BETTER LATE THAN NEVER: NOTICE AND OPT OUT AT THE SETTLEMENT STAGE OF CLASS ACTIONS

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Whether the Due Process Clause requires individual notice to class action members has not yet been resolved by the Supreme Court. Under the literal terms of Rule 23, however, courts currently require early individual notice in (b)(3) class actions, while leaving notice to the discretion of the trial court in (b)(1) and (b)(2) actions. In this Article, Professor Rutherglen questions the difference in procedural protections afforded to (b)(3) class members, on the one hand, and (b)(1) and (b)(2) class members, on the other. Arguing that effective notice need not meet the rigorous standard of early individual notice in (b)(3) class actions, Professor Rutherglen suggests a new rule that would give class members the right to receive individual notice later in the proceeding, and, at least for (b)(3) class members, the right to opt out at the settlement stage. Such a rule would better protect class members because it would provide notice at a time when information about the merits of the claim is more readily available. It also would empower class members to register their dissatisfaction with the performance of the class attorney by opting out. Where previous scholarship emphasizes the procedural dimensions of notice and the right to opt out under the Due Process Clause, Professor Rutherglen emphasizes the substantive aspects of the right to opt out. He stresses the importance of making substantive changes in the law that would provide for better management of both large class actions and related individual claims.

INTRODUCTION

Almost all class actions sooner or later result in notice to the class. If notice is not given sooner, as it is in class actions certified under Rule 23(b)(3), then it must be given later, at least before approval of a settlement under Rule 23(e) or at the remedy stage to distribute compensatory relief to members of the class. Notice early in the class action, of course, has been controversial, particularly on the issue of whether it serves any purpose at all. What can we learn from notice later in the class action, at the settlement or remedy stage? I will argue that we can learn three things.

First, effective notice need not meet the rigorous standard of "individual notice to all members who can be identified through reason-

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able effort," as required in (b)(3) class actions.[1] Practice in (b)(1) and (b)(2) class actions reveals that less expensive forms of notice, most often by publication targeted at the plaintiff class, can be effective in giving most class members an opportunity to object to the terms of settlement or to obtain individual relief.

Second, procedures designed to protect the class must be distinguished from procedures designed to protect the opponent of the class. Notice and the right to opt out are designed to protect the rights of class members. Yet these procedural requirements have been invoked most often by defendants in order to defeat any attempt to certify a class at all. It is both odd and ironic that the defendant has become the principal advocate of the class members' rights. Surely a better means of protecting the interests of the class can be found than by relying upon the interests of its adversary.

This problem leads to the third lesson to be learned from notice at the settlement or remedy stage of a class action. Through the rules on preclusion of class members' claims, the class members' right to notice and to opt out has been conflated with the defendant's right to obtain a judgment binding on the class. Under present law, early notice to class members in (b)(3) class actions is justified principally as a condition for making any judgment in favor of the defendant binding upon the class. Rule 23 does not have to operate this way, and indeed, in its original version, it did not. Rule 23 originally allowed one-way intervention: giving notice to class members and binding them by the judgment in a class action only if the judgment was rendered in favor of the class.[2] This procedure left class members with the option of benefiting from the class action if the class prevailed but escaping the effects of preclusion if it did not. The 1966 amendments to Rule 23 were an attempt to eliminate one-way intervention by requiring an early decision on certification of a class action followed by either of two procedures: early individual notice and the right to opt out (in (b)(3) class actions) or no early notice and no right to opt out (in (b)(1) and (b)(2) class actions).[3] If the original version of Rule 23 went too far in allowing one-way intervention, the 1966 amendments

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[1] Fed. R. Civ. P. 23(c)(2) ("In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.").

[2] 7A Charles A. Wright et al., Federal Practice and Procedure § 1752, at 31, 32-33, 40-41 (2d ed. 1986).

[3] See Fed. R. Civ. P. 23 advisory committee's note, reprinted in 39 F.R.D. 69, 99, 105-06 (1966).

perhaps went too far in eliminating any procedure that even resembled one-way intervention.

The 1966 amendments were the last systematic revision of Rule 23, and, indeed, the last significant amendments of any kind. As has become increasingly apparent since 1966, these amendments created an awkward mismatch between the subdivisions under which class actions are certified and the procedural protections to which a class is entitled.[4] They also have created a more widespread, and more pernicious, problem: a built-in conflict of interest for the class attorney, who can obtain a generous award of attorney's fees, and perhaps equally generous relief for a few named plaintiffs and members of the class, by compromising the interests of absent class members through preclusion of their claims. Settlements that blatantly sell out the interests of the class are not likely to receive judicial approval under Rule 23(e). Nevertheless, they represent only the most extreme examples of potential conflicts between the class attorney and the class, not to mention conflicts within the class or among various attorneys seeking to represent the class.[5] These conflicts of interest are all the more severe because class members usually do not have a sufficient stake in the class action to protect themselves. They are thus faced with the grim prospect of having the performance of their representative monitored mainly by their adversary.

There is no point in going back to one-way intervention as it was practiced under the original version of Rule 23.[6] That version of the Rule has been superseded in many other respects.[7] Much can be said, however, in favor of allowing class members to opt out of a class action if they are dissatisfied with the settlement obtained by the class attorney. Much also can be said in favor of limiting the preclusive effect of the class action in other ways. This Article examines a few of these alternatives to the existing procedures under Rule 23.

Part I begins with a brief discussion of two related issues: the availability of "fluid class" recoveries and other forms of approximate relief for the class; and the constitutional basis for the decision in

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[4] See, e.g., Kenneth W. Dam, Class Action Notice: Who Needs It?, 1974 Sup. Ct. Rev. 97, 115-16.

[5] See 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 (1986); Jack B. Weinstein, Ethical Dilemmas in Mass Tort Litigation, 88 Nw. U. L. Rev. 469, 502-06, 532-33 (1994).

[6] For an argument to the contrary, see Mark C. Weber, Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions, 21 U. Mich. J.L. Ref. 347, 400-13 (1988).

[7] See Fed. R. Civ. P. 23 advisory committee's note, reprinted in 39 F.R.D. 69, 98-99 (1966).

Eisen v. Carlisle & Jacquelin.[8] Part II then proceeds to a discussion of notice and preclusion in the two major types of class actions after *Eisen*: those certified under subdivision (b)(3), in which individual notice to class members is required; and those certified under either subdivision (b)(1) or (b)(2), in which such notice generally is not required. Part III turns from notice to the right to opt out and examines three aspects of this right: its effects on settlement; its substantive character; and its consequences for preclusion and the statute of limitations. I conclude that the current structure of Rule 23 should be revised to give greater rights to class members: in particular, to give them the right to receive effective notice later in the proceedings and the right to opt out at the settlement stage of class actions in order to register their dissatisfaction with the performance of the class attorney.

I
TWO RELATED PROBLEMS

Before I examine the procedures at the remedy stage of class actions, I would like to distinguish two related problems: the use of approximate remedies in class actions and the constitutional right of class members to individual notice. These problems are not entirely independent of the procedural issues at the remedy stage discussed in this Article. Nevertheless, they are complicated enough in their own right to deserve separate treatment. I will discuss them only insofar as they bear upon the appropriate procedures for notice and opt out at the settlement and remedy stages of class actions.

A. Approximate Remedies

The relationship between remedies and the procedures in class actions is a complicated one, made more complicated by the variety of remedies available in class actions. Approximate remedies, in particular, come in many different forms, from simplifying assumptions that are used to calculate the recoveries of individual class members to "fluid class" recoveries that expand the beneficiaries of a judgment to persons other than proven victims of wrongdoing.[9] At one extreme, the use of simplifying assumptions, such as presumptions about which individual class members are entitled to relief, does not dispense with

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[8] 417 U.S. 156 (1974).

[9] See, e.g., Kenneth S. Abraham & Glen O. Robinson, Aggregative Valuation of Mass Tort Claims, Law & Contemp. Probs., Autumn 1990, at 137, 140; Anna L. Durand, Note, An Economic Analysis of Fluid Class Recovery Mechanisms, 34 Stan. L. Rev. 173, 173-82 (1981).

the need for individual notice to class members. If they are to receive any benefits at all, they must at least come forward and identify themselves as members of the class and provide an address or some other means by which a recovery can be sent to them.[10] At the other extreme, a fluid class recovery might provide relief to future customers or employees of the defendant, instead of providing compensation only to past victims of wrongdoing.[11] A fluid class recovery dispenses with the need for notice by expanding the award of compensatory relief to those who are not victims of wrongdoing in the traditional sense. Some individuals receive the benefit of the judgment without proving that they are victims of wrongdoing. It follows that they do not need any kind of notice at all in order to benefit from the judgment.

Different remedial principles can combine features from both of these extremes, so that an approximate form of individual relief can gradually be transformed by degrees to a form of fluid class recovery. The approximation simply shifts from the issue of how much relief to give to the issue of which individuals are entitled to relief. When it is put in these terms, even the most common forms of relief embody some approximations. For instance, under Title VII, if the court finds that an employer has engaged in discrimination, say in promotions, then every class member who applied for a promotion and was denied one is presumed to be entitled to individual relief.[12] This presumption is rebuttable by the employer, but in theory it can, and undoubtedly sometimes does, result in compensation to individuals who are not really victims of discrimination. Even an ordinary finding that an individual class member is a victim of discrimination can depend upon approximations similar to those underlying fluid class recoveries. Novel remedial principles about who is entitled to relief, and in what amount, differ only in degree from more familiar presumptions frequently invoked at the remedy stage of litigation.

This is not to say that differences of degree do not matter. Of course they do. But it is the similarities in degree that are crucial because they reveal the substantive character of all remedial presumptions, whether or not they are invoked in class actions. Remedial presumptions have both deterrent and compensatory consequences: if they increase the probability of sanctions for conduct in violation of

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[10] See Thomas R. Meites & Sargent L. Aborn, Distributing the Settlement Fund in a Class Action, Litig., Summer 1981, at 33, 34.

[11] See Gail Hillebrand & Daniel Torrence, Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits, 28 Santa Clara L. Rev. 747, 761-73 (1988).

[12] See, e.g., International Bhd. of Teamsters v. United States, 431 U.S. 324, 361-62 (1977).

the law, then they increase its deterrent effect; if they redistribute awards of relief from one set of class members to another, then they affect the compensation available to victims of illegal conduct. Neither of these consequences easily can be confined solely to procedure, and thus to the kind of legal rules that can be determined by Rule 23.

This limitation on the scope of Rule 23 follows from the prohibition in the Rules Enabling Act against any rule that would "abridge, enlarge, or modify any substantive right."[13] This prohibition operates mainly to restrict the powers of the rulemakers, as I will argue in some detail later. It does not, however, restrict federal judges in applying and interpreting substantive law. Although Rule 23 cannot affect the substantive rights reflected in remedial presumptions, it still provides the procedural background against which courts must decide what those substantive rights are. A court that makes this judgment does not exercise any power under Rule 23, but instead exercises the broader power to adjust substantive rules of law to changed procedural rules.[14]

For this reason, a single-minded insistence on the limited scope of Rule 23 only succeeds in transforming many of the problems that commonly arise in class actions into problems in other areas of law, without really contributing to their solution. For instance, fluid recoveries could be viewed as solely a subject for the law of remedies, or tolling of the limitation period for class members could be viewed as solely a matter of interpreting the statute of limitations. These questions cannot be solved by Rule 23 itself, but they can be addressed from the substantive side by interpreting the law that gives rise to the plaintiffs' claims and determines the remedies to which they are entitled.

From the procedural side, Rule 23 must only remain flexible enough to accommodate whatever the substantive law is. In the case of remedial presumptions, it must provide the procedures by which these presumptions can be invoked or rebutted in class actions. Sometimes, notice and the right to opt out will be necessary to implement these presumptions; sometimes they will not. Whatever simplifying assumptions are made about calculating individual relief or about fluid class recoveries, Rule 23 must provide the procedural mechanism for implementing the resulting principles of substantive law. Unless the law wholly abandons any attempt to compensate vic-

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[13] 28 U.S.C. § 2072(b) (1994).

[14] See, e.g., Hal S. Scott, Comment, The Impact of Class Actions on Rule 10b-5, 38 U. Chi. L. Rev. 337, 367-68 (1971).

tims of past wrongdoing, the procedures under Rule 23 must contemplate some form of notice to individual class members.

B. Notice Under the Due Process Clause

The notice required at any stage in a class action must meet the minimum requirements of the Due Process Clause. If it fails to do so, and the class action goes forward, any resulting judgment is not binding on the class, or at least not on those class members who failed to receive notice.[15] The absence of a judgment binding on the class, in turn, leaves the defendant exposed to the dangers of one-way intervention: if the class wins, then individual class members can obtain relief from the defendant, but if the class loses, they can bring independent individual actions.

It remains uncertain, however, exactly what kind of notice the Due Process Clause requires. Ever since *Eisen v. Carlisle & Jacquelin*,[16] the question whether unnamed class members have a constitutional right to notice has been much discussed and analyzed by legal commentators and much avoided by the Supreme Court.[17] *Eisen*, of course, held that Rule 23 required individual notice to be mailed to all class members who could reasonably be identified.[18] This holding was based on the literal terms of subdivision (c)(2) which, in turn, applies only to class actions, usually for damages, certified under subdivision (b)(3). Subdivision (c)(2) requires "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[19] In *Eisen*, the Court interpreted this provision literally, and, with some justification, read the qualifying clause, "through reasonable effort," to apply only to the process of identifying class members, not to the process of giving individual notice.[20] The result was a nearly absolute rule requiring individual notice.

The leading case on notice under the Due Process Clause, *Mullane v. Central Hanover Bank & Trust Co.*,[21] imposes no such rigid rule. Under *Mullane*, the constitutional requirement is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity

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15 See Hansberry v. Lee, 311 U.S. 32, 40-41 (1940).

16 417 U.S. 156 (1974).

17 The seminal work is Dam, supra note 4, at 109-16.

18 *Eisen*, 417 U.S. at 173.

19 Fed. R. Civ. P. 23(c)(2).

20 See *Eisen*, 417 U.S. at 173.

21 339 U.S. 306 (1950).

to present their objections."[22] The qualifying phrase, "reasonably calculated" applies to "all the circumstances." The Court went on to hold that notice was not required to parties, essentially class members, who were not known in the ordinary course of business or whose interests were "either conjectural or future."[23] As to these parties, adequate representation by parties who did receive individual notice was sufficient. The Supreme Court has adhered to this flexible constitutional standard for notice in class actions in all but one narrow fact situation.[24]

Despite this limited support in opinions of the Supreme Court, the lower federal courts have frequently read a constitutional basis into the holding of *Eisen*, partly because that decision itself relied upon *Mullane*.[25] For instance, in *Johnson v. General Motors Corp.*,[26] the Fifth Circuit required individual notice to class members for whom monetary relief in the form of backpay was sought in a class action under Title VII of the Civil Rights Act of 1964. This decision went beyond *Eisen* itself because the class action had been certified under subdivision (b)(2),[27] as most employment discrimination class actions are, and so notice was not required by the literal terms of Rule 23, as it would have been for a class action certified under subdivision (b)(3). Sensibly enough, the court held that the request for backpay resembled a claim for damages, which would have required certification under subdivision (b)(3), so that individual notice was constitutionally required.[28] Other circuits have followed this approach, most recently the Ninth Circuit in *Brown v. Ticor Title Insurance Co.*,[29] a case in which the Supreme Court tried, but failed, to reach the constitutional question. Some circuits have rejected this holding and none has extended it to all class actions; in particular, no circuit has ex-

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22 Id. at 314.

23 Id. at 317.

24 In Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), the Court required individual notice to class members who resided outside the forum state, but the case was brought in state court on state claims, so that the issue of adequate notice was tied up with the issue of personal jurisdiction over members of the class. See id. at 806-14. The statements in the opinion endorsing individual mailed notice as a constitutional requirement must be interpreted in this light.

25 *Eisen*, 417 U.S. at 174.

26 598 F.2d 432, 433 (5th Cir. 1979).

27 Id. at 436.

28 See id. at 437-38.

29 982 F.2d 386 (9th Cir. 1992), cert. dismissed as improvidently granted, 114 S. Ct. 1359 (1994).

tended the holding to class actions in which only general injunctive relief is sought on behalf of the class.[30]

The exact dimensions of the constitutional requirement of individual notice remain uncertain, as the flexible standard articulated in *Mullane* would lead one to expect. As a result, Rule 23 has had a far greater practical impact upon the notice given in class actions than has the Due Process Clause. In particular, the notice given early in a class action, immediately after certification, depends primarily on the subdivision under which the class action is certified. With only a few exceptions, like that recognized in *Johnson*, courts routinely require individual notice soon after certification in (b)(3) class actions and routinely exercise their discretion to give less demanding forms of notice later in (b)(1) and (b)(2) class actions.[31] This familiar pattern of litigation under Rule 23 presupposes that the Constitution requires early notice mainly in some subset of class actions certified under subdivision (b)(3), but not in most class actions certified under subdivisions (b)(1) and (b)(2).

Whether or not this presupposition eventually proves to be justified, the rulemakers can do little to alter constitutional law. On the other hand, they need not do very much to conform to it. The Due Process Clause requires notice only as the condition for a binding judgment. Class members who do not receive adequate notice are not bound by the resulting judgment. This was the procedure in spurious class actions for damages under the old version of Rule 23. Class members were allowed to engage in "one-way intervention": they could benefit from a favorable judgment but escape the preclusive effect of an unfavorable judgment. As a result, the party opposing the class could lose with respect to the entire class, but could win only with respect to the named plaintiffs.[32] This procedure was attacked as unfair to the party opposing the class, but far from being constitutionally questionable, one-way intervention is precisely what the Due Process Clause condones.[33] No one argued then, and no one argues now, that this procedure denied class members their right to due process. Even under the current version of Rule 23, if class members do not receive constitutionally adequate notice, they can benefit from a favorable judgment and avoid an unfavorable judgment.[34] Whatever

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30 See 2 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 8.05, at 8-18 (3d ed. 1992).

31 See generally 2 id. §§ 8.15-.16.

32 See supra note 2 and accompanying text.

33 See Dam, supra note 4, at 117.

34 Note, Collateral Attack on the Binding Effect of Class Action Judgments, 87 Harv. L. Rev. 589, 601 (1974).

the scope of the constitutional requirement of individual notice, it can be met in either of two ways: by giving more notice to the class or by giving less preclusive effect to the resulting judgment.

The close relationship between notice and preclusion does not mean that the rulemakers are free to disregard the Due Process Clause. It does mean that they have a wide range of choices in deciding how to comply with it. Individual notice to all identifiable class members early in the proceedings, before a judgment on the merits, is only one way of providing due process. Different forms of notice at different stages in the proceedings can also satisfy due process if the preclusive effects of the resulting judgment are suitably limited. Several of these alternatives have been tried after *Eisen* as a way of adjusting to, and even avoiding, the consequences of that decision.

II
NOTICE AND PRECLUSION AFTER *Eisen*

A. Class Actions Certified Under Subdivision (b)(3)

Under the current version of Rule 23, individual notice is required only under narrowly defined conditions that have separate rationales. These conditions and rationales, however, bear no necessary relationship to one another, so that when they are pulled apart, the case for individual notice starts to unravel. Class members are entitled to individual notice only in class actions certified under subdivision (b)(3). The right to notice follows from the right to opt out, which class members again only possess in class actions certified under subdivision (b)(3).[35] In order to avoid the dangers of one-way intervention, however, a class action must be certified, notice must be given, and the right to opt out must be exercised before any judgment on the merits.[36] Each of these steps might be individually justifiable, but collectively they lead from procedures designed to protect members of the class—notice and the right to opt out—to procedures designed to protect the party opposing the class—early certification and notice.

What gets lost in the transition between protecting the class and protecting the party opposing the class is the question—really two questions—of cost: is early individual notice worth the cost? And if so, who bears the cost? The great defect of the procedures approved in *Eisen* is that they require notice at a time when it is least likely to be effective: early in the proceedings when class members are not

[35] See Fed. R. Civ. P. 23(c)(2)-(3).

[36] See Fed. R. Civ. P. 23(c)(1); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173-74 (1974).

likely to know either the value of their claims or the adequacy of class representation. Moreover, because notice must be given before any adjudication on the merits, the cost of notice rests initially upon the named plaintiffs or their attorneys.[37] Individual notice might offer theoretical protection to the class, but it functions in practice as an obstacle to maintenance of class actions, as the dismissal of the class action as originally defined in *Eisen* revealed.[38]

These criticisms of existing procedures in (b)(3) class actions are usually framed in terms of efficiency, or, more precisely, inefficiency: the overall cost of individual notice far exceeds the overall benefits.[39] Although this global perspective has its advantages—who is in favor of inefficiency?—it does not respond directly to the need to protect individual rights, either procedural rights under the Due Process Clause or substantive rights under the Rules Enabling Act. Any attempt to maximize overall efficiency inevitably requires trade-offs between individual rights and the general interests of society as a whole.[40] Yet rights generally operate as constraints on achieving overall efficiency. In particular, the Due Process Clause and the Rules Enabling Act forbid exactly the kinds of trade-offs that any serious attempt to maximize overall efficiency requires. In analyzing Rule 23, it is therefore necessary to focus on individual rights, either of class members or of the party opposing the class.

Individual notice protects the rights of class members only if it gives them some informed basis for deciding whether or not to opt out of the class action. The later the notice is, the more likely it is to provide class members with the information necessary to make this decision. Class members need to know whether their claims are more valuable when asserted within the class action or when asserted outside it. Taken to its extreme, this reasoning leads directly back to one-way intervention: giving class members individual notice and the right to opt out only after judgment. This extreme solution, of course, favors class members at the expense of the party opposing the class.[41]

The present version of Rule 23 has rejected this extreme solution only to favor a solution at the opposite extreme: certification of a class action "[a]s soon as practicable after the commencement of an action brought as a class action" and individual notice before any deci-

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[37] 2 Newberg & Conte, supra note 30, § 8.06, at 8-20 to 8-21.

[38] *Eisen*, 417 U.S. at 179 & n.16.

[39] See, e.g., 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, 27-28 (1991).

[40] See Ronald Dworkin, Taking Rights Seriously 92 (1977).

[41] See supra note 15 and accompanying text.

sion on the merits.[42] It is not necessary, however, to choose only between these extremes. And, indeed, emphasizing one-way intervention as the particular evil addressed by the 1966 amendments to Rule 23 greatly overstates the extent of this practice under the original Rule. The Advisory Committee Note to the 1966 amendments itself cites only "a few actions" in which courts "have held or intimated" that one-way intervention is possible and then goes on to cite conflicting authority as well.[43] These cases only established that one-way intervention was a *possibility* under the original version of Rule 23, not that it was standard practice.[44] One-way intervention was not even mentioned in the text of the original Rule, but was a consequence of judicial and scholarly interpretation of the Rule.[45] The 1966 amendments to Rule 23 focussed on the uncertainty of the procedures under the original Rule.[46] One purpose of the amendments was to clarify the preclusive effect of a judgment in a class action. Although the rulemakers were remarkably ambivalent about their power to make rules of preclusion,[47] their concern was mainly with the absence of definite rules of preclusion under the original Rule. They were less concerned with the precise means by which a class was defined, so long as it was defined before judgment so that it determined who was bound by the judgment. Indeed, a distinguished critic of one-way in-

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42 Fed. R. Civ. P. 23(c)(1)-(2).

43 See Fed. R. Civ. P. 23 advisory committee's note, reprinted in 39 F.R.D. 69, 105 (1966).

44 The cases as a whole were conflicting on the question. See 7B Wright et al., supra note 2, § 1800, at 450 n.2, 451 nn.3 & 5.

45 The principal case, and indeed, one of the few square holdings allowing one-way intervention, was Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 589 (10th Cir. 1961), cert. dismissed, 371 U.S. 801 (1962). The principal academic commentary was Harry Kalven, Jr. & Maurice Rosenfield, The Contemporary Function of the Class Suit, 8 U. Chi. L. Rev. 684, 712-14 (1941).

46 The focus then, as now, was on the division of class actions into different categories with different procedural consequences. See Fed. R. Civ. P. 23 advisory committee's note, reprinted in 39 F.R.D. 69, 98-99 (1966).

47 As the Advisory Committee Note states, "[a]lthough thus declaring that the judgment in a class action includes the class, as defined, subdivision (c)(3) does not disturb the recognized principle that the court conducting the action cannot predetermine the *res judicata* effect of the judgment; this can be tested only in a subsequent action." Fed. R. Civ. P. 23 advisory committee's note, reprinted in 39 F.R.D. 69, 106 (1966). In a contemporaneous article, the reporter to the Advisory Committee also expressed concern about the substantive nature of preclusion. See Benjamin Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (pt. 1), 81 Harv. L. Rev. 356, 378 & nn.79-80, 393 (1967). Similar concerns were expressed by the drafters of the original version of Rule 23. See Kalven & Rosenfield, supra note 45, at 705-06.

tervention, Zechariah Chafee, favored a flexible rule allowing class members to opt out at any time before judgment.[48]

Because most class actions are settled before trial, as is most litigation, it might make sense to require individual notice when a settlement is proposed or immediately before trial, whichever occurs earlier. Notice after a proposed settlement would allow class members to evaluate the settlement for themselves when they decide to opt out. Notice and the right to opt out before trial would allow the party opposing the class to gain the preclusive effect of a judgment in its favor. Unlike the question of whether to give individual notice at all, the question of when to give notice is inevitably a question of degree—whether to give it sooner or later in the action.

The practice of conditionally certifying settlement classes and simultaneously giving notice of a proposed settlement supports this reform.[49] Such delayed certification is at odds with the requirement under subdivision (c)(1) of certification "[a]s soon as practicable" after commencement of the action, but it is consistent with the further provision that certification "may be conditional, and may be altered or amended before the decision on the merits."[50] For example, in the pending class action for exposure to asbestos, *Georgine v. Amchem Products, Inc.*,[51] a class had been conditionally certified for settlement negotiations and then finally certified only when the settlement was approved. In such cases, as part of the settlement negotiations, the parties agree on a definition of the class and on a proposed settlement on the merits. The court then gives combined notice both of certification of the class and of the settlement, which is independently required before the settlement can be approved under subdivision (e).[52] If the class is certified under subdivision (b)(3), class members also have the right to opt out.

Because simultaneous certification and settlement now depends entirely upon the agreement of the parties, the defendant can force the additional cost of individual notice onto the class representative

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[48] See Zechariah Chafee, Jr., Some Problems of Equity 284-85 (1950). So, too, then-Professor Jack Weinstein favored development of nonmutual assertion of collateral estoppel as an alternative to class actions with one-way intervention. See Jack B. Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buff. L. Rev. 433, 448-54, 468-69 (1960).

[49] See 2 Newberg & Conte, supra note 30, § 8.21.

[50] Fed. R. Civ. P. 23(c)(1).

[51] 157 F.R.D. 246, 257, 261 (E.D. Pa. 1994), vacated and remanded, Nos. 94-1925 et al., 1996 U.S. App. LEXIS 11191 (3d Cir. May 10, 1996).

[52] See 2 Newberg & Conte, supra note 30, § 8.21. Courts have expressed reluctance about the practice of consolidated notice only to the extent of refusing to include opt-out forms on the ground that such forms might be confusing to class members. 2 Id. § 8.20, at 8-70.

(or more plausibly, the class attorney) simply by insisting upon certification before agreeing to any settlement on the merits. Under existing law, the cost of individual notice is a bargaining chip that is held by the party opposing the class. If the Rule were changed so that notice of certification and settlement were combined, the party opposing the class could insist on separate notice of certification only if it were prepared to undertake the additional expense of going to trial. If it instead agreed to a settlement before trial, then two sets of notices would be replaced by one. The cost of the combined notice would be itself a subject of negotiations, but it would eliminate a set of notices that must be financed initially by the class representative. Moreover, under existing practice, a settlement usually shifts the cost of notice to the defendant, assuming that the class recovers any relief at all, whether monetary or injunctive.[53]

No doubt there are other procedures for making individual notice to class members less a ritual and more a realistic means of protecting their rights. Settlement classes, with all their disadvantages,[54] are not a necessary condition for giving class members notice and the right to opt out at the settlement or remedy stage of a class action. In any class action in which individual relief is distributed to members of the class, it is necessary to give them effective notice, usually individual notice, at some point. This notice becomes far more valuable, and far easier to finance, after some recovery has been obtained for the class. The various forms that this notice can take, and the time at which it should be issued, have been more thoroughly explored in class actions certified under subdivisions (b)(1) and (b)(2). Because *Eisen* does not apply to these class actions, they have occasioned closer examination of different forms of notice and whether these forms of notice comply with the Due Process Clause.

B. Class Actions Under Subdivisions (b)(1) and (b)(2)

Nothing has stimulated certification of (b)(1) and (b)(2) class actions as much as the strict requirements of individual notice in (b)(3) class actions. This strategy for evading the requirements of *Eisen* reveals the mismatch between the distinctions among different class actions in subdivision (b) and the procedures in subdivision (c).[55] The

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[53] See 2 id. § 8.20.

[54] For a decision disapproving the use of a settlement class, see In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 786-804 (3d Cir.), cert. denied, 116 S. Ct. 88 (1995).

[55] A revision of Rule 23 proposed by the Advisory Committee dissolves the different categories of class actions now found in subdivision (b) but replaces them with greater reliance on the district court's discretion, for instance, on the issue of notice and the right

different categories of class actions correspond only loosely to the need for individual notice, although the existing categories do provide a closer fit with the right to opt out. Class actions under subdivision (b)(1) are mandatory joinder devices, fully analogous and similar in wording to the provisions on necessary and indispensable parties under Rule 19.[56] Allowing class members to opt out of (b)(1) actions would defeat the purpose of certifying them in the first place. These class actions are necessary either to protect the party opposing the class from inconsistent judgments in individual actions or to protect class members from judgments in individual actions that would adversely affect their interests. Class actions for injunctive and declaratory relief under subdivision (b)(2), at least when they conform to the literal requirement of relief "with respect to the class as a whole," also do not easily admit the right to opt out.[57] Class members who opt out would essentially create exceptions to what would otherwise be a general injunction or declaratory judgment applicable to the entire class.

In neither (b)(1) nor (b)(2) class actions, however, do these arguments against the right to opt out amount to arguments against individual notice. This would be the case only if the sole purpose served by individual notice is to allow class members to opt out. But individual notice can plainly serve other purposes: when exit is not a possibility, the choice between voice and loyalty becomes all the more important.[58] Class members are entitled to notice so that they have an opportunity to object to the class attorney's performance. This form of protest is the only alternative to acquiescence in the decisions of the class attorneys when exit is foreclosed, as it must be in (b)(1) and (b)(2) class actions.

The reason originally given for denying individual notice in these class actions—that the classes are more cohesive than in (b)(3) class actions—simply begs the question at issue.[59] Whether the class is co-

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to opt out. See Robert G. Bone, Rule 23 Redux: Empowering the Federal Class Action, 14 Rev. Litig. 79, 109-12 (1994).

[56] See Fed. R. Civ. P. 19(a).

[57] See Fed. R. Civ. P. 23(b)(2).

[58] Albert O. Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States (1970).

[59] See 7B Wright et al., supra note 2, § 1786, at 194-95; Stephen C. Yeazell, From Group Litigation to Class Action Part II: Interest, Class, and Representation, 27 UCLA L. Rev. 1067, 1110-15 (1980).

In this respect, the Advisory Committee's treatment of (b)(3) class actions appears to be a disturbing holdover of the special treatment of "spurious" class actions under the original version of Rule 23. The latter were cases in which class members were not united by some common pre-existing legal relationship and therefore were not bound by the resulting judgment unless they joined as parties in the class action. Absence of cohesiveness in (b)(3) class actions addresses the same concerns with diverging interests. As the Advi-

hesive depends upon the interests of the class members, which can only be ascertained by their response to notice of the class action. Nothing in the present requirements for certification under subdivision (b)(1) or (b)(2) assures any degree of cohesiveness among class members. To the contrary, in one type of class action, for damages against a limited fund under subdivision (b)(1)(B), class members must have antagonistic interests under the terms of the Rule itself. Class actions can be maintained under this subdivision only when the interests of class members are antagonistic, because recovery by one class member would impede the ability of others to recover.[60]

These (b)(1) class actions, such as those covering the many claims arising from use of the Dalkon Shield in *In re A.H. Robins Co.*[61] and from exposure to asbestos in *In re Joint Eastern and Southern District Asbestos Litigation (Johns-Manville)*,[62] resemble bankruptcy proceedings more closely than they do any kind of device for permissive joinder of claims. And, indeed, in both *A.H. Robins* and *Johns-Manville*, class actions were merged and conducted simultaneously with reorganization proceedings filed by the debtor, largely in order to prevent litigation of individual lawsuits against it.[63] In bankruptcy cases, all known creditors of the bankrupt are forced to present their claims for collection in a single proceeding. And they are each entitled to individual notice.[64] In *A.H. Robins*, although the class action was certified under subdivision (b)(1)(A), the district court issued notice to all identifiable class members and allowed them to present their claims in individual hearings, a procedure that the Fourth Circuit found to be equivalent to allowing them to opt out.[65]

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sory Committee noted, in requiring individual notice in (b)(3) class actions, "the interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether." Fed. R. Civ. P. 23 advisory committee's note, reprinted in 39 F.R.D. 69, 104-05 (1966).

[60] See Fed. R. Civ. P. 23 advisory committee's note, reprinted in 39 F.R.D. 69, 101 (1966).

[61] 880 F.2d 709, 740-41 (4th Cir.), cert. denied, 493 U.S. 959 (1989).

[62] 982 F.2d 721 (2d Cir. 1992) [hereinafter *Johns-Manville*].

[63] See *A.H. Robins*, 880 F.2d at 717; *Johns-Manville*, 982 F.2d at 725.

[64] See Bankr. R. 2002. This rule requires individual notice unless "notice by mail is impracticable." Bankr. R. 2002(l). Moreover, creditors whose claims are neither listed nor scheduled by the debtor can avoid discharge if they did not receive timely notice. 11 U.S.C. § 523(a)(3) (1994); see 3 Collier on Bankruptcy § 523.13(4)-(5), at 523-95 to 523-97 (Lawrence P. King ed., 15th ed. 1995).

[65] See *A.H. Robins*, 880 F.2d at 744-45. In *Johns-Manville*, the Second Circuit expressed doubts about certification of a mandatory class action, but admitted that it was permissible, although it then held that the creditors should have been divided into subclasses that more clearly corresponded to their conflicting interests. See *Johns-Manville*, 982 F.2d at 735-45.

A strong argument can also be made against the practice of certifying employment discrimination class actions under subdivision (b)(2). Although subdivision (b)(2) refers only to injunctive and declaratory relief, employment discrimination class actions commonly result in individual awards of backpay, remedial seniority, and other fringe benefits.[66] These forms of individual relief, just as much as individual awards of damages in (b)(3) class actions, justify individual notice and the right to opt out. With claims for damages now generally available in employment discrimination cases, the argument for certification of these actions exclusively under subdivision (b)(2) has collapsed. Cases such as *Johnson v. General Motors Corp.*,[67] which require individual notice as a matter of due process when awards of backpay are at issue, recognize that the distinctions among class actions in subdivision (b) do not correspond to the requirement of notice, let alone the right to opt out, in subdivision (c).

Most of the decided cases in (b)(1) and (b)(2) class actions, however, have reached a different result from *Johnson*: they have not required individual notice as a matter of due process.[68] The common practice in (b)(1) and (b)(2) class actions is usually to give individual notice in the exercise of the court's discretion under subdivision (d) or before approval of a settlement under subdivision (e), but not to require it in all cases.[69] Individual notice to identifiable class members has not been required in cases in which it is unduly expensive or in which alternative means of notice—such as posting or publication—are likely to be equally effective.[70] The fact that the courts and the parties use these alternatives when they are allowed by the Rule suggests that individual notice should not always be required even in (b)(3) class actions.

The practice of giving individual notice to identifiable class members as a matter of discretion simply reflects the superiority of individual notice as a means of communication when cost is not an obstacle to notice. When the cost of individual notice is small, as on the facts of *Mullane v. Central Hanover Bank & Trust Co.*,[71] the functional superiority of individual notice becomes a constitutional requirement.

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[66] See, e.g., Franks v. Bowman Transp. Co., 424 U.S. 747, 779 (1975); Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975).

[67] 598 F.2d 432, 437 (5th Cir. 1979).

[68] See 7B Wright et al., supra note 2, § 1786, at 191-94.

[69] See 2 Newberg & Conte, supra note 30, §§ 8.15-.18, at 8-50 to 8-64.

[70] See, e.g., Fowler v. Birmingham News Co., 608 F.2d 1055, 1059 (5th Cir. 1979) (posting on company bulletin board); Fujishima v. Board of Educ., 460 F.2d 1355, 1360 (7th Cir. 1972) (posting or announcement over school intercom); see also 2 Newberg & Conte, supra note 30, § 8.24, at 8-75 to 8-76; 7B Wright et al., supra note 2, § 1797, at 368-71.

[71] 339 U.S. 306, 318-19 (1950).

When the cost of individual notice becomes greater, then the offsetting benefit that it confers upon class members should be correspondingly greater. In (b)(1) and (b)(2) class actions, courts can adjust both the form and timing of notice to maximize its value to class members. For instance, some courts have gone so far as to hold that class members are entitled, under the Due Process Clause, to individual notice of any settlement that grants individual relief.[72] If they do not receive such notice, then they are not precluded from filing independent actions for relief. Of course, by the remedial stage of a class action, notice will rarely be a crucial issue. The named plaintiff or the class attorney can place the cost of notice on the defendant, either directly as part of the assessed costs, or indirectly as an expense payable from the compensation awarded to the class.[73] If, as in most cases, an agreement has been reached on the total sum payable to the class, the defendant will not object to most forms of effective notice. And, in any event, the defendant benefits from the greater preclusive effect assured by the best notice possible to class members.

The less effective forms of notice allowed in (b)(1) and (b)(2) class actions create problems of preclusion when individual class members fail to receive notice. Most of these problems are solved by the requirement of adequate representation. When class members fail to receive notice at some earlier stage of a (b)(1) or (b)(2) class action, they remain bound by the result of the class action so long as their interests were adequately represented by the named plaintiff and the class attorney. This result follows from the holding of *Mullane*: where individual notice is not practical, but some class members received actual notice, adequate representation alone is sufficient for preclusion.[74]

Adequate representation of individual claims in a class action, however, creates complications not found in the ordinary rules of preclusion. Thus, in *Cooper v. Federal Reserve Bank*,[75] the Supreme Court limited the preclusive effect of a judgment dismissing claims of a pattern or practice of discrimination in promotions. Individual actions alleging discrimination in promotions, brought by class members who testified at trial but who were not allowed to intervene as plain-

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[72] See, e.g., Johnson v. General Motors Corp., 598 F.2d 432, 436-38 (5th Cir. 1979); Simer v. Rios, 661 F.2d 655, 666-67 (7th Cir. 1981) (holding that possibility of individual relief required identification of class members and notice), cert. denied, 456 U.S. 917 (1982).

[73] See, e.g., Kyriazi v. Western Elec. Co., 465 F. Supp. 1141, 1144 (D.N.J. 1979), aff'd, 647 F.2d 388 (3d Cir. 1981); see also 2 Newberg & Conte, supra note 30, § 8.20.

[74] See *Mullane*, 339 U.S. at 317-18.

[75] 467 U.S. 867, 880 (1984).

tiffs, were not barred by the judgment of dismissal. These class members were bound by the judgment in the class action only to the extent that it resolved the pattern or practice claims. Under ordinary principles of preclusion, the individual claims plainly would be barred because they arose out of the same transaction or occurrence as the pattern or practice claims, yet they were allowed to go forward because they raised issues that had not been presented in the class action. Ordinary principles of preclusion were limited by the requirement of adequate representation as it applies in class actions.

The real question posed by the existing practice of giving notice in (b)(1) and (b)(2) class actions is not whether it is sufficient for preclusion under the Due Process Clause, but whether it should be left to the discretion of the district court. Under subdivision (d), the court possesses plenary discretion whether or not to order any notice at all in the course of the class, and under subdivision (e), although the court must order notice before approval of a settlement or voluntary dismissal, the method and content of the notice is left entirely to its discretion. If the current version of Rule 23 goes too far in one direction in requiring individual notice in (b)(3) class actions, it goes too far in the other direction in leaving notice almost entirely to the discretion of the district judge in (b)(1) and (b)(2) class actions. Although courts cannot be deprived of discretion in managing class actions, they also need some guidance in how their discretion should be exercised. Otherwise the district judge might be caught between several inconsistent obligations: to protect the class; to allow the class attorney to represent the class; and not to favor the class over the defendant.

A rule that identified the minimum requirements of timing, means, and content of notice to be issued would provide a framework in which the parties and the court could better litigate class actions. Like a proposed revision of Rule 23 recently considered by the Advisory Committee,[76] any such rule should not draw sharp distinctions among notice in different kinds of class actions. (On the other hand, unlike the Advisory Committee's proposal, it should not depend so heavily on the discretion of the district judge.) The differences in notice should be differences of degree, not differences in kind. Because individual notice is expensive, and increasingly expensive as the size of the class increases, it should not be required more frequently than necessary. As in temporary settlement classes, only one round of notice should be required by the rule, on the model of the notice now required by subdivision (e). Individual notice, however, should be required only when it is both feasible and effective in protecting the

[76] See Bone, supra note 55, at 109-12.

rights of individual class members. Additional rounds of notice, as needed in a particular case, should be ordered only in the discretion of the court. Although the exact formulation of a rule requiring notice could be quite elaborate, even a rule that simply required that individual notice be given to class members to the extent reasonably practicable, no later than before trial, a proposed settlement, or voluntary dismissal of a class action, would provide the participants with more certain procedures than they now have.

III
Opting Out and Its Consequences

Unlike notice, the right to opt out cannot be refined into questions of degree. Either class members have the right to opt out or they do not. The only refinement that might be possible under existing practice is to allow class members to opt out as to individual relief, but not as to classwide injunctive relief. To use the existing terminology, class actions could be certified for individual relief under subdivision (b)(3) and certified for classwide injunctive relief under subdivision (b)(2). This is the procedure effectively adopted in cases that have required individual notice as a matter of due process, as well as in some cases that have certified class actions under both (b)(2) and (b)(3).[77]

Having gone that far, however, it would be better to recognize that the fundamental inquiry is whether the joinder of class members through certification of a class action is mandatory or permissive.[78] Again to use the existing terminology, the real choice is between certification of class actions under (b)(1) or (b)(3). On the issue of opting out, there is no need for the intermediate category of the (b)(2) class action, which appears to have been added to the Rule mainly (but not exclusively) to take account of the practice of seeking classwide injunctions in civil rights cases.[79] Under the existing Rule, the procedures in (b)(1) and (b)(2) class actions are exactly the same. Likewise, the rationales for certification under each subdivision, if not exactly the same, are nevertheless very similar: as under subdivision (b)(1), classwide injunctive or declaratory relief under subdivision (b)(2) usually requires certification of a class action because individual actions would establish inconsistent standards of conduct for the party

[77] See, e.g., Taylor v. Union Carbide Corp., 93 F.R.D. 1, 7-9 (S.D. W. Va. 1980); Waldrip v. Motorola, Inc., 85 F.R.D. 349, 354 (N.D. Ga. 1980).

[78] See generally Diane W. Hutchinson, Class Actions: Joinder or Representational Device?, 1983 Sup. Ct. Rev. 459, 482-96.

[79] See Fed. R. Civ. P. 23 advisory committee's note, reprinted in 39 F.R.D. 69, 98, 102 (1966).

opposing the class or would adversely affect the interests of members of the class covered by the injunction or declaration. A court usually cannot grant uniform classwide injunctive relief without binding the entire class. Class actions now certified under subdivision (b)(2) are just as necessary as class actions now certified under subdivision (b)(1). The two subdivisions should therefore be combined.

All other class actions should be certified under subdivision (b)(3) with an accompanying right to opt out. In order to be effective, however, the right to opt out need not be exercised, as it is now, soon after certification of the class. The following sections examine the consequences of giving individual notice and granting the right to opt out later in the class action.

A. Effects on Settlement

If opting out were allowed later, what consequences would it have for those who remain in the class action and for those who opt out? The two questions are interrelated, because, taken together, the answers to these questions determine the defendant's overall exposure to liability. When class members can profitably pursue individual actions on their own, allowing them to opt out after settlement or just before trial obviously exposes the defendant to greater liability than does the class action judgment alone. These conditions are not always met, but when they are, the goal of efficiency in litigation comes into conflict with the interest of class members in pursuing their own claims independently.

Class actions are usually divided between those concerned with viable claims, which can be profitably pursued in individual actions, and those concerned with nonviable claims, which cannot.[80] It is a mistake, however, to apply this distinction automatically to an entire class action. It may be that all the claims aggregated in a particular class action are either viable or nonviable, but it may also be that some claims are large enough, or perhaps even simple enough, to be viable on their own while others are not. Those who opt out also may join their claims together or have them consolidated into a single case.[81] A mix of viable and nonviable claims might leave the defendant faced with the risk that a settlement precludes only nonviable claims that would not have been brought anyway, while class members

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[80] See Dam, supra note 4, at 104-05; Macey & Miller, supra note 39, at 30-31.

[81] For instance, in In re "Agent Orange" Product Liability Litigation, 611 F. Supp. 1223 (E.D.N.Y. 1985) [hereinafter *Agent Orange I*], aff'd, 818 F.2d 187 (2d Cir. 1987), cert. denied, 487 U.S. 1234 (1988), over 280 class members opted out and pursued their individual claims, although they soon lost on defendants' motion for summary judgment. See id. at 1230.

with more valuable, viable claims opt out to pursue separate actions.[82] In this situation, allowing opt outs at settlement "skims the cream off" of the claims of class members, leaving the defendant with a judgment that precludes only the smaller and weaker claims of the class.

In general, the right to opt out has only as much value as the individual class member's claim, determined according to its discounted present value as of the time at which the right to opt out is exercised. If the claim is not viable, then the right to opt out has no value. This conclusion has led to proposals to alter the compensatory remedies available to class members, either by creating various approximate or fluid class recoveries, or by dispensing with compensatory relief entirely.[83] Approximate and fluid class recoveries assure that some victims of wrongdoing receive some relief, with the attendant cost of extending relief to some nonvictims. Dispensing with compensatory relief entirely acknowledges that sometimes small awards of compensatory relief are simply impractical. For reasons discussed earlier, these are plainly substantive proposals beyond the reach of any revision of Rule 23 (although not beyond the power of a judge interpreting the underlying substantive law).[84]

Dispensing with notice and the right to opt out as to nonviable claims does not raise such plainly substantive issues, but these steps would still affect substantive rights. Whatever the value of a class member's claim, she has the right, absent the need for mandatory joinder, to decide how to pursue her claim. Taking away that right by denying notice and the right to opt out may be justifiable, but if so, it is for substantive reasons. In any event, requiring one round of notice and the right to opt out to holders of nonviable claims does not add much to the cost of class actions. If these class members are entitled to any compensatory relief at all, they will have to be notified of their right to apply for it anyway. And if they choose to opt out, it makes little difference to the defendant because their claims are worth so little.

All of the serious problems with the right to opt out concern class members with viable claims. Because more is at stake with these claims, both the class members and the defendant have strongly opposed interests: the class members in maintaining control of the claim

[82] See In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 166 (2d Cir. 1987) [hereinafter *Agent Orange II*], cert. denied, 484 U.S. 1004 (1988).

[83] Such as the proposal drafted by the Department of Justice, see Office for Improvements in the Admin. of Justice, U.S. Dep't of Justice, Effective Procedural Remedies for Unlawful Conduct Causing Mass Economic Injury: Draft Statute with Comment 3 (1977) (proposing public action for penalty where victims' claims do not exceed $500 each).

[84] See supra text accompanying notes 13-14.

and the defendant in obtaining a judgment that precludes further litigation. For this reason, postponing notice and the exercise of the right to opt out creates a greater risk of disrupting any attempt at settlement. It adds a further element of uncertainty to settlement negotiations and so increases the risk that the class attorneys and the defendant will fail to reach agreement because each assesses the uncertainty differently. A class attorney who overestimates the number of viable claims likely to be included in the class action (by underestimating the number of class members who will opt out) will insist upon a larger settlement to cover the projected larger number of claims in the class action. Conversely, a defendant who overestimates the number of class members who will opt out will underestimate the value of the settlement, and so insist upon a smaller settlement, since only the claims of those who remain in the class will be precluded by the settlement. These divergent estimates may prevent a settlement by opening a gap between the class attorney's lowest asking price and the defendant's highest bid. From the perspective of a judge trying to manage a class action, any threat to the settlement process increases the chance of prolonged and complex litigation.

For instance, in *In re "Agent Orange" Product Liability Litigation* (*Agent Orange III*)[85] class members were required to decide whether to opt out of the class action by a deadline that fell shortly before the case was settled.[86] Because the proposed settlement was greeted with widespread disapproval by members of the class, many of them undoubtedly would have opted out of the settlement had the right to opt out been allowed at settlement. This prospect, in turn, would have deterred the defendants from entering into the settlement in the first place, because it would have left them exposed to massive liability, not to mention the costs of continued litigation, on a large number of individual claims. Before turning to the question of whether anything could be done to foster settlement in these circumstances, it is first necessary to ask whether anything should be done.

Recall that the principal objection to early notice of a class action is that it does not give the class members sufficient information to make an informed judgment about what to do with their claims: whether to stay in the class action and participate in any recovery on behalf of the class or to opt out and pursue an individual action.[87] In a variation on the procedure used in *Agent Orange III*, notice of the terms of the settlement gives class members precisely such informa-

[85] 689 F. Supp. 1250 (E.D.N.Y. 1988) [hereinafter *Agent Orange III*].

[86] See Peter H. Schuck, Agent Orange on Trial 226 (enlarged ed. 1987).

[87] See supra text accompanying notes 37-38.

tion.[88] If they then exercise their right to opt out, they are simply making a decision which, as a matter of substantive law, they are entitled to make. It is their claim, and it is therefore their decision what to do with it. An increased likelihood of settlement cannot come at the expense of their right to control their claims.

Of course, individual class members might be advised by their own attorneys to pursue individual actions because the attorneys might benefit from taking this course. On the other hand, the class attorney might exploit the claims of the class to obtain an enhanced award of attorney's fees through a settlement that precludes their claims for an inadequate recovery.[89] Indeed, this risk is widely recognized as a pervasive problem in class actions: the difficulty faced by the class in monitoring the actions of the class attorney. Procedures that allow class members to exit in response to inadequate representation of their interests directly address this problem.

Allowing class members to opt out late in the class action has all the virtues of its vices. It presents both the advantages and disadvantages of opting out in the most extreme form. It gives each class member control over her claim, while disrupting resolution of the claims of the class as a whole. The conflict between the individual and collective perspectives is so stark that it raises the question whether the right to opt out should be considered a procedural issue at all, as opposed to one of substantive law. The next section of this Article will take up this question in detail,[90] but even if the right to opt out is wholly procedural, it is important enough that it should not be effectively denied by inadequate notice. In particular, class members should receive notice at a time when they can make the most informed judgment about whether to stay in the class action. This time is not always—or even often—early in the class action, when the likely value of a class member's claim may not even be known to the class attorney. A proposed settlement provides class members with at least the rough equivalent of a bid on the value of their claim. Bare notice at the outset of the class action does not.

To some extent, the adverse consequences of late notice and opt out at the prospect of settlement could be reduced by changing the nature of settlements: offers of settlement could be made contingent upon acceptance of the offer by a sufficient number of class members

[88] Indeed, Judge Weinstein gave the class members who had opted out repeated opportunities to rejoin the class and to participate in the settlement, even after summary judgment had been granted against them in their individual suits. See *Agent Orange III*, 689 F. Supp. at 1261-63.

[89] See Macey & Miller, supra note 39, at 22-26.

[90] See infra text accompanying notes 100-07.

with sufficiently valuable claims. Settlements have been made and accepted along these lines,[91] but this practice is hardly common. Likewise, court approval of settlements could be made contingent upon acceptance by sufficient class members. Again, this proposal has some basis in existing practice under Rule 23(e), but it, too, is hardly common. If a proposed settlement elicits widespread objections from the class then the court can refuse to approve it on this ground, although a decision to disapprove also requires an evaluation of the merits of the class members' objections.[92] Likewise, at an earlier stage in present class action practice, the fact that many class members have opted out may constitute grounds for decertifying the class for reasons of inadequate representation or lack of numerosity.[93]

The closest models for such conditional settlements, however, are from entirely different fields of law: tender offers in corporate law that are conditional upon acceptance by a minimum number of shareholders and reorganization plans in bankruptcy that require approval by a minimum number of classes of creditors. In both instances, an agreement becomes effective only if it obtains sufficient support from those intended to benefit from it. In a tender offer for corporate stock, the necessary level of support is set by the terms of the offer itself, usually a majority of the shares of common stock in the corporation.[94] In bankruptcy, the rules are set by statute and are more complicated. A reorganization plan must either obtain support from all classes of creditors whose claims are settled at less than face amount, or, if any class of creditors rejects the plan, its claims must receive absolute priority over those of any class junior to it.[95] Moreover, if any member of any class dissents from the plan, that creditor must receive at least the liquidation value of his claim.[96] A reorganization plan that meets all of these requirements, like a proposed settlement of a class action, must also receive the approval of the court.[97]

The settlement of class actions, of course, need not follow precisely the forms or procedures for agreements in these other areas of law. The conditional nature of these agreements, however, does suggest that similar agreements could plausibly be made to settle class actions. Conditional agreements would not be likely to yield the same

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91 See 3 Newberg & Conte, supra note 30, § 12.12, at 12-33 to 12-37.

92 See 7B Wright et al., supra note 2, § 1797.1, at 409-13.

93 See, e.g., Davis v. Roadway Express, Inc., 590 F.2d 140, 144 (5th Cir. 1979); see also 2 Newberg & Conte, supra note 30, § 7.47, at 7-144 to 7-146.

94 See Robert C. Clark, Corporate Law § 13.1, at 532 (1986).

95 See 11 U.S.C. § 1129(b) (1994); Douglas G. Baird, The Elements of Bankruptcy 255-56 (rev. ed. 1993).

96 See 11 U.S.C. § 1129(a)(7)(A)(ii) (1994).

97 See id. §§ 1128, 1129, 1141.

rate of settlement as unconditional agreements, for obvious reasons: the conditions for effectiveness of the agreements might sometimes fail to be satisfied and the agreement might be more difficult to reach because the conditions are an additional, and potentially complicated, term on which the parties might disagree. Protecting the right to opt out inevitably comes at some cost in securing settlement of class actions. In particular, if class members with strong claims decide to opt out, the parties may be forced to renegotiate the settlement, proceed to litigation, or abandon the class action.[98]

It is no simple matter to decide how to weigh the rights of individual class members to opt out of the settlement, or to object to its approval, against the collective interests of the class or the broader social interest in efficient litigation. It is doubtful that the balance can be struck correctly without relying to some degree on the district judge's discretion. As with notice, however, it is necessary for the rule on opting out to provide some structure for how that discretion should be exercised. The interests of absent class members cannot be left entirely to be considered by someone else, whether it is the district judge, the class attorney, or the party opposing the class. The real question posed by the analogies to corporate and bankruptcy law is not whether these areas of law strike the correct balance between individual rights and collective interests in class actions—it is doubtful that they can without significant modifications—but rather whether such a balance can be struck in the drafting or application of Rule 23. Can the right to opt out be either limited or denied completely without affecting substantive rights in violation of the Rules Enabling Act?

B. Substantive Rights and the Right To Opt Out

Disputes over whether rights are procedural or substantive can easily become too arcane to be useful. Nevertheless, the right to opt out has a strong claim to being characterized as substantive. If denying the right to opt out denies class members a realistic opportunity to pursue individual actions, then it denies them a substantive right. Other doctrines, such as those denying implied private rights of action or staying claims against a debtor in bankruptcy,[99] are plainly substantive and have the same effect on an individual's right to pursue a claim independently. For precisely the same reason, however, the right to

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[98] See *Agent Orange II*, 818 F.2d 145, 166 (2d Cir. 1987) (class actions may be inefficient if plaintiffs with strong claims opt out), cert. denied, 484 U.S. 1004 (1988); Kenneth S. Abraham, Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform, 73 Va. L. Rev. 845, 878 (1987).

[99] See 11 U.S.C. § 362 (1994).

opt out is substantive only if class members can realistically pursue individual actions.

Most of the confusion over the distinction between substance and procedure arises from the fact that all legal rights have both procedural and substantive aspects: procedural aspects because any legal right must be capable of affecting the course of judicial proceedings; substantive aspects because any legal right also affects the outcome of litigation and the relationship between the parties outside of court. To take two simple examples: the standard of negligence in tort law, although clearly substantive, plainly determines the instructions to the jury or the decision of the judge in cases to which it applies; conversely, the time limits for answering a complaint, although clearly procedural, can result in a default judgment if the defendant fails to comply with them, thereby requiring the defendant to pay money to the plaintiff.[100]

The ambivalent character of legal rights cannot be invoked, however, to deconstruct the distinction between substance and procedure as applied to the Federal Rules of Civil Procedure. When Congress provided in the Rules Enabling Act that the rules "shall not abridge, enlarge or modify any substantive right,"[101] it meant to provide some limitation on the rulemaking power of the Supreme Court. What precisely Congress meant has been debated—perhaps too frequently—under *Erie Railroad* and particularly when federal courts are faced with the choice between applying a Federal Rule or applying state law.[102] Nevertheless, the Rules Enabling Act itself does not protect only substantive rights under state law. It protects all substantive rights, regardless of their source. The rulemaking process guarantees neither the representation to those outside the legal community nor the means of collecting evidence adequate to the task of making substantive rules of law.[103] The restrictions imposed by the Rules Enabling Act cannot be written off simply by equivocating over the distinction between substance and procedure.

A workable definition of "substantive rights" which was developed under the *Erie* doctrine is whether the right arises from a legal rule intended to affect conduct outside of litigation.[104] Because all

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[100] See John Hart Ely, The Irrepressible Myth of Erie, 87 Harv. L. Rev. 693, 732-33 (1974).

[101] 28 U.S.C. § 2072(b) (1994).

[102] See, e.g., Hanna v. Plumer, 380 U.S. 460 (1965).

[103] Experimenting with different procedural rules can be justified as a means of ascertaining their empirical effects, but experimenting with substantive rights cannot. See generally Laurens Walker, Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments, Law & Contemp. Probs., Summer 1988, at 67.

[104] See Ely, supra note 100, at 724-27.

legal rules will have some effect outside litigation, the precise form of this definition requires further elaboration. To be sure, in *Hanna v. Plumer*,[105] the Supreme Court held that any question about the effects of a Federal Rule should be resolved in favor of finding that it is procedural. The Court only addressed the question of whether to apply a Federal Rule—not the original decision about how broadly a Federal Rule should be drafted.[106] The rejection of the proposed Federal Rules of Evidence, partly on the ground that the provisions on evidentiary privileges affected substantive rights, demonstrates that the authority of the rulemakers really is limited by the Rules Enabling Act.[107]

According to the preceding definition, the question of whether to imply a private right of action under a federal statute is substantive. A private right of action alters the authority to enforce federal law and consequently affects the out-of-court relationship between those who possess the right and those who are regulated by the law that creates the right. Hence, recent decisions have emphasized the need to find that Congress intended to confer a right of action on private parties.[108] This question differs only slightly from the question of whether class members have a right to opt out and to sue individually: an individual who is denied a private right of action has no control over any enforcement action, while a class member denied the right to opt out has only the very limited control implied by the duty of adequate representation of her interests. The existence of a private right of action is a matter of all-or-nothing, while the right to opt out is a matter of all-or-almost-nothing.

The law of bankruptcy presents an even stronger analogy that supports the substantive character of the right to opt out. The denial of the right to opt out is the exact analogue of the automatic stay of claims against a bankrupt debtor: it precludes individual actions and forces all creditors into a single, consolidated proceeding.[109] This rule of bankruptcy procedure clearly affects substantive rights because it denies a creditor the right to prosecute his claims to the full extent of

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105 380 U.S. 460, 471 (1965).

106 Id. ("[T]he court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.").

107 See Ely, supra note 100, at 693-97.

108 See, e.g., Touche Ross & Co. v. Redington, 442 U.S. 560, 575-76 (1979).

109 See 11 U.S.C. § 362 (1994). A similar provision in the federal interpleader statute also forces claimants into a single proceeding by authorizing injunctions against individual actions. See 28 U.S.C. § 2361 (1994). This statute, like the Bankruptcy Act, allows claimants to be individually represented in the interpleader proceeding. See id.

their value, without apportionment or subordination to other unsecured claims. Denying creditors the right to proceed individually plainly has substantive consequences, both over their conduct in dealing with debtors who are close to insolvency and in the distribution of the bankrupt debtor's assets. The whole point of bankruptcy is that creditors give up their right to maximize their individual shares of the debtor's property in order to maximize the collective recovery of all creditors.[110] Class members who are denied the right to opt out are also forced into a single proceeding, where their claims might be compromised or diminished based on the rival claims of other class members, which also sacrifices individual advantage for collective gain. In fact, the procedures in class actions without the right to opt out are even more detrimental to individual class members than the procedures in bankruptcy are to individual creditors; class members are denied the right to individual representation in the class action while individual creditors are not.

Forced consolidation of claims and the denial of individual representation, although they plainly concern litigation, cannot be dismissed as purely procedural. The question of who controls the presentation of a claim in court is not much different from the question of who owns it. And that question is as substantive as the question of who owns a piece of property, if indeed these questions can be distinguished. Ownership of property is, in a sense, nothing more than the right to bring actions to enforce a claim to the property. In bankruptcy, the priority attached to collective efficiency over individual recovery plainly affects substantive rights. To the extent that class actions deny the right to opt out, they depend upon a similar priority: the collective efficiency of a class action over individual pursuit of individual claims.

Granting class members the right to opt out leaves them in the same position that they were in before any class action was filed. Because they still have the right to opt out and to sue individually, their substantive rights have not been affected at all. Aside from the effects of the statute of limitations,[111] class members are in the same position that they would have been in if no class action had been brought. To be sure, this position does not guarantee them a day in court all to themselves. Whatever the rights of individual class members, they do not include the right to present an individual claim free of the usual

[110] See generally Thomas H. Jackson, The Logic and Limits of Bankruptcy Law 7-19 (1986).

[111] See infra Part III.C.

rules on joinder and consolidation.[112] They do include the right to select an attorney to present an individual claim subject to these rules. However, if class members are denied the right to opt out, then they are denied even these rights.

The crucial question is whether class members had a realistic opportunity to pursue individual actions in the first place. The distinctions drawn between different class actions in subdivision (b) have some bearing on this question, although they need to be drawn more precisely for reasons suggested earlier.[113]

1. Class Actions Under Subdivision (b)(1)

Claims that must be brought as class actions under subdivision (b)(1) really cannot be brought as individual actions. Following the model—and much of the language—of Rule 19 on necessary and indispensable parties, subdivision (b)(1) requires class actions because individual actions would prejudice either the party opposing the class or the class members themselves. The alternative to class actions under subdivision (b)(1) is not individual actions, but no action at all. Denying class members the right to opt out in (b)(1) class actions does not affect their substantive rights because, in the absence of a class action, they would not be able to bring any action at all.

Although the denial of the right to opt out in (b)(1) class actions is procedural, the question remains whether subdivision (b)(1) should be read to establish the equivalent of a bankruptcy proceeding, as it has been with increasing frequency.[114] In cases such as *In re A.H. Robins Co.*[115] and *Johns-Manville*,[116] the individual claims of class members may be large enough in the aggregate to bankrupt the employer. Nevertheless, these claims could be brought individually without prejudicing the right of other class members to obtain judgments against the defendant. The only prejudice, and therefore the only need for consolidation, arises not in the individual adjudication of the claims, but in proceedings to enforce the resulting judgments. In the

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112 See Weinstein, supra note 5, at 480-81 (noting that consolidation of individual mass tort claims may make case into quasi class action); Spencer Williams, Mass Tort Class Actions: Going, Going, Gone?, 98 F.R.D. 323, 329-30 (1982) (stating that right of individual plaintiffs to control their own claims is overstated).

113 See supra text accompanying notes 55-70.

114 See 7A Wright et al., supra note 2, § 1774, at 441-43; 7B id. § 1805, at 545-47. The converse question also remains open: whether bankruptcy law, either in its present form or as amended, can assume some of the functions now performed by class actions. See generally Note, The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings, 96 Harv. L. Rev. 1121 (1983).

115 880 F.2d 709, 740-41 (4th Cir.), cert. denied, 493 U.S. 959 (1989).

116 In re Joint Eastern and Southern District Asbestos Litigation [*Johns-Manville*], 982 F.2d 721, 735 (2d Cir. 1992).

analogous context of interpleader actions involving multiple claims arising out of a single accident, the Supreme Court has insisted that consolidation be limited to collection proceedings.[117] The same limitation should apply to interpretations of subdivision (b)(1): consolidation should be limited to collection proceedings. Class actions under subdivision (b)(1) do not constitute a substitute for bankruptcy proceedings, which consolidate the claims of all creditors against the bankrupt, not just the claims of those who happen to be members of the class.[118] In *A.H. Robins*, of course, the class action did not serve this purpose: it was conducted simultaneously with a reorganization under Chapter 11 that brought all the creditors before the court.[119]

2. *Class Actions Under Subdivisions (b)(2) and (b)(3)*

The baseline for determining whether the right to opt out is substantive in (b)(2) class actions depends on the individual action that would be brought if a class member opted out: if it concerns relief that applies equally to all members of the class, then it should be certified under subdivision (b)(1); if it depends on the class member's individual circumstances, then it should be certified under subdivision (b)(3). Claims for classwide injunctive or declaratory relief under subdivision (b)(2) should be analyzed in the same way as in (b)(1) class actions.[120] To the extent that such class actions concern claims that can only be considered in a class action, they should be binding on class members who do not have the right to opt out. To the extent that they concern claims that could be presented in individual actions, class members should retain the right to proceed individually. If class members have the right to proceed individually, as on the claims for backpay in *Johnson v. General Motors Corp.*,[121] then they have a sub-

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117 See State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 533-37 (1967).

118 See John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343, 1457-61 (1995).

119 The class action was against Robins's liability insurer, but it was intimately tied to the funds available to Robins to satisfy the claims against it in the reorganization proceedings. See *A.H. Robins*, 880 F.2d at 717-19. Class members also received a substitute for the right to opt out because they were allowed to present their individual claims to the court. See id. at 716-17, 744-45.

In *Johns-Manville*, the class action could have been considered part of the reorganization proceedings themselves, although the Second Circuit doubted whether the procedures for confirmation and amendment of the reorganization plan could be displaced by the procedures for approval of a settlement of a class action. See *Johns-Manville*, 982 F.2d at 735-49.

120 Cf. Weber, supra note 6, at 411-13 (proposing use of Rule 19 to join individuals allowed to opt out of (b)(2) class actions).

121 See 598 F.2d 432, 433 (5th Cir. 1979).

stantive right to opt out of any class action that includes their individual claims.

Conceptually, of course, the two categories of class and individual claims overlap: claims that can be brought as a single class action could theoretically be brought as a series of individual actions. An action to change general practices of the defendant, such as a class action alleging discrimination in a seniority system, could conceivably be broken down into a series of individual actions, each seeking individual relief from the same general practice. The test, however, should be one of practical necessity. What is conceivable in theory may not be feasible in practice. Uniform changes, where uniformity is required, may only be accomplished in a class action. It is not feasible for an employer to modify a seniority system for some class members but not others. The gain in efficiency from a class action is so great that it becomes a necessity.

The same reasoning could be extended to class actions that are now certified under subdivision (b)(3) but that consist of claims that are too small to be individually viable. As many commentators have pointed out,[122] denying class members the right to opt out and pursue these claims does not deny them anything of value. Although it may be difficult in any particular case to draw a precise distinction between viable and nonviable claims, even a conservative estimate of how much a claim must be worth to be independently pursued—say $1000—is better than no estimate at all. Individual notice and the right to opt out should be saved for the cases in which it really matters to the class members themselves.

From the perspective of the Rules Enabling Act, the right to opt out is allowed both too narrowly and too broadly under the current version of Rule 23. The right to opt out should be broadly allowed for any individual claim that could be prosecuted to judgment without prejudicing the rights of the party opposing the class or of other class members. But the right to opt out should be denied if class members have no realistic opportunity to pursue their claims individually.

C. Preclusion by Judgment and by the Statute of Limitations

Class members who opt out, of course, are not bound by the resulting judgment or settlement in a class action. That is just what the right to opt out means. Yet from the beginning, the drafters of the current version of Rule 23 recognized that questions of preclusion affect substantive rights beyond the scope of the rulemaking process.[123]

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122 See, e.g., Dam, supra note 4, at 105 & n.42; Macey & Miller, supra note 39, at 30-31.

123 See supra note 47.

Since the right to opt out is so intimately tied to questions of preclusion, the drafters' comments provide further support for the substantive character of the right to opt out. Even so, class members who are granted the right to opt out cannot simply luxuriate in the prospect of controlling their own claims.

Even if class members are not formally bound by a class action, they remain affected by it. If the settlement or judgment in the class action is favorable to the class, it bolsters the position of those who opt out. Conversely, if the outcome is unfavorable, it has the opposite effect.[124] In either case, class members who opt out are likely to use whatever segments of the record remain open to public knowledge to prepare their own claims. Knowing all this before they opt out, class members might well recognize that it is better for them to stay in the class action. Even if they lose control over their claims, they gain from the economies of scale that benefit the entire class.

Attorneys for individual class members, however, may suffer from the loss of contingent fees if their clients decide to remain in the class action. These attorneys are ethically obligated to act in the interests of their clients,[125] an obligation that could well be strengthened by explicitly requiring disclosure to the client of the costs and benefits of the decision to opt out. Although notice of settlement under Rule 23(e) already contains some of this information,[126] an ordinary class member may not understand it without the assistance of counsel. More elaborate and less formal communication, supervised by the court, may be necessary to inform class members effectively of their rights.[127] A fully informed decision, however it is achieved, might well lead the client not to exercise the right to opt out.

If the class member does decide to opt out, the class action likely will preclude him, practically if not formally, from obtaining certification of a separate class action. Only in the unlikely circumstance that the claims of class members who opt out independently meet the requirements of Rule 23 will they be able to obtain certification of a rival class action. Few decisions have allowed class actions to multiply in this way,[128] and even those that do can be better justified as deci-

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124 See Dam, supra note 4, at 120.

125 See Model Rules of Professional Conduct Rule 1.2(a) (1983) (requiring lawyers to abide by clients' decisions whether to accept a settlement); Model Rules of Professional Conduct Rule 1.5(c) (1983) (requiring contingent fee agreement to be in writing); see also Weinstein, supra note 5, at 490, 503 (discussing incentives of counsel to obtain contingent fees).

126 See 2 Newberg & Conte, supra note 30, § 8.32.

127 See Weinstein, supra note 5, at 546-47.

128 In an earlier article, I surveyed the decisions on multiple class actions in employment discrimination cases. George Rutherglen, Notice, Scope, and Preclusion in Title VII Class

sions to limit the scope of the initial class action or to allow the equivalent of subclasses. Practical preclusion of subsequent class actions greatly limits the defendant's exposure to continued litigation and liability. It leaves the defendant vulnerable only to litigation of individual claims. To be sure, in mass tort cases such as *In re "Agent Orange" Product Liability Litigation*[129] and *Georgine v. Amchem Products, Inc.*,[130] these individual claims can reach staggering proportions. Because of the difficulty or complexity of proof, however, the cost of pursuing individual claims also can be quite high.

Yet even in these cases, class members who opt out to avoid preclusion by judgment still face the risk of preclusion under the statute of limitations. This question, too, raises issues of substantive law, since the statute of limitations protects the defendant's right to repose. In addition to protecting procedural values of preventing litigation based on stale evidence, the statute of limitations allows the defendant some means of assessing and limiting its overall exposure to liability.[131] For this reason, the text of Rule 23 does not address the statute of limitations, but decisions under the Rule have established a clear principle of tolling: from the time that a class action is filed until the class action is concluded—either because certification of a class is denied, or because a class is certified and then decertified—the running of the limitation period is tolled on the individual claims of class members.[132]

The decisions that established this principle concerned class actions in which class certification was denied. In cases in which the class action is certified and results in a settlement or judgment, questions of whether subsequent individual actions are barred by the statute of limitations generally do not arise because such actions are precluded by the judgment in the class action. It remains possible that an individual claim that originally fell within the class action was excluded from it when the class was certified, but these cases can easily fit within the tolling principle because the partial certification of a

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Actions, 69 Va. L. Rev. 11, 79-83 (1983). See generally 2 Newberg & Conte, supra note 30, § 7.31.

[129] See *Agent Orange II*, 818 F.2d 145, 148-52 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988).

[130] 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).

[131] See Ely, supra note 100, at 729-32.

[132] See Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 353-54 (1983); American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 550-52 (1974). Depending on the underlying substantive law, the limitation period might be reinstated in its entirety and not just for the time remaining after the filing of the class action. See Chardon v. Fumero Soto, 462 U.S. 650, 658-62 (1983).

class action also constitutes a partial denial of certification. So, too, for class members who opt out, the limitation period begins to run again as soon as they opt out of the class.[133]

The question of tolling has also come up in cases in which a class member was entitled to individual relief under a settlement of a class action, but because she received no notice, failed to file a claim under the time limitations stipulated in the settlement for doing so. Sometimes courts have exercised their discretion to expand the time limits for filing claims under the settlement, as in *In re A.H. Robins Co.*;[134] at other times, they have held that the lack of notice to class members denied due process and so allowed them to bring individual claims.[135] Presumably the latter decisions tolled the running of the limitation until the class action reached a final judgment that distributed all relief under the settlement, so that the statute of limitations did not bar individual actions. Otherwise, these decisions succeeded only in shifting the ground of dismissal from preclusion by judgment to preclusion under the statute of limitations. In most cases, the statute of limitations does not leave class members who opt out with much time in which to decide whether to bring an independent action. This constraint, along with the cost of individual litigation, makes opting out a less attractive alternative to class members in practice than it might appear to be in theory.

The managerial problems created by the right to opt out are severe in one class of cases: mass tort litigation in which the statute of limitations does not operate as an effective bar on individual claims because of the long latency period before discovery or manifestation of the plaintiffs' injuries.[136] This problem has arisen in *Georgine*, in which settlement of claims on behalf of tens of thousands of current victims is contingent upon certification and settlement of claims on behalf of future victims of the same diseases.[137] Although all the future claimants were exposed to asbestos long in the past, the diseases which result from exposure have not yet manifested themselves. The commencement of the limitation period for bringing individual claims has therefore been postponed. The defendants to the present claims

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133 See *Crown, Cork & Seal Co.*, 462 U.S. at 351-52; Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 n.13 (1974).

134 See In re A.H. Robins Co., 880 F.2d 694, 700 (4th Cir.), cert. denied, 493 U.S. 959 (1989).

135 E.g., Burns v. Elrod, 757 F.2d 151, 155-56 (7th Cir. 1985).

136 See 2 Calvin W. Corman, Limitation of Actions §§ 11.1.2.1 to 11.1.2.3, at 136-45 (1991); Coffee, supra note 118, at 1424-25.

137 See Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 266-67 (E.D. Pa. 1994), vacated and remanded, Nos. 94-1925 et al., 1996 U.S. App. LEXIS 11191 (3d Cir. May, 10, 1996).

and to these future claims, of course, would like to reach a settlement that establishes some overall ceiling on their liability. So long as a large number of future claims are outstanding, they will be unable to do so and, for that reason, they have refused to settle the present claims in the absence of a settlement of the future claims.[138]

The major question in cases such as *Georgine* is whether attorneys for the present claimants can adequately represent the future claimants, especially since the terms of the proposed settlement treat present claimants better than future claimants. The former receive cash payments, whereas the latter mainly receive the right to present their claims to a Center for Claims Resolution (although future class members could not, in any event, receive a fixed sum for future diseases that have not yet developed).[139] A further issue is the right of future class members to opt out, as 236,000 of them already have.[140] Proponents of the settlement are succeeding in voiding the opt-out responses already submitted, on the ground that they were tainted by misrepresentations about the case by individual counsel,[141] and in imposing new opt-out notices with shorter deadlines and more information to counteract alleged misrepresentations.[142] Whether or not these arguments are successful, the defendants must reduce the number of future claimants who opt out in order to obtain significant savings from the settlement.

From the arguments advanced earlier in this paper,[143] it follows that future claimants have a substantive right to opt out and that allowing them to opt out after the proposed settlement gives them more information than they would have had before the settlement. Misrepresentations of the settlement by class members' individual attorneys may be a serious problem, but the proposed cure in this instance—limiting the class members' right to opt out because of the misconduct of their attorneys—is worse than the disease.[144] Time limits plainly can be imposed on the right to opt out, but not in a way that effectively denies class members the opportunity to exercise that right.

Nevertheless, the managerial problems are real enough, and they should be addressed if possible. One means of doing so is to impose time limits on the right to bring a claim after the class member has

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138 See id.

139 See id. at 294-99.

140 See Roger Parloff, The Tort That Ate the Constitution, Am. Law., July/Aug. 1994, at 75, 79.

141 Georgine v. Amchem Prods., Inc., 160 F.R.D. 478, 518 (E.D. Pa. 1995).

142 Id. at 519.

143 See supra text accompanying notes 100-13.

144 For a similar proposal to grant future claimants the right to opt out, see Coffee, supra note 118, at 1446-53.

decided to opt out, again in a manner that does not deny the effective exercise of the right to sue. Bankruptcy law provides another useful analogy: for claims not discharged in bankruptcy and not subject to the automatic stay, the creditor has at least thirty days in which to bring an action outside of bankruptcy.[145] This provision creates only a minimum period for filing an action outside of bankruptcy, so that tolling of a claim under nonbankruptcy law can greatly extend the limitation period. Nor does it apply to claims that have yet to arise, like those in *Georgine*. Other limitations might deal with the problem more effectively—for instance, statutes of repose that impose outer limits on the time in which a claim may be brought,[146] or statutes of limitations that impose time limits from the termination of related proceedings.[147] These examples are only illustrative, but they suggest how problems of management might be addressed consistently with allowing a right to opt out.

Unlike time limits on the exercise of the right to opt out, these time limits plainly raise questions of substantive law.[148] The long period over which claims might be brought shows just how far this issue goes into matters of substantive law. On most tort claims, as in *Georgine*, the applicable substantive law is state law, and a federal court, under the *Erie* doctrine, would be required to accept the application of the statute of limitations by state courts. Over the long term, however, it might be desirable to change class action practice by statute to provide a separate statute of limitations—for instance, for a fixed period of time running from the decision to opt out—that leaves class members a reasonable period in which to file their individual claims. There is no doubt that such a statute falls within the power of Congress and that it could be part of a more general reform of class action practice. A statute along these lines would hardly solve all the problems created by the right to opt out of mass tort class actions such as *Georgine*, but it would at least pose the right issue in the right way: as one of substantive law that can be addressed only by limiting the substantive right of individual litigants to pursue their own claims as they see fit.

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145 See 11 U.S.C. § 108(c) (1994).

146 See 2 Corman, supra note 136, § 11.2.

147 For instance, under Title VII of the Civil Rights Act of 1964, individual claims against private employers must be filed within 90 days of receipt of a right-to-sue letter that terminates administrative proceedings before the Equal Employment Opportunity Commission. See 42 U.S.C. § 2000e-5(f)(1) (1994).

148 The Supreme Court recognized as much in framing its decision in American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974), as one of federal common law. See id. at 556-59. As such, of course, it is subject to modification by Congress. Chardon v. Fumero Soto, 462 U.S. 650, 658-62 (1983).

CONCLUSION

The limited scope of Rule 23 limits the power of judges to manage large class actions. Any reform of the Rule must recognize these limits, as well as the desirability of more comprehensive reform by statute. This Article has argued that existing class action practice requires too much notice too early in the proceedings, yet results in too little real protection to class members. As others have pointed out, notice early in the class action is not likely to be effective, except in satisfying the formalities of the existing rule. It does not give class members information when it is most likely to be valuable to them: at the time when they are deciding whether or not to participate in a proposed settlement. So, too, the right to opt out should be more broadly allowed in any case in which class members have a realistic option of pursuing an individual claim for compensatory relief. Class members should be allowed to opt out at the time when they are most likely to receive information about how well their interests have been protected by the class action: either after a proposed settlement or just before trial.

Previous scholarship has emphasized the constitutional dimensions of these issues under the Due Process Clause. This Article has emphasized instead the substantive aspects of the right to opt out. Recognizing this limit on the power of the rulemakers, and on the power of federal judges to manage class actions based solely on the authority of the Rule, may prove disappointing to those impressed by the managerial problems created by large class actions. These problems can be addressed by a variety of other means, however, from substantive rulings of federal judges in interpreting federal statutes or in making federal common law, to amendments to the Judicial Code, to changes in state substantive law. They cannot be addressed successfully solely through a revision of Rule 23. Doing so would only increase the risk of reaching the wrong answer to a question of substantive law by asking it in purely procedural terms.