UNDERINCLUSIVE CLASS ACTIONS

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In recent years, there has been much case law and scholarly writing on the problems associated with broadly defined classes in the class action context. Here, however, Professor Morawetz discusses the complex issues resulting from class definitions that are drawn too narrowly, rather than too broadly. Throughout the article, Professor Morawetz focuses on the plight of those individuals who are excluded from class definitions and the institutional structures that may discourage broad class definitions under particular circumstances. Professor Morawetz concludes by offering proposals that will limit the number of classes that are drawn too narrowly by imposing greater responsibility on attorneys and the courts for reviewing class definitions for narrowness.

INTRODUCTION

Much case law and scholarly writing have been devoted to the questions of whether and when a broadly defined class action is a disservice to absent class members.[1] In drawing the boundaries for class certification in *General Telephone Co. v. Falcon*,[2] the Supreme Court focused on the injury that absent class members can suffer when a

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I served as counsel in three of the cases discussed in this Article: Dixon v. Heckler, 589 F. Supp. 1494 (S.D.N.Y. 1984), aff'd, 54 F.3d 1019 (2d Cir. 1995); Stieberger v. Sullivan, 792 F. Supp. 1376 (S.D.N.Y.), modified, 801 F. Supp. 1079 (S.D.N.Y. 1992); and Robinson v. Heckler, No. 83 Civ. 7864 (LFM) (S.D.N.Y.) (order entering consent judgment May 17, 1985).

[1] See, e.g., General Tel. Co. v. Falcon, 457 U.S. 147, 159-60 (1982) (requiring more thorough District Court determination of whether named plaintiff adequately represented absent parties); Howard M. Downs, Federal Class Actions: Due Process By Adequacy of Representation (Identity of Claims) and the Impact of *General Telephone v. Falcon*, 54 Ohio St. L.J. 607, 646-47 (1993) (arguing that absent class members are ultimate losers when class representative or counsel avers claims beyond her own evidence, injury, or direct interest); Arthur R. Miller & David Crump, Jurisdiction and Choice of Law in Multistate Class Actions After *Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 16 (1986) (suggesting that "[t]he rights of nonresident class members can be appreciated by considering either a class action in which defendant prevails and claimants take nothing or an action that is settled for much less than some class members think is reasonable"); George Rutherglen, Notice, Scope, and Preclusion in Title VII Class Actions, 69 Va. L. Rev. 11, 37 (1983) (arguing that in broadly defined employment discrimination class, awards of backpay to some class members may reduce funds available to others).

[2] 457 U.S. 147 (1982).

class action is resolved in a manner that prejudices the class members' interests. The Court cautioned that it is error to assume that all will go well with a class action and that "'manna will fall on all members of the class.'"[3]

Much less attention has been given to the plight of those who are excluded from the definition of a class. Just as potential class members are not guaranteed that "manna will fall on all members of the class," they will often lack any promise or hope of an alternative route to a day in court. A decision to limit the size of a class can therefore be a decision to deny redress to persons who might have been included in the plaintiff class. Limitations on the size of a class also raise the possibility of judicial inefficiencies, with several class actions taking the place of a single coordinated action.

The lack of attention to who is excluded makes some sense in class action contexts where attorney fee incentives can be counted on to encourage attorneys to plead class actions broadly. When attorney compensation is based on the recovery of a suit, attorneys will generally have every incentive to plead an inclusive class. In this situation, defendant opposition to class certification and judicial oversight of the class definition serve as a check on excesses of breadth, generally leaving little need to scrutinize classes for being too narrow.[4]

When attorneys lack these financial incentives, however, the institutional structure for determining class definitions is problematic. Because this structure is concerned solely with improper inclusions in a class definition, it provides no check against a class definition that unfairly excludes potential class members from its reach.

In theory, there are two stages at which decisions are made to limit the breadth of class actions. The first is the decision of the class representative and/or her counsel as to how the class should be defined. The second stage is the court's decision on class certification. Courts can modify, approve, or disapprove of the proposed class.

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[3] Id. at 161 (quoting Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1127 (5th Cir. 1969)).

[4] There may be circumstances, however, where a narrow class in a percentage recovery suit serves as a warning sign that the class is not represented adequately. As Professor Koniak explains, when the same attorneys represent both the class and excluded individuals who could be included in the class, a narrow class definition may indicate that the attorney is not getting for the class what is being obtained for the individual clients. See Susan Koniak, Feasting While the Widow Weeps, 80 Cornell L. Rev. 1045, 1051-86 (1995) (arguing that settlement class in Georgine v. Amchem Prods., 157 F.R.D. 246 (E.D. Pa. 1994), vacated and remanded, Nos. 94-1925 et al., 1996 U.S. App. LEXIS 11191 (3d Cir. May 10, 1996), was "gerrymandered" to ensure that no one with a live claim would be available to protest the inadequacy of the settlement).

Although a court's ruling is subject to appeal, it is reviewed under an abuse of discretion standard.[5]

In practice, the decision of the plaintiff's attorney or the class representative to exclude persons from a class definition is rarely reviewed.[6] One might think that defendants have something to gain by challenging a class definition as too narrow. A broader class can mean more efficient litigation of issues that might otherwise subject the defendant to multiple litigation costs. A broader class also provides the possibility of truly settling the issues at hand. Outside of the settlement context, however, defendant objections about the narrowness of classes are unusual.[7] Even if the defendant does challenge the narrowness of the class, it is likely to be because the defendant can garner some strategic advantage by doing so, rather than because of a concern for the interests of the court or the absent class members.[8] Thus, the issue of the exclusion of potential class members is unlikely to be presented to the court by the original parties to the action in a way that reflects the interests of the persons who were not included in the class.

There is also no guarantee that the narrowness of a class will be presented to the court by the excluded potential class members. These potential absent class members will only be able to alert the court to their exclusion if they have knowledge of the pendency of the

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[5] See, e.g., Giles v. Ireland, 742 F.2d 1366, 1372 (11th Cir. 1984); see also Lewis v. Bloomsburg Mills, 773 F.2d 561, 564 (4th Cir. 1985) (requiring showing of "manifest injustice" to reverse class certification decision). For some of the rare cases finding an abuse of discretion, see In re School Asbestos Litig., 789 F.2d 996, 1005 (3d Cir.), cert. denied, 479 U.S. 852 (1986); Lawler v. Alexander, 698 F.2d 439, 441 (11th Cir. 1983).

[6] Much commentary is premised on the idea that class representatives in fact play no role at all in these decisions. See, e.g., Jean W. Burns, Decorative Figureheads: Eliminating Class Representatives in Class Actions, 42 Hastings L.J. 165, 179-84 (1990); John C. Coffee, Jr., The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U. Chi. L. Rev. 877, 883-89 (1987).

Other commentary has stressed the importance of greater consultation with clients and client groups as part of class representation. See Stephen Ellmann, Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups, 78 Va. L. Rev. 1103, 1131 n.82 (1992); Lawrence M. Grosberg, Class Actions and Client-Centered Decisionmaking, 40 Syracuse L. Rev. 709, 713, 719-22 (1989); Lucie E. White, Mobilization on the Margins of the Lawsuit: Making Space for Clients To Speak, 16 N.Y.U. Rev. L. & Soc. Change 535, 538 (1987-88). Regardless of whether class action attorneys have heeded this call, the point remains that there is virtually no review of these decisions inasmuch as they exclude persons from potential classes.

[7] See infra text accompanying notes 54-56.

[8] Thus, it is not unusual for defendant counsel to argue that a class should be defined narrowly and that the narrow class is too small to meet Rule 23's numerosity requirement. See, e.g., Kendrick v. Sullivan, 784 F. Supp. 94, 104 (S.D.N.Y. 1992); Kohn v. Mucia, 776 F. Supp. 348, 352-53 (N.D. Ill. 1991).

action, access to legal representation to present their claims, and claims sufficient in size to justify the expense of such representation. Even where all of these conditions exist, the potential class members nevertheless may be denied intervention if there is a time lapse prior to their efforts to intervene. Furthermore, excluded potential class members may choose to litigate separately, thereby leading to duplicative litigation.

A court could consider the propriety of exclusions from the class in its class certification decision. On occasion, courts have attempted to do this, albeit without much success. Judicial efforts to broaden classes have been criticized by appellate courts on the general ground that courts should restrict themselves to the issues presented to them as well as on the ground that a class would not be adequately represented if the class representative objected to the broader class.[9]

On the whole, the institutional structures surrounding class certification are designed to limit class size, not to ask the question of whether there are persons excluded from the class who should be part of the class. As a result, the named plaintiff and her counsel have a great deal of discretion in choosing to exclude potential class members from a class action.

This Article addresses the questions of how and why a decision should be made to limit the size of a class. Part I examines Social Security class actions to illustrate the disparities that can result from discretionary decisions to narrow class definitions. Part II looks more generally at the reasons why class definitions may be drawn narrowly. Part III considers whether the resulting exclusion of persons from class definitions should be seen as a problem. Finally, Part IV sets forth possible solutions to the problem of unfair exclusion from class definitions.

I

DISPARITIES RESULTING FROM DISCRETIONARY DECISIONS TO NARROW CLASS DEFINITIONS

Although Rule 23's mandates of commonality and typicality require that the named plaintiff and the class share common questions of law or fact and that the named plaintiff's claim be typical of the class,[10] they do not require complete identity of claims.[11] The ques-

9 See infra note 57.

10 Fed. R. Civ. P. 23(a)(2), (3).

11 See Bazemore v. Friday, 478 U.S. 385, 405-06 (1986) (remanding for determination of class certification in case alleging salary discrimination where defendant state agency had a dominant role in salary decisions for class, even though 100 separate counties also played a role in determining salaries); Califano v. Yamasaki, 442 U.S. 682, 701 (1979)

tion in defining the class is how close the class should come to mirroring the position of the named plaintiff. Even where claims are identical, there may be many ways to limit the scope of the class by adding parameters that do not track the legal claims in the case.[12] As a result, those defining the class exercise considerable discretion in choosing who will and will not be included in the class.

The disparities that can result from different choices about class definitions are illustrated by the class actions brought against the Social Security Administration beginning in the early 1980s. During this time period, there were many issues on which multiple class actions were filed across the country challenging national policies. Typically, these cases challenged the rules by which the agency decided who was and was not disabled. These cases charged that the agency had implemented illegal policies that led to the denial of benefits to persons who met statutory standards.[13] As part of the relief, these cases sought the readjudication of thousands—and in some cases, hundreds of thousands—of benefit claims.[14]

The stakes in the Social Security benefit cases have been high. The difference between being included in one of these cases or being excluded often has been the difference between receiving a modest income from a program designed for the disabled or being relegated

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(describing class relief as "peculiarly appropriate" in action in which class included plaintiffs seeking relief on two types of claims, where some named plaintiffs only presented one of the two claims, and relief was granted as to only one of the claims). But see Downs, supra note 1, at 707-09 (arguing that General Telephone Co. v. Falcon, 457 U.S. 147 (1982), restored identity of claims requirement).

12 For example, Professor Rutherglen, who argues for a narrow reading of Rule 23's requirements, also argues that a nationwide employment discrimination suit would be appropriate in situations where the suit challenged a policy applied at a national level. Rutherglen, supra note 1, at 61-62. Within this framework, the drafter of the class definition could draw the class more narrowly; for example, by limiting the class to employees in one location.

13 See, e.g., Bowen v. City of New York, 476 U.S. 467, 475 (1986) (challenging policy on determining mental disability that the trial court found to be a "fixed clandestine policy"); Dixon v. Shalala, 54 F.3d 1019 (2d Cir. 1995) (challenging internal policy of increasing the threshold for denying benefits without an evaluation of vocational considerations); Lopez v. Heckler, 725 F.2d 1489 (9th Cir.) (challenging Secretary of Health and Human Services's refusal to follow circuit precedent that required the government to come forward with evidence that the recipient's medical condition had improved before terminating Social Security benefits), vacated and remanded, 469 U.S. 1082 (1984).

14 The settlement in Stieberger v. Sullivan, 792 F. Supp. 1376 (S.D.N.Y.), modified, 801 F. Supp. 1079 (S.D.N.Y. 1992), for example, provided for readjudications of up to a quarter of a million claims. See also Oversight Hearing on Supplemental Security Income Before the Subcomm. on Human Resources of the House Comm. on Ways and Means, 103d Cong., 1st Sess. (1993) (statement of Lawrence Thompson, Principal Deputy Commissioner, Social Security Administration) (noting that class in Sullivan v. Zebley, 493 U.S. 521 (1990), included 452,000 children).

to complete indigency.[15] Where these cases resulted in preliminary injunctive relief, those who were within the classes benefitted from having their disability evaluated under more lenient standards.[16] Those excluded continued to be evaluated by criteria that the courts had found probably to be illegal. When the cases reached their conclusions, and the courts issued final injunctive relief, those included in the classes had an opportunity to have their cases readjudicated under the standards the court accepted as meeting statutory requirements.[17] Those who were excluded lacked such an opportunity.[18]

Despite these important ramifications to inclusion in a class, many persons were excluded from class definitions based on parameters that did not track the legal claims in the case. The most common such restriction was geographic. Depending on the choices made by class counsel, the classes had different types of geographic limitations. Some were limited by state, some by the regions used by the agency, and some by circuit. Apart from these geographic restrictions, the scope of the class often varied with respect to start dates or end dates

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15 As Judge Sand observed in Stieberger v. Heckler, 615 F. Supp. 1315, 1342 (S.D.N.Y. 1985), vacated on other grounds, 801 F.2d 29 (2d Cir. 1986), "[the claimants in these cases] [w]hether or not 'disabled' within the statutory meaning of the term . . . are physically and mentally impaired individuals who rely heavily on the receipt of disability benefits to provide for the bare necessities of life." See also Holden v. Heckler, 584 F. Supp. 463, 483 (N.D. Ohio 1984) ("[Plaintiffs] often went without proper food, shelter and medical treatment. In some cases actual or threatened termination of benefits induced severe stress that apparently caused medical setbacks, hospitalization, and conceivably death."), stay vacated, 615 F. Supp. 682 (N.D. Ohio), modified, 615 F. Supp. 684 (N.D. Ohio 1985); Hyatt v. Heckler, 579 F. Supp. 985, 989-92 (D.N.C. 1984) (noting that loss of Social Security benefits often causes former recipients severe financial hardship, anxiety, depression, and decline in health), vacated on other grounds, 757 F.2d 1455 (4th Cir. 1985), vacated, 476 U.S. 1167, aff'd in part, 807 F.2d 376 (4th Cir. 1986), cert. denied, 484 U.S. 820 (1987).

16 See, e.g., Dixon v. Heckler, 589 F. Supp. 1494 (S.D.N.Y. 1984) (preliminary injunction requiring that disability be determined without reference to agency's severity standard pending determination of action), aff'd, 785 F.2d 1102 (2d Cir. 1986), vacated and remanded, 482 U.S. 922 (1987).

17 See, e.g., Dixon v. Heckler, 54 F.3d 1019, 1028, 1039 (2d Cir. 1995) (affirming final injunction requiring readjudication of claims denied under the agency's severity regulation between 1976 and the date of the preliminary injunction).

18 Excluded persons could sue individually. As a practical matter, however, many of the more complex claims raised in the class cases could not be raised in individual cases. Many of the class action cases discussed in this section required considerable discovery, which would be difficult to justify in an individual case. The summary judgment motion in Stieberger v. Sullivan, 738 F. Supp. 716 (S.D.N.Y. 1990), for example, included eight volumes of exhibits drawn from thousands of documents obtained through contested discovery. No individual case could have justified such an expenditure of resources. Discovery was particularly important to establish grounds for waiver of administrative exhaustion and statutes of limitations requirements for claimants who would have otherwise been treated as time-barred. See Bowen v. City of New York, 476 U.S. 467, 478-85 (1986) (setting forth evidentiary showing required for waiver of exhaustion and statute of limitations in Social Security cases).

for the class, programs covered by the action, or the requirements for exhaustion of administrative remedies. Although some of these limitations reflected additional proof requirements or possible defenses, others did not. Class counsel nonetheless made different choices in shaping proposed definitions. The result was that a person's opportunity for redress varied greatly depending on how class counsel chose to draw up the proposed definition of the class.

The most widely litigated issue was the agency's policy of discontinuing disability benefits without evaluating whether the recipient's medical condition had improved.[19] Because of geographic restrictions, and variations in the way counsel specified these geographic restrictions, the residents of some states were left without any representation. Twenty-five class action suits on this issue were filed on behalf of residents of thirty-two states.[20] Two of these cases were circuitwide actions,[21] while twenty-three were statewide actions.[22]

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19 These cases sought to require the agency to follow a medical improvement standard. Under a medical improvement standard, the Social Security Administration could not terminate disability benefits on the ground that a person was no longer disabled without first showing that the person's condition had improved since he or she was first found disabled. In the early 1980s, many courts required the agency to follow such a standard. See, e.g., Patti v. Schweiker, 669 F.2d 582 (9th Cir. 1982), and cases cited infra in notes 20-22. In 1984, Congress revised the governing statute explicitly to require a showing of medical improvement. See Social Security Disability Benefits Reform Act of 1984, 42 U.S.C. § 423(f) (1994).

20 Information on the medical improvement cases was obtained from reporters, LEXIS and Westlaw databases, and advocates who were involved in the litigation. These sources revealed cases affecting classes of individuals in the following states: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Hawaii, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Washington, West Virginia, and the Pacific commonwealths, territories, and possessions. In addition, passing references were made in other decisions to two unreported cases: Lopez v. Heckler, 106 F.R.D. 268, 270 (C.D. Cal. 1984) (citing Ramirez v. Schweiker, No. 82-1240 (D. Idaho Apr. 4, 1984)), and Smith v. Schweiker, No. 79-244, slip op. at 6 (D. Vt. July 29, 1982) (citing Siders v. Schweiker, No. 81-73161 (E.D. Mich. Nov. 12, 1981)), aff'd on other grounds, 709 F.2d 777 (2d Cir. 1983).

21 Polaski v. Heckler, 585 F. Supp. 997 (D. Minn.), modified, 585 F. Supp. 1004 (D. Minn.), remanded, 751 F.2d 943 (8th Cir. 1984), cert. granted and judgment vacated, 476 U.S. 1167, on remand, 804 F.2d 456 (8th Cir. 1986), cert. denied, 482 U.S. 927 (1987); Lopez v. Heckler, 572 F. Supp. 26 (C.D. Cal. 1983), aff'd in part, rev'd in part, 725 F.2d 1489 (9th Cir.), vacated and remanded, 469 U.S. 1082 (1984).

22 Belveal v. Heckler, 796 F.2d 1261 (10th Cir. 1986) (Wyoming); Samuels v. Heckler, 668 F. Supp. 656 (W.D. Tenn. 1986); Bowdoin v. Heckler, Civ. No. 83-0314-B (D. Me. Feb. 13, 1985); Pickett v. Heckler, 608 F. Supp. 841 (S.D. Fla. 1985), aff'd, 833 F.2d 288 (11th Cir. 1987); Avery v. Heckler, 584 F. Supp. 312 (D. Mass.), modified, 599 F. Supp. 236 (D. Mass. 1984), aff'd, 762 F.2d 158 (1st Cir. 1985); Hill v. Heckler, 592 F. Supp. 1198 (W.D. Okla. 1984); Turner v. Heckler, 592 F. Supp. 599 (N.D. Ind. 1984); Schisler v. Heckler, 107 F.R.D. 609 (W.D.N.Y. 1984), aff'd in part, rev'd in part on other grounds, 787 F.2d 76 (2d Cir. 1986), remanded, No. CIV-80-572E, 1987 WL 15330 (W.D.N.Y. Aug. 5, 1987), aff'd in part, rev'd in part, 851 F.2d 43 (2d Cir. 1988); Young v. Heckler, No. 83-5321 (S.D. Ill. Nov.

The residents of fifteen states, the District of Columbia, the Virgin Islands, and Puerto Rico were left out of these class definitions.[23] Residents of all jurisdictions other than the District of Columbia and the Fifth Circuit states[24] would have been included in a class had the class actions all been filed on a circuitwide basis. Similarly, with respect to challenges to the "severity" regulation for determining disability,[25] there was one circuitwide class action, one class action that initially encompassed four states in two circuits as well as the District of Columbia, and ten statewide actions.[26] Residents of fourteen juris-

16, 1984); Holden v. Heckler, 584 F. Supp. 463 (N.D. Ohio 1984), stay vacated, 615 F. Supp. 682 (N.D. Ohio), modified, 615 F. Supp. 684 (N.D. Ohio 1985); Thomas v. Heckler, 598 F. Supp. 492 (M.D. Ala.), motion for relief from judgment and stay denied, 602 F. Supp. 925 (M.D. Ala. 1984); Hyatt v. Heckler, 579 F. Supp. 985 (D.N.C. 1984), vacated on other grounds, 757 F.2d 1455 (4th Cir. 1985), vacated, 476 U.S. 1167, aff'd in part, 802 F.2d 376 (4th Cir. 1986), cert. denied, 484 U.S. 820 (1987); Morrison v. Heckler, 582 F. Supp. 321 (W.D. Wash. 1983); Rivera v. Heckler, 568 F. Supp. 235 (D.N.J. 1983); Doe v. Heckler, 576 F. Supp. 463 (D. Md. 1983), modified, 580 F. Supp. 1224 (D. Md. 1984); Graham v. Heckler, 573 F. Supp. 1573 (N.D. W. Va. 1983), dismissed, 742 F.2d 1448 (4th Cir. 1984); Kuehner v. Schweiker, 547 F. Supp. 49 (E.D. Pa. 1982), rev'd, 717 F.2d 813 (3d Cir. 1983), vacated and remanded, 469 U.S. 977 (1984), on remand, C.A. No. 82-1839 (E.D. Pa. Feb. 27, 1985) (clarifying class definition), aff'd, 778 F.2d 152 (3d Cir. 1985); Siedlecki v. Schweiker, 563 F. Supp. 43 (W.D. Wash. 1983); Trujillo v. Schweiker, 558 F. Supp. 1058 (D. Colo.), partial motion for summary judgment granted, 569 F. Supp. 631 (D. Colo. 1983); Smith v. Schweiker, No. 79-244 (D. Vt. July 29, 1982), aff'd on other grounds, 709 F.2d 777 (2d Cir. 1983); Wheeler v. Schweiker, 547 F. Supp. 599 (D. Vt. 1982), aff'd in part, rev'd in part, 719 F.2d 595 (2d Cir. 1983). As indicated in supra note 20, Ramirez v. Schweiker, No. 82-1240 (D. Idaho Apr. 4, 1984) and Siders v. Schweiker, No. 81-73161 (E.D. Mich. Nov. 12, 1981), appear to have been brought as statewide claims. Two of the statewide cases, *Bowdoin* and *Wheeler*, were limited to persons who had been "grandfathered" into the Supplemental Security Income program.

[23] The jurisdictions that did not fall within the ambit of any class action were: Connecticut, Delaware, the District of Columbia, Georgia, Kansas, Kentucky, Louisiana, Mississippi, New Hampshire, New Mexico, Puerto Rico, Rhode Island, South Carolina, Texas, Utah, the Virgin Islands, Virginia, and Wisconsin.

[24] The states in the Fifth Circuit are Texas, Louisiana, and Mississippi.

[25] The Social Security Administration uses a five-step "sequential evaluation" to determine whether a person is disabled. See 20 C.F.R. §§ 404.1520, 416.920 (1991). Under step two of this sequence, a person is disqualified from benefits if the impairment, evaluated on the basis of medical evidence alone, is "not severe." Id. Lawsuits challenging the severity regulation claimed that the regulation violated the governing statute by ignoring the interaction of vocational and medical factors in affecting an individual's ability to work. Many of these suits also claimed that the agency had illegally heightened the threshold showing of "severity." See Dixon v. Shalala, 54 F.3d 1019, 1030 (2d Cir. 1995) (finding that record evidence supported district court finding that severity regulation "was employed pervasively" to deny benefits to persons who "may fit within the statutory definition"); Bowen v. Yuckert, 482 U.S. 137, 157 (1986) (O'Connor, J., concurring) (noting that respondent and amici presented evidence that percentage of cases denied on severity standard had increased from 8% to 40% following promulgation of new administrative review regulations).

[26] The circuitwide action was Smith v. Heckler, 595 F. Supp. 1173 (E.D. Cal. 1984), motion to vacate denied, Civ. No. S-83-1609 EJG, 1985 WL 71736 (E.D. Cal. May 1, 1985), vacated and remanded, 823 F.2d 1553 (9th Cir. 1987), on remand, Civ. No. S-83-1609 EJG

dictions that went unrepresented would have been represented had the actions been brought on a circuitwide basis.[27]

(E.D. Cal. Dec. 4, 1989), cited in HALLEX I-5-408B (1992 WL 601849 (S.S.A.)), magistrate's recommendation adopted, Civ. No. S-83-1609 EJG (E.D. Cal. Oct. 3, 1990), cited in HALLEX I-5-408B (1992 WL 601849 (S.S.A.)), joint stipulation and order approved, Civ. No. S-83-1609 EJG (E.D. Cal. June 21, 1991), reproduced in HALLEX I-5-408B Attach. 1 (1992 WL 601849 (S.S.A.)). The multistate class was made up of residents of the states included in the Social Security Administration's Region III. This class initially encompassed Pennsylvania, Delaware, Maryland, West Virginia, and the District of Columbia. Bailey v. Heckler, C.A. No. 83-1797, 1985 WL 6284 (M.D. Pa. Dec. 3, 1985), vacated and remanded, 829 F.2d 30 (3d Cir. 1987), on remand, 699 F. Supp. 51 (M.D. Pa. 1988), aff'd in part, vacated in part, and remanded in part, 885 F.2d 52 (3d Cir. 1989), stipulation and order entered, No. 83-1797, 1991 WL 207484 (M.D. Pa. July 29, 1991). During the pendency of the case, the class first was altered to exclude residents of the District of Columbia, Pratt v. Heckler, 629 F. Supp. 1496, 1498 n.5 (D.D.C.), modified, 642 F. Supp. 883 (D.D.C. 1986), dismissed sub nom. Weathers v. Sullivan, C.A. Nos. 84-3035, 84-3038 (D.D.C. Feb. 24, 1992), appeal dismissed and remanded sub nom. Prue v. Shalala, No. 92-5081 (D.C. Cir. Apr. 26, 1993), stipulation and order entered, C.A. Nos. 84-3035, 84-3870 (D.D.C. July 23, 1993), reproduced in HALLEX I-5-419 Attach. 1 (1994 WL 463389 (S.S.A.)), and then to exclude residents of the Fourth Circuit states of Maryland and West Virginia. *Bailey*, 699 F. Supp. at 54.

The statewide class actions were: Salyers v. Secretary of Health and Human Servs., 798 F.2d 897, 900 (6th Cir. 1986) (referring to Eastern District of Kentucky order of Nov. 13, 1984 denying class certification); Mason v. Bowen, C.A. Nos. 83-390, 83-231, 83-391, 83-224, 83-406, 1986 WL 83399 (D. Vt. May 21, 1986), modified, C.A. Nos. 83-390, 83-231, 83-391, 83-224, 83-406, 1986 WL 15765 (D. Vt. Oct. 8, 1986), partial stay granted, C.A. Nos. 83-390, 83-231, 83-391, 83-224, 83-406, 1987 U.S. Dist. LEXIS 14774 (D. Vt. Jan. 21, 1987); *Pratt*, 629 F. Supp. 1496; Samuels v. Heckler, 668 F. Supp. 656 (W.D. Tenn. 1986); Wilson v. Heckler, 622 F. Supp. 649 (D.N.J. 1985), aff'd in part, vacated in part, 796 F.2d 36 (3d Cir. 1986), vacated and remanded, 482 U.S. 923, on remand, 829 F.2d 33 (3d Cir. 1987), on remand, 709 F. Supp. 1351 (D.N.J. 1989) and 734 F. Supp. 157 (D.N.J. 1990), modified, No. 83-3771, 1990 U.S. Dist. LEXIS 5114 (D.N.J. Mar. 29, 1990), stipulation of settlement and consent order approved, No. 83-3771 (D.N.J. Oct. 22, 1991), reproduced in HALLEX I-5-416A Attach. 1 (1993 WL 751921 (S.S.A.)); Campbell v. Heckler, 620 F. Supp. 469 (N.D. Iowa 1985), vacated and remanded, No. 86-1090NI (8th Cir. Oct. 28, 1987), on remand, No. C 84-2085 (N.D. Iowa Mar. 26, 1990), reproduced in HALLEX I-5-415 Attach. 2 (1992 WL 601851 (S.S.A.)), modified, No. C 84-2085 (N.D. Iowa Apr. 24, 1990), reproduced in HALLEX I-5-415 Attach. 2 (1992 WL 601851 (S.S.A.)), stipulation filed, No. C 84-2085 (N.D. Iowa Nov. 19, 1990), reproduced in HALLEX I-5-415 Attach. 2 (1992 WL 601851 (S.S.A.)); Mattson v. Heckler, 626 F. Supp. 71 (D.N.D. 1985) (class certification denied); McDonald v. Heckler, 612 F. Supp. 293 (D. Mass.), summary judgment granted, 624 F. Supp. 375 (D. Mass. 1985) and 629 F. Supp. 1138 (D. Mass. 1986), aff'd in part, vacated and remanded in part, 795 F.2d 1118 (1st Cir. 1986), on remand, C.A. No. 84-2190-G, 1987 WL 42446 (D. Mass. Jan. 29, 1987), aff'd, 834 F.2d 1085 (1st Cir. 1987); Dixon v. Heckler, 589 F. Supp. 1494 (S.D.N.Y. 1984), aff'd, 54 F.3d 1019 (2d Cir. 1995); and Johnson v. Heckler, 100 F.R.D. 70 (N.D. Ill. 1983), summary judgment granted, 593 F. Supp. 375 (N.D. Ill.), motion to alter denied, 607 F. Supp. 875 (N.D. Ill. 1984), modified, 604 F. Supp. 1070 (N.D. Ill.), aff'd, 769 F.2d 1202 (7th Cir. 1985), vacated and remanded, 482 U.S. 922, on remand, 834 F.2d 173 (7th Cir. 1987), on remand, 714 F. Supp. 1476 (N.D. Ill. 1989), aff'd in part, rev'd in part, 922 F.2d 346 (7th Cir. 1990).

[27] Those jurisdictions were: Arkansas, Connecticut, Indiana, Maine, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, Ohio, Puerto Rico, South Dakota, the Virgin Islands, and Wisconsin. In addition, no actions were brought in the Fifth, Tenth, and Eleventh Circuits.

In general, geographic limitations on class size meant that representation depended on the geographic distribution of legal resources. Class actions over Social Security issues were far more likely to be brought in populous states like California, Illinois, and New York.[28] If

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There were other issues that led to state-by-state, region-wide, or circuit litigation, thereby leaving out residents of many states. For example, six challenges were brought concerning the Social Security Administration's assessment of mental disability. City of New York v. Heckler, 578 F. Supp. 1109 (E.D.N.Y.), aff'd, 742 F.2d 729 (2d Cir. 1984), aff'd, 476 U.S. 467 (1986); Sprague v. Heckler, 595 F. Supp. 1380 (D. Me. 1984); H.J. v. Heckler, No. C-82-0483A (D. Utah Oct. 17, 1984); Avery v. Heckler, 584 F. Supp. 312 (D. Mass.), modified, 599 F. Supp. 236 (D. Mass. 1984), aff'd, 762 F.2d 158 (1st Cir. 1985); Morrison v. Heckler, 582 F. Supp. 321 (W.D. Wash. 1983); Mental Health Ass'n v. Schweiker, 554 F. Supp. 157 (D. Minn. 1982), aff'd as modified, 720 F.2d 965 (8th Cir. 1983). These cases covered residents in the states of Illinois, Indiana, Maine, Massachusetts, Michigan, Minnesota, New York, Ohio, Utah, Washington, and Wisconsin.

Similarly, seven class action suits were brought against the Social Security Administration's policies in determining the eligibility of widows, widowers, and divorced surviving spouses for disability benefits. Askin v. Shalala, No. 90-1089 Civ-J-10 (M.D. Fla. July 27, 1993), reproduced in HALLEX I-5-439 Attach. 1 (1994 WL 637410 (S.S.A.)); Bozzi v. Sullivan, No. 90-2580, 1991 U.S. Dist. LEXIS 1962 (E.D. Pa. Feb. 14, 1991), joint stipulation and order approved, No. 90-2580 (E.D. Pa. May 26, 1993), reproduced in HALLEX I-5-442 Attach. 1 (1994 WL 841142 (S.S.A.)); Turner v. Sullivan, No. 90-0688 (W.D. La. July 1, 1991), cited in HALLEX I-5-434 (1993 WL 751919 (S.S.A.)), modified, No. 90-0688 (W.D. La. Oct. 24, 1991), cited in HALLEX I-5-434 (1993 WL 751919 (S.S.A.)), joint stipulation and order approved, No. 90-0688 (W.D. La. Jan. 29, 1993), reproduced in HALLEX I-5-434 Attach. 1 (1993 WL 751919 (S.S.A.)); Begley v. Sullivan, Nos. Civ.-3-88-0841, Civ.-3-38-0157 (E.D. Tenn. Nov. 19, 1990), reproduced in HALLEX I-5-429 Attach. 1 (1992 WL 601855 (S.S.A.)); Hill v. Sullivan, 125 F.R.D. 86 (S.D.N.Y. 1989), joint stipulation and order approved, 87 Civ. 4344 (S.D.N.Y. Apr. 30, 1993), reproduced in HALLEX I-5-438 Attach. 1 (1994 WL 637409 (S.S.A.)); Marcus v. Heckler, 620 F. Supp. 1218 (N.D. Ill. 1985), summary judgment granted in part, 696 F. Supp. 364 (N.D. Ill. 1988), proposed order for relief approved in part, denied in part, No. 85 C 453, 1989 U.S. Dist. LEXIS 4129 (N.D. Ill. Apr. 17, 1989), final order adopted, No. 85 C 453 (N.D. Ill. June 12, 1989), partial stay granted, No. 85 C 453, 1989 U.S. Dist. LEXIS 11438 (N.D. Ill. Sept. 26, 1989), stay lifted, No. 85 C 453 (N.D. Ill. July 19, 1990), final judgment aff'd, 926 F.2d 604 (7th Cir. 1991). These cases covered residents of the states of Louisiana, Illinois, New York, and Tennessee and the states in the Third and Eleventh Circuits. A nationwide class was attempted in Pennsylvania, but certification was denied. Hudson v. Sullivan, 717 F. Supp. 340, 343 (W.D. Pa. 1989).

[28] See Bowen v. City of New York, 476 U.S. 467 (1986) (New York class action on standards for evaluating mental disabilities); Dixon v. Shalala, 54 F.3d 1019 (2d Cir. 1995) (New York class action on severity); Johnson v. Sullivan, 922 F.2d 346 (7th Cir. 1990) (Illinois class action on severity); State of New York v. Sullivan, 906 F.2d 910 (2d Cir. 1990) (New York class action on standards for evaluating cardiac impairments); Schisler v. Heckler, 787 F.2d 76 (2d Cir. 1986) (New York class action on medical improvement), remanded, No. CIV-80-572E, 1987 WL 15330 (W.D.N.Y. Aug. 5, 1987), aff'd in part, rev'd in part, 851 F.2d 43 (2d Cir. 1988); Stieberger v. Sullivan, 801 F. Supp. 1079 (S.D.N.Y. 1992) (New York class action on nonacquiescence in circuit law); Hill v. Sullivan, 125 F.R.D. 86 (S.D.N.Y. 1989) (New York class action on medical equivalence rules for widows' eligibility), joint stipulation and order approved, 87 Civ. 4344 (S.D.N.Y. Apr. 30, 1993), reproduced in HALLEX I-5-438 Attach. 1 (1994 WL 637409 (S.S.A.)); Marcus v. Bowen, 696 F. Supp. 364 (N.D. Ill. 1988) (Illinois class action on medical equivalence); Smith v. Heckler, 595 F. Supp. 1173 (E.D. Cal. 1984) (Ninth-Circuit-wide class action on

these actions were pled on a circuitwide basis, as happened in the Ninth Circuit,[29] then residents of smaller states in the circuit would be represented. Otherwise, residents of small states were often left unrepresented.

As to some issues, successful litigation in one state did not lead to any litigation in other states. *State of New York v. Sullivan*,[30] for example, was a discovery-intensive class action challenging the Social Security Administration's standards for determining disability for people with cardiac impairments. The class definition was limited to residents of New York State.[31] Although the suit was successful and led to an order to redetermine thousands of claims in cardiac cases, there was no similar suit filed to cover persons in any other state.[32]

Apart from geographic disparities in class action coverage, counsel made differing decisions about the programs covered in their proposed class definitions. Since the two main disability benefit programs, Title II[33] and Title XVI[34] of the Social Security Act, employ the same definition of disability,[35] most class actions regarding disability determinations were brought on behalf of claimants for both programs. In one of the medical improvement cases, however, the class was limited to recipients of Social Security benefits under Title II of

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severity filed in California), motion to vacate denied, Civ. No. S-83-1609 EJG, 1985 WL 71736 (E.D. Cal. May 1, 1985), vacated and remanded, 823 F.2d 1553 (9th Cir. 1987) on remand, Civ. No. S-83-1609 EJG (E.D. Cal. Dec. 4, 1989), cited in HALLEX I-5-408B (1992 WL 601849 (S.S.A.)), magistrate's recommendation adopted, Civ. No. S-83-1609 EJG (E.D. Cal. Oct. 3, 1990), cited in HALLEX I-5-408B (1992 WL 601849 (S.S.A.)), joint stipulation and order approved, Civ. No. S-83-1609 EJG (E.D. Cal. June 21, 1991), reproduced in HALLEX I-5-408B Attach. 1 (1992 WL 601849 (S.S.A.)); Young v. Heckler, No. 83-5321 (S.D. Ill. Nov. 16, 1984) (Illinois class action on medical improvement); Lopez v. Heckler, 725 F.2d 1489 (9th Cir.) (Ninth-Circuit-wide class action on medical improvement filed in California), vacated and remanded, 469 U.S. 1082 (1984).

29 See supra note 28.

30 906 F.2d 910 (2d Cir. 1990).

31 Id. at 914-15.

32 Much of the evidence presented in *State of New York* was tied to national policy as set out in internal manuals and explained by agency medical consultants. See State of New York v. Bowen, 655 F. Supp. 136, 139-42, aff'd, 906 F.2d 910 (2d Cir. 1990). Arguably, some of the evidence was limited to the New York region, meaning that another suit would have required somewhat different discovery. Id. at 140-41 (citing deposition of Social Security Administration's Regional Medical Advisor for New York Region).

33 Title II of the Social Security Act, 42 U.S.C. §§ 401-433 (1994), provides benefits to disabled insured workers and their dependents. It also provides benefits under specified circumstances to the disabled dependents of an insured worker who has died, retired, or become disabled. Id.

34 Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-1384 (1994), provides benefits to disabled persons who meet the statute's income and resource requirements. These benefits are generally referred to as Supplemental Security Income or SSI benefits.

35 42 U.S.C. §§ 423(d), 1382(c)(a)(3) (1994); 20 C.F.R. §§ 404.1501-.1599, 416.1001-.1094 (1995).

the Social Security Act.[36] No subsequent class action was filed in that state to cover disabled claimants under Title XVI of the Social Security Act.

One of the greatest disparities across the class definitions was the date by which a person had to have applied for benefits in order to qualify for membership in the class. For example, a person who was terminated from benefits in 1976 was covered by the Massachusetts, Pennsylvania, and New York medical improvement classes. In other states, coverage was limited to persons whose benefits were terminated as late as 1984.[37] These differences were largely a product of two factors. First, some counsel chose to argue for waiver of the statute of limitations and the requirement of exhaustion of administrative remedies. These counsel sought to include in their class persons who did not meet these requirements. Others simply excluded these claimants from their proposed classes. Second, depending on when the cases were filed, cases that did not challenge administrative exhaustion and statute-of-limitations requirements were limited to representing those whose claims were not yet stale when the case was filed. The start date of these classes depended on the date that the action was filed.[38] As with other restrictions on class definitions, when a class

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[36] Doe v. Heckler, 576 F. Supp. 463, 473 (D. Md. 1983), modified, 580 F. Supp. 1224 (D. Md. 1984).

[37] The actions covering residents of Maryland, Tennessee, West Virginia, Washington, and the states of the Eighth Circuit did not seek relief for those whose claims were not "live" as of the date of the filing of the suit. The start dates of these classes therefore depended on the date that the cases were filed—ranging from January 13, 1982 to January 30, 1984. Social Security Administration, Program Operations Manual System, DI 12555.001 (Mar. 1986) [hereinafter POMS] (noting that class in Samuels v. Heckler, 668 F. Supp. 656 (W.D. Tenn. 1986), included Tennessee residents who initiated administrative or judicial appeals on or after October 29, 1982); Telephone Interview with Russell J. Overby, *Samuels*'s Counsel (Jan. 1, 1995) (confirming that opening date of class was determined by date complaint was filed); POMS, supra, at DI 12546.001 (stating that in Graham v. Heckler, 573 F. Supp. 1573 (N.D. W. Va. 1983), dismissed, 742 F.2d 1448 (4th Cir. 1984), the "class consists of all . . . residents of West Virginia . . . whose claims of continuing disability were . . . active as of the date the class action was filed (8/9/83)"); Polaski v. Heckler, 585 F. Supp. 1004, 1006-07 (D. Minn.) (redefining class to include beneficiaries in Arkansas and Iowa for whom the statute of limitations had been tolled by the filing of separate class actions in those states; otherwise affirming a start date of January 30, 1984), remanded, 751 F.2d 943 (8th Cir. 1984), cert. granted and judgment vacated, 476 U.S. 1167, on remand, 804 F.2d 456 (8th Cir. 1986), cert. denied, 482 U.S. 927 (1987); *Doe*, 576 F. Supp. at 473 (certifying class of Title II recipients whose disability had been determined to have ceased on or after 60th day prior to action's filing); Morrison v. Heckler, 582 F. Supp. 321, 322 (W.D. Wash. 1983) (noting previous certification of class whose members had administratively active claims on or after 60 days prior to July 23, 1982).

[38] There were other factors at play as well. Some counsel argued for an earlier date for waiving exhaustion requirements than others. In some cases, a later date coincided with claims that the agency had failed to abide by the relevant circuit law. See, e.g., Lopez v. Heckler, 572 F. Supp. 26, 31 (C.D. Cal. 1983) (defining class in terms of agency's failure to

excluded persons with arguably stale claims, no other class action was filed on their behalf.[39]

The result of this pattern of pleading and occasional judicial narrowing of the geographic scope of the class is that persons with identical claims who live outside the borders of the class are often left without relief. Although copycat lawsuits will often be filed in a number of jurisdictions, it is rare that such lawsuits are filed in every state.[40] Furthermore, some issues will not be litigated in more than one state.[41] Even when such suits are filed, delay in filing usually means that many persons are time-barred from obtaining relief.[42] Where the decisions by counsel limit representation, no subsequent suit can be expected to be filed to pick up the excluded persons. Those who are excluded from the cases may benefit from the injunctive relief or new policies that result from the litigation.[43] But they will never receive the retroactive relief that their neighbors in represented classes will receive.[44]

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abide by 1981 and 1982 Ninth Circuit precedents held in Patti v. Schweiker, 669 F.2d 582 (9th Cir. 1982) and Finnegan v. Matthews, 641 F.2d 1340 (9th Cir. 1981)), aff'd in part, rev'd in part, 725 F.2d 1489 (9th Cir.), vacated and remanded, 469 U.S. 1082 (1984).

[39] As with the medical improvement cases, the time period for relief in cases challenging the standards for determining widows' disability varied tremendously from case to case. The temporal scope of the class receiving relief depended in part on whether the class included claims that were administratively stale as of the date of the filing of the suit, as well as when the suit was filed. See Askin v. Shalala, No. 90-1089 Civ-J-10 (M.D. Fla. July 27, 1993), reproduced in HALLEX I-5-439 Attach. 1 (1994 WL 637410 (S.S.A.)) (seven-month period covering claims that were not stale as of filing date); Begley v. Sullivan, Nos. Civ.-3-88-0841, Civ.-3-89-0157 (E.D. Tenn. Nov. 19, 1990), reproduced in HALLEX I-5-429 Attach. 1 (1992 WL 601855 (S.S.A.)) (two-year-and-nine-month period covering claims that were not stale as of filing date); Bozzi v. Sullivan, No. 90-2580 (E.D. Pa. May 26, 1993), reproduced in HALLEX I-5-442 Attach. 1 (1994 WL 841142 (S.S.A.)) (seven-year period including claims that were stale as of filing date); Hill v. Sullivan, 87 Civ. 4344 (S.D.N.Y. Apr. 30, 1993), reproduced in HALLEX I-5-438 Attach. 1 (1994 WL 637409 (S.S.A.)) (eight-year period including claims that were stale as of filing date); Marcus v. Sullivan, HALLEX I-5-431, 1993 WL 643219 (Feb. 12, 1993) (five-and-a-half-year period covering claims that were not stale as of filing date); Turner v. Sullivan, No. 90-0688 (W.D. La. Jan. 29, 1993), reproduced in HALLEX I-5-434 Attach. 1 (1993 WL 751919 (S.S.A.)) (15-month period covering claims that were not stale as of filing date).

[40] See supra text accompanying notes 19-32.

[41] See supra text accompanying notes 30-32.

[42] See supra text accompanying notes 37-39.

[43] For example, after class actions were filed in S.P. v. Sullivan, 90 Civ. 6294 (S.D.N.Y. Feb. 9, 1996) (approving stipulation and order of settlement), and Rosetti v. Shalala, 12 F.3d 1216 (3d Cir. 1993), the agency promulgated new federal regulations for determining when persons who are HIV-positive should receive disability benefits. See *Rosetti*, 12 F.3d at 1220; 20 C.F.R. § 404, subpt. P, app. 1 (1995). The regulations took effect on a nationwide basis. The retroactive reconsideration of claims, however, only applies to those who are within the class definitions of these cases.

[44] Similar issues can arise where the affected class is nationwide in scope but the relevant law is state law. In those situations, nationwide class actions can present complicated

II

WHY CLASS DEFINITIONS MAY BE DRAWN NARROWLY

Narrow class definitions make little sense in the context of the common presumption that attorneys have an interest in drawing a class as broadly as possible.[45] Although this presumption is reasonable in the entrepreneurial[46] world of money-making suits where fees are based on a percentage of the recovery,[47] it does not carry over to situations where fee-sensitive attorneys face different incentives, or where attorneys can be expected to be motivated by concerns other than the bottom-line fees that are expected from the litigation.[48]

As a purely economic matter, fee provisions may operate to make counsel indifferent or disinterested in broader representation. Under a lodestar system of fee recovery,[49] fees are based on the hours expended on a case. There is generally no enhancement for the risk

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choice of law issues. See generally, Miller & Crump, supra note 1. The failure to plead and pursue a nationwide class, however, can leave persons in some states without a remedy. For example, if the viability of a lawsuit depends on the size of the class, state-by-state litigation may lead residents of smaller states without redress. Id. at 71.

45 See, e.g., Downs, supra note 1, at 646.

46 The interests of the economically motivated or "entrepreneurial" class action attorney have been examined in depth in numerous articles. See, e.g., Coffee, supra note 6; John C. Coffee, Jr., Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 Colum. L. Rev. 669, 677-90 (1986); Jonathan R. Macey & Geoffrey P. Miller, The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U. Chi. L. Rev. 1, 12-27 (1991).

47 Under a percentage fee scheme, the bigger the class, the bigger the recovery; and the bigger the recovery, the bigger the fee. In an entrepreneurial world where counsel is presumed to make decisions based on an economic calculus, percentage fee schemes can be expected to lead to broadly defined classes.

48 Ethical rules presume that attorneys will not be motivated by financial considerations. See Evans v. Jeff D., 475 U.S. 717, 726-29 (1986). Even if financial incentives are sufficiently powerful to dwarf these obligations for some attorneys, see Coffee, supra note 6, at 882-96, they cannot be expected to do so in all contexts. At the very least, salaried attorneys in public interest organizations cannot be presumed to base their litigation decisions solely on the possibility of maximizing a fee for their organizations.

49 Under a lodestar system, attorney fees are based on the number of hours reasonably expended on the case multiplied by a reasonable hourly fee for legal services. See Hensley v. Eckerhart, 461 U.S. 424, 433-37 (1983). The lodestar method has been adopted as the "centerpiece" of attorney fee awards. Blanchard v. Bergeron, 489 U.S. 87, 94-95 (1989) (citing *Hensley v. Eckerhart* and "subsequent cases"). Many sources suggest that in common fund cases the trend is away from lodestar and toward percentage recovery. See, e.g., Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1267 (D.C. Cir. 1993); Longden v. Sunderman, 979 F.2d 1095, 1099 n.9 (5th Cir. 1992); In re Avon Prods., Inc. Sec. Litig., 89 Civ. 6216 (MEL), 1992 U.S. Dist. LEXIS 17072, at *7 (S.D.N.Y. Nov. 5, 1992); 1 Alba Conte, Attorney Fee Awards § 2.07, at 45 (2d ed. 1993). However, only two circuits have explicitly adopted the percentage approach in common fund cases. See *Swedish Hosp.*, 1 F.3d at 1271; Camden I Condominium Ass'n v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991).

associated with the case,[50] or for the size of the class that obtains relief.[51] Thus, there is no fee advantage to seeking relief for a broader group of plaintiffs. Furthermore, if an increased class brings with it increased costs in litigation or management of relief, there is a fee disincentive to broader representation. Although a lodestar scheme ordinarily would compensate successful counsel for these additional expenditures, the larger suit increases the stakes associated with the litigation. As a fee maximizing matter, if increased representation brings with it increased costs, and the attorneys are paid on a lodestar basis, the attorneys may prefer to limit their losses by diversifying their risks. A number of smaller classes would lower the attorney's risk as compared to a larger class. Indeed, increased costs with increased representation could serve as a disincentive to broader classes even in some percentage recovery cases. Although the larger class would mean a larger recovery, the stakes associated with investing in one big suit simply may be too high.[52]

Apart from fee incentives, the institutional structure for reviewing class definitions encourages narrow class definitions. Plaintiff counsel knows that the defendant can challenge the definition of the class and that such challenges are common. Although on rare occasions defendants have challenged class definitions as being too narrow,[53] it is routine for defendants to challenge a definition as too

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[50] City of Burlington v. Dague, 112 S. Ct. 2638, 2643 (1992). Risk enhancements may be permitted in common fund cases. See In re Washington Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1299 n.8 (9th Cir. 1994) (allowing risk enhancement in common fund case and showing circuit division in applying *Dague*'s prohibition to such cases).

[51] The fee may be enhanced to reflect "exceptional results" but only in rare and exceptional cases when specific evidence on the record and detailed findings by lower courts demonstrate that the lodestar method of calculation does not yield a reasonable fee. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 564-65 (1986) (citing Blum v. Stenson, 465 U.S. 886, 898-901 (1984)).

[52] As a general matter, percentage recovery schemes can be expected to encourage large classes. The bigger the class, the bigger the pot from which to calculate a percentage fee. Thus, narrow class definitions are much less likely to occur in cases where attorneys can expect to be paid on a percentage basis.

[53] In Vaughn v. CSC Credit Servs., No. 93 C-4151, 1994 U.S. Dist. LEXIS 2172 (N.D. Ill. Feb. 28, 1994), modified on other grounds, 1995 U.S. Dist. LEXIS 1358 (N.D. Ill. Jan. 31, 1995)—the only case of defendant objections that the author has identified in a survey of recent case law reported on LEXIS—the plaintiff sought to represent a class of debtors in the state of Illinois who had purchased cars and had obtained financing through CSC Credit Services. The plaintiff challenged the credit notices as violative of the Truth in Lending Act. Id. at *10-*11. The defendant objected that the restrictions in the class definition, requiring that the class consist of Illinois residents and persons who made car purchases, were arbitrary. Id. at *8. The defendant asserted that it used the same document nationwide for a range of transactions and that the suit should cover all creditors who received the same credit documents. Id. The court rejected the defendant's argument, concluding that if the class specified by the plaintiffs met the requirements of Rule 23, the court should not disturb that definition. Id. at *10.

broad.[54] Especially where the defendant does not expect those who are left out of the litigation to be able to sue separately, the defendant has little interest in a broader class definition.[55] In many situations, those who have an interest in raising the issue, namely the persons excluded from the class, will lack the information and resources to intervene and seek to have the class broadened.[56] Finally, under current practice, counsel can expect the court to ask whether the proposed class is too broad, but not whether it is too narrow.[57] Plaintiff

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Vaughn is perhaps best explained by the unusual statutory framework in which Truth in Lending and Fair Debt Collection Practices Act cases are brought. Under these statutes, damages are limited to $500,000 or 1% of a defendant's assets, whichever is smaller. Truth in Lending Act, 15 U.S.C. § 1640(a)(2)(B) (1994); Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a)(2)(B) (1994). Had the class in *Vaughn* been increased from an Illinois class of auto purchasers to a nationwide class of purchasers of a range of goods, the class would have climbed to 500,000 persons, and notice costs would have come close to or exceeded the total value of damages. *Vaughn*, 1994 U.S. Dist. LEXIS 2172, at *9. Thus, the defendant's efforts to expand the class were probably not prompted by the theoretical goals of efficiency outlined above, but rather by the possibility of making the class litigation infeasible.

[54] See Thomas E. Willging et al., An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges, 71 N.Y.U. L. Rev. 74, 114 (1996) (finding that defendants opposed class certification in more than 50% of the cases in three of the four courts examined, and in 40% of the cases in the other court).

[55] Even where the defendant would expect a subsequent case to be filed to represent those who are not in the original class definition, there are a number of possible reasons for a defendant's reluctance to challenge a class as too narrow. Uncertainty about the preclusive effect of class actions might eliminate the prime benefit of broader classes. See Ticor Title Ins. Co. v. Brown, 114 S. Ct. 1359, 1363 (1994) (O'Connor, J., dissenting) (reasoning that successful defendants would not find the obligation to relitigate questions of the preclusiveness of class action decrees to be inconsequential). In addition, defendants might be risk averse and prefer smaller lawsuits where the stakes are smaller.

Defendant interests play out differently in the settlement context. It is not unusual for defendants to be interested in broader definitions of a class at the time of settlement since a broader class means greater preclusive effect from the settlement. Again, one would expect defendant interest in broadening a class at this stage to depend on the degree to which the defendant sensed a serious threat of additional litigation by persons excluded from the class and on the degree to which the settlement provided relief to those persons. Thus, where the excluded persons would be less likely to be able to litigate independently or the settlement provides greater relief, defendant interests are unlikely to work to include persons in the class.

[56] Excluded class members will be unable to intervene if they cannot locate representation, either because of the scarcity of legal representation or because the excluded claims do not independently justify the necessary legal costs. They also cannot intervene if they lack adequate knowledge about the litigation. At the same time, if they do not intervene early in the litigation, their intervention may well be seen as an untimely effort to expand the class.

[57] There are very few cases in which the courts discuss broadening of a class. Those cases in which courts have sought to expand class definitions have been overturned or criticized by appellate courts. In In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation, 526 F. Supp. 887 (N.D. Cal. 1981) [hereinafter *Dalkon Shield*], vacated, 693 F.2d 847 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983), for example, the district court certified a nationwide non-opt-out class action on a claim for punitive

counsel therefore must justify all of the inclusive decisions in the class definition, but none of the decisions to exclude. Given this institutional environment, cautious counsel may self-censor a class definition. The narrower class avoids the possibility of an early defeat in the litigation and the possibility of adversely affecting the court's view of how the plaintiff is conducting the case.

The lower stakes of a smaller suit could also lead to the narrowing of class boundaries. The smaller the class, the smaller the group that can potentially be precluded as a result of the litigation. Where there is a possibility of separate representation for those who are defined out of the class, there is also a possibility that the separate suit might be before a more favorable forum or benefit from alternative litigation strategies. Counsel may wish to defer to those who would bring such a separate suit. Furthermore, if there is a broader law-reform objective of developing some favorable precedent, there is value in diversifying the opportunities for such a result. In addition, many smaller suits, with some favorable rulings, can help create a climate that is conducive to voluntary action on the part of defendants and that would be beneficial to a broader spectrum of people.[58]

There may also be strategic reasons why a narrow class better serves those who are lucky enough to be included in the class. If the broader class reflects some additional complexity in the case, it may mean greater delay in discovery and resolution of the suit. Even where the claims are no more complex, a larger case may be more likely to result in appellate review. The greater the stakes in the case, the greater the defendant's interest in pursuing additional review as

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damages over the objections of plaintiff counsel. The Ninth Circuit reversed, citing in part the problem of adequacy of representation where the named plaintiff has not offered to represent the broader class. *Dalkon Shield*, 693 F.2d at 851.

Similarly, in Castro v. Beecher, 334 F. Supp. 930 (D. Mass. 1971), aff'd in part, rev'd in part, 459 F.2d 725 (1st Cir. 1972), the court sought to expand the class definition in a challenge to police hiring practices. Although the denial of class certification ultimately was upheld by the First Circuit on other grounds, the circuit court criticized the district court for seeking to require the plaintiffs to represent a broader class. *Castro*, 459 F.2d at 731-32; see also Ganousis v. E.I. du Pont de Nemours & Co., 803 F. Supp. 149, 156 (N.D. Ill. 1992) (commenting that "the Court knows of no case" where a court has forced counsel to represent nationwide class when it had asked to represent plaintiffs in one state).

[58] For example, suits brought on behalf of residents of some states can lead to nationwide changes in regulations or congressional action. Specifically, the S.P. v. Sullivan, 90 Civ. 6294 (S.D.N.Y. Feb. 9, 1996), litigation in New York followed by the Rosetti v. Shalala, 12 F.3d 1216 (3d Cir. 1993) litigation led to nationwide changes in the regulations for determining disability for persons with HIV. See supra note 43. The cases regarding widows' disability benefits led to congressional repeal of the more-stringent statutory standard for determining eligibility for widows and widowers. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 5103, 104 Stat. 1388 (codified at 42 U.S.C. §§ 416(e), (h)(1)(A)-(B), (i)(1), 423(d)(2), (e), (f)(1)-(3), (g)(1)-(3) (1994)).

compared with abiding by the judgment of a lower court. Larger cases may also be seen as more worthy of close attention by the appellate courts. A nationwide class action, for example, is more likely to meet the "importance" standards for Supreme Court review, or to be seen as worthy of careful attention by courts of appeals.[59]

A smaller class also may be advantageous for obtaining an earlier settlement of the case. Although defendants are often presumed to be more willing to settle larger class actions so as to avoid potential large losses,[60] there can be advantages to settling smaller suits. With a smaller class, it is likely to be less costly for the defendant to settle the case. The lower cost of settlement with the smaller class might make settlement look more favorable as compared to the costs of litigating the case. Similarly, a smaller settlement may allow the defendant to save face. For example, where plaintiffs are litigating against a government defendant, a smaller class may allow the suit to be settled as an "experiment" rather than as a complete change in policy.[61]

Smaller classes may also ease management of relief in a case and improve communication with members of the class.[62] With a small class, there are simply fewer class members to receive notices and for whom to administer relief.[63] Similarly, smaller class size eases the possibility of meeting with class members or providing direct access to counsel.[64]

Narrower class definitions may also help to limit potential differences in the interests of members of the plaintiff class. Where the defendant may propose different relief for different groups, a broader class raises a greater danger of future conflicts within the class.[65]

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[59] See Samuel Estreicher & John Sexton, Redefining the Supreme Court's Role 63 (1986) (arguing that, in the context of federal court rulings that threaten to interfere significantly with important federal statutory programs or nonstatutory federal action, decisions which necessarily have nationwide scope should receive greater attention from Supreme Court).

[60] See Note, Certifying Classes and Subclasses in Title VII Suits, 99 Harv. L. Rev. 619, 627 & n.52 (1986) (citing several articles asserting view that broad certification unfairly burdens defendants by compelling them to settle even nonmeritorious claims).

[61] See Defendants' Memorandum Concerning Fairness of Proposed Settlement at 12, Stieberger v. Sullivan, No. 84 Civ. 1302 (S.D.N.Y. June 16, 1992) (on file with author).

[62] See generally Grosberg, supra note 6 (discussing applicability of client-centered norms to class actions); Deborah L. Rhode, Class Conflicts in Class Actions, 34 Stan. L. Rev. 1183 (1982) (addressing some problems of communicating effectively in class actions).

[63] Smaller classes, however, do not always ease administration of relief. Added parameters in a class definition can increase the number of disputes over class membership, thereby increasing the burden on class counsel.

[64] Once the class becomes so large that such direct meetings are not feasible, however, these benefits diminish.

[65] Class definitions will reduce such conflicts only to the extent that the parameters of the class definition track those by which the defendant would propose to limit or vary

Although these reasons for pursuing small class size suggest that proposed class definitions that are narrow are the result of careful deliberation on the part of class counsel, it is also possible for classes to be defined narrowly for no reason at all. Because counsel may have no incentive to provide relief for a greater number of persons, there may be little attention given to who is excluded from the class, so long as the class is sufficient in size to meet the numerosity requirements of Rule 23[66] and to provide an ample group from which to obtain named plaintiffs to avoid problems of mootness during the litigation. There may be no attention to the possibility that reasons that often support restricting the size of a class do not apply in the particular case. The failure to draw the class more inclusively may be merely a matter of neglect.

III
SHOULD NARROW CLASS DEFINITIONS BE SEEN AS A PROBLEM?

The next question is whether there is any reason to be concerned about a class being too narrow. If there were no harm done by narrowly defined class actions, an institutional framework that provided one-sided scrutiny of the breadth of a proposed class and did not encourage class counsel to consider the interests of those excluded from the class would not be troubling.

The principal harm caused by defining a class narrowly is the potential of denying similarly situated persons the same opportunity for relief for similar claims. If it is predictable that there will not be subsequent litigation on behalf of those excluded from the class, the decisions made in defining a class are fundamentally decisions about equality. The definition determines who will be treated similarly and who will be treated differently; who will have an equal opportunity to realize the fruits or the consequences of the litigation and whose claims simply will not be heard.

Some narrow class definitions will operate to foreclose subsequent class action litigation on behalf of those excluded from a class. This is clearest where the narrow class leaves leftover groups that are not sufficient in size to meet the numerosity requirements of Rule 23.[67] Consider, for example, the case of *Robinson v. Heckler*,[68] for

relief. For a discussion of how class definitions cannot obviate counsel's need to resolve class member differences over forms of relief, see Nancy Morawetz, Bargaining, Class Representation, and Fairness, 54 Ohio St. L.J. 1 (1993).

[66] Fed. R. Civ. P. 23(a)(1).

[67] Fed. R. Civ. P. 23(a)(1).

[68] No. 83 Civ. 7864 (LFM) (S.D.N.Y.) (order entering consent judgment May 17, 1985).

which I must take personal responsibility for what, in retrospect, appears to have been an unjustifiably narrow class. In *Robinson*, the plaintiffs challenged the policies of the Appeals Council of the Social Security Administration to determine whether an appeal was filed on time. The case raised a variety of claims, including some that were based on Second Circuit law. There were no legal issues specific to residents of New York State. Nonetheless, as was the custom of the office litigating the case, the class was limited to New York State residents. Given that the New York State class was about two hundred persons, the excluded persons from the less populous states of the circuit—Vermont and Connecticut—were left with a claim for which it would have been more difficult to identify an affected named plaintiff and more difficult to establish numerosity.

Subsequent litigation may also be foreclosed where the absent class members must rely on the actions of the named plaintiff to meet applicable statutes of limitations. Whereas absent class members who are included in the class definition will be protected from a limitations defense because of the actions of the named plaintiff, those who are excluded will be held independently responsible for meeting time limits. They may learn of their rights far too late to protect them.[69]

It could be argued that statutes of limitations are generally the responsibility of all persons who seek to pursue claims, and that there is, therefore, no reason to be concerned about those who will have missed a statute of limitations.[70] In the class context, however, class members are not required to meet statutes of limitations indepen-

[69] For example, in Page v. Pension Benefit Guaranty Corp., 130 F.R.D. 510 (D.D.C. 1990), the plaintiffs sought to amend their complaint to alter the definition of the proposed class. Under the amended complaint, the class was specified as a nationwide class challenging policies that affected a number of pension plans. The court concluded that the original complaint did not provide notice of the breadth of the challenge or its geographic scope. It therefore concluded that the amendments could not relate back to the date of the original complaint. The result was that the claims of many members of the new proposed class were barred by the applicable statute of limitations. The court excluded this time-barred group from the scope of the class definition. Id. at 513-14.

Similarly, in Ganousis v. E.I. du Pont de Nemours & Co., 803 F. Supp. 149 (N.D. Ill. 1992), plaintiffs suffered from the failure of an earlier class action to be pled broadly. *Ganousis* sought relief on behalf of a class of Illinois residents who were injured by a medical device. A prior class action had been filed in Minnesota. If the pleadings in the Minnesota case were read broadly to cut across state lines, the statute of limitations would have been tolled for the Illinois plaintiffs. The Minnesota plaintiffs, however, clarified their request for relief in their motion for class certification as including only residents of Minnesota. The court in Illinois concluded that this made clear that the class was limited to one state and, therefore, that the statute of limitations was not tolled for the Illinois plaintiffs. Id. at 155-57.

[70] In Lewis v. Bloomsburg Mills, 773 F.2d 561 (4th Cir. 1985), the court relied on this argument in upholding a district court's decision to limit an employment discrimination case to a class of black women employees. The court stated that black men were no more

dently.[71] Instead, the action of the named class member serves to toll the statute of limitations for all those included as absent members and spares those in the described class from any obligation to file a claim to protect their rights.[72] In contrast, those who are excluded from the class definition must actually file a lawsuit to protect their rights. Why should the failure to act be so catastrophic for one group while it is of no consequence to the other? Furthermore, the reality is that, in many cases, class members lack knowledge about their claims. It is the attorneys, who develop the claim and bring the action, who have the knowledge of the claims and of the time-limitation period. Even if the potential class members do know about their claims, they are unlikely to know whether they are or are not within the technical definition of a class. Whereas the individual plaintiff knows whether or not she is represented, and therefore knows whether an attorney has undertaken an obligation to take steps to protect her rights, the class client often will know nothing or at most know that there is a class action being pursued with respect to her interests. Unless she inspects the pleadings, she will not know if her own claim has been left out. Thus, when the attorney draws the boundary of the class narrowly, and the court leaves that boundary unquestioned, the attorney is making a decision that is determinative of the absent class members' opportunity for relief.

Even when the excluded class members retain the theoretical right to sue, it may be difficult for those who were excluded to find counsel to pursue relief. Lodestar fees[73] that are paid only to successful counsel are by definition insufficient compensation for the risks of litigation, regardless of the merits of the case.[74] There simply may not be another private attorney willing to take on the case of those who were left out of the case. Nor can the public-interest bar be relied on to provide representation. Public-interest litigation is financed from limited funds, and the funds that are available are not distributed evenly. As a result, persons with identical claims who are left out of a class definition may find themselves without counsel. This appears to have been the case with much of the Social Security litigation in the 1980s. Despite the fact that many cases raised issues about nation-

harmed by being excluded from the class than any group of "strangers" to the litigation. Id. at 565.

71 American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 550 (1974).

72 Id.

73 See supra note 49.

74 See City of Burlington v. Dague, 112 S. Ct. 2638, 2647-48 (1992) (Blackmun, J., dissenting) (noting that attorneys have an incentive to take even the most nonmeritorious claim that guarantees payment of fees as compared to the most meritorious claim under a fee-shifting statute where there is a risk of not receiving payment).

wide policies, certain states lacked the legal services resources to litigate issues that were better litigated on behalf of persons who lived in states with more well-funded organizations.[75]

Litigation on behalf of the excluded group may also be impractical because the leftover class is unaware of its rights or is too dispersed. For example, in discrimination cases, courts sometimes permit class definitions to include persons who have been discouraged from applying for employment or housing.[76] If these persons are not included in the class definition, it is highly unlikely that they could sue separately. They are likely to lack information about the suit, and would therefore be less able to bring suit even where they would not be time-barred. Furthermore, these persons are likely to be dispersed, making identification of a named representative more difficult. If a named representative is identified, it may be difficult to prove that those who are identifiable as discouraged applicants meet the numerosity requirements for class certification.

In the law reform context, it is very possible that an initial narrow class will operate to foreclose subsequent litigation on behalf of the groups that are excluded. Law reform resources are limited and unevenly distributed. Once one group takes on representation with respect to a given issue, it is very possible that other groups will focus on other issues that are deserving of representation.[77] The decisions of the first group as to who is included in the class are therefore determinative.

Given that a class definition may operate to exclude similarly situated persons with meritorious claims, the question remains whether this should be seen as a problem. The answer to this question depends very much on one's understanding of the purpose and function of class actions.

The class action rule itself reflects four basic concerns. The first is that it provides for efficient adjudication of issues that would otherwise require multiple litigation.[78] Second, the rule provides for judi-

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[75] See supra text accompanying notes 19-38.

[76] See, e.g., Glover v. Crestwood Lake Section 1 Holding Corp., 746 F. Supp. 301, 306 (S.D.N.Y. 1990) (approving class definition including persons discouraged from applying for housing rather than limiting class to persons who applied and were rejected); Byrd v. IBEW, Local 24, 18 Fair Empl. Prac. Cas. (BNA) 1280, 1288-89 (D. Md. 1977) (noting possibility of tentative certification of deterred nonapplicant class in sheet metal trade).

[77] For example, in New York State there are many legal services organizations that have litigated cases about disability policies. Since the early 1980s, there have been suits brought by upstate groups about the medical improvement standard, and suits brought by New York City groups about cardiac, widows' disability and mental impairment policies. No group brought a case to fill in gaps left by the class definitions of earlier cases.

[78] See General Tel. Co. v. Falcon, 457 U.S. 147, 155 (1982) (noting that "'the class-action device saves the resources of both the courts and the parties by permitting an issue

cial access in instances where individual cases could not be brought.[79] Third, the class action device provides the opportunity for consistent adjudication. Consistency is an express goal of Rule 23(b)(1)(A), which permits certification of classes where inconsistent rulings could leave a party with conflicting obligations,[80] and of (b)(1)(B), which addresses the problem of consistency where adjudication on behalf of a segment of a class would impair the interest of others in the same class.[81] Finally, the rule reflects due-process concerns through its requirement of adequacy of representation.[82]

From an efficiency standpoint, a narrow class definition is only a problem if subsequent cases will be brought that could have been part of the original case, if there will be obstacles to joining the cases together at a later stage, and if consolidation of the cases would have reduced the costs of litigation. These efficiency concerns will be greatest when it is most economically viable to bring a separate lawsuit. In these situations, the excluded class members suffer only to the extent that they lose the ability to share attorney costs. They do not suffer in terms of losing their day in court.

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potentially affecting every [class member] to be litigated in an economical fashion under Rule 23'" (quoting Califano v. Yamasaki, 442 U.S. 682, 701 (1979))).

[79] In its discussion of subdivision (b)(3) of Rule 23, the Advisory Committee specifically recognized that "the amounts at stake for individuals may be so small that separate suits would be impracticable." See Fed. R. Civ. P. 23 advisory committee's note; see also Judith Resnik et al., Individuals Within the Aggregate: Relationships, Representation, and Fees, 71 N.Y.U. L. Rev. 296, 299-300 (1996) (discussing the legislative history of Rule 23). The role of class certification in allowing access to the courts was also recognized by the Supreme Court in its decision in Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985); see also O'Neil v. GenCorp, No. 88 Civ. 8498 (JSM), 1991 U.S. Dist. LEXIS 2475, at *23 (S.D.N.Y. Mar. 1, 1991) (noting that small size of some claims meant that plaintiffs would lose forum for redress if class certification were denied).

While the legislative history of Rule 23 refers explicitly to access in (b)(3) actions, (b)(2) has served the function of securing access. All of the Social Security cases described in Section I were certified as (b)(2) actions and in each case class litigation served to provide access for persons who otherwise, in all likelihood, would have gone unrepresented. The Supreme Court has recognized the role of Rule 23(b)(2) in permitting litigation of claims such as these that have limited monetary value. See *Califano*, 442 U.S. at 701 (commenting on the suitability of class certification in a nationwide class that had been certified under Rule 23(b)(2)); cf. Hoffman-LaRoche, Inc. v. Sperling, 493 U.S. 165, 170 (1989) (noting that collective action procedures under the Age Discrimination in Employment Act provide "plaintiffs the advantage of lower individual costs to vindicate rights by pooling of resources").

[80] Fed. R. Civ. P. 23(b)(1)(A).

[81] Fed. R. Civ. P. 23(b)(1)(B).

[82] See, e.g., Morgan v. Laborers Pension Trust Fund, 81 F.R.D. 669, 679 (N.D. Cal. 1979) (stating that requirement of adequate representation ensures due-process rights of absent class members); Richardson v. Coopers & Lybrand, 82 F.R.D. 335, 338 (D.D.C. 1978) ("Rule 23(a)(4)'s requirement of adequate representation has roots in the requirements of due process . . . ."). See generally, Hansberry v. Lee, 311 U.S. 32, 44-45 (1940) (holding that litigants with opposing interests should not be certified as class).

In contrast, the concern of access to the courts is most directly presented when the excluded class members lack the resources and/or the sophistication to present their claims separately. In this context, it is surely efficient (in terms of minimizing the burden on the court) to allow the group to be excluded. No subsequent case is expected to clog the courts. But it is precisely in such a circumstance that those excluded from the class will suffer most.

In some cases, the persons excluded from a class will be worse off as a result of a previously filed narrow class. Consider, for example, the situation in which a class definition carves out a core class and the remaining group will have trouble establishing its numerosity. In this situation, the excluded persons would have been better off had there been no prior litigation. Thus, the definition of the original class serves to block access for other persons who could have been included in that class action.

In other cases, the class definition cannot be said to block access, but at the same time it serves to deny the only feasible access that was available to the excluded persons. Consider, for example, the situation in which the time limitation is running out. Those who are included in the class definition will have their rights protected; those who are not will be barred from litigating their claims. The choice about how to define the class will have the practical effect of determining who in the potential classes will have access to the court.

In some situations, limited class definitions may raise concerns of inconsistent opportunity to pursue relief. When a class definition results in a leftover class that cannot sustain separate litigation, the problem is similar to that addressed by section (b)(1)(B) of Rule 23: The first group to get to court and define the class serves to deny similar relief to similar groups. But the more common problem of consistent adjudication is one of consistency in results. Of course, this type of consistency is hardly required by Rule 23.[83] There is reason, however, to be troubled by the inconsistency in results that follows from a decision to exclude persons from a class. Unlike the inconsistency that flows from opt-out decisions in the Rule 23(b)(3) context, those who receive inconsistent relief because they are unable to secure representation cannot be said to have made a choice. They lack a consistent opportunity to obtain the relief that will flow from the class litigation.

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[83] Rule 23 specifically contemplates inconsistent results through its provisions for opt-out classes under Rule 23(b)(3). Furthermore, permissive certification to achieve consistency is limited to situations where a party would be subjected to inconsistent obligations or would be effectively barred from asserting a claim due to the prior action. See Fed. R. Civ. P. 23(b)(1).

The final concern underlying Rule 23 is adequacy of representation. Adequacy of representation, of course, has been the battle cry for limited class definitions. The narrower the class, it is assumed, the more adequately the class representative and lawyer will protect the interests of class members.[84] Narrow class definitions, however, hardly promise an absence of conflicting interest in the class. Although narrowly drawn classes may help to ensure common interests as to aspects of litigation, many of the distributive issues faced in litigating and settling class actions cannot be avoided through narrow class definitions. Rather, the seemingly narrow class may only lead to less attention to the variations in interests that are inherent in all class litigation.[85] At the same time, narrow classes may preclude the possibility of any representation for those excluded. Although differences within the class could require greater attention to the adequacy with which class members' rights are protected, it is only through inclusion that there is any attention to the interests of potential class members who lack the knowledge and resources to litigate separately or who would otherwise be time-barred from pursuing relief.[86]

Apart from these concerns under Rule 23, the consequences of narrow class definitions merit attention because they are court-sanctioned determinations of who should be treated equally. At the very least there should be some attention to whether these determinations are arbitrary.

IV
POSSIBLE APPROACHES

Because no actor is currently understood to have an obligation to worry about class definitions being too narrow, solutions could be formulated either at the level of attorney obligations and incentives or at the level of judicial review. These approaches are interconnected in

[84] See, e.g., Rutherglen, supra note 1, at 43 ("Confining the scope of the class to similarly situated [litigants] with similar claims reduces the risk that any one segment of the class will be exploited for the benefit of another."); see also Downs, supra note 1, at 644 (arguing that identity of claims is the best route to adequate representation).

[85] For example, litigation strategy and the assessment of settlement options often raise issues of time versus money. Such issues arise in evaluating, for example, whether it is worth it to pursue discovery when it will cause delay in obtaining a final result; or, more obviously, in deciding whether to accept a settlement or seek greater relief at trial. Since class members are likely to have differing assessments of these types of choices, a narrow class definition does not remove the need to be concerned with the fair treatment of these types of divergences in class member interests.

[86] Cf. Rhode, supra note 62, at 1194-97 (arguing that even where class representative's position is contrary to the position of most class members with respect to injunctive relief, denial of class certification followed by individual litigation could impede protection of the absent parties' interests).

the sense that the greater attention the attorney gives to broadening the class, the less concern the court must have in reviewing the class for narrowness; and similarly, the greater role the court takes in reviewing class definitions for narrowness, the more likely it is that attorneys will avoid arbitrary narrowing of their proposed classes.

A. The Attorney's Responsibility for a Fair Class Definition

Whether or not courts take a more active role in looking at who is excluded from class definitions, a major responsibility will lie with the attorneys who represent the class. The attorney prepares the original class definition and presents it to the court. She must have a conception of what her responsibilities are in shaping that definition. As with many other aspects of class litigation, the attorney will find that traditional ethical precepts are of little help.

As both commentators and courts have recognized, the class action device depends upon relationships between attorneys and their clients that differ from the typical case of a single client and a single attorney. For example, funding of the litigation depends heavily on abandonment of the traditional rule that lawyers may not advance costs for which the client is not ultimately liable.[87] Communication between class attorneys and clients is, at best, far from the ideal of individual representation.[88] And traditional rules about conflicting interests in multiple representation must be relaxed in the class context.[89]

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[87] See Rand v. Monsanto Co., 926 F.2d 596, 601 (7th Cir. 1991) (holding that "a district court may not establish a per se rule that the representative plaintiff must be willing to bear all (as opposed to a pro rata share) of the costs of the action"); Vanderbilt v. Geo-Energy Ltd., 725 F.2d 204, 210 (3d Cir. 1983) (allowing intervenor in corporate derivative action to indemnify class plaintiff for litigation costs); County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407, 1415 (E.D.N.Y. 1989) ("There is nothing unethical about the attorneys advancing the cost of litigation even though their clients can never pay unless the action is successful."), aff'd, 907 F.2d 1295 (2d Cir. 1990). But see In re Mid-Atlantic Toyota Antitrust Litig., 93 F.R.D. 485, 489 (D. Md. 1982) (finding plaintiff's lack of liability for costs of unsuccessful lawsuit to contravene Model Code of Professional Responsibility DR 5-103(B) (1980)). See generally Committee on Prof. Resp., Association of the Bar of the City of N.Y., Financial Arrangements in Class Actions, and the Code of Professional Responsibility, 20 Fordham Urb. L.J. 831 (1993) (discussing conflicts between need to finance and maintain class action and restrictive provisions of ABA Code of Professional Responsibility).

[88] See Grosberg, supra note 6, at 711 (noting different levels of client control in class actions and individual representation); Rhode, supra note 62, at 1234-42 (reviewing the difficulties in achieving meaningful communication between class counsel and class members over litigation decisions).

[89] See In re "Agent Orange" Prod. Liab. Litig., 800 F.2d 14, 18-19 (2d Cir. 1986) (holding that traditional rules of attorneys' representation must give way to balancing of client interests, the public, and the court in achieving just resolution in class action disputes).

As a general matter, class counsel lacks clear instructions about how to structure the representation. Unless the class action practitioner is representing a well-organized constituency that is directing the litigation, class counsel must make informed judgments about how to proceed in the case.[90] In theory, however, class counsel has a standard for shaping the representation, namely the interests of the plaintiff class.

At the class definition stage, class counsel's obligations are more opaque. While it is clear that counsel cannot undertake to represent a class for which class representation is not in the class members' interests,[91] it is not so clear how class counsel should choose among the possible definitions of the plaintiff class.

One view is that class counsel should shape the class in the manner that best serves the interests of the named plaintiff.[92] Under this approach, narrow class definitions are problematic only if they lessen the named plaintiff's chances of success. Conversely, class definitions must be kept narrow if they increase the named plaintiff's chance at an improved outcome. Under this understanding of the attorney's ethical role, there would be no independent consideration of the interests of those excluded from the class. Class counsel would only have reason to consider excluded persons' interests if the decision to exclude were subject to judicial review.

Even if counsel adopts this understanding of her obligations in a class suit, she generally will not escape responsibility for determining the breadth of the class. Because class litigation is often lawyer-

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[90] David Luban argues that the responsibility of the attorney for decisions made on behalf of the plaintiff class depends on the degree to which the client class is able to let its actual wishes be known. David Luban, Lawyers and Justice: An Ethical Study 351-54 (1988). I have elsewhere examined alternative fairness principles that can guide class counsel in making informed judgments on behalf of class members in the settlement context. See Morawetz, supra note 65, at 29.

[91] If the class action were not in the interest of the members of the class, the attorney would have an obligation to seek to decertify the class. Thus, the definition must consider whether it is in the interest of the absent members to be a part of the class.

[92] This type of instrumental approach to the class action attorney's obligations is suggested in a 1974 ABA Formal Opinion on ethics. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 334 (1974). In the course of discussing the ability of legal-services offices to undertake class actions, the opinion explains that where a matter has been taken on and the full representation of that client's interest requires a class action, there can be no limitation on class actions. Id.; see also Brian J. Waid, Ethical Problems of the Class Action Practitioner: Continued Neglect by the Drafters of the Proposed Model Rules of Professional Conduct, 27 Loy. L. Rev. 1047, 1057 (1981) (suggesting that requirement of zealous advocacy means that "[t]o the extent that solicitation of additional class representatives may benefit his client's cause, class counsel may . . . have an ethical duty to either advise his client to solicit the needed additions or to do so himself").

financed litigation,[93] it is simply inaccurate to describe many class cases as ones in which a decision made in the course of representing a client involves expansion from individual representation to class representation. The lawyer is often representing the client only in the context of a decision to bring a class action. Thus, the decision to take on representation and the client's agreement to act as a class representative may be simultaneous. Under these circumstances, the lawyer's choice of who to offer the named status to will determine the set of interests that define the class. If there are potential clients that would fit within different definitions of the class, the decision to "name" one of them would drive the decision about how to define the class. And if several were named together, it would require a broader class. Thus, looking to the interests of the persons named would not cabin the attorney's discretion, but would instead shift that discretion to the stage at which plaintiffs are selected. In this way, the lawyer who claims to be merely following an instrumental model of pursuing a client's interests is in fact determining the shape of the class.

An alternative approach is to see plaintiff counsel as having an independent obligation to consider the interests of those who could be included within a class. Following Professor William Simon's work on ethical discretion in lawyering, the plaintiff attorney's obligations with respect to just outcomes can be seen as dependant on the degree to which the attorney can legitimately rely on procedural rules and institutional arrangements to achieve just results.[94] To the extent that the relevant procedures and institutions predictably fall short of achieving substantive justice, attorneys face more responsibility for the substantive justice of the resolution.

In the class definition setting, a justice approach requires that counsel consider the context in which she is making the decision about how to define the class. In the context of the case, do the procedures and mechanisms available to the potential absent class members, and the institutional roles of the court and the defendant in determining class definitions, provide assurance that there will be a fair determination of who can and cannot benefit from class litigation? If the options available to the excluded class assure that persons who could be placed in the class are either included in the class or provided other adequate redress, then there is no need to be concerned with decisions by named representatives or attorneys to narrow class definitions. If they do not, however, the class action attorney, being the party who in

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[93] See supra note 87.

[94] See generally William H. Simon, Ethical Discretion in Lawyering, 101 Harv. L. Rev. 1083, 1097-98 (1988).

fact makes decisions to exclude persons from the class, must assume responsibility for the implications of her decisions.

To the extent that courts continue to apply one-sided scrutiny of proposed classes, and the limited resources of the excluded parties will foreclose them from intervening or pursuing independent actions, the ethical discretion approach requires that attorneys take responsibility for the distributive implications of the decisions they make in drawing class definitions. In class litigation contexts where the excluded potential class members are not able to finance the litigation or in situations in which separate litigation will be time-barred, the attorney can predict that the decision to draw a class narrowly will be determinative of the rights of these absent parties. Thus, the decision as to how to draw the boundaries of the class is an important distributive decision. Under Professor Simon's model for evaluating the attorney's responsibilities, the determinative quality of the attorney's decision as to how to draw the class brings with it a responsibility to ensure that this distributive decision is made fairly.

Under a conception of the attorney's obligation for just outcomes, there is no single formula for evaluating the fairness of excluding persons from the plaintiff class. At the very least, however, this model would require attention to the decision to exclude a group from the plaintiff class and a justification for doing so. Thus, mere inattention to the implications of how the class is drawn would be inexcusable. Beyond preventing such arbitrary exclusions, a justice approach requires some balancing of the harm done to those who are excluded from the class and the potential benefits for the remaining class in proceeding on its own.

If counsel undertakes a justice approach to determining class membership, the first step is to ascertain whether inclusion in the class is indeed in the interest of the persons who would be excluded from the class. Inclusion in the class obviously raises the possibility of losing a claim or receiving inadequate relief for the claim, as well as the possibility of obtaining appropriate relief.

Inclusion in the class may be expected to be in the interest of the potential class members when it is unlikely that they will be able to litigate their claims independently.[95] In this situation, the potential

[95] In some situations, such as where a time limitation is running, it will be clear that inclusion as an absent class member is the only route to relief. In other situations, such as where class litigation depends on pro bono legal services, the possibility of representation for those left out of the class may be limited for lack of pro bono resources. There may also be situations in which it is predictable that some portion of the excluded group will be left unrepresented, while others will be included in subsequent cases. This has been the case in the Social Security context: the medical improvement litigation led to many subse-

class members will generally have little to lose by being included in the case.

There may be situations, however, where inclusion is not in the interests of those who would otherwise go unrepresented. One factor to consider is the degree to which the interests and concerns of the expanded class are understood and appreciated. Even in a situation where the legal claims are completely identical, the surrounding context in which those claims would be litigated may mean that it is not in the interest of some persons to be included in the class.

Preclusion rules may also affect the interest of the potential class members in being included in the class. If smaller suits are filed in several jurisdictions against the same defendant, each class has the possibility of taking advantage of offensive collateral estoppel from the cases that are resolved favorably for similarly situated classes. Under offensive collateral estoppel, those suits that are successful for the plaintiffs can be used to preclude relitigation of issues, while those that are unsuccessful would only serve as adverse precedent.[96] The role of preclusion can be overstated, however. Since many class actions are settled, it is not necessarily possible to benefit from a successful suit in another jurisdiction.

If, on balance, it is in the interest of the potential class members to be joined in the case, the next question is how that interest should be evaluated by the named plaintiff and the attorney shaping the class definition. Because the named plaintiff may have countervailing interests in narrowing the class, the question is what circumstances create a strong claim by those who might be excluded to be included.

One factor to consider is the nature and degree of prejudice that the excluded persons would suffer. Some narrow classes will cause a high degree of prejudice to those excluded. In the example where the leftover class will not present an independently viable basis for class litigation, a person who could have initiated class litigation is being denied the opportunity to do so. The bringing of a class action that excludes that person, therefore, is working a direct injury to that person by denying the opportunity for a day in court.

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quent lawsuits, although large numbers of persons never benefitted from class representation. See supra text accompanying notes 19-24. Other litigation, such as litigation over the standard for widows' benefits, left persons in many jurisdictions without representation. See supra note 27.

[96] See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979) (authorizing the use of nonmutual offensive collateral estoppel by federal trial courts). The excluded class members would not be able to invoke offensive collateral estoppel, however, if they could easily have joined the original litigation, id., or if the defendant is the federal government. See United States v. Mendoza, 464 U.S. 154, 162 (1984) (holding that nonmutual offensive collateral estoppel does not apply against federal government).

In other situations, the prejudice is less harsh. Take, for example, the situation in which a statute of limitations is running on the plaintiff class. In this situation, a decision to exclude a group, such as a geographic region, could mean that it will be impossible for the persons in that group to obtain relief. Although they cannot be said to be worse off than they would have been in the absence of the litigation, they are clearly prejudiced relative to their position had they been included in the class.

Even further from traditional definitions of prejudice are situations in which the excluded persons are not foreclosed from litigation, but might find it difficult to obtain counsel due to the shortage of available counsel. In the Social Security cases, for example, there is the theoretical possibility of suits in all fifty states challenging the same policies. Each of these suits would be governed by fee statutes placing no premium on the number of persons who could benefit from the lawsuit.[97] Thus, potential suits in other states would not be made any less "viable" as a result of a decision to plead a narrow class covering just one state. Nonetheless, depending on the availability of counsel to represent those left out of a class, the exclusion of potential class members from the class might mean that they would be denied a practical opportunity to vindicate their claims.

Balanced against these interests in proposing a larger class are the interests served by a narrower class definition. As discussed earlier, there are many reasons why a narrower class may be advantageous from the standpoint of plaintiff counsel.[98] A narrower class may simplify the case and make it more economically viable. It may be more manageable. It may be more likely to lead to an early and favorable settlement for those who are included in the class. But it is also possible that these goals are not served by a narrower class or that they are only modestly advanced.

Looking back at the variations in class definitions in Social Security litigation, some of the decisions to narrow class definitions appear unjustifiable under a justice view of attorney obligations. It is difficult to understand, for example, a justification for excluding applicants for benefits under Title XVI of the Social Security Act from a class action regarding disability determinations. The same agency administers the Title II and Title XVI programs;[99] the two programs employ the same

[97] Fees in Social Security class actions are generally based on the Equal Access to Justice Act, 28 U.S.C. § 2412(d) (1994). These fees are paid only where the party prevails and the position of the government was not "substantially justified." Fees are then paid on a lodestar basis, with a capped hourly rate. Id. § 2412(d)(2)(A).

[98] See supra Part II.

[99] See 20 C.F.R. § 401.110 (1995).

definition of disability and are administered with the same rules;[100] and, in fact, many applicants for benefits apply simultaneously under both programs. Thus, the two programs raise the same legal issues and involve the same monitoring of relief. Although there is some possibility of having to litigate the question of representing both groups, and of administering relief to a larger numerical group, these additional costs should not be significant.[101] At the same time, the excluded group, being recipients of a needs-based program, could be expected to be in the worst position to litigate separately.

With respect to geographic limitations, there are certainly management difficulties that must be considered in pursuing a very broad class action. Some classes may be too big to be adequately represented. In addition, geographic breadth may add complications as to the relevant law, even in cases governed by federal law. In the Social Security context, for example, variations in the law from one circuit to another often counsel against suits that cross circuit boundaries.[102] But within these constraints, a justice approach suggests that attorneys should consider whether similarly situated persons in other states will lose out on relief simply because they lack the resources to bring a separate suit. If they are likely to be left unrepresented, their interests in inclusion should be entered into the balance of determining the shape of the class.

With respect to decisions to draw class lines to exclude those who face an additional defense, such as the exhaustion defenses in Social Security suits,[103] counsel faces a classic equality dilemma. More narrowly framed suits are likely to be easier to settle, but they also leave the excluded group without any opportunity of relief. Here, counsel must balance the possibility of achieving faster and more certain relief for some with the certainty of leaving others without any chance of any relief.

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100 See supra note 35.

101 Because the relief would be in the same jurisdiction, the same local offices would have to be monitored. But since the class would be larger, there would be the possibility of larger numbers of class members whose inquiries might need to be handled by counsel.

102 Within any one circuit, for example, there may be claims of nonacquiescence in circuit law. See, e.g., Lopez v. Heckler, 572 F. Supp. 26, 31 (C.D. Cal. 1983) (certifying circuit class, but declining to certify national class, in constitutional challenge to Secretary of Health and Human Services' policy of nonacquiescence, noting court's unfamiliarity with "the nature and extent of the Secretary's interference by nonacquiescence with federal appellate precedent in other circuits"), aff'd in part, rev'd in part, 725 F.2d 1489 (9th Cir.), vacated and remanded, 469 U.S. 1082 (1984).

103 See supra text accompanying notes 37-39.

B. *Judicial Role in Evaluating the Fairness of Class Definitions*

Another approach to addressing the narrowness problem is for courts to undertake some role in reviewing class definitions for under-inclusiveness. Courts have traditionally viewed their role with respect to class definitions as protecting absent class members from being improperly included in a class, not from the possibility of being improperly excluded. Courts have only rarely proposed broadening of a class.[104] This silence could be replaced with active judicial oversight of class definitions to protect the interests of those who have been left out of the proposed class.

It is well recognized that courts exercise broad discretion in supervising actions brought under Rule 23.[105] The court is expressly granted the power under Rule 23(d) to issue orders regarding the class action[106] and has the duty under Rule 23(e) to supervise any settlement or compromise of the action.[107] The court also has broad discretion in deciding whether the case should proceed as a class action[108] and to modify the definition of the class during the course of the action.[109]

An objection to judicial oversight of narrow classes is that the court should concern itself solely with the case presented, and not with other cases and other parties that could have been pursued.[110] Since those excluded from the class are not technically before the court, arguably the court has no reason to be concerned with their interests. This objection, however, overlooks the access goal of Rule 23.[111] To the extent that class actions are designed to improve access to the courts, judicial management of a class action properly includes consideration of whether that goal is advanced through the case as

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104 See supra note 57.

105 See, e.g., Califano v. Yamasaki, 442 U.S. 682, 703 (1979) ("The certification of a nationwide class, like most issues arising under Rule 23, is committed in the first instance to the discretion of the district court.").

106 Fed. R. Civ. P. 23(d).

107 Fed. R. Civ. P. 23(e).

108 See, e.g., Shipes v. Trinity Indus., 987 F.2d 311, 316 (5th Cir.) ("[T]he district court has wide discretion in deciding whether to certify a proposed class. . . . The threshold requirements of commonality and typicality are not high . . . ."), cert. denied, 114 S. Ct. 548 (1993).

109 See, e.g., Catanzano ex rel. Catanzano v. Dowling, 847 F. Supp. 1070, 1078 (W.D.N.Y. 1994) ("Questions on class certification, including modification of the class definition, are left to the sound discretion of the court.").

110 This objection is discussed in Castro v. Beecher, 459 F.2d 725, 730-31 (1st Cir. 1972); see also Hoffman-LaRoche, Inc. v. Sperling, 493 U.S. 165, 174-76 (1989) (Scalia, J., dissenting) (criticizing district court's intervention in notice to potential parties in non-Rule 23 case).

111 See supra note 79.

pled by the parties.[112] Furthermore, because the definition of a class is subject to revision,[113] the district court has a management interest in overseeing the way in which the class is defined.[114]

A modest, but perhaps powerful, exercise of judicial discretion under Rule 23 would be for courts to direct class counsel to justify both the aspects of a class definition that draw persons into the class as well as those that exclude persons from a class. Simply requiring class counsel to explain decisions to draw a class more narrowly than required by Rule 23(a) would lead counsel to think carefully about both inclusive and exclusive decisions. Class counsel thus would have an interest in making these decisions in a way that would be defensible before the court.[115]

Requiring justification of exclusionary decisions would open up a dialogue between counsel and the court. For example, there could be a discussion between counsel and the court over the appropriate geographic restriction on a class, rather than a unilateral conclusion by counsel that a particular restriction is necessary; the court might offer reasons for a broader definition of a class that are persuasive to counsel. By involving the court in the discussion of how the class should be defined, a justification requirement would prevent classes from being narrowly defined by counsel based on predictions of the court's view,

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112 The Supreme Court upheld judicial actions to protect the access interests of nonparties in *Hoffman-LaRoche*, 493 U.S. at 169-71. Because *Hoffman-LaRoche* was an Age Discrimination in Employment Act (ADEA) case not subject to the requirements of Rule 23(a), the scope of the class of interested nonparties was arguably broader than it would be in a Rule 23 case. Compare Church v. Consolidated Freightways, 137 F.R.D. 294, 304-06 (N.D. Cal. 1991) (holding that all requirements of Rule 23 need not be met in ADEA class action before court can facilitate notice to proposed class) with Wilkerson v. Martin Marietta Corp., 875 F. Supp. 1456, 1461 (D. Colo. 1995) (finding "case management and control aspects" of rule to be "a compelling basis" for applying Rule 23 requirements to ADEA non-Rule 23 suit). But to the extent Rule 23 is read as a provision to enhance access, courts managing Rule 23 actions have as much reason to be concerned with the interests of excluded persons who could meet the requirements of a Rule 23 class as courts managing ADEA actions have to be concerned with those who may wish to "opt in" to an ADEA case. For an argument that courts have the power to consider the interests of putative plaintiffs outside the class action context, see generally Marjorie A. Silver, Giving Notice: An Argument for Notification of Putative Plaintiffs in Complex Litigation, 66 Wash. L. Rev. 775 (1991).

113 Fed. R. Civ. P. 23(c)(1).

114 Cf. *Hoffman-LaRoche*, 493 U.S. at 171-74 (recognizing the trial court's management interest in ADEA cases).

115 As a general matter, procedures that mandate explanations of decisions can be expected to lead to more deliberate decisionmaking. For example, detailed notice requirements for government agencies are expected to yield more deliberate decisionmaking and avoid arbitrariness and unnecessary errors. See, e.g., David v. Heckler, 591 F. Supp. 1033, 1044 (E.D.N.Y. 1984).

rather than a full understanding of the class definition the court is willing to accept.

The dialogue between the court and counsel could also allow the court to undertake measures that would encourage broader representation in appropriate cases. In statutory fee cases, findings by the court on such issues as the availability of qualified counsel can have significant implications for the fees that will later be available to counsel.[116] If the court were to make such a finding at the time of class certification, counsel would have a greater incentive to undertake representation of those for whom qualified counsel would not otherwise be available.

A stronger measure would be for the court to condition certification on undertaking representation of the broader class.[117] Such orders offer the promise of broader access, since the court would require that a larger group receive the benefit of representation in any one case. This promise, however, could be illusory. Especially in statutory fee cases, where counsel might be inadequately compensated for the risk of litigation,[118] requiring counsel to undertake the greater costs of broad representation could chill representation, thereby defeating the very access goals that the court would be attempting to promote. Judicial intervention requiring broader representation as a condition of class certification should therefore be approached with caution.

Judicial intervention conditioning certification on broader representation would be appropriate to enforce the requirement that restrictions on class definitions be justifiable. Through a justification requirement, courts could prevent their own complicity in class definitions that are arbitrary or discriminatory. A justification requirement also serves to ensure that counsel pay attention to the question of who should or should not be included in the class, and to permit the type of dialogue that would obviate restrictive class definitions based on an erroneous view of the court's likely rulings in the case.

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116 See, e.g., Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(A) (1994) (limiting attorney fees generally, but allowing court to determine if "limited availability of qualified attorneys for the proceedings involved" justifies higher fee).

117 An alternative method of enforcement would be to deny class certification outright. But this remedy ignores the harm. Since the problem with an arbitrarily narrow class is that it excludes persons from the class, the proper remedy is to condition certification on their inclusion.

118 See supra notes 49-50 and accompanying text; see also Phyllis T. Baumann et al., Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases, 33 B.C. L. Rev. 211, 283-88 (1992) (discussing chilling effect on plaintiffs' representation of cases denying fees for successful defense against proposed intervenors and cases creating an "adversary relationship" between lawyers and their clients in settlement contexts).

Judicial intervention would also be appropriate when the first class action makes it more difficult for the excluded persons to pursue relief independently. The members of the leftover class,[119] for example, are made worse off by the litigation that excludes them. They are less able to bring litigation that they otherwise could have brought and therefore may be cut off from their access to the courts. In this situation, conditioning class certification on broader representation works to prevent restrictions on access, a proper Rule 23 concern.[120]

An objection to such strong judicial measures is offered in the court's discussion in *Dalkon Shield*.[121] In *Dalkon Shield*, the court suggested that representation might be inherently inadequate if the representative had not volunteered to represent the broader class.[122] The existence of defendant class actions, however, demonstrates that such unwilling representation can be adequate.[123] In defendant class actions, the defendant does not choose to represent a class but is required to do so by the court. Although the defendant class representative must be an adequate representative, it need not be a willing representative.[124] Similarly, the plaintiff class representative must be

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119 See supra text accompanying notes 67-68.

120 A requirement that the class not proceed without those who would be prejudiced by exclusion could also be derived from Rule 19 of the Federal Rules of Civil Procedure. Rule 19 sets forth standards for evaluating when a party must be included in a case for "just adjudication." These include situations in which the party would suffer "practical harm" from exclusion. Fed. R. Civ. P. 19(a). Where a party suffers such practical harm, Rule 19 calls for joinder, or, if joinder is not feasible, for the court to balance competing interests in deciding whether to dismiss the suit. Fed. R. Civ. P. 19(b). Drawing on Rule 19 as a framework, the court in a class action could evaluate whether the harm to the excluded parties warrants an order conditioning the suit on inclusion of all interested parties through the form of a broader class definition.

121 693 F.2d 847 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983).

122 See *Dalkon Shield*, 693 F.2d at 854-55 (suggesting reluctance to find court-designated lead counsel to be an adequate representative where named plaintiffs' attorneys refused to undertake nationwide class representation).

123 Although there is some dispute whether Rule 23 authorizes defendant class actions in the Rule 23(b)(2) context, compare Henson v. East Lincoln Township, 814 F.2d 410, 412-17 (7th Cir. 1987) (finding they were not permitted under Federal Rule of Civil Procedure 23(b)(2)), cert. dismissed, 506 U.S. 1042 (1993) with Marcera v. Chinlund, 595 F.2d 1231, 1238 (2d Cir.) (holding propriety of such classes settled), vacated on other grounds, 442 U.S. 915 (1979), there is no question that the rule is designed to allow suits against a class in other circumstances. See *Henson*, 814 F.2d at 412 ("It is apparent from the words of Rule 23(a) ('sue or be sued as representative parties') that suits against a defendant class are permitted. But it does not follow that they are permitted under all three subsections of Rule 23(b)."); National Ass'n for Mental Health, Inc. v. Califano, 717 F.2d 1451, 1457 (D.C. Cir. 1983) ("Defendant class actions are clearly authorized by Rule 23 of the Federal Rules of Civil Procedure."), cert. denied, 469 U.S. 817 (1984).

124 See Conrail v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir.) (holding that Rule 23(a) requirements "apply equally to plaintiff and defendant classes"), cert. denied, 115 S. Ct. 2277 (1995); In re Gap Stores Sec. Litig., 79 F.R.D. 283, 290 (N.D. Cal. 1978) (noting focus should be on ability of party, not willingness, to represent defendant class, and fair-

in a position to represent the class adequately. Thus, limited financial resources or conflicts within the class would be reasons not to require expansion of a class definition. But where the representative would be adequate, the mere fact that the representative originally chose to specify a more narrow class should not serve as a bar to expansion of the class. Certainly, plaintiffs who invoke the class action rule have less cause for complaint in being required to represent a broader class than unwilling defendants who are required to serve as class representatives.

CONCLUSION

We are all familiar with the dangers of an overinclusive class. It can lead to litigation and settlement decisions that disregard the interests of some absent class members; at worst, it can result in a denial of due process. Underinclusive classes pose less serious dangers, but dangers nonetheless deserving of attention. While protected from denials of due process, persons excluded from the class may be left with no process, with no realistic opportunity for relief. At the very least, the resulting disparities between the positions of absent class members and persons excluded from the class deserve attention from some actor in the class definition process.

ness of placing burden upon representative defendant). But cf. *National Ass'n for Mental Health*, 717 F.2d at 1458 (holding that unwillingness to serve as representative is sufficient basis to deny certification of defendant class if grounded on "clearly minimal financial stake in the outcome" of suit).