

**Comments of
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Submitted at the Request of
Lawyers for Civil Justice
To
The Federal Rules Advisory Committee**

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I. Introduction

Lawyers for Civil Justice, a nationwide coalition of defense and corporate counsel working to improve the civil justice system, has requested that I share my views with the Rules Advisory Committee regarding class action reform and the pending amendments to Rule 23. I support the adoption of the proposed amendments to Rule 23 in regard to overlapping class actions, as well as the necessity of even more sweeping and fundamental revisions of federal class action jurisdiction and procedure. The need for class action reform, is a subject of great interest and importance to me as coauthor of a civil procedure casebook, a reviser of Moore's Federal Practice Third Edition, a teacher of civil procedure for almost thirty years, and an active participant in the litigation of a number of class actions.

It is my position that modern class action procedure, on both jurisdictional and structural levels, is in need of significant retooling in order to prevent serious harm to the attainment of many of the most fundamental goals underlying the federal procedural system. These goals include (1) making the adjudicatory system as efficient as reasonably possible, (2) avoiding use of the litigation system for purposes of harassment or coercion, (3) assuring individuals a meaningful opportunity to control both the choice whether to litigate in order to vindicate their private rights and the ability to control the conduct of that litigation if the choice is made to sue, and (4) assuring that the Federal Rules of Civil Procedure do not alter substantive law in a manner prohibited by the Rules Enabling Act. In one way or another, the current method of adjudicating class actions has dangerously undermined the procedural system's pursuit of each of these vitally important social, political, and (in certain respects) constitutionally grounded ends.

I fully recognize that to a certain extent, implementation of the requisite remedial measures is beyond the legal or political authority of this Committee. At least a few of these measures will have to come through the legislative process. However, it by no means follows that this Committee should play no role in this retooling process. Much of the required redesigning, on both jurisdictional and structural levels, falls well within the bounds of this Committee's authority as part of the rule making process pursuant to the terms of the Rules Enabling Act. Perhaps more importantly, to the extent this Committee were to conclude either that it lacks such legal authority or that for other reasons taking the necessary action is inappropriate, I urge the Committee to advocate adoption of appropriate jurisdictional and structural reform before both the Judicial Conference and Congress.

The remainder of these comments is divided into three sections. The first section explains both the imperative need to provide rules or legislation for the preclusion of sequential or overlapping

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of parallel class actions once the court has denied class certification, and the authority of the rule making process to implement such a power consistent with the dictates of the Constitution and the Rules Enabling Act. The second section discusses the need for this Committee actively to support currently proposed legislation designed to impose minimal diversity requirements in certain diversity-based class actions in federal court. The final section explains the need for this Committee to reconsider, and ultimately to reject, the opt-out procedure provided for in the current version of Rule 23(b)(3).

II. Amendments to Preclude Overlapping Class Actions

The proposed amendments to Rule 23 currently under consideration by this Committee include a number of options that would provide preclusive impact to a denial of class certification in order to prevent future attempts to gain class relief in other courts—whether state or federal—on the same controversy under identical certification standards. It is my position that the problems that these amendments are designed to remedy are extremely serious ones, while their supposed costs—either to the interests of federalism or to the interests of individual class members—have been significantly overstated. On the basis of any realistic cost-benefit analysis, then, it is essential that the Federal Rules provide for a mechanism to prevent the inescapable and severe harms that flow from the problem of overlapping class actions. The significant benefits to be derived from adoption of preclusion options are obvious. Preclusion rules are essential in order to avoid the three major “demons” of modern procedure to which overlapping class actions may give rise: (1) waste and inefficiency due to duplicative litigation, (2) the use of litigation for *in terrorem* strategic effect, and (3) the evils of sequential forum shopping.

Where overlapping state and federal class actions have been certified, the burdens and inefficiencies of duplicating the litigation process will inevitably be both harassing and wasteful. As commentators have wisely noted, “[t]he duplication of effort is a major cause of the protraction of time needed to resolve cases,” and therefore “multiplicity is a harm to society’s legitimate interests in judicial efficiency.” Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court’s Role in Defining the Litigation Unit*, 50 U. Pitt. L. Rev. 809, 832-33 (1989). See also James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 Stan L. Rev. 1049, 1064 (1994) (“Many of the costs of duplicative litigation are self-evident. It is patently wasteful.”) Indeed, duplication in the class action context can be exponentially more problematic than duplication in the event of parallel single party suits, because of the unique and heroic efforts invariably required to resolve such suits.

In recent years, both courts and Congress have taken important strides in reducing the dangers of duplicative litigation, by such actions as the judicially expanded breach of mutuality in the use of collateral estoppel by non-parties [see, e.g., *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979)] and the congressional codification of supplemental jurisdiction. 28 U.S.C. § 1367. As I have

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previously noted, these advances “have been adopted because they prevent wasteful and potentially harassing litigation redundancy.” Martin H. Redish, *Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem*, 75 N.D.L. Rev. 1347, 1348 (2000). It is, then, anomalous that both the revisers of the Federal Rules and Congress fail to deal effectively with the problems of duplicative litigation in their most intensified form in the class action context.

Where a federal court has refused to certify a class action, permitting another court—state or federal—subsequently to certify essentially the same class under the same governing substantive and procedural standards effectively enables plaintiffs’ lawyers to use the class action device as a means of legalized blackmail. A defendant is aware that its success in opposing class certification in one, two, or even fifty different courts would not preclude a fifty-first court from granting certification. The defendant thus must face the possibility of a constant stream of harassing filings. Hence defendants are effectively forced to “buy” litigation peace, even where such payments are wholly undeserved, by settling. For at least twenty years, the Advisory Committee has sought to modify the Federal Rules in order to prevent or at least reduce the danger of the use of litigation as a means of indirectly coercing settlement. (See, e.g., 1983 Amendments to Rule 26.) While to date the Committee has sought to achieve this result largely through a dramatic increase in the judicial control of the discovery process, there is every reason for it to be at least as vigilant in seeking to avoid the misuse of the litigation process in the class action context, where the force of the potentially coercive procedural weapon is geometrically expanded.

A related concern is the significant danger of sequential forum shopping to which the absence of certification preclusion gives rise. In 1965, in *Hanna v. Plummer*, 380 U.S. 460, 467-68 (1965), the Supreme Court expressed concern that the Rules of Decision Act be construed in order to avoid the significant strategic unfairness caused by a plaintiff’s ability to manipulate the choice of governing law by engaging in forum shopping between state and federal courts in diversity cases. See also *Semtek International Inc. v. Lockheed Martin Corp.*, 531 U.S., 497, 504 (2001). The forum shopping to which the absence of certification preclusion gives rise, in contrast, is considerably more invidious than the form found so troublesome by the Court in *Hanna*. Whereas the *Hanna* Court sought to prevent a plaintiff from getting to take his *best* strategic bite at the apple, *sequential* forum shopping (i.e., allowing a plaintiff’s lawyer to seek certification in an unlimited number of courts, despite failure to obtain certification in his first suit) allows a plaintiff’s lawyer to acquire *multiple* bites at the class action apple. Thus, sequential forum shopping implicates litigation waste and harassment to an even much greater degree than does the more traditional form of forum shopping long disdained by Supreme Court doctrine.

Once one recognizes the need for the use of preclusion rules to solve the problem of overlapping class actions, it is important to understand that, to be effective, the normal rules of preclusion must be modified in the class action context. In order to be effective, a preclusion rule enforcing a denial of certification must extend well beyond the individual named plaintiffs in the first action. Once it is acknowledged that the procedural harms caused by permitting multiple

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attempts to certify the same class under the same governing standards are prohibitive, it is necessary to recognize that use of traditional forms of preclusion will prove completely ineffective in dealing with the problem. In the traditional single action model, imposing a preclusive bar on the named parties represents a fair and effective means of preventing future waste or harassment. In the normal class action context, in contrast, precluding only the individual named plaintiffs will be completely ineffective, for in such a situation the named plaintiff is fungible with countless other members of the class, usually represented by the same attorney. Thus, it is essential that any preclusion rule control the attorney, or stand in effect as a procedural bill of peace by precluding any future similarly situated class action, regardless of who the named plaintiff is.

Extending the preclusive impact of certification denial beyond the named plaintiffs neither violates procedural due process nor gives rise to fundamental unfairness. In the traditional single party action, generally the due process principle that a litigant must be afforded his day in court prevents the assertion of preclusion against someone who is not a party or privy to someone who was a party in the first action. The class action context, however, is substantially different. Initially, it is important to remember that a denial of class certification never deprives a future litigant of his individual cause of action. Indeed, denial of certification on the grounds of failure of the asserted class to comply with the requirements of Rule 23 will in no way negatively impact the individual plaintiff's ability to pursue her own claim. At most, future plaintiffs are denied the right to use of a particular procedural device that is unrelated to success or full use on the merits of plaintiff's claim. This fact clearly dilutes any conceivable negative impact on future plaintiffs' right to pursue their individual causes of action caused by the invocation of preclusion. Secondly, the indisputable reality in most class actions today is that the plaintiff's attorney, rather than the named plaintiff, is effectively the real party in interest.

Moreover, adoption of interfederal certification preclusion rules neither threatens nor undermines the values of federalism. It is, of course, true that developing interfederal preclusion rules to bar multiple certification attempts or enabling a federal court to enjoin an overlapping state class action raises *prima facie* questions of judicial federalism. Closer examination reveals, however, that the potentially negative impact on federalism concerns is smaller than might first appear. Initially, it should be noted that the proposed preclusion rules run in both jurisdictional directions. Thus, federal courts would be just as bound by a state court denial of class certification as would a state court be bound by a federal court's denial of certification. Secondly, the preclusive impact of a federal denial of certification would extend to other federal courts, as well as to state courts. Thirdly, under most proposed versions of the overlapping class action preclusion rules, the preclusion rule is to be applied by the court hearing the second case.

This situation is far less invasive of state judicial prerogatives than the situation created by the long-established relitigation exception to the Anti-Injunction Act, which allows a federal court to enjoin a state court proceeding in order to protect or effectuate the federal court's prior judgment. 28 U.S.C. § 2283. This statutorily created practice departs dramatically from traditional *res judicata* practice, under which the second court determines whether or not *res judicata* applies,

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rather than the first court.¹ One could hardly accept with equanimity the existence of the extraordinary federal judicial authority established by the Anti-Injunction Statute's relitigation exception, yet simultaneously reject as a violation of federalism the reciprocal preclusion authority, always to be enforced by the second court, created by the proposed preclusion amendments.

Even empowering federal courts to enjoin overlapping state class actions should not be deemed to be an improper departure from accepted principles of judicial federalism. When construed in a manner consistent with its plain meaning, the in-aid-of-jurisdiction exception to the Anti-Injunction Statute, 28 U.S.C. § 2283, clearly authorizes such relief. Indeed, construing this statutory exception to preserve the federal court's flexibility in the meaningful exercise of its jurisdiction brings it into harmony with the construction traditionally given to the relitigation exception in the same statute, which allows a federal court to enjoin a state court action that threatens to undermine a preexisting federal judgment.

¹In fact, the Supreme Court has held that a litigant who wishes to ask a federal court to assert the statutory authority to enjoin an ongoing state action may not first give the state court the option of considering the res judicata question. *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986).

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Arguments have been raised questioning the consistency of these proposed preclusion amendments with the limitations imposed on the rule making process by the Rules Enabling Act, 28 U.S.C. _ 2072. The concern is that a rule directly impacting or controlling the outcome of a state judicial action would abridge substantive rights, in contravention of the express restrictions imposed by the Enabling Act against such an impact. If accepted, however, such an argument would prove far too much. Existing rules already may have a similar impact. For example, under Rule 13(a) of the Federal Rules of Civil Procedure, a defendant is required to raise counterclaims deemed compulsory. Failure to do so will bar any future complaint on the same grounds. The rule would be a toothless tiger, however, if state courts could ignore the sweeping preclusive impact of a failure to raise a compulsory counterclaim in a federal action. Thus, if only as a matter of federal supremacy, failure of a defendant to comply with Rule 13(a) will necessarily have a dramatic effect on state court authority. To deny power under the Enabling Act to create a rule effectively restricting the exercise of state judicial power, then, would logically invalidate the preclusive impact of failure to comply with Rule 13(a).²

III. Proposed Legislation Allowing Class Action Removal In Minimal Diversity Cases

Under the restrictions currently imposed as part of the diversity jurisdiction, out-of-state corporate defendants in state class actions are often subjected to all of the risks of local bias that, since the time of the Constitution's adoption, the diversity jurisdiction has been designed to avoid.³ This danger still exists, if in somewhat altered form, to this very day. State judges, whose independence is not constitutionally guaranteed and who are often chosen by election, may well be subjected to local pressures that the considerably more independent federal judges need never face.⁴ Surely, this Committee is sufficiently aware of anecdotal data concerning the abuses committed against out-of-state class action defendants in state courts from Texas to

²It might be argued that Rule 13(a) does not itself directly dictate a limitation of state judicial authority. Rather, it is only by means of a separate common law rule that state courts are required to dismiss a claim barred under Rule 13(a). Such an argument, however, places form over substance. The fact remains that, but for Rule 13(a), no such common law rule would ever exist. Moreover, the so-called common law rule exists for the sole purpose of requiring a state court to adhere to the directives that grow directly out of the operation of a Federal Rule of Civil Procedure.

³See *United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809); John Frank, *Historical Bases of the Federal Judicial System*, 13 Law & Contemp. Prob. 1 (1948).

⁴Martin H. Redish, 15 Moore's Federal Practice, 3d Ed. _ 102.03 (1997). States judges have, on occasion, acknowledged the problem. See Nealy, *Why Courts Don't Work* 27-28 (1982).

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Madison County, Illinois, to recognize that these concerns about prejudice towards out-of-state interests go considerably beyond the purely theoretical. Because of the complete diversity requirement, class action plaintiffs are able to prevent defendants from taking advantage of a neutral federal forum through the process of removal, simply by joining as a defendant a citizen of the named plaintiff's state. Such strategies will preclude removal, even in cases having only minimal connection to the state in which the class action has been brought.

It is well established that the complete diversity requirement is not dictated by Article III of the Constitution. Rather, it is grounded solely in an inference of congressional intent on the basis of congressional silence in the diversity statute. *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523 (1967). Thus, there is no doubt that Congress possesses constitutional power to suspend the requirement in compelling situations in which it finds that the need for diversity jurisdiction exists despite the absence of complete diversity. Indeed, Congress long ago did exactly that in the case of interpleader, where its fear of the risk of the imposition of unfair multiple liability on defendants caused it to expressly adopt only a minimal diversity requirement. 28 U.S.C. § 1335.

Ironically, even absent congressional action a form of minimal diversity has long been applied uniquely in the class action setting, where citizens of the same state as the party opposing the class are permitted to be absent class members, even though their rights are being adjudicated as part of the proceeding. *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921). Precedent has therefore already been established to recognize the unique jurisdictional demands of the class action. It is, then, perfectly appropriate for Congress to employ the diversity jurisdiction in the class action context in order to assure that out-of-state interests are treated fairly. This Committee would be fulfilling its role as an important partner in the fashioning of modern federal procedure were it to urge Congress to enact the proposed minimal diversity class action removal legislation.

IV. The Need For Structural Reform: Class Actions, Opt-Out and the Distortion of Private Rights Adjudication

A. Overview

Adoption of the proposed jurisdictional reform measures described in the prior sections would no doubt go a long way to reduce the burdens, inefficiencies and abuses of the current class action system. However, absent fundamental alteration in the structure of (b)(3) classes, which requires absent class members who do not wish to participate in the class affirmatively to opt out of the class, the federal class action will continue to threaten core values. Indeed, though the class action has existed in its current form for more than 35 years, it is my position that, as currently structured, the (b)(3) class action is in direct tension with the Rules Enabling Act's dictate that a Federal Rule not modify substantive rights. Though to this point, no commentator or jurist appears to have recognized the tension between the (b)(3) class action procedure and substantive

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rights, I believe that careful analysis of the intersection between class action procedure and substantive policies demonstrates this serious conflict. One need not, however, reach the conclusion that the opt-out procedure constitutes a technical violation of the Enabling Act in order to find the procedure's insidious disruption of substantive value choices unacceptable. If only as a matter of sound social policy, this Committee needs to seriously rethink the wisdom of the opt-out procedure.

Specifically, the provision that absent class members will be deemed members of the class unless they affirmatively opt out of that class dramatically and insidiously alters the fundamental character of both the civil adjudicatory process and the substantive law enforced through that process. Moreover, depending on the circumstances, use of the opt-out practice may undermine the values of federalism or threaten the fundamental due process right of a litigant to control the prosecution of her own claim. Finally, the entire rationale underlying adoption of the opt-out practice in the first place, as well intentioned as it clearly was at the time of its adoption, smacks of an attitude of governmental paternalism towards its citizens that does not comport with fundamental notions of liberal democratic theory. In any event, it is highly unlikely that any of those responsible for adoption of the opt-out procedure in 1966 ever envisioned the dramatically negative practical consequences to which that process has today given rise. It is therefore time for this Committee to reconsider, and ultimately to reject, the opt-out procedure in favor of a structure requiring absent class members to affirmatively consent to their participation in the class action.

B. The Ominous Implications of the Constructive Waiver of Due Process Rights

In critiquing the opt-out practice, it is at the outset necessary to draw a dichotomy between two categories of absent claimants. A distinction is to be made between those whose individual claims are sufficiently large that, absent the class action, the claimants could reasonably be expected to possess sufficient incentive to pursue those claims on the one hand, and those whose claims are not sufficiently large to pursue their claims, on the other.⁵ The opt-out procedure gives rise to serious, albeit different, problems in the two contexts.

In the case of large claims, the opt-out procedure constitutes a type of "guerilla warfare" on an individual's right-grounded in both the Constitution and basic notions of American political theory—to control the conduct of a litigation in which he is a party. It is well established that "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, n. 7 (1979). That another unrelated litigant has had the opportunity to litigate the same claim does not satisfy due process concerns. *Id.* This precept is of special force in (b)(3)

⁵These will, to be sure, be cases at the margins where it is unclear whether the individual claims are viable even absent the use of the class action device. However, the dichotomy nevertheless functions appropriately as a rough guideline for the overwhelming majority of cases.

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classes, where the interests of litigants are widely thought not to be as unified as they are in other class action categories.

It might be argued that the opt-out procedure nevertheless provides a technically sufficient means for a litigant to protect his due process right to control the litigation of his claims, since any absent plaintiff who truly wishes to litigate his claim individually need only exercise his option to remove himself from the class. His failure to exercise that option, then, is appropriately construed to imply his consent to passive participation in the class action. In virtually no other context, however, may an individual's constitutional rights be waived without any affirmative act on the part of that individual.⁶ As the Supreme Court has stated, “[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights. . . .” *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). Where absent plaintiffs' claims are sufficiently large that these plaintiffs could be reasonably expected to sue on their own behalf absent the class action procedure, inferring consent to the cession of control from nothing more than the absent class members' silence takes the waiver of constitutional rights to a new and ominous level. It is quite reasonable to assume that in numerous cases, class members' failure to affirmatively respond to class notice by filing an opt-out will be through inadvertence, rather than a conscious decision to participate in the class. Litigants' due process rights should not be subject to the vagaries of “Book-of-the-Month Club” service.⁷

C. The Opt-Out Procedure and the Maintenance of the Substantive-Procedural

⁶It is true that a litigant may waive his right to be heard by defaulting in a suit brought against him. However, in such an instance there exists no reasonable alternative to protect the rights of the plaintiff. Any other conclusion would effectively transform service of a complaint into an R.S.V.P.

It is also true that a party may waive his Seventh Amendment right to jury trial or his due process objection to personal jurisdiction by failing to assert them in a timely manner. However, in both contexts this failure is combined with some affirmative act by the party in the course of the litigation. The same is not true of the waiver brought about by inaction associated with the opt-out procedure.

⁷It is true, of course, that class actions must in any event comply with the requirements of Rule 23(a), which dictate that the named representatives adequately represent the interests of absent class members. But while such a requirement undoubtedly constitutes a *necessary* condition for purposes of due process, it by no means constitutes a *sufficient* one, at least in the context of the loosely connected (b)(3) classes. To view adequacy of representation as a substitute for requiring a litigant's conscious choice to cede litigation control smacks of an ominous form of litigation paternalism that is inconsistent with our nation's liberal democratic traditions, grounded in notions of individual dignity and autonomy.

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Balance

As serious as the structural and systemic problems caused by the opt-out procedure are where absent class members' claims are individually viable, they are even more disruptive where absent class members' claims are too small to justify individual suit. All of these difficulties are caused by a single fallacy that underlies the opt-out procedure: that an individual's failure to object to suit on his behalf equates to the desire to bring suit. In reality, however, the two are by no means identical, and failure to recognize that difference has enabled the class action procedure to have a dramatic impact on numerous important substantive concerns, well beyond the procedural framework contemplated by the Rules Enabling Act. Ironically, while many observers have expressed great concern over the supposedly substantive impact of some of the proposed amendments to Rule 23 dealing with preclusion, none of those same observers appears to be at all concerned with the sweeping and questionable substantive reach of the class action procedure caused by the presence of the opt-out practice.

What renders the opt-out procedure especially invidious is not merely that it enables a procedural rule to assume a distinctly substantive cast, but that it does so without making evident that it is doing so. On the surface, Rule 23(b)(3)'s opt-out process appears to be nothing more than a procedural device – a means to implement the class action procedure. However, more subtle examination reveals that it is considerably more than that. In reality, the Rule causes a dramatic alteration in the structure and impact of governing substantive legislation while at the same time portraying itself as nothing more than a substantively neutral procedural device. While the electorate is led to believe that one law has been adopted, as a result of the operation of the opt-out procedure in reality a very different law has been implemented.

To understand the enormous substantive impact caused by Rule 23(b)(3)'s adoption of the opt-out procedure, one must first recognize that, in measuring its substantive impact, a law's normative directive cannot realistically be separated from the means chosen to enforce that directive. How the legislature (whether Congress or, in the case of diversity jurisdiction, a state legislature) chooses to enforce its prescriptions on primary behavior will inevitably have a dramatic effect on how those directives will be implemented and on the impact that the law will have on the lives of the populace.

When deciding how to enforce its normative directives, a legislature has several, non-mutually exclusive options open to it. These options can initially be divided into two categories: Incentive-based enforcement and non-incentive-based enforcement. The former category includes situations in which the legislature has chosen to tie enforcement of public norms to private economic incentives. Under this approach, the legislature creates a private damage action for those negatively impacted by the proscribed behavior. The legislature's goals in such a situation are usually two-fold: (1) To compensate victims of the primary behavior sought to be regulated, and (2) punish and/or deter continuation of that behavior.

When the legislature creates a private damage remedy, it is authorizing a judicial action that falls

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within the bounds of the so-called “private rights” model of adjudication. This model posits, as I have previously described it, that “the judiciary’s primary role is to resolve disputes between individuals, and to enforce and protect individuals’ rights and interests. Under this model, any judicial exposition of [legal] principles is merely incidental to the performance of this dispute resolution function.” Martin H. Redish, *The Federal Courts in the Political Order: Judicial Jurisdiction and American Political Theory* 87-88 (1991).

Under a purely private, incentive-based remedial model, however, the legislature’s primary goal must be assumed to be compensatory, rather than behavior-changing, since pursuant to this framework, government exercises no control over the decisions of private victims to sue to enforce their statutorily provided remedy. If, for example, a significant portion of the potential private plaintiffs makes the ultimate decision that, under a cost-benefit analysis, it is simply inefficient to sue, then the law will go largely unenforced. Such a result must be deemed fully acceptable under a pure private rights model, however, since by choosing a private incentive-based remedial structure the legislature has necessarily concluded that any regulatory impact on primary behavior will be purely incidental to achievement of that goal of victim compensation. From this perspective, government’s primary concern is satisfied as long as victims are given the *option* to pursue a damage remedy. Whether or not private right holders decide to sue is of course beyond governmental control.

Where the legislature’s goal is primarily to punish or deter specified behavior, it may choose to include with the private incentive-based system a non-incentive based, governmentally enforced option, or simply confine its remedial framework to such a non-incentive-based system. In other words, it may choose to provide for governmentally enforceable remedies—either civil or criminal, either in the form of direct restraint (injunction), civil or criminal fines, or imprisonment. The enforcement of these remedies, of course, does not turn on the outcome of personal cost-benefit choices made by private individual plaintiffs. Rather, government agents, who do not stand to directly benefit economically from successful judicial action, will make the decision whether or not to pursue available remedies in court.

The motivation of the party initiating suit under these two models will often differ significantly. Whereas decisions concerning the need for governmental enforcement should, for obvious reasons, never directly implicate issues of private economic gain for the agents bringing suit and should instead be premised on neutral assessments of the public interest (i.e., “public-regarding” decision making), private incentive-based enforcement choices will generally be based largely, if not exclusively, on issues of personal economic benefit (i.e. “private-regarding” decision making). This is so, even though presumably the legislature contemplated that, when private damage plaintiffs pursue their own private economic concerns, their privately motivated actions may well have the incidental effect of advancing the public interest, as the legislature has defined it.

The political acceptability of the two models may also differ significantly. A law defended politically on the grounds that its goal is to compensate innocent victims will often be politically more attractive to many segments of the electorate than a law that lacks such a compensatory

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element. Finally, the practical impact on primary behavior of the two different models may also differ substantially. The decision to vindicate privately enforced laws will usually turn on personal economic considerations that are absent in the case of non-incentive-based enforcement models and therefore their impact on the primary behavior of those sought to be regulated is likely to be far less predictable.

As commonly perceived, Rule 23(b)(3) class actions are nothing more than a conglomeration of what otherwise would be individual damage suits that fall within the framework of the incentive-based private rights adjudicatory model. They are structurally nothing more than a creative and convenient joinder device to facilitate classic private-rights adjudication on a mass scale. To be sure, for reasons previously discussed, many such actions may have a substantial, albeit incidental, impact on advancement of the public interest. But under the terms of the private rights adjudicatory model, both structurally and pragmatically, such advances are deemed subordinate to the primary goal of victim compensation. This must be so; otherwise, the legislature would not have vested total and final authority in private individuals to decide whether to seek judicial enforcement in order to vindicate their statutorily created private rights. Yet on both conceptual and experiential levels, it should be clear that, largely because of the opt-out procedure, the (b)(3) class action has too often been transformed into a hybrid adjudicatory framework—what can appropriately be called the “bounty hunter” model—that synthesizes elements of both private-regarding and public-regarding approaches to statutory enforcement.

As previously noted, an individual class member’s failure to affirmatively opt out of a class at most logically implies *no objection* to suit; it in no way necessarily signals a conscious decision affirmatively to seek a judicial remedy for the defendant’s behavior. Thus, due to the obviously intended inertia in favor of participation that is implemented by use of the opt-out procedure, a remedy, quite clearly understood at the time of its creation to be triggered only when the harm suffered by a private litigant is sufficiently great to lead that litigant to choose to pursue his individual damage remedy, is activated without any affirmative individual litigant choice ever being made. Instead, under the bounty hunter model, private plaintiffs’ attorneys are given the private economic incentive to enforce public-regarding prohibitions on defendants’ private behavior, without regard to the goal of vindicating individual plaintiffs’ rights. Compensation to victims becomes at best a tertiary concern when contrasted to the considerably more prominent public-regarding goals of punishment for and deterrence of the proscribed primary behavior of defendants and the chosen means of attaining those goals, the “bounty hunter” incentives provided to plaintiffs’ lawyers. All of this occurs, as a practical matter, through the inertia-shifting impact of the opt-out procedure. In no other procedural context (with the obvious exception of compulsory joinder combined with default) does a plaintiff have his rights litigated without ever actually making the decision to bring suit in order to vindicate those rights. By dramatically shifting that inertia against entry and then placing the absent litigant in an overwhelmingly passive role within the adjudicatory process, the (b)(3) class action structure will often effectively transform the suit into something closely approaching the “bounty hunter” remedial model, where it is the financial interests of the plaintiffs’ lawyers, rather than those of the individual class members, that provides the focus. In so doing, the (b)(3) class action process

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has the effect of transforming – *sub rosa* – the essence of the chosen legislative means to enforce the public interest, from a private rights adjudicatory model to a very different bounty hunter model.

Of course, it might be responded that the goal of individual compensation is nevertheless achieved by use of the (b)(3) class action, whatever one assumes its primary goals to be. Casual familiarity with the operation of many modern class actions, however, should make one seriously doubt the accuracy of this assertion. That the modern (b)(3) class action has largely turned into something approaching this non-compensatory “bounty hunter” model can be seen, simply by taking judicial notice of the numerous “coupon” settlements that have been implemented in recent years. Defendants pay nothing directly out of their pockets to class members. Instead, they provide a type of forward-focused relief which allows interested plaintiffs to obtain discounts on future purchases. At most, such relief will reduce later profits, though it will probably not even do that. Though I frankly concede that I possess no empirical data on the question, I would wager a good deal that invariably, relatively few absent class members actually “take advantage” of these options. After all, class members who remained passive at the outset of the class action are unlikely all of a sudden to overcome their inertia to act. Moreover, to the extent they do, it is at least conceivable that the defendants will turn such choices into an ongoing stream of future business.

The only ones who are paid in the form of real money are, of course, the plaintiffs’ lawyers. To be sure, as a result the defendants have imposed upon them substantial economic disincentives to continue their challenged behavior, and public-regarding interests may be furthered as a result. The “bounty hunter” enforcement model, then, works in a manner similar in many ways to the purely public-regarding enforcement structure, in that private compensation to victims is not its primary (or even secondary) focus. Unlike the pure public-regarding model, the bounty hunter model achieves its goal by the creation of economic incentives, not grounded in concerns of compensation, that are to be acted upon by “deputized” private attorneys. In this sense, the “bounty hunter” model bears similarities to *qui tam* actions, under which private whistle blowers who themselves have suffered no personal or private economic injury may gain economically by suing to protect the government from fraud or illegality.

I should emphasize that I am in no way taking a position on the constitutionality—much less advisability—of the “bounty hunter” model. My point, simply, is that whatever one thinks of it as a normative matter, *it is something fundamentally different from a pure private rights enforcement model*. Thus, when a legislature—state or federal—enacts a substantive statute which on its face includes a purely compensatory private incentive-based enforcement structure, the opt-out procedure enables Rule 23(b)(3) to transform that substantive law into a very different—and quite probably much more controversial⁸—“bounty hunter” model. Moreover, it does so, *under the*

⁸ One could reasonably predict, I believe, that supporting a statute that seeks to compensate injured victims would make a legislator considerably more attractive to the

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guise of functioning in a purely procedural fashion as nothing more than a joinder device, designed to facilitate the mass adjudication of private rights. It is difficult to imagine how a supposedly procedural rule could have a more dramatic and insidious impact on the operation of substantive law.

All of these seriously negative consequences trace their origin to the opt-out procedure, which, as I have demonstrated, effectuates a fundamental change in the “DNA” of private rights litigation. No longer is the class action simply a means of procedurally facilitating the adjudication of private rights to compensation under a private incentive-based remedial structure. By dragging along numerous plaintiffs who may well have never made the conscious choice to sue and who, on more than one occasion, are likely not even aware that they are in fact suing, the opt-out procedure transforms the essential nature of the class action, with significant substantive impact as a result. Instead of a grouping of willing individual plaintiffs, the class is transformed into nothing more than a faceless “entity”, designed to serve as little more than a means to an end, rather than as an end in itself.

electorate than supporting a statute that openly seeks to enforce its restrictions on primary behavior by creating enormous economic incentives for private attorneys.

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It might be responded that the opt-out procedure is necessary to protect private individuals who are, for a variety of reasons, incapable of protecting themselves. Because of the inertia brought about by apathy or ignorance, the argument would proceed, requiring private plaintiffs to affirmatively opt into a class would often result in their failure to protect their rights. Three responses may be made to this argument. First, while such reasoning may have been prevalent at the time of Rule 23's revision in 1966, such paternalism is largely inconsistent with modern notions of individual autonomy and responsibility. In any event, in today's world it is relatively easy for plaintiffs' lawyers to advertise or otherwise communicate with absent class members in an attempt to convince them to affirmatively exercise their option to enter the class. Finally, where a danger of plaintiff inertia or ignorance is found to exist, government has available other remedial measures, such as pure public-regarding enforcement and governmental distribution of benefits. In this sense, government would be acting in its classic capacity as *parens patriae*. The key point, however, is that the choice to provide these alternative remedial options implicates important substantive choices well beyond the scope of the procedural rules. It is wholly inappropriate for a Federal Rule to transform the nature of enforcement and adjudication contemplated by those who create the rights.

It is important to emphasize that abandonment of the opt-out procedure would in no way signal the end of the (b)(3) class action as a useful adjudicatory device. It would mean, simply, that the class action would be returned to its original procedural function of significantly facilitating the mass joinder of suits by willing plaintiffs who have made the conscious choice to seek to vindicate their private compensatory rights. It is, however, only through abandonment of the opt-out procedure in favor of an opt-in process that Rule 23 may be kept within proper procedural bounds.