The Vicissitudes of the American Class Action—With a Comparative Eye*

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The vicissitudes of the American class action offer a lesson for other countries interested in group and class litigation. Of course, this history must be understood within the particular characteristics and culture of the American legal system.[1] The approach to group litigation and aggregation in other systems—particularly those countries who are just starting to think about class actions and see in it a panacea to the problems of mass litigation—appears to me oversimplified and naive.

For that reason, my observations can be viewed as a flashing yellow light—which in the United States is the signal for proceeding with caution. It may well be that many of the abuses of the class action that I identify can be explained as particular to the "American" context. And it is certainly true that the American class action has been molded in a system that (1) relies on a strong adversary tradition, (2) is powered by entrepreneurial lawyering, (3) is comfortable with a culture of robust judicial lawmaking, and (4) is complicated by the intricacies of an expansive dual system of courts. Indeed, since it is the federalism attributes that take up substantial attention in this article, these class action "abuses" in the United States do not necessarily have resonance in foreign systems.

Still, an interesting irony arises with respect to group litigation in the United States that has more universal application; it is one that Professor Steve Burbank and I observed in an earlier article we wrote for a comparative procedure conference in Florence two years ago.[2] Seen at its inception, group litigation—in particular the class action—

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1. *See generally* Oscar G. Chase, *Some Observations on the Cultural Dimension in Civil Procedure Reform*, 45 AM. J. COMP. L. 861 (1997).

2. *See* Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 684-88 (1997).

was perceived as a device to *empower* individuals in affording them access to justice. In other countries, this feature appears to be a motivating force for the adoption of a class device. For example, Professor Per Lindblom in his article on class actions for that same comparative procedure symposium,[3] talks about the class action as a vehicle to promote access to justice for the individual. More recently, however, aggregation in the United States has had the effect of restraining individuals from commencing their own litigation, in the service (we are often told) of preserving access to justice.[4]

A second theme that emerges from the story of class actions in the United States is that it cuts across different substantive areas of law. Although the treatment of class actions so far has generally been trans-substantive—i.e. a one-size rule that fits all—more recent developments suggest class action reform should be approached in particular substantive contexts and as a part of substantive law reforms. Reform proposals on the agenda in the United States are going in two directions. Reform of securities class actions has come with the Securities Litigation Uniform Standards Act[5] and the Private Securities Litigation Reform Act,[6] both of which are directed specifically to securities class actions. In addition, the Working Group on Mass Torts under the stewardship of Judge Anthony Scirica of the Third Circuit was created to deal with the problem of class actions and mass torts.[7] At the same time, broader proposals for class action reform generally have been introduced in Congress. So the question of how to approach class action development—whether it should be done on a trans-substantive basis or whether the issues are best attacked in particular substantive contexts—is a fundamental one of which other systems should be aware.

Thus, as the American class action story unfolds, I believe there are important lessons for countries beginning to experiment with the device of the class action. The developments I highlight here and the changing nature of the class action in the United States may help

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3. *See* Per Henrik Lindblom, *Individual Litigation and Mass Justice: A Swedish Perspective and Proposal on Group Actions in Civil Procedure*, 45 AM. J. COMP. L. 805, 816 (1997) (noting that access to justice for collective interests has been a major trend of reform for Swedish civil procedure).

4. *See* Burbank & Silberman, *supra* note 2, at 685.

5. *Securities Litigation Uniform Standards Act of 1998*, Pub. L. 105-353, 112 Stat. 3227 (signed by the President on November 3, 1998).

6. *Private Securities Litigation Reform Act of 1995*, Pub. L. 104-67, 109 Stat. 737 (codified at 15 U.S.C.A §§ 77, 78 (West 1997)).

7. *See* Report of the Advisory Committee on Civil Rules 41 (Dec. 8, 1997).

shape the device for other systems.[8] Left for another day is whether and how this complicated procedural tool can be customized to fit within their own judicial systems.[9]

I. A BRIEF ACCOUNT OF RULE 23 PRACTICE OVER THE YEARS

Historically, the class action in the United States was limited in its use and confined to those with a tight community of interest.[10] Its critical feature was that it bound all persons who were members of the class despite the fact that they were not parties to it. For that reason the "true" class action extended only to those whose rights could be said to be "joint, common, or secondary."[11] The federal courts also recognized a device—known as the "spurious class action"—that was

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8. The English analogue to the class action is a "representative proceeding," *see* Rules of the Supreme Court, Order 15, Rule 12, but it has seldom been used for aggregation of "individual" damage claims. Ability to pursue such actions was also constrained by the English system of cost-shifting and, until recently, the lack of any type of "contingent" or "conditional" fee, and the role of Legal Aid. However, proposals for reform of "group" and "class" litigation have been generated more recently. *See* Law Society Civil Litigation Committee, *Group Actions Made Easier* (Oct. 1995); *see also* Lord Woolf, *Access to Justice, Final Report* [hereinafter *the Woolf Report*] 223-49 (1996) to the Lord Chancellor on the Civil Justice system in England and Wales. In Canada, Ontario, British Columbia, and Quebec have expanded their rules on representative actions to permit class proceedings for aggregation of individual claims—similar to rule 23(b)(3) of the Federal Rules Civil Procedure. The Ontario legislation retains cost-shifting rules with certain limits, provides for discretionary Legal Aid funding of disbursements and the indemnification of defendants with pay-back requirements if the action is successful, and permits the use of contingent fees on a non-percentage basis. *See, e.g.*, Class Proceedings Act, S.O. 1992, c.6 (Ont.) and Law Society Act, R.S.O. 1990, C.L. 8 (Ont.) (Class Proceedings Fund); *see also* Ontario Civil Practice r.12 (1992). *See generally* MICHAEL G. COCHRANE, CLASS ACTIONS (1993).

In Continental Europe, the resistance to the class suit seems rooted in deeper cultural notions of the role of law and client, and the centrality "of the injured person's role as the personal holder and proponent of rights, not as a figurehead." Richard B. Cappalli & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 TEMP. INT'L & COMP. L.J. 217, 289-90 (1992). In France, the most analogous procedural mechanism is a "group action," which can be undertaken by a pre-existing affiliation on behalf of its members; in Germany group actions have not been very effective in obtaining damage awards. *See* William B. Fisch, *European Analogues to the Class Action: Group Action in France and Germany*, 27 AM. J. COMP. L. 51 (1979). For a description of the procedural mechanisms available for group actions in Germany, see generally Harald Koch, *Class and Public Interest Actions in German Law*, 5 CIV. JUST. Q. 66 (1986) (describing individual actions representing the public interest, actions by associations, and actions to enforce citizens rights by a public institution).

9. For a brief overview of collective actions in a comparative context, see Bryant G. Garth, *Group Actions in Civil Procedure: Class Actions, Public Actions,* Parens Patriae *and Organization Actions*, 1990 General Reports of the XIII International Congress of Comparative Law (International Academy of Comparative Law) 205.

10. The English legal historical tradition is exquisitely detailed in STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987).

11. The most common examples of this type of group litigation were shareholder derivative actions and actions relating to unincorporated associations. Interestingly, when rule 23 was revised in 1966, these "traditional" cases of group litigation were separated out into rules 23.1 and 23.2.

used primarily to obviate joinder problems but formally bound only those who were named parties to the litigation. However, an additional feature of the spurious class action was to allow absent members to intervene *after* the judgment, thereby taking advantage of a favorable outcome in the litigation.

In 1966, rule 23 of the Federal Rules of Civil Procedure was revised to construct a tri-part classification of different types of class action possibilities, some with different requirements, but all imposing the critical feature of binding absent members. All class actions were required to meet numerosity, commonality, and typicality requirements and the class representative was required to "fairly and adequately" represent the interests of the entire class. With respect to rule 23(b)(1) class actions, the requirements encompassed what had been traditionally the "true" class actions, where rights were "joint" or "common," at least in terms of the relief requested. Interestingly, the most typical class actions—derivative actions by shareholders and actions relating to unincorporated associations—were carved out in special provisions; and the (b)(1) action was defined to embrace situations which could give rise to incompatible standards of conduct or impair as a practical matter the interests of other members of a group.[12] A second type of class action—the (b)(2) action—was directed toward class injunctive and declaratory relief. The third type of action, known as the (b)(3) action, was the most revolutionary in that it gave binding effect to an action brought as a class where the relationship between the parties was greatly attenuated and largely the result of persons who found themselves similarly situated because of conduct by the defendant. As a result, extra protections were imposed for class certification in these situations, including individual notice to absent class members and the ability to opt out of the class. Professor Arthur Miller, writing in 1979, argued persuasively that the rulemakers who brought about the 1966 revision to rule 23 probably did not perceive the dramatic effects that these amendments would create.[13] And although I believe Professor Miller was correct in attributing the flexing of rule 23's muscles in the 1970s to societal changes and the general increase in "public law" litigation , there was a clear sense of the importance of the change to rule 23 (b)(3) which effectively bound absent class members (who shared only questions

12 *See* Rule 23(b)(1)(A), (B), and Advisory Committee Note.

13. *See* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 670 (1979).

of law or fact in common) unless they exercised their privilege to opt out of the suit.[14]

Whatever the intention of the 1966 class action amendments, the effect of Federal Rule 23(b)(3) was to facilitate the aggregation of relatively small claims that were not otherwise individually economically viable to pursue into a group claim. As a result, the availability of class action litigation dramatically increased. The growth of these types of "damage" class actions can be attributed in part to entrepreneurial lawyering generated by contingent fees available in the class context where lawyers for a plaintiff class in a massive damage can collect fees from a common fund if successful.[15] Alternatively, the specter of huge damage awards against defendants in a class action suit and the expense of litigating these large suits in a system without cost-shifting frequently led defendants to settle even marginal cases, with the settlement often including substantial attorneys' fees for the class lawyers.

In the immediate period following the 1966 class action amendments, class action suits proliferated. There was much enthusiasm for the class action as a device that could be instrumental in providing access to justice for economically disadvantaged groups, and the new rule was being construed in liberal fashion leading to an abundance of class certifications.[16] Amidst increasing criticism of excessive attorneys' fees, the burdens of litigating class action suits, and abuse of class certifications, several Supreme Court decisions in the mid-1970s limited the availability of the class action, at least in the federal courts. [17] For example, in *Snyder v. Harris*[18] and *Zahn v. International Paper Co.*,[19] the Supreme Court held that each individual claimant must meet the requisite amount in controversy to satisfy the diversity of citizenship grant of subject matter jurisdiction

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14. Referring to the impact of binding absent class members, Professor Miller wrote:

> Even that change, although it probably has altered some of the practical dynamics of class actions in favor of those proposing class treatment, was primarily intended not to change the distribution of power, but rather to clarify the effect of class action judgments and to eliminate the one-way intervention practice under the 1938 text. Thus, in the main, the rulemakers apparently believed they simply were making rule 23 a more effective procedural tool.

Id. at 670 (footnote omitted).

15. *See generally* Janet Cooper Alexander, *Contingent Fees and Class Actions*, 47 DEPAUL L. REV. 347 (1998).

16. *See* Miller, *supra* note 13, at 678.

17. *See id.* at 679.

18. 394 U.S. 332 (1969).

19. 414 U.S. 291 (1973).

to the federal courts.[20] Thus, many consumer-type fraud actions could no longer be brought in federal court, although state courts and their class action counterparts were still available. An even greater impact upon the federal class action came in *Eisen v. Carlisle & Jacquelin*,[21] in which the Supreme Court held that rule 23(c)(2) required all identifiable members of the potential (b)(3) plaintiff class (which in *Eisen* meant two million odd-lot investors whose average claim was about $70.00) to be given individual notice, and that the costs of that notice must be borne by the plaintiff class.[22] Although some lamented *Eisen* as devastating to the class action suit, the decision may well have had the positive influence, in the short run, of forcing more realistic definitions of plaintiff classes and reducing manageability problems, thereby making class action litigation ultimately more viable. Still, at the end of the 1970s and during much of the 1980s, class action litigation had fallen off dramatically.[23]

Nonetheless, before there was any official burial of the class action, its resurrection came in a curious form. For judges who previously perceived the class action as the cause of their docket problems, they now found in it one of their solutions. Mass tort actions, particularly those involving asbestos claims, threatened to overwhelm the federal court system. A variety of solutions were contemplated, experimented with, and rejected. Finally, "class action" settlements were brokered as a means to resolve some of this mass litigation.[24] The use of the class action in this context was somewhat surprising in light of the caution expressed in the Advisory Committee Note to the 1966 amendments to rule 23 that the "mass accident" case was ordinarily not appropriate for a class action.[25] Of

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20 *See Snyder*, 394 U.S. at 338; *Zahn*, 414 U.S. at 294.

21. 417 U.S. 156 (1974).

22 *See id.* at 173.

23. *See* Douglas Martin, *The Rise and Fall of the Class-Action Lawsuit*, N.Y. TIMES, Jan. 8, 1988, at B7; *see also* Professor Stephen C. Yeazell, Remarks at the Meeting of Section of Civil Procedure, Association of American Law Schools (1989). Professor Yeazell's remarks preceded his presentation of a paper which was subsequently published. *See Collective Litigation as Collective Action*, 1989 ILL. L. REV. 43.

24. *See, e.g.*, Georgine v. Amchem Products, Inc., 157 F.R.D. 246 (E.D. Pa. 1994), *vacated*, 83 F.3d 610 (3d Cir.), *aff'd sub nom.* Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997); *In re* Asbestos Litigation, 134 F.3d 668 (5th Cir.), *cert. granted sub nom.* Ortiz v. Fibreboard Corp., 118 S. Ct. 2339 (1998).

25. *See* FED. R. CIV. P. 23 Advisory Committee Note: A "mass accident" resulting in injuries to numerous person is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

course, nationwide classes of tort claimants for product defects, like tobacco and asbestos, were not the "mass accidents" to which the Advisory Committee Note referred. And the "class settlement" aspect of these cases meant they would not, by definition, "degenerate" into multiple individual lawsuits. They were a new animal entirely, and it was unlikely that the 1966 rulemakers envisioned litigation of this kind. Nonetheless, the concerns that led to provisions in rule 23(c)(2) for notice and an opportunity to opt out in (b)(3) actions take on increasing significance in this context: Are settlement classes being used to disempower individuals rather than empower them, and to buy peace for defendants and the courts at the expense of individual justice for the absent class members?[26]

The class action settlement device has found applications other than mass torts. Lawsuits against insurers, banks, car manufacturers, and major corporations have been brought on behalf of large classes in both state and federal courts—with the primary objective of achieving a settlement that buys peace for large numbers of defendants. Certain characteristics of these settlements raise questions of whether rights of individual class members have been compromised by class lawyers who short-change clients' interests in reaching favorable settlements with defendants for benefits to themselves through generous attorneys' fees.[27] Among the questionable practices are settlements that compensate class members with "discount coupons" rather than cash, "reversionary settlements" where sums not claimed in the settlement are returned to the defendants, and with respect to mass tort actions, "inventory settlements," which settle both claims of "present-injuries" and "exposure-only" claims. But as they have at other times, the courts through the common law judicial method have intervened to offer guidance and protection.[28]

Both the Supreme Court and the federal appellate courts have focused attention on the "adequate representation" prerequisite to class action certification in rule 23 as necessary to protect against potentially conflicting interests of class members. This vigorous

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26. *See* Burbank & Silberman, *supra* note 2, at 685-86.

27. *See* Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805 (1997); *see also* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995).

28. The Advisory Committee on Civil Rules considered revisions to rule 23 prior to the Supreme Court decision in *Amchem*. One of the proposals would have added to rule 23(b) the following subsection: "(4) the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial." Proposed Amendment to the Federal Rules of Civil Procedure, 167 F.R.D. 559 (1996). After the Supreme Court decision, in *Amchem* the Committee decided not to go forward with the proposal. Additional efforts are being considered by the Working Group on Mass Torts, chaired by Judge Anthony Scirica.

judicial oversight was particularly necessary in light of numerous filings of "settlement class actions," to which I have just alluded. In the "settlement class action," the parties effectively arrive at a settlement before or shortly after the action is commenced. Once the class action is commenced, both the lawyers for the plaintiff class and the defendants ask the court to certify the class as the parties have defined it. The court usually reviews the settlement before certifying the action, thus "postponing the formal certification procedure." If the court finds the settlement to be fair, it will certify the action provisionally as a class action for settlement purposes only. The court will then direct class counsel to simultaneously notify all class members of the suit, the "provisional" class certification, and the settlement. It will then usually hold a "fairness" hearing, entertaining objections with respect to both the propriety of the class certification and the fairness of the settlement.

The incentives operating in settlement class actions can often work to the disadvantage of absent class members. Plaintiffs' attorneys begin with substantial leverage because class actions are burdensome and difficult to defend. Defendants have strong incentives to settle class actions to avoid the substantial litigation costs associated with litigation. Plaintiffs' attorneys may procure a limited recovery for class members but a generous attorneys' fee for themselves; and the defendants want to buy whatever "global peace" they can achieve by "binding" the largest group at the least cost. Judges, for their part, see a way of clearing masses of cases from their calendars.

However, the Supreme Court's decision in *Amchem Products, Inc. v. Windsor* (*Georgine*)[29] should put the brakes on any rush to use the settlement class as a docket-clearing device. The Supreme Court made clear that the "adequate representation" requirement is critical to class certification and indeed may have a more robust function in the context of the settlement class. In *Amchem*, the settlement class involved asbestos claimants (who had not previously filed suit) against twenty asbestos manufacturers.[30] Included in the class were persons who had already suffered injuries and some of whom were only exposed.[31] The district court approved the class and the settlement, but the Third Circuit Court of Appeals found "no adequate representation" due to the conflict of interest between "present injury"

29. 521 U.S. 591 (1997).
30 *See id.* at 597.
31 *Id.*

and "exposure-only" class members and overturned the certification and the settlement.[32] The appellate court found that the settlement favored those members of the class who currently exhibited symptoms of injury.[33] Exposure-only class members were unlikely to pay attention and opt out of the suit because they had not developed the disease yet.[34] The Third Circuit also expressed the view that a class action for settlement purposes must meet the same requirements as a rule 23 "adversarial" class action; thus if a class could not be certified for litigation, it could not be certified for settlement.[35] But the Supreme Court in *Amchem*, although agreeing with the Third Circuit that a settlement class for these asbestos claims should not be certified, took a somewhat different view about settlement classes generally. The Court stated that the requirements of rule 23 were to be evaluated with close attention to whether the context was settlement or litigation and that the criteria were not necessarily identical.[36] In addition, the Court suggested that concerns about class definition and adequacy of representation might demand "heightened attention" in the settlement class context.[37]

Even prior to *Amchem*, other federal appellate courts were becoming increasingly skeptical of broad, nationwide classes, whether for the purpose of litigation or settlement. For example, in *In re General Motors Corp. Pick-up Truck Fuel Tank Products Liab. Litig.*, the Third Circuit overturned a settlement (for both failure of adequate representation and unfairness of the settlement) where the class of GM truck owners (who had allegedly sold trucks with defective fuel tanks) were given coupons redeemable toward the purchase of a new truck and attorneys' fees of $9.5 million.[38] And in a contested class certification case, *In re Rhone-Poulenc Rorer*, a district court's decision to certify a nationwide class of hemophiliacs infected by HIV on the issue of general liability was reversed by the Seventh Circuit, on the ground that differences in applicable law and the feasibility of individual suits weighed heavily against class treatment.[39] There, Judge Posner also expressed concern that certification could force the

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32 *See id.* at 608-11.

33 *See id.* at 610-11.

34 *See id.*

35 *Id.* at 625.

36 *Id.* at 620. For example, in a settlement class action, there need be no inquiry whether the case, if tried, would present intractable management problems, because there is no trial.

37 *See id* at 620.

38. *See In re* General Motors Corp. Pickup Truck Fuel Tank Prod. Liab., 55 F.3d 768 (3d Cir.), *cert. denied sub nom.* General Motors Corp. v. French, 516 U.S. 824 (1995).

39. 51 F.3d 1293 (7th Cir. 1995).

defendants to "stake their companies on the outcome of a single jury trial."[40]

As the reported case decisions reveal, it is important to have a "check" on a court's ruling on whether or not to certify a class. Recognizing the impact that a certification ruling has, the Advisory Committee on Civil Rules recently promulgated Rule 23(f),[41] which authorizes interlocutory appeals from grants or denials of class action certification at the appellate court's discretion.[42] Interestingly, this same Committee considered broader revisions to rule 23, including a specific subsection on settlement classes.[43] However, in the aftermath of the Supreme Court's decision in *Amchem*, the Committee decided not to proceed with its broader proposals.

Often, it is absent class members whose settlement interests may be sacrificed by class counsel and defendants. Members of the class may, of course, intervene and object to the settlement, and can appeal a ruling if they are unsuccessful. But what of class members who fail to object or intervene in the proceedings—are they prevented from appealing the adequacy of representation or fairness of the settlement? The Seventh Circuit Court of Appeals ruled that only parties who were granted leave to intervene by the court could appeal an adverse judgment or settlement;[44] and the Supreme Court issued a per curium affirmance by an "equally divided court,"[45] leaving final resolution of the issue for another day.

II. THE AUTONOMY/ENTITY TENSION AND THE REQUISITE PROTECTIONS NECESSARY FOR CLASS ACTION TREATMENT

In a recent article, Professor David Shapiro has highlighted competing conceptualizations of the class action.[46] As Professor Shapiro's article illustrates, the class action can be viewed as an aggregation of individual claims where autonomy must be preserved wherever possible and consent is an important value to sustain class

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40. *See id.* at 1299.

41. *See* Amendments to the Federal Rules of Civil Procedure, Criminal Procedure, Evidence, and Appellate Procedure, U.S. Order 98-17 (Dec 1. 1998).

42. The rule came into effect on December 1, 1998 after no action was taken by Congress. *See Federal Rule Changes Take Effect Without any Congressional Tinkering*, 67 U.S.L.W 2344 (Dec. 15, 1998).

43. *See supra* note 28.

44. *See* Felzen v. Andreas, 134 F.3d 873 (7th Cir. 1998) (involving an appeal of a settlement by absentees in a shareholder derivative action).

45. *See* California Pub. Empl. Ret. Sys. v. Felzea, 119 S. Ct. 720 (1999) (The Court divided 4-4 with Justice O'Connor taking no part in the consideration or decision of the case.).

46. *See* David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913 (1998).

action viability.[47] Alternatively, the class action can be perceived as a vehicle which by its very nature demands the surrender of individual interests in order to pursue collective action for the entity.[48] Professor Shapiro allies himself with the "entity" model of group litigation,[49] and recommends legislative reforms to accomplish new substantive standards necessary to accommodate the reconceptualized view of the class action. I share some of Professor Shapiro's sympathies here, but I do not think a "pure" entity model can work on a trans-substantive basis. For particular types of actions, such as tobacco and asbestos causes, it should be possible to enact legislation that will achieve certain kinds of trade-offs and provide particular "entity" relief at the expense of private individual claims. But I believe these changes must be achieved within a particular contextual and substantive framework.[50] More expansive uses of the mandatory class action (which is not burdened with requirements of notice and consent through opt-out) have been tried in mass tort and other cases. Whether these efforts will be successful may be answered by the Supreme Court, which recently granted certiorari in *Ortiz v. Fibreboard Corp.* on the question of whether a mandatory non-opt-out settlement class for asbestos claims was properly certified. [51]

Professor Shapiro envisions that "adequacy of representation" can do most of the heavy lifting in protecting the interests of absent class members.[52] But because of the attenuated relationships between

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47 *See id.* at 918.

48 *See id.* at 919.

49. *See id.* Professor Shapiro focuses upon the mass tort class action. For substantial claims, he views efficiency and the goals of the tort system as weighing in favor of the entity model. He also aligns himself with the entity model for smaller claims, because autonomy has little meaning if the cost of suit is prohibitive. *See id.* at 923-34.

50. For a comparative example, see the situation in Israel, where the ability to proceed as a class, and the requirements for class certification are dependent upon the specific statutory context. *See generally* Gerald Walpin, *America's Failing Civil Justice System: Can We Learn from Other Countries?*, 41 N.Y.L. SCH. L. REV. 647 (1997) (describing an explicit cost-benefit analysis of proceeding as a class against a specific industry); *see also* GOLDSTEIN & HACOHEN, INTERNATIONAL ENCYCLOPEDIA OF LAWS 179 (1994) (describing recent statutory enactments with class action provisions such as the Securities Law and the Law to Prevent Environmental Harms).

51. *See* Ortiz v. Fibreboard Corp., 118 S. Ct. 2339 (1998) (No. 97-1704). In *Ortiz*, the Fifth Circuit affirmed a certification by the district court of a rule 23(b)(1)(B) limited fund class. Opponents of the settlement class argue that it is similar to *Amchem* in that exposure-only plaintiffs lack both notice and adequate representation, and due process requires that they should be given the opportunity to opt-out of the settlement class. Alternatively, those in favor of the settlement distinguish *Amchem* because in *Ortiz* exposure-only claimants are treated evenhandedly with current claimants and would be compensated once their exposure ripens into injury. *See* Steven T.O. Cottreau, *The Due Process Right to Opt Out of Class Actions*, 73 N.Y.U. L. REV. 480 (arguing that the due process opt-out rights should also be given for class actions seeking nonmonetary relief.

52 *See* Shapiro, *supra* note 46, at 937.

rule 23 (b)(3) class members, it may be almost impossible to achieve the coalescing of interests that he desires. For that reason, the notice and opt-out provisions for (b)(3) actions remain important elements of the structure for actions where the class members are part of an amorphous group. The opt-out mechanism operates as the means for balancing autonomy interests against the need for collective treatment, and it preserves for class members (and their attorneys) the right to bring their own litigation or to reach their own agreement if the parameters of the litigation or the settlement are unsatisfactory. Indeed, the existence of a high number of opt-outs may signal that class action treatment is not warranted or desirable.

There are, however, a number of unanswered questions regarding the notice and opt-out provisions. Although *Eisen* required individual notice to identifiable class members, notice by publication, including via the Internet, appears to be permissible when the class is so large that its members cannot be identified.[53] From defendants' perspective, the result is massive, nationwide class litigation imposing enormous costs on defendants. From the perspective of absent class members, they may never get any real notice of a litigation or settlement. One possible reform is to make the opt-out right more meaningful, possibly limiting the class size so that absent class members do get individual notice and the opt-out right becomes less illusory. A combination of close judicial scrutiny of "adequacy" in the particular circumstances, assurances of meaningful notice to absent class members who can choose to opt out, and serious consideration of "objectors" arguments against class treatment can make the hearing on class certification an effective vehicle for determining whether class treatment is appropriate.

In the United States some of the complications of class actions are due to the nature of nationwide classes and the possibilities of parallel litigation in the context of the federal system. To protect against attorney-shopping and forum-shopping for favorable settlements in these circumstances, I have previously suggested a set of standards and procedures that should be adopted in deciding whether class action settlements are appropriate.[54] They include

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53. *See, e.g.*, *In re* "Agent Orange" Prods. Liab. Litig., 818 F.2d 145, 167-68, 175 (2d Cir. 1987) (notice through announcements in national publications and on radio and television were acceptable where members of the class could not be located through reasonable means).

54. My co-author and I set forth standards and procedures that might be appropriate for state courts in considering whether to approve a settlement class releasing both state and federal claims. *See* Marcel Kahan & Linda Silberman, Matsushita *and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 SUP. CT. REV. 219, 254-55.

having the court hold a preliminary fairness hearing on the settlement *before* notice is sent to the class, adopting incentives encouraging other counsel to appear at the certification/settlement hearing, requiring that the forum have a substantial nexus with the claims and parties, and requiring that all released claims be transactionally related.[55]

One observation to be made is that substantial responsibility for protecting the rights of absent class members rests with the judge. To some degree, the context of the adversary system limits the information that a judge has at her disposal in evaluating the worth of the claims not only in the instant but in other parallel or even future litigation. While this is a serious problem for an adversary system, I do not think civil law systems would be any more comfortable with the centrality of the judge's role to protect the interests of absent class members. Indeed, they might well find such a role less congenial. As Professor Claudio Consolo wrote in a paper a few years ago, the civil law judge plays a much more "passive" role on matters of this kind, and would feel disabled from exercising choice and responsibilities on these social values and comparative costs and benefits. [56]

A final post-script to class action practice, particularly as it applies to settlement class actions, is now playing out in the courts. These developments raise a central problem of class actions: can there be binding effect to a rule 23(b)(3) action, where the class member's claims have only an attenuated relationship to one another? Certainly the formal answer to that question is "yes"; that was the precise point of the 1966 class action reform. But a recent case in the Ninth Circuit Court of Appeals, *Epstein v. MCA*, Inc.,[57] has opened a wide door for challenging a class certification decision through a collateral attack in a second court. In *Epstein*, the Delaware Chancery Court approved a settlement class action brought by shareholders against directors for breach of their fiduciary duties, and the Delaware Supreme Court affirmed.[58] The settlement also released exclusive federal securities claims that were the subject of federal court litigation, recently dismissed but pending appeal. The *Epstein* plaintiffs, who failed to opt out of the state class, argued to the federal court that they had not been adequately represented in the state action

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55 *See id.* at 253.

56. *See* Richard B. Cappalli & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 TEMP. INT'L & COMP. L.J. 217, 291 (1992).

57. 126 F.3d 1235 (9th Cir. 1997), rehearing granted.

58 *See id.* at 1237-38.

and therefore were not bound by the state court judgment.[59] In a 2-1 decision, the Ninth Circuit Court of Appeals agreed with the plaintiffs that class members who chose not to opt out of a class remained free after the entry of final judgment to attack the judgment collaterally and challenge the determination of adequacy of representation that was made in the original suit.[60] The case, if it stands, represents serious danger to the finality that is the essence of class litigation and settlements.[61]

III. THE SPECIAL PROBLEMS OF FEDERALISM

Some of the class action problems to which I have alluded will resonate with other judicial systems, but many of the difficulties associated with class actions in the United States are directly attributable to the operation of the class action in a federal system. Limitations on federal subject matter jurisdiction, which I referred to earlier, forced many class actions into state courts. Because many class claims are the result of nationwide activity, the contours of class actions can be "multistate" or "nationwide." One of the first problems to arise was whether absent class members who are not otherwise subject to the jurisdictional reach of the court's process [62] were part of the class and thus bound by the judgment. In *Phillips Petroleum Co. v. Shutts*, the Supreme Court held that absent class members need not have "minimum contacts" with the forum state because their position was quite different from that of ordinary defendants.[63] Absent class members would be bound so long as other due process safeguards were provided, including notice, the

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59 See id. at 1238.

60 See id. at 1255-56.

61. For more on this debate, see Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of* Epstein v. MCA., Inc., 73 N.Y.U. L. REV. 765 (1998); William T. Allen, *Finality of Judgments in Class Actions: A Comment on* Epstein v. MCA., Inc., 73 N.Y.U. L. REV. 1149 (1998); Geoffrey P. Miller, *Full Faith and Credit to Settlements in Overlapping Class Actions: A Reply to Professors Kahan and Silberman*, 73 N.Y.U. L. REV. 1167 (1998); Alan B. Morrison, *The Inadequate Search for "Adequacy" in Class Actions: A Brief Reply to Professors Kahan and Silberman*, 73 N.Y.U. L. REV. 1179 (1998); Marcel Kahan & Linda Silberman, *The Proper Role for Collateral Attack in Class Actions: A Reply to Allen, Miller, and Morrison*, 73 N.Y.U. L. REV. 1193 (1998); *see also* Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148 (1998).

62. These jurisdictional limitations are an issue not only for state courts but also for federal courts, which do not have nationwide process in the absence of a specific federal statute. *See* Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 HARV. L. REV. 718 (1979).

63. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 (1985).

opportunity to be heard, the opportunity to opt out, and adequate representation.[64]

Another complicating factor in nationwide class actions was the question of the law applicable to the various class claims[65] and how that question impacts the decision of whether to certify a class.[66] In a multistate class, a number of different laws may apply to different members of the class; as a result, there may be questions of whether there is adequacy of representation by the class representatives and/or whether class action treatment is "superior" to other methods of adjudication. Several cases, for example, were denied nationwide class action treatment because the liability rules were likely to be different for various members of the class.[67]

The potential for parallel litigation and overlapping class litigation may be unique to the American federal system. The lack of formal mechanisms to consolidate or prioritize conflicting class litigation proceeding simultaneously in state and federal courts is not only inefficient but also creates the danger of "reverse actions." In the class setting, where competing teams of plaintiffs' attorneys often file suits in the wake of newsworthy events such as corporate takeovers, unexpected share declines, or investigation of defective products, each group wants its lawsuit to go forward and generate fees for plaintiffs' attorneys. The consequences are many. Plaintiff lawyers are likely to forum shop for a state in which class certification is relatively easy. They are also likely to want a large nationwide class, where the recovery (and fees) will be extensive. Because some state courts have been more liberal about certification than other courts, there will necessarily be some state class action havens. The Supreme Court decision in *Matsushita Elec. Indus., Ltd. v. Epstein*, [68] made clear that the law of the jurisdiction rendering the judgment defines the scope of the release and that a court can settle claims even if it does not have adjudicatory power over those claims.[69] As a

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64. *See id.* at 812.

65. The Supreme Court in *Shutts* also held that a forum's maintenance of a multistate class action did not in and of itself justify applying forum law to the controversy with respect to all class members, and that due process limitations operate to limit that application of particular law. *See id.* at 820.

66. *See* Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 564-66 (1996).

67. *See, e.g.*, Castano v. American Tobacco, Co. 84 F.3d 734 (5th Cir. 1996); *In re* American Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996).

68. 516 U.S. 367 (1996).

69 *See id* at 378; *see also* Williams v. General Elec. Capital Auto Lease, Inc., 159 F.3d 266 (7th Cir. 1998) (approving issuance of injunction against other litigation as protection of global nationwide class settlement).

result, defendants have incentives to forge a nationwide settlement with one group of plaintiff attorneys, thus precluding the other suits. Armed with the power to confer large attorneys' fees on the favored group, defendants are able to arrive at a settlement at the lowest price. Indeed, it was concern over the danger of potential "sell-out" settlements that led the Ninth Circuit in the *Epstein* case to allow a collateral attack in federal court challenging the adequacy of representation in the state court that had initially approved the settlement.[70] While the availability of collateral attack may operate to reduce forum shopping by class counsel in reaching a settlement, it is just as likely to result in "reverse forum shopping" (*i.e.* shopping by competing class counsel) for the forum most hospitable to collateral attack and most skeptical of a prior determination of adequacy.

Recently proposed legislation has attempted to find a solution to some of the difficulties that are magnified by this multijurisdictional system of courts.[71] The 1999 proposed Senate bill would impact those cases where the class is national and "diverse" in scope; it provides for original and removal jurisdiction in federal court for class claims based on state law whenever there is minimal diversity between any plaintiff class member and any defendant.[72] The $75,000 jurisdictional amount requirement is retained, but class members are permitted to aggregate their claims.[73] Any defendant (without the consent of other defendants) can remove such a class action brought in state court to federal court,[74] and any absent class member, who under existing law has no power to control the venue of the case, also has a right to remove the action from state to federal court.[75] Although the district court is instructed to "abstain" from hearing a class action if the substantial majority of the proposed plaintiff class are citizens of the same state as the primary defendants and the claims will be governed by the laws of the state,[76] the thrust of the proposal is to federalize most class actions. The broader access to federal courts means that the consolidation mechanisms that already exist in the federal courts will be available to eliminate multiple and parallel class litigation. Further, the proposals reflect a view that it is the

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70 *See id* at 385-87.

71. *See* Class Action Fairness Act of 1999, S.353, 106th Cong. Similar legislation was introduced in the previous Congress. *See* Class Action Fairness Act of 1998, S.2083, 105th Cong.; Class Action Jurisdiction Act of 1998, H.R. 3789, 105th Cong.

72. *See* S.353, §§ 3-4 (containing original and removal jurisdiction provisions).

73. S.353, § 3.

74. *Id.* § 4.

75. *Id.*

76. *Id.* § 3.

federal courts that should be trusted with making the critical decision as to whether a class should be certified, at least with respect to national classes. Finally, the provisions dealing with removal by absent class members offer protection against the "sell-out settlements" engaged in by some parochial state courts.

My own view with respect to these federal jurisdictional provisions is that they are overkill. These class action problems do not warrant entirely revamping federal subject matter jurisdiction and adding this enormous burden to the federal courts' docket.[77] Instead, legislation directed to specific abuses could be more narrowly tailored. There are other provisions in the Senate bill that accomplish these goals. For example, the bill requires specific and detailed notice to class members and that state attorneys general (as well as the Attorney General of the United States) be notified about any proposed class action settlement in which a resident of their state is a class member.[78] Another provision also takes direct aim at lawyer fee abuse by providing for certain limitations with respect to attorneys' fees.[79] Exercising even greater control over such fees might be a possibility worth exploring.

There is some indication that state appellate courts themselves have taken notice of the class action abuses in some lower state courts and are acting to put their own houses in order.[80] If their efforts fail,

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77. For a more thorough critique of S.353, as well as the earlier proposals, see Thomas Woods, Note, *Wielding the Sledge Hammer: Current Legislative Solution for Class Action Reform*. N.Y.U. L. REV. (forthcoming).

78. *See* S.353, § 2. The provisions on notification to attorneys general would be imposed in all actions filed in federal court and those actions in state court in which at least one class member resides outside the state in which the action is filed and where the transaction or occurrence that gave rise to the action occurred in more than one state. A hearing to consider final approval of a proposed settlement cannot occur less than 120 days after the state attorneys general and the Department of Justice are served with notice. Failure to provide notice to a state attorney general allows class members of that state to choose not to be bound by the settlement or consent decree.

79. S. 353, section 2 also includes provisions which limit attorneys' fees to a "reasonable percentage" of any damages and prejudgment interest "actually paid to the class," including future financial benefits based on the cessation of alleged improper conduct and costs "actually incurred" by defendants. This provision is intended to curb the practice in reversionary settlements where money is paid to a settlement fund for the class but unclaimed funds revert to the defendants after a specified period. *See id.*

80. *See, e.g.*, ; *Ex parte* Green Tree Fin. Corp., 723 So. 2d 6 (Ala. 1998) (decertifying nationwide class for failure to meet Alabama rule 23 requirements); *Ex parte* Prudential Ins. Co., 721 So. 2d 1135 (Ala. 1998) (vacating class certification for failure to provide notice and hold evidentiary hearing and instructing trial court to consider application of *forum non conveniens* to national class); White v. General Motors Corp., 718 So. 2d 480 (La. App. 1998) (applying principles of *Amchem* and reversing certification of nationwide class settlement).

the Supreme Court is there to exercise its appellate jurisdiction to set forth the constitutional standards that must be met.

IV. CONCLUSION

Some abuses of the class action system may have resulted from the failure to foresee and to guard against its myriad uses. The procedural history of the American class action highlights key issues that should be addressed by those countries embarking upon the class action experiment. Perhaps the American experience may help other systems to put the class suit to its best use and prevent its worst abuses.