defendants negotiate is the *price of global peace*. For example, when Judge Weinstein successfully persuaded defendants to offer—and plaintiff attorneys to accept—$180 million to settle the Agent Orange class action, no one knew just how many veterans were in the class, much less what their injuries were and how many would ultimately come forward to claim compensation. When defendants tentatively placed $4.2 billion on the table to settle the silicone gel breast implant litigation, their estimates of the size of the class were reportedly about 100,000; subsequently, more than 400,000 women sought to share in the settlements.

If defendants set an aggregate price on global peace, the amount that each individual class member gets, and, therefore, the amount of fees that each personal injury attorney who represents an individual claimant gets, will depend on how many individuals come forward to claim a share of the settlement. If the notice of a possible settlement is widespread, and relatively easy for lay persons to grasp, many *unrepresented* claimants may come forward to share in the settlement. The larger their numbers, the less money available for represented claimants, and the less money available for the latter’s attorneys. (Recall that personal injury attorneys, having signed fee contracts with their client-class members, will receive a percentage of each client’s award, which they will likely be required to split with class counsel.) Just as defendants may not be willing to settle a mass tort class action if too many prospective class members opt out, individual plaintiff attorneys may be unwilling to settle if too many claimants opt in. Class counsel, who expect to be paid a percentage of the total settlement, may be less concerned about the ultimate number of opt-ins.

Wrestling with these uncertainties, plaintiff attorneys and defendants who were attempting to craft global settlements of mass torts proposed to judges that they *conditionally certify classes for settlement purposes only*, and notify the class of certification and the terms of the tentative settlement in a single announcement. Class members could then be asked both whether they wanted to opt out
and whether they wanted to opt in. Defendants agreed to settle a class action on the proposed settlement terms, but reserved the right to contest certification if the judge ultimately declined to approve the settlement, and, sometimes, if other conditions were not met. For example, defendants might withdraw agreement if the number of opt-outs was excessive (sometimes termed a “back end opt-out”). Plaintiff attorneys, in turn, might withdraw agreement if the number of opt-ins was so numerous that the value of individual claims would be diluted. For the judge, this approach to the opt-out process might also be attractive, since the number of opt-outs could be taken as an indicator of the perceived fairness of the settlement.

Conditional class certification was not a new idea. The Advisory Committee Notes to Rule 23 refer to the possibility of conditioning the “maintenance” of a class action on attorneys’ satisfying various judicial concerns. Settlements conditional on the number of opt-outs and opt-ins are sometimes negotiated in consumer class actions as well. But the idea of conditional certification for settlement purposes only raised new issues for mass tort class actions. If judges were only certifying a class for settlement, did this mean that they did not need to decide whether it would be possible to try the litigation as a class? Rule 23 instructs judges to take into account the “difficulties likely to be encountered in the management of a class action” in deciding whether to certify a case.

Trying mass tort class actions raises a host of problems. Consumer class actions brought under a single state statute have arguably common liability and damage issues. Conversely, in mass tort class actions, the claims may present common liability issues, but almost always present different damages issues because claimants’ injuries are typically diverse and vary in severity. In response to this configuration of claims, judges who have certified mass tort cases for trial typically propose to try the common issues (often including punitive damages) first, and then hold separate trials for individual damage claims or groups of damage claims. For example, in the first asbestos worker injury class action, Jenkins v. Raymark Industries, Judge Robert Parker proposed to hold a single trial on the common issues of liability and punitive damages, followed by multiple individual trials on damages in which juries would hear the cases of seven to ten plaintiffs at a time and determine damages for each.

In practice, most judges anticipate that parties to a mass tort class action will settle the individual damage claims without trial—as happened in Jenkins, where defendants settled the claims of class members five weeks into the common issues trial. But suppose the parties do not settle? For a subsequent asbestos worker injury class action, Judge Parker devised a plan for trying damages using a statistical sampling approach. The plan required three juries whose decisions were to determine the outcomes of 2000 class members’ claims. The first jury heard the liability evidence and decided against the defendants; it also
decided to award punitive damages and determined how those damages would be computed. Then, two different juries heard the evidence concerning nine class representatives and 160 additional class members, who had different exposure history and injury severity, and who had been selected to represent the variations in damages within the class. The two juries sat jointly to hear some of the evidence and separately to hear evidence specific to plaintiffs’ individual damages. After the juries decided whether and how much to award the 160 individual plaintiffs, the judge extrapolated these awards to the entire 2000-member class, according to a formula that the parties had agreed to before the trial. Defendants appealed the results on the grounds, \textit{inter alia}, that they had been denied their due process rights to jury trial of each individual claim, and the Fifth Circuit ultimately agreed with the defendants, reversed the individual outcomes, and returned the case to the district court for retrial.

In the east Texas asbestos class action trial, all of the class members’ cases were subject to Texas tort law. But if judges certify \textit{nationwide} class actions of mass tort claims, the problems of trying a class action multiply dramatically. What law should apply to these cases? Unlike securities cases and some consumer class actions, which are brought under specific federal or state statutes, mass tort claims are brought under the so-called common law—that is, the case law that has developed over time, as judges decide specific cases. No \textit{federal} tort law exists for cases that are filed in federal court under the diversity jurisdiction. Therefore, even if the cases are brought in a federal court, the law of the separate states in which the claims arise may be deemed to apply, and these laws may imply very different trial or settlement values for factually similar claims. How to address what lawyers term the “choice of law” problem is one of the most difficult issues for class actions brought under common law theories, and—more generally—for nationwide class actions that involve different states’ laws. Numerous law professors and task forces have issued recommendations addressing choice of law problems, and congressional legislation has been introduced in the past to provide a special forum for nationwide mass tort litigation to remedy choice of law problems. So far, no solution to this problem has been found. Indeed, some attorneys and parties believe that when claims implicate different states’ laws, certification should not be an option, because the requirement that common issues predominate is not met.

To some judges presiding over mass tort cases, it seemed that certifying classes for settlement only provided a means of postponing these difficult choices of law and other trial problems—and, if the class action settled, a means of avoiding them altogether. However, other judges disagreed.

As controversy over mass tort class actions mounted in the 1990s, some critics focused on settlement classes—cases certified for settlement only. Critics argued that judicial certification of a class immensely strengthened the plaintiffs’
bargaining position by raising the potential cost of resolution dramatically. By agreeing to negotiate a settlement in the shadow of a possible denial of class certification, these critics asserted, plaintiffs were throwing away their most powerful weapon. In our interviews, several plaintiff attorneys rejected this contention. They argued that, in some instances in which certification was far from a sure thing, defendants were willing to negotiate settlements favorable to plaintiffs because they feared the possibility of certification. Uncertainty about certification, these attorneys said, was a double-edged sword: when the likelihood of certification, absent a settlement, was modest, uncertainty helped plaintiffs negotiate settlements that might not be possible at all if the judge were to rule on certification before the parties began negotiation. If, however, the likelihood of certification were high, negotiating a settlement in the absence of a certification decision should strengthen the defendant’s hand at the expense of plaintiffs. The net effect of certifying settlement classes, across “all” class actions, would depend on the balance of strong and weak cases.

Controversy within the bench, bar, and legal academy over whether settlement classes are allowable under Rule 23 contributed to the effort to revise Rule 23 in the late 1990s, and ultimately led to a U.S. Supreme Court decision. The Court ruled that class actions could be certified for settlement only. But its decision raised other questions about the viability of mass tort class actions, to which we will return below.

The silicone gel breast implant class action illustrates how judges and lawyers have tried to manage mass torts within the class action framework. In the breast implant litigation, Judge Pointer—who had been assigned all federal breast implant cases under the multidistricting rules—conditionally certified a class for settlement purposes only. To deal with the twin problems of opt-outs and opt-ins, the attorneys devised a procedure that they dubbed the “double opt out.” The broad terms of the conditional settlement would be advertised worldwide and women would be given the opportunity to opt out (the first opt out). If too many women opted out, the class would not be officially certified and the defendants could walk away from the settlement. If the defendants decided to stay in, those women who did not opt out in the first round would be asked to register themselves either as “current” or “future” claimants (current claimants were seeking compensation for current illness). Depending on the characteristics of their disease and other aspects of their claims, the women who registered would be assigned to categories in a matrix that assigned different monetary values to each category. After the opt-in period was over, the attorneys and defendant would calculate whether the total $4.2 billion would suffice to cover all claims. If not, the values of all of the categories of injury/claim would be reduced proportionately. Women would then be given another opportunity to opt out (the second opt-out) if they were unsatisfied with the new
amount. Defendants would then get their second chance to walk away from the class action and the settlement, if opt-outs were too numerous.184

All proceeded smoothly through the first opt-out stage: About 8,000 women filed requests to opt out (including many represented by the individual personal injury attorneys who had been most successful in winning jury verdicts and generous settlements), and defendants decided to stick by the settlement. But in a staged process for registering claims, more than 400,000 women came forward, including approximately 100,000 who declared themselves current claimants. Although some were unrepresented, about 30,000 plaintiff law firms filed claims on behalf of one or more clients. With defendants unwilling to increase their settlement offer significantly, the settlement value of each claim would have had to be reduced by 90 percent. Long before the bureaucratic process of categorizing claims was complete, it was clear that the proposed settlement plan was dead.

4. The Question of “Future” Claimants

The silicone gel breast implant settlement had one ingredient that distinguished it from other mass tort settlements: it sought to bind all women who had used breast implants, whether or not they had been injured or had filed lawsuits prior to the notice of the conditional $4.2 billion offer by defendants. In mass torts that are settled outside a class action, there is no way to scoop up claims that have not yet been filed; the attorneys can only negotiate a deal on behalf of those individuals who have filed lawsuits that are before a particular court—for example, the court to which the Judicial Panel on Multidistrict Litigation has transferred cases. If defendants want to settle more cases, they have to negotiate with other attorneys, or they have to negotiate another settlement with these same attorneys some time in the future, when the attorneys have taken on more cases. In effect, mass tort settlements outside the class action framework can offer only regional and temporary—rather than global and eternal—peace. In practice, a settlement in a multidistrict litigation may end the litigation with regard to all attorneys who are currently interested in this particular litigation, thereby buying global peace, albeit not guaranteeing it.

Only two procedural mechanisms—bankruptcy and class actions—arguably permit attorneys and defendants to broaden the embrace of their proposed settlement to incorporate the claims of individuals who have not previously come forward. Bankruptcy provides for informing individuals with personal injury claims against a bankrupt defendant (whether or not they have already filed lawsuits) that they must come forward to state their claim, because the objective of the bankruptcy proceeding is to assess the total value of all claims of all creditors against the bankrupt debtor, in order to devise a plan to liquidate or
restructure the bankrupt entity. Bankruptcy courts have treated as “creditors” individuals who—absent bankruptcy—would have had a viable claim against the entity in the future, and required that bankruptcy plans take these future claimants’ interests into account. Class action notice required under Rule 23 informs individuals who have not previously filed lawsuits, but who have a viable claim, that they need to take action—namely, opt out—to retain the right to pursue the claim outside the class action. The rule is silent on the question of whether those who might have a claim in the future are regarded as prospective class members.

Defendants seeking global peace would like to bind all those who do not opt out from ever suing them individually for the injuries associated with a particular product. By quantifying and capping their risk, defendant corporations can send a signal to the stock market that the company’s financial viability is not at risk. Hence, defendants have sought the protection of the bankruptcy courts in several instances of mass litigation, including asbestos (which has led to a dozen or so bankruptcies of major defendants), the Dalkon Shield litigation (which led A. H. Robins to the bankruptcy court), and the silicone gel breast implant litigation (in which Dow Corning declared bankruptcy after the class action settlement collapsed). Defendants have also attempted to include potential future claimants under the umbrella of class action settlements in some mass torts.

The 1984 class action settlement of Vietnam veterans’ Agent Orange claims successfully precluded all future litigation against the manufacturers of Agent Orange, even though at the time of the settlement many veterans had not initiated lawsuits and may not have regarded themselves as injured. But binding future asbestos personal injury claimants proved highly controversial when attorneys negotiated settlements with two different sets of asbestos defendants on behalf of all workers (and their family members) who had not previously filed lawsuits against these defendants. Legal scholars who had not previously concerned themselves with mass torts, and who seemingly assumed that asbestos suits were being considered individually by the courts, worried that future claimants would be denied due process. Asbestos plaintiff attorneys who were not party to the negotiations, including some who—absent the settlement—might well have expected to represent many of the individual workers included in the proposed “futures classes,” also objected vigorously to the proposed settlements.

Several features of the proposed settlements contributed to the scholarly and practitioner attack upon them. The plans established ranges of recovery for different types of injury, and tightly restricted access to the courts for those who wished to challenge what would essentially be administrative decisions. The
terms of the plans were far less generous, critics argued, than the terms of settlements that these same defendants had just recently agreed to for “current” claimants. What made this evolution of plan terms particularly troubling was that the same attorneys who represented those current claimants had negotiated on behalf of the futures classes with these same defendants. The chronological proximity of the current and future settlements raised questions about whether the attorneys had bargained away the rights of future unknown clients in favor of current clients and current fees. Moreover, the fact that the judges had certified these suits as settlement classes only—and that it seemed unlikely that the cases would have been certified for trial—suggested to some critics that plaintiffs’ attorneys had bargained from a position of weakness, further diminishing the merits of the settlements.

Additionally, in one of the cases, the trial court certified a non-opt-out class on the arguable presumption that the nonbankrupt defendant was capable of financing only a limited fund. The U.S. Supreme Court ultimately agreed to review both cases. In Amchem v. Windsor (the case previously known as Georgine), the Court ruled that settlement classes are allowable under Rule 23(b)(3). But the Court firmly rejected this class. Siding with the critics, the Court found that there were too many differences in fact and law within the class to satisfy Rule 23’s “commonality” requirement; the mere fact of settlement could not, in itself, satisfy this requirement. The Court held that the class representatives could not credibly represent the interests of such a diverse class, and questioned whether notice can ever be adequate when a class seeks to embrace future claimants—and hence whether class actions including future claimants could ever be sustained. Subsequently, in Ortiz v. Fibreboard Corp., the Court rejected the limited fund non-opt-out class as well.

Although the controversy over futures class actions focused on concerns about the rights of individuals who might not yet realize that they are injured—and hence might ignore notices of the pendency of a class action and their need to opt out if they wish to retain the right to sue—there was a larger question underlying the controversy: Can and should a mass tort class be defined to include currently nonimpaired product users? In any suit over mass product injuries there is likely to be a mix of class members who are currently injured and class members who know or believe that they have been injured (exposed), but who are not currently impaired. By defining a class to include all those who have used a product during a specified time period, plaintiff attorneys and defendants can sweep into the class those who are currently impaired and those who are not. This broad class definition is attractive to defendants, because they gain protection against any possibility of suits from individuals who become ill in the future as a result of their past product use. It is also attractive to class action attorneys because a broad definition vastly increases the size of the class,
which will usually result in higher class counsel fees. It may not be attractive to individual personal injury attorneys, who may worry that increasing the class size will mean that there will be less money for their clients and for themselves.

Whether and how to compensate currently unimpaired individuals is a hotly contested question in mass tort settlement negotiations. When all class members allege that they have a current injury, the monetary settlement will usually be structured so as to compensate class members—to a greater or lesser degree—for their medical and other economic losses. But when the class includes individuals who have no current injury, settlements may include noncash components as well, such as regular medical check-ups (“medical monitoring”). In mass toxic exposure cases where significant numbers of class members are unimpaired, the community in which such exposure took place may be offered a new community facility or service, in lieu of or in addition to other compensation.

In some instances, such nonmonetary or groupwide benefits have attracted the same criticism as the use of coupons to settle consumer class action lawsuits. From our interviews, it appears that class action practitioners are more comfortable with these sorts of case outcomes than individually retained mass tort practitioners who traditionally take and shape cases to secure individual cash compensation for their clients. The failure of the original silicone gel breast implant class action settlement, and the obstacles encountered by the futures settlements of asbestos worker class actions, reflect the difficulties of bringing together formula-minded consumer class action lawyers and individual compensation–oriented tort lawyers.

5. Absent Parties

In consumer class actions for small money damages, we do not expect the class members themselves to appear on the scene, at least until notice of class certification is provided and, more likely, only when a notice of settlement and instructions for securing compensation are published or appear in the mailbox. But what of the mass tort class members who know or believe they were exposed or injured? Unlike the consumer who may have lost a modest amount in a transaction or series of transactions, injured individuals are likely to have received medical diagnoses; at a minimum, they are likely to have been exposed to worrisome information about future illnesses due to their product use or exposure.

Mass tort litigants who have retained individual attorneys have varying degrees of interaction with those attorneys and receive differing levels of attention from them. For example, mass tort litigants may find attorneys through mass advertisements, receive information from automated telephone call-in systems, and
communicate with the law firm by mail. They may talk to paralegals but never meet their lawyer. Mass tort litigants who are represented by class action attorneys do not come forward until notice of class certification or settlement is published. Their identities are unknown to the lawyers who represent them—as the lawyers may be unknown to the class members.

Mass tort litigants generally lack adequate information to monitor individual or class action attorneys’ behavior. Some firms disseminate newsletters about the progress of the litigation. Sometimes litigants form victims’ groups that disseminate information. But in most mass tort litigation, whether or not a class is certified, plaintiffs are absent from the rooms in which settlements are discussed and negotiated.

In most class actions, class members’ first and best opportunity to voice their aspirations for the litigation is at the “fairness hearing,” held by the judge prior to approving the settlement. In the Agent Orange class action, Judge Weinstein held fairness hearings in five cities to provide opportunities to Vietnam veterans residing in different parts of the country to express their views. By the time of a fairness hearing, however, the shape of the settlement is set. Judge Weinstein apparently viewed the role of the fairness hearings as catharsis—an opportunity for individuals to have at least a vestige of their “day in court”—rather than a real opportunity to learn from class members what they wanted from the litigation.

Judges rarely turn to mass tort litigants for help in monitoring lawyers’ behaviors. Some have suggested that judges should appoint party representatives who could play this role, but others argue that it is the lawyers’ responsibility to properly represent the interests of class members and individual clients.

6. Back to the Drawing Board?

In the wake of the Supreme Court’s rejection of the Amchem settlement, practitioners whom we interviewed questioned the viability of mass tort class actions for latent injury claims. Echoing the recommendations of the 1991 report of the Ad Hoc Committee on Asbestos Litigation, Justice Ruth Bader Ginsburg’s opinion for the Court suggested that Congress should take up the question of developing a compensation process for asbestos worker injury suits. (Recall that this was the report that—in lieu of congressional action—recommended that the Advisory Committee on Civil Rules consider revising Rule 23 to facilitate mass tort class actions.) The Ortiz Court repeated this call.

But the Court’s decisions in the asbestos cases did not spell the end of aggregation. Class actions have been filed in the “fen-phen” diet pill litigation, and all of the federal lawsuits on behalf of fen-phen users have been collected in a sin-
Informal coordination of state court cases continues apace. Plaintiff personal injury lawyers who were not appointed to the plaintiff steering committee by multidistrict Judge Louis Bechtle have organized the state court cases so that they can proceed through the pretrial process in a coordinated fashion, but outside of the federal multidistrict litigation.

Once litigation erupts over mass marketed products, it inevitably is pursued in an aggregative fashion.

E. DILEMMAS FOR PUBLIC POLICY

Traditional representative class actions over money, particularly lawsuits involving small dollar claims, pose multiple dilemmas for public policy. Many believe that these lawsuits serve an important regulatory function, especially in an era of limited governmental resources and limited appetites for bureaucratic process. Despite their distaste for class litigation and their dismay about rising numbers of lawsuits, many corporate representatives whom we interviewed said that the burst of new class litigation had caused them to review financial and employment practices. Likewise, some manufacturers noted that heightened concerns about potential class action suits sometimes have a positive influence on product design decisions.

But, in a large, complex, and highly regulated economy—comprising hundreds of thousands of firms and individual entrepreneurs, with diverse opportunities and predilections for small and large violations of legal rules—the private financial incentives for class actions also create a litigation system that tends toward expansion. As long as the legal system rewards success with substantial fees, private law firms that are expert at selecting and pursuing cases that have a high potential for financial reward will flourish, enhancing their risk-taking capacity. Over the long run, we should expect these successful firms to seek increasingly risky opportunities for litigation, testing whether various types of class action suits are viable.

For those who believe that a key objective of damage class actions is regulatory enforcement, a central dilemma is how to keep these expansionary forces from producing significant amounts of nonmeritorious litigation. For whenever the justice system rewards litigation without regard to its legal or factual merit, the deterrent potential of litigation is squandered.

Largely clientless consumer class action litigation holds within itself the seeds for questionable practices. The powerful financial incentives that drive plaintiff attorneys to assume the risk of litigation intersect with powerful interests on the defense side in settling litigation as early and as cheaply as possible, with the
least publicity. Procedural rules, such as the requirements for notice and judicial approval of settlements, provide only a weak bulwark against self-dealing and collusion. Notices may obscure more than they reveal to class members whose immediate gain or loss from a proposed settlement is modest. Individuals who step forward to challenge a less-than-optimal resolution or a larger-than-appropriate fee award often have a price at which they will agree to go away or join forces with the settling attorneys. Judges who are constantly urged to clear their dockets and are schooled to believe that the justice system is better served by settlement than adjudication may find it difficult to switch gears and turn a cold eye toward deals that—from a public policy perspective—may be better left undone.

Over time, we would expect that predatory class action filings and collusive settlement practices would produce increasing numbers of cases whose merits are either dubious or not well known, because they were not prosecuted to the fullest. They would also create a climate of cynicism about the objectives of plaintiff attorneys and the value of class actions generally.

Rather than solving the incentive problems posed by “headless” consumer class actions, multiheaded mass tort class actions bring an additional set of problems to class action practice. The multiplicity of lawyers of different types—class action practitioners, aggregative individual practitioners, more selective tort lawyers—provides additional opportunities for deal-making among practitioners, which may or may not benefit class members. The need to satisfy so many legal representatives may also drive up the total transaction costs for the litigation. The size of individual class members’ claims—tens or hundreds of thousands of dollars, rather than the small dollars and cents of consumer class actions—means that the financial stakes of the litigation are enormous, measured in hundreds of millions, or billions, of dollars. Defendants’ drive to make their ultimate financial exposure certain leads them to put huge amounts of money on the table in order to settle class litigation, an investment of resources that serves society’s interests only when the class members’ injuries are, in fact, caused by the defendants’ product. Plaintiff attorneys are hard put to reject the largess that flows from fees calculated as a percentage of such enormous sums, even when the deals that defendants offer are not necessarily the best that they could obtain for injured class members if they were to invest further effort and resources in the litigation. Defendants’ incentives to settle mass tort class actions—even when scientific evidence of causation is weak—and plaintiff attorneys’ incentives to settle for less than the individual claims taken together are worth, diminish the deterrence value of product litigation, leading to both over- and underdeterrence.

Controversy over the role of “junk science” in class actions is another aspect of the controversy over whether class actions, in practice, achieve regulatory en-
forcement objectives. We want manufacturers to take the costs of injury into account when they design and market products. Exposure to liability (combined with market forces and regulation) should cause manufacturers to invest in making safer products, the cost of which will be passed on in the form of higher prices to the consumers who benefit from the improvements. If defendants pay large amounts to settle claims of individuals whose injuries were most likely not caused by the defendants’ products, then these costs as well are passed on to consumers who end up paying higher prices for products than they should. If the manufacturer cannot design a product whose benefits to consumers outweigh the risks, or that cannot be properly labeled so that consumers can decide whether to use it, then consumers do not want that product on the market. But if defendants come to believe that certain products are likely to lead to expensive litigation, without regard to scientific evidence indicating whether plaintiffs’ injuries were caused by their use of that product, then good products may be kept off the market and consumers lose again. Ultimately, if the legal system does not properly distinguish between safe and unsafe products, the legal system’s ability to deter bad products and practices is also lost.

The expansionary effect of class actions has special consequences for mass torts. In consumer class actions, a successful notice campaign will increase the cost of litigation for defendants, but often will have little impact on the amount that class members collect, since the economic losses that led to the class action were modest and the remedies are usually commensurately small. But in mass tort litigation, the expansion of the claimant population as a result of class certification affects both defendants and plaintiffs. Defendants will likely pay more to settle a class action than they would absent the class action because more claimants come forward in response to notices and the media attention that class actions often receive, and some of those who secure payment might not have been able to win individual lawsuits. What attracts defendants to mass tort class actions nonetheless is saving litigation costs and capping their risk—both necessary to reassure stock market analysts who closely follow the progress of such high-stakes litigation. Individual class members whose claims have merit are likely to get less than if they sued individually, because the money will have to be shared with many other claimants—including those with less serious or questionable injuries. Those with the most serious injuries and strongest legal claims are likely to lose the most.

Moreover, allocating damages to mass tort class members raises special questions. In consumer classes, if the primary goal is regulatory enforcement, carefully matching damages to losses is not a great concern. As long as defendants pay enough to deter bad behavior, economic theorists tell us, it does not matter how their payment is distributed. In mass torts, there are twin goals: compen-
sating injured class members, and deterring unsafe products and practices.¹⁹⁹ Tort damages are intended to make the victim whole. Where class members’ injuries vary in nature and severity, finding a means of allocating damages proportional to loss without expending huge amounts of money on administration is a tall challenge. The need to save transaction costs drives attorneys toward formulaic allocation schemes. But resolutions that lack individualization challenge a fundamental reason for dealing with mass injuries through the tort liability system, rather than a public administrative scheme.

Finally, mass tort class actions may exacerbate the problems that courts have dealing with evolving scientific evidence of causation. Scientific questions are rarely resolved forever. Today, scientific research may suggest that there is no link between exposure to a certain substance and certain diseases. Next year—or a decade from now—scientists may discover one. Courts, in contrast, need to make decisions in the short term; they need to decide whether there is now enough information to indicate that the defendant’s product caused the plaintiff’s injury (and that the defendant should have known it). When cases are decided individually, some plaintiffs may not receive compensation for an injury this year because they cannot demonstrate that the product caused their injury. Years from now, other plaintiffs may be able to receive compensation for the same type of injury because they can demonstrate causation. We accept this outcome, in return for the knowledge that the legal system will provide a remedy for provable wrongs within a reasonable period of time. However, when huge numbers of cases are collected and litigated on the basis of current scientific knowledge we run the risk of making the “wrong” decision in the light of future knowledge for many individuals, including some whose injury has not yet even manifested itself. Whether this risk is worth the benefits to class action plaintiffs and defendants is an important public policy question.

Although eliminating Rule 23(b)(3) might eliminate small damage consumer class actions, mass personal injury litigation is not a creature of Rule 23. Mass litigation is a creature of a modern global economy, a cultural belief that those who impose harms upon others should pay for them, and a litigation system that is driven by information technology and entrepreneurship. Absent class actions, mass tort litigation proceeds in aggregative form, albeit perhaps in multiple jurisdictions and on a smaller scale. Class action rules and practice offer a structure for considering troubling questions of representation and fairness, for regulating attorney fees, and for achieving more efficient resolution of the central causation and liability questions that lie at the heart of most mass torts—a structure that is much less developed outside the class action domain. Whether the current Rule 23 is well-crafted to fit the features of mass tort litigation—or whether it might be better to devise a special version of the rule for these cases—is a question deserving further consideration. But no one con-
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templating the appropriateness of class treatment for mass torts should do so in the belief that truly individual litigation is the alternative.

Whether there are legal rules and practices that could better harness the incentives created by collective litigation, to assure that its public goals are not outweighed by the private gains, is the key question for public policy. In the final chapter, we will return to this question.

NOTES

1Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134 § 504(a)(7), 110 Stat. 1321 (1996) (“None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity. . . that initiates or participates in a class action suit”), and Omnibus Consolidated Appropriations Act of Fiscal Year 1997, Pub. L. No. 104–208, § 502(b), 110 Stat. 3009 (1996), forbid Legal Services Corporation grantees to participate as counsel in a class action or to engage in any litigation concerning welfare, abortion or redistricting, or on behalf of aliens (with some exceptions) or prisoners. Commenting on the appropriation for the Legal Services Corporation on September 29, 1995, Senator Peter Domenici (R) emphasized: “No class action lawsuits—no class action lawsuits—can be filed. . . [The appropriation provides for] [i]ndividual legal services for individual Americans in need, for their case and their cause and only that.” And Senator Ernest Hollings (D) commented: “There are plenty of moneys [sic] for class actions for these other groups [from other sources]. You have to keep [LSC] couched and carefully controlled. . . So I welcome the restrictions that have been put on by Senator Gramm and others here with respect to class action and illegals and otherwise. Let us make sure that we maintain the integrity of the program.” 141 Cong. Rec. S14,607 (Sept. 29, 1995).


3Social 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).


7In re General Motors Pick-Up Truck Fuel Tank Litigation, 55 F.3d 768 (3d Cir. 1995).


10The legal term of art for this is that civil procedure rules are “trans-substantive.”


12We also compiled data from the Bureau of National Affairs (BNA) litigation reporters, which we presented in a briefing on the preliminary results of the study. See Deborah Hensler et al., Preliminary Results of the RAND Study of Class Action Litigation (Santa Monica, Calif.: RAND, 1997). Because those data reflect trends in some litigation areas but not others, we have not included them in the analysis here.

13See supra Chapter Two at p. 12.

14Willging et al., supra note 11. In Appendix B we compare the results of our database search with the Federal Judicial Center data.
Business critics of class actions have complained that Alabama state court judges have been too ready to entertain damage class actions and hence that Alabama has become a “hotbed” of such litigation. Plaintiff class action attorneys whom we interviewed agreed that Alabama was an attractive place to file certain kinds of class action lawsuits. None of our interviewees shared detailed information on the distribution of their pending class action cases by state. A study conducted for a corporate consortium by Stateside Associates found 91 putative class actions filed in six rural Alabama counties from 1995–1997. In half of these cases, the court had yet to act on certification. Virtually all of the cases in which certification had been decided were certified, often on an ex parte basis (that is, without defendants having a chance to argue against certification)—a practice then permitted in Alabama as well as some other states. More than half of the certified cases involved nationwide classes. See Martin Connor, Class Actions in State Courts A Case Study: Alabama (Arlington, Va.: Stateside Associates).

Appendix C describes our qualitative interview methodology.

No one we interviewed gave us access to their files so that we could independently count their pending or past class action lawsuits. Some shared rough estimates of the size of their pending caseload, and compared it to cases pending three to five years ago. Others consulted lists of cases during our interviews but would not share those lists with us. A few reviewed their lists with us during the interview, but we were not allowed to copy them. Some described the cases in detail, although they would not allow us to identify the cases in our writing.

Caseloads of the leading national class action attorney firms could grow as a result of the shifting of class action suits from smaller regional or local firms, rather than as a result of growth in the total number of class actions nationwide. Our interviews provided no evidence of such a shift, however.

We conducted the majority of interviews when securities lawyers were still trying to determine how to respond to the new federal legislation. More recent conversations with securities lawyers and those who monitor securities litigation suggest that the number of federal securities suits may have increased since the reforms were enacted into law.

In the past, some class action practitioners specialized in securities class actions, while others were primarily engaged in consumer law. Few of either set of attorneys had anything to do with mass product litigation. In the past several years, securities lawyers have ventured first into the broader consumer domain and then, increasingly, into mass personal injury and property damage litigation. Section D describes this evolution.

There is considerable theoretical and empirical research showing that Americans are generally unlikely to pursue legal claims. See, e.g., Michael Saks, "Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?" 149 University of Pennsylvania Law Review 1147 (1992); William Felstiner et al., “The Emergence and Transformation of Disputes: Naming, Blaming, Claiming. . . ” 15 Law and Society Review 629 (1981); Deborah Hensler et al., Costs and Compensation for Accidental Injury in the United States (Santa Monica, Calif.: RAND, 1991).

Public officials can prosecute on behalf of the government or they may bring class actions on behalf of all consumers or all residents within their state.


representations or antitrust violations affecting numerous persons would be likely, although not by any means sure candidates for class treatment under subdivision (b)(3).” Id. at 393.

32Harry Kalven, Jr., and Maurice Rosenfield, 8 University of Chicago Law Review 684, 686 (1941).

33Id.

34Id. at 721. Writing about 30 years later, Judge Jack B. Weinstein echoed the views of Kalven and Rosenfield: “Where the public authorities are remiss for a variety of reasons—inadequate legal authority, too heavy workload, or what have you—the class action does furnish a desirable remedy . . . When the organization of a modern society, such as ours, affords the possibility of illegal behavior, accompanied by widespread diffuse consequences, some procedural means should exist to remedy or at least deter that conduct. . . . That is not to say that we can solve all social ills or even that justiciable controversies of broad public concern merit class action status. . . . The solution, it seems to me, will have to come from a case by case interpretation of subtle doctrines and standards . . . ” Jack B. Weinstein, “Some Reflections on the ‘Abusiveness’ of Class Actions,” 58 F.R.D. 299, 305 (1973).

35The evolution of legal doctrine concerning attorney fees in class actions is discussed later in this chapter.

36Corporate representatives have asserted that securities class action attorneys file suit whenever a stock price drops, an assertion that the latter reject. Relying, in part, on a study commissioned by plaintiff attorneys, Professor John Coffee, a noted critic of class action abuses, concludes that this assertion “has to be an overstatement.” He suggests, instead, that there are three criteria for filing such a suit: (1) a significant stock drop following a material adverse disclosure (2) a preceding self-off by insiders, and (3) a sufficient turnover to generate potential damages in the $20 million range.” John Coffee, “Securities Class Actions: Myth, Reality and Reform,” New York Law Journal, July 28, 1994, at 1, 7.


39Procedural law dealing with jurisdictional issues is complex, and there are various ways plaintiffs can structure a lawsuit so as to seek federal or state jurisdiction; similarly, defendants who are unhappy with the initial jurisdiction may ask to have the case “removed” to the alternate (i.e., state or federal) system. In Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921), the U.S. Supreme Court held that, for purposes of diversity jurisdiction, it is only necessary for the named (representative) plaintiffs’ jurisdiction to be diverse from the defendant’s. Plaintiff class action attorneys who prefer federal court jurisdiction could select only representative plaintiffs who are diverse from the defendant; plaintiff class action attorneys who prefer state court jurisdiction could select only representative plaintiffs who are nondiverse, so as to thwart any defendant action to seek federal diversity jurisdiction.

4028 U.S.C. §1332(b). The threshold was last increased by Congress on October 19, 1996, effective 90 days after that date.

41This interpretation of the application of the jurisdictional threshold to class actions dates back to the period before the adoption of the 1966 amendments to Rule 23. After 1966, some proponents of damage class actions argued that the jurisdictional requirement could be met by aggregating individual class members’ claims. The Supreme Court rejected this interpretation first in Snyder v. Harris, 394 U.S. 332 (1969), and then again in Zahn v. International Paper, 414 U.S. 291 (1973). At the time Zahn was decided, the jurisdictional threshold was $10,000.

42After Zahn, plaintiff attorneys preferring federal jurisdiction sometimes sought to meet the individual threshold by claiming punitive damages for each class member; defendants who preferred state court jurisdiction would contest this and seek removal to state court. More recently, plaintiff class action attorneys who view federal judges as disinclined to certify damage class actions have filed in state courts, and have abjured punitive damages so as not to provide defendants with grounds for removal to federal court.

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

The settlement rate rose somewhat, and the trial verdict and pretrial judgment rates declined. About 23 percent were terminated by pretrial judgment, and about 5 percent were terminated by verdict. Whether a court can dismiss a case on the merits before certifying it is currently unclear. See *practicable* after it has been filed. Whether a court can dismiss a case on the merits before certifying it is currently unclear. See Manual for Complex Litigation 214–15 (3d ed. 1995). In its study of class action litigation in four federal district courts, the Federal Judicial Center found that court rulings on dismissal preceded decisions on certification about three-quarters of the time when dismissal was considered. Rulings on motions for summary judgment occurred prior to decisions on certification in about 60 percent of the cases in which such motions were considered. See Williging et al., *supra* note 11, at 169, 171, tables 20 & 23. In some instances, damage class actions implicating multiple state standards have been tried, at least partially. For example, in *Naef v. Masonite Corp.*, No. CV-84-4033 (Ala. Cir. Ct. Mobile County 1984), the jury was asked to decide whether the defendant was liable for an allegedly defective wood siding product, applying a variety of state standards. The case ultimately settled. Judges in other jurisdictions have declined to certify nationwide classes implicating different state laws, citing *Naef* as an example to avoid. See, e.g., *In re Masonite Corp. Hardboard Siding Products Liability Litigation*, 170 F.R.D. 417 (E.D. La. 1997); *In re Ford Motor Co. Ignition Switch Products Liability Litigation*, 174 F.R.D. 332 (D.N.J. 1997).

The district court in the *Eisen* case found that out of a prospective class of six million individuals and institutions, about 2,250,000 could be identified by name and address. However, concluding that the cost of mailing notices to all of these would be prohibitive, it sanctioned a combination of individual notices to some prospective class members and publication of notice in the Wall Street Journal and other newspapers. Finding that the plaintiffs were likely to prevail in the case, the district court further held that most of the notice costs should be paid by the defendants. The Supreme Court held that the combination of individual and public notice did not satisfy the rule’s notice requirements and that there was no basis in law for the district court’s making a preliminary decision on the merits and imposing costs on the defendant. In 1979, an announcement by the “Fund for Class Action Costs” appeared in Class Action Reports, offering to subsidize notice costs for plaintiffs and attorneys in class and derivative suits who were unable to shoulder these costs themselves. Applications for support were to be vetted by a “disinterested expert panel,” and attorneys who accepted assistance had to promise to reimburse the fund if they were successful. 6 *Class Action Reports* 77 (1979).

Not all states follow *Eisen* in interpreting their own class action rules. For example, California consumer legislation provides for judges to impose the costs of notice on defendants. Cal. Civ. Code § 1781(d).

The *Manual for Complex Litigation* recommends that “notice should ordinarily be given promptly after the certification order is issued.” *Id.* at 224. The *Manual for Complex Litigation* has no force of law, but is generally relied on by federal judges. There is no comparable reference manual for state trial court judges; as a result, they too, turn to the *Manual for Complex Litigation* for advice.


From 1985 to 1995, about 72 percent of all federal civil suits were terminated by settlement, about 23 percent were terminated by pretrial judgment, and about 5 percent were terminated by verdict. The settlement rate rose somewhat, and the trial verdict and pretrial judgment rates declined.
somewhat, over the decade. (Calculations performed by RAND on data reported in the federal statistical database.) Similar statistics are reported for state courts. See, e.g., James Kakalik et al., *Averting Gridlock: Strategies for Reducing Civil Delay in the Los Angeles Superior Court* (Santa Monica, Calif.: RAND, 1990) (finding 4 percent of civil cases filed in 1980–82 were disposed of at or after trial).

There has been a good deal of controversy concerning the question of whether the rate of settlement in class actions is the same as or higher than in ordinary civil litigation. In its study of class actions terminated from 1992 to 1994 in four federal district courts, the Federal Judicial Center found trial rates for class actions ranging from 3 to 5 percent, and settlement rates ranging from 53 to 64 percent. Willging et al., *supra* note 11, at 115, 167.

Protagonists in the securities class action reform debate offered conflicting data on settlement rates. See *Private Litigation Under the Federal Securities Laws: Hearings Before the Subcommittee on Securities, U. S. Senate Committee on Banking, Housing, and Urban Affairs*, 103d Cong., 1st Sess. (1993) (hereinafter *Senate Securities Litigation Hearings*) (proceedings of June 17 and July 21, 1993). In the absence of comprehensive data on class actions in federal and state courts, it is not possible to determine conclusively whether class action settlement patterns differ significantly from those of other cases.


58Id.

59Rule 23(c)(2) says “. . . The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion. . . ” This seems to imply that notice would occur prior to any resolution. The practice of certifying settlement classes has proved highly controversial, as discussed in Chapter Two and later in this chapter.


63922 F. Supp. at 1278.

64Id. at 1278–79. See also “Report of the Third Circuit,” *supra* note 60, at 16–25 (discussing problems associated with lodestar approach).

65See, e.g., *In re “Agent Orange” Product Liability Litigation*, 818 F.2d 226 (2d Cir. 1987) (appeal of attorney fee awards).
the defendant may require the plaintiff attorney to enter into a contract not to bring another such
claim, could be a dangerous defense strategy. If the class action is dropped, the defendant has no
assurance that it will not face another class action in the future alleging the same facts and harms.

In order to guard against this turn of events, some plaintiff attorneys and defense counsel told us,
agreeing to settle the individual lawsuits, in return for the plaintiff attorney dropping the class
action, the fund had been claimed. 444 U.S. at 477 n.4. The court held that in statutory fee cases, negotiation over fees could not begin until after the trial court had approved settlement. The court also noted that in common fund cases “the adverse interests [between class members and class counsel] are patent and the necessity for a court to recognize the equities of the absent and passive members of a class is obvious.” Id. at 1020. The Third Circuit returned the case to the trial court for reconsideration of the fee amount on other grounds. On a second appeal, it reiterated its support for separating settlement and fee negotiations. Prandini v. National Tea Company, 585 F.2d 47 (1978).

The Third Circuit study group proposed that judges negotiate a percentage fee arrangement with
class counsel at the outset of the case or “as early as practicable.” “Report of the Third Circuit,” supra note 60, at 42. In complex cases, the study group further recommended that the judge appoint an attorney other than class counsel to negotiate the fee arrangement on behalf of the class; the attorney would then submit a fee recommendation to the judge for her approval. Id. at 45–47.

Evans v. Jeff D., 475 U.S. 717 (1985). A fee in the Jeff D. case would have been awarded to the prevailing party under the Civil Rights Attorney’s Fee Awards Act of 1976, 42 U.S.C. § 1988. The defendant offered the plaintiff attorney an optimal settlement for class members, conditioned on the plaintiff attorney’s waiver of fees. The attorney accepted the settlement, saying he was ethically bound to do so, and subsequently sought to overturn the fee waiver.

The notion of creating a trust to hold settlement funds, with the understanding that any amount of money remaining after distribution to claimants will be put to some other good use, derives from the law of charitable trusts where it is termed a “cy pres” remedy. In class action litigation, cy pres remedies are frequently termed “fluid recovery.” See Note, “The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions,” 38 Hastings Law Journal 729 (1987).

Boeing v. Van Gemert, 444 U.S. 472 (1980). After settlement of a class action against it, Boeing appealed a court order awarding fees against the total value of the fund, arguing that it had a colorable claim for the return of the unclaimed money. At the time of Boeing’s appeal 47 percent of the fund had been claimed. 444 U.S. at 477 n.4.


suit against this defendant. Of course, this does not protect the defendant against class actions brought by other plaintiff attorneys.

78 In a complex securities suit, a district court judge approved a settlement notwithstanding objections from the class plaintiff. The Second Circuit Court of Appeals reversed the trial court’s decision but noted that, “despite the seeming incongruity . . . the assent of the plaintiff [who brought the action] is not essential to the settlement.” The court explained that a contrary holding “would put too much power in a wishful thinker or a spite monger to thwart a result that is in the best interests of the [class members].” Saylor v. Lindsey, 456 F.2d 896, 899–900 (2d Cir. 1972).

79 Manual for Complex Litigation at 238.
80 Id.
81 Id. at 238–39.
82 Id. at 239.
83 Id.
84 Id.

85 Public Citizen Litigation Group, “Public Citizen’s Involvement in Class Action Settlements” (June 12, 1997) (on file with the authors). Since 1997, Public Citizen lawyers have appeared in about another dozen class actions.
87 See, e.g., Bowling v. Pfizer, Inc. 922 F. Supp. 1261 (S.D. Ohio 1996). In Bowling, objectors included Public Citizen as well as private law firms. Some of the latter subsequently joined with class counsel as “special counsel,” and applied for attorney fees in that role.
90 See Van Voris, supra note 4. In virtually all of the consumer class actions which it participated in as an objector through 1997, Public Citizen took issue with fees as well as settlements. See Public Citizen Litigation Group, supra note 85.
91 Bowling v. Pfizer, 102 F.3d 777 (6th Cir. 1996).
92 Public Citizen Litigation Group, supra note 85, at 1.
96 In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768 (3d Cir. 1995). For a discussion of objections to the settlement, see Wolfman and Morrison, supra note 76.
97 See Public Citizen Litigation Group, supra note 85, at 19–20.
In a case affirming district court approval of a settlement of a Title VII class action in 1977, the court wrote: “Particularly in class action suits, there is an overriding public interest in favor of settlement. . . In these days of increasing congestion within the federal court system, settlements contribute greatly to the efficient utilization of our scarce judicial resources.” Cotton v. Hinton, 559 F.2d 1326, 1331 (5th Cir. 1977). In response to an appeal of a class action settlement, the Ninth Circuit more recently noted that its role is limited, “especially. . . in light of the strong judicial policy that favors settlements, particularly where complex class action litigation is concerned.” Chemical Bank v. City of Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992).

Rule 53 of the Federal Rules of Civil Procedures provides for the appointment of special masters, but cautions that such appointments should be rare.

Chemical Bank v. City of Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992).

Frank, supra note 75.


See Senate Securities Litigation Hearings, supra note 52.


Public Citizen Litigation Group, supra note 85, at 18–19.

White v. General Motors Corp., 718 So. 2d 480 (La. 1998). Public Citizen ultimately decided to support this settlement. Public Citizen Litigation Group, supra note 85, at 19–20. This settlement was challenged by individuals who had objected to the similar settlement that had been rejected by the Third Circuit, but, on appeal, the Third Circuit reluctantly rejected the challenge, in part, on the grounds that the state court in Louisiana had already affirmed the settlement. In re General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation, 134 F.3d 133 (3d Cir. 1998).


Public Citizen Litigation Group, supra note 85, at 18.


Dale v. Ford Motor Co., No. 661492 (Cal. Super. Ct. Orange County 1991). Defendants removed the case to federal court, where it was ultimately remanded back to state court.


Laughman v. Wells Fargo Leasing Corp., No. 96 C 925 (N.D. Ill. 1997).


Laughman v. Wells Fargo Leasing Corp., No. 96 C 925 (N.D. Ill. 1997).


In re General Mills Oat Cereal Litigation, No. 94 CH 06208 (Ill. Cir. Ct. Cook County 1994).


Public Citizen Litigation Group, supra note 85, at 11.

Id. at 17.

Id. at 21. In this case, as in others, defendants did not oppose the fee requests.


Borel v. Fibreboard Corp., 493 F.2d 1076 (5th Cir. 1973).

The evolution of asbestos worker injury litigation is described in Deborah Hensler et al., Asbestos in the Court: The Challenge of Mass Toxic Torts (Santa Monica, Calif.: RAND, 1985).

The large majority of asbestos personal injury claimants are male. See James Kakalik et al., Variation in Asbestos Litigation Compensation and Expenses (Santa Monica, Calif.: RAND, 1984).


Hensler and Peterson, supra note 143, at 988.

Id. at 996.

28 U.S.C. § 1407. From 1968 to 1996, the Judicial Panel on Multidistricting considered 278 motions to collect and transfer personal injury suits, and transferred 193 cases (69 percent). (Analysis of docket information provided by the clerk of the panel.)

Francis McGovern, “Rethinking Cooperation Among Judges in Mass Tort Litigation,” 44 UCLA Law Review 1851 (1997). Judicial cooperation was facilitated by the creation of the Mass Tort Litigation Committee under the aegis of the private, nonprofit National Center for State Courts. Each state was invited to send a representative to the meetings of this committee. In the silicone gel breast implant litigation, this committee of state judges met also with Judge Samuel C. Pointer, who presided over the federal multidistrict litigation.


See, e.g., In re Nineteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litigation, 982 F.2d 603 (1st Cir. 1992) (sustaining individual tort lawyers’ challenge of judge’s award of fees to plaintiffs’ management committee).


See Hensler, supra note 148, at 1601 (Figure 1).


See, e.g., In re Norplant Contraceptive Products Liability Litigation, 168 F.R.D. 577 (E.D. Tex. 1996); In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995); Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996). The concept of maturity as an important indicator of the readiness of mass tort cases for aggregation has also been endorsed by the Working Group on Mass Torts in Report of the Advisory Committee on Civil Rules and the Working Group on Mass Torts to the Chief Justice of the United States and the Judicial Conference of the United States 5 (Feb. 15, 1999) (on file with the authors).


Green, supra note 149.
167See Sobol, supra note 154.
168On the application of Rule 23 to mass tort litigation, see Paul Rheingold, Mass Tort Litigation (Deerfield, Ill.: Clark Boardman Callaghan, 1996).
169Mass torts have rarely been certified as non-opt-out Rule 23(b)(2) class actions. In In re Asbestos Litigation, 90 F.3d 963 (5th Cir. 1996), the Fifth Circuit upheld certification of an asbestos settlement on a limited fund theory. The Supreme Court subsequently reversed. Ortiz v. Fibreboard, 1999 U.S. LEXIS 4373 (1999). In In re Silicone Gel Breast Implant Products Liability Litigation, No. CV 92-P-10000-S, MDL No. 926, 1993 WL 795477 (N.D. Ala. 1993), Judge Sam Pointer certified a (b)(2) class action against Mentor Corporation, an insolvent implant manufacturer. Id. at 5.
170In the Agent Orange litigation, for example, some plaintiff lawyers feared that the attorney who had begun the litigation and then been pushed aside, Victor Yannaconne, might urge his supporters in the Vietnam veterans community to opt out of the litigation. “He’s well known and strongly identified with the litigation,” one of the attorneys told a reporter, “If he becomes an open dissident, it’s not going to help.” Susan Milstein, “The Crusader Who Lost His Way,” American Lawyer, Apr. 1984, at 97.
171Indeed, the details of the compensation scheme had yet to be devised. See Schuck, supra note 164, at 143–67.
172Angell, supra note 163, at 22.
174782 F.2d 468 (5th Cir. 1986).
175About 600 claims were settled within two weeks of the trial’s start; the remaining 103 claims were settled three weeks later. The trial was not completed and the jury did not deliberate. See Mark Peterson and Molly Selvin, Resolution of Mass Torts: Toward a Framework for Evaluation of Aggregative Procedures 41 & n.93 (Santa Monica, Calif.: RAND, 1988).
177Initially, Judge Parker proposed a somewhat different plan for the jury trial. On appeal, the Fifth Circuit upheld a classwide trial on common issues but rejected the plan for trying damages. In re Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990). Judge Parker’s initial response was to adopt the plan intended for the Jenkins trial (which, as a result of the settlement, was never implemented). However, asserting that it would take 4-1/2 years to try all class members’ claims under that plan, he then changed his mind and adopted the sampling plan, which was ultimately rejected by the Fifth Circuit. Cimino v. Raymark Industries, 151 F.3d 297 (5th Cir. 1998).
181In re Pick-Up Truck Fuel Tank Litigation, 55 F.3d 768 (3d Cir. 1995) (holding that if a class cannot be certified for trial, it cannot be certified for settlement).
184In re Silicone Gel Breast Implant Products Liability Litigation, No. CV 92-P-10000-S, MDL No. 926 (N.D. Ala. 1994).
185In most bankruptcies the court specifies a “bar date” by which all creditors, including tort claimants, must come forward. In the Manville and other asbestos bankruptcies, claimants did not have to file before the bankruptcy agreement was approved by the court.
186 In 1989 and 1990, two new class actions were filed on behalf of plaintiffs who alleged that they had not been aware of any injuries at the time of the Agent Orange class action notice and settlement. Filed in state court in Texas, the suits were first removed to the federal courts in Texas (on defense motions) and then transferred to Judge Weinstein by the Judicial Panel on Multidistricting (the panel treated them as tag-along cases). Judge Weinstein held that the veteran plaintiffs were part of the 1984 class and therefore barred from litigation, a holding subsequently upheld by the Second Circuit. In re Agent Orange Product Liability Litigation, 996 F.2d 1425 (2d Cir. 1993).


190 Asbestos worker injury suits had been certified previously for trial in east Texas. Jenkins v. Raymark Industries, 109 F.R.D. 269 (E.D. Tex. 1985); Cimino v. Raymark Industries, 751 F. Supp. 649 (E.D. Tex. 1990). However, these classes comprised individuals who had filed lawsuits in Texas.


195 In re Diet Drugs Products Liability Litigation, MDL No. 1203 (1997).


197 On problems associated with achieving deterrence through private litigation when defendants believe that standards are unclear and will be applied erratically, see Steven Garber, “Product Liability, Punitive Damages, Business Decisions and Economic Outcomes,” 1998 Wisconsin Law Review 237.

198 For a discussion of the deterrence effects of product liability litigation and how litigation can lead to over- and underdeterrence, see id.