Education and Training Series

An Overview of Federal Class Actions: Past, Present and Future

Federal Judicial Center

SECOND EDITION

FJC-ETS-77-8

THE FEDERAL JUDICIAL CENTER

Board

The Chief Justice of the United States
Chairman

Judge Ruggero J. Aldisert
United States Court of Appeals for the Third Circuit

Judge Frank J. McGarr
United States District Court Northern District of Illinois

Judge Robert H. Schnacke
United States District Court Northern District of California

Judge Aubrey E. Robinson, Jr.
United States District Court District of Columbia

Judge John C. Godbold
United States Court of Appeals for the Fifth Circuit

William E. Foley
Director of the Administrative Office of the United States Courts

---

Director
A. Leo Levin

Deputy Director
Joseph L. Ebersole

Division Directors

Kenneth C. Crawford
Continuing Education and Training

William B. Eldridge
Research

Charles W. Nihan
Innovations and Systems Development

Alice L. O'Donnell
Inter-Judicial Affairs and Information Services

1520 H Street, N.W.
Washington, D.C. 20005
Telephone 202/633-6011

AN OVERVIEW OF FEDERAL CLASS ACTIONS: PAST, PRESENT, AND FUTURE

By

Arthur R. Miller

Federal Judicial Center
December, 1977

Second Edition

FJC-ETS-77-8

FOREWORD

This monograph by Professor Arthur R. Miller of the Harvard Law School analyzes the origins, development, and present state of the law governing class actions. He also suggests what the future might hold in this area. It was developed from presentations he made to the Center's workshops for United States District Judges. Requests from workshop participants to have his remarks available in a more permanent form led us to ask him to prepare this paper.

In this paper, Professor Miller treats a time consuming, often vexing, area of federal litigation, one which presents difficult questions not only to federal judges but also to those magistrates who are involved in preliminary motions in class action suits. Class actions are not only a difficult area of the law but also one in rapid flux, and thus it is important to note that Professor Miller's research covers developments occuring through September, 1977.

In analyzing the class action, Professor Miller draws on his rich background as educator and scholar as well as his experience as a practitioner. I hope this monograph will prove of particular value to those who must deal regularly with the topics it covers.

A. Leo Levin
Director

AN OVERVIEW OF FEDERAL CLASS ACTIONS: PAST, PRESENT, AND FUTURE

This monograph represents an excursion through part of the wonderful world of class actions. It is an edited version of one of the presentations I made at the workshops for district judges presented by the Federal Judicial Center throughout the United States during 1976 and 1977. Senior Judge William Becker, then Chief Judge of the Western District of Missouri, shared the podium with me and his paper "The Class Action Conflict," which was distributed at those sessions is a very useful document to read in conjunction with this monograph. It provides an organized discussion of the conflict areas and contains a rather extensive list of citations of the key cases. His paper also analyzes several subjects that time did not permit me to go into during my presentations, in particular, questions of federal jurisdiction, such as the problems raised by the decisions in Snyder v. Harris[1] and Zahn v. International Paper Co.,[2] in which the Supreme Court restricted subject matter jurisdiction by deciding that aggregation is not permitted in class actions, except under limited circumstances. He also has an extensive discussion of Eisen v. Carlisle & Jacquelin[3] and its impact on notice in class actions. Finally, the paper has one of the best descriptions currently available of appeals in class actions, with particular emphasis on the various modes of mid-stream review that the courts of appeals have employed to provide some guidance

---

1. 394 U.S. 332, 89 S. Ct. 1053, 22 L. Ed. 2d 319 (1969).

2. 414 U.S. 291, 94 S. Ct. 505, 38 L. Ed. 2d 511 (1974).

3. 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974).

for the district judges on a number of class action matters.[4]

This monograph is in the nature of a discursive walk through Federal Rule 23, although some times it will be more like a run or a race. I will attempt to identify those key areas of administering the Rule that have caused difficulty during the past ten years. But before I embark on a technical discussion of how the Rule has been interpreted since it became effective in 1966, let me offer a few background observations that also will indicate some of my attitudes regarding Rule 23. I think this may be useful because we seem to be in the midst of a holy war over this Rule, one being fought between the defense bar and the plaintiff's bar. In some respects it has become a political figure, for example, in the consumer and environmental areas, and some aspects of the Rule have received public notoriety in many parts of the United States because of media attention. Unfortunately, much of the discussion has been highly emotional and considerable snake-oil has been sold along the way.

There are those who say that the 1966 revision of Federal Rule 23 is the most drastic procedural innovation of the twentieth century; that it has done more to change the face of federal practice than any other procedural development, including the promulgation of the Civil Rules themselves in 1938. Moreover, there have been accusations concerning widespread abuse of the Rule by lawyers and litigants on both sides of the "V," with particular emphasis on practices relating to attorneys' fees, sweetheart deals, and misrepresentations to judges.

---

4. See also 7A Wright & Miller, Federal Practice and Procedure § 1802. Footnote references will be kept to a minimum, relying, in the main, on citations to the discussion in the Wright & Miller treatise where the cases and commentaries are collected. Because of the constant development and change in the class action area, a great deal of valuable material will be found in the pocket parts.

There also has been a great deal of controversy over the relationship between Rule 23 and the changing role of the federal district judge who must shoulder the heavy burdens of class actions. The assertion is that cases are now brought that are totally unmanageable and have a longer life expectancy than many of the judges asked to adjudicate them, a rather morbid thought to contemplate. Of course, there is no question about the fact that the dimensions of certain class actions are beyond anything ever seen in Anglo-American courts in terms of size, complexity, and longevity. Nor is there any question that some of these cases require federal judges to undertake management tasks requiring the expenditure of enormous time and effort, converting their role from one of passive adjudicator to that of active systems director.

In point of fact, we have precious little empiric evidence as to how the Rule actually has been functioning. The evidence that we have, largely in the form of an excellent report by the Senate Committee on Commerce,[5] the so-called Magnuson Committee Study, and a study done by the American Bar Foundation on antitrust class actions,[6] indicates that much of the debate has been based on erroneous assumptions. The studies indicate that

---

5. Staff of Senate Comm. on Commerce, 93d Cong., 2d Sess., Class Action Study (Comm. Print 1974). The essence of the report appears in Note, Rule 23(b)(3) Class Actions: An Empirical Study, 62 Geo. L.J. 1123 (1974).

6. See DuVal, The Class Action as an Antitrust Enforcement Device: The Chicago Experience (1), 1976 Am. B. Foundation Research J. 1023; Wolfram, The Antibiotics Class Actions, 1976 Am. B. Foundation Research J. 251. See also Kennedy, Securities Class and Derivative Actions in the United States District Court for the Northern District of Texas: An Empirical Study, 1977, 14 Hous. L. Rev. 769 (1977).

Rule 23 is achieving its intended purposes and may well be providing system-wide economies, even though some cases are incredibly difficult to process. Moreover, it appears that to the extent there are difficulties with the functioning of Rule 23, they center around the (b)(3) category of cases and do not involve (b)(1) or (b)(2) cases.

These studies also suggest that although there are some indications of undesirable or unprofessional conduct in certain cases, abuse is not widespread. What appears to have happened is that anecdotes about a few situations have been repeated so often at professional meetings that an impression has been created that these abuses occur in every case. The empiric evidence also suggests, contrary to a widely held opinion, that in settled damage class actions, particularly in the treble damage antitrust and securities contexts, the vast majority of the money received actually is distributed to the class members. It does not get devoured by avaricious attorneys questing for fees nor is it eaten-up by administrative expenses.

I tend to doubt the claim that the 1966 revision of Rule 23 itself has had a revolutionary impact. Certainly the revision has been followed by a pronounced change in the face of civil litigation in the federal courts. But I do not believe this has been the result of the revision; to the contrary, I believe that these changes would have occurred had Rule 23 not been amended in 1966. That amendment has become a very convenient scapegoat for those distressed with the character and direction of class action litigation today, particularly those who must defend them. It is not surprising that the Rule's revision is blamed by many federal judges who have had to work mightily in cases that are dinosaur-like in their dimensions and pace and have had to engage in managerial activities that are fairly far removed from the judiciary's central task of dispute resolution and justice dispensing. But I believe that the federal courts would find themselves in exactly the same position they now are in with regard to class actions had Rule 23 not been touched in 1966.

Indeed, I am prepared to argue that federal judges would find themselves in the same administrative and managerial morass today had Federal Rule 23 never been promulgated and the short, cryptic text of Rule 38 of the Equity Rules of 1912 had remained in force! Since I am in the mood for making strong statements, I will go one step further and say that had there never been a formal rule on class actions, judges would find themselves in exactly the same position today if the old equity bill of peace practice still obtained.

Why do I believe this? It is because I think that the current situation regarding class action litigation is a function of forces totally unrelated to the rewriting of the Rule. Although it was promulgated in 1966, the current Rule actually was drafted by the Advisory Committee on Civil Rules in 1961 and 1962. It was then distributed to the bench and bar for comments, worked its way through the Judicial Conference to the Supreme Court, and presented to Congress. I attended several meetings of the Advisory Committee at the time the drafting took place as a special consultant on other matters, and I have a very clear recollection of what the Committee had in mind in revising the Rule. Basically, the 1966 revision of Rule 23 was intended to be (1) a redefinition of the cases that could proceed as class actions, which was achieved by eliminating the conceptualistic descriptions of class actions in the original Rule and substituting more functional descriptions; (2) a codification of some of the better practices that federal judges had developed since 1938, which are now found in subdivisions (c) and (d) of the Rule; (3) an attempt to provide district judges with more guidance regarding their procedural powers in class actions, which also is reflected in subdivisions (c) and (d); and (4) a clearer statement of the kinds of notice that should be required in class actions.

In truth, the only textual change in 1966 that has had a "substantive" effect on class actions is the shift from the 1938 to 1966 practice of

requiring non-party class members to "opt-into" a damage class action to the current practice of giving those class members an opportunity to "opt-out" of a class action. That is probably the only change that has had any impact on the practical dynamics or economics of class action litigation. In the main, the rule-makers were operating under the assumption that they were clarifying the language of Rule 23 and making it a more effective procedural tool.

With the benefit of hindsight, it is very clear what has happened. Remember, the critical period was 1961-1962. The character of federal litigation has changed dramatically since then in ways totally unrelated to class actions and in ways that were unforeseen in 1961-1962. Brown v. Board of Education,[7] of course, had been decided in 1954 but the Civil Rights Acts of 1964 and 1965 had not been promulgated at the time the revised Rule was drafted; Title VII did not exist. It would have taken clairvoyance for the Advisory Committee to know that the procedural skeleton it was drafting eventually would be used in hundreds--no thousands--of civil rights class actions. In some circuits--notably the Fifth Circuit--lawyers seem to have a rubber stamp for marking their pleadings "Title VII Class Action." The rule-makers never anticipated this wave of race and sex-based discrimination class actions. But all of these civil rights class actions could have been brought under the original text of Rule 23; the 1966 revision has not been responsible for their institution. Indeed, I think that all of these discrimination actions could have been brought under the Equity Rules of 1912; they probably could have been brought under the original equity class action or bill of peace. The revision of Rule 23 has nothing to do with the appearance of these cases.

Similarly, Rule 23 is not responsible for the tremendous substantive law changes in the antitrust

---

7. 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954).

and securities fields facilitating private actions. That has come about largely as a result of Supreme Court and court of appeals decisions that have recognized new rights in these areas, which often produce class actions. This phenomenon is not attributable to the new language of Rule 23. Those cases would be in the courts today had Rule 23 not been revised in 1966, although the shift from "opt-in" to "opt-out" may have made the representative action a more effective litigation tool for plaintiffs.

Similarly the new sensitivity to Due Process concerns has generated a myriad of cases involving matters such as dress and hair codes, academic and government employment, and welfare benefits. This represents shifts in substantive law as social conditions change, new statutes are enacted, and Due Process concepts broaden. My impression is that every one of these cases could have been brought under the 1938 text of Rule 23. The 1966 revision has nothing to do with their appearance. Certainly this is true of the cases brought under new statutes like the Truth in Lending[8] or the Fair Credit Reporting Acts,[9] which appear to have been enacted without the class action in mind.

Nor can the new Rule be held responsible for the corporate democracy, consumer, or environmental cases; class actions in these fields simply reflect the pressure on the courts to recognize new substantive rights. Admittedly Rule 23 is utilized to try and bring about that end; but the maintenance of cases reflecting these post-1966 phenomena is not facilitated by the amended Rule itself.

Finally, during the past decade we have witnessed two dramatic changes in the demography of the legal profession that are having a significant effect on the incidence of class action litigation.

---

8. 15 U.S.C. § 1601 et seq.

9. 15 U.S.C. § 1681 et seq.

The first is the emergence of the no-fault concept; in a number of states this drastically affects automobile accident and matrimonial litigation and has caused a dislocation in the trial bar. Accident and matrimonial lawyers fearing a diminution in their practices feel that they had best explore other pastures in which to find pots of gold. A number of them, not surprisingly, have moved into the class action field, in part because of the availability of court-awarded fees. Thus you now have more lawyers willing to bring class actions in various contexts than hitherto have been available to do so. The drying up of automobile and matrimonial cases certainly is not something you can lay at the feet of revised Rule 23. Nor is the "retreading" of lawyers that has resulted from it.

The second is that the law schools, as I am sure you are aware, have been graduating law students in unprecedented numbers. New law schools have opened; many existing law schools have expanded. The public attention given social and political movements during the past two decades has made law an "in" profession. As a result many more people are entering the profession today than was true ten years ago. And an impressive number of these young attorneys have become involved in social action litigation, in the environmental, race relations, discrimination, consumer, and corporate democracy fields. They are bringing cases that never would have been brought before--many of which are quite appropriate for class action treatment--because they are not motivated by the type of economic incentives that are central to most practitioners. They often sustain themselves with private funding or fee awards. Again, you cannot blame Rule 23 for the upsurge in this type of litigation.

In light of these factors, I believe that virtually all of the class actions that have been instituted since the 1966 revision of the Rule would be on the dockets of the federal courts had there been no change in the Rule. Thus it is wrong, in my judgement, to blame the class action device or the 1966 amendment for the increased work burden

associated with the new litigation patterns. What has happened is a function of forces set in motion by Congress, the Supreme Court, the courts of appeals, social changes, and the legal profession.

Another general observation before beginning an analysis of the Rule itself. To evaluate Federal Rule 23 cases properly, I think it is important to keep in mind that even though the Rule has been in force more than eleven years, many aspects of practice under it remain unsettled. The Reporter to the Advisory Committee that drafted the revision, Professor Benjamin Kaplan of the Harvard Law School, now a Justice of the Massachusetts Supreme Judicial Court, said it probably would take twenty years to shake-down the Rule to understand what it provides and how it actually will function. This may seem surprising to those who think that Rule 23 is highly detailed and textually complex--if not neuralgic--and that it reads like a provision from the Internal Revenue Code. However, Rule 23, even in its enlarged form, is basically only a procedural skeleton and should be viewed as that by district judges. Of course, it provides guidance on a number of matters and authorizes judicial activity of various kinds, but the basic operation of the Rule really depends on the ingenuity, experimentation, and tenacity of district judges, ideally working cooperatively with counsel, to engineer a workable plan for the management of complicated lawsuits.

The different procedural complexities that can emerge under the Rule are extraordinary. Accordingly, cases are highly individualistic and the precedents can be misleading. A district judge is well advised to recognize that any decision under Rule 23 is based on a particular set of facts and that the court's procedural approach may well be ill-advised in another context.

Furthermore, a judicial opinion must be evaluated in terms of the time it was rendered and the court that issued it. I happen to believe Ben Kaplan was right; it is going to take several more years to achieve a general understanding of the

scope and utility of Rule 23. Not surprisingly, therefore, in the eleven years during which we have been living with the Rule, we can discern three time-frames in its interpretation that represent three swings of the general judicial attitudes towards class actions. It is like the swing of a pendulum, and this one is still moving.

In the period from 1964, when the Rule was presented to the bench and bar and many judges actually began to use it anticipating its promulgation, until approximately 1969, there was a great deal of euphoria about the Rule. It was believed to have great prophylactic value in enabling justice to be dispensed to small claimants and socially or economically disadvantaged groups. Unfortunately, in that period of euphoria many lawyers and judges failed to pay sufficient attention to the precise prerequisites for class action treatment spelled out in the Rule, a subject I will return to later. Class actions tended to be certified somewhat cavalierly, settlements often were approved without in-depth analysis, and fee petitions were not scrutinized as carefully as experience now suggests they should be. As a result, mistakes were made. A number of cases were accorded class action status that should not have been, various settlements were approved that now seem inappropriate, and several lawyers received fee awards that probably were not justifiable. These events combined to give class action practice a very black eye.

As one might expect, a reaction developed. The Chief Justice spoke out on various occasions about attorneys' fees and some of the difficulties with class actions. The media had a field day with certain cases, such as the Playboy litigation, which was brought on behalf of members of the Playboy Clubs alleging improper practices regarding club charges. The case was settled, as almost all class actions seem to be, with each club member receiving chits for a small number of drinks and the lawyers walking off with a six figure fee. That did not enhance the image of the process.

Accordingly, from 1969 to approximately 1972 or 1973--these dates are somewhat arbitrary and really differ from court to court--a reaction set in. During this period judges tended to deny certification (typically on the ground of unmanageability), fee applications were eviscerated, and it generally was a very rough time for the class action practitioner.

In my judgment, we are now in a third phase, which I mark as beginning approximately in 1973 in some courts, more recently in others. I think this is a phase that we will probably remain in for some time, perhaps to the end of the twenty year period Ben Kaplan envisioned. I think it is a period of increasing stabilization in the class action field and I am quite optimistic about what has been happening during the last couple of years.

I think the current phase is marked by increased sophistication on the part of most lawyers and the judges. The shock waves sent out by the Supreme Court in Snyder, Zahn, and Eisen have made many lawyers much more careful in defining their classes and describing the scope of their claims. They are acting less like pigs at a trough and more like mature professionals in terms of what they are asking for by way of class action certification. In addition, district judges are now beginning to discover the flexible arsenal of procedural powers set out in Rule 23(c) and 23(d), two subdivisions that really went largely ignored both by the judges and the commentators during the early years of the Rule's administration. As a result, judges are becoming aware that instead of wielding a meat axe in deciding the question whether to certify as class action, they can operate with a scalpel by redefining the class, granting partial certification where appropriate, bifurcating certain cases, insisting on improved representation of the class, and declaring subclasses when there are antagonisms and conflicts within the group. The mood of the present period encourages both judges and lawyers to define the class and the issues early for purposes of

certification. This should enable better administration of the discovery process, and eventually the trial, by making certain that those issues worthy of class treatment are accorded it, that the class is adequately represented, and that the class is subdivided into sub-classes to avoid antagonisms and conflicts that might make a shambles out of the management of the case.

The preceding has been by way of background. I will now attempt to analyze the operation of Federal Rule 23 by focusing on three aspects of the class action that put the most pressure on the district judge: (1) the certification question; (2) the settlement dynamic, and the special obligations of a district judge; and (3) the question of attorney's fees, which from the judge's perspective is probably the most unpleasant aspect of a class action. In my judgment, these three are the primary points of difficulty for a district judge. In the course of dealing with them, several notice problems will be discussed.

Let me turn first to certification. In terms of the dynamics and economics of class actions, and most particularly in a Rule 23(b)(3) damage case, the lawyers believe that whether the case will be certified as a class action under Rule 23(c)(1) is the single most important issue in the case. All the lawyers' weapons and all of the litigants' resources tend to be mobilized to deal with that question. Defense lawyers believe that their ability to settle the case advantageously or to convince the plaintiff to abandon the case depends on blocking certification. Conversely, plaintiffs' lawyers believe that their ability to obtain a large settlement turns on securing certification.

Inasmuch as almost all class actions are settled, from the district judge's perspective certification also probably represents the single most important question in the administration of a particular class action. Moreover, the certification motion is the primary educative tool for

the judge. It is at this juncture that he or she must make a realistic appraisal as to how merit discovery can be managed, the legal and factual issues, the quality of the lawyers, and the motivation of the parties and attorneys. A good education at the Rule 23(c)(1) stage will be of great assistance to the court should a settlement subsequently be presented for approval or if an application is made for attorneys' fees. In short, the certification question is important to everyone.

If you parse the language of the Rule, you discover that the district judge must make seven affirmative findings before the case can be certified as a class action. Let me simply identify them at this point. There are two prerequisites not stated expressly in the Rule that have been developed by the courts. There are four prerequisites set out in Federal Rule 23(a), making six. The seventh is that the district judge must find that the case falls within one of the three categories of class actions described in Rule 23(b). The determination that an action falls within Rule 23(b)(3) requires two findings, but more of that later.

The party seeking class action treatment--who, for the sake of simplicity will generally be referred to as the plaintiff, although it could be the defendant--has the burden of establishing all seven prerequisites. Substantial compliance with this burden is not enough. The existence of all seven must be demonstrated or there is no class action.

The certification issue is raised by motion. Typically there is a hearing, in many instances accompanied by extensive documentation, depositions, admissions, interrogatories, affidavits, and, occasionally, by some oral testimony.[10]

---

10. See generally 7A Wright & Miller, Federal Practice and Procedure § 1785.

It is definitely in the district judge's interest to insist that counsel make a careful and extensive presentation on the class action certification issue. If I can be autobiographical for a moment. After fifteen years of teaching I thought it might be interesting to return to the New York law firm with which I practiced before becoming an academic to resensitize myself concerning the way lawyers litigate. Thus, I have just spent the better part of a year in the class action and "big case" environment. It was quite an experience, both in terms of reinforcing some judgments I had tentatively come to regarding class action litigation and in terms of participating in the actual preparation of papers and seeing the documents in a wide range of Rule 23 cases.

In all too many instances the papers on the certification motion are extensive in size but thin in content. The movant typically alleges compliance with each of the class action prerequisites in highly conclusory terms and devotes most of his attention to demonstrating that he is a paragon of the bar and a worthy class representative. In most cases the judge will learn precious little from a document like that and probably even less from the defendant's equally conclusory arguments that the class action prerequisites have not been satisfied.

Because certification is so important in terms of the district judge educating himself and making some very crucial findings required by the Rule, the court should insist on a fully informative presentation. Thus, I am sympathetic toward the growing practice of insisting on some discovery relating to the propriety of class action treatment, particularly with regard to such issues as adequacy of representation, predominance of the common questions, and the superiority of the class action procedure. The certification issue is too important to permit the lawyers to furnish boiler plate memoranda laden with self-serving conclusions.

To be sure the Supreme Court in Eisen said that certification should not depend on the district judge's perception of the merits of the dispute, but this is not inconsistent with the type of full exploration of the case I am advocating in connection with making the necessary findings on the Rule 23(c)(1) motion. Moreover, as we discuss the class action prerequisites, I think it will become apparent that there is no way the judge can make the seven findings required by Rule 23 without at least a preliminary exploration of the merits. This will not be to ascertain who is going to win and who is going to lose, but simply to develop some feel for the contours of the case.

I turn now to the prerequisites themselves and begin with the two that have been implied by the courts. The first is that there must be a class.[11] That may sound a bit tautological or self-evident. It is true that this prerequisite has not caused a great deal of difficulty, inasmuch as the moving papers typically describes a group that claims to have been injured--for example, recipients of a certain welfare benefit, employees of a particular company, or purchasers of a certain security. But, in a number of instances the plaintiff will offer a very vague description of the people affected; the description may even have a superficial precision to it. However, unless the district judge takes the time to look at the group carefully, there may be difficulties later in the action in determining who is and who is not in the class. It is highly undesirable to proceed with a case through certification, extensive discovery, to settlement or an adjudication of the merits, and then find out that it is impossible or very difficult to determine who is in the class.

Let me suggest some non-classes. "All people active in the peace movement." There simply is no way to ascertain who is in a class described in that fashion. "All people who have been or may be

---

11. See generally 7 Wright & Miller, Federal Practice and Procedure § 1760.

harassed by the police." Again much too amorphous to permit identification with reasonable effort; it is not desirable to expend judicial resources in determining whether particular individuals are class members. "All poor people." This is totally insufficient without providing some basic statment of the objective factors that determine who is "poor" for purposes of class membership.

The foregoing are easy; let me try to make it somewhat more difficult. In a case lodged in a district court in the Southwest, the class was described as all people with Spanish surnames, having Mexican, Indian, or Spanish ancestry, and speaking Spanish as a primary or secondary language.[12] One could ascertain who was in that class, but it would take an enormous effort to do so. As a practical matter, it probably would be necessary to question everyone with a Spanish surname in the area covered by the action. As this suggests, it is not simply a problem of ambiguity--all poor people--it often is a problem of how difficult it is to determine who is in and who is not in the class because of the complexity of membership characteristics.

In the case I just described, the court allowed an amended class description of all people with Mexican or Spanish surnames. That is much easier to determine than the three elements of the initial description. You do not have to inquire of everyone; "Do you speak Spanish?" Or, "Do you have Mexican or Indian or Spanish ancestry?" Ironically, the court actually approved a class much larger than the one originally described but the result probably was wise because it avoided the managerial and administrative difficulties inherent in figuring out who satisfied all three conditions.

Another example, this one suggested by the period when stringent search procedures were in

---

12. See Tijerina v. Henry, 48 F.R.D. 274 (D.N.M. 1969).

force in the federal courthouses in many cities, is a class described as all people entering the building. That is no good. Nor is it sufficient to describe the class as all people entering the building as courtroom spectators. But an action on behalf of all those licensed to practice before, let us say, the Northern District of Illinois or the Seventh Circuit, if the matter is in Chicago, should be upheld. This description of the class has some precision to it in that membership can be determined by reference to a list of those admitted to practice before the Northern District or the Seventh Circuit.

The court must insist that the plaintiff's lawyer provide an intelligible description of a cohesive class. This not only will avoid the enormous difficulties of figuring out who is in the class for purposes of administering discovery, the notice requirement, and any settlement, but unless you have a fairly clear description of the class no one is going to be able to determine the res judicata or collateral estoppel effect of the judgment. Consequently, the district judge's objective should be to have confidence that when he has to enter judgment or approve a settlement there will be a reasonably efficacious way to ascertain who is affected by the action.

It must be kept in mind that the composition of many classes is fluid; some people may be a member at certification but not at disposition, or vice versa. Therefore, as a practical matter it is not necessary for the plaintiff to be able to identify each and every class member at the certification point. That would be a crippling burden. What is necessary is that the court have enough information to be confident that when it becomes necessary to do so, it will be possible to identify the class members with relative ease.

The second implied prerequisite is that the class representative must be a member of the

class.[13] If there are multiple representatives, they all must be members of the class. Like the first prerequisite, this sounds tautological; it seems so obvious. In more than 95 percent of the cases plaintiff's membership will be fairly obvious because the representatives will have been discriminated against, or have purchased securities as a result of fraud, or have been victims of an antitrust conspiracy or price-fixing scheme along with everyone else in the class. But there is a group of cases in which, for one reason or another, the representatives turn out not to be members of the class. I might add parenthetically at this point that a problem of class membership may appear after certification in the form of mootness. Even if mootness does not block the rights of the entire class to continue, it may affect the claims of the representatives and require that new ones be selected.

One area of difficulty has been the prisoners' rights field.[14] I think it is fairly safe to say that if a class action is brought on behalf of prisoners or inmates at a mental health institution, the representatives must be current prisoners or inmates; this type of a class action cannot be run by people who are not presently incarcerated. The fact that they may have been in prison in the past is irrelevant; they are not presently members of the class. The point also may be articulated in terms of lack of standing to sue or not being adequate representatives under Rule 23(a)(4).

There are situations in which the putative representatives, although not currently in the institution are still being affected by the institution's practices. A prisoner's suit to expunge

---

13. See 7 Wright & Miller, Federal Practice and Procedure § 1761.

14. See, e.g., White v. Sullivan, 474 F.2d 16 (5th Cir. 1973).

records improperly maintained by the institution, brought by a former inmate whose records are still maintained there, illustrates this category. The alleged continued abuse of the records seems sufficient to satisfy the requirement that the plaintiff be a class member.

Another example of possible difficulties under the second prerequisite would be a suit against a state university challenging its definition of residency for purposes of distinguishing in-state and out-of-state students, which typically governs the amount of tuition charged.[15] If the class action is being maintained by students who would be classified as in-state residents under any definition that might be applied, they are not members of the affected class and cannot serve as representatives. Notice that this illustrates something I said earlier: You cannot completely separate out and ignore the merits in deciding the propriety of class action treatment. In this situation, the district judge will have to explore the merits preliminarily to determine whether the particular plaintiffs are members of the out-of-state student class seeking resident status. Indeed, the chances are that there may have to be some discovery on that issue.

Another case illustrating the second prerequisite, one from the Seventh Circuit, involved a challenge to an airline's no-marriage, no-pregnancy rule for female flight attendants.[16] The representatives consisted of the union and several stewardesses. The court held that the union was not a member of the class affected by the rule. (This was based primarily on the conflicting interests within the class.) The

---

15. See, e.g., Dyer v. Huff, 382 F. Supp. 1313 (D.S.C. 1973), aff'd without opinion, 506 F.2d 1397 (4th Cir. 1974).

16. See Air Line Stewards & Stewardesses Ass'n, Local 550 v. American Airlines, Inc., 490 F.2d 636 (7th Cir. 1973).

same principle would apply if some of the representatives were stewards. They certainly are not members of the class of people adversely affected by the airline's rule. This conclusion seems sound since there is no way the stewards could be damaged by the ban. Indeed, when one thinks about it, not only are the stewards not detrimentally affected by the rule, in a real sense they actually are benefitted by it because the job seniority structure is such that if stewardesses get bumped out upon marriage or pregnancy, the seniority of the stewards is enhanced by the rule's enforcement and retarded by its elimination. From a pragmatic perspective, the stewards and the stewardesses have antagonistic interests. It might be appropriate to appoint stewards as representatives of a sub-class of stewards, since their interests potentially are antagonistic to those of the stewardesses.

Continuing along a spectrum illustrating the occasional difficulties in determining whether the plaintiff is or is not a member of the class, let me turn to a case from the Ninth Circuit, LaMar v. H & B Novelty & Loan Co.[17] It is an important case and symbolizes much of the Ninth Circuit's rather cautious approach to the class action. LaMar was a class action brought against a number of pawnbrokers in California, alleging that they had violated the Truth in Lending Act. To simplify, let me characterize it as an action against pawnbrokers X, Y, and Z. The plaintiff representative claimed to have been directly injured by pawnbroker X, but not by pawnbrokers Y and Z. The Ninth Circuit held that the plaintiff could only represent those people who allegedly had been injured by pawnbroker X because the plaintiff was not injured by Y or Z. Arguably, this is a very, very technical result. If the plaintiff's lawyer had alleged a conspiracy among X, Y, and Z, his client probably would have had standing to represent a class of all those

---

17. 489 F.2d 461 (9th Cir. 1973).

injured by the conspiracy, which would have embraced all those injured by X or Y or Z.

The best cure for the LaMar type of defect is not dismissal. If the district judge wants to make certain that there is adequate representation and class membership, all that is necessary is forming subclasses--all those injured by X, all those injured by Y, all those injured by Z--and making certain that each has proper representation. Thus, in reality LaMar poses a formality question of how best to insure membership in the class and adequacy of representation in this context.

A final example is suggested by several securities cases involving Rule 10b-5. Let us hypothesize that plaintiff brings a Rule 10b-5 action on behalf of all purchasers of certain municipal bonds saying that the Official Statement sent to purchasers of bonds was defective because it contained affirmative misrepresentations and failed to disclose certain other matters. During plaintiff's deposition, taken in connection with the certification motion, she unequivocally states that she never read the Statement. Without getting into the mysterious byways of securities law and the ambiguities left by the Supreme Court's decision in Affiliated Ute Citizens of the State of Utah v. United States,[18] concerning its application in misrepresentation, as opposed to omission, cases, an interesting question is presented. If the plaintiff did not read the Statement, and did not rely on the alleged affirmative misstatements in it, is she a member of the class that has been injured by misrepresentations? In one case, Judge Owen of the Southern District of New York allowed the action to go forward without much discussion of the point. I think this is a terribly difficult question in a

---

18. 406 U.S. 128, 92 S. Ct. 1456, 31 L. Ed. 2d 741 (1972).

pure misrepresentation case.[19]

In any event, it illustrates how subtle the question of class membership can become. Furthermore, it is an interesting demonstration that there often is no way to decide the issue of class membership without deciding, at least preliminarily, a rather important substantive law question, in this instance about reliance in Rule 10b-5 cases. This is another indication of why I believe the Supreme Court's statement in Eisen that the district judge should not get into the merits to determine certification questions cannot be taken as a categorical imperative.

We turn now to the four express prerequisites in Rule 23(a). The first, Rule 23(a)(1), requires that the class be so numerous the joinder of all members be impracticable--note, "impracticable," not "impossible."[20] This has come to be known as the "numerosity" requirement--a terrible word if ever there was one. How do you decide whether there is "numerosity" for purposes of Rule 23(a)(1)? By and large, it turns out to be a question of numbers. Each year I read all of the published class action decisions in order to prepare the pocket parts to the Wright and Miller treatise on Federal Rules of Civil Procedure. I have probably read seven hundred to one thousand opinions that deal with numerosity in some degree. The following guideline can be offered as a result: If the class has more than forty people in it, numerosity is satisfied; if the class has less than twenty-five people in it, numerosity probably is lacking; if the class has between twenty-five and forty, there is no automatic rule and other factors, discussed below, become relevant. I should add that there are a few cases below twenty-five and

---

19. Levy v. First National City Bank, No. 75 Civil 1335 (S.D.N.Y., April 27, 1977).

20. See generally 7 Wright & Miller, Federal Practice and Procedure § 1762.

above forty that do not conform to these general propositions. There are cases, for example, with much smaller classes that were certified,[21] and one case in which there were 350 people that was not certified for lack of numerosity.[22]

The few cases that go beyond the question of numbers tend to focus on one or two factors. The first is the size of the claims of the individual class members. If they are small, the chances are that there is impracticability of joinder, because people are not likely to become involved in litigation if only a small amount of money is at stake. On the other hand, if the class is composed of people with very large claims, joinder is far more feasible economically and impracticability will exist only if the group is larger.

A second variable that occasionally is considered is the geographic dispersion of the class. If it is relatively small and the members all live within a particular city or some similarly contained area, it is not unreasonable to expect them to join and a class action probably is unnecessary. If they are dispersed over a state or the entire country, however, the situation is different and it is more appropriate to conclude that, from the perspective of efficiency, joinder is impracticable.

That basically is all there is to the "numerosity" issue. Therefore, let us turn to Rule 23(a)(2), which requires that the action raise questions of

---

21. See, e.g., Local 246, Utility Workers Unions of America v. Southern California Edison Co., 13 Fed Rules Serv. 2d 23a.2, case 1 (C.D. Cal. 1969).

22. See, e.g., Minersville Coal Co. v. Anthracite Export Ass'n, 55 F.R.D. 426 (M.D. Pa. 1971).

law or fact common to the class.[23] This prerequisite, not surprisingly, goes under the rubric "commonality." The courts have had very little difficulty with Rule 23(a)(2). This probably is because it is difficult to perceive of a situation in which someone has gone to the trouble of bringing a class action in which there will not be common questions of law or fact.

Notice that the Rule is phrased in the disjunctive--common questions of law or fact. Thus, if there is a common liability issue, Rule 23(a)(2) is satisfied. Similarly if there is a common fact question relating to negligence, or the existence of a contract or its breach, or a practice of discrimination, or misrepresentation, or conspiracy, or pollution, or the existence of a particular course of conduct, the Rule is satisfied. Typically, the subdivision (a)(2) requirement is met without difficulty for the parties and very little time need be expended on it by the district judge.

It also should be noted that there is no qualitative or quantitative aspect to Rule 23(a)(2). The Rule does not say that the common questions need be important or controlling. In this connection it is very important to distinguish the Rule 23(a)(2) common-question requirement from the passage, which we will discuss later, in Rule 23(b)(3), calling for the common questions to predominate in order to have a class action under that subdivision. The requirement that common questions predominate only applies to subdivision (b)(3) class actions; it has no application in subdivision (b)(1) or (b)(2) cases, in which the only common-question requirement that need be satisfied is the simple, low-level Rule 23(a)(2) requirement.

---

23. See generally 7 Wright & Miller, Federal Practice and Procedure § 1763.

And the "s" on "questions" should not be read literally. After some preliminary skirmishing, it is now fairly well established that one significant common question or law or fact will satisfy Rule 23(a)(2).

As I have already indicated, Rule 23(a)(2) is relatively easy to satisfy. Therefore it is not surprising that very, very few cases have been dismissed for failing to meet the common question requirement. One case, from the Northern District of Illinois, shows that it is possible for an action to fail on this basis, but even in that action there were other reasons for denying class action treatment.[24]

The case involved an attempt to bring a class action on behalf of benefit recipients against the administrators of a program on the ground that the members were being deprived of a livelihood compatible with health and well-being, which apparently was the formulation for benefits under the program. As I remember the opinion, the court concluded that there was no common question of law or fact for purposes of Rule 23(a)(2) because what constitutes a livelihoood compatible with health and well-being is an individual issue that must be determined on a person-by-person basis. I suppose it is true that one individual's needs for health and/or well-being differs from those of another, but the decision nonetheless seems somewhat narrow. I cannot help but believe that an allegation charging the program administrators with a systematic course of conduct depriving the beneficiaries of a livelihood compatible with health and well-being would have

---

24. Metcalf v. Edelman, 64 F.R.D. 407 (N.D.Ill. 1974).

satisfied the subdivision (a)(2) requirement, because it would have raised a common question as to that administrative practice. In any event, this is one of only a handful of cases I have been able to find in which the plaintiff fails to satisfy the Rule.

I now turn to Rule 23(a)(3), which requires that the claims or defenses of the representative parties be typical of those of the class. This prerequisite goes under the name "typicality."[25] The Rule does not require identity or substantial identity among the class members' claims or defenses. Occasionally a court will use the word "co-extensive," but this should not be translated into "identical."

I must confess that Rule 23(a)(3) is very much of an enigma to me because it is very difficult to see any independent purpose served by the provision. It is true that there is a fair amount of overlap between and among the Rule 23(a) prerequisites, and again among the categories of class action described in Rule 23(b). But in the case of subdivision (a)(3), there does not seem to be any function it performs that is not accomplished by some other portion of the Rule. Subdivision (a)(3) insists that the representatives have typical claims or defenses. But if the plaintiffs are class members (an implied requirement), and there are common questions (Rule 23(a)(2)), and the class is adequately represented (Rule 23(a)(4)), it is very, very difficult to identify anything that is added by "typicality." The other prerequisites will insure "typicality" among the class members' claims or defenses.

---

25. See generally 7 Wright & Miller, Federal Practice and Procedure § 1764.

The Fifth Circuit in Gonzales v. Cassidy[26] tried to breathe some life into Rule 23(a)(3) by saying that the claims or defences should spring from a common event or transaction, which is the well-known transactional test, or that the claims or defences of the class should proceed on a common factual or legal theory. Note that the Fifth Circuit used the disjunctive "or" in formulating this test, which means that Rule 23(a)(3) is satisfied when the representatives and the class are tied together either by a single transaction or event or related transactions or events, such as a conspiracy, pattern of discrimination, misrepresentation, or fraud, or by claims or defences based on a single factual or legal theory. It seems to me that at most this amounts to adding some teeth to the Rule 23(a)(2) requirement because, whereas "commonality" merely requires one or more common questions of law or fact, "typicality" under Gonzales obliges the common questions to satisfy a transactional test or produce a common legal or factual theory. But this strikes me as the inevitable effect of satisfying commonality, especially in connection with the other class action prerequisites.

Thus, when all is said and done, there does not really seem to be terribly much of independent significance to subdivision (a)(3). That is reflected in the cases. Very few opinions focus on Rule 23(a)(3) and the prerequisite tends to be discussed by the court in almost conclusionary terms.

The next port of call is Rule 23(a)(4).[27] In my judgment, this is the single most important prerequisite of them all. This provision requires a showing that the representative parties will fairly and adequately protect the interests of the

---

26. 474 F.2d 67 (5th Cir. 1973).

27. See generally 7 Wright & Miller, Federal Practice and Procedure §§ 1765-70.

class. By far it is the most heavily litigated of the prerequisites. Defense lawyers are constantly pressing the court with arguments about conflicts, antagonisms within the class or trying to show shortcomings in the competence of the representatives as bases for denying certification.

I cannot emphasize the importance of this prerequisite too much. There are two reasons for its special status. First, a somewhat philosophical point, is that despite the fact that Rule 23(a)(4) is stated in rather benign, procedural terms, it actually embodies a due process requirement. American jurisprudence has always operated under the principle that each litigant is entitled to a day in court regarding his grievance or a defense to a grievance against him. Our rules of former adjudication, collateral attack, and full faith and credit, at root, are based on this due process notion.

The class or representative action represents an exception to the principle of an individual right to a day in court. The justification for permitting it is that considerations of efficiency and economy and good practice permit issuing an order or rendering a judgment that binds everyone in a defined group who was properly represented before the court and therefore has had a day in court vicariously. It is Rule 23(a)(4) that ensures the quality of that representation and the integrity of the system. Unless there has been fair and adequate representation, due process has not been satisfied and any attempt at binding the absentee is improper.

This leads to the second reason why I am putting so much emphasis on Rule 23(a)(4)--the pragmatic reason. If the adequacy prerequisite embodies a due process concept, and certainly the Supreme Court's decision in Hansberry v. Lee[28] so

---

28. 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed. 22 (1940).

suggests, then a failure to satisfy subdivision (a)(4) produces a defect of constitutional dimension, which makes the judgment vulnerable to being reopened on a collateral attack. It clearly would be a perversely wasteful expenditure of time and effort to go through the agony of class action certification, complete extensive discovery, negotiate and approve a settlement or actually adjudicate the merits of the case, and draft and enter a judgment only to have it unravelled three or five years later by someone who does not want to be bound by the result, claims that he or she was inadequately represented, and now wants a day in court.

I have an uneasy feeling that a number of the class actions terminated during the years following the promulgation of the amended version of Rule 23 are vulnerable to collateral attack because sufficient attention was not paid to Rule 23(a)(4). If the possibilities of challenge become apparent, some adventuresome plaintiffs' lawyers may try to upset existing class action judgments and settlements that are thought to be final. In sum, I am advancing the notion that it would be unwise for a district judge to rob Peter to pay Paul in administering Rule 23(a)(4). Time expended on the adequacy of representation issue is time well spent. Any attempt to be "super-efficient" or to "cut corners" regarding the quality of the adequacy inquiry simply magnifies the risk that sometime later the court will be faced with a collateral attack on the class action. This will put the burdens of that action on the judge's back once again, only this time they will be heavier. Given this risk, it is in the district judge's interest to make the lawyers dot the "i's" and cross the "t's" on the adequacy of representation question.

There already has been some judicial experience with regard to collateral attacks on class action judgments. Two court of appeals decisions, one by the Fifth Circuit and the other by the Tenth Circuit, are of particular importance. The former is

Gonzales v. Cassidy,[29] and the latter is In re Four Seasons Securities Law Litigation.[30] In the Fifth Circuit case the court permitted the collateral attack; in the Tenth Circuit the challenge was rejected, the court distinguishing the earlier Fifth Circuit case. In my judgment, the two circuits actually took somewhat different views about the availability of collateral attack but the Supreme Court denied certiorari in Four Seasons, leaving a certain amount of uncertainty on the subject.

I think that the Fifth Circuit's decision in Gonzales is well worth studying carefully because it provides a good procedure for a district judge to follow with regard to adequacy. The Gonzales court made it clear that the court has two types of responsibility under Rule 23(a)(4). First, the judge's obligation at the point of certifying the class action is to make certain that there is adequacy of representation and he or she must do whatever is necessary to make an enlightened decision on that point. Second, after certification the district judge has the responsibility to monitor the quality of the representation to make certain it continues to be adequate. Several things can occur after certification to undermine the decision on the Rule 23(c)(1) motion. The judge may find that he or she was misled during the certification process, or that the representation is not living up to expectation, or that there has been a "sweetheart" arrangement between some of the plaintiffs and some of the defendants, or a few of the key representatives may settle out, debilitating the adequacy of the representation.

---

29. 474 F.2d 67 (5th Cir. 1973).

30. 502 F.2d 834 (10th Cir. 1974), cert. denied, 419 U.S. 1034, 95 S. Ct. 516, 42 L. Ed. 2d 309 (1974).

According to the Fifth Circuit in Gonzales, it is the judge's responsibility to make certain the adequacy of representation continues from certification to the ultimate termination of the action, whether by settlement, verdict, or decision. Now, I have no illusion that district judges will greet this notion with enthusiasm. I have heard several judges say: "If a lawyer is licensed to practice in my court, it is not my business to determine how good he is." With all due respect, I suggest that statement is incorrect! It might be true in a typical, run of the mine, single plaintiff, single defendant action, but it is not true in a class action for two reasons. First, there are hundreds, possibly thousands of people, whose rights are going to be affected by the conduct of the particular representatives--especially the lawyer--and they really have no means of protecting themselves unless you keep a weather eye out for them. Unlike a typical lawsuit, they did not select the lawyer, the forum, or even make the decision to litigate. Second, the district judge must face the fact that unlike other forms of litigation, in a class action Rule 23(a)(4) imposes an affirmative obligation on the court to assure adequacy of representation. You do not have any option on the matter; you cannot play the ostrich. The Rule requires the court to make a finding on adequacy, an obligation that does not exist in a non-class action. The task may be unpleasant, but it must be undertaken. Moreover, Rule 23(a)(4) and the supervisory duties imposed on the judge by other portions of the Rule, notably Rule 23(e), indicate that the Fifth Circuit was correct in Gonzales when it concluded that the task was a continuing one.

What constitutes adequacy of representation? The prerequisite has two elements to it. Rule 23(a)(4) refers to the "representative parties," so at a minimum the district judge has to make a qualitative finding as to the litigants themselves. Realistically, of course, the basic consideration usually is the adequacy of the lawyers for the representative parties--the second element. The

fact that the adequacy of counsel is not expressly referred to in the text of the Rule is not significant because it seems self-evident that an important aspect of whether the parties are adequate representatives is the quality of the lawyers they have retained.

The characteristics of the parties to be taken into account basically reflect common sense notions. Those who would be representatives must be prepared to act as guardians for those not actually before the court--they serve as fiduciaries. The court should ascertain whether the particular plaintiffs have a substantial stake in the litigation, how serious do they appear to be about pursuing the case, is there any reason to believe that they are motivated by factors unrelated to the case itself, such as greed, vindictiveness, or pursuit of a competitive advantage, and whether they have adequate resources to prosecute the lawsuit.[31]

Let me focus on that last factor for a moment. There have been instances in which a district judge has concluded that the representatives are inadequate, at least in part, because they do not appear to have the financing to maintain the action.[32] But this is a rather tricky consideration that must be treated with some care because if financial capacity is emphasized, it may mean that poorer claimants will be prevented from maintaining class actions. Accordingly, discretion is required; although the ability to fund the case certainly is

---

31. See generally 7 Wright & Miller, Federal Practice and Procedure §§ 1765-69.

32. See, e.g., Mudd v. Busse, 68 F.R.D. 522 (N.D. Ind. 1975). See also Ralston v. Volkswagenwerk, A.G., 61 F.R.D. 427 (W.D. Mo. 1973). But compare Roberts v. Cameron Brown Co., 72 F.R.D. 483 (S.D. Ga. 1975).

a factor, it probably should not be a determinative factor.

Of course, if a strike-suit aroma pervades the case and, on deposition, the plaintiff admits that he or she will not expend more than $5,000 in prosecuting a mammoth antitrust or securities case, the district judge should be very leery about certifying the action under the aegis of that particular representative. The court might insist that he be reinforced by others who could provide additional financing or an outside agency, such as a state attorney general's office, that could assume some of the litigation burdens and costs. Indeed, I would think that an attorney general's office or a corporate counsel's office of a city or a municipality offers a great resource in many contexts, which must have been in the mind of Congress when it recently authorized parens patriae actions in lieu of class actions in certain antitrust cases.[33] In any event, Rule 23 gives the judge ample power to do what is necessary to augment the quality of the representative parties.[34]

It is clear that defense counsel around the country sense that lack of financing is a potential Achilles Heel for class action plaintiffs and have begun, as a routine matter, to interrogate the representatives about their resources. This confronts the court with a delicate balancing task. On one side there is the desirability of promoting the policies underlying the class action, particularly in certain contexts of social importance,

---

33. Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1396.

34. See, e.g., Armstrong v. O'Connell, 416 F. Supp. 1325 (E.D. Wis. 1976) (appoint counsel for new subclass). The responsibilities of judges and lawyers concerning representation are discussed in National Ass'n of Regional Medical Programs, Inc. v. Mathews, 551 F.2d 340 (D.C. Cir. 1976).

such as civil rights and protection of the environment. This means easing back from the notion that the representatives must have a litigation war chest large enough to sustain an eight year class action. This also means not allowing defense counsel to push the inquiry into plaintiff's financing too far. It certainly must not become a harassing technique in the form of gross intrusions on the personal privacy of the representatives. The district judge must be ready to cut off discovery with a protective order when it goes beyond a point relevant to class action certification. On the other side, it clearly is in the interest of justice to find out at a preliminary stage how the action is going to be financed and whether there is enough money to sustain it. It would be unfortunate to expend significant time and energy in processing the case and then have it collapse for a lack of financing, creating risks to the rights of those who have relied on its commencement. To avoid this possibility some judges require the presentation of a budget showing an estimate of the financial needs of the action and the funding sources to meet it.

Finally, the court should examine the relationship between the party and the lawyer. The two should be different people and have no strong familial or financial relationship that would undermine the independence of the party's judgment about matters relating to the conduct of the action.[35] When the tie between attorney and client is too tight, there is reason to be concerned about whether there is any restraint on the attorney making decisions that are motivated by his own financial interest in the lawsuit.[36]

---

35. See, e.g., Kramer v. Scientific Control Corp., 534 F.2d 1085 (3d Cir. 1976).

36. See, e.g., In re Goldchip Funding Co., 61 F.R.D. 592 (M.D. Pa. 1974).

Perhaps the most abrasive and difficult aspect of the Rule 23(a)(4) analysis for a district judge is the question of the adequacy of counsel. (The situation is made all the worse by the puffing often engaged in by the lawyer seeking class action status--especially when there is a contest for the position of lead counsel--and opposing counsel's attempts to denigrate the quality of the class's representation.) Again, the fact that the plaintiff's lawyer has been admitted to practice does not end the judicial inquiry. For all of the reasons I have identified, the judge has an obligation to make certain that the attorney for the class can do the job required in the instant case. This does not mean that he or she must be the most proficient lawyer in the bar; it does mean, however, that we are insisting on lawyers whose professional responsibility and competence are unquestioned.

One important characteristic of the representatives' attorney is that he be experienced in handling litigation of the type involved in the case. A superbly gifted antitrust lawyer may not be adequate in a Title VII case, and the finest civil rights lawyer in the community may not be able to develop a complex securities case. Similarly, a specialist in automobile accident litigation, whose experience has been in single party, single issue cases, may not have the organizational and administrative capacity to manage a big multi-party, multi-district, multi-year lawsuit.

Accordingly, all of the resources of the lawyer should be evaluated--professional experience, motivation, competence, support personnel, and other professional commitments. You cannot prepare a complicated class action out of a shoebox. The attorney must have ready access to clerical personnel, research support, and even paraprofessionals. I know it is difficult for a judge to say to a member of the bar: "You just can't handle this matter. You have no experience with antitrust cases." Or: "You are a single practitioner and don't even have a secretary." Or: "You're

three months out of law school and you're not ready to take on General Motors on behalf of half a million people." But as I indicated before, it seems to me that Rule 23(a)(4) requires that you do exactly that.

This does not necessarily mean dismissing the case. There are other options. You could say to that lawyer: "I will let you represent your client and anyone else who wants you as a lawyer, but I am not going to certify you as a representative of over 100,000 other people." This will enable the action to proceed on an individual or joinder basis. Or the judge could say: "Look, you may have a good case on the merits and you may be a fine lawyer, but you need help. Try to get some from the attorney general of the state or associate yourself with more experienced counsel." You certainly have this power under Rule 23, particularly Rule 23(d), and most lawyers will take the hint to avoid dismissal of the case.

But there is a problem lurking here requiring some sensitivity. In many instances, particularly in the public policy arena, class actions will be brought by relatively young, inexperienced lawyers. It would be wrong for district judges to shut them out. How will they ever get experience as class action litigators if their lack of experience brands them as inadequate? The problem is even more severe for women who have been entering the profession in significant numbers only recently, and frequently represent plaintiffs in sex-discrimination actions. Yet it may be unfair to allow them to represent people with significant substantive rights at stake in these cases. That leaves the judge with the very delicate question of deciding when to allow relatively inexperienced attorneys to prosecute these cases.

The bench can only do so much to help these lawyers along. On occasion they can be reinforced by having them associate with a governmental agency or more experienced counsel. One judge in Florida

used an interesting device in a different context--but I think it is relevant to this point. In his case a settlement had been worked out and all that remained was awarding an attorney's fee. Since the only one left before the court with any interest in the matter was the petitioning lawyer, and someone was needed to protect the non-party class members and the integrity of the process, the court appointed another lawyer as a guardian ad litem for purposes of the fee petition procedure.

In general, I think that many of the problems of assuring adequacy of representation can be alleviated by judges invoking the resources of the organized bar to reinforce counsel in cases that should be allowed to proceed but the court is concerned about the lawyer's ability to move the case effectively. Much can be accomplished at an off-the-record meeting with counsel to avoid embarrassment. Experience has shown that if it is done this way, it being implicit that if necessary the question of the lawyer's capacity will be discussed on the record, the lawyer will do what is appropriate in the given situation.

All in all it occasionally can be a very unpleasant business. The Rule 23(a)(4) process symbolizes the fact that during the last ten years the job description for district judges has been changed and that they are now systems managers as well as adjudicators. The host of administrative burdens imposed on judges, such as determining adequacy of representation and the accounting process that must be undertaken on an attorney's fee petition, unquestionably are time-consuming and deflect judicial energy from the central task of deciding cases on their merits.

There is another phenomenon that accentuates the difficulties for the court. It is the practice of many lawyers--almost Pavlovian in its character--of inserting class action allegations in their complaints. It is clear that either boiler-plate complaints are circulating among lawyers in certain substantive areas, the environmental,

consumer, and Title VII fields being the most obvious, or, for reasons that mystify me, lawyers think their cases gain in stature when there is a class action threat in the complaint. Most lawyers seem totally unaware of the fact that the interposition of a class action allegation gets them into the quicksand of having to satisfy the court that there is adequacy of representation and to convince the district judge, as required by Rule 23(e), that any settlement or non-merit disposition of the action should be approved.

Increasingly, district judges are becoming painfully aware that the cavalier interposition of the class action allegation in the complaint often is quite unnecessary for the protection of their clients. Different judges have different responses to the problem. It is now quite common for the court to screen cases in which class action status is claimed by meeting informally with counsel from time to time to make sure that they really want to proceed on that basis and fully understand the consequences. The problem is most severe in the Title VII area. A high percentage of these cases could proceed as individual actions since they will lead to a decree that, in practical terms, has class-wide application making it unnecessary to employ the class action. Any damage claims could be administered individually. Some courts have gone further and have refused to certify under Rule 23(b)(2) on the ground that everyone affected by the challenged practice would benefit from a decree in favor of a particular plaintiff.[37]

Another technique that is being used is decertification. The Rule gives the court plenary power to decertify and this certainly should be employed when it turns out that there is less than fair and adequate representation. Following

---

37. See, e.g., Craft v. Memphis Light, Gas & Water Div., 534 F.2d 684 (6th Cir. 1976).

Gonzales, some district judges have used decertification to solve a problem of lack of adequacy of representation. In several Title VII cases before Judge Stagg of Louisiana, he found the representation adequate at the time of certification, tried the case as a class action under Rule 23(b)(2), and then became convinced that the representatives' lawyer was not performing adequately. At the end of the case he simply decertified it, issued the injunction, but gave the absent class members an opportunity to come in and prove their own damages.[38] Admittedly that is an expensive procedure in terms of a particular case, but my guess is that it may prove to be an effective way to call the bar's attention to their responsibilities under Rule 23, particularly refraining from interposing class action allegations without giving serious thought to whether it is necessary to do so. In short, it may take a few decertifications or refusals to certify in order to make it clear to the bar that they have the responsibility to separate the wheat from the chaff before pleading a class action.

We move now to Rule 23(b), which prescribes the various types of class actions permitted in federal practice.[39] First, a quick overview. Rule 23(b)(1) is something I like to refer to as the "prejudice" class action. It authorizes class action treatment if some prejudice would result either to the party opposing the class or to members of the class if the disputants chose to litigate on the basis of a series of individual actions. Rule 23(b)(2) authorizes class actions for injunctive

---

38. See, e.g., Johnson v. Shreveport Garment Co., 442 F. Supp. 526 (W.D. La. 1976); Clark v. South Cent. Bell Tel. Co., 419 F. Supp. 679 (W.D. La. 1976).

39. See generally 7A Wright & Miller, Federal Practice and Procedure §§ 1772-84.

or declaratory relief. Rule 23(b)(3) is the so-called "damage" class action; it is the one that has drawn all the criticism in recent years. As we shall see, these categories overlap and a case may fit in more than one of them.

A few preliminary observations before analyzing each of these provisions. Cases falling within subdivisions (b)(1) and (b)(2) are much more traditional and natural types of class actions than are those under subdivision (b)(3). The latter is really an elaborated joinder device. The only thing tying the members of a Rule 23(b)(3) class together is that they claim to have been injured in the same way. There being less cohesion among them than in a subdivision (b)(1) or (b)(2) class, there is more apprehension about binding the absent members of a Rule 23(b)(3) class by representation. As a result, the Rule 23(b)(3) class action is hedged in by procedural prerequisites that do not apply to cases under subdivisions (b)(1) and (b)(2). The two most significant are: the special notice requirement for Rule 23(b)(3) cases set out in Rule 23(c)(2),[40] which was interpreted by the Supreme Court in Eisen v. Carlisle & Jacquelin.[41] Since Eisen is only an interpretation of the special notice requirement for subdivision (b)(3) cases in Rule 23(c)(2), it does not speak directly to subdivision (b)(1) or (b)(2) class actions, although there is a growing recognition of a need for some type of notice in these actions. Second, to give the heterogeneous members of a subdivision (b)(3) class special protection and in deference to the importance of the day-in-court principle, every member of the class is given the right to opt-out

---

40. See generally 7A Wright & Miller, Federal Practice and Procedure § 1786.

41. 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974).

of the class action and not be bound by its result.[42] There is no opt-out privilege in subdivision (b)(1) or (b)(2) cases.

There are numerous opinions stating that when a case can be classified either under subdivision (b)(1) or (b)(3) or under subdivision (b)(2) or (b)(3), or under all three categories, it should be classified under either subdivision (b)(1) or (b)(2) rather than under subdivision (b)(3).[43] The obvious motivation for this preference is that it is procedurally easier because neither the Rule 23(c)(2) notice provision nor the opt-out privilege would be applicable. Until the Eisen decision, no one really thought very much about the validity of the proposition, which amounts to giving unfettered discretion to the judge to classify when more than one of the Rule 23(b) categories apply.

I think it is becoming more apparent that if the notice and opt-out procedures are to have any meaning, they cannot be avoided that easily. If the case has significant subdivision (b)(3) attributes, such as a claim for damages, it seems wrong to circumvent the notice and opt-out procedures by calling it a (b)(1) or (b)(2) action. What I think will emerge in the foreseeable future is that if the case is a mixed (b)(1) and (b)(3) or a mixed (b)(2) and (b)(3) case, it will have to be certified under both subdivisions. As a result, for some purposes the case will be treated as a Rule 23(b)(1) or Rule 23(b)(2) case, normally in order to administer injunctive or declaratory

---

42. See generally 7A Wright & Miller, Federal Practice and Procedure §§ 1786-87.

43. See, e.g., Mungin v. Fla. E. Coast Ry. Co., 318 F. Supp. 720 (M.D. Fla. 1970), aff'd per curiam, 441 F.2d 728 (5th Cir. 1971).

relief, and for other purposes it will be treated as a Rule 23(b)(3) case, typically in order to give notice, to effectuate the opt-out right, and to assess damages.

This is what is beginning to happen in Title VII cases, which are combined (b)(2) and (b)(3) cases whenever there is a back-pay request that is more than purely incidental. Another technique used in these cases, particularly by some judges in the Fifth Circuit, is to certify under Rule 23(b)(2) for purposes of determining the issues relating to the availability of injunctive or declaratory relief and then send notice to each of the affected people to determine which of them wish to seek a back-pay award. This, in effect, treats it as a Rule 23(b)(3) action at this point. The assumption is that the back pay request is tantamount to a damage demand and brings the action under subdivision (b)(3). The procedure poses some interesting problems, however, such as whether there must be a jury trial.

I turn now to a closer examination of each of the categories in Rule 23(b). I earlier referred to subdivision (b)(1) as the "prejudice" class action.[44] What I meant is that the rule-makers have decided that if members of the class are required to proceed by bringing individual actions, and that will cause prejudice that can be obviated by using a class action, that procedure should be available. The provision is broken down into two clauses--(b)(1)(A) and (b)(1)(B)--and is somewhat difficult to follow. The language is not Shakespeare; I would say it is closer to Joyce.

---

44. See generally 7A Wright & Miller, Federal Practice and Procedure §§ 1772-74.

I like to think of the two passages as two telescopes. Rule 23(b)(1)(A) is a telescope trained on the non-class party and the provision basically asks the question whether the non-class party would be prejudiced by a series of individual actions rather than a single group action. Rule 23(b)(1)(B) is a telescope trained on the members of the class, and asks whether the members of the class would be prejudiced by individual actions rather than class treatment of the dispute.

Rule 23(b)(1)(A) authorizes a class action when: "The prosecution of separate actions would create a risk of," that is the preamble, "inconsistent or varying adjudications with respect to individual members of the class," now here are the crucial words, "which would establish incompatible standards of conduct for the party opposing the class." The focal point of attention in looking through the (b)(1)(A) telescope is whether individual actions would create a risk of incompatible standards of conduct for the non-class party--typically the defendant.

At the outset it is important to understand what types of actions are not embraced by this provision. Rule 23(b)(1)(A) does not include a situation in which the risk of inconsistent results in a series of individual actions simply means that the defendant would prevail in some cases and not in others and therefore would have to pay damages to some claimants but not to others. Examples would be mass tort cases or any other typical damage actions. The risk of paying money to some and not to others is not what rule-makers intended by the words "incompatible standards of conduct." The situation in which the defendant is faced with inconsistent results requiring it to pay some class members but not others is covered by Rule 23(b)(3) not Rule 23(b)(1). The Advisory Committee's Notes make this clear even though the language of the Rule itself is somewhat indefinite on the point.

What then are incompatible standards of conduct for purposes of subdivision (b)(1)(A)? One example is a situation in which a sanitary district having jurisdiction over a landfill area starts leasing portions of that land. Challenges to the legality of the leases ensue. In this situation, if you allow people to attack the leases in individual actions there clearly is a risk of inconsistent result. But beyond that, there is a risk of "incompatible standards of conduct" because if there are inconsistent adjudications as to the legality of the leases, the sanitary district does not know whether it can or cannot continue to issue leases. The non-class party is stalemated and put in a conflicted position within the meaning of the Rule.

The same, obviously, would be true when the constitutionality or the statutory propriety of some term of a municipal bond is challenged. Since the municipality will not know whether it is legal to issue the bonds if the risk of inconsistent results materializes, it is in a conflicted position.

Another illustration would be voting rights dispute involving a registration question: if applicants for registration sue individually some may prevail against the board and others may lose. The election board would then be in a conflicted position, because it could not be certain whether or not to register the affected people.

These are the types of "incompatible standards of conduct" that Rule 23(b)(1)(A) was designed to protect against, situations in which the non-class party does not know, because of inconsistent results, whether or not it can pursue a particular course of conduct. This provision turns out to embrace a rather limited number of cases.

With regard to Rule 23(b)(1)(B), again, individual actions must create a risk of inconsistent adjudications as to individual members of the class. But this time the inconsistent results would, and these words are important, "as a practical matter"--it need not be as a legal matter--"be dispositive of

the interests of the other members of the class not party to the adjudication, or substantially impair or impede their ability to protect their interest." In other words, the Rule 23(b)(1)(B) is concerned about the class members. What is being said is that if individual actions go forward, some of the people similarly situated will not be able, as a practical matter, to protect their rights.

The paradigm Rule 23(b)(1)(B) case is one in which there are multiple claimants to a limited fund, such as insurance proceeds, a bank deposit, or trust assets, and there is a risk that if litigants are allowed to proceed on an individual basis those who sue first will deplete the fund and leave nothing for the late-comers. That is a clear illustration of a situation in which individual actions can be dispositive as a practical matter. If a district judge has a limited fund case and there are a couple of pigs nuzzling up to the trough, and he knows there are some lethargic claimants who have rights but they have not been heard from, he is looking at a subdivision (b)(1)(B) action. The individual cases probably should be converted into a class action so that the limited fund can be equitably distributed among all members of that class. Otherwise there is a premium to the winner of the race to the courthouse. In a real sense, Rule 23 (b)(1)(B) cases operate something like interpleader suits.

Although less clearly within Rule 23(b)(1)(B), another illustration would be a situation in which there is a question of patent validity or patent infringement. If individual retailers or wholesalers or manufacturers are allowed to proceed on their own in seeking declarations of invalidity or noninfringement, there is a risk that one of them will result in an adjudication adverse to the interests of the others, which, given the sensitivity of the marketplace, may well be dispositive "as a practical matter" of the rights of the other retailers, wholesalers, or manufacturers. Accordingly, cases involving patent validity or patent infringement questions can be brought within subdivision (b)(1)(B). Of course,

these typically also are Rule 23(b)(2) cases because the relief sought is a declaratory judgment or an injunction. But the choice of classification as between Rule 23(b)(1) and Rule 23(b)(2) is not critical in any way.

Turning to Rule 23(b)(2),[45] the provision really has not generated any significant difficulties, even though more cases probably have been brought under this category than under any of the others in subdivision (b). Its primary application is to a straight injunction suit. The typical Title VII case falls in this category, as do many environmental and consumer cases. The provision states: "the party opposing the class has acted or refused to act on grounds generally applicable to the class." The remaining few words of the subdivision are quite important: "thereby making appropriate final injunctive relief" or "corresponding declaratory relief with respect to the class as a whole." The language of this portion of the Rule makes clear that it is the class that must be seeking the injunction or declaration.

The defendant's conduct need only be "generally applicable" to the class; there is no requirement that the defendant's conduct be damaging or offensive to every member of the class. Illustratively, a challenge to a school dress code would qualify under the subdivision. The code is conduct generally applicable to the entire class--the students--and meets the conditions of Rule 23(b)(2) even though it may actually only intervere with or be repugnant to a minority of the class members; the vast majority of the students may voluntarily adhere to the code and not be offended by it.

The only construction issue that has arisen in connection with Rule 23(b)(2) is the meaning of the word "corresponding" preceding the reference to "declaratory relief." It is unclear from the Rule itself what is meant by a "corresponding" declaratory

---

45. See generally 7A Wright & Miller, Federal Practice and Procedure §§ 1775-76.

judgment. According to the Advisory Committee the reference is to any remedy that "as a practical matter . . . affords injunctive relief or serves as a basis for later injunctive relief." The declaratory judgment, in effect, must have the trappings of an injunction. For example, a declaration of unconstitutionality with regard to certain governmental conduct, which normally operates to enjoin the commission of that conduct by the governmental organization, would qualify. The same probably is true of a request for a declaration of patent infringement.

What would not be corresponding declaratory relief? A request for a declaratory judgment that certain conduct constitutes a breach of contract seems to fit that description. Yet the fact is that the line between what is "corresponding" and what is not is a very shadowy one and I really am not certain that any useful purpose has been served by inserting that confusing word. Fortunately, it has not caused any difficulty thus far. It has not been a litigated point and perhaps this is an instance of "silence being golden." It may well be that the "marketplace" is telling the rule-makers what it thinks of the word "corresponding."

As I mentioned before, the Rule 23(b)(3) action is the so-called "damage" class action.[46] It is the subdivision (b)(3) action that has been the source of controversy during the past decade. In this type of class action the judge is obliged by the Rule to make two findings before certifying the case under Rule 23(c)(1). According to the Rule's language, the

---

46. See generally 7A Wright & Miller, Federal Practice and Procedure §§ 1777-84. Although the Advisory Committee clearly indicated that mass tort cases were not within the scope of Rule 23(b)(3), see id. at § 1783, there is now some precedent to the contrary. See, e.g., Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558 (S.D. Fla. 1973), which contains a comprehensive discussion of the subject by Judge Atkins.

court must find that the questions of law or fact common to the members of the class, and this is the key word, "predominate" over any questions affecting only individual members--the common questions must "predominate." In addition, the court must find that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Although easy to state, these prerequisites become rather opaque when any attempt is made to apply them. The truth is that if one reads fifty or even a hundred cases involving predominance and superiority, a clear picture of what is happening under Rule 23(b)(3) does not emerge. A DiVinci or Michaelangelo could not draw a straight line through the subdivision (b)(3) cases.

I think the reason for this is clear. In the hands of the district judges the questions of predominance and superiority become highly individualistic; each case turns on its particular facts and, I honestly believe, the result may turn on the identity of particular judges. What is predominance to one judge is not to another; what is class action superiority to one judge proves to be inferiority to another. And discrepant treatment often appears within a circuit, occasionally even within a district. I must conclude, and it really is not surprising, that an individual judge's personal attitude toward class actions or the particular area of substantive law involved in the action has a significant bearing on whether the court will find predominance and superiority exists or does not exist. As a result, I can only offer a few impressionistic observations about the application of these prerequisites.

The first thing to notice about predominance is that the Rule does not say determinative![47] There can be predominance without the common issues being determinative, and certainly there can be predominance

---

47. See generally 7A Wright & Miller, Federal Practice and Procedure § 1778.

without every question in the action being common. Indeed, there are some contexts in which predominance will exist with only a single issue being common; that issue simply is so overpowering in its centrality to the litigation that it, in and of itself, satisfies predominance. Under certain circumstances, an issue of conspiracy, pattern of discrimination, price fixing, or monopolization would be a predominant common question and enough to satisfy this aspect of Rule 23(b)(3). The key should be whether the efficiency and economy of common adjudication outweigh the difficulties and complexity of individual treatment of class members claims. What we obviously are looking for is achieving the "maximum bang for the judicial buck." For example, if the case involves the existence of a discriminatory practice in job seniority, in hiring, or in vocational testing, there probably is predominance. On the other hand, if the case is brought by a group of stock investors who are claiming that a major brokerage house's employees churned their accounts, there probably is no predominance because each class member's claim is likely to turn on the way in which his or her account was churned. What constitutes churning for one investor's account may not be churning for a different investor's account, particularly because different investors have different objectives.

In some cases common and individual issues seem to be in equilibrium. Let me give an illustration of how difficult it occasionally is to quantify and weigh the issues for purposes of determining predominance. Consider a prototypical securities action under Rule 10b-5, like the case I described earlier involving the alleged deficiencies in an Official Statement accompanying an issue of municipal bonds. Now without getting into the Alice in Wonderland world of that part of securities law, let us list the basic issues in a Rule 10b-5 case. They are misrepresentation, scienter, materiality, reliance, causation, damage--six issues. I realize that not everyone would agree with that enumeration, but for purposes of this exercise let us assume

these are the issues.

If the case involves statements in or omissions from a single document, like an Official Statement, misrepresentation is a common question. Scienter is clearly a common question. The same is true of the issue of materiality, which means that we now have three common questions. The issue of reliance depends on how you interpret the Supreme Court's decision in Affiliated Ute Citizens of the State of Utah v. United States.[48] That case technically was an omissions case and the Supreme Court said that in such a case you communize the issue--there need not be proof of individual reliance. This would push reliance into the common issue category also. But there is a school of thought to the effect that when the claim is based on an affirmative misrepresentation, Affilited Ute does not apply and there must be individual proof of reliance. If this is correct, reliance would have to be put into the individual issue category in an affirmative misrepresentation case. The status of reliance becomes even more uncertain when the action involves a mixture of omissions and affirmative statements. The tendency appears to be to extend to Affiliated Ute and treat reliance as a common issue in these situations.[49] Causation is still an individual issue. Each litigant, in theory, is supposed to be able to demonstrate that he or she was caused to purchase or caused to sell by the offending statements or omissions. Thus causation falls into the individual issue category. (I must confess to having difficulty distinguishing between causation and reliance, and those two issues may come to be treated similarly in the future. On the other hand, the Supreme Court's securities decisions of late have been less expansive than they were in the past.)

---

48. 406 U.S. 128, 92 S. Ct. 1456, 31 L. Ed. 2d 741 (1972).

49. See, e.g., Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374 (2d Cir. 1974).

Finally, damages, quite clearly, is an individual issue.

To recapitulate, misrepresentation, scienter, and materiality are three definitely common issues; causation and damage are two individual issues; and reliance probably is a common issue but in certain contexts may be treated as an individual issue. Is there predominance? When a Rule 10b-5 case is atomized into its component issues in this fashion, a borderline situation emerges, although on balance I believe predominance exists. I would argue that if you look qualitatively at misrepresentation, scienter, and materiality, they predominate over damage and causation. Certainly in an omissions case, in which reliance clearly is common, there would be four common issues to two individual issues. Please understand that I am not advising this type of nose-counting approach. I have used it simply to illustrate the difficulties of determining whether predominance exists in many situations.

One final point. In order to decide predominance, the district judge is obliged, contrary to an intimation in the Eisen case, to inquire into the merits of the case if for no other reason than to determine what the issues are. Of course, this inquiry is solely for purposes of reaching a conclusion with regard to predominance.

Turning now to the superiority requirements,[50] the Rule requires the court to look at other adjudicative possibilities and to compare them to the class action. The first one that comes to mind is letting the interested class members bring individual actions. I have the feeling that the mind plays a funny little trick when this alternative is considered. Let me illustrate what I mean by considering a situation such as Eisen v. Carlisle

---

50. See generally 7A Wright & Miller, Federal Practice and Procedure § 1779.

& Jacquelin.[51] That involved an enormous class of odd-lot buyers and sellers--millions of people. Over two million of them were identifiable but none of the class members had claims of more than $50 or $60. I could well understand a judge confronted by such a case thinking about the superiority question in the following terms: "Which do I think is better, allowing Morton Eisen's class action on behalf of millions of people in a case so complicated (it was an antitrust case) that I am not likely to be relieved of it for eight or twelve years, or denying certification and forcing individual actions to be brought, knowing that none of the class members have enough at stake to ever show up at the courthouse?" From the perspective of enlightened self-interest, which, believe me, I am not disparaging, the prospect of not facing individual actions appears superior to an eight to twelve year class action involving millions of people. Naturally, there is a temptation to say the class action is not superior to individual actions whenever the latter probably will never materialize.

As you might suspect, I think this line of thought is unfortunate. It misses the mark in terms of what the draftsmen meant by superiority, particularly their clear intention that the class action be available to assist small claimants in securing redress of their grievances. Moreover, it is not so certain that the millions of claimants always will remain quiescent. One of these days millions of Morton Eisens may show up to litigate individually. The reasons for this possibility are as follows. First, as I said earlier, the demography of the bar is shifting in such a way that there are now large numbers of lawyers interested in social action litigation who are funded by means that make them independent of the resources of particular clients. Institutions, charitable foundations, and in some cases the government provide the fi-

---

51. 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974).

nancing to initiate cases that hitherto have been thought uneconomic. This means that we may begin to see social action lawyers who are not motivated by economic reward for their clients bringing cases like Eisen simply to eliminate perceived injustices.

Second, statutory provisions or common law doctrines authorizing the award of attorney's fees do not distinguish between class and individual actions. If the court is permitted--or obligated--to make an award, it theoretically should make no difference how many plaintiffs are involved unless the fee is based on the size of the recovery. But in recent years the movement of the law relating to computing fees has been away from that approach. The fee standard now emphasizes time and normal billing rate, which should produce an attractive incentive for a lawyer to bring a case, even without a class action. It may encourage a future Morton Eisen to sue for $60 and to ignore the large numbers of other people similarly situated who he knows he cannot afford to give notice under Rule 23(c)(2) if the class is large. If it takes years to succeed and consumes thousands of hours of lawyering time to recover Eisen's $60 in damages, the lawyer is still entitled to an attorney's fee. And if that fee is computed on the basis of the attorney's time, normal billing rate, and other factors to be discussed in a few minutes, he may end up with a fee of several hundred thousand dollars. There is nothing inappropriate in this. If an attorney proves a price fixing conspiracy or some other serious violation of public policy, he or she should get that fee, even though the litigation was in the context of a $60 claim. That is precisely the purpose of the private action procedure and the incentive of allowing a fee award.

In short, I think lawyers may begin to bring small individual claims; they may even begin to abjure the class action with all of its difficulties. It is only the contingent fee or percentage-of-recovery approach to fee awards that has created the existing imbalance between the incentive to pursue cases on a class basis and the disincentive

of bringing them on an individual basis. If my speculation, and admittedly that is all it is, comes to pass, in time the superiority question may look quite different. The class action will be patently superior to numerous individual actions.

There are adjudicative possibilities to consider in deciding superiority other than leaving the situation to individual actions. Among them are: (1) considering consolidation of the individual actions, particularly the possibility of using Section 1407; (2) referring some of the cases to an administrative agency; (3) employing the test case mechanism, although this is a rather risky course to follow because of the difficulties of securing consent, framing the contours of a useful test case, and the uncertainty inherent in the application of formal adjudication principles;[52] and (4) determining that as a matter of substantive law class treatment is not superior, which seems to be the case under the Truth in Lending Act whenever claimants could recover more on an individual basis than they could on a class basis because of the statute's limitation on damages.

In spite of the express recital in the Rule of four illustrative factors that the court should consider in deciding superiority,[53] the cases simply cannot be harmonized into a cohesive pattern, as also was true in the predominance context. Once again individual judicial attitudes seem to be quite significant in understanding the results. There are some very liberal results in a number of districts, particularly the Southern District of New York; on the other hand, there have been several restrictive decisions from the Ninth Circuit.

---

52. The test case technique is discussed at length in Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir. 1974), cert. denied, 419 U.S. 885, 95 S. Ct. 152, 42 L. Ed. 2d 125 (1974).

53. See generally 7A Wright & Miller, Federal Practice and Procedure § 1780.

A good example of the latter is In re Hotel Telephone Overcharges.[54] In that case plaintiff sued several national hotel chains alleging that there had been a conspiracy to defraud guests by putting an arbitrary, daily small charge on their hotel bills for what was called in-coming message service. It apparently did not matter whether you actually received any messages. If you multiply 13, or 15, or 18 cents a day by the number of guests in these hotels throughout the nation, you can see that an extremely large amount of money was involved. Of course, none of the guests had a substantial claim.

A class action was instituted under Rule 23(b)(3). Almost all the hotel chains settled; the case continued, however, and the propriety of class action certification went to the Ninth Circuit, which concluded that the case was unmanageable and therefore the class action procedure was not superior. The court expressed concern about the inability to process the case in less than fifty or sixty years if each of the claimants had to establish their damages before a jury. The court did not seem willing to explore the possibility of using a master and employing the jury to confirm his report, which probably would be consistent with the ancient practice of hearing actions based on a long account in equity. Nor was it receptive to an aggregate damage award under a fluid class theory, a possibility left open by the Supreme Court in Eisen.

The Ninth Circuit also indicated that the case was unmanageable and lacked superiority because the sums were so small that there was no way of distributing the recovery effectively; administrative costs would eat up the award. Apparently, however, the records of every guest's stay at the hotels had been maintained on computer tapes and with a relatively modest effort a machine could have been programmed to identify each class member, compute that

---

54. 500 F.2d 86 (9th Cir. 1974).

guest's recovery, type out a check, and address the envelope. In my judgment it was relatively simple to manage the case and distribute any award once liability had been determined. The result, therefore, can only be understood in terms of the Ninth Circuit's view of the inherent limitations on the judicial process and its conception of the proper scope of availability for the class action.

A very different approach in In re Hotel Telephone Overcharges would have been to bifurcate the class actions into liability and damage determinations to avoid unmanageability. For example, in a situation in which 2,000 employees of a company charge sex or race discrimination the existence of discrimination is common, but the application of the discriminatory policy to individual employees raise individual issues. A judge might well conclude there is no predominance and the case is unmanageable and lacks superiority. Yet, this might be an appropriate case in which to certify the class, as permitted by Rule 23(c)(4), only with regard to the issue of discrimination, which can be handled on a common basis, and leave the damage issues for individual treatment if discrimination is established. An alternative would be to bifurcate the case and leave the damage issues in limbo pending adjudication of the discrimination question. If discrimination is found, the district judge can then use his power under Rule 23(d)(2) to give notice to the 2,000 employees and inquiring whether they wish to submit claims. Many of them will not and others will easily reach settlements with the company. Thus, what looked like unmanageability at the outset turns out to be quite manageable. I believe that many difficulties of predominance and manageability can be alleviated by using the bifurcation procedure or by forming subclasses requiring the lawyers to reshape and limit their classes. Once again, judicial use of a scalpel seems preferable to wielding the meat axe of refusing certification.

That concludes my discussion of Rule 23(b). I turn now to the judge's role in the class action settlement process. Time, however, will only permit

a few observations. For better or worse, the district judge is obliged by Rule 23(e) to involve himself quite deeply in any class action settlement.[55] In that regard, Rule 23(e) is a relatively unique provision in American law. It is inconsistent with the general principle that litigants are free to settle, discontinue, or terminate a lawsuit as they see fit. In the context of class actions, therefore, Rule 23(e) overrides the provisions in Rule 41 dealing with discontinuance and voluntary termination.

Underlying Rule 23(e) is the same philosophy we discussed in connection with adequacy of representation. Namely, the settlement of a class action will affect many, many people who are not actually before the court, are involved in the action only by representation, and they deserve the best possible protection. Accordingly, the system has decided that the district judge has an obligation to supervise and approve the propriety of a settlement in order to make certain that the self-appointed representatives have not simply become weak of heart, or have been bought off, or have entered into a sweetheart deal with the defendant, or their attorneys have made a covert arrangement with opposing counsel. In addition to these considerations of fairness, the settlement should produce a judgment that will stand up under collateral attack--this is a very, very important consideration. Indeed, it is also to the defendant's advantage to dot the "i's" and cross the "t's" on the settlement in order to insure that the judgment entered on the settlement gets the benefit of res judicata.

The first issue relating to settlement that may confront a district judge is, when does the obligation prescribed in Rule 23(e) become applicable? There is considerable disagreement over

---

55. See generally 7A Wright & Miller, Federal Practice and Procedure § 1797.

this, especially because of the potential effect of the rather cavalier interposition of class action allegations, which we discussed earlier

In my view the purposes to be served by Rule 23(e) require the conclusion that even though a class has not been certified, the provision technically is applicable at any point after the commencement of an action claiming to be a class action. This means that if a settlement is presented to the court before certification, the judge is obliged under Rule 23(e) to examine its terms and evaluate its merits before approving it, as well as to give the notice of the proposed settlement called for by subdivision (e). Admittedly this puts a heavy burden on the district judge. Fortunately, Rule 23(e) does not apply to a pre-certification termination on the merits or on some dilatory point, and, as indicated earlier, the problem can be obviated if the plaintiffs can be shown the inadvisability and inappropriateness of seeking class action status and convinced to withdraw the class action allegations. One other saving grace to this embracive reading of Rule 23(e) is that when the settlement occurs during the pre-certification period, particularly very early in the action, such as before answer or discovery on the Rule 23(c)(1) question, the judicial inquiry under subdivision (e) can be much more modest than it typically is after certification. This approach seems proper because the settlement often is in the nature of a discontinuance of the class action status of the case and it is unlikely that other class members will have detrimentally relied on its institution. All the court need require is a demonstration by the attorneys that no one will be prejudiced by removing the class allegations. But it is important that the court press the lawyers on this and perhaps make a record of their representations.

There are situations, however, involving a true settlement prior to certification as distinguished from an early discontinuance or backing away from the class action procedure. This situation

requires much more serious attention and presents one of the sharpest controversies that has arisen among judges since the promulgation of amended Rule 23.

One school of thought, which has been forcefully articulated in the Manual For Complex Litigation,[56] by a Board of Editors composed of experienced class action judges, argues that a true settlement never should be allowed prior to certification because the risk of abuse is too high if the inquiries required by the seven class action prerequisites are not made. The notion is that the district judge does not have sufficient information to discharge his responsibilities under Rule 23(e)--he does not know whether the representation is adequate, whether there are antagonisms or conflicts within the class, the details of the economics of the case or the proposed settlement, or very much about the substantive, procedural, or logistical issues in the case. This position also argues that pre-certification settlement short-circuits the absentees' ability to intervene and participate in the case. The fear is that if a tentative class for settlement purposes is formed, the district judge may do more harm than good to the absentees because the settlement may be based on an undisclosed sweetheart deal or a misappraisal of the case. Moreover, any judgment entered on the settlement may be vulnerable to collateral attack by absent class members in the future. Stated somewhat differently, the Board of Editors, and a number of other judges, believe that in the process of going through the certification inquiry the district judge will learn a great deal to help him in determining the bona fides of any settlement that subsequently is proposed and this gives greater assurance that the

---

56. Manual for Complex Litigation § 1.46 (4th rev. 1977).

objectives of Rule 23(e) will be satisfied. Finally, there is the textual argument that Rule 23(c)(1) requires the certification issue to be determined "as soon as practicable" and the formation of tentative classes is inconsistent with this objective.

The other school of thought is that the system should encourage settlement whenever it is possible to do so.[57] Since the certification question is an extremely difficult one and often takes two or more years to resolve, the litigants should not be inhibited from settling by artificially declaring that the certification process must be completed first.

Personally, I have always found this to be a close debate. So close as a matter of fact that in Volume 7A of the Wright and Miller treatise there are passages intimating the authors' belief that the tentative formation of a class is a proper practice, but in the pocket part to that Volume there is some backtracking from that view. I have become convinced in recent years that there really is a serious problem of the judge not having enough information prior to certification to do a completely effective job under Rule 23(e). What is clear, is that if the court is going to consider a proposed settlement prior to formal certification, he is advised to demand a full presentation on all of those aspects of certification bearing on an adequacy of representation and class homogeny. Ironically, if he does, he might as well complete the Rule 23(c)(1) process.

There is a notice requirement that attends the court's approval of the settlement. It usually is provided for by the parties in the proposed settlement. The Rule states that notice shall--note that word "shall"--be given to all members of the class in such manner as the court directs. That is a very interesting provision, especially when compared to the provision in Rule 23(c)(2)

---

57. See, e.g., Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30 (3d Cir. 1971).

that was interpreted in the Eisen case. Rule 23(c)(2) states that in Rule 23(b)(3) class actions the court shall--again that word "shall"--"direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." The Supreme Court in Eisen said that the subdivision (c)(2) notice provision is to be interpreted literally and individual notice must be given to each identifiable member of the class in a Rule 23(b)(3) action. The question therefore is, inasmuch as the Supreme Court interpreted the notice requirement in subdivision (c)(2) literally, should not the notice provision in subdivision (e) be given a corresponding construction so that notice must be given to every identifiable class member when a settlement is proposed. The result of such a construction obviously would be onerous and expensive, creating a serious deterrent to settlement.

The Rule itself provides an "out" from this interpretation by referring to notice "in such manner as the court directs." There is no jurisprudence as to what that means. I suspect that the rigors of Eisen will not be imposed on that passage in Rule 23(e). They certainly should not be. To my mind all that is necessary is a form of notice that is reasonably calculated to insure that all viewpoints regarding the settlement will be represented before the court. For example, I would hope that the notice Judge Tyler actually issued in Eisen would satisfy Rule 23(e).[58] He authorized publication coupled with individual notice to a random subset of the odd-lot buyers and sellers, institutions, and the most active odd-lot buyers and sellers.[59]

---

58. Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (S.D.N.Y. 1971).

59. Notice by mail is quite common. See, e.g., Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir. 1975), cert. denied, 423 U.S. 864, 96 S. Ct. 124, 46 L. Ed. 2d 93 (1975).

The district judge must act as a guardian for the absent class members in evaluating the propriety of the proposed settlement. He cannot rely totally on the attorneys' presentation. There may be an improper arrangement underlying the proposal. Nor can he discharge his duty under Rule 23(e) without insisting on a fairly extensive display of the underlying justifications for the settlement. The showing should include (1) economic data, (2) information on the dimensions of the class, as well as the dimensions and the viability of the claim, and (3) some indication as to the realities of the litigation, how much it would cost, how long it would take to try, and the chances of the class succeeding in the action.[60] The judge also should determine approximately what percentage of the settlement actually will reach class members and appraise the problems of distribution, not only as they affect the attorneys but also whether they will burden the court. Finally, let me employ the "robbing Peter to pay Paul" image again. If an effective job is not done under Rule 23(e) in testing the validity of the settlement, it may come back to haunt everyone in the form of a successful collateral attack or appeal. In general terms, the court's job under Rule 23(e) is one that is quite appropriate for district judges--an inquiry into the bona fides of the proposed settlement and its fairness and reasonableness. Although it is desirable in most cases, an open court hearing is not necessary. The cases do not require that procedure.[61] In most instances, however, discretion being the better part of valor, the court actually does hold a hearing.

---

60. See generally Manual for Complex Litigation § 1.46 (4th rev. 1977).

61. See, e.g., City of Detroit v. Grinnell Corp., 356 F. Supp. 1380 (S.D.N.Y. 1972), aff'd, 495 F.2d 448 (2d Cir. 1974).

The recognition of the importance of scrutinizing proposed settlements closely is reflected in the increased willingness of district judges to reject proposed settlements in recent years.[62] I think this quite properly represents the growing awareness among district judges of the need to dig into the details of a proposed settlement to make certain that the parties are within a legitimate range. This is a manifestation of the third pendulum swing in the class action field I described at the outset of this presentation. Admittedly this is a costly process but it ultimately may save a great deal of unnecessary effort subsequently, either on appeal or a collateral attack. Consequently, as is true of the Rule 23(a)(4) determination, the Rule 23(e) determination is worth a little patience and effort, as well as the court insisting that the lawyers make a fully detailed presentation.

In the few minutes that remain I will sketch the current situation regarding attorney's fees.[63] This aspect of class actions has been in disarray for a number of years, but I think it is straightening itself out now. We have had important decisions by the Second Circuit in City of Detroit v. Grinnell Corp.,[64] the Third Circuit in Lindy Brothers Builders, Inc. of Philadelphia v. American Radiator & Standard

---

62. See, e.g., In re International House of Pancakes Franchise Litigation, 487 F.2d 303 (8th Cir. 1973); Liebman v. J. W. Petersen Coal Co., 63 F.R.D. 684 (N.D. Ill. 1974).

63. See generally Manual for Complex Litigation § 1.47 (4th rev. 1977); 7A Wright & Miller, Federal Practice and Procedure § 1803 (particularly the pocket part).

64. 495 F.2d 448 (2d Cir. 1974).

Sanitary Corp.,[65] the Fifth Circuit in Johnson v. Georgia Highway Express, Inc.,[66] the Eighth Circuit in Grunin v. International House of Pancakes,[67] and numerous district court cases that have established a reasonably presentable approach to the determination of fee awards.

It now seems clear that the petitioning lawyers should maintain fairly elaborate time records.[68] Five years ago, a plaintiff's lawyer would have been surprised by a judge's request to see time records. But there is no reason in 1977 why a plaintiff's lawyer should not have them. Of course, if a lawyer had been caught in midstream by the transition regarding the judicial approach to awarding attorney's fees, particularly a lawyer accustomed to working on a contingent fee basis who never keeps such records, the court can be charitable and allow a certain amount of reconstruction of his time expenditures, which, I fear, is a euphemism for engaging in reconstructing history. But in general, time records are essential and I would strongly urge district judges to announce at the outset that they are expected. Indeed, a number of judges now follow the practice of requiring the presentation of time records every month or two. This is particularly helpful when the lawyer has multiple cases in the same district because it discourages him from making requests for awards for hours approximating, or actually in excess of, 24 per day, one of the unseemly practices that has emerged--fortunately, very rarely.

---

65. 540 F.2d 102 (3d Cir. 1976).

66. 488 F.2d 714 (5th Cir. 1974).

67. 513 F.2d 114 (8th Cir. 1975), cert. denied, 423 U.S. 864, 96 S. Ct. 124, 46 L. Ed. 2d 93 (1975).

68. See, e.g., Miller v. Mackey Int'l, Inc., 70 F.R.D. 533 (S.D. Fla. 1976).

Not only are time records required but an increasing number of courts are insisting that they be broken down in terms of each lawyer working in the case, with some indication of the status of that lawyer within the hierarchy of the firm--senior partner, junior partner, senior associate, and junior associate. Paralegals should not be included because they are thought of as an expense, not a profit-making, item. In addition, each lawyer's time should be broken down in terms of the different kinds of work actually performed by the attorney--pleading, research, negotiation, discovery, trial, case administration. There are now a number of opinions in the reports that provide good illustrations of the kind of work categories that should be included.[69] All of this documentation is designed to give the judge a basic feel for the number of hours worked by whom and on what.

The judge then attributes what is called a "normal billing rate" to each of those lawyers and for each of the tasks they have undertaken. This means differentiating in terms of hourly rate between seniors and juniors and between lawyering work requiring modest skill and that requiring significant skill. The district judge presumably knows the economics of the legal profession in his community or can call for expert testimony if further elaboration on the billing practices of the bar is thought necessary.

With the time and rate figures in front of him, the court then engages in what the Second Circuit has called the lodestar computation--multiplying each lawyer's time by the rate for each of the functions he has performed. This produces the basic working figure for fixing the final fee. The recent cases indicate that the judge has two

---

69. See e.g., Doughboy Indus., Inc. v. American Cyanamid Co., 1975-2 CCH Trade Cases ¶ 60,452 (D. Minn. 1975).

types of discretion with regard to the figure produced by the lodestar computation.[70] The first permits the amount to be augmented, and presumably discounted, in light of the so-called "contingency" factor. The court must ask: how risky was the case? Was there a government prosecution or something akin to it that the plaintiff simply followed? Did the plaintiff have to break new procedural or substantive ground in order to maintain the action? Was the defense particularly rigorous? These and other equally imprecise considerations come in under the rubric "contingency." In reality it gives the district judge enormous discretion to adjust the fee in order to compensate a lawyer for "taking a chance" on a case that performs some social objective.

The second factor is the so-called "quality" factor. To be sure, the normal billing rate of each attorney already reflects, at least in general terms, the professional competence of each of them, or so the theory goes. The "quality" factor seeks to respond to a slightly different consideration, however. It focuses on how each lawyer actually performed in the particular case before the court. Was he obstreperous, was he helpful, was he prepared, did he do an especially good job for his client, did he negotiate an advantageous settlement, and did he work efficiently? The "quality" factor can be used to increase or decrease the lodestar figure. Again, it is something in the nature of a wild card and gives the court considerable flexibility.

In some of the cases that have appeared in the last two or three years, these two factors were not employed by the court. Only one or two cases actually discounted the figure produced by the time-rate computation; the judge apparently

---

70. See generally 7A Wright & Miller, Federal Practice and Procedure § 1803 (pocket part).

concluded that the case was not very contingent or that the lawyer's work was not of high quality. A number of cases have increased the time-rate figure, even to the extent of multiplying it four or six times because the court felt there was significant contingency or the lawyer's work was of extraordinarily high quality.

This new approach to fees has a certain mathematical precision to it. In reality, however, this precision is superficial. Thus, although there is no doubt that it is a good analytical technique, one should not be mesmerized by its apparent certainty. For example, there is no uniformity as to what is an hour. Some people think a billable hour is fifty minutes. Others think it is a full sixty minutes. Is an hour spent on a repetitive and cumulative intervention petition or pleading a compensable hour? It probably should not be. What about an hour spent on preparing the fee petition itself? Is that a compensable hour? In all of these contexts there are differences of view among district judges as to whether they should be included.[71]

There are other ambiguities. What is a lawyer's normal billing rate? In any area I know anything about, the billing rates of lawyers vary tremendously. Indeed, for certain segments of the plaintiff's bar, the notion of normal billing rate really has no meaning. And what is the district judge to do about the enormous billing differentials that exist in different parts of the country? On a related matter, in a very large case the lawyers may be from all over the country.

---

71. Compare Dorfman v. First Boston Corp., 70 F.R.D. 366 (E.D. Pa. 1976), with Kiser v. Miller, 364 F. Supp. 1311 (D.D.C. 1973), aff'd in part, remanded in part, 517 F.2d 1275, 171 U.S. App. D.C. 1 (D.C. Cir. 1975).

Whose normal billing rate do you use? The rate that lawyers would charge where the court is located or the rate normally charged by each lawyer? The reported opinions on fee awards make it clear that the billing rate is radically different in Memphis, Tennessee than in New York City, to take two examples. If nothing else, the ventilation of billing practices by this process is going to be very interesting to watch as lawyers begin to understand the tremendous discrepancies in their billing practices.

A final word on attorneys' fees. At least the Third Circuit has indicated that if the district court follows this method in computing fees it will not accept interlocutory appeals on fee matters and will only review for an abuse of discretion.[72] This would be a salutary development. It makes me optimistic that we may now have finally found a fee formula--admittedly not a perfect one but one clearly far superior to the old salvage approach--and we may now be seeing the end of the very expensive and inefficient process of multiple appeals on attorneys' fee questions that has characterized the practice until recently.

Time has expired and I must subside. I thank you for your kind attention and hope that this overview proves to be of some value as you labor in the class action vineyards.

---

72. Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976)(en banc).

☆ U.S. GOVERNMENT PRINTING OFFICE:1987-181-850/75107

FEDERAL JUDICIAL CENTER
DOLLEY MADISON HOUSE
1520 H STREET, N.W.
WASHINGTON, D.C. 20005