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Allen R. Kamp

John Marshall Law School

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CIVIL PROCEDURE IN THE CLASS ACTION MODE

ALLEN R. KAMP*

There is a growing movement in the federal courts to redress the grievances of groups, rather than individuals.¹ This movement has resulted in an increasing number of class action suits which has necessitated the emergence of two parallel sets of procedural rules; one for class actions and the other for the traditional, individual suit.²

A look at class action procedure as a whole discloses a host of peculiar procedural consequences that occur when adversaries enter into class action litigation. The rules differ from those in non-class actions in such areas as mootness, standing, exhaustion of administrative remedies, subject matter jurisdiction, adequacy of legal representation, attorney's fees, and the res judicata effect of the judgment.³ Unfortunately, however, the cases that interpret the rules shed little light on the underlying theory which is responsible for the differing procedural treatment of class action suits.

This article explores the strong divergence of procedure between class and individual actions to identify the goals that the courts are trying to attain in creating a separate class action procedure. The article concludes that we are seeing a movement towards a civil procedure that may better achieve the goals of the substantive law in redressing the grievances of groups, not individuals. The courts are embarked on a shift from a conception of litigation as dealing with differences between individuals to one that sees adjudication as adjusting the relation of groups to social institutions. The peculiar procedure applicable to class actions reflects the fact that a class action adjudicates the rights of a group, not an aggregation of individuals.

I. THE PROCEDURAL RULES

The basic distinction between the class action lawsuit and the traditional lawsuit lies, of course, in the parties to the lawsuit. The distinctions continue, however, past this basic difference in the number of parties. In

*Associate Professor, John Marshall Law School; A.B. University of California, Berkeley; M.A., University of California, Irvine; J.D., University of Chicago. The author wishes to thank Helen Scheller for her research assistance.

1. The number of class action suits pending in the United States district courts in 1972 was 3,148. Administrative Office of the U.S. Courts, Ann. Rep. (1972) at 155. In 1978 the number of class action suits had increased to 6,014. *Id.* (1978) at 547-48.

2. "Procedure" is used in the broad sense of the rules that generally apply to civil litigation. "Procedure" as used in this article encompasses such rules as standing, mootness, and the granting of attorney's fees.

3. See generally 1 H. NEWBURG, CLASS ACTIONS § 1010-1010.4, at 25-43 (1977).

fact, a new set of procedural rules have emerged from class action litigation. These rules differ from and at times contradict the procedural rules characteristic of the traditional lawsuit.

This section briefly summarizes and discusses some of the more striking dissimilarities between the class action procedural rules and the traditional procedural rules. As the discussion indicates, class action litigation is procedurally a law unto itself.

A. *The Case or Controversy Requirement—Standing and Mootness*

Article III of the Constitution grants jurisdiction to the federal courts over cases and controversies.⁴ Therefore, before a federal court can try a lawsuit, the parties to the suit must be able to show that a case or controversy exists. A considerable body of law has developed that requires a live controversy at each stage of the litigation. This requirement is frequently expressed in terms of standing and mootness. Standing, of course, is the requirement that a particular plaintiff have an interest in the outcome of the litigation,⁵ which is constitutionally mandated by Article III's cases and controversies requirement.⁶ The mootness doctrine is an extension of the standing requirement in that it requires the plaintiff to have a bona fide dispute throughout the controversy. If the plaintiff does not have a dispute that the court can resolve at the time of the trial, the court will dismiss the suit, as if the dispute never existed.⁷

In contrast, class action litigation is marked by cases where the class representative may not have standing against a particular defendant and cases where the dispute of the class representative has been mooted. In a class action, for instance, a plaintiff may represent a wider class of persons than those persons in his or her exact situation. Thus, the representative plaintiff in the class action may be suing defendants who have done him no harm.⁸ Similarly, a class action suit can continue although the case of the representative plaintiff has been mooted.⁹

4. U.S. CONST. art. 3, § 2.

5. *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970) (business competitors); *Barlow v. Collins*, 397 U.S. 159 (1970) (tenant farmers); *Flast v. Cohen*, 392 U.S. 83 (1968) (taxpayers). See generally J. NOWAK, R. ROTUNDA & J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 68-83 (1978).

6. U.S. CONST. art. 3.

7. *California v. San Pablo & T.R. Co.*, 149 U.S. 308 (1893). An exception to this requirement is, of course, the exception for cases "capable of repetition, yet evading review." *Roe v. Wade*, 410 U.S. 113 (1973).

8. An example of this situation is *Haas v. Pittsburgh Nat'l Bank*, 526 F.2d 1083 (3d Cir. 1975). In *Haas*, a class action suit was brought against several banks which were alleged to have overcharged their customers for service charges. One of the banks moved for a dismissal of the suit against it because Haas had not had any relationship with that bank. Although clearly Haas had no case or controversy against that particular bank, the court held that summary judgment for the bank was improper because Haas represented other members of the class who did have standing against that particular bank. *Id.* at 1087.

9. An example of this situation is *Sosna v. Iowa*, 419 U.S. 393 (1975). In *Sosna* the plaintiff challenged Iowa's residency requirement for obtaining a divorce. At the time of trial, the plaintiff had satisfied the requirement and had obtained a divorce in another state.

B. Federal Subject Matter Jurisdiction

The jurisdiction of the federal courts is limited to the powers granted them by the Constitution or by Congress acting pursuant to the Constitution. Federal jurisdiction based upon diversity of citizenship¹⁰ is one of the most commonly invoked grants of jurisdiction in the federal courts. Almost since the outset of diversity of citizenship jurisdiction, the statute granting that jurisdiction has been held to require complete diversity between plaintiffs and defendants.¹¹ Moreover, the absence of complete diversity consistently has been held to be fatal to diversity jurisdiction.¹²

In contrast, diversity of citizenship in a class action is required only between the class representative and the defendant.¹³ Therefore, a class action can continue under diversity jurisdiction although many of the class members are citizens of the same state as the defendant. In non-class litigation, if the non-diverse parties were added pursuant to the rules of joinder, then the action would be dismissed for lack of diversity.

A second requisite of federal jurisdiction based on diversity of citizenship is that each plaintiff satisfy the statutory amount in controversy.¹⁴ The failure by any plaintiff to prove to the court's satisfaction that he has a colorable claim for the required amount in controversy requires the dismissal of that plaintiff.¹⁵ In a class action, each class member must also satisfy the jurisdictional amount.¹⁶ This obstacle may be circumvented, however, by pleading a claim in restitution based upon the unjust enrichment of the defendant at the expense of the class members.¹⁷ Consequently, the restitution claim permits the class action to continue although the class members cannot satisfy the required amounts in controversy.

C. Review of the Adequacy of Legal Representation

The classic common law rule is that the litigant is bound by the acts of his attorney. If the attorney fails to represent his client vigorously, or if he even fails completely to raise an issue, he can be sued for malpractice, but the litigant remains bound by the results of the litigation.

In a class action, however, a class member is not bound by the actions of the attorney if the legal representation was not adequate. A class member may directly or collaterally attack results of the class action liti-

The Supreme Court held that the class action suit brought by the plaintiff could continue although her case was clearly moot. *Id.* at 401-02.

10. 28 U.S.C. § 1332 (1976).

11. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

12. See 13A C. WRIGHT, A. MILLER & H. COOPER, *FEDERAL PRACTICE AND PROCEDURE*, § 3605 (1980 & Supp. 1982).

13. *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921).

14. 28 U.S.C. § 1332 (1976).

15. *Oliver v. Alexander*, 31 U.S. (6 Pet.) 143 (1832).

16. *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

17. See Denbeaux, *Restitution and Mass Actions: A Solution to the Problems of Class Actions*, 10 SETON HALL 273 (1979).

gation on the grounds that the representation was inadequate.¹⁸ Although the present law is unclear on the exact scope of collateral review, the Supreme Court has held that parties are not bound by prior decrees because of prior inadequate representation.¹⁹ The judiciary's extreme sensitivity to the adequacy of representation thus insures that the issues in the prior litigation have been adequately argued.

D. Attorney's Fees

Traditionally, attorney's fees are paid by the client rather than the losing party. Moreover, the traditional "American rule" is that a civil litigant may not recover for attorney's fees without statutory authorization.²⁰

Where the attorney obtains a judgment for a class, however, he may obtain compensation from that fund through the "common fund doctrine." In *Boeing Co. v. Van Gemert*, the Supreme Court discussed the common fund doctrine:

Since [1882] this Court had recognized consistently the common fund doctrine, . . . one is entitled to a reasonable attorney's fee from the fund as whole The common fund doctrine reflects the traditional practice in courts of equity . . . it stands as a well-recognized exception to the general principle that requires every litigant to bear his own attorney's fees. The doctrine rests on the perception that persons who obtain the benefits of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense.²¹

E. Res Judicata

A basic rule of civil procedure is that no one is precluded by an action to which he was not a party. However, the price paid by the plaintiff class for other procedural advantages is that in a class action, the class members are bound by the decision rendered in their case. They are precluded from individually suing for more relief than that obtained by their class representative, and, if their representative loses, they also lose.²²

18. See, e.g., *Saylor v. Lindsley*, 456 F.2d 896 (2d Cir. 1972) (court could not approve a settlement over opposition of plaintiff claiming there was doubt whether discovery was truly adversary); *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106 (7th Cir. 1979) (before approving settlement, judge must assure himself class has been adequately represented during the settlement talks).

19. *Hansberry v. Lee*, 311 U.S. 32 (1940).

20. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

21. 444 U.S. 472, 478 (1980); see Note, *Awarding Attorney's Fees from Class Action Judgments*, 30 CASE W. RES. 187 (1980). Attorneys seeking non-monetary relief in class actions frequently will obtain attorney's fees at the discretion of the court because they are enforcing civil rights, under 42 U.S.C. § 1988 (1976 & Supp. IV 1980).

22. E.g., *Robertson v. National Basketball Assoc.*, 622 F.2d 34 (2d Cir. 1980) (under doctrine of res judicata antitrust suit brought by Wilt Chamberlain against National Basketball Association barred by settlement of previously filed suit); *Bronson v. Board of Educ. of School Dist. of Cincinnati*, 525 F.2d 344 (6th Cir. 1975) (parents of minor school children bound by collateral estoppel effect of prior decision holding that school system not racially segregated); *Wren v. Smith*, 410 F.2d 390 (5th Cir. 1969) (where state prison inmates were

The class member, of course, is only nominally "present" or in "privacy" in a class action. Moreover, in a 23(b)(1) or (2) action, a lawsuit is filed by a representative who need not inform the class members of the suit. The class member may live thousands of miles away from the courtroom and never hear of the lawsuit, and yet he is "deemed to be present" in the courtroom. Because of this fictional presence, his rights are adjudicated.

II. THE DECISIONS FORMING CLASS ACTION PROCEDURE

An examination of how the procedural rules for class action suits have developed is crucial to a complete understanding of why they differ from the procedural rules which apply to individual litigation. It is important, however, to underscore the fact that an examination of class action procedure can not be limited to a review of Rule 23 of the Federal Rules of Civil Procedure because the rule itself only deals with limited aspects of class procedure. For example, Rule 23 fails to address mootness, standing, attorney's fees and the requirements surrounding the exhaustion of administrative remedies.

Moreover, the courts have failed to fully develop a coherent theory underlying class action rules. Instead, the courts have issued a series of ad hoc decisions which, though generally favoring the class actions, fail to develop the underlying rationale for the decisions. The few courts that have attempted to develop the underlying theory or policy rationale for class action suits have done so briefly, leaving a disjointed review of the theoretical underpinnings of the class action suit.

A. *The Limited Relevance of Rule 23*

Rule 23 was never intended to prescribe every detail of class litigation. "Even in its current elaborated form, Rule 23 really must be thought of as a procedural skeleton requiring fleshing out by judges and lawyers experimenting with it in an ever-increasing range of circumstances and in a variety of innovative ways."²³ Consequently, Rule 23 fails to prescribe procedures in certain areas such as mootness, standing and attorney's fees, and the courts have labored to fill in the gaps. Moreover, in carving out the class action procedure in these areas, the courts appear to be ignoring the clear language of Rule 23.

The United States Supreme Court has attempted to redirect the lower courts' attention to the requirements of Rule 23,²⁴ yet the Court's insistence of rigorous compliance with Rule 23 is contradicted by its own decisions. For instance, the Court has allowed a class action to exist even

properly within a class in prior class action they are bound by prior integration order). See generally Annot., 48 A.L.R. FED. 675 (1980).

23. Miller, *Class Action Problem*, 92 HARV. L. REV. 664, 667 (1979); see also Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39 (1968).

24. *General Tel. Co. v. Falcon*, 457 U.S. 147 (1982).

where a district court has denied class certification.²⁵ This decision was reached despite the Rule's clear language which dictates that it is up to the district court to determine whether or not a suit is a class action.²⁶ Additional conflicts have surfaced with respect to the requirement of the Court's approval of settlements for non-certified classes²⁷ and with respect to the class action rules on standing and mootness that allow a class representative to maintain an action on behalf of a group even though his claim is moot.²⁸

B. *Ad Hoc Decisionmaking*

While failing to strictly adhere to Rule 23, the courts have made their decisions on a case-by-case basis without the benefit of any apparent theory. No one, certainly not the Supreme Court, has established or articulated a system in this area. The ad hoc nature of these decisions, made on the basis of unstated policy goals, manifests itself in such areas as subject matter jurisdiction and the exhaustion of administrative remedies.

1. *Federal subject matter jurisdiction*

The class action device enables a court to have subject matter jurisdiction where there are non-diverse members of the class, even though it does not allow class members with claims under the \$10,000 amount in

25. See *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977). In this case the district court had denied a class action in a suit brought by United Airline stewardesses alleging employment discrimination. A group of stewardesses intervened, appealed the denial of the class action and had the class certified in the Seventh Circuit. The original filing of the case was held to have satisfied the statute of limitations, even though the appellants' intervention came five years after the denial of class certification. Therefore, the class was deemed to exist even though the district court had denied certification. As one writer points out, the effect of this analysis was a tacit acknowledgement that the class was indestructible. See Note, *United Airlines, Inc. v. McDonald: Class Certification and the "Uncertain Sound"*, 11 J. MAR. J. PRACT. & PROC. 635, 643 (1978).

26. The Rule states: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." FED. R. CIV. P. 23(c)(1).

27. *E.g.*, *Moreno v. Lo-Vaca Gathering Co.*, 80 F.R.D. 282 (W.D. Tex. 1978) (judicial supervision of compromises and dismissals required even where class has not been certified); see also *Shelton v. Fargo, Inc.*, 582 F.2d 1298 (4th Cir. 1978) (a district court may approve of voluntary pre-certification settlement but need not follow procedures under Rule 23(d) because there was no class certification); *Wheeler v. Am. Home Prod. Corp.*, 582 F.2d 891 (5th Cir. 1977) (treating non-certified action as a class action for purposes of exhaustion of administrative remedies).

28. See *Sosna v. Iowa*, 419 U.S. 393 (1975) (a case challenging Iowa's one-year residency requirement for divorce was not mooted by the named class representative satisfying the one-year residency requirement and obtaining a New York divorce).

As the dissent in *Sosna* points out, this decision is contrary to Rule 23's typicality requirement. It may be argued that one whose claim is mooted, no longer has claims typical of the class. See Willborn, *Personal Stake, Rule 23 and the Employment Discrimination Class Action*, 22 B.C.L. REV. 1 (1980).

controversy requirement to remain parties to the action. If there were a coherent procedural scheme employed in the class action mode, these criteria would not be treated differently.

Class action diversity is governed by the Supreme Court's decision in the case of *Supreme Tribe of Ben Hur v. Cauble*,²⁹ which involved an action brought to enjoin a state court proceeding from adjudicating rights in benefit certificates issued by the Tribe, a fraternal benefit society. The issue in *Ben Hur* was whether the prior adjudication, involving a plaintiff class, bound the Indiana citizens, who were non-diverse to the defendant. The Court ruled that there was ancillary jurisdiction over the non-diverse class members: "If the decree is to be effective and conflicting judgments are to be avoided all of the class must be concluded by the decree."³⁰ This leads to the anomalous result that if one party to a non-class adjudication is non-diverse, there is no diversity jurisdiction³¹ while if there are enough non-diverse parties to have a class action, there is jurisdiction.

Unlike diversity, the Court has required each party to satisfy individually the amount in controversy requirement. In *Snyder v. Harris*,³² the Court ruled that one could not aggregate the amounts claimed by members of the class in order to satisfy the amount in controversy requirement. In *Zahn v. International Paper Co.*,³³ ancillary jurisdiction could not be exercised over those members of the class with less than \$10,000 in controversy.

In making these decisions, however, the Court has not sought to reconcile them. Rather, the decisions were made independently. As stated by Professor Currie: "The Supreme Court has approached the problems of pendent nonfederal parties, incomplete diversity, and the amount in controversy as though they were essentially unrelated. It has not paid much attention to the interpretation of the statutory language, which should be determinative."³⁴ The lack of coordination between the decisions betrays a lack of a comprehensive scheme for class actions and the ad hoc nature of the decisions.

2. *Exhaustion of administrative remedies*

The lack of a reasoned discussion of the principles involved in class action procedure may be best exemplified by the Court's decision that individual exhaustion of administrative process is not required before proceeding to court. This rule, so important in allowing the class to include all those injured by the defendant's action, was promulgated in a footnote in *Albermarle Paper Co. v. Moody*.³⁵ The importance of this decision is shown by positing the opposite result—a class action in an area such as

29. 255 U.S. 356 (1921).

30. *Id.* at 367.

31. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

32. 394 U.S. 332 (1969).

33. 414 U.S. 291 (1973).

34. Currie, *Pendent Parties*, 45 U. CHI. L. REV. 753, 766 (1978).

35. 422 U.S. 405, 414 n.8 (1975).

employment discrimination could only include those few employees who had filed charges with an appropriate agency, such as the EEOC. The Court's decision in *Albermarle* again allows the class action to provide for a broad-based relief that may restructure the employment relationship with respect to *all* of the affected employees. The Court is silent, however, on any policy justifications for this crucial decision.

3. Mootness and standing

Another prime area in which class action procedure enables the judiciary to sidestep traditional law is that of mootness and standing. It is the law that, "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."³⁶ In a class action, however, the class representative can seek redress for the legal rights of others even though his own claim may be mooted. Moreover, a class representative is not limited to seeking redress for his particular injury; he can seek relief for harm to other class members although the harm is not totally congruent to his own injury.³⁷

In allowing these changes, the courts have replaced a rigid standing rule with one giving much more flexibility. They are able to do so because of the existence of a class which has been reified into a legal entity. To quote the court in *Sosna v. Iowa*:

If appellant had sued only on her own behalf, both the fact that she now satisfies the one-year residency requirement and the fact that she has obtained a divorce elsewhere would make this case moot and require dismissal. . . . But appellant brought this suit as a class action and sought to litigate the constitutionality of the durational residency requirement in a representative capacity. When the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant.³⁸

While the class in a class action exists in the sense that its members are actually living (or will be living in the future), its presence in the courtroom is entirely fictional; it need not participate in the litigation process at all. Its only presence in court is its description in the pleadings and order for certification. Its fictional existence, however, is enough to create a new set of procedures that reject the traditional doctrine of mootness without explicitly doing so.

The ad hoc nature of the decisions may stem from a desire to give formal allegiance to the traditional rules while rejecting them in practice. The traditionalists have the rules of mootness and standing while the litigants have a lawsuit even though the named plaintiffs have long since lost any personal stake in the controversy. The divergence between the rule

36. *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

37. See Comment, *Federal Rule of Civil Procedure 23(a)(3) Typicality Requirement: The Superfluous Prerequisite to Maintaining a Class Action*, 42 OHIO ST. L.J. 797 (1981).

38. 419 U.S. 393, 399 (1975).

and actual practice is explained by calling the litigation a "class action." A direct challenge to outmoded rules is avoided.

III. THE RATIONALE FOR CLASS ACTION PROCEDURES

Since the courts have not formulated any explicit theory of class actions and have minimized the application of Rule 23, we must infer from their decisions the underlying goals of the class action procedures. The class action procedures work toward goals that include increased efficiency, and procedural simplification. Most importantly, however, they represent a basic change in the function of the litigative process from one of resolving conflicts to one of achieving substantive goals. In using class litigation as a means of enforcing the substantive law, the courts have rejected key elements of the adversary process.

A. *Efficiency*

Class action procedures can be explained in part as an attempt to deal on an assembly-line basis with the current explosion of litigation.³⁹ If thousands of potential lawsuits can be dealt with in a unit, then overcrowded dockets can be cleared to that extent. Alternatively, if each class member had to file individually, to meet such procedural requirements as statutes of limitations, the efficiency gained by consolidating many cases into one would be lost. As stated in *Deposit Guaranty National Bank v. Roper*:

Requiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming grievement.⁴⁰

But efficiency alone does not account for the popularity of the class action because it frequently facilitates litigation that could not otherwise have been brought, rather than consolidating already existing litigation. The difference is critical, for one cannot justify as an efficiency measure that which creates litigation.⁴¹ Reasons other than efficiency, all of which center around the achievement of substantive goals, are more important.

B. *Achievement Of Substantive Goals*

1. *The rejection of the adversary process*

Class actions allow judges to shed their roles as neutral referees and

39. The Court has explicitly recognized efficiency to be a key consideration in the development of class actions. See *General Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 155 (1982); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980); *American Pipe and Constr. Co. v. Utah*, 414 U.S. 538 (1974).

40. 445 U.S. 326, 339 (1980).

41. *Yeazell, Group Litigation, Pt. II*, 27 U.C.L.A. L. REV., 1067, 1100 (1980).

become active participants in the litigation. Rule 23 requires that the judge be involved in protecting the members of the class.⁴² The judge is given the responsibility to oversee settlements, to give discretionary notice, and to assure adequacy of legal representation.⁴³ This forced involvement has given rise to a judiciary which actively manages the litigation: "The Rule 23(a)(4) process symbolizes the fact that during the last ten years the job description for district judges has been changed and that they are now systems managers as well as adjudicators."⁴⁴

According to Professor Miller, some judges actively embrace the new powers given by Rule 23:

Conversations with district judges suggest that the special requirements of class actions are not always viewed negatively. Some judges embrace the management opportunities these cases present and the responsibilities rule 23 imposes on them to monitor the adequacy of representation, proposed settlements, and fee petitions. In part, these obligations, as well as growing acceptance of the judges' responsibility to control their dockets, alleviate many traditional restraints imposed by the adversary process. Judges may now counter the problems caused by incompetency or dilatory practice; judicial intervention using the powers granted under rule 23 thus may accord quite well with some judges' notions of their role.⁴⁵

Here, the class action procedure represents a development away from reliance on the adversary process to produce a just result. The judge seeks to achieve a result that is no longer left to the litigants. The judicial aggressiveness required in reviewing settlements, for example, shows how the judge takes upon himself the duty to see that the goals of the substantive law are met.⁴⁶

If the action goes to judgment, the decision can be attacked collaterally if there has been inadequate legal representation. The rule in non-class litigation, however, is that one is bound by his attorney's representation no matter how unjust the result. A clear example of the application

42. FED. R. CIV. P. 23(d)(2).

43. *E.g.*, *Flynn v. FMC Corp.*, 528 F.2d 1169 (4th Cir.), *cert. denied*, 424 U.S. 967 (1975).

44. MILLER, AN OVERVIEW OF FEDERAL CLASS ACTIONS 37 (1977).

45. Miller, *Class Action Problems*, 92 HARV. L. REV. 664, 667-68 n.20 (1979).

46. *In re Gen. Motors Engine Interchange*, 594 F.2d 1106 (7th Cir. 1979) is a prime example of the settlement review process. The trial judge had approved a subclass settlement covering purchasers before April 11, 1977, of Oldsmobiles with Chevrolet engines. The settlement offered each member of the subclass \$200 plus a 36 month or 36,000-mile warranty on the power train. In return, each purchaser would be required to sign a release of all state and federal claims concerning the substitution. The Seventh Circuit reversed, holding that the conduct of the settlement negotiations was too irregular to be approved. Of special importance is the court's ruling that the settlement negotiations themselves must be open to discovery in order to better determine their fairness and adequacy. The court also reviewed the substantive fairness of the settlement, holding that the settlement's "take it or leave it" nature was fundamentally unfair. *Id.* at 1133, 1137. The court's thorough examination of the substantive and procedural aspects of the representation, to the point of allowing discovery, ensures fairness.

of this rule is *Sandoval v. Rattikin*,⁴⁷ in which the defendants were evicted from their home because their attorney had not raised the defense that a deed absolute on its face should be construed to be a mortgage.⁴⁸ In denying a rehearing, the Texas court ruled: "In the absence of fraud, a party is as fully concluded by the acts of his attorney as if he were acting for himself. The court will not set aside the judgment because of the negligence or the mistakes of his attorney".⁴⁹ This result was reached even though their legal aid attorney did not have time to prepare the case, and could not communicate with his clients, who were Spanish-speaking.⁵⁰ The Supreme Court has affirmed this principle. In *Link v. Wabash Railroad Co.*,⁵¹ the plaintiff's case was dismissed by a district court for want of prosecution after his lawyer failed to attend a pre-trial conference.⁵² The Supreme Court held that the "petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent."⁵³

To the contrary, if the attorney representing a class has failed to realize the goals of the substantive law, another court can try to remedy the situation. In *Gonzales v. Cassidy*,⁵⁴ for example, Gayton sued in a class action seeking a declaration of the unconstitutionality of the Texas Safety Responsibility Act.⁵⁵ The court ruled that the order should be prospective only as to class members.⁵⁶ Gonzales, a member of the Gayton class, then sued, seeking the same relief.⁵⁷ The Fifth Circuit held that failure to appeal the denial of retroactive application constituted a lack of adequate representation and therefore, the prior proceeding was not *res judicata*.⁵⁸ The judicial review of attorney performance ensures that the class members will achieve their rights under the substantive law if there is not adequate legal representation of the entire class.

2. Attorney's fees

The class action procedures work toward the achievement of substantive goals in several other ways. By granting attorneys fees under the "common fund doctrine," the class procedure offers a financial induce-

47. 395 S.W.2d 889 (Tex. Civ. App. 1965), *cert. denied*, 385 U.S. 901 (1966).

48. *See* 395 S.W.2d at 893.

49. *Id.*

50. *Id.* at 897 n.7 (Sharpe, J., dissenting).

51. 370 U.S. 626 (1962).

52. 370 U.S. at 627.

53. 370 U.S. at 633-34; *see also* *Ackermann v. United States*, 340 U.S. 193 (1950). Mr. and Mrs. Ackermann and one other individual were convicted of fraud and ordered deported. The Ackermanns decided not to appeal, based on their attorney's advice, despite the fact that their companion won an appeal. However, the Court affirmed the judgment below since the Ackermanns had counsel at all times.

54. 474 F.2d 67 (5th Cir. 1973).

55. *Id.* at 69.

56. *Id.* at 71.

57. *Id.*

58. *Id.* at 75.

ment for the bringing of actions to enforce substantive rights. If the lawsuits had to be brought individually, many would be cost prohibitive because the cost of litigation would exceed the benefits incurred.⁵⁹

3. *Liberalization of the case or controversy requirement*

Once brought, the class action is allowed to continue by the liberalized rules of mootness and standing.⁶⁰ In non-class litigation, the focus is on the resolution of the controversy between the parties before the court and thus meeting the demands of the plaintiff ends the lawsuit. In class actions, the satisfaction of the plaintiff does not end the suit, and its continuation allows the courts to address the substantive issues involved. This principle was at work in *Sosna v. Iowa*,⁶¹ where the Court ruled that the residence requirements for obtaining a divorce were not unconstitutional.⁶² Justice Rehnquist clearly manipulated the mootness rules in order to declare the state law valid.⁶³

The holding in *Sosna* was extended in *Deposit Guaranty National Bank v. Roper*⁶⁴ and *United States Parole Commission v. Geraghty*⁶⁵ in which the Court permitted appeals from denials of class certification despite arguments of mootness and lack of standing.⁶⁶ In *Deposit Guaranty* the Court ruled that the named plaintiffs could appeal the denial of a class, even though they had been granted judgment for the amounts they had claimed in their individual capacities.⁶⁷ In *United States Parole Commission* the named plaintiff had standing to appeal the denial of class certification, even though he had been released from prison.⁶⁸ The Court ruled that the controversy remained "a 'live' one between petitioners and at least some members of the class respondent seeks to represent."⁶⁹ Standing to appeal was based on a procedural claim; "the claim that he [the individual plaintiff] is entitled to represent a class."⁷⁰ The Court ruled that the plaintiff had enough "personal stake" in his

59. See generally *Developments in the Law: Class Actions*, 89 HARV. L. REV. 1318, 1353-66 (1976).

60. For a discussion of the rules of mootness and standing, see *supra* notes 4-9 and accompanying text.

61. 419 U.S. 393 (1975).

62. *Id.* at 404-10.

63. Mootness was at issue because *Sosna* had filed a class action in United States district court attacking Iowa's durational residency requirement for obtaining a divorce. She had long since satisfied the one year requirement by the time the case reached the Supreme Court. Justice Rehnquist acknowledged the problem but upheld the Court's jurisdiction in light of "the posture of the case and . . . the absence of disagreement among the parties as to wanting the issue decided." *Id.* at 396-97 n.3.

64. 445 U.S. 326 (1980).

65. 445 U.S. 388 (1980).

66. See also *Deposit Guar. Bank v. Roper*, 445 U.S. at 332-36; *United States Parole Comm'n v. Geraghty*, 445 U.S. at 394-401.

67. 445 U.S. at 336, 340.

68. 445 U.S. at 404.

69. *Id.* at 396.

70. *Id.* at 402.

right to have the class certified to give him standing.⁷¹ "This 'right' is more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the 'personal stake' requirement."⁷²

The dissent argued that the majority misinterpreted Rule 23 as conferring standing where there was none.⁷³ Justice Powell's point is well made, for the Court allows one who is not personally affected by his adversary's actions to represent others who are.⁷⁴ On the other hand, if the lawsuit ended at the termination of the representative's case, the unrepresented class would be forced to find a new representative and to relitigate. This would result in a waste of judicial time and a delay in awarding remedies to potentially deserving class members. Thus, these decisions enable courts to decide substantive issues by use of a private attorney general concept.⁷⁵

4. Greater enforcement of decrees embodying the substantive law

Class judgments can include both injunctive and monetary relief. Both types of relief work to enforce substantive policies to a greater degree than do individual lawsuits. In the case of money damages, the aggregation of damages can result in high sums being awarded. These judgments result in a greater deterrence—some would say an overdeterrence—of illegal activity than that obtained by individual lawsuits.⁷⁶ One reason defendants resist class actions must be that they inevitably expect to pay more in a class action judgment than they would from a series of private suits.

For injunctive relief, the class action provides greater enforcement powers. The crucial procedural device is the availability of the contempt sanction in a class action injunction. The potency of this sanction is highlighted by comparing the contempt procedure with that of *stare decisis*. If a welfare rule is declared unconstitutional, for example, that ruling has a *stare decisis* effect on all other welfare beneficiaries. There is no direct sanction on the administrator to comply with the decision, however, and in fact frequently there is no compliance.

Professor Braveman describes just such widespread non-compliance by New York welfare officials.⁷⁷ Several New York cases have been denied class action status on the theory that *stare decisis* would adequately pro-

71. 445 U.S. at 404.

72. 445 U.S. at 403.

73. *Id.* at 421-24.

74. Since the individual plaintiff has already been released from prison, he stands to gain nothing but personal satisfaction from representing a class of prisoners awaiting parole. *Id.*

75. *Id.*

76. Note, *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1354-55, 1361 (1976).

77. See Braveman, *Class Certification in State Court Welfare Litigation: A Request for Procedural Justice*, 28 BUFFALO L. REV. 57, 79-85 (1979).

tect those concerned. Once a case has been decided, state officials would follow the law laid down in decisions brought by individual plaintiffs. This theory has not been borne out in practice, as the officials frequently ignore the adverse decisions and continue acting as they always have.⁷⁸ Professor Braveman points out that mere reliance on *stare decisis* gives a financial incentive to state officials to buy off the individual litigants and to continue to ignore many similarly situated persons.

The use of the contempt process on the other hand puts judicial coercive powers directly on the defendant in order to force compliance with state law.⁷⁹ A comparison of the enforcement procedures shows the greater power of the class action to enforce the substantive law. Suppose, for example, that welfare officials are denying benefits to a group of people. In individual litigation, one beneficiary sues and wins, having the action of the official declared illegal. After this decision there is no legal duty created by the judgment for the official to pay any other citizens in similar circumstances. If another beneficiary wishes to obtain benefits, he must file his own lawsuit. In a class action, however, once an order is entered, any member of the class can move for contempt if it is not followed. The class action provides a much simpler procedure (the filing of a motion rather than an entire new lawsuit) for the enforcement of substantive law. Thus, the class action is superior in enforcing substantive goals.

5. *The move to the group as the litigant*

The focus on substantive goals leads to the conclusion that the courts now see the class action process as one structuring the relationship of opposing groups. The peculiar procedural rules surrounding class actions arise because the class action adjudicates the rights of a group rather than an aggregation of individuals. The loosening of the mootness and standing requirements, for example, allow the action to proceed even though certain individual controversies have been resolved.

Although certain types of proceedings, such as equity, have historically dealt with group problems,⁸⁰ the common law has always been based on a model of settling one controversy between two individuals.⁸¹ As stated by Professor Chayes, the defining features of the ordinary, non-class litigation are: (1) the lawsuit is bipolar; (2) the litigation is retrospective; (3) right and remedy are interdependent; (4) the lawsuit is a self-contained episode; and (5) the process is party-initiated and party-

78. *E.g.*, *Lewis v. Lavine* [1972-74 Transfer Binder] *Pov. L. REP. (CCH)* ¶ 16, 865 (S.D.N.Y. 1973).

79. *See generally* Braveman, *Class Certification in State Court Welfare Litigation: A Request for Procedural Justice*, 28 *BUFFALO L. REV.* 57, 79-85 (1979).

80. *See* Yeazell, *Group Litigation and Social Context: Toward a History of Class Action*, 77 *COLUM. L. REV.* 866, 893 (1977).

81. Address by Learned Hand before the Association of the Bar of the City of New York (Nov. 17, 1921), *reprinted in*, 3 *Lectures of Legal Topics, Association of the Bar of the City of New York* 87, 90 (1926).

controlled.⁸² The types of cases dealt with by class actions, however, deal in the main with wrongs suffered by a group, rather than by an individual, with respect to long-standing governmental or corporate policies. Examples of class action cases are prisoners seeking relief from unconstitutional punishment, school children suffering from segregation, or overcharged debtors. The class action exists as a mechanism to adjudicate the rights of these groups.⁸³

Professor Yeazell points out that the early class actions dealt with small, agricultural communities regulating their rights with regards to such questions as tithes and fishing rights. The modern group, however, often is a class of citizens locked into a relationship with a bureaucratic institution. Professor Yeazell states:

An incontrovertible feature of modern American life is our growing involvement in continuous relationships with large public and private institutions. As Charles Reich has noted, new forms of property are increasingly found in the expectation of largesse from government on some continuing basis. Thus some umpiring of people's relationships with institutions is inevitable, and the new institutional litigation is merely one product of these new relationships.⁸⁴

The class action then, adjudicates the relation of the group with an institution, not the rights of an aggregation of separate individuals. Cases dealing with employment discrimination, for example, recognize that the injury is suffered by the group as a whole, not by individuals.⁸⁵ In *Dickerson v. United States Steel Corp.*,⁸⁶ the court, in ruling that the dismissal of a class claim did not bar individual claims, pointed out that res judicata between the class and the individual does not apply because the individual claim does not seek redress for the same injury as the class claim, and that in fact class and individual actions involve two separate causes of action. The court stated that "[t]he class claims were not examined as a mere aggregation of individual claims, as the Company's argument suggests."⁸⁷ The court noted that types of proof used in a class discrimination lawsuit consists of statistical evidence of patterns or practice of discrimination, which differs from proof of individual instances of discrimination. In a class action, moreover, each member need not prove that he suffered racial discrimination directed at him personally.

The class then, formally present although physically absent, pos-

82. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282-83 (1976).

83. Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 510-12 (1980).

84. *Id.* at 511.

85. "We cannot disagree with the proposition underlying the across-the-board rule—that racial discrimination is by definition class discrimination." *General Tel. Co. v. Falcon*, 457 U.S. 147, 157 (1982).

86. 582 F.2d. 827 (3d Cir. 1978).

87. *Id.* at 830.

sesses both its own legal existence and its own rights. As stated by Justice Stevens:

In my opinion, when a proper class action complaint is filed, the absent members of the class should be considered parties to the case or controversy at least for the limited purpose of the court's Art. III jurisdiction. If the district judge fails to certify the class, I believe they remain parties until a final determination has been made that the action may not be maintained as a class action.⁸⁸

Since a class action deals with groups instead of individuals, it requires a different procedure than that applicable to an individual's controversy. Rule 23 becomes irrelevant because a Federal Rule of Civil Procedure cannot embody such a radical change in litigative procedures. The courts, however, have accepted the challenge by speedily adopting a new set of rules that exist alongside the traditional ones. These rules fly in the face of those governing ordinary litigation, but they do enable the courts to cope with the mass problems generated in our society.

The class action procedure thus allows the courts to get through procedural thickets and apply the substantive law to the group's relations with its opponents. It allows the court to try the issue, to decide it in conformity with substantive rather than procedural law, and to enforce the decision in an attempt to solve the problems of our society.

88. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 342 (1980) (Stevens, J., concurring).