

Rethinking the Class Action: A Policy Primer on Reform †

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Today, virtually everyone has a proposal for "reforming" class action litigation but both consensus and coherence are lacking. Some proposals are bluntly restrictive. For example, the Reagan Administration would reduce attorney's fees, place a ceiling on product liability, and partially repeal treble damage statutes.¹ In the same vein, the United States Supreme Court has shown itself parsimonious on the question of fee awards, by authorizing fee waivers,² approving offers of settlement that seemingly permit fee shifting against the plaintiff's attorney,³ and curtailing the traditional bases on which a fee award may be enhanced.⁴ Other proposals have offered essentially neutral procedural reforms; new criteria for fee awards,⁵ new pleading requirements,⁶ expanded hearings at the settlement approval stage,⁷ procedures for the appointment of special guardians,⁸ the greater use of sanctions for

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1. See Pastzor, *Cabinet Maps Easing of Antitrust Law; Business Groups Think Plan Is Too Bold*, Wall St. J., Dec. 6, 1985, at 6, col. 1. For a similar proposal by a bar association committee, see *Report on Treble Damages*, 40 REC. A.B. CITY N.Y. 647, 660 (1985). For the Reagan Administration's proposals to limit jury awards and attorney's fees, see Pear, *Administration Submits Plan to Reduce Damages Awards*, N.Y. Times, May 1, 1986, at B9, col. 1.

2. See Evans v. Jeff D., 106 S. Ct. 1531 (1986).

3. Marek v. Chesny, 473 U.S. 1 (1985). *Marek* does not hold that the defendant's fees may be shifted against the plaintiff under Rule 68 of the Federal Rules of Civil Procedure, but its logic points to this conclusion. See *infra* note 72 and accompanying text. For a discussion of Rule 68's impact, see Miller, *An Economic Analysis of Rule 68*, 15 J. LEGAL STUD. 93, 95 (1986).

4. See *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 106 S. Ct. 3088 (1986) (fee award may not be enhanced because of merit or skill of plaintiff's attorneys). *Delaware Valley* held over for reargument next term the even more important issue of whether the factor of risk may justify an enhancement of the fee award when the plaintiff's attorneys are compensated on a contingent fee basis. See *infra* note 32 for a further discussion of this case's significance.

5. For recent persuasive arguments, see Note, *Derivative Suit Settlements: In Search of a New Lodestar*, 48 LAW & CONTEMP. PROBS. 229 (Summer 1985); Clermont & Curriyan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529 (1978); Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L.J. 473 (1981).

6. See Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986). But see Note, *Pleading Securities Fraud Claims with Particularity under Rule 9(b)*, 97 HARV. L. REV. 1432 (1984).

7. See Note, *Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations*, 84 MICH. L. REV. 308 (1985).

8. Note, *supra* note 5.

the filing of frivolous actions,⁹ and greater coordination among federal and state judges.¹⁰ Conversely, a third group of proposals seeks to expand and streamline the use of class actions. An ABA Committee has recommended that Rule 23 of the Federal Rules of Civil Procedure be amended to allow federal judges to certify virtually any maintainable class action as a mandatory class action,¹¹ and several commentators have urged an expanded use of the mandatory class action in the case of the mass tort action.¹² Still, a recent Supreme Court decision may halt this incipient trend because it seems to imply that the right to opt out from the class action has a constitutional dimension as an element of due process.¹³ Policy issues thus overlap with constitutional ones because the rights of the individual plaintiff frequently come into conflict with those of the plaintiff class as a whole.

Largely lacking in this recent outpouring of commentary has been any sustained focus on the incentive effects on the plaintiff's attorney of these proposed reforms. This Article will focus on incentives and the unstable dynamics within the large class action. To evaluate them it is first necessary to understand the context itself. Frequently, commentators begin with such a preface and then turn to very specific contexts: antitrust class actions, products liability cases, securities litigation, "mass disaster" cases, civil rights litigation, and so on. Although this tendency to subdivide the field into

9. In 1983, Rule 11 of the Federal Rules of Civil Procedure was amended to require a pre-filing inquiry by an attorney into both the factual and legal basis for a pleading, motion or other paper. According to the principal decision interpreting this new requirement, it substitutes an objective standard in place of the prior "bad faith" or subjective standard governing the imposition of sanctions. See *Wells v. Oppenheimer & Co.*, 101 F.R.D. 358 (S.D.N.Y. 1984); *Rauenhorst v. United States*, 104 F.R.D. 588 (D. Minn. 1985). One survey has found that sanctions imposed under Rule 11 are now three times more likely to be imposed against the plaintiff than the defendant. See *Marcotte, Rule 11 Changes*, A.B.A. J., Sept. 1, 1986, at 34.

10. Weinstein, *Preliminary Reflections on the Law's Reaction to Disasters*, 11 COLUM. J. ENVTL. L. 1, 25, 47 (1986).

11. See Gruenberger, *Plans for Class-Action Reform*, Nat'l L.J., July 8, 1985, at 32, col. 1 (reporting recommendation of Special Committee on Class Action Improvements of the Litigation Section of the American Bar Association).

12. See Note, *Class Certification in Mass Accident Cases Under Rule 23(b)(1)*, 96 HARV. L. REV. 1143, 1160-61 (1983); Rosenberg, *The Causal Connection in Mass Exposure Cases: A 'Public Law' Vision of the Tort System*, 97 HARV. L. REV. 849 (1984); Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039 (1986). But see Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1, 38-56 (1986).

13. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the Court upheld Kansas' exercise of jurisdiction over a multistate class action in which the vast majority of the plaintiffs had no connection with Kansas. In so doing, the Court seems to have assumed that the right to opt out is a fundamental due process requirement. *Id.* at 811-14. Some commentators have suggested that "[t]he conclusion seems to follow that *Shutts* prohibits mandatory class actions." See Miller & Crump, *supra* note 12, at 39. While this conclusion may follow from *Shutts*, I doubt that the Supreme Court will follow this conclusion outside the context of a state court forum. See also *In re Asbestos School Litig.*, 104 F.R.D. 422 (E.D. Pa. 1984), *vacated*, 791 F.2d 920 (3d Cir. 1986).

specialized subcategories is understandable (because it allows each expert to stress the uniqueness of his or her context and to plead for specially tailored rules), such a taxonomic approach obscures the common denominators among these distinct subcategories. The starting point for this Article is the recognition that the similarities overwhelm the differences—that there is a broader context that this Article will describe as that of “entrepreneurial litigation.” Today, most observers would probably concede that some litigation contexts—most notably, derivative, securities, and antitrust litigation—are ones in which the plaintiff’s attorney functions in such an “entrepreneurial” mode, but they might resist this description as applying to mass tort or products liability litigation. Yet, any attempt to draw categorical lines among these contexts is suspect, unless we can distinguish these contexts in terms of objective criteria. Part I will seek to identify these relevant characteristics and thereby to define “entrepreneurial litigation.” Its focus is largely on the relationship between the adversaries and how it is shaped by the relative presence or absence of the factors that distinguish entrepreneurial litigation.

Part II will then turn to the internal dynamics within the large class action. Recently, writers have advanced provocative models of how to reform the class action in order to achieve “public law” objectives. Courts also have noted the “desperate need” for a new procedural vehicle by which to remedy mass torts.¹⁴ Although I am sympathetic to those needs, significant problems of distributive fairness arise under these proposals that have not received adequate attention. The large class action is an unstable coalition of persons with different and conflicting interests. To understand the tensions within the class, it is useful to examine the experience in related contexts—such as collective bargaining, negotiations and corporate re-organizations in bankruptcy—where claimants have also had to dispute among themselves over the distribution of a limited fund. The pattern in these analogous areas is not encouraging; repeatedly, it has been observed that one class of interests is subordinated to, or submerged within, a larger or stronger class with divergent interests. Moreover, as Part III will note, to the extent that protections have been accorded to minority interests in these related areas, either through voting rules or substantive legal standards, these protections do not seem to be realistically replicable in the class action context. As a result, the right to opt out of the action gains increased significance. Yet at the same time, broad recognition of the right to opt out can give rise to a classic “prisoner’s dilemma” problem that works to the disadvantage of all plaintiffs. Against this backdrop, Part III will consider what compromises are possible.

14. See *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1327 (5th Cir. 1985) (en banc), cert. denied, 106 S. Ct. 3339 (1986) (“desperate need exists for federal legislation in the field of asbestos litigation”).

I. THE NATURE OF ENTREPRENEURIAL LITIGATION

This section will stress four generalizations that relate to the performance of plaintiff's attorneys in the large class action. As a matter of exposition, it is simplest to set forth these generalizations as naked assertions and then to examine each more closely:

1. High agency costs characterize class action litigation, and permit opportunistic behavior by attorneys; as a result, it is more accurate as a descriptive matter to view the attorney as an independent entrepreneur than as an agent of the client.

2. Class actions necessarily involve asymmetric stakes, meaning that defendants are prepared to expend greater resources on the prosecution of the action than are the plaintiff's attorneys because the former have more at stake.

3. An initial cost differential tends to favor the plaintiff's side in many types of class action litigation, thereby inviting the filing of actions having a low prospect of success at trial. While this factor may offset or overcome the asymmetric stakes factor, its significance erodes during the course of the litigation.

4. The absence of a clearly specified property right in the class action gives rise to a classic "common pool" problem that discourages investment by the attorney in the action and produces wasteful competition among plaintiff's attorneys that can be exploited by defendants.

These four assertions—high agency costs, asymmetric stakes, a cost differential, and a "common pool" problem—are far from the only generalizations that can be advanced about the likely behavior of plaintiff's attorneys in class action litigation, but they apply with considerable force over the greatest range. Other generalizations depend upon more contingent factors, such as the specific fee award formula used by the court, the availability of fee shifting, and applicability of specific procedural rules. Each of these four generalizations will next be examined more closely.

A. *The Agency Cost Problem*

It is no secret that substantial conflicts of interest can arise in class action litigation between attorney and client.¹⁵ In the language of economics, this is an "agency cost" problem.¹⁶ All principal-agent relationships are said to give rise to agency costs, which by definition consist of: (1) the costs of monitoring the agent, (2) the costs the agent incurs to advertise or guarantee

15. For classic statements on this problem by Judge Friendly, see *Alleghany Corp. v. Kirby*, 333 F.2d 327, 347 (2d Cir. 1964) (dissenting opinion); *Saylor v. Lindsley*, 456 F.2d 896, 899-900 (2d Cir. 1972).

16. See Jensen & Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

his fidelity ("bonding" costs), and (3) the residual level of opportunistic behavior that it is inefficient to prevent.¹⁷

Although the theory of agency costs is well-known, the class action context is distinctive in several respects. Obviously, the members of the plaintiff class usually have very little capacity to monitor their agents. While this same observation could also be made, for example, about shareholders, who are typically widely dispersed and have too small an investment on an individual basis to justify substantial monitoring expenditures, two factors differentiate these different principal-agent relationships. First, the critical decisions in litigation typically have lower visibility and require greater expertise to understand than in the case of the shareholder-manager relationship (where at least publicly reported financial statements and the financial press reveal much and supply a basis for comparison). Second, no public market exists in the case of the attorney-client relationship to motivate the agent to serve the interests of the principal; that is, the client may neither sell his ownership interest, nor may the attorney buy such an interest, in a secondary market. Academic as this observation sounds, it has considerable significance. Under the standard theory of agency costs, the shareholders, as principals, can compensate the managers, as their agents, through stock options and similar devices in order to align their interests with those of the shareholders and thereby reduce the agent's incentive to act opportunistically. The absence of such an informed and active market for legal claims removes the standard mechanism for aligning the attorney's self-interest with that of his clients, and requires that we turn to imperfect substitutes. In addition, the market for legal services works inefficiently at best in the case of class actions because few clients are informed or motivated enough to investigate the reputations of attorneys. Indeed, as a practical matter, the attorney often finds the client only after the attorney has first prepared the action. To be sure, the attorney has an interest in his reputation, but it is the court, not the client, that he needs most to impress, and the court's interests, as a regulatory body, may not be the same as the client's. For example, the court may want expeditious settlements, not maximized recoveries.

One means does exist, however, by which clients can seek to reduce agency costs and align their attorney's interests with their own: they can compensate their attorney under a percentage-of-the-recovery fee formula, which is, in effect, the fundamental analogue of the stock option device used by shareholders. Although this fee arrangement does give the attorney an interest in maximizing the size of the recovery (and prevents collusive agreements under which the plaintiff's attorney can exchange a low settlement for a high fee

17. *Id.* For example, because it is not cost efficient in isolation to spend \$10 on a burglar alarm or on auditing systems to prevent an expected loss of \$9, such loss would be rationally accepted as an unavoidable residual cost.

paid by the defendants), economic analysis suggests that the percentage-of-the-recovery fee formula leads to "premature" settlements (that is, settlements that properly informed clients would reject).¹⁸ In any event, the percentage-of-the-recovery formula is no longer the dominant fee formula, at least not in federal courts. Except in a few special areas, it has been largely superseded by the "lodestar formula," which essentially compensates the plaintiff's attorney based on the time the attorney reasonably expended on the action.¹⁹ It should take little time or analysis to recognize that the lodestar creates a perverse incentive for delay.²⁰ Predictably, once time is equated with money, those lawyers who cannot be closely monitored by their clients will procrastinate or engage in more "makework" and overstaffing than if they were compensated on a percentage basis. Little more analysis is needed to realize that the lodestar formula also creates a strong incentive for cheap settlements on the eve of trial, because typically by that point the attorney has expended the time that determines his compensation and has no reason to accept the litigation risks incident to going to trial when a larger recovery for the client will not substantially affect his own fee award.²¹

Why then has the lodestar formula predominated? Various answers can be given. In some contexts, such as civil rights litigation, there seldom is any monetary recovery to make a percentage fee system work (or the recoveries are typically too low to produce fees that reflect the public benefits of the action). Yet this reason cannot explain why the formula is used in the very different contexts of securities and antitrust litigation, where monetary recoveries are at the heart of the litigation and where the lodestar

18. See Coffee, *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, 686-90 (1986). For an earlier demonstration of this point, see Clermont & Currihan, *supra* note 5, at 544; Schwartz & Mitchell, *An Economic Analysis of the Contingent Fee in Personal Injury Litigation*, 22 STAN. L. REV. 1125, 1136 (1970).

19. The "lodestar formula" was recognized by the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), as the prevailing method for the determination of fee awards in fee shifting cases. *But see* *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) (indicating that percentage fee is instead normally to be used in common fund cases). For a fuller explanation of the lodestar formula's operation, see Leubsdorf, *supra* note 5, at 477-82. Most recently, in *Rivera v. City of Riverside*, 106 S. Ct. 2686 (1986), the Court rejected use of the percentage fee (or any rule of proportionality) in a civil rights case, where the fee would be shifted to the defendant.

20. For a fuller discussion of the plaintiff attorney's incentive to delay under the lodestar formula, see Coffee, *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 LAW & CONTEMP. PROBS. 5, 33-40 (Summer 1985). While a court can add a "contingency bonus" or "multiplier" to the time charges under the lodestar formula and this may reduce the incentive for collusion, the ability of federal courts to award such bonuses has been sharply limited by a recent Supreme Court decision. See *infra* note 32.

21. Even if the trial will be an extended one and hence will result in substantial billable time, the validity of this point is not affected because the same incentive to enter into a cosmetic settlement will again become strong towards the conclusion of the trial before the judge or jury reaches its verdict. By definition, there is always a point before judgment at which an attorney compensated on a time basis has a perverse incentive to settle if there is any chance of an adverse decision.

formula can clearly have perverse effects. Here, the key reason for the lodestar's popularity may reflect the inertial force of legal culture, even in the face of abundant evidence of inefficiency. Put simply, the legal system is comfortable with compensating the plaintiff's attorney on an hourly basis and uncomfortable with a percentage system, because the former system treats the plaintiff's attorney the same as all other attorneys, while the latter recognizes that he is in fact a "bounty hunter"—in effect, an independent entrepreneur. Much can be at least partially explained by positing that the legal system is unwilling to recognize explicitly that lawyers in some contexts behave as independent entrepreneurs, and the persistence of the lodestar formula may owe a great deal to the desire to repress this evident reality.

Because neither client control nor fee formulas seem adequate to minimize agency costs, there is obviously a strong case for regulation to fill this void. Viewed in this light, the court in determining the fee award is functioning essentially as a regulatory body, which—much like a rate-setting public utility commission—is determining the fair return for the plaintiff's attorney. The court's incentives to monitor, however, are open to serious question.²²

It would oversimplify to treat the problem of agency costs as uniform. Although client control in class actions will necessarily be weaker than in those situations where the client hires the attorney to bring an individual action, the degree of client control can still vary considerably. In a few circumstances, the plaintiff class may have a pre-existing relationship and be sufficiently tightly knit so as to be able to select their own attorney. The nature of tort injuries suggests, however, that in mass tort cases such client cohesion will be unusual, because the victims of dangerous products, airplane accidents, toxic torts or similar events, have little in common but their injury. In other cases, there may be a pre-existing organization that can represent the plaintiffs—such as the ACLU, the NAACP Legal Defense Fund, the Sierra Club, and so on. In these instances, a wholly different issue emerges: who is the principal—the named plaintiffs or the organization? Although a very different set of potential conflicts can arise in these cases, because the organization is not always a perfect proxy for the client,²³ these conflicts are largely beyond the scope of this Article.

22. Judge Friendly phrased this point elegantly in his famous remark that "all the dynamics conduce to judicial approval of settlement" once the adversaries have locked arms and approached the court. *Allegheny Corp.*, 333 F.2d at 347 (Friendly, J., dissenting). Empirical evidence also supports this conclusion. See Rosenfeld, *An Empirical Test of Class-Action Settlement*, 5 J. LEGAL STUD. 113, 119 (1976) (settlement of class action suits tends to result in monetary bonuses to attorneys at the expense of class interests). Many courts seem to take their obligation to review the settlement very lightly. See *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 740 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) ("In deciding whether to approve this settlement proposal, the court starts from the familiar axiom that a bad settlement is almost always better than a good trial.") For a critique of the result in *Warner Communications*, see Coffee, *supra* note 18, at 719 n.134.

23. For example, a recurrent conflict in school desegregation cases arises between the

In those areas of litigation where agency costs are highest, the practice has developed that the attorney finds the clients, rather than vice versa. The extreme case is the derivative action where the client may be a professional plaintiff who has appeared in literally hundreds of other actions,²⁴ or another attorney (or the pension fund of another law firm) with whom a reciprocal relationship exists.²⁵ But if this is the limiting case, there are underground railroads in other areas of litigation (most notably securities litigation) by which local attorneys direct potential plaintiffs to specialist attorneys in return for referral fees. Although this pattern is less visible in products liability and mass disaster cases because the typically more serious and less predictable injuries in those cases preclude the use of "in-house" clients, it is noteworthy that even in these true disaster cases the same individuals can turn up recurrently as lead plaintiffs, even where they do not appear to have sustained serious injury.²⁶ Alternatively, the lead counsel may engage, as in *Agent Orange*, in a nationwide solicitation for eligible plaintiffs.²⁷

clients—typically, black parents—and organizations, such as the NAACP Legal Defense Fund. Sometimes the client group would prefer to accept remedial relief that improves the quality of education but still preserves the challenged "freedom of choice" concept, while the litigation firm is committed on ideological grounds to mandatory busing and elimination of all indicia of past segregation. Cf. Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728 (1986). In these cases, neither group desires to enter into a cosmetic settlement, but there is a conflict over litigation objectives. To claim as Professor Gewirtz does that the clients are not entitled to their preference (i.e., financial or ameliorative relief) is in essence to argue, as this author would, that client objectives should not always control litigation decisions, even in the settlement context.

24. The legendary case is Harry Lewis, a retired attorney who since 1971 has "filed nearly 100 shareholder actions in Manhattan Federal District Court and close to fifty in state court." Shereff, *The Constant Suitor*, MANHATTAN, INC., (May 1986). This figure is just Mr. Lewis's total for New York. He has also filed "dozens" of actions in Delaware. See Schmidt, *Attorneys Are Often Big Winners When Shareholders Sue Companies*, Wall St. J., June 12, 1986, at 31. See also Marcus, *supra* note 6, at 474-76 (43 federal class actions by end of 1984 in which Mr. Lewis was a named plaintiff). Another such example is William Weinberger, who was reported to have "roughly 30 suits" pending as a plaintiff in June, 1986. Schmidt, *supra*.

25. See, e.g., *Lowenschuss v. Kane*, 520 F.2d 255, 259 n.2 (2d Cir. 1975) (plaintiff was attorney whose firm's pension plan invested in takeover target). See also *Tanzer v. International Gen. Indus., Inc.*, 379 A.2d 1121 (Del. 1977) (plaintiffs were trustees of "Tanzer Economic Associates, Inc. Profit Sharing Plan"). A pension or profit-sharing plan makes a near-perfect client for a plaintiff's attorney, because its diversified holdings give the attorney ready access to a broad variety of transactions that he may wish to challenge in the future. An ability to use its portfolio ends the need to search for an individual client after the fact. Other times, one plaintiff's attorney may serve as the client for another. See, e.g., *Weiss v. Temporary Inv. Fund, Inc.*, 692 F.2d 928 (3d Cir. 1982), *vacated*, 465 U.S. 1001 (1984). (Mr. Melvyn Weiss, a well-known plaintiff's attorney in the securities class action field, served as the plaintiff in this action). Obviously, if reciprocal relationships can be struck, both attorneys profit since each will have a skillful, experienced client who can hold his own well in depositions.

26. See Stewart, *Wake of Disaster: Controversy Surrounds Payments to Plaintiffs in Hyatt Regency Case*, Wall St. J., July 3, 1984, at 1, 12 (noting that plaintiff Deborah Jackson, the only plaintiff able to establish diversity jurisdiction in the class action growing out of the collapse of the Hyatt Skywalk in Kansas City, Missouri, was also the plaintiff in the class action stemming from the MGM Grand Hotel fire in Las Vegas, Nevada). This appears to be

The existence of high agency costs implies the likelihood of "opportunistic behavior." "Opportunism" is an economic term of art that comprehends any form of disguised self-seeking behavior.²⁸ At its simplest, the classic form of opportunism in class actions is the "sweetheart" settlement, namely one in which the plaintiff's attorney trades a high fee award for a low recovery. However, opportunism also includes subtler behavior, such as "shirking"—namely, a failure to expend the effort or deliver the services that a client who was capable of actively monitoring the attorney would receive. Thus, if the fee formula compensates the attorney on a time basis, the action may be overstaffed or continued at an interminably desultory pace (much like Dickens' classic *Jarndyce v. Jarndyce*²⁹). Finally, another form of opportunistic behavior may involve linkages between unrelated cases—such as putting aside, or cheaply settling, one case in order to pursue more lucrative opportunities.

The extent of opportunistic behavior possible in a given litigation context probably depends on a variety of factors. First, one largely random factor is the possibility that a few plaintiffs may have suffered disproportionately large injuries and thus have a sufficient stake in the action to justify expending funds to monitor the attorney. However, these plaintiffs with larger stakes in the outcome may find it in their own interest to "opt out" of the class action and pursue individual remedies. Whether they can do so depends on some highly technical (and much disputed) doctrinal rules.³⁰ Yet, the

an illustration of the curious "underground railroad" by which plaintiff's attorneys can locate and obtain the services of a valuable plaintiff who can establish standing, diversity jurisdiction, or some other important element in the case. Mrs. Jackson did not sustain any apparent physical injury in the Skywalk collapse, but did receive \$172,500 in damages. *Id.* at 1.

27. A fascinating example is that of Victor Yannacone, who initiated the Agent Orange Litigation. See *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296, 1301-02 (E.D.N.Y. 1985). Early in the case, Mr. Yannacone travelled across the nation seeking veterans who had arguably experienced "Agent Orange" related injuries or disabilities, and he entered into numerous agreements with their local counsel. *Id.* at 1302, 1335. In this manner he also formed an "ad hoc" firm ("Yannacone and Associates") to litigate the case. *Id.* at 1301. See also P. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 47-52 (1986) (describing efforts of Yannacone to "barnstorm throughout the country"). New patterns of client solicitation are appearing in other mass tort cases, as plaintiff's attorneys have developed arrangements with unions and medical clinics to screen and refer potential plaintiffs in return for paid medical services. See Richards & Meier, *Widening Horizons: Lawyers Lead Hunt for New Groups of Asbestos Victims*, Wall St. J., Feb. 18, 1987, at 1, col. 6.

28. The term has been coined by Yale economist Oliver Williamson to include behavior that amounts to "self interest seeking with guile," whether or not fraudulent by traditional legal criteria. See Williamson, *The Modern Corporation: Origins, Evolution, Attributes*, 19 J. ECON. LIT. 1537, 1545 & n.12 (1981).

29. In Charles Dicken's *Bleak House* an action captioned *Jarndyce v. Jarndyce* continued for decades until the trust estate at issue was exhausted by legal fees.

30. Essentially, the plaintiff may opt out from a class action unless it is a mandatory class action under Rule 23(b)(1) of the Federal Rules of Civil Procedure. For the debate over the scope of Rule 23(b)(1), see Note, *supra* note 12, at 1153-59 and *infra* notes 53-62 and accompanying text.

immediate point is that an inability to "opt out" may reduce the opportunistic behavior to which those other plaintiffs who have sustained relatively small injuries would be subjected, because these plaintiffs can now "free ride" on the monitoring efforts of those plaintiffs who have a larger stake in the outcome. By the same token, however, "opting out" protects the client with a substantial stake who fears that he cannot monitor the class's lead counsel as efficiently as he can monitor his own attorney in an individual action. To the extent that "opting out" has been more restricted in some specific litigation contexts (such as "mass accident" cases), then we might hypothesize that less opportunistic behavior might be visible in these contexts.

A second factor determining the magnitude of agency costs is the degree of cohesion and prior association among the plaintiff's attorneys who become involved in a particular case. There is a world of difference between an antitrust class action in which a dozen antitrust specialists appear, who are all well known to each other, and a products liability class action in which the plaintiffs are represented by a hundred or more plaintiff's attorneys, who neither know each other nor have had much prior exposure to complex civil litigation in the federal courts. In the former case, all the preconditions for collusion are satisfied. That is, because the process by which a cheap settlement can be exchanged for a high fee award necessarily involves at least a tacit understanding within the plaintiff's attorneys' camp, such an agreement can most easily develop among "repeat players" who know and can trust each other. In contrast, an action in which there are one hundred or more attorneys who are basically strangers to each other implies chaos. Inefficiency may be inevitable under such circumstances, but collusion is less likely. The large number of participants ensures that there are likely to be objectors. More generally, the process of fashioning a settlement that maximizes the attorneys' self-interest, but not the clients', is a delicate one in which euphemisms and code words play an important role. Obviously, in some litigation contexts, the plaintiff's attorneys may have pre-existing relationships with their clients, but this is unlikely in the highly specialized world of plaintiff's antitrust or securities class action litigation. Absent such a prior relationship, the potential for opportunistic behavior is enhanced. These reasons may at least partially explain why cosmetic settlements tend to be a more pervasive problem in derivative actions and securities class actions than in product liability or mass tort class actions.³¹

31. Of course, another factor involves the ease with which derivative and securities class actions can often be settled on the basis of non-pecuniary relief, such as revised disclosures, changed corporate procedures or board structures, or injunctive relief of limited value (because the issue has become moot). For a discussion of this problem of cosmetic settlements, see Coffee, *supra* note 20, at 23-33. To date, this problem has not yet arisen in mass tort cases, but I can see it arising in the future. By agreeing to provide generalized "disaster relief," or promising to deliver future medical care or other services of indeterminate value, a defendant

B. Asymmetric Stakes

In most litigation (as in poker), one side's winnings are the other side's losses; the stakes are thus equal, absent special factors. However, once we recognize that the attorney is often an independent entrepreneur in class action litigation, then it follows that in these instances the operative litigation stakes will be unequal. The defendants have at stake their potential liability plus their legal expenses, while the stake for the plaintiff's attorneys is essentially their expected fee award (minus their costs). A number of empirical surveys have shown that the fee award in most class action litigation tends to be a decreasing function of the recovery and typically averages between 20% and 30% of the recovery (and then declines further once the judgment enters the multi-million dollar range).³² This pattern seems to hold true, whatever the fee formula used. As a result, this 20% to 30% benchmark range for fee awards means that in a litigation where the defendant sees the expected loss to be \$1,000,000 plus litigation expenses, the plaintiff's attorney sees an expected recovery of at most \$200,000 to \$300,000 (minus those costs that will not be separately reimbursed). This asymmetry in the litigation stakes can have profound consequences on the willingness of the parties to expend funds on the action. Rationally, the defendants in the foregoing

may be able to strike a deal with a less than zealous plaintiff's attorney that follows the familiar script of a cheap settlement in return for a high plaintiff's fee award. For example, in a *Bhopal*-type case, some highly visible assistance might be traded off against a much greater reduction in financial liability. That such deals have not yet been brokered in the mass tort field may owe more to the novelty of mass disaster litigation than to the higher standards of the personnel in this field.

32. Empirical surveys of class actions have recurrently reported statistics in the 20% to 30% range, whatever the fee formula used. See Mowrey, *Attorney Fees in Securities Class Action and Derivative Suits*, 3 J. CORP. L. 267, 334-38, 345-47 (1978); Cole, *Counsel Fees in Stockholders' Derivative and Class Actions—Hornstein Revisited*, 6 U. RICH. L. REV. 259, 273-75, 281 (1972) (fee awards average 20% and decline as recoveries increase). See also Warner *Communications*, 618 F. Supp. at 749-50 (reviewing all recent fee awards in the Second Circuit securities class actions and arriving at 20% to 30% figure); S. Salop & L. White, *Private Antitrust Litigation: An Introduction and Framework* (Sept. 1985) (unpublished paper) (finding plaintiff's fee awards to average 20.2% of the total recovery in antitrust cases in non-Multi-District cases, but to fall to 8.3% in the typically much larger Multi-District cases). As a result, if within a specific litigation context, a fee of between 25% to 30% is expected based on past experience, we still have in effect a de facto percentage of the recovery system, except that there is a strong incentive to delay until sufficient time has been expended.

This seeming equivalence between the lodestar and the percentage of the recovery formula may not last much longer, however, because it was probably achieved by intelligent judicial manipulation of the "multiplier" or "contingency factor" that could be added to the time charges under the lodestar formula. See Leubsdorf, *supra* note 5. In *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 106 S. Ct. 3088 (1986), the Supreme Court sharply curtailed the ability of federal courts to add such bonuses onto the time charges and thus may have ended the rough equivalence of these two fee formulas. In light of *Delaware Valley*, I think those commentators who continue to support the lodestar formula have not focused adequately on its recent eclipse. See Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 584 n.89 (1987).

action would spend up to \$999,999 to avert the \$1,000,000 expected loss, but the plaintiff's attorney will not be willing to invest more than \$299,999 to earn an expected fee of \$300,000. Of course, if the plaintiffs are successful, some of their litigation expenses will be reimbursed in addition to the fee award, but their major expense—the opportunity cost of their time and effort—is bounded by the expected fee award.

While this asymmetry is probably inherent in the concept of a contingent fee, it is aggravated by judicial regulation. Absent judicial prohibitions, an individual client might strike a bargain with his attorney under which the fee was wholly contingent but could amount to 99% of the recovery. This would be no more irrational than a defendant paying \$99 in legal expenses to avert a \$100 loss. But because courts understandably do not believe that meaningful bargaining can occur between a lead counsel and a dispersed plaintiff's class, they have established their own fee formulas, which "protect" the class by denying them the ability to enter into "expensive" contracts for legal services.³³ Although such paternalism is both fully understandable and to a degree justified, its consequence is to permit the defendants to purchase more costly legal services than can the plaintiffs, thereby eroding the deterrent potential of private law enforcement.

The bottom line is evident: at least in a significant number of cases, we should expect the defendant's side to be willing to litigate more vigorously, expend more resources, pursue more collateral matters, and in general to seek to exploit this differential in their relative willingness to invest in the action by attempting to raise the "ante" at each stage of the litigation. Of course, there are limits on this advantage, both because the plaintiff's costs may be less than the defendant's and because the expected fee awarded could be large enough to justify whatever costs that the defendant's dilatory intransigence can impose on the plaintiff. In principle, the plaintiff's attorney will focus on the margin between the expected fee and his expected costs. In all likelihood, the plaintiff's costs do not rise as a constant function of the amount of the damages sought; some point of diminishing marginal returns from further investment must be reached. Thus, at least in the class action for very high damages, asymmetric stakes may be less of a factor. In such cases, the defendant cannot realistically threaten to raise the plaintiff's attorney's costs in such a manner as to erode the expected return to a level that does not adequately compensate the plaintiff's attorney for the risk assumed. Where this point lies, however, is largely indeterminate.

33. Rather than this paternalistic approach, we might adopt, as I have elsewhere suggested, the use of an increasing percentage-of-the-recovery formula. See *Coffee*, *supra* note 18, at 696-97.

C. *The Cost Differential*

It cannot be assumed that litigation is equally costly to both sides, and this factor may offset the above-noted impact of asymmetric litigation stakes. Professors Rosenberg and Shavell have offered a formal model of the nuisance suit that depends upon the plaintiffs being able to exploit a significant cost differential.³⁴ That is, if the plaintiffs know that by spending \$10,000, they can cause the defendants to spend \$100,000 to have the action dismissed, this 10:1 cost differential gives the action a settlement value even if it is frivolous. Much about the nature of civil discovery corroborates the possible existence of such a differential.³⁵ For example, it is far simpler to demand that the defendant identify and furnish all documents, memoranda, letters and conversations conceivably pertaining to a particular subject matter over a multi-year period than it is to comply with such a demand. Compliance may require the defendant's attorney to sort through musty storehouses of records, where each single file drawer searched may consume an hour or more of expensive legal time. Depositions similarly take substantial time for preparation of the deponent that may easily exceed the time expended in the deposition by the plaintiff's attorney. Of course, the fact that discovery can be used to punish an adversary does not alone imply a cost differential, because defendants can in turn seek discovery of plaintiffs and their witnesses. Yet, in most class action litigation, there is relatively little to be learned from the lead plaintiff. Although the plaintiff's adequacy to serve as the representative of the class can be challenged, this is usually a fairly perfunctory inquiry.³⁶ In the typical securities class action, there is no real issue that the plaintiff bought the securities whose value is at issue; nor in the typical toxic tort case is there much doubt that the plaintiff suffered an injury. The extent of this injury is not at this point especially relevant.

Still, there are problems with the cost differential thesis if it is used as a starting point for policy analysis. For example, if both sides are relying on expert witnesses, each would appear roughly equally vulnerable to discovery abuse with no clear cost advantage favoring the plaintiffs. Of course, defense attorneys may claim that plaintiff's attorneys typically employ fewer and

34. Rosenberg & Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3 (1985).

35. In *Agent Orange*, for example, the defendants' litigation costs amounted to approximately \$75 million dollars. See Sugarman, *Doing Away With Tort Law*, 73 CALIF. L. REV. 555, 598 (1985). Plaintiffs, in contrast, had considerable difficulty in raising \$1.25 million to finance their litigation.

36. Recent decisions have tended to view skeptically the defendant's claim that some asserted conflict of interest renders the lead plaintiff incapable of providing effective representation for the class. See, e.g., *Tyco Laboratories Inc. v. Kimball*, 444 F. Supp. 292, 299 (E.D. Pa. 1977); *Shamrock Associates v. Horizon Corp.*, Fed. Sec. L. Rep. (CCH), § 92, 711 (S.D.N.Y. 1986).

less costly witnesses, and some defense attorneys have argued to this author that plaintiff's attorneys tend to be low budget operators who have little overhead and low opportunity costs. As a generalization, this may have some validity, but what does it prove? Put simply, a litigation cost differential may be less a cause than an effect; that is, the consequence of asymmetric litigation stakes may make the plaintiff's attorney less prepared to invest in the action than is his adversary. For example, in an action where the defendants realistically are exposed to a \$1,000,000 loss, but the expected fee award is unlikely to exceed \$300,000, it certainly should be expected that the defendants will expend more resources on expert witnesses, deposition preparation, discovery, and associated expenses. Given the imbalance in expected payoffs, a rational strategy for the profit-maximizing plaintiff's attorney may be to engage in what amounts to "feigned" litigation—that is, to create and exploit a cost differential by making broad discovery requests, scheduling numerous depositions, and otherwise seeking to maximize the costs that defendants will incur without, himself, preparing intensively for trial. Sometimes, the plaintiff's attorney's ability to exploit this cost differential will be abetted by the defendant's attorney, whose own self-interest leads him to prepare prodigiously and bill accordingly. Hence, the plaintiff's attorney may subpoena crates of files and documents, which the defendant's attorney will zealously review for privileged information and release only after costly skirmishing, but which the plaintiff's attorney may inspect only cursorily. In principle, it may be enough for the plaintiff's purposes that the defendants know that he possesses potentially damaging information.

This strategy of low-intensity litigation may allow the plaintiff's attorney to maintain contemporaneously a sizable portfolio of actions, while exploiting the cost differential so that settlement becomes less costly to the defendants than a total victory. There are, of course, limits to the plaintiff's attorney's ability to exploit this cost differential. Obviously, the plaintiff's attorney must possess credibility, and this probably requires some past litigated victories. Thus, the plaintiff's attorney has a strong, but not constant, incentive to invest in developing a reputation. But, once acquired, such human capital can be made to earn a return, much as any other asset, and the plaintiff's attorney who is seen as a formidable antagonist can exploit his reputation without expending significant effort on a particular case. In effect, he becomes a "repeat player" who is confronting a defendant who has not previously experienced major high stakes litigation and is therefore probably more risk-averse. In this confrontation, the inexperienced defendant, who may face a potentially catastrophic loss, can typically be convinced by his own attorneys to expend substantial amounts on preparing an "airtight" defense. One side then may be over-investing and the other side under-investing, in terms of what fully informed and experienced clients would do if agency costs were lower on both sides. If the action is stretched out long enough (which under the lodestar formula is in the mutual interest of both

groups of attorneys), risk-averse defendants may eventually recognize that a settlement would be less costly than continued litigation, even though the odds at trial are heavily in their favor. This scenario depends upon the defendants being unable to minimize costs, and thus it does not apply as well to "repeat players" (such as insurance companies) who may deem it in their strategic interest to develop their own reputation for toughness by fighting to a litigated resolution.

The foregoing analysis suggests that what appears to be a significant cost differential favoring the plaintiffs may be the composite of several interrelated factors. First, plaintiffs may litigate more cheaply simply because they have to. Asymmetric stakes necessitate that the plaintiff's attorney, as an independent entrepreneur, minimize costs, while defense attorneys can persuade their more nervous clients to litigate according to a more luxurious style. Closely related to this first possibility is a second that by trying to increase the ante, defendants may be seeking to exploit the asymmetric stakes factor and the plaintiff's attorneys are responding by engaging in low cost "feigned" litigation that gives the action the appearance of being a frivolous one. Even if defendants cannot force the plaintiff's side to match their expenditures dollar for dollar, they may still be able to demonstrate to plaintiffs their ability to make protracted litigation unprofitable for the plaintiffs because the expected fee recovery will not cover the plaintiff's attorneys' opportunity costs. Still a third possibility is that risk-neutral plaintiff's attorneys can manage a portfolio of individual actions according to a low intensity litigation strategy, hoping either to identify a risk-averse defendant who will settle on a basis more generous than the litigation odds would dictate, or to discover a "smoking gun" that changes the litigation odds after only a limited search. Finally, there is the original possibility that a litigation cost differential does give the plaintiff's attorney a license to commit extortion. This advantage seems likely to fade over the course of the litigation, however, because, as the defendants expend resources to prepare for trial, the plaintiff's leverage declines. This is because rational defendants will disregard sunk costs and focus only on marginal costs. Thus, each dollar the defendants expend reduces the future litigation expenses to which the plaintiffs can expose them. In addition, each dollar the plaintiff's attorney spends brings him closer to the point at which his own costs will exceed the expected fee award.

On a practical level, it seems likely that the significance of both the cost differential and the asymmetric stakes factors will decline in the context of very large class actions. There are obviously limits on the ability of one party to effect the outcome of the litigation, or the expenditures that the other party must make, by itself expending resources. In this realm of the very large class action, the next factor considered may have the greatest significance.

D. *Inter-plaintiff Competition and the Common Pool Problem*

A large class action may involve one hundred or more plaintiff's attorneys.³⁷ Either individually or in smaller groups, they may have filed class or individual actions in various district courts across the nation, often piggybacking on an earlier commenced action brought by public authorities that in effect signalled the existence of this cause of action. These actions are then consolidated in a single district court by the Judicial Panel on Multi-District Litigation, technically for pre-trial proceedings, but in reality typically for trial as well.³⁸ The result is an unstable caucus that is expected to function as an "ad hoc law firm." Until recently, the *Manual on Complex Litigation* instructed the trial court to let the plaintiff's attorneys elect their own lead counsel.³⁹ The result was sometimes to provoke the equivalent of an unsupervised political convention without a rules or credentials committee. Rival slates would be formed, other attorneys invited into the action in order to secure their vote for lead counsel, and eventually a political compromise struck.⁴⁰ The obvious result tended to be both overstaffing and an inability to eliminate the free-riding or marginally competent attorney, whose vote gave him a leverage that his ability did not. Less obvious but potentially more important is the corrosive impact of this system on the plaintiff's attorney's willingness to search out actionable legal violations. This incentive to search is dulled because the attorney who discovers an actionable legal violation may have to share the expected reward with those other attorneys who later file parallel class actions and are typically then consolidated into a single nationwide proceeding. The first attorney is thus like a prospector

37. For a list of recent class actions in the antitrust field where the number of plaintiff's attorneys has approached or exceeded 100 attorneys, see Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 Md. L. Rev. 215, 223 n.17 (1983). The number of attorneys is likely to be even higher in mass tort cases involving widely distributed products such as asbestos or the Dalkon Shield. In the *Agent Orange* litigation, some 600 individual cases were consolidated before Judge Weinstein. See "Agent Orange," 611 F. Supp. at 1301.

38. See 28 U.S.C. § 1407(a) (1976). For a discussion of the procedures followed by the Judicial Panel, see Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001, 1017 (1974) (noting failure to remand cases to original district court following pretrial proceedings).

39. See MANUAL FOR COMPLEX LITIGATION § 1.92 (5th ed. 1981) (advising trial court not to itself select lead counsel for class but to request that plaintiff's attorneys select such counsel). More recently, this phrasing has been changed to give the judge authority to select counsel. See MANUAL FOR COMPLEX LITIGATION, SECOND § 20.224 (1985). However, the court is still advised "to give special consideration to the suggestions of counsel" in determining an attorney's role in a class action. *Id.* Lead counsel, however chosen, is also expected to make litigation decisions based upon "consensus." *Id.* at § 20.222. "Consensus" is in many respects simply a more delicate word for majority vote.

40. For a detailed examination of this process, see Coffee, *supra* note 37, at 248-61. See also *In re Fiue Paper Antitrust Litig.*, 98 F.R.D. 48 (E.D. Pa. 1983), *aff'd in part, rev'd in part*, 751 F.2d 562 (3d Cir. 1984).

who cannot stake out a legally valid claim on his discovery, and thus his incentive is to exploit the newly discovered resource quickly by reaching an early settlement (if he can) before others intervene. As a practical consequence, the private attorney general concept operates today largely by piggybacking on the earlier efforts of governmental enforcers, because this strategy minimizes search costs, on which the attorney will not expend funds, given the legal insecurity of such an investment. Only the mass disaster and products liability contexts stand as major exceptions to this generalization, because in these areas the attorney need not incur extensive search costs as either the event has been widely publicized or the client is aware of the injury.

On a more abstract level, the pattern described above represents an example of a "common pool" problem.⁴¹ Such problems arise whenever there is difficulty in identifying or asserting property rights over an asset or resource. Here, that asset is the expected fee award. Given the ambiguities in the law and the substantial discretion accorded the court, uncertainty over who will control the action and thus be able to claim the greater share of the fee award inhibits the rationally entrepreneurial attorney from making substantial expenditures on search costs. Classically, the answer to this problem is to allocate the property right in question so as to establish clear and enforceable entitlements. The substantial obstacles to implementing this prescription by clearly according ownership of the action to one attorney (or one firm) have been explored by this author elsewhere.⁴² Suffice it here to say that however crude it may seem to favor the first attorney to file an action, this approach creates appropriate incentives from an ex ante perspective (although it also encourages hastily filed, under-prepared actions).

Still, even if a system that properly rewards the attorney who incurs search costs seems out of reach, a variety of means are possible to reduce destructive inter-plaintiff competition over control of the action. Today, this competition take two basic forms. First, there is the usual struggle over the selection of lead counsel and the membership of the steering committee that controls the action's management. While some jockeying for position by plaintiff's attorneys is probably inevitable and may even enhance the court's ability to choose, the policy objective here should be to encourage greater hierarchical control within the "ad hoc" firm so that the lead counsel, once selected,

41. For a standard discussion of this problem, see Sweeney, Tollison & Willett, *Market Failure, The Common-Pool Problem and Ocean Resource Exploitation*, 17 J. L. & Econ. 179 (1974). Classically, common pool problems arise with resources such as oil, where individual owners of drilling rights that tap into the same resource will have an incentive to compete to withdraw the resource even though the value of the resource could be maximized by a different strategy. The standard solution to a common pool problem is "compulsory unitization"—a result that parallels the law's discovery of the class action as an alternative to competitive individual actions.

42. See Coffee, *supra* note 20, at 77-79.

does not find it necessary to negotiate with various constituencies to remain in power or to award them patronage in the form of work assignments. An efficient structure requires that plaintiff's lead counsel be able to prune the deadwood from the "ad hoc" firm and employ only those whose ability he respects. The second form of inter-plaintiff competition involves "opting-out." Today, it commonly happens that the losers in the struggle for lead counsel designation or steering committee membership simply opt out and pursue their claims in either state court or "tag-along" individual actions in federal court. Alternatively, plaintiff's attorneys may oppose class certification or file a state action before certification is granted. Another economic motive also underlies "opting out": typically, the plaintiff's attorney can expect a higher fee award from pursuing an individual action on a contingent fee basis than from remaining in a subordinate position in the class action.⁴³

Understandable as this pattern is, its unfortunate consequence is both to multiply the public costs of the action and to produce a rush to judgment, because plaintiffs in the various individual actions have to fear the potentially preclusive or otherwise damaging effect of a settlement in the class action. Even more important, defendants may be able to exploit this inter-plaintiff competition by seeking to bring the weaker individual cases to trial ahead of the class action in order to create unfavorable precedents and gain settlement leverage.⁴⁴ Finally, opting-out, if it occurs on a large enough scale, may seriously complicate the settlement of the class action; indeed, if the defendant's assets appear insufficient, it may also give rise to a "prisoner's dilemma" problem that Part II discusses in more detail. To alleviate these problems, some federal courts have begun to restrict opting-out by expanding a doctrine known as the "limited fund" theory in order to make the action a mandatory class action.⁴⁵ These decisions are controversial and will be

43. Contingent fee awards in mass disaster cases often reach 40% of the recovery. See Note, *supra* note 12, at 1148; Craft, *Factors Influencing Settlement of Personal Injury and Death Claims in Aircraft Accident Litigation*, 46 J. AIR L. & COM., 895, 919 (1981). For example, in the *Agent Orange Litigation*, at least one attorney had a 50% contingent fee arrangement with his clients. 611 F. Supp. at 1316. In contrast, if the class action is a large one (say fifty attorneys or more), it is inevitable that some attorneys who filed class or individual actions that were consolidated will be excluded from the plaintiff's team and denied any realistic opportunity to participate. In the *Agent Orange* litigation, this was the fate of approximately 100 attorneys who, although having private clients, were not employed by the plaintiff's management committee and received no fee award as a result. *Id.* at 1318, 1338. Inevitably in any large class action, there will be such losers, and, from an *ex ante* perspective, it is predictable that they will seek to opt out.

44. For a similar view that defendants will seek to bring the weaker cases to trial first, see Note, *supra* note 12, at 1148.

45. If there is a "limited fund" out of which the recovery will be satisfied, the advisory committee's note to Rule 23 of the Federal Rules of Civil Procedure specially notes that this factor justifies certification of a Rule 23(b)(1) "mandatory" class action from which the plaintiffs may not opt out. See *Advisory Committee's Note*, 39 F.R.D. 69, 101 (1961); Note, *supra* note 12, at 1157-58. In some mass disaster cases courts have been prepared to certify a

discussed further in Part II. For the present, particularly in the mass tort cases, the current prospect is for continuing chaos.

E. *An Initial Summary*

General as the considerations discussed above have been, they do in common point toward some policy objectives. Most fundamentally, if agency costs are to be reduced, the most effective monitor is likely to be the plaintiff having the largest stake in the action. Of course, no such client may exist with a large enough stake to be effective, but where they are present, "high stake" plaintiffs, much like the large shareholder in the corporate setting, are likely to be the most effective monitors, because they are more likely to expend time and effort in supervising the plaintiff's attorneys. Yet, the "entrepreneurial" attorney has little desire to represent such an active, concerned client and, at least in theory, should prefer a more passive client less able or willing to monitor him. This is one of a number of reasons why the "high stakes" plaintiff may be disadvantaged in class actions.⁴⁶

This line of analysis has two further implications. First, because it is the plaintiff who has the largest stake in the action who is most likely to opt out of the class action, when we restrict the plaintiff's ability to opt out we ensure that the most effective monitor will remain on duty—admittedly at a possible cost in fairness to the party. To be sure, the largest stakeholder may still be dwarfed by the overall size of the action, but in many instances relatively modest expenditures by such a client might substantially reduce opportunistic behavior by the plaintiff's attorneys. Second, because the largest stakeholder in the action is more likely to control opportunistic behavior by his own attorney, this conclusion suggests in turn that, other things being relatively equal, the court should designate the attorney of one of the largest stakeholders as the lead counsel. For example, in an antitrust class action, if the choice for lead counsel were between: (1) a prominent antitrust litigator with a well-known reputation (in other words, the equivalent of a Melvin

Rule 23(b)(1) class action based on the judgment that the defendant's solvency would be seriously challenged. See *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 725 (E.D.N.Y. 1983), *petition for mandamus denied*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984). But see *In re "Dalkon Shield" IUD Prod. Liab. Litig.*, 693 F.2d 847, 851 (9th Cir. 1982), *cert. denied sub. nom. A.H. Robins Co. v. Abed*, 459 U.S. 1171 (1983). One recent decision has required detailed fact findings to support the conclusion that a limited fund would exist and reversed a Rule 23(b)(1) certification in the absence thereof. See *In re Bendectin Prod. Liab. Litig.*, 749 F.2d 300, 305-06 (6th Cir. 1984). At present, courts appear divided between those that require the proponents of class certification to show that a limited fund will "necessarily" affect the plaintiff's claim, "*Dalkon Shield*," 693 F.2d at 852, and those that require only that a "substantial probability" exists, "*Agent Orange*," 100 F.R.D. at 726.

46. This theme, which is addressed more fully in the next section of this Article, may also explain the frequent appearance of seemingly professional plaintiffs who have minimal stakes in the action. See *supra* notes 24-26.

Belli in the torts field) but with a relatively minor client whose claimed injury did not exceed \$100,000; and (2) another experienced, competent attorney who had been retained by a large client (such as an association of hospitals whose claimed damages involve millions as the result of overpayments for drugs caused by a price-fixing conspiracy), this suggested rule would point toward the latter candidate—regardless of the results of any election among the plaintiff's attorneys.

Although constraining the plaintiff's ability to opt out reduces the problem of inter-plaintiff competition and the rush to judgment, it does so at a probable cost in terms of fairness to the largest plaintiffs who often feel that the class action subordinates their interests to those of the average class member. In this light, preferring the attorneys for the largest plaintiff in the selection of the lead counsel represents a less drastic step that may induce the client not to opt out. Thus, the choice of lead counsel should be viewed not only in terms of the relative skill of the contending attorneys, but also in terms of the impact of a given choice on the rate of opting out and the need for effective monitoring.

II. MODELS OF THE CLASS ACTION: "BUREAUCRATIC JUSTICE," "INDIVIDUAL JUSTICE" AND "RATIONAL ACTOR"

Once upon a time civil procedure teachers simply sought to explicate the scope and meaning of the Federal Rules of Civil Procedure, but today a new generation has begun to offer coherent, integrated models of how a system of civil procedure should operate. An outstanding example is Professor David Rosenberg, whose work is guided by a "public law" vision of the tort system.⁴⁷ Although others have expressed reservations about this proposal because they fear his explicit subordination of the interests of the individual client would fundamentally distort our system of procedural justice,⁴⁸ my reservations are of a different character. While I share his attraction to public law norms that emphasize the deterrent role of the civil law, I will outline in this section the critical junctures where, I believe, his vision does not examine critically enough the incentives and disincentives that it creates for the legal entrepreneurs who predictably will come to the fore under such a new order. At the outset, it must be underscored that the "rational actor" perspective that I adopt is in no sense a statement of normative values. I do not assume that lawyers *should* behave as utility-maximizing entrepreneurs, but only that in a world of high agency and information costs lawyers typically *will* do so. My purpose is not to debunk any set of normative

47. In addition to Professor Rosenberg's Article in this Symposium, see Rosenberg, *supra* note 12.

48. See, e.g., Transgrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779 (1985); Miller & Crump, *supra* note 12, at 54-55.

values—either those underlying a “public law” approach or those espoused by adherents of individual justice—but to examine the likely consequences of proposed mechanisms for implementing normative visions.

Professor Rosenberg’s vision of a “bureaucratic system of tort law” leads him to make two central policy proposals: (1) mandatory classing; and (2) damage averaging. Each will be examined separately, but in overview, under his first proposal, the ability of the individual plaintiff to opt out and pursue a private damages action remedy would be sharply curtailed or eliminated, and, under the second, the court would impose “damage schedules based in principle on the average loss suffered by members of the class or subclass.”⁴⁹ This averaging procedure is justified chiefly on the grounds of cost efficiency in order to eliminate “the costs of redundant, de novo, particularized adjudication.”⁵⁰ Mandatory classing can also be justified on this ground as well as on two independent grounds. First, a disaggregated process of individual lawsuits is likely to produce a sub-optimal result from the plaintiffs’ perspective because of substantial “free-rider” problems. Standard economic theory suggests that no individual plaintiff (or attorney) will have an adequate incentive to develop information and data or to litigate as aggressively as would all the plaintiffs collectively.⁵¹ Second, the defendant can exploit a case-by-case linear processing of mass tort cases, both by litigating weaker cases first and by creating a rush to settlement.

These claims have logic and force. Yet, they leave unresolved an important anomaly: plaintiffs appear to be opposing the certification of mandatory class actions, while defendants regularly favor it.⁵² This paradoxical fact

49. Rosenberg, *supra* note 32, at 570.

50. *Id.* at 564.

51. “Free-rider” problems will arise any time some of the plaintiffs can hope to benefit from the discovery and other litigation work done by earlier plaintiffs without having to bear their full share of these costs. For a discussion of the “free rider” problem as a cause of sub-optimal allocation of resources, see J. HIRSCHLEIFER, *PRICE THEORY AND APPLICATION* 537-38, 561-64 (2d ed. 1980); R. POSNER, *ECONOMIC ANALYSIS OF LAW* 45-46 (2d ed. 1977). Although the plaintiffs can contract to share these costs, this process is costly when the plaintiffs are dispersed and largely uninformed about their legal rights. A mandatory class action reduces or eliminates these costs by establishing an organizational structure to administer the action in lieu of market negotiations among dispersed plaintiff’s attorneys. See *supra* note 37.

On a less theoretical level, small plaintiffs lack the economic resources to undertake massive litigation, such as those involved in mass tort cases. In *In re “Agent Orange” Prod. Liab. Litig.*, 506 F. Supp. 762, 790 (E.D.N.Y. 1980), *rev’d*, 635 F.2d 987 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984), Judge Jack Weinstein noted that “it is doubtful if a single plaintiff represented by a single attorney pursuing an individual action could ever succeed.”

52. For example, in *In re Dalkon Shield IUD Prod. Liab. Litig.*, 526 F. Supp. 887, (N.D. Cal. 1981), *vacated and remanded*, 693 F.2d 847 (9th Cir. 1982) *cert. denied sub nom.* A.H. Robins Co. v. Abed, 459 U.S. 1171 (1983), it was the defendant, A.H. Robins, the manufacturer of the product, who sought mandatory class certification. *Id.* at 895. Ideally defendants would prefer to certify a mandatory class action for settlement purposes; this procedural innovation assures them immunity from future claims relating to the same subject and spares them the uncertainty surrounding a judge’s or jury’s determination of damages. See *In re “Bendectin”*

should caution those who favor mandatory classing. Put simply, if Brer' Rabbit wants to be thrown into the briar patch, there is something about the briar patch that proponents of the public law model may not understand. Again, this suggests the centrality of an incentives-based inquiry, which this section will next undertake.

A. *Mandatory Classing: Whose Ox is Gored?*

Proponents of mass tort reform have succeeded in convincing some courts to accept a "constructive bankruptcy" theory under which the likely insufficiency of the defendant's assets in comparison with the financial recovery sought justifies deeming the corporation itself to be a "limited fund" and hence certifying the action as a mandatory class action under Rule 23(b)(1)(B).⁵³ Essentially, this conclusion means that the plaintiffs may not opt out and will be bound by the judgment or settlement. While more courts ultimately have rejected this theory than have accepted it,⁵⁴ I will leave any exploration of its doctrinal foundations to the teachers of civil procedure and focus instead on its incentive effects.

The opposition of plaintiff's attorneys to mandatory class action is easily understood, because it exposes them to two distinct losses. First, contingency fees in personal injury actions often equal (or exceed) 40% of the recovery, while in the class action there is judicial supervision of the fee award and typically a lower fee will be awarded in terms of a percentage of the recovery.⁵⁵ Moreover, for an attorney who represents multiple plaintiffs, the same contingency fee may be charged to each, even though there are obviously economies of scale and in a competitive market the attorney would reduce his price as his marginal cost per plaintiff decreased. In contrast, the

Prods. Liab. Litig., 102 F.R.D. 239 (S.D. Ohio), *rev'd*, 749 F.2d 300 (6th Cir. 1984). In the "*Bendectin*" case, opposition to this procedure came from within the plaintiffs' attorneys' camp. 749 F.2d at 302 n.3. For the view that plaintiff's attorneys now often resist class certification on the grounds that it favors the defendants, see Wagner, *The New Elite Plaintiffs' Bar*, A.B.A. J., Feb. 1, 1986, at 48 (quoting Thomas Henderson, a member of the plaintiff's management committee in the "*Agent Orange*" case). Interestingly, in the "*Agent Orange*" case, it was the defendants who first sought to consolidate the actions. P. SCHUCK, *supra* note 27. Most recently, in *In re Asbestos School Litig.*, 104 F.R.D. 422, 426 (E.D. Pa. 1984), *vacated*, 791 F.2d 920 (3d Cir. 1986), the principal defendants accepted mandatory class certification, which was opposed by many plaintiffs. See Miller & Crump, *supra* note 12, at 40 n.354.

53. See "*Dalkon Shield*," 526 F. Supp. at 897-99. For a review of this theory and the critical reception it has received from appellate courts, see Miller & Crump, *supra* note 12, at 42, 46-48.

54. See *In re "Dalkon Shield" IUD Prod. Liab. Litig.*, 693 F.2d 847, 851-52 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *In re "Bendectin" Prods. Liab. Litig.*, 749 F.2d 300, 306 (6th Cir. 1984); see also Miller & Crump, *supra* note 12, at 46-48. *But see In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 726 (E.D.N.Y. 1983), *petition for mandamus denied*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984).

55. See *supra* note 43.

attorney in a class action will typically be compensated under the "lodestar formula," which looks to the hours he has reasonably expended on the action. The attorney thus faces greater uncertainty, because he does not know in advance how much time the court will deem to have been reasonably expended. Nor does he gain much by representing multiple plaintiffs, because little additional time can be justified to the court on this basis.

Another economic loss that the mandatory class action poses for plaintiff's attorneys involves the number of attorneys who can participate in the action. In a mass tort action, there can conceivably be thousands of claimants, and each may have his own individual attorney. In the aggregate, the result is overstaffing and excessive legal fees. In contrast, once control of the class action is awarded to a judicially selected steering committee (which seldom has more than a dozen or so members), that committee has full control of the action and no incentive to overstaff it. Typically, those not given a seat on the steering committee will have only a limited involvement in the action and will be unable to obtain substantial fee awards, because the committee will control work assignments.⁵⁶

Although both these factors—the lower fee formula and the reduction in staffing—explain why plaintiff's attorneys do not like mandatory class actions, they do not tell us why sophisticated defendants seek class certification. After all, the plaintiff's attorney's loss is logically his client's gain, not the defendant's.

Why then do defendants seek class certification in mass tort cases? Several different answers can be given. First, the transition from multiple individual actions to a class action also involves a transition from contingent percentage fee to a "lodestar" or time-based fee formula. With the use of the latter formula comes a heightened prospect of a collusive settlement. Once the plaintiff's attorney expends substantial time on the action (or simply is in a position to claim that he has), a basic conflict arises between him and his client, because the attorney's fee award is largely divorced from his success and is, within limits, relatively constant whether he settles at a high or low figure. By settling, the attorney avoids the usually substantial risk of an adverse judgment. The net result is one that I have elsewhere termed "structural collusion."⁵⁷ While no honest defendant's attorney would offer to exchange a low settlement for a high fee award (nor would a responsible plaintiff's attorney accept such an offer, if made), neither has to offer any

56. A representative example is supplied by the "Agent Orange" litigation. There some one hundred attorneys who had individual clients but were not employed by the plaintiff's management committee received no fee award from the court. *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296, 1318, 1338 (E.D.N.Y. 1985). Increasingly, to prevent overstaffing and duplicative work, courts are indicating at the outset of a class action that they will only compensate a limited number of attorneys for work done under the direction of the plaintiff's steering committee. See *In re Continental Ill. Sec. Litig.*, 572 F. Supp. 931 (N.D. Ill. 1983).

57. Coffee, *supra* note 20, at 23-33.

such "bribe," because the legal rules applicable to class actions essentially do it for them. Once sufficient time has been expended to justify the expected fee, the parties can reach a settlement that is below the action's litigation value without the need for any actual or implicit agreement that links the fee to the settlement. Add to this factor the generally higher agency costs applicable to class actions (where plaintiffs are dispersed and seldom have a close relationship with their attorney), and an initial reason for the defendant's preference for class actions becomes evident: it may be able to settle the action more cheaply and with less uncertainty than when faced with a proliferation of individual actions in which attorneys are compensated on a percentage basis.

A second (and, I believe, more fundamental) reason for the defendant's preference concerns the behavior of the legal decision-maker (typically, a jury). One aspect of this problem involves punitive damages. If the defendant must face multiple juries and each wishes to punish it for conduct that it considers shocking and reprehensible (such as the deliberate suppression of a serious health hazard to workers or consumers), the net result may be astronomic damages far beyond that which any single decision-maker would impose. In part, this is the familiar problem of the tyranny of small decisions, and defendants who elect class certification probably perceive that a single decision-maker would be more moderate. Possibly for this reason and also because the early recipients of punitive damages may bankrupt the firm and so deprive later plaintiffs of any damages, some courts in mass tort cases have certified mandatory class actions for punitive damages.⁵⁸ Still, although much attention has focused on punitive damages, it is only the proverbial tip of a legal iceberg that involves a much larger problem.

The central problem, which defendants may recognize (but which legal scholars have largely ignored), starts from the tendency of the legal decision-maker (and especially the jury) to behave in a manner that is as much retributive as compensatory. The standard assumption that juries award compensation is a remarkably simplistic model for the behavior of a body that probably sees itself more in the role of a Greek chorus. Assume instead that the typical jury focuses less on the plaintiff's injury and more on the defendant's behavior—that is, it desires more to punish than to compensate and wishes to "send a message" that expresses its revulsion. This assumption has particular relevance to the mass tort context where the behavior could

58. See, e.g., *In re Federal Skywalk Cases*, 93 F.R.D. 415 (W.D. Mo.), vacated, 680 F.2d 1175 (8th Cir.), cert. denied sub nom. *Stover v. Rall* 459 U.S. 988 (1982), "Dalkon Shield," 526 F. Supp. 887; *Coburn v. 4-R Corp.*, 77 F.R.D. 43 (E.D. Ky. 1977), petition for mandamus denied sub nom. *Union Light, Heat & Power Co. v. United States Dist. Court*, 588 F.2d 543 (6th Cir. 1978), cert. dismissed, 443 U.S. 913 (1979). See also Note, *Mass Liability and Punitive Damages Overkill*, 30 HASTINGS L.J. 1797, 1800-12 (1979); Putz & Astiz, *Punitive Damage Claims of Class Members Who Opt Out. Should They Survive?*, 16 U.S.F. L. REV. 1, 18-40 (1981); Miller & Crump, *supra* note 12, at 42-50.

have injured members of the jury, itself, had they been differently situated. Once we make this assumption, the impact of multiple proceedings is in effect to increase the number of quasi-sentencing proceedings that the defendant must face and thereby to expose it to cumulative punishment and, loosely speaking, a kind of double jeopardy. To be sure, in no single action will the damages approach the total damages awarded in the class action, but in each individual action the jury's award will include a component that represents a moral penalty, even though punitive damages may not be legally obtainable. Thus, sensible as it is to certify a mandatory class action for punitive damages so as to preclude races to the courthouse and inter-plaintiff competition, the implicit goal of a single retributive penalty is not truly feasible if claims for "compensation" can be pursued in multiple forums before retributively minded fact-finders.

My premise here has some empirical foundation. A recent Rand Institute for Civil Justice study of jury awards in Cook County, Illinois, found that the per plaintiff recovery declined significantly as additional co-plaintiffs were added. Specifically, as each additional plaintiff was added, the original plaintiff on average could expect to experience a 27% decrease in his recovery.⁵⁹ While hardly conclusive, this finding is at least consistent with the behavior that one would expect of a jury that was responding in significant part to moral criteria (as opposed to evidence of plaintiff's loss).

If so, what policy implications follow? From one perspective, the fact that multiple actions expose the defendant to multiple punishment and multiple forums in which the plaintiff has the "home court" advantage seems unfair. True as this is, however, a countervailing observation must be made. Because the class action is likely to result in a lower fee award for the plaintiff's attorney than the individual personal injury action (where as previously noted a contingent percentage fee will likely be used), we should anticipate that a lower expected recovery means a lower investment by the attorney in the action. Obviously, an attorney who expects a fee award equal to 40% of the recovery will invest more in discovery, expert witnesses, date collection, and trial preparation than one who foresees only a 20% fee, and this greater incentive should translate into a higher expected recovery. Thus, it may be oversimplified to see the higher legal fees in individual actions as only evidence of social waste. Some waste undoubtedly results from a proliferation of individual actions, but this waste may be more attributable to the independent fact that overstaffing and redundant work is inevitable when one hundred or more attorneys represent individual plaintiffs who collectively could be represented at least as effectively by ten to twenty attorneys.

59. See A. CHIN & M. PETERSEN, DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS 48 (1985).

As noted earlier, the existence of asymmetric stakes in class action litigation may produce under-investment in actions from the plaintiffs' collective perspective, and higher fee awards may counteract this tendency. Thus, although the attorneys receive a bigger slice of the pie in the individual actions, it is an open question whether this makes the pie sufficiently bigger to justify the higher percentage.

While it would be an overstatement to conclude that plaintiffs are therefore better off in individual actions (because obviously much of the effort so expended is duplicative and inefficient), this illustration does point up why a novel alternative may be the "second best" solution. Recently, in a number of mass tort cases, litigation networks have developed by which cooperating plaintiff's attorneys litigating separate individual actions involving the same subject matter (for example, a particular drug or toxic product) share the fruits of their discovery (for example, expert witnesses, epidemiological studies, depositions of the defendant's witnesses, and so on).⁶⁰ Such information networks obviously reduce waste and achieve some of the advantages of consolidated pre-trial discovery in a federal court, without exposing each individual attorney to the loss of his client (and his fee award) to the attorneys controlling the class action. Of course, redundancy still exists, and the legal costs in the aggregate may be well above those in a mandatory class action. Still, at least on an *a priori* basis, it is not clear whether the reduced costs associated with class actions fully offset the reduced efforts that are predictable once we reduce the attorney's incentive by lowering his fee award. The critical and unresolvable issue is the nature of the relationship between the attorney's investment in the action and the size of the settlement. Nonetheless, anecdotal evidence suggests that defendants do fear this new institution of the litigation network and have taken steps to impede it.⁶¹

My tentative suggestion then is that multiple proceedings, each with their overlapping focus on the moral propriety of the defendant's action, could in a "second best" world both offset the plaintiff's attorney's lesser incentive to expend funds on the action and marginally better protect the plaintiffs

60. The litigation network, which can exist on either plaintiff's or defendant's side of a series of related actions, has not yet received a full descriptive account. For a useful history of one of the first such networks, see Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116 (1968); see Rheingold, *Mass Disaster Litigation and the Use of Plaintiffs' Groups*, LITIGATION, Spring 1977, at 18. For a more recent and still unpublished account, see Galanter, *Lawyers' Litigation Networks* (1985) (available at University of Wisconsin).

61. It is now common that defendants will seek protective orders with respect to pretrial discovery and depositions in toxic tort cases in order to prevent the communication of such information among members of a plaintiff's litigation network. Until such information is admitted into evidence, no right of public access exists to information gathered through pre-trial discovery. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). This strategy is an instance of defendant's usually greater ability to conduct a broad litigation campaign that looks beyond the instant individual action.

from collusive settlements. Thus, public goals may in fact be better served by a proliferation of private actions than Professor Rosenberg recognizes. Still, my hypothesis is not an argument for the preservation of the status quo. To the extent that the lodestar formula is the real villain of the story because it encourages structural collusion, it could easily be eliminated by legislative or judicial action that established a variable "percentage-of-the-recovery" fee formula under which the court preserved some discretion to adjust the fee award. Mandatory class actions for punitive damages also make considerable sense from both the plaintiffs' and the defendants' perspectives, because the possibility that the defendants will be exposed to multiple punitive damage awards in individual actions is counterbalanced by the possibility that multiple plaintiffs can be pressured into early and cheap settlements if the defendant can create a race to settlement because those who hold out for trial will be unable or ineligible to receive punitive damages.⁶² Still, in any form of litigation where agency costs are predictably high, the problem of asymmetric stakes surfaces, and policy analysis should recognize that some litigation advantages that the plaintiffs may possess from using multiple forums compensate (albeit imperfectly) for this factor. Better compromises can probably be designed, but to ignore this factor may make plaintiffs worse off.

B. *Damage Averaging*

Ideally, Professor Rosenberg would implement his vision of bureaucratic justice by instructing courts in mass tort class actions to "impose damage schedules based on the average loss suffered by members of the relevant subclasses or even by the class as a whole."⁶³ As he recognizes, courts have not yet done this, but in the settlement negotiations such a regression to the mean may already be occurring. To understand the implications of this

62. The law on punitive damages is uncertain, but in some jurisdictions limitations exist on multiple awards, either as a matter of statutory law or common law. See *Federal Skywalk*, 93 F.R.D. at 424-25; "*Agent Orange*," 100 F.R.D. at 728; *Jacksou v. Johns-Manville Sales Corp.*, 727 F.2d 506, 526-30 (5th Cir.) (suggesting federal common law limitation), *rev'd on other grounds*, 750 F.2d 1314 (5th Cir. 1984) (en banc), *cert. denied*, 106 S. Ct. 3339 (1986). *But see* *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 3335 (1986). Fear that a court may impose such a limitation can cause risk-averse plaintiff's attorneys to settle cheaply before trial because of their concern that the first action to obtain such a verdict will preempt other recoveries of punitive damages. Where there is both a pending class action and separate individual actions, those plaintiffs in the individual actions appear to be particularly exposed to this pressure. See Stewart, *Wake of Disaster: Controversy Surrounds Payments to Plaintiffs in Hyatt Regency Case*, Wall St. J., July 3, 1984, at 1, 12 (noting that defense attorneys in *Federal Skywalk* successfully pressured individual plaintiffs to settle before trial of federal class action in order to avert possible loss of claims to punitive damages).

63. Rosenberg, *supra* note 32, at 570.

proposal, it is helpful to begin by dividing all class actions into three categories.

Category A consists of those class actions in which no individual plaintiff has a "marketable" legal claim. That is, either because of difficulties of proof or low recoverable injuries, such plaintiffs would not be represented by a private attorney on a contingent fee basis and would either not find it attractive or would be unable to pay such attorneys out of their own pockets. Here, the availability of the class action reduces transaction costs and thereby gives rise to litigation that would not otherwise be brought. While Category A provides probably the fundamental rationale for the class action,⁶⁴ it also must be recognized that it is within this context that the attorney is most able to function as an independent and unconstrained entrepreneur, because no individual plaintiff probably has the ability or incentive to monitor his performance.

Category B consists conversely of those class actions in which all members do have "marketable" legal claims. Here, the variance among claims is again low, and the use of the class action device is dictated either by the fact that there is a "limited fund" out of which the recovery must be satisfied (so that all plaintiffs prefer a unified proceeding to a competitive race to judgment) or by the fact that the class action will reduce attorney's fees, prevent "free riding," and thereby solve a "collective goods" problem. A mass disaster, such as a plane crash or a building collapse, provides a good illustration of this second category.

Finally, Category C is the problematic case that constantly arises in the real world. Here, there is a high variance among the settlement values of the legal claims possessed by the different plaintiffs; that is, some have high value claims and some low value claims. For example, in an *Agent Orange* type case, some plaintiffs may have incurred cancer or some disease known to be caused by the toxic substance to which they were exposed for prolonged periods; in contrast, other plaintiffs, who were exposed only briefly (if at all), have only vague symptoms (for example, headaches and depression). On their own, the latter plaintiffs would certainly not sue in individual actions and even might not be able to sue in class actions because a realistic plaintiff's attorney would consider their chances of prevailing too weak to justify the substantial investment of time that he would have to make. It is important here to distinguish between claims that have low values because of their legal merit and those that merely seek a small recovery per plaintiff. A class action can aggregate individuals with small monetary claims into an effective client whose legal injuries are now marketable, but it is less suc-

64. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), where the average claim was for \$100, Justice Rehnquist noted that "most of the plaintiffs would have no realistic day in court if a class action were not available."

cessful at aggregating claims uniformly having weak legal merit. For example, if there are 1,000 citizens who wish to sue Coca-Cola on the claim that its product has made them nervous, depressed, or impotent, it is unlikely that aggregation of their claims will alone make them marketable. To be sure, on a simple discounting basis, it may appear that even a 10% chance of a plaintiff's verdict will have a significant settlement value if the claims, after aggregation, total \$100 million, but this is superficial. Weak cases may look even worse collectively, and courts find ways not to certify such a class action. What such "weak" plaintiffs need is a lead plaintiff (or plaintiffs) whose claims have clear legal merit. With such a lead plaintiff, who ideally has a vivid story to tell, the remainder of the plaintiff class may now have a chance to tag along, in effect hiding the weakness of their claims behind those of the lead plaintiff. Such a lead plaintiff would be well advised, however, to opt out of the class action, because he probably has little to gain from this association. Indeed, if his claim must be litigated through a mandatory class action, this plaintiff is in effect required to make an involuntary wealth transfer.

On a more general level, I have elsewhere described this process as one of "adverse selection."⁶⁵ The analogy here is to the field of insurance where a well known phenomenon is that those persons who purchase insurance are far more likely to be vulnerable to the risks insured against than the general population or an actuarial sample having their overt characteristics. Similarly, the class action disproportionately attracts "weak" plaintiffs, not simply in the sense that these plaintiffs could not afford to sue, but in the sense that they have legally weak claims that they wish to disguise within the general population of the plaintiff class. Within a large enough herd, the weak claims can hide and hope to escape notice.

This assertion has a two-fold significance. First, if non-meritorious claims receive compensation, over-deterrence may result. I have less concern about this danger than others may have, given my earlier emphasis on the impact of asymmetric stakes and the incentives for collusive settlements. Still, Professor Rosenberg seems to me to oversimplify when he characterizes all criticisms of his damage averaging proposal as based only on distributive fairness and individual justice concerns. Efficiency concerns also are implicated, because distributive contests within the class can lead to either under-deterrence or over-deterrence.

Second, my "adverse selection" hypothesis suggests that plaintiffs with high value legal claims will be forced to make wealth transfers to those having lower value claims. Indeed, the dynamics of the class action bargaining

65. See J. COFFEE, *THE REGULATION OF ENTREPRENEURIAL LITIGATION: BALANCING FAIRNESS AND EFFICIENCY IN THE LARGE CLASS ACTION* 45-46 (Sept. 1986) (Center for Law and Economic Studies, Columbia University School of Law Working Paper No. 22).

process seem to me to ensure such a result. The entrepreneurial attorney who views all issues in terms of his naked self-interest may even prefer to represent a "low stakes" plaintiff because by definition such a client will be an ineffective monitor; or, it may be that such an entrepreneur can most easily find "weak" claimants, since they will predictably outnumber others if he undertakes a fairly random search for an eligible plaintiff who can confer standing. To be sure, referral mechanisms exist, but they do not necessarily match the best attorney with the strongest client. Rather, the typical race to the courthouse inclines the attorney to take the first eligible plaintiff once he has decided to become involved.

More importantly, voting rules within the class action do not differentiate between "high stakes" and "low stakes" plaintiffs, and this invites overreaching. Assume in a Category C ("high variance") class action that there are ten plaintiffs with injuries having an average provable legal value of \$100,000 and one hundred plaintiffs with injuries having an average value of \$10,000. The aggregate values of the claims held by these two classes is the same (\$1,000,000 each), but their voting power is not so long as voting is on a "one person, one vote" basis. As a result, a proposed settlement in which all plaintiffs would receive an "average recovery" of \$20,000 would be accepted by the "low-value" majority, although it seems clearly unfair to the "high-value" plaintiffs. Yet this result seems exactly where Professor Rosenberg's proposal leads once we fill in the background political dynamics. Moreover, this same plaintiff class might be willing to accept an average recovery of only \$18,000, even though the total recovery now was well below the \$2,000,000 total settlement value of their claims. Thus, damage averaging might be manipulated by defendants so as to reduce their total liability, and under-deterrence can result.

Of course, a potential answer to this problem is the use of subclasses, such of which would have to approve the settlement. However, I doubt the feasibility of this approach as applied to the mass tort context. One cannot simply expect plaintiffs to value their own claims accurately for this purpose. If we tried to divide plaintiffs into a "high value" subclass and a "low value" subclass, most would predictably describe themselves as having "high value" injuries (but, if rational, they would still accept the foregoing \$18,000 recovery if they, or their attorneys, accurately perceived the actual value of their claims).

Perhaps subclasses could be generated in terms of specifically described injuries (for example, death, permanent disability, loss of limbs, and so on). Often, however, this approach will simply replicate within each subclass the same tensions that existed within the class as a whole. Within each subclass, "lower value" plaintiffs will rationally seek a single-valued settlement offer that pays each plaintiff on the basis of the average value of all claims within the subclass. To be sure, this problem can be minimized if we maximize the use of subclasses and thereby reduce the variance possible within any sub-

class.⁶⁶ But this approach carries with it problems of its own. Chief among these is the question whether each subclass is to be given a veto power over the entire settlement's approval. If not, it is possible for the other classes to settle, leaving the lone dissenting class with little negotiating leverage. Conversely, if any subclass can prevent the settlement's overall approval, the prospect for extortion is high. Such a minority veto invites the lowest valued class to exploit its position and nuisance value in order to demand a wealth transfer by the other classes.⁶⁷

An even more serious problem with subclassing as a proposed solution to intra-class conflicts is that it cannot differentiate between litigants whose claims would have substantial merit at trial and those whose claims approach the frivolous. Thus, even if it were possible to define homogenous subclasses in terms of injuries (for example, death, total disability, and so on), these subclasses would still have a high internal variance in terms of the litigation strength of the claims within each subclass. For example, among those plaintiffs suffering total disability, there may be some whose injuries derive from an entirely different source or who were contributorily negligent. Such plaintiffs represent an example of adverse selection at work, because it is almost irrational for them not to join the class action if they can anticipate being grouped within a subclass whose members will receive substantial awards pursuant

66. Increasing the number of subclasses does not necessarily reduce the variance among claims; it depends on how the subclasses are defined. For example, if we defined subclasses A and B in terms of whether their members were injured before or after a specified date (because additional defendants also began to engage in the allegedly tortious conduct at that point), it is unlikely that this multiplication of the subclasses will reduce claim variance. Only if we can define injuries and subclasses in a way that relates to their settlement value is variance likely to be reduced. If such a definition of the subclasses is possible (and I am skeptical that it often is), then the client's incentive to opt out can be reduced; the trade-off would involve whether the "higher stakes" plaintiff (within that subclass) believed he would receive a recovery in an individual action that exceeded the "averaged" recovery for that subclass by a margin that was greater than the increased transaction costs that he would bear from opting out. Of course, the plaintiff's attorneys might have independent reasons for preferring to opt out, because of their preference for contingent fees.

To give a concrete example, if the net average recovery for a subclass were likely to be \$50,000 and a specific plaintiff believed his injuries would yield a \$75,000 recovery, his rational calculus would have to consider whether the marginal cost of opting out and pursuing an individual action would exceed \$25,000 (plus the time value of any greater delay). If we assume that plaintiff's attorneys would demand a 33 1/3% (or greater) contingent fee, there would be no incentive for the plaintiff to opt out here, because the plaintiff's expected net recovery would be greater in the class action. To be sure, the individual plaintiff's ability to make these comparisons is doubtful.

67. Some settlements have actually involved explicit payments to "buy off" nuisance claims in order "to secure the agreement" of each subclass to the settlement. See *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1084-88 (2d Cir. 1971), *aff'g*, 314 F. Supp. 710 (S.D.N.Y. 1970) (\$3 million "nuisance" award), *cert. denied*, 404 U.S. 871 (1971). Although courts may believe that such nuisance value payments are borne by the defendants, it is also possible that they represent wealth transfers by one plaintiff class to another. See also *Plummer v. Chemical Bank*, 91 F.R.D. 434 (S.D.N.Y. 1981), *aff'd*, 668 F.2d 654 (2d Cir. 1982); *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983).

to damage scheduling. Not surprisingly, those who favor subclassing (such as Professor Rosenberg) tend also to downplay the significance of causation and affirmative defenses. Perhaps, they assume that defendants with deep pockets should bear the cost of compensating even plaintiffs whose actions would be unmarketable on an individual basis on the theory that this additional liability generates more deterrence. Yet, the real cost bearer may be the other plaintiffs within the subclass (or other subclasses) who are forced to make an involuntary wealth transfer in the form of their diminished share of the action's recovery.

My sense is that these tensions within and between subclasses have not yet publicly surfaced for three distinct reasons. First, contemporary judicial practice has not made a serious attempt to structure subclasses in terms of the monetary value of the plaintiffs' claims; instead, courts typically have used more overt physical, geographic, and chronological characteristics.⁶⁸ Sometimes courts simply tell all plaintiffs to "share-and-share alike"—a result that in effect legitimates wealth transfers.⁶⁹ This approach simply compresses the same tensions into those subclasses that are characterized by a high variance in claim values. Second, lawyers today so totally dominate the process and pursue their own independent interests (which usually favor an early settlement) that the real conflicts among their clients may never surface. Third and most important, the "high-value" plaintiff has in the past generally had an available remedy by which to protect himself: he could opt out and thereby escape the tyranny of the "low stakes" majority. Yet, if we begin to restrict opting out in favor of bureaucratic justice, we must expect these problems to surface and must be prepared to design either voting rules or related procedures to ensure fair representation.

At this point, my central concern about Professor Rosenberg's proposal for bureaucratic justice can be advanced. Put simply, we have seen systems of bureaucratic justice operate in several related areas of the law to apportion claims against a third party, and in each case the outcome has been the same: wealth transfers have been encouraged. Two examples merit brief discussion. Bankruptcy law supplies the closest analogy to the mandatory class action because by definition we are dealing in it with a "limited fund"

68. One reason for this tendency involves the frequent presence of multiple defendants, not all of whom are liable to the same plaintiffs. Also, different subclasses may possess different substantive causes of action. Thus, in a securities class action, one subclass may have a cause of action under some express remedy (such as § 11 of the Securities Act of 1933) while another subclass may only be able to assert liability under Rule 10b-5. Or, different subclasses may have relied upon different alleged misstatements.

69. In the *Corrugated Container* antitrust litigation, the court approved a "share-and-share-alike plan of distribution," despite clear differences in the legal merits among claims (some of which were probably time barred by the statute of limitations), because the administrative difficulties in valuing the individual claims made discrimination among plaintiffs infeasible. See *In re Corrugated Container Antitrust Litig.*, 1981-1 Trade Cas. (CCH) § 64,114, at 76,718 (S.D. Texas 1979), *aff'd*, 659 F.2d 1322 (5th Cir. 1981).

and multiple classes. The conflict among these various subclasses is explicit in bankruptcy: secured creditors, unsecured creditors, trade creditors, preferred stockholders, common stockholders, and other special groups, such as employees, are all contending for their share of a limited pie. By almost all accounts, the process of corporate reorganization under the supervision of the bankruptcy court has tended to result in the junior creditors finding means by which to overreach senior creditors (chiefly by overvaluing the consideration paid to them).⁷⁰ This has occurred even in the face of an absolute priority rule that formally entitled the senior creditor to "full value" before junior creditors received anything.

In response to these problems, Congress adopted The Bankruptcy Reform Act of 1978, which, while it partially abandoned the absolute priority rule, did so only with respect to reorganization plans that were accepted by at least two-thirds in amount and more than one half in number of the "allowed claims" of the creditor class.⁷¹ In effect, this supermajority requirement is a recognition of the inevitable imperfections of voting rules. As a result, the Bankruptcy Act contemplates that the court will appoint the representatives of each class who are to negotiate on the class's behalf, and the Act intends these persons to be those with the largest claims in the class.⁷² Such a system parallels my earlier proposal that the largest plaintiff be given a preference in the choice of the lead counsel on the grounds that he will normally be the best monitor. Similarly, the Bankruptcy Act's emphasis on judicial appointment of the class representative differs from existing procedures in the class action where the participating plaintiff's attorneys typically elect the lead plaintiff's counsel and the steering committee. In this respect, the Bankruptcy Act implicitly recognizes the failure of elections and substitutes a regulatory paternalism. In both the class action and bankruptcy contexts, the same danger exists that small claimants will outvote larger claimants, but in the Bankruptcy Act this problem is directly addressed by requiring supermajority approval in terms of the aggregate economic interest

70. Cf. V. BRUDNEY & M. CHIRELSTEIN, *CASES AND MATERIALS ON CORPORATE FINANCE* 123-74 (2d ed. 1979). The ability of the junior creditors to cause delay and expense has been thought to enable them to compel senior creditors to settle for less than their contractual rights. In response to this problem, the courts created the "absolute priority rule" to minimize the leverage that such nuisance value gave the junior creditor. See *Case v. Los Angeles Lumber Prod. Co.*, 308 U.S. 106 (1939).

71. See 11 U.S.C. § 1126(c) (1982) (defining "acceptance" of plan to require approval by two-thirds in principal amount of all allowed claims and majority in number). A plan that is not "accepted" by a class may still be judicially approved under the more rigorous "cram down" provisions. *Id.* at § 1129(b) (1982 & Supp. 1985). A similar rule requiring approval by two thirds in amount plus a majority in number was contained in § 179 of the predecessor Bankruptcy Act (11 U.S.C. § 579).

72. For a discussion of these procedures, which obviously reflect a distrust of a simple democratic bargaining model, see V. BRUDNEY & M. CHIRELSTEIN, *supra* note 70, at 142-43.

in the action.⁷³ To be sure, this procedure cannot be easily translated to the class action where no mechanisms exist for "allowing" claims prior to the vote on the settlement plan. Clearly a "one dollar, one vote" rule would serve mainly to escalate the claimed value of each plaintiff's claims. But, if so, alternative procedures must be found.

Another context in which multiple classes bargain over the distribution of a fund to be received from a common adversary is collective bargaining. Here again, commentators have concluded that the dynamics tend to favor the voting majority of lower salaried workers at the expense of higher salaried workers.⁷⁴ Possibly as a result, there are some express limitations in the Labor Management Relations Act which are intended to preclude the "permanent submergence" of one group within a larger bargaining unit. For example, professional employees cannot be placed in a non-professional unit without their consent.⁷⁵ How well these protections work is open to question, but their failures are likely to foreshadow worse problems that will emerge in the class action context if opting out is seriously restricted.

III. SCENARIOS FOR MASS TORT REFORM

My starting point for thinking about reform of the "mass tort" class action is that two rationales justify mandatory class actions, while other

73. Note, however, that in *Los Angeles Lumber Prod.*, 92% of the bondholders consented to the participation by the stockholders, but the Supreme Court still found the proposed plan invalid. This high vote suggests that even a supermajority requirement may not give adequate protection. Conflicts of interest appear to have been as prevalent in this context as in the class action, because the investment bankers who usually played a decisive role in devising the plan were often aligned with management and the stockholders and thus did not efficiently represent the senior security holders.

74. See Freed, Polsby & Spitzer, *Unions, Fairness, and the Conundrums of Collective Choice*, 56 S. CALIF. L. REV. 461, 477 (1983); Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 MINN. L. REV. 183, 218-21 (1980). Some studies have found instances in specific unions where the skilled workers suffered a significant deterioration in their wage position relative to unskilled workers. See R. MACDONALD, *COLLECTIVE BARGAINING IN THE AUTOMOBILE INDUSTRY* 158 (1963) (discussing wage bargaining within the law). Freed, Polsby & Spitzer, *supra*, cite the case of the American Federation of Musicians which for thirteen years did not negotiate a wage increase for one group of skilled musicians in order to prefer unskilled workers. *Id.* at 477.

Professor Rosenberg responds in his Article to this assertion by arguing that the labor analogy teaches that the strongest subclass will dominate the negotiations. See Rosenberg, *supra* note 32, at 584 n.92. Even if this is so, it is not clear that the subclass of "high stakes" plaintiffs will have a higher aggregate value than the potentially far more numerous subclass of plaintiffs with low valued claims. If the latter have a higher aggregate value, then under Professor Rosenberg's own analysis they should dominate the negotiations, even if their individual claims are virtually unmarketable. Also, the problem of adverse selection may interfere with the negotiating strength of the "high stakes" subclass if this subclass comes to include a large number of "feigned" high stakes plaintiffs (who will not want to go to trial).

75. Labor Management Relations Act § 9(b)(1), 29 U.S.C. § 159(b)(1) (1982). See also Freed, Polsby & Spitzer, *supra* note 74, at 477-78 (noting policy of preventing "permanent submergence" of one group within a bargaining unit and limited efficacy of this policy).

concerns probably do not. First, the same basic "prisoner's dilemma" problem underlies both class actions and corporate re-organization practice in bankruptcy.⁷⁶ In both contexts, if claimants were permitted to proceed individually, the aggregate recovery may be reduced. Moreover, because early plaintiffs could deprive later claimants by depleting the fund from which the recovery is to be satisfied, there is a high risk of substantial variance among recoveries, which risk averse plaintiffs would prefer to avoid even at some cost in the mean recovery. Finally, piecemeal litigation may also reduce the aggregate size of this fund.⁷⁷ The answer to this problem is for the parties to agree on concerted action: namely, a common action. The second justification is the problem of "free riding"; some means must be found to tax the free rider, and a mandatory class action is one available means. Thus, the economic case for some kind of mandatory class action is strong. But what kind? These rationales point only to the need for a common proceeding and cost sharing, whether by means of mass consolidating or a mandatory class action, and they do not suggest any need for damage averaging. Moreover, I find Professor Rosenberg's confidence about the merits of "bureaucratic justice" to be unsupported by the results that have been observed for decades in the most closely comparable areas: collective bargaining and corporate reorganizations. This does not mean that I would reject the mandatory class action, but procedures must be found by which to domesticate it.

It is considerably easier to point out why most obvious reforms will not work than to identify those that may work. Both in theory and in practice, voting rules seem unlikely to alleviate the problems associated with the class action. The theoretical problems associated with voting rules—basically the

76. For a standard discussion of the "prisoner's dilemma" problem, see R. LUCE & H. RAIFFA, *GAMES & DECISIONS* (1957). Because the term now appears to be in common use (and misuse), I will not set forth the standard elements in this bargaining game, but its central feature is that, because cooperation cannot be assured, rational behavior by individuals leads to a sub-optimal decision from a collective viewpoint. Cf. Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 *STAN. L. REV.* 819, 859-62 (1981).

Here, each plaintiff, unless assured of cooperation among plaintiffs, will attempt to "beat out" the other plaintiffs in a race to the courthouse, because they all fear that the defendants' assets will not prove sufficient to satisfy all claims (or they fear that only the first judgment creditors will be eligible to receive punitive damages). The game is not, however, a zero sum one, because this race produces excess transaction costs (i.e., the multiple legal fees of all the claimants) and may reduce the value of the defendants' assets through piecemeal liquidation. Also, such a race among claimants produces variance among individual recoveries, which to risk averse plaintiffs is a disadvantage for which they would prefer to substitute some reduction in the mean recovery. See Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 *YALE L.J.* 857, 861-67 (1982) (describing similar reasons why a collective bankruptcy proceeding is preferable to a competition for individual recoveries).

77. See Jackson, *supra* note 76, at 864-65 (going concern value of business may exceed its liquidation value and only collective proceeding can realize upon it).

Arrow theorem and the likelihood of agenda manipulation⁷⁸—are well-known and will not be re-assessed here. Any practical attempt at implementation also seems likely to flounder on more prosaic problems. A “one person, one vote” voting rule seems likely to aggravate the problem of adverse selection discussed earlier. Conversely, a “one share, one vote” rule cannot work in this context where there is no mechanism for determining at the settlement stage the value that each claimant may rightfully place on his claim. That a “one share, one vote” rule works well in the bankruptcy context derives from the fact that voting on a re-organization plan only occurs after “allowable claims” are first established.⁷⁹ This difference underscores the basic infeasibility of voting procedures in large class actions: while potentially thousands, even tens of thousands, will be bound by a settlement, few are likely to vote on it or respond in any way, even if they can be reached and given adequate notice and disclosure.⁸⁰ Response rates are likely to resemble those for direct mail advertising or public opinion questionnaires. If instead we ask the attorneys to vote, this approach invites sophisticated attempts to stuff the ballot box as attorneys invite their partners and friends into the action in order to secure their votes.⁸¹

In the bankruptcy context, justifiable skepticism about the bargaining process resulted in the judicial adoption of a legal rule—the absolute priority doctrine—to protect those claimants most exposed to abuse (the senior creditors). No such substantive rule seems apparent that would work similarly in the class action field to protect plaintiffs with “high value” claims. Thus, we come full circle back to the topic of the mandatory class action and the right to opt out.

Several options therefore need to be compared on the policy level, even if they are not currently available under existing law.

A. A Limited Opt-Out: Restricting Bureaucratic Justice to the Liability Determination

Current practice is to certify a class action only with respect to the common questions of law and fact concerning liability and to permit each plaintiff

78. For a concise discussion of the problems of collective choice, see Freed, Polsby & Spitzer, *supra* note 74. They are in no sense unique to that context, nor more or less easily solved (if solvable at all).

79. See 11 U.S.C. § 1126(c) (1982). The subject of how claims are proven in bankruptcy in order to acquire voting rights is beyond the scope of this Article, but suffice it to say that no equivalent procedure could be structured into the litigation process without significantly complicating settlement (which is the method by which 90% or so of all civil actions are resolved).

80. For a sense of the limited ability of most lay persons to understand or respond intelligently to legal notices, even when carefully written and relatively clear, see Miller & Crump, *supra* note 12, at 22-23 & n.162.

81. For an instance in which this has apparently occurred, see Coffee, *supra* note 37, at 248-61; see also *In re Fine Paper Antitrust Litig.*, 98 F.R.D. 48 (E.D. Pa. 1983), *aff'd in part, rev'd in part*, 751 F.2d 562 (3d Cir. 1984).

the right to an individual trial on the issue of damages.⁸² Although Professor Rosenberg would move well beyond this stage, this compromise arguably has the desirable effect of protecting the rights of "high stakes" plaintiffs to an individualized damage determination. The problem with this compromise comes at the settlement stage. If the court certifies a mandatory class action and if a settlement is proposed and accepted, this right is effectively lost. An obvious compromise then would be to certify a mandatory class action as to liability and causation issues, but permit opting out exclusively as to damage determinations. Critics may respond to this proposal that it will again create a competition over the "limited fund" that justified mandatory class certification. However, this conclusion need not follow. To be sure, such a "prisoner's dilemma" would result if each plaintiff could rush back to his home forum to seek damages, but permission to do so need not be granted. If the same court that determined the amount of liability were also to apportion it among the claimants, both the goals of administrative efficiency and relative equity seem achievable in principle. In effect, the court could determine at the time it approves the settlement a "benchmark" or average award for the class or each subclass. It would then realize that any time it awarded above average damages, it would have to compensate in other cases by corresponding amounts.

Alternatively, the court could use a "points" system, awarding points for the severity of each individual injury (and other relevant factors) and ultimately dividing this total number of points into the fund to determine the dollar award per point. In practice, this approach might closely resemble damage scheduling in some hands, but, because it preserves the right to opt out, it better avoids the problem created by the Supreme Court's decision in *Phillips Petroleum Co. v. Shutts*, which may have given constitutional stature to the right to opt out.⁸³ Although this approach would not alone cure the problem of adverse selection (only mandatory individualized damage determinations would do that), it would reduce the amount of the wealth transfers possible by giving those with the highest damages the ability to opt out partially. This approach would have clear advantages in terms of administrative efficiency in comparison to wholly individualized proceedings, and it would produce less of an incentive to opt out because of the attorney's own self-interest in a contingent fee because all fee awards could still be controlled by the court as an aspect of the class action.

B. *Chilling the Right to Opt Out*

If, either as a matter of constitutional law or legislative preference, the plaintiff must be given a full right to opt out in all except "true" limited

82. See Rosenberg, *supra* note 32, at 568-69; Payton v. Abbott Laboratories, 83 F.R.D. 382 (D. Mass. 1979), *vacated*, 100 F.R.D. 336 (D. Mass. 1983).

83. 472 U.S. 797 (1985); see also Miller & Crump, *supra* note 12, at 39.

fund cases, another policy response could be to chill the exercise of that right. One possibility that I have raised elsewhere is to compensate plaintiff's attorneys who opt out of the class action after its filing only to the extent they obtain a recovery in excess of the average amount awarded to plaintiffs in the same class or subclass.⁸⁴ That is, if the class award were \$50,000 per plaintiff and the attorney who opted out obtained an \$80,000 recovery, the court in setting his fee award would base it only on the marginal \$30,000 by which he bettered the subclass's recovery. The rationale for such a rule resembles that underlying Rule 68 of the Federal Rules of Civil Procedure.⁸⁵ In opting out, the plaintiff imposes costs on his adversary and on the judicial system, just as he does by rejecting a reasonable settlement offer that he is unable to better at trial. In both cases, he should bear some of these private and social costs by receiving a reduced fee when he is relatively unsuccessful. Here, the appropriate cost-bearer is the attorney, not the client, because the attorney is uniquely subject to a conflict of interest in this area: he may be opting out in order to obtain higher compensation under a contingent fee agreement. The specifics of this proposal need not be discussed further here, but my basic claim is that even if a right to opt out exists, society need not subsidize the decision to opt out and may reasonably tax it. Other alternatives are also easily imagined. For example, the client who opts out could be taxed for a share of the discovery costs on which he would otherwise be able to free ride.⁸⁶

84. See Coffee, *supra* note 65, at 53-56. This proposal would require the court to supervise and limit contingent fees in individual actions, which power it does not currently exercise. Basically, fee awards in individual "tag along" cases must be integrated with class action fee awards in order to reduce the perverse incentives that today exist for plaintiff's attorneys to opt out to improve their own economic position.

85. Under *Marek v. Chesny*, 473 U.S. 1 (1985), a party forfeits his or her right to statutorily awarded fees when the party declines a settlement offer made pursuant to Rule 68 and then fails to do better at trial. By analogy, a decision to opt out resembles a decision to reject a settlement offer (except that it in effect rejects an offer made by the other plaintiffs participating in the class action), and it imposes costs on these other plaintiffs. Alternatively, the party could be required to share some portion of the class action's costs. My proposal would probably require legislative action but it is a compromise that maintains the individual's right to opt out but makes the plaintiff (or the plaintiff's attorney) bear some of the costs of that decision. One variant on this proposal might be to deny statutory fee awards to the individual plaintiff on the theory that it forces the defendants to pay twice (i.e., to the class and to the individual plaintiff), unless the plaintiff can show that his decision was justified by his "success."

86. Some efforts to tax "opting out" plaintiffs in a mass tort class action have already occurred. In "*Agent Orange*," Judge Jack Weinstein charged the plaintiff's attorneys who opted out for a share of the discovery costs incurred by the plaintiff's management committee in the class action on the grounds that they had benefitted from such discovery. See *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296, 1317 (E.D.N.Y. 1985). See also Letter from Federal District Court Judge Jack Weinstein to the Author (October 23, 1986) (copy on file at Indiana Law Journal).

The problem with Judge Weinstein's preferred solution of assessing opting-out plaintiffs "at the time they make use of MDL discovery materials," Weinstein letter, *supra* at 1317, is that it is exactly this stage at which plaintiff's attorneys are least willing to invest in the action.

C. *The Bankruptcy Alternative*

In practice, those most likely to favor mandatory class certification today appear to be the major defendants in mass tort cases.⁸⁷ They do so both because they fear continuing uncertainty, the repetitive award of punitive damages, and a Gulliver-like struggle against an army of Lilliputian plaintiffs who are increasingly learning to share costs through litigation networks. Even if these concerns are valid, however, it does not follow that they should justify sacrifice of the "high stakes" plaintiffs' interests. The other forum available to defendants is the bankruptcy court, which could be authorized to scale down excessive tort awards, invalidate multiple punitive damage recoveries, and generally seek to achieve equity among similarly situated plaintiff classes.⁸⁸ Its key attractions from a public law perspective is that

Given asymmetric stakes and substantial risk, this required early investment will erode the litigation cost differential on which they depend. Or, it may cause plaintiffs either to forego use of the discovery materials compiled in the class action or to undertake duplicative discovery (either of which results are undesirable from a public law standpoint). Moreover, a determined trial court can easily use this technique to chill opting out completely by imposing a high price on discovery materials. Because the power to tax is the power to destroy, I prefer a rule that cannot be manipulated to prohibit opting out. In this light, the superiority of a fee formula that only compensates the plaintiff's attorney on the basis of the net improvement that he obtains over the class action is that it establishes fixed and clear incentives and does not expose the attorney to a prohibitory tax that a judge could impose who wished to preclude opting out. Such fee-based regulation could also be implemented, as Judge Weinstein noted in *Agent Orange*, by subjecting all private fee arrangements involving plaintiffs who opt out to judicial approval and requiring all "counsel in such cases to report to the court any fee received so that an appropriate percentage could be ordered paid to the class . . ." *Id.*

Some will predictably argue that my proposal (or similar proposals) impermissibly chills a constitutional right to opt out, which *Shutts* may have recognized. *See supra* note 83. Still, my proposal is probably a less serious obstacle to the plaintiff who wishes to opt out than is the taxing formula adopted by Judge Weinstein. In addition, it would probably be constitutional (although undesirable on policy grounds) to authorize two-way fee shifting with respect to plaintiffs who opt out.

Finally, if the argument is raised that the client could not find an attorney willing to take his case under my proposed fee formula (which I doubt), a modification could be adopted under which the client could himself accept liability for use of the discovery materials obtained in the class action. Ultimately, the public policy goal should be not to preclude or chill opting out, but to align the plaintiff's attorney's incentives with respect to this decision with those of his client. This is what a fee formula focused on the incremental gain expected from the individual action uniquely does; it leads the attorney to seek to opt out only in circumstances where the rational client in possession of the same knowledge and expertise would have authorized this decision.

87. *See supra* note 52.

88. Some commentary has objected to the use of bankruptcy as a means by which to resolve tort claims in mass disaster cases. *See Note, The Manville Bankruptcy: Treating Mass Claims in Chapter 11 Proceedings*, 96 HARV. L. REV. 1121 (1982); *Note, Cleaning Up in Bankruptcy: Curbing Abuse of the Federal Bankruptcy Code by Industrial Polluters*, 85 COLUM. L. REV. 870 (1985). *But see Roe, Corporate Strategic Reaction to Mass Tort*, 72 VA. L. REV. 846 (1984). I do not argue that bankruptcy has not been misused but that it has great potential as the superior forum. Ironically, Johns-Manville's attempt to use bankruptcy to evade toxic tort claims for asbestos appears to have failed badly. *See Mitchell, Negative Verdict: Manville's*

it offers a collective centralized proceeding that responds to the "prisoner's dilemma" problem. While this approach would be more costly to defendants (because the bankruptcy court would also have greater power to oust management and generally realign relationships among creditors), it is arguable that such a price should be placed on the defendant's ability to escape individualized assessments of its responsibility. No specific proposals are here offered, but it needs to be clearly recognized that the bankruptcy proceeding is a substitute procedure for the mandatory class action and perhaps has been the leading historical example of bureaucratic justice administered by a court.

CONCLUSION

This Article has chiefly sought to frame alternatives and point out some of the considerations on which policy analysis should focus. That is the easier task, and I leave to others the much harder task of tailoring a policy within these parameters.

In overview, one last generalization, however, cannot be resisted. Class actions are too easily conceptualized as a process by which individual plaintiffs organize to advance their claims against their legal adversary. This is only half the story. Often, the more difficult and contentious disputes involve the distribution of the recovery, both within the class and between attorney and client. Visions of "bureaucratic justice" must be tested against that reality. Moreover, the usual egalitarian values that underlie proposals that move differently situated individuals toward the mean seem largely inapplicable to the mass tort context where plaintiffs are differentiated less by class, race, or wealth than by the severity of their injuries.⁸⁹ Against such a backdrop, the propriety of asking "high stakes" plaintiffs to subsidize "low stakes" plaintiffs seems to raise more troubling issues of justice than its proponents have yet recognized.

Bid to Evade Avalanche of Lawsuits Proves Disappointing, Wall St. J., July 15, 1986, at 1, col. 7; Glaberson & Atchison, *Manville's Asbestos Victims May Have Won the Store*, BUSINESS WEEK, August 12, 1985, at 23. Not only has its senior management been replaced by the bankruptcy court, but as much as 80% of its common stock may be placed in a trust fund for victims and two plaintiffs' attorneys have been placed on its board of directors. I am unaware of any mass tort class actions that have been this successful from the plaintiffs' perspective. Uniquely, this forum can better respond to future victims and claimants by revising the firm's capital structure.

89. I recognize that wealth and class correlate positively with the likely economic recovery that the same physical injury will support for different individuals. Still, I think this point is of secondary significance in most mass tort cases, in part because of the greater significance in my judgement of the problem of adverse selection which might allow "weak" plaintiffs to obtain wealth transfers in class actions from "strong" plaintiffs if damage averaging were followed.