AN OVERVIEW OF CLASS ACTION LITIGATION IN THE UNITED STATES OF AMERICA

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SUMMARY: I. *An overview*. II. *Prerequisites for class certification*. III. *Conclusion*.

In the United States, the most common means for vindicating the rights of a group of similarly situated individuals is the so-called "class action." At the federal level, class actions are governed by several closely related Federal Rules of Civil Procedure,[1] that establish the conditions that must be satisfied before a lawsuit will be allowed to proceed as a class action. Pursuant to that rule, class actions have been used in a wide variety of contexts. Among those are mass accident, products liability and toxic tort cases,[2] antitrust cases,[3] patent, copyright, and trademark cases,[4] bankruptcy cases,[5] consumer credit and consumer fraud cases,[6] shareholder class and shareholder derivative suits,[7] government benefits cases,[8] employment discrimination cases,[9] and institutional reform litigation of

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1 See Rules 23, 23.1 and 23.2, *Federal Rules of Civil Procedure*.

2 See generally Conte, Alba & Newberg, Herbert, *Newberg on Class Actions*, 4th ed., 2002, vol. 5, ch. 17.

3 *Ibidem*, vol. 6, ch. 18.

4 *Ibidem*, ch. 19.

5 *Ibidem*, ch. 20.

6 *Ibidem*, ch. 21.

7 *Ibidem*, vol. 7, ch. 22.

8 *Ibidem*, ch. 23.

9 *Ibidem*, vol. 8, ch. 24.

various kinds, such as suits challenging conditions in prisons, jails, juvenile detention facilities, or mental health institutions.[10]

In addition to these federal suits, it is possible under parallel rules of civil procedure applicable to individual states within the United States, for class actions to be brought in state courts.[11] A recent compilation concluded that all but two states in the United States have a class action statute or rule that permits such suits.[12] These state suits can be brought to vindicate claims based entirely on state law, over which a federal court would not have jurisdiction,[13] but they also can be brought in certain instances based on federal law,[14] and can involve plaintiffs from beyond the borders of the state involved in certain circumstances.[15] Many, but not all, state-level class action statutes or rules are patterned after Rule 23 of the Federal Rules of Civil Procedure,[16] and, where that is the case, federal precedents are frequently relied on in construing the comparable state law provision.[17]

Because the federal procedural rules governing class actions are used so widely and have had such a significant influence on the development of class action jurisprudence in the various states of the United States, this paper will confine itself to a discussion of those federal rules, and the issues that they raise. Even so limited, however, this paper can only begin to scratch the surface of this very complex topic. As a concession to that reality, I offer only a summary discussion of major points, and refer those of you who are interested in a more thorough treatment of the

10 *Ibidem*, ch. 25.

11 *Ibidem*, vol. 4, ch. 13.

12 See Newberg, Herbert, *Newberg on Class Actions*, 3rd ed., 1992, vol. 3, Appendix 13-1 (indicating that only Mississippi and Virginia lacked statutory or rule-based authority for bringing class actions, and indicating that each permitted such actions if allowed at common law).

13 *Op. cit.*, note 2, vol. 4.

14 *Ibidem*, § 13:02.

15 *Ibidem*, §§ 13:25, 13:26, and § 13:27 (discussing cases where state court refused to certify class involving out-of-state plaintiffs).

16 *Ibidem,* § 13:04, at 13-14, 13-19 (noting that 36 out of 50 states have adopted some version of Rule 23).

17 *Ibidem,* §§ 13:01, 13:07, 13:08.

topic to what is far and away the leading treatise in the field, the eleven-volume work, Alba Conte & Herbert Newberg, Newberg on Class Actions, 4th ed., 2002, which I reference extensively throughout this paper.

I. An overview

1. *The general class action*

Rule 23 governs most class actions. Every lawsuit that is filed as a class action will be brought by one or more persons with whom the lawyer involved actually has an attorney-client relationship (referred to as the "named plaintiffs") on behalf of a larger group of persons, including the named plaintiffs, who are allegedly "similarly situated" (referred to as the "plaintiff class").[18] A class action complaint must contain allegations asserting that it is brought as a class action, describing the class on whose behalf the suit is supposedly brought, and claiming that the class as so described is a proper one under the rule. To be a proper class, a suit must satisfy all four of the requirements set out in paragraph (a) of the rule and at least one of those set out in paragraph (b) of the rule.[19] As a preliminary matter, then, the complaint filed must allege compliance with those requirements, which it commonly does in a conclusory fashion that merely tracks the language of the rule.

It is important to consider the peculiar posture of the case at this juncture. A lawyer will have appeared before a court, through the vehicle of the complaint she has drafted, claiming to

18 Under Rule 23, it also is possible to have classes of defendants. Such classes present special problems, because they allow the plaintiff in a case to choose, at least initially, which of his rivals he will litigate against. The main dangers of permitting that to occur, of course, are that the plaintiff will pick someone who is not well qualified to discharge the role of defendant class champion, or who has no interest in doing so, but there are many other unique problems as well.

19 *Op. cit.*, note 2, vol. 1, § 3:1.

be entitled to represent the many members of the pla intiff class literally thousands, perhaps even millions, of individualsall but a handful of whom she has never met, almost all of whom have never consented to have her represent them, and virtually all of whom probably have no idea that the litigation in question even exists. As Rule 23 contemplates that any final judgment entered in a class action will be binding on all members of the class as certified, even if they never received notice of the suit or an opportunity either to participate in or to exclude themselves from it,[20] it obviously is very important to make every reasonable effort to ensure that the interests of all class members are effectively represented. Thus, Rule 23 contemplates that "as soon as practicable" the court before whom the lawsuit is pending will hold a hearing to determine: (1) whether a plaintiff class, as alleged, really exists; (2) if it does, whether it satisfies the requirements of Rule 23; and (3) assuming it satisfies those requirements, whether the named plaintiffs and their lawyers are the proper parties to vindicate the interests of that class being asserted in the lawsuit.[21] This aspect of a class action lawsuit is called the "class certification" phase.

The status of persons who are included in a class as described, but who are not named plaintiffs (so-called "absent class members"), is a peculiar one.[22] They are not considered full parties for a variety of purposes. For example, their citizenship is not considered in deciding whether there is a diversity of citizenship between all of the plaintiffs and all of the defendants, as is required in the United States in some cases in order to confer jurisdiction on a federal court.[23] Likewise, they generally are not ame-

20 *Ibidem*, § 1:2; "Hansberry v. Lee", 311 U.S. 32, 41-43 (1940).
21 See Rule 23(c)(1), *Federal Rules of Civil Procedure*.
22 *Op. cit.*, note 2, vol. 5, ch. 16.
23 See *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921). However, in *Zahn v. International Paper Co.*, 410 U.S. 925 (1973), the Supreme Court concluded that even absent members of a proposed plaintiff class must each satisfy the minimum jurisdictional amount-in-controversy requirement. *Zahn* obviously adversely impacts *Ben Hur's* potential benefits to persons seeking to fashion a class action based on diversity of citizenship. Whether a relatively recent statue, 28 U.S.C. § 1367, conferring supplemental jurisdiction on the federal courts, abrogates the *Zahn* case remains an open question.

nable to discovery "as a matter of course," as parties to litigation are, but rather only when a court finds that the interests of justice so require.[24] On the other hand, they are considered parties for other purposes. For example, the statute of limitations is tolled by the filing of a class action lawsuit with respect to all persons who are members of the class as described in the plaintiff's complaint,[25] and the statute remains tolled unless and until the court declines to certify the class or, having once certified it, later changes its mind and decertifies it.[26] Likewise, absent class members are not subject to counterclaims that the defendant might have against them, unless they are individually served with such a pleading in accordance with law.[27] In addition, absent class members in a certified class are entitled to notice of any proposed settlement of the case and an opportunity to object to that settlement or any associated award of attorney's fees to their counsel,[28] including the right to intervene in the action in appropriate cases.[29]

Under the adversary system of litigation followed in the United States, the named plaintiffs and their counsel bear the burden of showing that the proposed class should be certified, while the defendants endeavor to show that the plaintiffs have not discharged that burden.[30] *This often leads to the peculiar situation where the defendants, who almost always would prefer that no class action be maintained by anyone, disavow that purpose and piously claim instead that they only oppose such an action because either the plaintiffs or their attorneys are in some sense inadequate champions of the proposed class. In any event, in connection with this effort, it is quite common for both* the defendants

24 *Op. cit.*, note 2, vol. 5, §§ 16:2, 16:3.

25 See *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 1974.

26 See *Chardon v. Fumero Soto*, 462 U.S. 650 (1983); *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 1977.

27 *Op. cit.*, note 2, vol. 2, § 4:34. See also "*Phillips Petroleum Co. v. Shutts*", 472 U.S., pp. 797, 809-810, 1985 (observing that absent plaintiffs are "almost never subject to counterclaims").

28 *Op. cit.*, note 2, vol. 4, §§ 11:53-11:58, 11:60.

29 *Ibidem,* vol. 5, §§ 16:10-16:12.

30 *Ibidem,* vol. 3, § 7:7.

and the named plaintiffs to undertake a substantial amount of discovery of their opponents, supposedly limited to class certification issues, but straying into the merits to as great an extent as possible.[31] In a case of any complexity, months perhaps even many monthswill be spent in such activities.

Once that discovery is complete, the parties will present their contentions and evidence to the court, which will then decide whether or not a class should be certified.[32] The court has a great deal of discretion in deciding whether to certify a class. It may certify the class requested by the named plaintiffs in their complaint, certify an alternate class requested by the defendant, or certify a class that it devises that is different from either of those alternatives. It may certify a class as to some issues or claims, but not others.[33] It may deny certification altogether, and must do so if it concludes that the named plaintiffs have not carried their burden of showing compliance with Rule 23.[34] All certification rulings made by the court are provisional, and may be modified or even reversed at any time prior to the decision on the merits.[35]

This is obviously a decision of immense significance. If the class is certified, the financial risk to the defendant posed by the lawsuit increases enormously perhaps by thousands or even millions of time sover what it would have been had the court denied certification. For example, if five plaintiffs bring a claim on behalf of five million persons, with each plaintiff's claim being valued at $10, the defendant's litigation exposure is $50,000,000 if a class is certified, but only $50 if it is not. Not surprisingly, then, the battle over class certification is always a hard-fought one, and one the losing side typically wishes to have reviewed on appeal immediately. However, under Rule 23, there is no guarantee that such an immediate review will be forthcoming. Instead, Rule 23(f) only provides that "[a] court of appeals *may* in its discre-

31 *Ibidem,* § 7:8.
32 *Ibidem,* § 7:9.
33 *Ibidem,* § 7:33; Rule 23(c)(4)(B), *Federal Rules of Civil Procedure*.
34 *Ibidem*, § 7:34; Rule 23(c)(4)(A), *Federal Rules of Civil Procedure*.
35 See Rule 23(c)(1), *Federal Rules of Civil Procedure*.

tion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order." In particular circumstances, immediate appellate review is also allowed under section 1292(b) of title 28 of the United States Code [36] or by way of mandamus,[37] but only the latter option is available when Rule 23(f) itself is not.[38]

If a class is not certified and that decision is either not immediately reviewable by an appellate court or, if reviewable, is affirmed on appeal, typically the litigation comes to an end. The amount at stake, when compared to the costs and expenses of continuing the case, typically compels plaintiffs and their counsel to surrender. Even if they are not willing to do so, defendants can typically moot the case by offering plaintiffs a sum that clearly equals or exceeds the full amount of their alleged damages at the hands of the defendants, together with any costs or expenses to which they have become subject by virtue of conducting the litigation up to the point of the offer. Even in such cases, however, the plaintiffs may appeal the decision to deny class certification, once a final judgment is entered against them on the merits of their claims.[39]

If a class action is certified, depending on the subdivision of Rule 23(b) under which certification is granted, the court may be required to notify the members of the class of that event. No such notice is required if certification was made pursuant to subparagraphs (b)(1)(A), (b)(1)(B), or (b)(2), although the court, in the exercise of its sound discretion may require it.[40] On the other

36 *Op. cit.*, note 2, vol. 3, § 7:41 (such an appeal, however, requires, among other things, the concurrence of both the court of appeals *and* the trial court in the desirability of immediate review of the certification issue, and so is of less use to a party wishing to appeal than Rule 23(f) itself is).

37 *Ibidem*, § 7:42 (stating that some courts have concluded that immediate review of a certification decision may be available by way of mandamus in rare instances).

38 *Idem*.

39 *Ibidem*, vol. 1, § 2:32; "Deposit Nat'l Guaranty Bank v. Roper", 445 U.S. 326 (1980); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980).

40 *Ibidem*, vol. 2, §§ 4:1, at 8; 4:2, at 9 n.5; 8:15-8:17. This position has been criticized,

hand, if certification was made pursuant to subparagraph (b)(3), those persons who are members of the class as set out in the order of certification and who can be identified "through reasonable effort" must be sent notice of the pendency of the action.[41] This notice is sent out by the clerk of the court, but the cost of doing so is borne by the class.[42] The contents of the notice are generally negotiated by the parties and are subject to the approval of the court. Generally speaking the class notice will contain a description of the litigation and the principal contentions of the parties; state that a class has been certified, provide the definition of the class, and that the recipients are members of that class; extend to them the opportunity to participate in the action through counsel of their choice; inform them of the fact that any judgment entered in the suit will resolve any claims that they might have against the defendant that are addressed by the litigation; and, where applicable, advise them of their right to opt out of the class, and thus avoid those consequences.[43]

In general, Rule 23 contemplates that the prosecution of the merits of a class action is largely deferred until after the court has decided whether to certify a class. Once that occurs, the normal range of discovery devices used in litigation in the United States-interrogatories, requests for production of documents, depositions, and requests for admissions are employed to develop the

as the judgments entered in Rule 23(b)(1) and Rule 23(b)(2) class actions also purport to bind all class members, so that they presumably are as likely to want to be informed of the existence and nature of the case as the members of any other classindeed, perhaps even more so, as they do not have the right to opt out of the suit. A proposed amendment to Rule 23(c)(2) would change this procedure by requiring post-certification notice in all cases, not just those certified under Rule 23(b)(3). See Alba Conte & Herbert Newberg, *Newberg on Class Actions*, 4th ed., 2 1, at xv-xvii.

41 See Rule 23(c)(2), *Federal Rules of Civil Procedure*.

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

43 *Op. cit.*, note 2, vol. 3, § 8:31; Rules 23(c)(2), (3), *Federal Rules of Civil Procedur*e. Although not all of these features of a class certification are set out in Rule 23 itself, recent proposed amendments creating new subparagraphs (c)(1)(B) and (c)(1)(C) would include them. See *Ibidem*, vol. 1, at xiv-xv. Apparently all are commonly included now as a matter of almost universal custom.

parties claims, defenses, and other contentions (for example, the amount of damages involved). Because class actions are typically quite complex undertakings, this case development period can extend over many months, perhaps even years. In recent years, federal courts have become more active in managing this process by developing, with the aid of the parties, detailed schedules for the completion of different phases of this process.[44] Even so, in the typical class action case, several years will have elapsed between institution of the suit and its conclusion by settlement or trial.[45]

Over time, however, an alternate approach to conducting class action litigation developed, one that threatened to disrupt the checks on such litigation that are contained in Rule 23. In cases involving this new approach, counsel for plaintiffs would contact a defendant suspected of wrongdoing before filing suit, disclose the nature of the plaintiff's claims, and make demands for settlement. If the defendant were amenable, the parties would then enter into an agreement tolling the running of the statute of limitations and conduct negotiations, without suit being filed. If those negotiations were successful, plaintiffs would only then bring a class action against the defendant, setting out their claims. At virtually the same time plaintiffs would move for certification of the plaintiff class, often including their proposed settlement with the defendant as part of that same motion. This gambit led to the plaintiff class being referred to as a "settlement class." As part of its settlement with the plaintiffs, defendants would have agreed not to oppose either the motion for class certification or the settlement it embodied. Often, too, the defendants would have agreed to a fee for class counsel to receive, or at least agreed to

44 A great deal of creativity and ingenuity have resulted in numerous techniques designed to manage the inordinately complex pretrial, trial, and post-trial / settlement phases of class actions. Not only does a single class action present these difficulties, but also it is quite common for particular controversies to give rise to numerous individual and class actions, that then need to be coordinated and harmonized to the extent possible. For an excellent overview of these problems and the creative approaches taken to managing them, see *op. cit.*, note 2, vol. 3, ch. 9.

45 *Op. cit.*, note 2, vol. 3, §§ 9:1-9:10.

an amount that they would not oppose. Thus, the first notice that unnamed plaintiff class members would get of the pendency of the action would be the notice, mandated by Rule 23(e), that the parties had reached a tentative settlement of the matter.[46]

The custom developed of treating the decision to certify these "settlement classes" with less rigor than ordinary classes, and to examine the settlements resulting in such cases with greater deference. These trends, however, were highly problematic. The fact that negotiations had been conducted by the parties in secret, without the active involvement or supervision of the court, increased the likelihood that some sort of understanding had been reached between the parties that benefitted the lawyers for the plaintiffs, perhaps the named plaintiffs themselves, and the defendant, but at the expense of the plaintiff class as a whole. Moreover, without a public record of what information came to plaintiffs' attention concerning the defendant's alleged misconduct, and without a true adversary presentation to the court on that topic due to the parties' agreement on the terms of a settlement, it would be difficult for class members to mount an effective objection to the terms of the settlement, and equally difficult for the court to determine whether the settlement was unfair, inadequate or unreasonable and so one that it should reject. In *Amchem Products, Inc. v. Windsor*,[47] however, the Supreme Court of the United States put an end to this line of jurisprudence, concluding, as it should have, that the same standards apply to the certification of settlement classes as to other classes, and the same standards apply to the approval of proposed settlements in such cases as to those arrived at in traditionally prosecuted class actions.[48]

46 For a description of the contents of a typical settlement notice, see *op. cit.*, note 2, vol. 3, §§ 8:32, 8:39. For a description of the contents of a typical combined class certification and settlement notice, see in *op. cit.*, § 8:21.

47 510 U.S. 591 (1997).

48 *Op. cit.*, note 2, vol. 4, § 11:28.

The overwhelming majority of all suits filed as class actions that survive the certification process and any subsequent motions to dismiss or motions for summary judgment[49] are resolved by settlement rather than by trial.[50] As a result of the *Amchem* decision, all of those settlements now follows a uniform path. Under Rule 23, any settlement of a suit that has been certified as a class action requires the approval of the court before which the case is pending.[51]

A recently proposed amendment to Rule 23(e), however, would resolve this uncertainty, by requiring that "a person who sues or is sued as a representative of a class may settle, voluntarily dismiss, compromise, or withdraw all or part of the class claims, issues, or defenses, but only with the court's approval".[52]

49 It is a peculiar and extremely significant feature of class action law in the United States that a party opposing the class cannot file a motion to dismiss or a motion for summary judgment attacking the class action complaint prior to certification. Rather, as a result of the Supreme Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), ordinarily courts are to resolve the issue of the propriety of certifying a class before resolving issues going to the merits of the case. The principal reason for doing so is to prevent so-called "one-way interventions," by which a judgment in favor of the defendant on the merits would only bind the named plaintiffs, while a judgment in favor of the named plaintiffs would bind the defendants, not only with respect to the named plaintiffs but also, due to the doctrines of res judicata and collateral estoppel, with respect to all other persons similarly situated to the named plaintiffs. See *op. cit.*, note 2, vol. 3, §§ 8:3, 8:9, 8:10. However, the concern just expressed stems primarily from a desire to protect the party opposing the class, and so can be waived by that party. Thus, a number of courts have concluded that *Eisen* was not intended to, and does not, absolutely prohibit the resolution of dispositive motions prior to a hearing on the issue of class certification. See *id.*, § 9:42.

50 For an excellent, detailed discussion of the types of provisions that are commonly included in class action settlements, see *op. cit.*, note 2, vol. 4, ch. 12.

51 There is a split of authority as to whether suits that were filed as class actions but never certified as such, or that were certified but later decertified, require notice to the putative class as a condition of dismissal. See *op. cit.*, note 2, vol. 4, §§ 11:70, 11:71 (party may voluntarily delete or dismiss class action allegations from complaint prior to class certification, without giving notice to putative class, provided that the court determines that no damage to the class will result); *cf.*, § 11.74 (noting that some courts have observed that such conduct should always be viewed with suspicion). On the other hand, if a class has been certified and the plaintiff wishes to dismiss the classwide aspects of his suit as part of a settlement of his or her individual claims, or for any other reason, notice to members of the class is mandatory. See § 11.73.

52 See *op. cit.*, note 2, vol. 1, at xvii (proposed new Rule 23(e)(1)(A)).

Thus, in the event that the parties reach a tentative agreement, they advise the court of that fact, and provide the court with their own assessment of why their proposed agreement meets the standard specified by the rule, namely, that it be "fair, reasonable and adequate" under all the circumstances.[53] If the court agrees that the settlement might reasonably be found to satisfy that standard, with the parties' participation, it fashions a notice of the proposed settlement that is sent by mail to all members of the class who can be identified with reasonable effort, and often is publicized in other ways, all designed to ensure that as many class members as possible receive actual notice of the impending settlement.[54] This settlement notice will set forth the contentions of the parties, describe major activities undertaken in the case, and set forth the terms of the proposed settlement, including any attorney's fees either sought by plaintiff's counsel or agreed to by the defendant.[55] The notice will also inform class members of their right to submit objections to the proposed settlement and to appear personally before the court at a hearing (called a "fairness hearing"), should they so desire, to urge those objections as a basis for rejecting the proposed settlement.[56]

The fairness hearing works very much like a mini-trial. Both the parties and the objectors have the right to appear in person, present evidence and testimony, and cross-examine witnesses called by others.[57] Although the parties typically will have made a considerable amount of material pertinent to the proposed settlement available to any interested party, objectors also have a right to independent discovery.[58] Although there is a presumption that the negotiations leading to the proposed settlement were con-

53 See *op. cit.*, note 2, vol. 4, §§ 11:24, 11:25.
54 *Ibidem*, §§ 11:26, 11:27, 11:30, 11:31, 11:32.
55 *Ibidem*, vol. 3, §§ 8:32, 8:39.
56 *Ibidem*, vol. 4, § 11:53.
57 *Ibidem*, §§ 11:55, 11:56. In order to facilitate an orderly presentation of issues and to prevent spurious objections, it is common for courts to require that objections be in writing and be made prior to the fairness hearing in order to be considered. See § 11:56, at 181.
58 *Ibidem*, § 11:57.

ducted in good faith, that presumption is subject to challenge,[59] and the burden of proof remains on the proponents of the settlement to demonstrate that it is fair, adequate, and reasonable under all the circumstances.[60] The types of objections that can be raised include the timing of payments called for by the settlement, the procedures for determining eligibility for such payments, the amounts to be awarded, the allocation of the proposed recovery among various classes of claimants, the types of relief awarded or not awarded, and the amount or source of payment of attorney's fees for class counsel.[61]

Under Rule 23, the court may either approve the settlement as written or reject it, but it may not approve the settlement in a modified form not approved by the parties. If the settlement is approved,[62] the court will issue a final judgment to that effect.[63] If no appeal is filed, that judgment becomes final and the settlement is implemented.[64] However, anyone objecting to the court's approval and having the standing to do so[65] may appeal its judgment.[66] In that case, implementation of the settlement is deferred,

59 *Ibidem*, § 11:51.

60 *Op. cit.*, note 2, vol. 4, § 11:42.

61 *Ibidem*, § 11:58.

62 As to the criteria that the court will consider in making that determination, see *op. cit*., note 2, vol. 4, §§ 11:41-11:51. A recently proposed amendment to Rule 23 would specifically set forth the criteria the court should employ in these circumstances in the rule itself. See vol. 1, at xix-xx (proposed new Rule 23(e)(1)(C)).

63 *Op. cit.*, note 2, vol. 4, § 11:59; Rule 54, *Federal Rules of Civil Procedure*.

64 It is not uncommon for a class action settlement to call for a fairly elaborate administrative process, by which class members wishing to participate in the settlement must submit proof their claims to administrators retained as part of the settlement to consider them. For a description of various arrangements of this kind, see *op. cit*., note 2, vol. 4, §§ 11:33-11:40.

65 Occasionally, persons who lack standing to object to the proposed settlement, such as a person who at some earlier stage of the proceeding elected not to participate in the suit, may attempt to block it. If such a person's objection is correctly denied for lack of standing, she will be denied the right to appeal on that basis as well. See *op. cit*., note 2, vol. 4, § 11:55.

66 *Op. cit.*, note 2, vol. 4, § 11:60. A recently proposed amendment to Rule 23 would give Rule 23(b)(3) class members, including objectors, an important additional right: a second chance to opt out of the class. See *id.*, vol. 1, at xx-xxii (proposed new Rule 23(e)(3)).

pending resolution of the appeal. If the settlement is rejected, the court generally will explain the bases for its decision. No immediate appeal of that decision is allowed. The parties are then free to take the court's views into account, however, and negotiate further in an effort to resolve the suit without trial. If those efforts are unsuccessful, the suit is tried to a verdict and final judgment in the same fashion as any other action.

One very important part of the resolution of any class action is the topic of attorney's fees. At present, Rule 23 itself does not speak to the topic of attorney's fees, so resort to case law on the topic is required.[67] In the United States, we follow the so-called "American Rule," whereby, absent exceptional circumstances, each party bears its own costs, expenses, and attorney's fees.[68] There are, however, two important exceptions to this rule. The first exception is the "common fund doctrine," under which an attorney can seek to recover attorney's fees out of a fund created by the attorney that benefits the plaintiff class.[69] The second exception arises under what is now a myriad of fee-shifting statutes, that permit a party (who usually but not always has to be a prevailing party) to recover reasonable attorney's fees from the opposing party.[70]

It must be borne in mind that, in most class actions, the only persons with whom the attorney for the class will have had an actual fee agreement will be the named plaintiffs; and their share of any fees that the attorney's hope to recover is apt to be trivially small. If the attorney seeks to recover the overwhelming bulk of her fee from the absent members of the class that she represented, she will not be able to rely on a contractual agreement, because there is none.[71] Instead, any such award is dependent on

67 A recent proposed amendment to Rule 23 would incorporate criteria for the court's consideration in that regard into the rule itself. See *op. cit.*, note 2, vol. 1, at xxv-xxvi (proposed new Rule 23(h)).

68 *Ibidem*, vol. 4, § 14:1.

69 *Ibidem*, § 14:6.

70 *Ibidem*, § 14:3.

71 *Ibidem*, § 14:2.

the court's application of the equitable common fund doctrine to the absent class members' share of any recovery obtained.[72]

Whether a common fund or a fee-shifting award is sought, the issue of deciding how the attorney's fee should be calculated remains. It is universally acknowledged that, no matter which situation is involved, counsel for the class is limited to a "reasonable" fee.[73] Two methods for determining such a fee have commonly been employed. The first is to award a percentage of any recovery as the fee.[74] This leaves open, of course, what that percentage should be, and no set rule emerges from the cases. About the only generality that can be made is that the percentage involved tends to decline as the size of the fund recovered on behalf of the class increases.[75]

Quite often, however, courts employing the percentage method to determine an appropriate attorney's fee will use the lodestar method, discussed immediately below, as a check on whether the percentage-of-the-recovery amount they are contemplating awarding is reasonably close to the sum that the other method would yield.[76]

72 Occasionally, under the pressure of threatened or actual litigation, but without an admission of liability or the actual compulsion of a court order, a defendant will agree to change its behavior and remedy allegedly wrongful conduct. The defendant will then argue that it should not be responsible for paying any attorney's fees related to the benefit it conferred on the class, because it supposedly provided that benefit voluntarily. In such cases, however, courts typically applied a "catalyst" analysis, by which, if it could be shown that the actual or impending litigation played a substantial role in bringing about the benefit obtained by the class, the class attorney could either use that benefit as a source of attorney's fees, or, if a fee-shifting statute applied, hold the defendant liable for reasonable attorney's fees under it, despite the absence of an admission or finding of liability or entry of a court order. See *op. cit.*, note 2, vol. 4, § 14:4. However, in the face of those numerous lower court cases to the contrary, the Supreme Court recently held that that requires a party to have "prevailed" in order to be entitled to an award. Instead, only a plaintiff who either secured a judgment on the merits or a court-ordered consent decree satisfied that test. See *Buckhannon Bd. And Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001). Presumably, the "catalyst" theory remains available in pure "common fund" cases, but the issue is not yet settled.

73 *Ibidem*, § 14:1.

74 *Ibidem*, § 14:6, at 550-568.

75 *Idem*, at 568-569.

76 *Ibidem*, § 14:7.

The second method commonly used is the so-called lodestar method.[77] This method requires the court, using information supplied primarily by class counsel, together with any additional guidance offered by the opposing party or by objectors to the settlement, to establish reasonable hourly rates for all timekeepers whose fees are sought to be recovered, to examine the time expended on the case by each of those timekeepers, to eliminate any wasteful, duplicative, or non-productive hours they may have expended, and multiply the hours that remain by the hourly rates involved,[78] to obtain the so-called "lodestar" fee. That fee is then subject to adjustment, upward or downward, by a multiplier, designed to reward class counsel for exceptional efficiency, obtaining an exceptionally favorable result, or for undertaking an exceptionally risky matter.[79] By the same token, multipliers of less than one have occasionally been used to punish class counsel for unusually dilatory or unsuccessful outcomes. In either event, this adjusted lodestar figure becomes the final fee award.[80] Obviously, this is a very laborious and time-consuming process, if undertaken in a conscientious fashion.

2. *Rules 23.1 And 23.2*

Rules 23.1 and 23.2 address two special circumstances in which an aggrieved party might choose to vindicate its rights through a class action, but which, historically, have presented

77 *Ibidem*, § 14:5.

78 Because, in a common fund case, the work for which compensation is sought must have benefitted the class, as a general rule, time expended in preparing the fee petition for the court is not compensable. See *op. cit.*, note 2, vol. 4, § 14:8. On the other hand, at least some courts have allowed compensation for such work in fee-shifting cases. See *idem*, § 14:5, at 545.

79 In *City of Burlington v. Dague*, 505 U.S. 557 (1992), the Supreme Court concluded that, in a fee-shifting case, the fee awarded a prevailing party cannot be enhanced due to the contingent nature of the undertaking. A number of lower courts, however, have refused to extend this rule to common fund cases. See *op. cit.*, note 2, vol. 4, § 14:6, at 571-573.

80 *Ibidem*, § 14:5.

special problems. The first is a so-called shareholder's derivative suit, in which "one or more shareholders or members [seek] to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce [the] right which may properly be asserted by it".[81] Because such suits have a long history of being used in an abusive manner, Rule 23.1 imposes additional requirements on the complaints filed in such actions, including that they be verified; that they allege that the shareholder has standing to bring the action; that they allege that the action is not a collusive one to confer jurisdiction on a court of the United States that it would not otherwise have; that they state with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the shareholders or members of the organization or association, together with his reasons for failing either to obtain the action sought or to try to do so, as the case may be.[82] Finally, the rule specifically authorizes dismissal of such actions "if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated" with respect to enforcing the right of the corporation or association,[83] but goes on to provide that such an action "shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs".[84] In an action to which Rule 23.1 applies, in the event of a conflict with Rule 23, Rule 23.1 controls.

Rule 23.2 is a special provision that applies to "[a]n action brought by or against the members of an unincorporated association as a class".[85] It provides that such an action may be maintained "by naming certain members as representative parties only if it appears that the representative parties will fairly and ade-

81 Rule 23.1, *Federal Rules of Civil Procedure*.
82 *Idem*.
83 *Idem*.
84 *Idem*.
85 *Idem*.

quately protect the interests of the association and its members".[86] The rule goes on to provide that, in conducting such actions, "the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e)".[87] This rule was necessitated by the fact that, at common law, unincorporated associations were not considered jural entities and could only be sued by bringing an action against all of their members.[88] Although those limitations had been removed in many jurisdictions by statute by the time this rule was first adopted in 1966, it nonetheless was seen as useful in order to clarify that the class action device was available in suits by or against such associations as well.[89]

Because these forms of class actions raise specialized issues that are not appropriate for a survey paper of this kind, they will not be considered further here. Instead, this paper will focus on the general considerations applicable to class action brought under Rule 23 itself.[90]

This paper also will not address these other sources of class action law, although the reader should be aware of their existence.

II. PREREQUISITES FOR CLASS CERTIFICATION

To be certified as a class under Rule 23, every proposed class must satisfy all four of the requirements of Rule 23(a) and at least

86 *Idem*.

87 *Idem*.

88 See Alan, Charles, *et al.*, F*ederal Practice and Procedure*, 2nd ed. 1986, § 1861, at 214-215.

89 *Ibidem*, at 215-216.

90 There has been significant legislation in the United States that directly affects the application of Rule 23 in certain types of cases. For example, the Private Securities Litigation Reform Act of 1995 imposed a number of significant restraints on securities fraud class actions that go beyond the requirements of Rule 23. Likewise, the Federal Employer Liability Act contains its own class action provision, that requires a potential class member to affirmatively choose to participate in any class certified (to "opt in"), rather than being included automatically, as would be true under Rule 23.

one of the four subparagraphs of Rule 23(b). A great deal of law has grown up concerning these various requirements.

1. *Rule 23(a)*

Rule 23(a) provides as follows:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parites on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are common questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Each of these requirements is discussed below.

1. *Subparagraph (a)(1): Numerosity*

The numerosity requirement reflects a bias in United States jurisprudence in favor of actual participation as full parties by all persons whose interests are, or might be, adjudicated in the course of a given lawsuit. If there are not too many persons involved to make it "impracticable" to have each one joined individually, Rule 23 provides, then such joinder is the preferable alternative to instituting a class action. One might think that this requirement would substantially limit the availability of a class action, as there are instances in United States jurisprudence of lawsuits involving thousands of individually named plaintiffs. However, this has not proven to be the case. Class actions have been approved with fewer than fifty class members, where it appears, for whatever reason, that it would be "impracticable" for those persons to appear individually and prosecute the action. Among the factors that will lead to a finding of impracticability are that the potential class members are widely dispersed geographically, or that their individual claims are relatively small,

thereby making it unlikely that the claims would be asserted at all in the absence of the class action mechanism.[91]

One of the principal ways to attack a plaintiff's claim of numerosity is to assert that what the plaintiff characterizes as a single large class actually is a number of smaller groups, none of which has the requisite number of members to satisfy the numerosity requirement, even though, in the aggregate, the number of persons involved would suffice.[92] As an example, suppose that plaintiff's claim, in essence, is that a particular class of businessmen, say automobile dealers, are victimizing their customers, among whom are the plaintiffs, in the same way. Plaintiffs seek certification of a single class consisting of all persons who were customers / victims of any of the dealers. In such a case, the dealers will argue, perhaps successfully, that a proper class, if one exists at all, is limited to just the customers of a single dealer that is, that there should be many small classes rather than one large one.[93] The dealers will then go on to argue that there are not enough customers in these smaller groups of customers / victims to justify certifying them as a series of class actions.

An interesting mechanism used by plaintiffs for expanding the number of persons in a class, and one that presents numerous legal and practical difficulties, is to include in the class as proposed those persons who will be, but have not yet been, injured by the conduct complained of.[94] This approach is most often seen in suits seeking institutional reform, but it is not limited to such cases. Thus, for example, in a suit attacking the conditions under which prisoners are held as unconstitutional, the class might be defined as "all persons who currently are, *or in the future will be*, confined to [the prison system involved]. Obviously, this definition expands the number of persons included in the class by a substantial but unascertainable amount. Presumably, at least in

91 *Op. cit.*, note 2, vol. 1, § 3:6.
92 *Ibidem*, § 3:9.
93 *Ibidem*, § 3:18.
94 *Ibidem*, § 3:7.

any case where a defendant's allegedly wrongful conduct is continuing, this approach would permit a presently very small pool of victims to surmount the numerosity hurdle.

That benefit, however, comes with a number of costs. For example, it is not clear that the future claims involved are even cognizable by a court, because they have not yet occurred. In the United States, it is not clear that a court may entertain such claims, because it is limited to adjudicating "cases or controversies," and the future claimants, by definition, do not yet have any basis for complaining about the unconstitutional conditions being challenged, because they are not yet subject to them. A second problem with future classes is that it is not at all clear that there are any such persons, because their alleged claims may never occur. Presumably, if the court remedies the challenged conditions with respect to current prisoners, and enters an appropriate order enjoining them from reoccurring, no persons will be subject to those conditions at a later time. Moreover, there is always the possibility that, should the unconstitutional conditions recur at some future time, those then subject to them might want different or additional remedies than those achieved in the initial suit. It is not clear, however, that they would be entitled to do so if, as could occur in a "future class action," their claims had been adjudicated and their rights declared as part of the initial suit. These and other problems discussed elsewhere in this paper make the inclusion of the claims of future victims of a defendant's conduct in a class action problematic, and a number of courts have excluded such persons from the certified class for those reasons, among others.[95] Nonetheless, the practice is not absolutely prohibited.

95 *Ibidem*, § 3:7, at 262-64. For an early scholarly treatment of the issues raised by defining classes to include future victims of the defendant's conduct, see Schuwerk, Robert P., *Future Class Actions*, 39 Baylor L. Rev. 63 (1987).

2. *Subparagraph (a)(2): Commonality*

A second requirement that all federal class actions in the United States must meet is that there are questions of law or fact that are common to the named plaintiffs and to all members of the proposed class. Generally, the threshold for finding such commonality is low. Indeed, since the common question can be either one of fact or one of law, it is almost inconceivable to see how a plaintiff might bring class action that does not involve at least one such issue.[96] Typically, the ultimate issue of the defendant's liability for the harms complained of, as well as the body of substantive law applicable to determining that issue, will present such common questions.[97] Thus, it is very rare to see a class denied certification for lack of a common question of law or fact.

However, for class actions brought pursuant to Rule 23(b)(3), it is not sufficient that there merely *be* common questions of law or fact, as mandated by Rule 23(a)(2). Instead, Rule 23(b)(3) requires that common questions of law or fact *predominate* over individual issues in order for certification to be proper. Because Rule 23(b)(3) class actions are the principal ones employed in suits for money damages, the issue of predominance is of great practical significance. A discussion of that concept, however, is deferred to the treatment of that rule below.[98]

3. *Subparagraph (a)(3): Typicality*

A third requirement that all federal class actions in the United States must meet is that the claims of the named plaintiffs be typical of the claims of all members of the proposed class.[99]

96 *Ibidem*, § 3:10.
97 *Ibidem*, § 3:12.
98 See section II.B.3.a, *infra*.
99 See *General Telephone Co. of the Northwest, Inc. v. Equal Employment Opportunity Commission*, 446 U.S. 318, 330 (1980) (stating that the typicality requirement "emphasizes that the [class] representatives ought to be squarely aligned in interest with the represented groups").

This typicality requirement, along with the commonality requirement, is designed to ensure to the maximum extent possible that the interests of the named plaintiffs are aligned with those of the other members of the proposed plaintiff class.

Typicality challenges mainly arise in two contexts. The first is a claim that the named plaintiffs are subject to special defenses or to counterclaims that are not applicable to other members of the proposed class. The concern there is that those special claims or defenses might either defeat the named plaintiff's claim altogether, leaving the plaintiff class without a champion, or else prove so distracting to the named plaintiff that they reduce her ability to represent the broader interests of the plaintiff class effectively.[100] For example, the typicality requirement might defeat class certification where the named plaintiff may have failed to bring suit within the time allowed by law (a statute of limitations defense), even though many members of the class would not be faced with that obstacle because their injuries are more recent.[101]

A second common variant of the typicality requirement is a claim that there are conflicts of interest between the named plaintiffs and other members of the proposed plaintiff class. Should it appear that the named plaintiff has interests that are significantly antagonistic to those of other members of the plaintiff class, the court will either deny certification outright or certify a class that excludes from membership those persons originally proposed for inclusion in the class whose interests conflict with those of the named plaintiffs. To return to the previous example, a plaintiff whose own claim was in no danger of being barred by the statute of limitations might not satisfy the typicality requirement with respect to other potential class members whose claims might well be barred by that statute, because the named plaintiff would have the financial incentive to surrender the marginal claims of other class members in order to increase the recovery of persons in his

100 *Op. cit.*, note 2, vol. 1, § 3:16, at 372-378.
101 *Ibidem*, § 3:16, at 371-372.

more favored position.[102] Becouse such conflicts of interest raise questions as to the plaintiff's adequacy as a class representative, this type of concern is often considered under subparagraph (a)(4) of Rule 23, rather than under this heading.[103]

4. *Subparagraph (a)(4): Adequate Representation*

A fourth requirement that all federal class actions in the United States must meet is that the named plaintiffs will adequately represent the interests of the class as a whole. Case law has further broken down this requirement into two distinct components. The first is that the named plaintiffs *themselves* will adequately represent the class. This requirement is often phrased as the "absence of conflicts" test.[104] The second is that the *attorneys* for the named plaintiffs will adequately represent the class. This is often referred to as the "vigorous prosecution" test.[105]

A. *Adequacy of Class Representatives*

The two most significant aspects of adequate representation are commonly taken to be the absence of material conflicts of interest between named and absent class members and strong evidence that the named plaintiffs are firmly committed to a vigorous prosecution of the claims of the entire class.[106] Insofar as the adequacy of the named plaintiffs is concerned, satisfaction of the commonality and typicality requirements are themselves impor-

102 A particularly interesting example of this phenomenon is where the named plaintiff is also an attorney for the plaintiff class. In such cases, courts uniformly reject the attorney / plaintiff as a proper representative of the class, because of the fact that she will recover an attorney's fee as well as whatever sum she might achieve by virtue of being a plaintiff. The concern is that such circumstances provide an undue temptation to the attorney / plaintiff to compromise the interests of the class in order to receive a substantial attorney's fee. See *op. cit.*, note 2, vol. 1, §§ 3:16, at 368-370; 3:40.

103 *Ibidem*, §§ 3:21, 3:22 (both discussing this type of problem as a form of inadequate representation of the proposed class).

104 *Ibidem*, § 3:23.

105 *Ibidem*, § 3:24.

106 *Ibidem*, § 3:22.

tant assurances along those lines.[107] In addition, however, a wide variety of other attacks will be brought by the party opposing class certification on the named plaintiffs. Among them are claims that the named plaintiffs are not committed to pursuing the broader interests of the proposed class,[108] that they are not committed to providing the necessary financial resources to prosecute the broader suit effectively,[109] that they have little or no knowledge of the nature of the claims being asserted in the class action,[110] that they are unwilling or unable to exercise a significant degree of control over the lawyers for the class,[111] and on and on and on.[112] Such challenge are usually unsuccessful, because courts either find that the supposed differences are immaterial, or conclude that they are relatively unimportant as compared to the common interests shared by the named plaintiffs and the absent class members.

In the event a court finds that these challenges have merit, however, it has a number of options available. In cases where the conflicts between one or more of the named class representatives and the absent class members is fundamental and irreconcilable, the named plaintiff will be denied the right to serve as a representative of the class; and if all named class members are found to be inadequate representatives, certification of the class will be denied.[113] However, in most instances, the problem involved can be and is addressed without taking such a drastic step. For example, should some members of the proposed class disagree with the named plaintiff over the propriety of bringing suit at all, the court can resolve the issue by permitting those persons to opt out

107 *Ibidem*, at 411-414.

108 *Ibidem*, § 3:34, at 477-478 (retired employees or discharged employees who do not desire reinstatement may not be adequate class representatives with respect to claims for injunctive relief directed at the unlawful practices of the party opposing the class).

109 *Ibidem*, § 3:37.

110 *Ibidem*, §§ 3:33, 3:34.

111 *Ibidem*, § 3:42, at 531 n.7 (citing *Kirkpatrick v. J.C. Bradford Co.*, 817 F.2d 718, 728 (11th Cir. 1987), cert denied, 485 U.S. 959 (1988) (finding plaintiffs were inadequate class representatives because they "virtually have abdicated to their attorneys the conduct of the case").

112 *Ibidem*, §§ 3:25, 3:26, 3:35, 3:36, 3:38, 3:39, 3:40.

113 *Ibidem*, § 3:25, at 426-432.

of any class certified.[114] Similarly, should disagreement arise over what forms of relief should be sought, the court can create subclasses, each headed up by a named plaintiff favoring one of the remedies at issue.[115] A similar strategy can accommodate differences over the distribution of any damages recovered,[116] at least in most cases.[117]

B. *Adequacy of Class Attorneys*

Challenges to the adequacy of class counsel are also wide ranging. The most common are a lack of experience in bringing class actions, or an inability to adequately staff or financially support the suit.[118] Other, less common challenges include alleged ethical improprieties in connection with either the suit at bar or other actions[119] or disabling conflicts of interest within the class that prevent the lawyer from vigorously pursuing the interests of some class members without sacrificing those of other class members.[120]

In modern practice in the United States, however, these concerns are often minimized by the fact that a class action will develop from numerous earlier-filed individual and class suits that

114 *Ibidem*, § 3:30.
115 *Ibidem*, § 3:31.
116 *Ibidem*, § 3:32.
117 One of the most intractable problems of this kind stems from including both present and future claimants in the same class. Typically, such cases are settled for a lump sum, to be divided among both categories claimants. How much money goes to an individual claimant, however, depends on how many total claimants there will be and how serious their injuries will be. No one, however, can really say what the answers to those questions are. There is an almost irresistible tendency in such cases for the present claimants to minimize the amount of the settlement fund that should be set aside for future claimants, by underestimating either the number or severity of their injuries, because the present claimants are actually known and vocal in their demands, and future claimants are not. As a result, there is an increasing reluctance to include present and future claimants in the same damages class and, if that is nonetheless done, there is an almost universal requirement that the two groups be represented by separate counsel.
118 *Op. cit.*, note 2, vol. 1, § 3:42.
119 *Ibidem*, at 535-536; vol. 5, ch. 15.
120 *Ibidem*, vol. 1, at 539-542.

are later consolidated in a single forum.[121] When that occurs, the court before whom the cases are consolidated will appoint lead or liaison counsel, who inevitably will possess the requisite experience and resources to prosecute the suit effectively.[122] Lead counsel, in turn, will oversee the assignment of tasks to other counsel in such a way as to avoid duplication of effort or the undertaking of conflicting obligations or those beyond a lawyer's present capabilities.[123] For example, less experienced counsel can be assigned tasks that are commensurate with their abilities, leaving more complex matters to be overseen by more senior attorneys, with the junior attorneys gaining valuable experience by serving in a supporting role. Similarly, were a court to conclude that a suit filed on behalf of a single class actually consisted of two or more factions having significantly conflicting interests, rather than deny certification outright, the court would be apt to certify multiple sub-classes (each comprising one of the various factions) and, with the assistance of lead counsel, appoint attorneys from among those already involved in the case to represent each of those sub-classes.[124]

* * * * *

In evaluating whether proposed classes should be certified, courts bear in mind that, under the adversary model of litigation employed in the United States, it is the party opposing the class-not the court that is devising the arguments highlighting proposed defects in the class, and that it is in that party's interest not to have the best possible class the ostensible object of the certification process but rather no class at all. Thus, it is quite common for courts to treat the attacks on proposed classes "with a grain of

121 *Ibidem*, vol. 3, §§ 9:12-9:27.
122 *Ibidem*, §§ 9:31, 9:32, 9:34.
123 *Ibidem*, §§ 9:30, 9:31, 9:35, 9:37, 9:38, 9:39.
124 A recent proposed amendment to Rule 23 would regulate the process for selection of class counsel, and link it to the class certification process. See *ibidem*, vol. 1, at xxii-xxv, proposed new Rule 23(g).

salt," as we say that is, with a certain degree of scepticism. Courts frequently observe, for example, that while *some* questions of law or fact must be common to the named plaintiffs and those of the rest of the plaintiff class, there is no requirement that *all* such claims satisfy that standard. Likewise, courts often admonish zealous class opponents that the typicality requirement does not require that the interests of the named plaintiffs and those of other members of the proposed class be identical in *all* respects, and that named plaintiffs need merely be *adequate* class representatives, *not perfect* ones.

In short, a proposed class fails to be certified for failing to meet one or more of the requirements of Rule 23(a) only in those situations where the defects asserted are both clear and irremediable. On the other hand, many more suits fail to be certified due to noncompliance with Rule 23(b)'s additional tests, especially those set out in Rule 23(b)(3).

2. *Rule 23(b)*

For a class to be certified under Rule 23, it must satisfy at least one of the four subdivisions of Rule 23(b). It is possible that a given class will satisfy more than one of those subdivisions.[125] It is also possible that different claims brought on behalf of a single class will satisfy different subdivisions.[126] Finally, it is possible that some, but not all, of the claims of the class will satisfy one or more of those subdivisions.[127] In that case, the suit may proceed as a class action with respect to those claims that qualify for class treatment, with those issues not meeting those standards reserved for disposition at a later time, perhaps even before different courts.[128]

125 *Ibidem*, vol. 2, § 4:1, at 4.
126 *Ibidem*, § 4:1, at 4.
127 Rule 23(c)(4), *Federal Rules of Civil Procedure*.
128 *Idem*.

As noted earlier, the provision of Rule 23(b) under which a class is certified has important practical ramifications.[129] For one, only those classes certified under Rule 23(b)(3) carry with them the requirement that notice be given to the class, with the costs of doing so being borne by the class.[130] For another, only those classes certified under Rule 23(b)(3) provide putative class members with the right to opt out of the suit.[131] Finally, the requirements for certification under Rule 23(b)(3) are substantially more stringent than those under Rules 23(b)(1) or 23(b)(2).[132]

Case law has now made clear what is only implicit in Rule 23: class actions described in subdivisions (b)(1)(A), (b)(1)(B), and (b)(2) of that rule are merely specific instances of class actions that, in many instances, also could satisfy the more general certification requirements of subdivision (b)(3).[133] As a consequence, the general rule is that suits that qualify for certification under subdivisions (b)(1)(A), (b)(1)(B), or (b)(2) should be certified under those provisions rather than subdivision (b)(3).[134]

A. *Rule 23(b)(1) Class Actions*

Rule 23(b)(1) provides as follows:

(b) Class Action Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

129 *Ibidem*, § 4:1, at 5-6.

130 *Ibidem*, § 4:1, at 5.

131 On the other hand, a number o f courts have concluded that, in compelling circumstances, federal courts have the power to permit members of classes certified under Rule 23(b)(1) or Rule 23(b)(2) to opt out of their class. See *Ibidem*, § 4:14, at 97-99.

132 *Ibidem*, § 4:11, at 62.

133 *Ibidem*, § 4:20.

134 *Idem*.

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests

From a conceptual standpoint, Rules 23(b)(1)(A) and 23(b)(1)(B) view potential classes involving the same fact situation from the defendant's and the class members viewpoints, respectively.

a. Rule 23(b)(1)(A) Class Actions

Rule 23(b)(1)(A) raises the issue whether the litigation by one who is similarly situated to other existing or potential suits may establish incompatible standards of conduct for the defendant.[135] Thus Rule 23(b)(1)(A) is available for use by the party who might normally *oppose* creation of a class when it believes that it is in its interests to do so. This might occur, for example, when the defendant sees benefits to compelling multiple actions against it whether individual suits or class actions to be consolidated into a single class action, which it might resist more effectively and economically.[136] On the other hand, the consensus is that a defendant does not have veto power over whether an action that satisfies that rule can be maintained as a class action, where it is the plaintiffs rather than the defendant who desire that result.[137]

The principal problem in interpreting Rule 23(b)(1)(A) is its apparent breadth. In virtually any case, one can imagine that a defendant might be faced with differing interpretations of its liability to different plaintiffs, depending on the abilities of the attorneys employed, the vagaries of the evidence introduced at different trials and the assessments of that evidence by different

135 *Ibidem*, § 4:3, at 10-11.
136 *Ibidem*, § 4:7, at 25.
137 *Idem*.

judges and juries. Although a number of narrowing interpretations of the rule have been proposed, the leading commentator has rejected most of them as contrary to either the language or policies underlying Rule 23.[138] He suggests that the prime candidates for certification under that provision involve the following: (1) the suit challenges the conduct or practices of defendants who are required by law or by practical exigencies to deal with all class members in the same way; (2) the relief sought on behalf of the class includes both equitable (injunctive or declaratory) and monetary relief; and (3) other individual or class suits are already pending or reasonably expected to be filed.[139]

b. Rule 23(b)(1)(B) Class Actions

Rule 23(1)(B) addresses a common problem in class litigation: the possibility that the damages suffered by some small fraction of all injured parties will exhaust the funds available to satisfy the damages suffered by the entire class of victims of the defendant's conduct.[140] These cases are commonly referred to as "limited fund" cases.[141] The Supreme Court recently clarified and restricted what constitutes a "limited fund" for purposes of this rule, however, concluding that an effort to resolve mass asbestos-related tort claims against a defendant by locking claimants into a no-opt-out Rule 23(b)(1)(B) class that could only lodge claims against a $1.525 billion settlement fund, did not comply with Rule 23. See *Ortiz v. Fibreboard Corp*., 527 U.S. 815, 119 S.Ct. 2295 (1999). The Supreme Court concluded that if the plaintiff class sought certification on a limited fund theory under Rule 23(b)(1)(B), it had to "show that the fund is limited

138 *Ibidem*, §§ 4:4, 4:5, 4:6.

139 *Ibidem*, § 4:8, at 26.

140 It is now settled that the mere fact that an initial lawsuit may set an adverse precedent that would then be used to defeat claims by subsequent class members is not the type of impairment "as a practical matter to which Rule 23(b)(1)(B) is directed. See *Ibidem*, § 4:10.

141 *Ibidem*, § 4:9, at 33-36.

by more than the agreement of the parties", and that it had failed to do so.[142]

The Supreme Court's concern stems from certain peculiarities of Rule 23. Obviously, Rule 23(b)(1)(B), with its focus on situations involving limited funds, is concerned with class members having claims for money damages. On the other hand, Rule 23(b)(3) is also concerned with such actions. However, Rule 23 (b)(3) permits class members who wish to pursue their own claims instead of relying on class counsel to opt out of the classwide litigation, while Rule 23(b)(1)(B) does not explicitly do so. This has led to a great deal of speculation concerning whether the latter rule should be construed to permit class members to opt out, or, if it is not so construed, whether it complies with due process of law. These issues remain open.[143]

B. *Rule 23(b)(2) Class Actions*

Rule 23(b)(2) provides as follows:

(b) Class Action Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive or corresponding declaratory relief with respect to the class as whole.

This short and relatively straightforward provision has been the subject of a surprisingly large number of cases interpreting and applying its language. For one, it is now settled that the defendant's alleged misconduct, while necessarily directed at the class as a whole, need not be aimed at damaging every member of the class. For example, racial discrimination in employment, or the maintenance of segregated schools or unconstitutionally harsh

142 *Ibidem*, 119 S. Ct. at 2302.
143 *Ibidem*, § 4:9, at 36-52.

prison conditions, are actionable under Rule 23(b)(2), even though not every employee or prisoner is the target of such illegal conduct, and even though there may be some persons who do not object to the challenged condition, as, for example, minority parents who want their children educated in an all-minority school rather than a desegregated one.[144]

Another, equally important construction of this provision is that, despite its explicit reference to cases involving classwide injunctive or declaratory relief, money damages that are merely ancillary to such relief, such as compensation for back pay lost as a result of enjoined discriminatory practices, may be sought by and awarded to members of the plaintiff class without precluding certification of that class under Rule 23(b)(2).[145] This is very important as a practical matter, because class actions brought under Rule 23(b)(2), unlike those brought under Rule 23(b)(3), the principal class action provision used for claims involving money damages, do not have to meet the more rigorous requirements, discussed below, that the questions of law or fact common to the class "predominate" over individual issues, and that the class action be "superior" to other methods available for adjudicating the controversy.[146]

C. *Rule 23(b)(3) Class Actions*

Rule 23(b)(3) provides as follows:

(b) Class Action Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(3) the court finds that the questions of law or fact common to members of the class predominate over any questions affecting

144 *Ibidem*, § 4:11, at 55-56.

145 *Ibidem*, § 4:14. On the other hand, where the predominant relief sought on behalf of the class is monetary damages, certification pursuant to Rule 23(b)(2) is improper. See at 82-84.

146 *Ibidem*, § 4:11, at 62.

only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; [and] (D) the difficulties likely to be encountered in the management of a class action.

Rule 23(b)(3) expressly requires that the questions of law or fact common to all class members "predominate" over those applicable only to individual members, and that a class action be "superior" to other available methods for the fair and efficient adjudication of the controversy. Both of these tests have generated a sea of case law, that can only be dipped into briefly here.

a. Predominance

The principal reason for the predominance requirement is a sense of unease as to just when a class action should be used to adjudicate the claims of persons seeking money damages. Where the damages are significant, the attitude has always been that an individual's interest in controlling the presentation of her own claim, in a forum of her choosing, using counsel of her own choice, should seldom be overridden in favor of a classwide remedy. On the other hand, where individual claims are insignificant, stem from a common source, and are readily calculated, the attitude has been that a classwide determination might be the only approach that makes sense. As Judge Kaplan, the former reporter for the Committee that drafted Rule 23, once explained: "The object of the functional tests of Rule 23(b)(3) is to get at the cases where a class action promises important advantages of economy of effort and uniformity of

result without undue dilution of procedural safeguards for members of the class or for the opposing party".[147]

In light of these considerations, the predominance test "asks whether a class suit for the unitary adjudication of common issues is economical and efficient in the context of all the issues of the suit." [148] Thus, cases frequently conclude that common issues predominate "when liability can be determined on a classwide basis, even when there are some individual damage issues".[149]

On the other hand, where a party seeks to certify a nationwide class in which the damages awardable to class members would have to be determined on a state-by-state basis, class status is typically denied.[150]

The predominance test, however, does not involve a comparison of court time needed to adjudicate common issues as opposed to that devoted to individual ones,[151] nor is it a numerical test in which the number of common interests is compared to the number of individual ones.[152] Rather, in finding that common issues predominate over individual ones, courts have characterized the common issues as "possess[ing] the common nucleus of fact for all related questions, have spoken of a common issue as the central or overriding question, or have used similar articulations".[153]

On the other hand, many proposed classes have been denied certification where the plaintiffs have not been able to convince a court that the resolution of common issues will significantly advance the resolution of many individual issues.[154] However, "[c]hallenges based on the statute of limitations, fraudulent concealment, releases, causation, or reliance often are rejected and

147 See Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure" *Harvad Law Review*, (I), 81, 1967, at 356, 389-390.
148 *Op. cit.*, note 2, vol. 2, § 4:25, at 156.
149 *Ibidem*, at 159.
150 *Ibidem*, at 162-165.
151 *Ibidem*, at 171-172.
152 *Ibidem*, at 172.
153 *Ibidem*, at 173 (footnotes omitted).
154 *Ibidem*, § 4:26.

will not bar predominance satisfaction because those issues go to the right of a class member to recover, in contrast to [the] underlying common issues of the defendant's liability."[155]

b. Superiority

a. Comparison Between Methods Of Adjudication. Rule 23(b)(3) requires that classes certified under its provisions provide a superior means for resolving the controversy, as compared to other available methods. What might those other methods be? At least in theory, they might include: (1) allowing individuals to bring or not bring claims on their own; (2) joining a large group of potential class members in a suit against the defendant (a so-called "mass action"); (3) permitting a representative cross section of potential class members to intervene in an action brought by one or more of them; (4) filing a "test case" involving a relatively small number of potential class members, with an agreement that the outcome of that case will be binding on other potential class members, as well as the party opposing the class; or (5) consolidating a number of pending individual or mass actions for certain limited purposes, such as pretrial discovery, and then remanding those separate actions to their original courts of filing for trial.[156]

Before proceeding to a discussion of these alternatives, one critically important point bears mentioning. Although occasional cases exist where courts fail to recognize this fact,[157] the comparison between available means of resolving a controversy mandated by Rule 23(b)(3) *is predicated on the assumption that those other means would be exercised, even if, as a matter of actual fact, they probably would not be*. For example, in deciding whether a class action brought on behalf of a million people who each suffered a loss of $10 as a result of (let us assume) a defen-

155 *Ibidem*, at 241.
156 *Ibidem*, § 4:27, at 245-246.
157 *Ibidem*, § 4:32, at 275 n.15.

dant's clearly wrongful conduct is "superior" to other available means for resolving that controversy, the relevant comparison is between the class action, with all of its burdens and potential benefits, *and other forms of action that would permit the claims of the one million class members to be actually heard and resolved*. It is *not* a comparison between the class action, with all of its burdens and benefits, and the actual likely alternative outcome, which would be either a scattering of individual actions seeking $10 recoveries or, as is far more likely, no litigation at all. No litigation is clearly less burdensome to the judicial system than a class action would be, *but that fact has no relevance to the superiority determination, because "no litigation" is not another method for hearing and resolving the classwide controversy at allmuch less a "superior" one.* Rather, it is only a way to *avoid* hearing and resolving that controversy.[158]

Probably in large part for that very reason, courts have been reluctant to find that any of the five alternative approaches referred to above are superior to the class action device, at least across the great run of cases. Allowing people to bring their own suits, along with the consolidation approach discussed below, are perhaps the most widely accepted alternatives. However, the acceptance of the individual action alternative tends to be restricted to those cases where each potential class member has both a valuable claim and a significant incentive to assert it. It is rejected out of hand in situations where the claims of individual class members are small, and so unlikely to be asserted at all unless prosecuted through a class action mechanism.[159]

Both joinder and intervention are also rejected as not being "superior" to a class action, at least in those cases where the proposed class is sufficiently large to satisfy the numerosity requirement of Rule 23(a)(1).[160] Difficulties in communicating with potential class members and, in cases where their individual claims

158 *Ibidem*, § 4:27, at 248-251.
159 *Ibidem*, § 4:27, at 250-251.
160 *Ibidem*, § 4:27, at 246.

are small, mustering up a sufficient number of them to join together in a mass action of sufficient size to present a sufficient financial incentive to attract competent counsel for the plaintiff class and a credible financial threat to a defendant, are seen as making those methods of adjudicating the claims involved inferior rather than superior to a class action.[161] Indeed, the Supreme Court has explicitly recognized that individual lawsuits, even if augmented by the joinder or intervention of additional claimants, are not realistically available alternatives to a class action for adjudicating numerous small claims. Thus, in *Phillips Petroleum, Inc. v. Shutts*, 472 U.S. 797, 809 (1985), the Court observed that "[c]lass actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually... [Because] this lawsuit involves claims averaging about $100 per plaintiff, most of the plaintiffs would have no realistic day in court if a class action were not available".

The "test case" alternative to a class action does hold out considerable promise in at least some situations. Under applicable law in the United States, the doctrines of res judicata and collateral estoppel could be invoked for the benefit of non-party potential class members, should the test-case plaintiffs prevail in their case. Were that occur, the defendant's liability to those who could show themselves to be similarly situated to the test-case plaintiffs would be established without the need for a trial on that issue.[162]

Nonetheless, two significant barriers to the widespread use of this method exist. The first is its failure to provide sufficient financial incentive to counsel for the test-case plaintiffs to pursue their clients' case, at least where, as is typically true, their clients' claims are not substantial in and of themselves. In that regard, it must be borne in mind that counsel for the test-case plaintiffs would not automatically become counsel of record for the non-test case plaintiffs, while, in a class action context, counsel for

161 *Ibidem*, at 246-247.
162 *Ibidem*, §4:27, at 250; *Ibidem*, vol. 3, § 8:10.

the named plaintiffs virtually always become counsel for the absent class members as well, and thereby entitled to seek a fee that is also based on their share of any recovery obtained for the class as a whole.[163] The second problem presented by the test-case approach that is reduced by the class action alternative is the possibility of collusion between the named plaintiffs and the defendant.[164] In this regard, it should be recalled that the settlement of the test case will be a private matter between the parties. The court will not ordinarily even be informed of the terms of that settlement, and, even if so informed, will not have any power to prevent the settlement from being consummated. By contrast, under Rule 23(e), the settlement of a class action will be the subject of an elaborate fairness hearing, as a result of which the court will become fully aware of its terms, including any payments to be made to the named plaintiffs or their counsel by the defendant. Moreover, the court will have the ultimate say as to whether the settlement is fair, reasonable and adequate and so should be approved. Thus, a collusive class action settlement between the named plaintiffs and the defendant, while not absolutely impossible, is far less likely to occur than in a test case.

Finally, consolidation of cases is a frequently practiced alternative to class actions. In many instances, however, it is used because class certification is inappropriate for other reasons, and so cannot be viewed, at least in those cases, as a genuine alternative to the class action device. Consolidation is practiced most often in mass tort or mass products liability cases, often with significant benefits to all concerned in terms of streamlining the discovery process, avoiding unnecessary repetition and duplication of effort, and the like. Typical cases that are candidates for consolidation involve accidents having mass casualties, such as industrial explosions or fires; allegedly defective products, such as breast implants or asbestos; and allegedly defective or dangerous medicines or chemicals, such as thalidomide, bendectin, or di-

163 *Ibidem*, vol. 2, § 4:27, at 251.
164 *Ibidem*, § 4:27, at 252-254.

oxin. In such settings, plaintiffs are able to achieve many of the benefits of a class action through consolidated pretrial proceedings without having to sacrifice many of the freedoms associated with individual suits, such as choice of counsel and choice of settlement or trial strategies.

b. Superiority Factors Enumerated In Rule 23(b)(3). The first factor mentioned in Rule 23(b)(3), the interest of individual members of the class in controlling their own actions, has not received a good deal of attention in the decided cases. By and large, it is a commonsense factor that varies according to the apparent significance of the claim to the class member, as measured primarily by the gravity of the injury the class member has allegedly sustained.[165] Where it appears that injury is substantial and is likely to result in a substantial recovery by each class member, class certification will tend to be denied. While courts remain free to consider the burden that would be imposed on them by individual actions as a factor favoring class certification, most often that factor plays out through the mechanism of consolidation rather than through the certification of a class.[166] Where the amount of class members' claims varies significantly, however, with only a relatively small number involving substantial damages, the tendency is to certify a class, with the expectation that those having a genuine interest in retaining control over their own claims will be able to protect that interest by opting out of the class.[167]

The second factor mentioned in Rule 23(b)(3) is "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class." This factor's significance in any given case is ambiguous. On the one hand, the presence of other litigation may suggest that class members both wish to control their own destiny and have a sufficient incentive to do so, thus making a class action both unwise and unnecessary.

165 *Ibidem*, § 4:29.
166 *Ibidem*, at 257-258.
167 *Ibidem*, at 256.

On the other hand, the existence of such actions, especially if they are competing mass or class actions, may suggest that a single, comprehensive class action would be very helpful. When several such related actions are pending in different federal courts, the proper procedure to follow is either to transfer and consolidate the different cases in a single court pursuant to 28 U.S.C. § 1404 or transfer the cases for coordinated proceedings pursuant to 28 U.S.C. § 1407.[168]

The third factor mentioned in Rule 23(b)(3) for the court's consideration is "the desirability or undesirability of concentrating the litigation of the claims in the particular forum." This factor does little to advance the superiority analysis on its own, because its focus is more on which court should hear the matter than it is on whether the matter should be heard as a class action at all. Presumably, it could guide a court's decision on whether a class action should be heard by it or by some other federal court where venue over the action exists, based on an analysis of the relative convenience of the different fora to the parties, including the ease of access to relevant evidence and witnesses in each court. However, it also would be of marginal relevance were the court before which the class action is pending to decide that certain plaintiffs would experience substantial inconvenience in litigating their claims before it rather than in some other forum, and that there were no substantial countervailing advantages to either the judicial system or the class as a whole in maintaining the suit as a class action in that location.[169]

By far the most important factor among those listed in Rule 23(b)(3) is the fourth one, "the difficulties likely to be encountered in the management of the class action." Manageability "has been the most hotly contested and the most frequent ground for holding that a class action is not superior" to other means of resolving a particular controversy.[170] However, as stressed earlier

168 *Ibidem*, § 4:30.
169 *Ibidem*, § 4:31.
170 *Ibidem*, § 4:32, at 269.

in this paper, it is not appropriate to view the burdens imposed on the court or the parties by a class action in isolation in making this determination. Rather, "[i]t is only when such difficulties make a class action less fair and efficient than some other method [for resolving the controversy], such as individual intervention or consolidation of individual lawsuits, that a class action is improper" due to a lack of manageability.[171]

Thus, although there are cases to the contrary, most courts reject the claim that a class action would be unmanageable where no effective alternative basis for asserting those claims exists.[172] They recognize that the purpose underlying Rule 23, including conserving judicial resources, providing a forum for small claimants, and deterring illegal activities, also must be considered along with the issue of manageability.[173] In addition, numerous courts have concluded that the difficulty in determining the extent of management difficulties at the outset of litigation, the creativity of counsel that may manifest itself should such difficulties arise, and, ultimately the ability of the court to decertify the class should management problems prove insurmountable, all argue in favor of class certification despite legitimate management-related concerns.[174]

The manageability contentions that are most frequently raised "relate to the complexity and numerousness of individual issues, class size, geographical scope of the class, [the existence of supposedly] compulsory counterclaims, problems in giving class notice, complications from exclusion of class members, and lack of benefit to class members".[175] While the proponents of

171 *Ibidem* (citing *Reiter v. Sonotone Corp*., 442 U.S. 330, 346 (1979), and numerous other authorities).

172 *Ibidem*, § 4:32, at 275-280.

173 *Ibidem*, at 277-278. For a fuller discussion of the impact of these considerations on the question of manageability, *idem*, §§ 4:39 (achieving judicial economy), 4:40 (providing forum for small or uninformed claimants), 4:41 (promoting effective enforcement of substantive law).

174 *Ibidem*, at 278.

175 *Ibidem*, at 283. For a detailed discussion of each of these factors, *idem*, §§ 4:33 (class size and geographical scope), 4:34 (existence of counterclaims), 4:35 (class notice

class actions have proposed many ingenious means of taming the apparently unmanageable class action, courts are understandably careful to ensure that those methods do not force the party opposing to surrender any procedural rights or substantive defenses that it might have to the plaintiffs' claims. Thus, for example, where a court concludes that the claims of plaintiffs in a proposed nationwide class action will have to be resolved under the laws of their fifty states of residence, or that they will have to be determined through a series of mini-trials, or that the determination of class members' damages will involve inordinately complex accounting procedures, the requested class actions are likely to be found to be unmanageable and certification denied.[176] Similarly, courts have been cautious not to certify otherwise unmanageable classes in the expectation that the party opposing the class would surrender to the class' claims out of sheer terror at its financial exposure. Thus, in one suit, where counsel for plaintiff argued that a proposed class action would be manageable because, if a class were certified, the defendant would probably settle, the court properly responded that it "did not view (that possibility) as an appropriate measure of manageability".[177]

Before rejecting certification on lack-of-manageability grounds, however, courts frequently explore the feasibility of a variety of innovative management techniques that might surmount them. Among those techniques are: (1) conditional class certification, pursuant to Rule 23(c)(1); (2) limited class certification, pursuant to Rule 23(c)(4); (3) bifurcated trials, in which liability issues are resolved in a class action format at the initial stage, and damages are resolved in an individualized format in a second stage; (4) initial proof of damages on a classwide basis, with individual damages determined pursuant to formulas or

difficulties), 4:36 (lack of benefit to class members), and 4:37 (complications from exclusion of class members).

176 *Ibidem*, § 4:32, at 285-287 (citing and discussing authorities).

177 *Ibidem*, at 285, quoting the court of appeals in *Andrews v. American Tel. & Tel. Co.*, 95 F.3d 1014, 1025 n. 6 (11th Cir. 1996).

damages grids based on a variety of variables; (5) the use of magistrates or special masters to resolve individual damages issues once liability is determined; and (6) fluid class recoveries, in which, after classwide damages are determined, individual damages are awarded to persons presently affected by the defendant's practices, in lieu of undertaking an effort to locate and award damages to the historical victims of past misconduct, on the theory that rough justice will be done.[178] When it appears that those devices will alleviate the management concerns raised by the party opposing the class, they will be employed in lieu of denying class certification.

III. Conclusion

The United States has had a considerable amount of experience with procedural devices designed to facilitate the processing of claims of large groups of people, while avoiding abridging the rights of either the plaintiff group or the party opposing it. We have had some successes, but we have had our share of failures too. I hope that this summary discussion of the United States' experience will be of some assistance to other countries as they continue to grapple with similar problems.

178 *Ibidem*, § 4:32, at 287-288 (citing authorities).