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Once More Unto the Breach?

Richard L. Marcus

UC Hastings College of the Law, marcusr@uchastings.edu

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ONCE MORE UNTO THE BREACH?

FURTHER REFORMS CONSIDERED FOR RULE 23

by Richard Marcus

EVEN HENRY V PROBABLY COULD NOT EXHORT THE RULE MAKERS TO ACTION,¹ but reported needs of the procedural system may do so. Surely the class-action rule is one of the most important in the rulebook. Equally surely, it has vocal supporters and opponents. Indeed, it has even attracted international detractors.² Changing the rule therefore is a project that must be approached carefully and deliberately. Only after much thought should change proceed. Only after further evaluation, and public comment, should a change be adopted. But

failing to modify the rule to adapt to evolving litigation conditions might produce greater problems than undertaking change.

The Advisory Committee on Civil Rules has formed a subcommittee to consider whether constructive changes can be made to Rule 23, and this article is designed to introduce the current discussions and invite readers to make suggestions about them.³ This project is in its formative stages, and it seems singularly appropriate for this journal to include a report about the current orientation. The subcommittee has already identified issues that seem to

warrant attention, as explained below. During 2015, work will move forward, but the earliest that draft amendments could be published for comment would be the summer of 2016. This article serves as something of an invitation for reactions to the issues described below and also to suggest additional issues that may warrant attention. Because the work is moving forward, the earlier comments are received the more helpful they likely will be.

It should be clear from the outset, however, that there is no assurance that any change will actually be formally proposed. And as the history ▶

of past amendment proposals shows, a formal proposal by no means leads automatically to an actual amendment. So it makes sense to begin with the rulemaking background and then introduce the ideas now under consideration.

THE PRE-MODERN CLASS ACTION

The 1966 amendment of Rule 23 was the great watershed between the modern rule and the “pre-modern” class action. As Professor Stephen Yeazell has demonstrated,⁴ the modern class action is a lineal descendent of the medieval group litigation in England. In England, that sort of litigation was often an in-court expression of an existing social reality. Thus, the citizens of the Village of X might seek relief collectively against the lord. In somewhat the same vein, the American Supreme Court in 1853 recognized a class action on behalf of some 1500 travelling preachers of the southern branch of the Methodist Episcopal Church against 3800 travelling preachers of the northern branch of the church in a dispute over church property resulting from disputes about slavery.⁵

Although there was an Equity Rule that dealt with class actions, there were not many cases. Nonetheless, Rule 23 was included in the original Federal Rules of Civil Procedure to carry forward the old equity practice.⁶ Original Rule 23 did so by embracing “jural relationships” to distinguish among three types of class actions — the “true” class action, involving a “joint” or “common” right, as in the case involving the Methodist Episcopal preachers, a “hybrid” class action, where the rights were “several” rather than “joint,” but the action sought an adjudication regarding specific property. Finally, there was a “spurious” class action, involving a right that was “several” but presenting a common question and seeking common relief. In such instances, class members could

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elect to join the case, but unless they did the decree would not bind them.

Many were unhappy with the operation of original Rule 23. Professor Zechariah Chaffee, for example, criticized it in 1950 on the ground that he had as much trouble telling a “common” from a “several” right as telling whether some ties are green or blue. On balance, he concluded, “the situation is so tangled and bewildering that I sometimes wonder whether the world would be any the worse off if the class-suit device had been left buried in the learned obscurity of Calvert on Parties to Suits in Equity.”⁷

THE 1966 MAKEOVER AND ITS EFFECTS

Unhappiness with the original version of Rule 23 contributed to the decision to develop a revised rule in the 1960s. That effort produced the 1966 amendments, which abandoned the focus of the original rule on the sorts of legal categories that frustrated Professor Chaffee and emphasized a

more functional attitude.⁸ Although there was some controversy within the Advisory Committee about the proposed changes, it is not clear now whether the drafters foresaw — or could have foreseen — the variety of ways in which the rule would be used in subsequent decades.⁹ As Professor Arthur Miller, who was present during the deliberations leading up to the 1966 amendments, explained:

The Committee obviously could not predict the great growth in complicated federal and state substantive law that would take place in such fields as race, gender, disability, and age discrimination; consumer protection; fraud; products liability; environmental protection; and pension litigation, let alone the exponential increase in class actions and multiparty/multi-claim practice that would flow from the expansion of those legal subjects.¹⁰

But it does seem that the drafters soon realized that new Rule 23 could have major importance, and that changing it could raise major issues. So they resolved to refrain from considering further changes for a quarter century thereafter.¹¹

Almost immediately, the rule was embraced by some and used in a significant number of cases. As Professor Miller (soon to become Reporter to the Advisory Committee) explained in 1979, some classes were certified on the basis of “rather conclusory assertions of compliance with Rule 23(a) and (b),” and “the procedure fell victim to overuse by its champions and misuse by some who sought to exploit it for reasons external to the merits of the case.”¹² Decisions curtailing use of class actions followed. By the late 1980s, some were predicting that the class action would soon pass from the scene.¹³ But at the same time, concern with mass torts prompted some to try to adapt class actions so they could provide solutions to those problems. If it had a near-death experience

in the late 1980s, the class action surely returned in the 1990s, and the rulemakers focused on it again.

THE 1996 AMENDMENT PACKAGE

In March 1991, the Judicial Conference approved a recommendation of its Ad Hoc Committee on Asbestos Litigation and requested that the Advisory Committee study whether changes to Rule 23 should be made to accommodate the needs of mass tort litigation.¹⁴ Beginning in 1991, the Advisory Committee ended its quarter-century abstinence and resumed consideration of Rule 23. At first, there was some consideration of a comprehensive rethinking of the rule like the one done in 1966.

But the actual proposals that emerged were less aggressive. After five years of work, the Advisory Committee produced a preliminary draft of proposed amendments to the rule.¹⁵ Rather than fundamentally rework the 1966 format, the package included several recommended revisions of that format:

(1) Revising the list of criteria for certifying a class under Rule 23(b)(3) to include, among others, the “maturity” of related litigation and consideration “whether the probable relief to individual class members justifies the costs and burdens of class litigation.”¹⁶

(2) Adding a new Rule 23(b)(4), which would permit the parties to submit a proposed settlement of a Rule 23(b)(3) class action to the court for approval and permit the court to approve it as a binding class-action settlement even though the requirements of Rule 23(b)(3) might not be met for purposes of trial.¹⁷ This proposal was prompted in part by rulings of the Third Circuit that class actions could not be certified for settlement unless they could also be certified for trial.

(3) Modifying the timing requirement for certification decisions under Rule 23(c) so that it directed that the deci-

sion be made “when practicable” rather than “as soon as practicable.”¹⁸

(4) Modifying the settlement approval provisions of Rule 23(e) to require the court to hold a hearing on whether to approve a proposed class settlement.¹⁹

(5) Adding Rule 23(f), permitting immediate appellate review of a decision whether to certify a class, at the discretion of the court of appeals.²⁰

There was a great deal of public comment on these proposals. Much of it was critical. Eventually Judge Paul Niemeyer, then Chair of the Advisory Committee, had the commentary bound as a four-volume set of records on this rule-amendment episode. Meanwhile, other events moved forward. In particular, the Supreme Court granted certiorari in *Amchem Products, Inc. v. Windsor*²¹ and decided the case, approving some differences in certification standards for settlement and litigation classes. After reviewing the public commentary and considering the possible impact of the *Amchem* decision, the Advisory Committee decided to recommend adoption only of the addition of new Rule 23(f), and that new rule provision went into effect on Dec. 1, 1998. This history may be cloudy or unknown to many who are concerned about the contemporary operation of class actions, but it is relevant to the question whether further changes to the rule should be pursued now.

THE 2003 AMENDMENTS

Beginning in 2000, the Advisory Committee turned its attention to a somewhat different sort of Rule 23 amendments from the ones included in the 1996 package — procedural revision of the certification and settlement-approval process rather than substantive revision of the certification criteria.²² As in the 1991-96 period, this consideration of options included review of an extensive array of possibilities and gradual winnowing of the list of possible amendment ideas.

Unlike the 1996-98 experience, in this amendment package most of the proposed changes went forward and became effective in 2003.²³ Because these rule changes were adopted, they are likely more familiar to contemporary readers than the proposals that were not adopted, so a brief recounting should suffice:

(1) *Timing and Content of Certification*

Decision: Rule 23(c) was amended to direct that the certification decision be made “[a]t an early practicable time,” and that the certification order define the class, and the class claims and defenses. It also was amended to direct that the notice of certification to Rule 23(b)(3) classes “clearly and concisely state, in plain, easily understood language” at least seven specific things that had not all been spelled out in the prior rule.

(2) *Settlement Approval Criteria and Procedures:* Until 2003, Rule 23(e) was almost entirely devoid of specifics on *how* a court was to decide whether to approve a proposed class-action settlement. Amended Rule 23(e) contains a standard for judicial approval — that the proposed settlement is “fair, reasonable, and adequate.” It also adds a number of specifics — that the parties must identify any “side agreements” made in connection with the proposed settlement, that any class member may object, but may withdraw an objection only with the court’s approval, and that the court may refuse to approve the settlement unless a second opt-out is permitted in a Rule 23(b)(3) class action if the original time to opt out has expired.

(3) *Class Counsel:* It had long been recognized that class counsel play an extremely prominent role in the conduct and success of class actions. But there were no provisions in the rule explicitly about counsel, although courts had considered their capacity under the Rule 23(a)(4) adequacy prong. In 2003, Rule 23(g) was added, providing a standard for appointment,

requiring consideration of four matters and authorizing consideration of any other pertinent matters, and permitting appointment of interim class counsel before class certification. The rule also articulates the duty of class counsel to “fairly and adequately represent the interests of the class.”

(4) *Attorney’s Fees*: By 2003, it had also long been recognized that attorney’s fee awards played an important role in the functioning and fairness of class actions in general and class-action settlements in particular. But as with class counsel, there had been no rule provision addressed to this important issue. Rule 23(h) was added in 2003 to guide these decisions. Among other things, it requires that class members be given notice of the motion for attorney’s fees, provides that a class member may object, and directs that the court must hold a hearing and make findings of fact and state conclusions of law in connection with its resolution of fee award matters.

In sum, 2003 could be viewed as a “procedural” watershed for Rule 23 in that an array of specifics about how class-action matters should be handled were added to the rule. Often the rule provisions built on prior judicial experience with class actions. Certainly the amendments were not designed primarily to change judicial practice.

TOPICS CURRENTLY UNDER CONSIDERATION

Many possible subjects for Rule 23 amendments have been examined over the years, but few rule changes have actually been adopted. Concerns about the use of class actions, and the smooth functioning of these cases, continue. Moreover, the law keeps evolving. The Supreme Court has decided a remarkable number of class-action cases in recent years.²⁴ In 2005, Congress passed the Class Action Fairness Act. In the wake of these developments, some believe class actions are in decline,²⁵ but others seem to see them as a

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threat to the economy. In some quarters, concerns about predatory class settlement objectors have emerged.²⁶ Meanwhile, more than a decade has passed since the 2003 amendments to Rule 23 went into effect.

Altogether, these developments — and others — suggested that it would make sense for the Advisory Committee to return its attention to Rule 23. In 2011, the Advisory Committee appointed a Rule 23 Subcommittee. In 2011-12, it made a preliminary survey of possible issues for rule reform. Beginning in early 2014, the Subcommittee returned to its list and reconsidered the importance of the items originally identified.²⁷

The experience of the last two decades shows that reforming Rule 23 is a challenging and time-consuming process. The process of winnowing (and expanding) the list of topics to address as possible candidates for rule changes is ongoing and almost certain to evolve. But enough winnowing has already occurred to make it useful to identify the candidates that presently seem to be “front-burner” subjects:

(1) *Refining Settlement Review Criteria*: Only since 2003 has the rule contained any specifics about how judges should evaluate proposed class settlements. Now it says that the courts should focus on whether a proposed settlement is “fair, reasonable, and adequate.”²⁸ That set of criteria was largely based on existing case law.

In the view of some, that existing case law has shortcomings. For example, the American Law Institute Principles of Aggregate Litigation report:

The current case law on the criteria for evaluating settlements is in disarray. Courts articulate a wide range of factors to consider, but rarely discuss the significance to be given to each factor, let alone why a particular factor is probative. . . .

Many of these criteria may have questionable probative value in various circumstances. For instance, although a court might give weight to the fact that counsel for the class or the defendant favors the settlement, the court should keep in mind that the lawyers who negotiated the settlement will rarely offer anything less than a strong favorable endorsement.²⁹

To remedy this problem, the ALI Principles propose that a court approving a proposed settlement must make findings on several “mandatory” topics:

- (1) the class representatives and class counsel have been and currently are adequately representing the class;
- (2) the relief afforded to the class (taking into account any ancillary agreement that may be part of the settlement) is fair and reasonable given the costs, risks, probability of success, and delays of trial and appeal;
- (3) class members are treated equitably (relative to each other) based on their facts and circumstances and are not disadvantaged by the settlement considered as a whole; and
- (4) the settlement was negotiated at

arm's length and was not the product of collusion.³⁰

These Principles do not make any other consideration irrelevant to settlement approval, but do direct that a court may not approve a settlement unless it can make the findings listed above.³¹

As it moves forward, the Advisory Committee will need to consider whether more precise criteria would improve the handling of settlement review — either by ensuring that certain essential matters are always addressed or assuring that other inappropriate matters are not emphasized. It will also need to consider whether there is a genuine need for a rule that attempts to do these things, and whether adopting such a rule could produce negative consequences.

(2) *Settlement Class Certification:*

In 1996, a preliminary draft of a new Rule 23(b)(4) was published to enable certification only for settlement purposes of a Rule 23(b)(3) class action that could not meet the requirements for litigation certification. Some argue that the certification requirements for litigation should not be relaxed at all for settlement certification.³² Clearly the Supreme Court's *Amchem* decision says that there are differences between certifying a settlement and a litigation class. But the Court's opinion also said that the Rule 23(b)(3) predominance requirement should apply in the settlement-review setting. In partial dissent, Justice Stephen Breyer said he was bewildered by how the predominance prong of the rule should work when settlement was proposed, given that the issues before the court were fairness, reasonableness, and adequacy.³³

Since 1997, an abiding question has existed about whether the *Amchem* standards for settlement certification unduly cramped settlement opportunities. Some see the increased resort to MDL processes as proving that settling class actions has become too difficult.³⁴ If that is a troubling trend, is it time

ON THE FRONT BURNER

Components of Rule 23 currently under consideration for reform include:

- Settlement review criteria
- Settlement class certification
- Cy pres provisions
- The role of objectors
- Mootness and Rule 68 offers of judgment
- Issues classes
- Notice to class members

to revisit something like the 1996 Rule 23(b)(4) proposal for a settlement-certification rule provision?

The ALI Principles of Aggregate Litigation propose that settlement certification depend on satisfying the standards for approval of the proposed settlement and that (1) "significant" common issues exist; (2) the class is sufficiently numerous to warrant classwide treatment; and (3) the class definition is sufficient to ascertain who is included in the class.³⁵ The drafters explain this proposal:

For many years, courts and commentators have debated whether the strict requirements for certifying a class action for litigation purposes should apply in the context of a case in which certification is sought solely for purposes of achieving a classwide settlement. ... Some states ... have

adopted rules that exempt settlement classes from the stringent requirements for certifying a litigation class. This Section does not require a settlement class to satisfy all of the same criteria as a class certified for purposes of litigation. For example, settlement classes should not be subject to a rigorous evidentiary showing that, in a contested trial, common issues would outweigh individualized issues. So long as there is sufficient commonality to establish the case is generally cohesive, the propriety of a settlement need not depend on satisfaction of a "predominance" requirement.³⁶

Is this proposal a promising response to a real problem? It does seem contrary to the language in the *Amchem* opinion about the role of the predominance factor in the settlement context, at least in a Rule 23(b)(3) class action. Its emphasis on the importance of finding the settlement proposal satisfactory appears at a tension with the *Amchem* Court's view that Rule 23(e) review is no substitute for scrutiny under Rule 23(a) and (b).³⁷ Would that be an appropriate change in the rule? Or would it be too broad an invitation to courts to implement what the *Amchem* Court called "a grand-scale compensation scheme," which it said was "a matter for legislative consideration."³⁸ Would it be preferable instead to weaken or remove predominance from the Rule 23(b)(3) calculus rather than superseding more of Rules 23(a) and (b) in instances in which the court is satisfied with the proposed settlement under the standards of Rule 23(e)?

The 1996 Rule 23(b)(4) proposal was limited to settlement certification under Rule 23(b)(3). If more aggressive action is warranted to facilitate settlement certification in those cases, should it be extended to classes certified under Rules 23(b)(1) and (2)? As to "mandatory" class certification such as that authorized in "limited fund" situations covered by Rule 23(b)(1)(B), ▶

it may be argued that predominance of common questions has no role to play in deciding whether class-action treatment is warranted, and that this treatment is not suitable for purposes of settlement in situations in which it would not be justified for purposes of full litigation.³⁹ But it may be that Rule 23(b)(2) class actions for injunctive relief are peculiarly suited to settlement class certification, as an injunction limited to some in the class seems inherently inadequate, and Rule 23(b)(1)(A) class certification may raise similar issues. So a related issue is whether, should some provision for settlement class certification go forward, it should include cases relying on Rule 23(b)(1) or (2).

(3) *Cy Pres Provisions*: *Cy pres* provisions in class-action settlements have provoked much interest and also produced some uneasiness among judges. Chief Justice John Roberts recently observed, while concurring in denial of certiorari in the case before the Court, that the Supreme Court “may need to clarify the limits on the use of such remedies.”⁴⁰ Perhaps a clarifying rule provision would be an alternative route for dealing with the topic.

The drafters of the ALI Principles of Aggregate Litigation included a section about *cy pres* treatment among their proposals.⁴¹ The proposal seeks to limit use of this technique, and would direct that if class members can be identified with reasonable effort and the amount of money is sufficient to make individual distributions to them economically viable, distributions must be made to them, not to others.⁴² Recognizing that after such distributions there is often a residue of settlement funds, the proposal further directs that this residue must be also distributed to class members unless the amounts involved would be too small to make individual distributions economically viable.⁴³ Only when individual distributions to class members are not economically viable may the court authorize distributions to others.

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The “premise” of the ALI proposal is that the settlement funds are “presumptively the property of the class members.”⁴⁴ So distributing the money to others should only be considered when delivering the money to the class is not economically viable. Returning the residue to the defendant (a “reversion”) is viewed as unwise because it “would undermine the deterrence function of class actions and the underlying substantive-law basis of the recovery by rewarding the alleged wrongdoer simply because distribution to the class would not be viable.”⁴⁵

This ALI proposal has been adopted by some courts.⁴⁶ But the rule currently says nothing about *cy pres* arrangements. Should it be revised to address

that possibility? If so, should that be limited to settlement class actions? For some time, a related notion of “fluid recovery” was urged in some cases,⁴⁷ and it may be that such a provision could be adopted in a litigated class action in which some class members could not be identified.

Many questions might arise were such a rule provision under consideration. Should the availability of such measures depend on a legal basis from outside the rules? The law of some states may explicitly authorize *cy pres* measures.⁴⁸ If distribution of a residue to someone other than class members is contemplated, should the class be entitled to notice of this possibility? To whom should the court be authorized to distribute the funds? Often the proposal is that the money be paid to individuals or organizations that further the interests asserted in the underlying suit. But in some instances it might be argued that remaining funds could appropriately be delivered to “public interest” organizations whatever their particular focus.⁴⁹ Would that be a desirable feature of a rule provision?

(4) *The Role of Objectors*: Class members are entitled to notice of a proposed settlement⁵⁰ and to object to the proposal.⁵¹ If they object, “the objection may be withdrawn only with the court’s approval.”⁵² At least on occasion, there seem to be concerns that objectors seek to extract tribute by delaying consummation of the proposed settlement rather than raising genuine objections to the settlement proposal.⁵³ How often this behavior occurs is uncertain. But there certainly are examples of objectors who make genuine objections to the merits of proposed settlements rather than seeking to profit from obstruction.

One goal of the provision requiring court approval for withdrawing an objection was to enable the court to exercise some control over the behavior of objectors. It is uncertain whether that provision achieved its objective.



In part, it may be that some objectors escape it by noticing an appeal when the court approves the settlement despite their objections, and then withdrawing their appeal for a payoff. Given the amount of time it takes to dispose of an appeal — compared to the time needed to review and approve a proposed settlement — it may be that this tactic is effective.

Some have urged that district courts counter this sort of behavior by imposing a bond requirement on objectors who appeal. But it seems difficult to support such measures under current law, which permits only limited recovery of costs on appeal.⁵⁴ It may be that rule revisions to the Appellate and Civil Rules might create a requirement of court approval for withdrawing an appeal once filed (analogous to the existing requirement of approval to withdraw an objection in the district court), but it may be that such a provision should enable the district judge (more familiar with the case) to pass on the request to withdraw the appeal, as the district judge can already pass on the request to withdraw an objection. It might also be that requiring some disclosure of “side agreements” in connection with withdrawal of an objection or appeal comparable to that required of the settling parties⁵⁵ would be desirable. But such provisions might themselves introduce further delays in situations in which delay should be avoided, and might also call for delicate treatment of the respective roles of district judges and courts of appeals.

So there remain questions about whether problems caused by objectors justify addressing such complications, and how rule changes could best address these problems if they are serious enough.

(5) *Mootness and Rule 68 Offers of Judgment*: It has long been true that a defendant could attempt to moot a proposed class action by offering the named plaintiff an amount that exceeded his or her individual prospec-

tive recovery.⁵⁶ Until 2003, Rule 23(e) was interpreted to require court approval for a dismissal of any action filed as a class action.⁵⁷ As amended in 2003, however, the rule now requires court approval only for the settlement of a “certified class.”⁵⁸ Although a proposal for a classwide settlement would therefore require court approval, a proposal for an “individual” settlement would not. And in 2013 the Supreme Court held (by a 5-4 margin) that a Rule 68 offer could moot a proposed collective action under the Fair Labor Standards Act (FLSA), although it said that class actions are different.⁵⁹

For defendants facing claimants with small individual claims that they assert on behalf of potentially large putative classes, making a Rule 68 offer to moot the case may be an inviting method to pick off a putative class action before it becomes a full-fledged class action. In the Seventh Circuit, it seems that class-action plaintiffs who seek to forestall that sort of thing must file “out-of-the-chute” class-certification motions.⁶⁰ But judges in other circuits have not welcomed such “out-of-the-chute” class-certification motions. Consider the views of a district judge in Alabama asked to defer ruling on such a premature certification motion:

[T]his might be compelling if this Court were situated in the Seventh Circuit, if the law of the Seventh Circuit governed this proceeding, or if the Seventh Circuit approach constituted either a majority rule or one as to which the Eleventh Circuit had expressed favor. This is not the case. In fact, the Seventh Circuit acknowledged the uniqueness of its formulation of the mootness rule in pick-off situations⁶¹

Whether these issues are serious enough to justify a rule amendment is not certain. At least some courts of appeals seem unreceptive to arguments based on the Supreme Court’s FLSA decision.⁶² If rule amendments are

worth considering to address the “pick-off” problem, it might be debated what they should be. One possibility would be to restore to Rule 23(e) the requirement previously recognized that even individual settlements require court approval. Another might be to change Rule 68 to make it inapplicable to class actions (and derivative actions) since the court-approval requirement would prevent using the rule to settle with the class. But Rule 68 does not itself speak to mootness; indeed, it precludes filing the offer in court unless it is accepted and then directs immediate entry of judgment, something ill-suited to the class-action settlement setting. It may be that these problems will cure themselves in the relatively near future.

(6) *Issues Classes*: Rule 23(c)(4) says that “[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues.” Rule 23(b)(3), on the other hand, says that a class action may be certified only when common issues predominate. For some time, it appeared that a conflict existed among the courts of appeals on whether Rule 23(b)(3) classes could be certified under Rule 23(c)(4) without satisfying the predominance requirement. The Fifth Circuit declared in a footnote in its *Castano* decision: “A district court cannot manufacture predominance through the nimble use of subdivision (c)(4).”⁶³ The Second Circuit declared in 2006 that it disagreed, and that (c)(4) may be used to certify a class as to some but not all issues.⁶⁴ More recently, some commentators have argued that actually the Fifth Circuit has embraced issue classes.⁶⁵

Whether this is an occasion for seriously considering a rule change is uncertain. On the one hand, one might say there is almost an inherent tension between Rule 23(b)(3) and (c)(4). On the other hand, if the courts have reached agreement on how to implement these rule provisions as currently written, it would seem a rule change

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would be worth considering only to change that treatment. A rule change could attempt to clarify either: (a) that (c)(4) may only be used for a class action that already satisfies Rules 23(a) and (b); or (b) that despite the predominance requirement of (b)(3) a class could be certified under (c)(4) “when appropriate.” In either event, one might favor addressing something that may be uncertain under the current rule — what does the court do after resolving the issue for which the class was certified? It is unclear what sort of judgment would then be appropriate, but not obvious how the court would be expected to resolve all other issues involving individual class members so that a full judgment could be entered.

The ALI Aggregate Litigation Principles generally favor discretion to employ issue classes,⁶⁶ but add that interlocutory appeals should be authorized for the district court’s decision of those common issues.⁶⁷ Current Rule 23 does not have such a provision. So another possibility — if the rule should be amended to facilitate the use of issues classes, and possibly even if current practice adequately fosters use of (c)(4) certification — might be a rule amendment to provide for immediate appellate review. But an abiding question is whether any amendments should be seriously considered to deal with issues classes.

(7) *Notice to Class Members*: The Supreme Court’s 1974 *Eisen* decision⁶⁸ declared that the rule requires notice by first class mail to all Rule 23(b)

(3) class members who can be identified with reasonable effort. Except in the settlement context, however, the rule calls for no notice at all to class members in Rule 23(b)(1) or (b)(2) classes. In 2001, a proposal to require some efforts to give notice of class certification in (b)(1) and (b)(2) class actions was published for comment. It was not included in the eventual amendment package, however. During the public comment period, opposition was expressed on the ground that the cost of giving notice would deter lawyers from taking public interest cases.

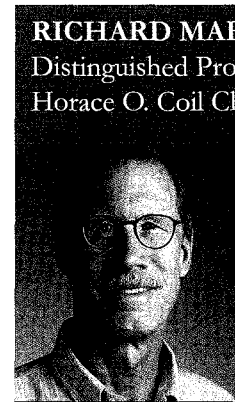
Viewed from the 21st century perspective, a legal requirement for “snail mail” notice seems antique. Certainly most Americans rely heavily on other means of communication that are faster and cheaper. Indeed, it may be that the concerns expressed in 2001 about the cost of notice in (b)(1) and (b)(2) cases might no longer be troubling. The notion that first-class mail must still be used surely does look troubling, if it is still seriously embraced.

So the questions include: (a) whether the rule should be changed on manner of giving notice; (b) whether notice requirements should be broadened to include all class actions; and (c) what substitute methods of notice should be accepted or adopted. In addition, such issues might include consideration of online methods for class members to use to submit claims, either to a settlement fund or in connection with an adjudication of liability (perhaps in an issues class).

CONCLUSION

Nearly 40 years ago, Professor Abram Chayes observed: “I think it unlikely that the class action will ever be taught to behave in accordance with the precepts of the traditional model of litigation.”⁶⁹ It may be that the Advisory Committee’s subsequent experience with Rule 23 somewhat confirms that prediction. But that does

not mean that rule changes should or will emerge to address the issues listed above. In addressing that question, the Advisory Committee continues to seek guidance, and that guidance could include identifying other issues that might profitably be addressed by changing the rule. Although Henry V was exhorting his troops to do battle,⁷⁰ the Advisory Committee is only interested in making improvements in the rules that will produce improvements in practice. The question whether there are promising avenues for rule amendments — either along the lines sketched above or otherwise — remains very much open.



RICHARD MARCUS is the Distinguished Professor of Law, Horace O. Coil Chair in Litigation, at the University of California-Hastings College of Law. He is a lead author of the West case-books *Complex Litigation* (5th ed. 2010) and *Civil Procedure: A Modern Approach* (6th ed. 2013). He is also an author of several volumes of the *Federal Practice & Procedure* treatise (known as Wright & Miller) and serves on a variety of committees dealing with practice issues. Since 1996, he has served as Associate Reporter to the Advisory Committee on Civil Rules of the Judicial Conference of the United States.

- ¹ See WILLIAM SHAKESPEARE, *HENRY V*, act 5, sc. 1, 1-2 (Harfleur, France): “Once more unto the breach, dear friends, once more/Or close the wall up with our English dead.”
- ² Examples abound. For example, Professor Hodges of Oxford began his study of European techniques of group litigation by emphasizing that other countries need not depend on “a US-style court-based mechanism” to afford group relief. CHRISTOPHER HODGES, *THE REFORM OF CLASS AND REPRESENTATIVE ACTIONS IN EUROPEAN LEGAL SYSTEMS I* (2008). Somewhat similarly, Professor Walker of Osgoode Hall in Canada introduced a panel on group litigation procedures at a conference in Moscow by suggesting that “everyone, at least outside the United States, seems also to agree that they do not want to adopt US-style class actions in their systems.” JANET WALKER, “General Report,” in *CIVIL PROCEDURE IN CROSS-CULTURAL DIALOGUE: EURASIA CONTEXT* 413, 414 (D. Maleshin, ed. 2012).
- ³ Since 1996, I have served as Associate Reporter of the Advisory Committee on Civil Rules, and I presently serve as Reporter to the Rule 23 Subcommittee of that body. This article reports about current discussions of class-action issues. Although it reflects discussions that have occurred and are ongoing, it is not in any way an official statement of the Advisory Committee and does not represent the thoughts of anyone but the author.
- ⁴ See generally STEPHEN YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987).
- ⁵ See *Smith v. Swormstedt*, 57 U.S. 288 (1853).
- ⁶ The Committee Note accompanying original Rule 23 said that the rule was a “substantial restatement of Equity Rule 38 (Representatives of Class) as that rule has been construed.” FED. R. CIV. P. 23(a) COMMITTEE NOTE (1937).
- ⁷ ZECHARIAH CHAFFEE, *SOME PROBLEMS OF EQUITY* 257 (1950).
- ⁸ Amendments were made to the other joinder rules at the same time, and the various amendments invoked similar terms and considerations. But those other rules (Rules 13, 14, 19, 20, and 24) have not produced concerns of the magnitude that Rule 23 has produced.
- ⁹ For a very informative analysis of the rule from its origins in 1938, see JOHN RABIEJ, *The Making of Class Action Rule 23 — What Were We Thinking?*, 24 MISS. C. L. REV. 323 (2005). The discussion of the 1966 amendments is at pp. 333-45.
- ¹⁰ ARTHUR MILLER, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 295 (2014).
- ¹¹ See RABIEJ, *supra* note 9, at 328 (referring to “a self-imposed moratorium on further amendments” from 1966 to 1991).
- ¹² ARTHUR MILLER, *Of Frankenstein Monsters, and Shining Knights: Myth, Reality, and the “Class Action Problem,”* 92 HARV. L. REV. 664, 678 (1979).
- ¹³ See DOUGLAS MARTIN, *The Rise and Fall of the Class-Action Lawsuit*, N.Y. TIMES, Jan. 8, 1988 (reporting that “class actions had their day in the sun and kind of petered out”).
- ¹⁴ Memorandum from HON. PATRICK HIGGINBOTHAM, Chair, Advisory Committee on Civil Rules, to HON. ALICEMARIE STOTLER, Chair, Standing Committee on the Rules of Practice and Procedure of the Judicial Conference of the U.S., PROPOSED RULES, reprinted in 167 F.R.D. 535, 536 (1996).
- ¹⁵ See *id.* at 559-60.
- ¹⁶ *Id.* at 559.
- ¹⁷ *Id.*
- ¹⁸ *Id.*
- ¹⁹ *Id.* at 560.
- ²⁰ *Id.*
- ²¹ 521 U.S. 591 (1997).
- ²² See RABIEJ, *supra* note 9, at 369 (“the 2003 amendments were procedural in nature, often embodying the ‘best practices’ of the courts”).
- ²³ This is not meant to say that all of the draft amendment ideas published for comment in 2001 were adopted, or that those that were remained exactly as they had been presented in the original package of preliminary drafts of amendments. Several were revised after the public comment period.
- ²⁴ For an examination of some of these decisions, see MARY KAY KANE, *The Supreme Court’s Recent Class Action Jurisprudence: Gazing Into a Crystal Ball*, 16 LEWIS & CLARK L. REV. 1015 (2012).
- ²⁵ See ROBERT KLONOFF, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013).
- ²⁶ See, e.g., JOHN LOPATKA & D. BROOKS SMITH, *Class Action Professional Objectors: What To Do About Them?*, 39 FLA. ST. U. L. REV. 865 (2012); BRIAN FITZPATRICK, *The End of Objector Blackmail*, 62 VAND. L. REV. 1623 (2009).
- ²⁷ For those interested, details on the various topics that have been considered can be found in the reports of the Rule 23 Subcommittee to the Advisory Committee contained in the agenda materials for the March 2012, November 2014, and April 2015 meetings. Those agenda materials are available on the www.uscourts.gov website via the link for Rules and Archives of the Rules Committees.
- ²⁸ FED. R. CIV. P. 23(e)(2).
- ²⁹ A.L.I., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.05, comment a (2010).
- ³⁰ *Id.* § 3.05(a).
- ³¹ See *id.* § 3.05(b).
- ³² See HOWARD ERICHSON, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951, 987-88 (2014) (arguing that the settlement class device should be abandoned).
- ³³ See *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 634 (1997) (Breyer, J., partially dissenting) (“Nor do I understand how one could decide whether common questions ‘predominate’ in the abstract — without looking at what is likely to be at issue in the proceedings that will ensure, namely, the settlement”).
- ³⁴ See, e.g., EDWARD SHERMAN, *The MDL Model for Resolving Complex Litigation if a Class Action is Not Possible*, 82 TULANE L. REV. 2205, 2206 (2008) (“Developments in recent years have made the MDL model more attractive as a central device for resolving complex litigation. A number of federal courts have applied increasingly stringent requirements for class certification, particularly for cases arising in multiple states.”).
- ³⁵ See *supra* note 29 at § 3.06(b).
- ³⁶ *Id.* comment a.
- ³⁷ “Rule 23(e), on settlement of class actions, . . . was designed to function as an additional requirement, not a superseding direction, for the ‘class action’ to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b).” 521 U.S. at 620-21.
- ³⁸ *Id.* at 622; see also RICHARD MARCUS, *They Can’t Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858, 872-82 (1995) (examining various then-recent class action settlements, including the one later before the Court in *Amchem*, and raising questions about the lawmaking power of federal judges under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), not the Rules Enabling Act).
- ³⁹ See MARCUS, *supra* note 38, at 900 (discussing such issues).
- ⁴⁰ *Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (Roberts, C.J., statement regarding denial of cert.).
- ⁴¹ A.L.I. PRINCIPLES, *supra* note 29, § 3.07.
- ⁴² *Id.* § 3.07(a).
- ⁴³ *Id.* § 3.07(b).
- ⁴⁴ *Id.* § 3.07 comment b, at 218.
- ⁴⁵ *Id.* at 219.
- ⁴⁶ See, e.g., *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060 (8th Cir. 2015).
- ⁴⁷ See A.L.I. PRINCIPLES, *supra* note 29, § 3.07

comment a, at 218 (“A related remedy, known as fluid recovery, provides relief to future consumers to reasonably approximate the interests being pursued by the aggrieved class when class members cannot reasonably be identified.”).

⁴⁸ See CAL. CIV. PROC. CODE § 384 (forbidding reversions and providing directions for use of residue after distribution to class members).

⁴⁹ CAL. CIV. PROC. CODE § 384(b), for example, provides for payment “to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent.” Note that 28 U.S.C. § 1712(e) includes the following regarding coupon settlements: “The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties.”

⁵⁰ FED. R. CIV. P. 23(e)(1).

⁵¹ FED. R. CIV. P. 23(e)(5).

⁵² *Id.* This provision was added in 2003.

⁵³ See FITZPATRICK, *supra* note 26; LOPATKA & SMITH, *supra* note 26.

⁵⁴ See *Tennille v. W. Union Co.*, F.3d 1249 (10th Cir. 2014), in which the court of appeals overturned district court order that a class-action objector post a bond of over \$1 million to cover (1) the cost of re-noticing the class, (2) the cost of maintaining the settlement during the pendency of the appeal, and (3) the costs of printing and copying the

supplemental record on appeal. The court held that items (1) and (2) could not be the ground for a bond because these items were not costs ordinarily recoverable on appeal. It also reduced the amount for item (3) from \$25,000 to \$5,000.

⁵⁵ See FED. R. CIV. P. 23(e)(3) (requiring the settling parties to “file a statement identifying any agreement made in connection with the proposal”).

⁵⁶ 12 CHARLES WRIGHT, ARTHUR MILLER & RICHARD MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3001.1 (3D. ED. 2014)

⁵⁷ See, e.g., *Shelton v. Pargo, Inc.*, 582 F.2d 1298 (4th Cir. 1978) (holding that the court must approve the proposed “individual” settlement reached in an action filed as a class action).

⁵⁸ FED. R. CIV. P. 23(e).

⁵⁹ See *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013).

⁶⁰ *Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011). Compare *Smith v. Greystone Alliance, LLC*, 772 F.3d 448 (7th Cir. 2014) (reversing ruling that Rule 68 offer mooted a proposed class action because the district court reached this conclusion only by “whittling down” the amount of the individual plaintiff’s claim, so the offer did not encompass all relief plaintiff sought in the case). See also *Scott v. Westlake Services LLC*, 740 F.3d 1124, 1126 n.1 (7th Cir. 2014) (recognizing that this court’s view of mootness due to a Rule 68 offer may need to be reconsidered in light of the views of the four Justices who dissented in the Supreme Court’s FLSA case).

⁶¹ *Church v. Accretive Health, Inc.*, 299 F.R.D. 676, 677 (S.D. Ala. 2014).

⁶² See *Stein v. Buccaneers Ltd. P’ship*, 772 F.3d 698, 703 (11th Cir. 2014) (“We agree with the *Symczyk* dissent.”).

⁶³ *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996).

⁶⁴ See *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 226–27 (2d Cir. 2006)

⁶⁵ See PATRICIA BRONTE, GEORGE ROBOT & DARIN WILLIAMS, “Carving at the Joint”: The Precise Function of Rule 23(c)(4), 62 DEPAUL L. REV. 745 (2013) (arguing that more recent Fifth Circuit cases show that it accepts issue certification).

⁶⁶ See, e.g., A.L.I. PRINCIPLES, *supra* note 29, § 2.02(a); 2.08.

⁶⁷ See *id.* § 2.08(c).

⁶⁸ *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

⁶⁹ ABRAM CHAYES, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1291 (1976).

⁷⁰ See *supra* text accompanying note 1.

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