

# Promoting Justice Through Public Interest Advocacy in Class Actions

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#### INTRODUCTION

2011 witnessed a number of blockbuster developments in the world of class action litigation. The Supreme Court's opinion in *Wal-Mart Stores, Inc. v. Dukes*<sup>1</sup>—the largest civil rights class action suit in United States history—has the potential to drastically reshape the fundamentals of the class certification analysis.<sup>2</sup> In the course of rejecting a district court determination that plaintiffs' challenges to a national retailer's uniform personnel policies exhibited

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1. 131 S. Ct. 2541 (2011).

2. See Catherine Fisk & Erwin Chemerinsky, *The Failing Faith in Class Actions: Wal-Mart v. Dukes and AT&T Mobility v. Concepcion*, 7 DUKE J. CONST. L. & PUB. POL'Y 73, 77-85 (2011) (discussing how *Dukes* effectively imposed a heightened standard of proof at the class certification stage and the impact this holding will have on future proposed classes); Judith Resnik, Comment, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 148-50 (2011) (same); Daniel Fisher, *Wal-Mart Case Wounds but Doesn't Kill the Class Action*, FORBES (June 21, 2011), <http://www.forbes.com/sites/danielfisher/2011/06/21/wal-mart-case-wounds-but-doesnt-kill-the-class-action/> (same).

sufficient commonality for class treatment, the Court subjected the proposed class to an increased level of scrutiny and appears to have raised the bar for all future groups seeking class certification.<sup>3</sup> The Court also decided *AT&T Mobility LLC v. Concepcion*,<sup>4</sup> issuing an opinion that states that arbitration clauses in consumer contracts will be enforced, even if they force parties to forfeit their ability to seek any form of class-based relief.<sup>5</sup> The societal impacts that these precedents will have cannot be understated: not only will they change the landscape of aggregate litigation by altering the procedural avenues by which individuals are able to seek vindication of their rights, but they will modify the behaviors of employers, producers of consumer goods, and other business entities.<sup>6</sup> The lives of millions of individuals—the vast majority of whom were not parties in these suits and whose interests were not represented—will be affected by these decisions.<sup>7</sup>

The Justices at One First Street, however, were not responsible for 2011's class action decision with the largest potential ramifications for society. That distinction belongs to United States Court of Appeals Judge Denny Chin of the Second Circuit, who, when sitting by designation in the Southern District of New York, rejected the proposed settlement in the *Google Books* case.<sup>8</sup> Even though Judge

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3. See Fisk & Chemerinsky, *supra* note 2, at 79-80. The district court's decision was *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004), *aff'd in part, remanded in part*, 603 F.3d 571 (9th Cir. 2010), *rev'd*, 131 S. Ct. 2541 (2011).

4. 131 S. Ct. 1740 (2011).

5. See Fisk & Chemerinsky, *supra* note 2, at 85-96; Resnik, *supra* note 2, at 121-30; Editorial, *Gutting Class Action*, N.Y. TIMES, May 13, 2011, at A26; Brian Fitzpatrick, *Key Case Could End Class-Action Suits*, S.F. CHRON., Nov. 7, 2010, at E8.

6. See Resnik, *supra* note 2, at 91-93.

7. For instance, if future courts apply the holding in *Concepcion* liberally, it is probable that *all* consumer contracts will force individuals to waive their rights to seek class-based relief, which, in many cases, will prevent consumers from having a viable means for pursuing claims. Further, as discussed *infra* Part II, consumers and employees will be less likely to receive fair treatment from corporations whose bad behaviors had been kept in check by the threat of class-based liability. See Resnik, *supra* note 2, at 91-93.

8. *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 669-70 (S.D.N.Y. 2011).

Chin's decision did not resolve the core issues of the suit or change the status quo, it was significant because of the colossal public impacts that would have resulted from adoption of the settlement.<sup>9</sup> Had it been approved, the *Google Books* settlement would have absolved Google of liability for engaging in the wholesale copying and online posting of copyrighted works without permission and created a royalty scheme that would have granted Google the right to continue doing so into perpetuity.<sup>10</sup> Adoption of the settlement would have revolutionized copyright law, drastically expanding the public's ability to access out-of-print written works and significantly altering the copyright rights of all current and future creators of original works.<sup>11</sup> Despite the important issues that were at stake, the public's interests in the resolution of the suit lacked any type of direct representation.

These decisions provide concrete examples of how aggregate litigation can reshape society, with the verdicts and (more commonly) settlements reached in these suits having impacts that reach far beyond the original dispute and into the lives of the public. The fact that class action litigation can affect such changes should not be mistaken for an unintentional byproduct, as it is clear that the parties involved in drafting and enacting the procedural rules authorizing such suits were aware that they would have these types of consequences.<sup>12</sup> Further, attempting to characterize the oversized impacts of these suits as

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9. See Giancarlo F. Frosio, *Google Books Rejected: Taking the Orphans to the Digital Public Library of Alexandria*, 28 SANTA CLARA COMPUTER & HIGH TECH. L.J. 81, 81 (2011) ("Digitization projects, such as the Google books project, are reviving the hope that [the dream of a universal depository of knowledge] may come true."); Alessandra Glorioso, Note, *Google Books: An Orphan Works Solution?*, 38 HOFSTRA L. REV. 971, 971-74 (2010) (discussing how the proposed settlement would have given Google a constructive monopoly on copyrighted materials with unknown rightsholders ("orphan works")).

10. See Glorioso, *supra* note 9, at 974; Amir Efrati & Jeffrey A. Trachtenberg, *Judge Rejects Google Books Settlement*, WALL ST. J., Mar. 23, 2011, at B1.

11. Frosio, *supra* note 9, at 81; Peter B. Maggs, *The Balance of Copyright in the United States of America*, 58 AM. J. COMP. L. 369, 374 (2010); Pamela Samuelson, *Google Book Search and the Future of Books in Cyberspace*, 94 MINN. L. REV. 1308, 1310 (2010).

12. Indeed, there are indications that one of the primary motivations for revising the class action rule in 1965 was consideration of the societal benefits that could be reaped from such suits' large impacts. See *infra* Part I.C.2.

inherently good or bad for society makes little sense—whether the resolution of a class-based suit has a beneficial or detrimental impact will depend on the particulars of the case and the way in which the claims are resolved. What is not beyond critique, however, is questioning whether the status quo is structured in a way that ensures that class-based suits are adjudicated in a way that furthers society's broader interests.

This Article expands upon existing critiques of aggregate litigation by introducing the idea that many of the common criticisms levied on the class action device can be linked to the judicial system's failure to recognize the public's heightened interests in the adjudication of class-based suits. That our system is not designed to take these impacts into consideration is not only peculiar, but also a major structural problem given the colossal repercussions that class action suits can have for the general public. Identification of this shortcoming suggests fertile grounds for reform.

The reform developed in this Article—the Public Advocate proposal—breaks new ground by introducing a new actor to class action suits, changing the fundamental dynamics of representative litigation and capturing numerous benefits. This new litigant—the Public Advocate—would represent the public's interest in class action litigation, ensuring that class-based suits are adjudicated in an expedient, just manner and that they are resolved in ways that respect the public's interests. By giving a voice to a group that has been marginalized by the status quo, this reform would fix a fundamental flaw in our representative litigation system and remedy many of the problems associated with aggregate suits.

After reviewing the history of the procedural rules authorizing representative litigation in Part I, Part II of this Article reviews the literature discussing the problems with modern class action practice, focusing on how representative litigation has detrimentally affected not only the judicial system and litigants, but also the public as a whole. The dire state of class action litigation is primarily attributed to courts inappropriately denying class certification to certain groups of litigants, the interests of class members and the public being inadequately represented, and the prevalence of frivolous suits. Part III introduces the Public Advocate proposal and argues that the best way to address the status quo's deficiencies is to add

third-party public litigants—Public Advocates—to federal class actions. Specific details concerning the reform are supplied, including a description of the role that Public Advocates would play in class action suits (and how this role resembles the roles occupied by attorneys in other areas of law), institutional details about how Public Advocates would be organized and where they could be situated within the federal government, and reasons why this reform would help resolve the current system's problems.

### I. A BRIEF HISTORY OF REPRESENTATIVE LITIGATION

Before delving into the realities of modern class action practice and the potential benefits that could be garnered through reform, a brief review of group-based litigation's past is warranted. Over the last millennium, the procedural rules allowing individuals to represent much larger groups in civil suits have gone through a stop-and-start evolutionary process. From the judiciary's first uses of representative classes to resolve competing property claims in twelfth-century England to the explosion of securities and product liability suits in the end of the twentieth century, representative litigation's developmental history reveals several themes. The most prominent of these is the growth of the device's availability to litigants over time. Analysis of this gradual expansion reveals policymakers' beliefs that significant public goods would be captured by increased use of aggregate litigation.<sup>13</sup> Identification of the benefits that were meant to flow from increased use of class

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13. In order to avoid dedicating a disproportionate amount of space to this topic, this Part discusses only the most pivotal moments in the evolution of representative litigation. The most recent modifications to class action litigation—the creation of subsection (f), the revision of subsection (c), the enactment of the Class Action Fairness Act and the Private Securities Litigation Reform Act—will not be discussed as they did not modify core aspects of Rule 23. For academic discussions concerning these amendments, see Alan B. Morrison, *Improving the Class Action Settlement Process: Little Things Mean a Lot*, 79 GEO. WASH. L. REV. 428 (2011) (discussing how class action procedures have changed since the 1970s and arguing that these changes have improved the settlement process); Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439 (2008); John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 MISS. C. L. REV. 323, 340-60 (2005); George F. Sanderson III, Note, *Congressional Involvement in Class Action Reform: A Survey of Legislative Proposals Past and Present*, 2 N.Y.U. J. LEGIS. & PUB. POL'Y 315, 327-34 (1999).

action litigation sets the stage for Part II's discussion of the problems with contemporary class action practice.

A. *English and Early American Representative Litigation*

As far as legal historians can tell, the first use of representative litigation occurred in an English court of equity in 1199.<sup>14</sup> It wasn't until the seventeenth century, however, that England's courts began to apply consistent standards to suits that sought relief on behalf of (or against) a class of individuals.<sup>15</sup> During this period, courts looked to a three-part test articulated by the Court of Chancery, permitting representative actions when: (1) the number of parties involved in the suit was large enough that filing individual suits would be impracticable, (2) all the members of the proposed class had a joint interest in the resolution of the suit, and (3) the named parties adequately represented the interests of the class.<sup>16</sup>

The rules governing representative litigation changed very little in the period following the creation of the Court of Chancery's test<sup>17</sup> and by the middle of the nineteenth

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14. STEPHEN YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 38-39, 47-48 (1987) [hereinafter YEAZELL, MEDIEVAL GROUP LITIGATION] (citing Martin, Rector of Barkway c. Parishioners of Nuthamstead (1199) (Ch.), reprinted in *Select Cases from the Ecclesiastical Courts of the Province of Canterbury, c. 1200-1301*, 95 SELDEN SOCIETY 8 (Norma Adams & Charles Donahue, Jr. eds., 1981)). Given that modern class action practice predominantly involves plaintiff classes suing individual defendants, it is interesting that the earliest reported use of representative litigation saw an individual plaintiff suing a class of defendants. For a discussion of how the primary use of representative suits has gradually shifted from suits involving defendant classes to its current state, see Stephen C. Yeazell, *The Past and Future of Defendant Classes in Collective Litigation*, 39 ARIZ. L. REV. 687 (1997) [hereinafter Yeazell, *Past and Future*].

15. YEAZELL, MEDIEVAL GROUP LITIGATION, *supra* note 14, at 69-71; Zechariah Chafee, Jr., *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297, 1303-09 (1932).

16. Chafee, *supra* note 15, at 1308-09.

17. YEAZELL, MEDIEVAL GROUP LITIGATION, *supra* note 14, at 100-01; Yeazell, *Past and Future*, *supra* note 14, at 694. Interestingly, the use of representative parties in England decreased from this point of time forward, and this type of litigation neared extinction in the latter half of the nineteenth century. See YEAZELL, MEDIEVAL GROUP LITIGATION, *supra* note 14, at 197-212 (analyzing this trend in litigation and discussing possible reasons for its occurrence).

century, the fledgling American court system had imported the English test.<sup>18</sup> While the language that courts used to describe the prerequisites for class suits changed over time, the requirements remained the same.<sup>19</sup> Hence, the evolution of representative litigation remained relatively stagnant from the time the Court of Chancery developed its three-part standard in the seventeenth century to the adoption of the Federal Rules of Civil Procedure in 1938.<sup>20</sup>

### B. *The 1938 Federal Rules of Civil Procedure*

The next major development in the history of representative litigation occurred when Congress adopted Rule 23 of the 1938 Federal Rules of Civil Procedure. In drafting and enacting Rule 23, the Advisory Committee on the Civil Rules, the Supreme Court of the United States, and Congress sought to expand the use of the class construct, believing that allowing more parties to aggregate their claims would accrue efficiency and equity gains that would benefit society.<sup>21</sup> While the class recognition rules set

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18. The English procedural approach was introduced to America's federal jurisprudence via Federal Equity Rule No. 48. *See Rabiej, supra* note 13, at 324 & n.8; *see also* *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 302-03 (1853). Similar provisions could be found in various states' procedural rules. Chafee, *supra* note 15, at 1300-01 & n.7. In accordance with these rules, courts of equity could enter a single "bill of peace" that would resolve class-based claims. *Id.* at 1309-10; Thomas D. Rowe, Jr., Comment, *A Distant Mirror: The Bill of Peace in Early American Mass Torts and Its Implications for Modern Class Actions*, 39 ARIZ. L. REV. 711, 713 (1997).

19. *See* sources cited *supra* note 15.

20. *See* H.R. DOC. NO. 75-588, at 22-23 (1938) (Advisory Committee's notes to Rule 23(a) of the 1938 Federal Rules of Civil Procedure) (discussing Equity Rule No. 38 (Class Representation), which was a revised version of Equity Rule No. 48); DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 11 (2000); Arthur R. Miller, Comment, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 669 n.24 (1979) ("Federal Equity Rule No. 38 (1912) provided: 'When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.'" (quoting JAMES LOVE HOPKINS, FEDERAL EQUITY RULES (8th ed. 1933))).

21. 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1752 (3d ed. 2005); *see also* Mary J. Davis, *Toward the Proper Role for Mass Tort Actions*, 77 OR. L. REV. 157, 169 (1998) ("The class action procedure thus evolved as a product of concern for the 'convenient and economical'



forth in the 1938 version of the Federal Rules ended up being replaced less than thirty years after their adoption, they served as an important stepping-stone in the developmental odyssey of class-based litigation.

The 1938 version of Rule 23 authorized federal courts to recognize three different types of representative classes.<sup>22</sup> Although the original rule did not provide names for each type of class, practitioners quickly labeled them true, hybrid, and spurious classes. True classes involved groups asserting rights that were “joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it.”<sup>23</sup> This category included, for example, a group of individuals with joint interests in a trademark filing suit to enjoin a third party’s infringing use of that mark.<sup>24</sup> Hybrid classes existed in suits involving groups of individuals, each of whom had a several right in the same property, where “the object of the action is the adjudication of claims which do or may affect specific property involved in the action.”<sup>25</sup> These classes can be thought of as those present in basic “limited fund” cases, where numerous creditors seek repayment from an insolvent borrower and courts must determine which creditors will receive less than the face value of their claim.<sup>26</sup> Finally, spurious classes consisted of groups of individuals seeking to assert rights that were several with there being “a common question of law or fact affecting the

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provision of justice, coupled with the substantive concern of affording a meaningful remedy to large numbers of otherwise disenfranchised victims of breached obligations.” (footnotes omitted)).

22. FED. R. CIV. P. 23 (1938).

23. FED. R. CIV. P. 23(a)(1) (1938).

24. *E.g.*, *Grand Rapids Furniture Co. v. Grand Rapids Furniture Co.*, 127 F.2d 245, 251-52 (7th Cir. 1942); *Matlaw Corp. v. War Damage Corp.*, 7 F.R.D. 349, 351-52 (S.D. Ind.), *aff’d*, 164 F.2d 281 (7th Cir. 1947).

25. FED. R. CIV. P. 23(a)(2) (1938).

26. *E.g.*, *Pa. Co. for Ins. on Lives & Granting Annuities v. Deckert*, 123 F.2d 979, 982-83 (3d Cir. 1941); *see also* H.R. DOC. NO. 75-588, at 24 (1938) (Advisory Committee’s notes to Rule 23(a)(2) of the 1938 Federal Rules of Civil Procedure) (noting that adjudications involving hybrid classes bore a strong resemblance to modern bankruptcy proceedings); RICHARD L. MARCUS & EDWARD F. SHERMAN, *COMPLEX LITIGATION* 219 (4th ed. 2004) (“The prototype of the hybrid class action was the equity receivership.”).

several rights and a common relief . . . sought.”<sup>27</sup> An example of a spurious class would be a group of individuals who purchased debentures from a company which had made false statements in its prospectus and filed suit under the applicable securities law.<sup>28</sup> Courts distinguished between judgments entered in suits involving the three different types of classes; while verdicts entered in cases involving true and hybrid classes were considered binding on all class members, verdicts entered in cases involving spurious classes were not given any preclusive effect.<sup>29</sup>

Comparing the 1938 version of Rule 23 with the English rule that it replaced illuminates the goals and concerns that animated the reform. Rule 23 expanded the range of situations in which representative litigation could occur: whereas the equitable rules allowed class representation *only* when members of the class had a joint interest, Rule 23 authorized courts to recognize classes for groups with either joint or several interests.<sup>30</sup> While this expansion was partially constrained by the fact that courts refused to consider judgments entered for (or against) spurious classes as binding on absent class members, the adoption of Rule 23 signaled an interest in increasing the ability of courts to adjudicate large numbers of claims simultaneously.<sup>31</sup>

This reform was likely motivated by a belief that greater use of this procedural device would benefit society by helping the court system produce more efficient,

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27. FED. R. CIV. P. 23(a)(3) (1938).

28. *E.g.*, *Escott v. BarChris Constr. Corp.*, 283 F. Supp. 643, 704-05 (S.D.N.Y. 1961); *Kaeppler v. James H. Matthews & Co.*, 180 F. Supp. 691, 695 (E.D. Pa. 1960).

29. HENSLER ET AL., *supra* note 20, at 11-12. The non-preclusive nature of spurious class suits led some to view the spurious class as simply another procedural mechanism by which the permissive joinder of parties could be achieved, rather than a true form of representative litigation. David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implication for the Modern Class Action*, 63 FLA. L. REV. 657, 673-74 (2011) (“[T]he spurious class action promised little beyond that which permissive joinder under Rule 20 could accomplish.”).

30. *Compare* Rabiej, *supra* note 13, at 324 (discussing Fed. Equity R. No. 48), and HENSLER ET AL., *supra* note 20, at 10-11 (discussing Fed. Equity R. No. 38), with FED. R. CIV. P. 23 (1938).

31. *See* HENSLER ET AL., *supra* note 20, at 11-12.

consistent, and just results.<sup>32</sup> The use of representative litigation for groups of individuals with joint interests—Rule 23’s true classes—appears to have been designed to advance these interests. By empowering one individual to take action on behalf of all similarly situated individuals, the use of true classes would prevent duplicative suits from being filed and eliminate the risk that multiple courts would hear an issue and enter inconsistent judgments. The use of representative litigation for groups of individuals with several interests in certain property—Rule 23’s hybrid classes—was set up to realize similar benefits. By allowing all claimants to form a single hybrid class, the rule would prevent each individual from having to file her own suit, which not only helped claimants and reduced the burdens placed on the courts, but also helped to circumvent the problems associated with different courts entering inconsistent rulings regarding parties’ property interests. Finally, while the creation of the spurious class did not have these beneficial effects, it signified an initial, albeit hesitant, desire to provide courts with a powerful aggregation tool—one that would allow them to efficiently adjudicate suits that involved a large number of individuals with claims that involved common issues of fact and law.

Despite the best intentions of those who drafted and enacted the initial version of Rule 23, the reform was a failure.<sup>33</sup> Practitioners, judges, and commentators struggled when deciding whether claims fell within the rule’s three categories.<sup>34</sup> Further, there was widespread uncertainty among these groups regarding several key doctrinal points, such as the extent to which class members were bound by judgments and how jurisdictional requirements applied to class-based claims.<sup>35</sup> Because of these problems, the enactment of the 1938 version of Rule 23 did not generate the societal benefits that its creators had hoped for.

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32. See John C. Harkins, Jr., *Federal Rule 23—The Early Years*, 39 ARIZ. L. REV. 705, 709-10 (1997).

33. See ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 200 (1950) (noting “enormous complications” resulting from the new class actions); WRIGHT ET AL., *supra* note 21, § 1752; Resnik, *supra* note 2, at 141.

34. CHAFEE, *supra* note 33, at 257-58; Rabiej, *supra* note 13, at 331.

35. H.R. DOC. NO. 89-391, at 38-45 (1966) (Advisory Committee’s notes to the 1966 amendment of Rule 23); Rabiej, *supra* note 13, at 331.

C. *The 1966 Revision to Rule 23*

The legal community's dissatisfaction with the state of class-based litigation led to a massive overhaul of Rule 23 in 1966, just three decades after the original version of the Rule had been enacted.<sup>36</sup> As shall be discussed below and in Part II, the revised rule has succeeded in expanding the use of the class action device.<sup>37</sup> The new version of the Rule, however, has only achieved mixed results in advancing the equitable and efficiency-based interests that motivated the Rule's original enactors to seek an increase in representative litigation in the first place. As described by one of the individuals involved in drafting the revised Rule:

The entire reconstruction of the Rule bespoke an intention to promote more vigorously than before the dual missions of the class-action device: (1) to reduce units of litigation by bringing under one umbrella what might otherwise be many separate but duplicating actions; (2) even at the expense of increasing litigation, to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.<sup>38</sup>

That these goals motivated the groups responsible for the revision of Rule 23—the Advisory Committee on the Civil Rules, Supreme Court, and Congress (collectively, “the revisionists”)—is evident in the way they modified the class

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36. Judith Resnik, *From 'Cases' To 'Litigation,'* 54 LAW & CONTEMP. PROBS., Summer 1991, at 5, 8-9 (stating that one of the primary motivations behind reforming Rule 23 was to do away with the confusing class categories set forth in the former Rule). For a basic, but thorough, overview of Rule 23, see JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 659-734 (9th ed. 2005); see also John Bronsteen & Owen M. Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419 (2003). For a review of the amendments to class action procedure since 1966, see sources cited *supra* note 2.

37. See, e.g., Bruce Bertelsen et al., Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L.J. 1123, 1129 (1974) (analyzing case filings and finding that the new rule did lead to an increase in class action suits). *But see* Miller, *supra* note 20, at 670-76 (attributing the dramatic increase in class action suits following 1966 to factors other than the enactment of the revised Rule).

38. Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969).

certification requirements and in the way they expanded the binding effect of judgments on class members.<sup>39</sup>

Subsections (a) and (b) of the 1966 version of Rule 23 radically redefined the types of litigants that could qualify for class treatment.<sup>40</sup> By abandoning the earlier rule's insistence that class members share joint interests or specific types of several interests, the first two subsections of the new rule ensured that the class certification decision would no longer be dictated by the results of a highly technical analysis.<sup>41</sup> Under the new paradigm, the certification decision depended on a judicial determination as to whether (1) the proposed class possessed the non-technical, prerequisite group characteristics listed in subsection (a) of the Rule, and (2) the proposed class's suit had qualities that matched one of the categories set forth in subsection (b) of the Rule.<sup>42</sup> The revisionists defined the characteristics and categories listed in the revised Rule in a broad manner that opened the class action door to litigants who previously would have lacked access.<sup>43</sup> By instituting these changes, the revisionists expressed their desire to expand the types of groups that could engage in class-based litigation, as well as their increasing comfort with allowing members of the judiciary to exercise a greater degree of discretion when determining whether class certification was appropriate.

While it is clear that the new Rule was meant to increase the use of representative classes in civil suits, determining why the revisionists expanded access in the

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39. See Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 48 (1975) (identifying reduced transaction costs, individual compensation, and deterrence of wrongful conduct as the chief policies advanced by the procedural expansion of class action litigation).

40. Compare FED. R. CIV. P. 23 (1938), with FED. R. CIV. P. 23 (1966).

41. Rabiej, *supra* note 13, at 331-33.

42. FED. R. CIV. P. 23(a)-(b).

43. Judith Resnik, *Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act*, 156 U. PA. L. REV. 1929, 1940 (2007) ("As for the focus on the consumer, securities, and antitrust cases, the drafters of Rule 23 assumed that groups of plaintiffs, assisted by lawyers attracted by fees, would enable federal judges to enforce federal regulations aimed at corporate misbehavior.").

specific ways they did is a tougher task.<sup>44</sup> There are two basic ways to determine the motivations behind the 1966 reform of Rule 23: (1) looking at the statements and records of individuals involved with the drafting and enactment of the revised Rule, and (2) analyzing the revised Rule itself and attempting to decipher intent from its provisions. This Article primarily utilizes the latter approach.<sup>45</sup>

1. *Types of Certifiable Classes.* The general claim that the 1966 revision of Rule 23 sought to advance efficiency and fairness interests by increasing access to the class action device is uncontroversial to the point of being banal.<sup>46</sup> Greater insight into the specific goals that the reform was meant to accomplish can be gained by analyzing the mechanisms by which the revised Rule extended and (even more importantly) refused to extend access to aggregate litigation.<sup>47</sup> Subsection (b) of the Rule authorized class certification for groups of individuals that could show:

- that non-class litigation could lead to courts issuing judgments that make contradictory demands on a defendant ((b)(1)(A) classes) or that are dispositive of other party's interests ((b)(1)(B) classes);

- that the party opposing the potential class treated all of the class members in generally the same manner and that injunctive relief would resolve the class members' problems ((b)(2) classes); or

- that there are so many questions of law or fact common to the potential class members' claims that use of

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44. Kaplan, *supra* note 38, at 497.

45. Benjamin Kaplan, the official Reporter for the committee that drafted the revised Rule, has discussed the motivations that led to the creation of the modern Rule. *Id.*; Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 375-400 (1967); *see also* Dam, *supra* note 39, at 48.

46. JOHN J. COUND ET AL., CIVIL PROCEDURE 703-05 (6th ed. 1993) (noting that the 1966 amendment expanded access to class actions); Robert G. Bone & Davis S. Evans, *Class Certification and Substantive Merits*, 51 DUKE L.J. 1251, 1259-60 (2002) ("The shift . . . opened up new possibilities for the class action and led to greatly expanded use of the device."); Rabiej, *supra* note 13, at 327-28.

47. Resnik, *supra* note 2, at 142 ("[I]ts subparts were . . . crafted with discrete sets of plaintiffs in mind.").

representative litigation should be permitted ((b)(3) classes).<sup>48</sup>

The revisionists' decision to enumerate specific types of groups eligible for class certification raises the question why these categories, as opposed to others, were selected for inclusion.<sup>49</sup>

Subsection (b)(1) classes are defined in such functionalist language that the revisionists' intention in enacting this part of the Rule can be seen in the text of the provision. Rule 23(b)(1) authorizes certification of classes whenever doing so would either avoid the risk that multiple separate "adjudications . . . would establish incompatible standards of conduct for the party opposing the class" or avoid the problems posed by individual adjudications that "would be dispositive of [or substantially impair] the interests of" other potential class members.<sup>50</sup> Given these criteria, it is clear that the revisionists extended access to these groups because they thought doing so was necessary to advance equity interests that traditional litigation did not address. More specifically, the revisionists viewed representative litigation as a way to eliminate the problems created when a judgment entered in one lawsuit forced a party to take a certain action, the performance of which would cause the party to violate the judgment entered against them in a related but separate lawsuit.<sup>51</sup> They also

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48. FED. R. CIV. P. 23(b)(1)-(3).

49. See WRIGHT ET AL., *supra* note 21, § 1753 ("[T]he Committee felt that the original [1936] rule 'did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness,' [and that the amended rule] describes in more practical terms the occasions for maintaining class actions."); see also *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557-59 (2011).

50. FED. R. CIV. P. 23(b)(1).

51. H.R. DOC. NO. 89-391, at 37-45 (1966) (Advisory Committee's notes to the 1966 Amendment of the Federal Rules of Civil Procedure); see also *Corley v. Entergy Corp.*, 222 F.R.D. 316, 320 (E.D. Tex. 2004), *aff'd sub nom. Corley v. Orangefield Indep. Sch. Dist.*, 152 F. App'x 350 (5th Cir. 2005); *Van Gemert v. Boeing Co.*, 259 F. Supp. 125, 130 (S.D.N.Y. 1966); Yeazell, *Past and Future*, *supra* note 14, at 696. Courts have also had to combat this type of problem when dealing with conflicts between federal and state laws. See, e.g., *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992); *Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp. Relations Comm'n*, 427 U.S. 132, 138-46 (1976).

believed that representative litigation could be used to prevent opportunistic, collusive, or ineptly represented parties from being able to obtain judgments that would unfairly preclude other individuals from asserting similar claims.<sup>52</sup>

The revisionists' decision to extend class action access to the groups described in subsection (b)(2) was also motivated by equitable concerns.<sup>53</sup> Analysis of the types of suits authorized under this subsection, however, reveals the problems it was designed to address.<sup>54</sup> By offering class certification to any group of individuals seeking injunctive relief against a party who "acted or refused to act on grounds that apply generally" to the group, subsection (b)(2) opened the courthouse doors to certain types of litigants—those seeking to prospectively modify another party's behavior at more than an individualized level—who had previously lacked an effective form of relief.<sup>55</sup> Examples of such groups would be individuals who claim that a defendant's policy or pattern of behavior infringes their civil rights, violates employment discrimination laws, or ignores environmental regulations.<sup>56</sup> The expansion of class action

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52. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833 (1999) ("[The Advisory Committee] spied out situations where lawsuits conducted with individual members of the class would have the practical if not technical effect of concluding the interests of the other members as well, or of impairing the ability of the others to protect their own interests." (quoting Kaplan, *supra* note 45, at 388)).

53. Memorandum from John P. Frank to the Civil Rules Comm., Response to 1996 Circulation of Proposed Rule 23 on Class Actions (Dec. 20, 1996), in ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 2 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO RULE 23, 260, 266 (1997) ("[23(b)(2) classes were intended to] create a class action system which could deal with civil rights and, explicitly, segregation.").

54. Resnik, *supra* note 2, at 84, 142.

55. *Id.*

56. Edward F. Sherman, *Introduction to the Symposium—Complex Litigation: Plagued by Concerns Over Federalism, Jurisdiction, and Fairness*, 37 AKRON L. REV. 589, 591 (2004) ("The paradigms [of Rule 23(b)(2) class actions seeking declarative or injunctive relief] have been the 'civil rights' suits of the 1960s and 1970s that helped bring an end to segregation and enforced the civil rights acts, and the 'institutional reform' suits of the 1970s and 1980s that applied constitutional and statutory standards to governmental institutions like prisons, mental hospitals, and welfare departments, and to companies charged with unfair employment practices." (footnotes omitted)); Jack Greenberg, *Civil*



access to these litigants constituted an attempt to make our procedural system more equitable by creating a means for individuals to bring injunction-based reform litigation.<sup>57</sup>

Lastly, we turn to the goals the revisionists sought to achieve by authorizing class certification for the groups described in subsection (b)(3). The definition of (b)(3) classes differs from those set forth in the earlier subsections in that it directly indicates that efficiency concerns played a role in the expansion of representative litigation.<sup>58</sup> The language in subsection (b)(3) is vague, essentially offering class certification to any group of litigants who could show that class treatment of their claims would be efficient. This lack of specificity stands in marked contrast from the (b)(1) and (b)(2) class definitions, which are concrete enough that they seemed to be tailored to address specific deficiencies in the status quo. Rather than limit the use of class certification to suits involving parties that would be harmed if individual litigation occurred or groups seeking uniform injunctive relief, this provision authorizes certification for *any group* that can show that “questions of law or fact common to class members predominate over any question affecting only individual members” and that use of a “class action [would be] superior to other available methods . . . [of] adjudicating the controversy.”<sup>59</sup> The language of subsection (b)(3) showcases not only the revisionists’ conviction that broader use of representative suits could result in significant efficiency gains in our courts, but also their belief that it was necessary to subject “common issue” classes to a higher

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*Rights Class Actions: Procedural Means of Obtaining Substance*, 39 ARIZ. L. REV. 575, 577 (1997) (“Indeed, those who revised the federal class action rules in 1966 took particularly into account the concerns of civil rights litigants. Professor Albert Sacks, who was Associate Reporter of the revised rules, was intimately familiar with civil rights litigation and had in mind the role of class actions in civil rights litigation in formulating the rule. . . . The partnership between class actions and civil rights has grown to such an extent that the Advisory Committee revising Rule 23 noted that, ‘subdivision (b)(2) has cemented the role of class actions in enforcing a wide array of civil rights claims.’”).

57. H.R. DOC. NO. 89-391, at 41 (1966) (Advisory Committee’s notes to the 1966 Amendment of the Federal Rules of Civil Procedure).

58. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997).

59. FED. R. CIV. P. 23(b)(3); see also Yeazell, *Past and Future*, *supra* note 14, at 697.

level of scrutiny—in the form of the predominance and superiority requirements—prior to certification.<sup>60</sup>

The revisionists' inclusion of subsection (b)(3) also advanced an important equitable interest. Prior to the revised Rule's enactment, the high costs of litigation meant that many individuals who had low-value claims against other parties were economically barred from pursuing these claims, as the cost of suing would exceed any damages they might be awarded.<sup>61</sup> The creation of (b)(3) classes removed this economic deterrent—by allowing large numbers of individuals to aggregate their claims and pursue them in a single action, it reduced per-litigant transaction costs to the point where individuals would be able to benefit from small damage awards.<sup>62</sup>

2. *Prerequisite Class Characteristics.* Analysis of the 23(b) class types has established that the 1966 revision of Rule 23 was intended to expand access to class actions and capture fairness and efficiency gains. If we understand the broad class categories articulated in subsection (b) to be part of the revisionists' effort to increase access to class certification, subsection (a)'s prerequisites should be viewed as their attempt to create a quality control mechanism. The revisionists recognized that even when a group of individuals qualified for class treatment under subsection (b), the facts underlying certain claims might make it

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60. *Wal-Mart*, 131 S. Ct. at 2558; HENSLER ET AL., *supra* note 20, at 14; Resnik, *supra* note 2, at 143.

61. See Memorandum from the Advisory Comm. on Civil Rules to the Chairman and Members of the Standing Comm. on Practice and Procedure of the Judicial Conference of the U.S., Summary Statement of the Civil Rules Amendments Recommended for Adoption 7 (June 10, 1965) ("If separate litigations are always required, then access to the courts may be put out of reach for those whose individual stakes are low or who by reason of poverty or ignorance will not go it alone."); see also Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 9 (1991); Resnik, *supra* note 2, at 142-43.

62. See *Amchem Prods.*, 521 U.S. at 616-17 (noting that 23(b)(3) class actions allow for the aggregation of small recoveries which makes litigation worthwhile); Kaplan, *supra* note 38, at 497 (stating that the modified Rule would "provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all").

undesirable to certify those claims for class treatment.<sup>63</sup> Subsection (a) addressed this concern by providing judges with the ability to deny certification to proposed classes that did not possess four prerequisite characteristics—numerosity, commonality, typicality, and adequacy.<sup>64</sup> Presumably, the drafters of the revised Rule included this provision because they felt that representative litigation involving groups that lacked one (or more) of these qualities would be undesirable.<sup>65</sup> This sentiment is reasonable, as it is hard to understand how representative litigation would benefit society if courts certified classes that could be accommodated via joinder, classes possessing widely divergent claims, classes where the class representative's claims do not match up with those of the class as a whole, or classes whose members were inadequately represented.<sup>66</sup>

#### D. Summary

The evolution of representative litigation in the United States, both in terms of its procedural underpinnings and the goals it was meant to serve, stands out as one of the most novel legal experiments in our country's legal history. It began as an esoteric and rarely used device that was only recognized by courts of equity and which some commentators felt served little purpose.<sup>67</sup> Over time, the legal community began to realize the potential efficiency

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63. See FED. R. CIV. P. 23(a) (listing the prerequisites for a class action); Rabiej, *supra* note 13, at 327-28 (arguing that a more efficient Rule 23 will result in more litigation).

64. FED. R. CIV. P. 23(a).

65. The drafters' decision may also have been motivated by a desire to create a discretionary mechanism that the courts could use to control the flow of class action lawsuits. Legislative history indicates that the Advisory Committee was concerned that making the class action procedure too efficient would cause a "freeway effect"—wherein the courts would be besieged with an overwhelming number of suits, most of which would not have been filed absent the reform. Rabiej, *supra* note 13, at 327-28.

66. See Marissa L. Bracke, *Where Improper Purposes Lead, Inadequate Protections Follow: Integrating the Rule 11 Improper Purpose Inquiry with the Rule 23 Protections for Absent Class Members*, 41 VAL. U. L. REV. 353, 353-55 (2006) (discussing the importance of each requirement and its importance in pursuing the goals of representative litigation).

67. CHAFEE, *supra* note 33, at 200; Yeazell, *Past and Future*, *supra* note 14, at 694.

and equity gains that were attainable through increased aggregate litigation and took steps to increase the availability of class action certification.<sup>68</sup> This led to the modern version of the Rule, which attempts to take advantage of the benefits that are generated by liberal use of representative litigation and minimize the burdens that class-based suits can impose. The following Part of this Article discusses the extent to which the Rule has been effective in striking this balance and identifies the largest problems with contemporary class action litigation.

## II. PROBLEMS CAUSED BY CONTEMPORARY CLASS ACTION PRACTICE

Having reviewed the history of representative litigation and the different goals that drove the creation and evolution of the class action, we are now in a position to critique the state of modern representative litigation. One important basis for evaluation is determining whether class action suits are effectively capturing the benefits that the revisionists had in mind when enacting Rule 23. Additionally, we can look beyond the revisionists' goals and analyze the impact of these suits, not only on the litigants themselves, but also on society as a whole. A review of class action practice establishes that the contemporary incarnation of representative litigation has largely failed to provide the benefits the revisionists had envisioned and, in fact, has had detrimental effects on the judicial system, litigants, and the general public.

The majority of the discussion in this Part will center on the problems that suits involving Rule 23(b)(3) classes have generated. This focus is appropriate given that (b)(3) classes have been at the heart of many of the largest (both in terms of the numbers of individuals involved and the size of settlements and verdicts), most drawn out, and most controversial suits in recent decades.<sup>69</sup> Whereas many

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68. See, e.g., William H. Pryor Jr., *Class Actions in the Gulf South Symposium: A Comparison of Abuses and Reforms of Class Actions and Multigovernment Lawsuits*, 74 TUL. L. REV. 1885, 1887-88 (2000) (discussing the recognition of equitable gains that could be accomplished through expansion of representative litigation).

69. See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 517 F.3d 76, 82 (2d Cir. 2008); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 752 (5th Cir. 1996); *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 558 (E.D. La. 2009); *Brown v. Am.*

critiques of our class action system have focused exclusively on analyzing how the adjudication of these suits affect litigants and the court system, this Article also pays special attention to the ways in which modern practices harm the public as a whole.<sup>70</sup>

As discussed earlier, the resolution of suits involving representative parties often have significant impacts on individuals that are not directly involved in the suit and whose interests are not represented before the court. Because class-based suits tend to have these oversized impacts, they implicate the interests of non-parties—the general public—in ways that standard litigation does not. While Part II.A reviews the ways in which the status quo harms litigants and the courts, Part II.B is dedicated to discussing the ways in which modern class action practices harm members of the public. These society-wide detriments provide a crucial part of the justification for the Public Advocate proposal.

#### A. *Problems for Litigants and Courts*

From the moment the modern version of Rule 23 was enacted to the current day, scholars have debated the shortfalls (and, less commonly, the merits) of our system of representative litigation.<sup>71</sup> Because of the breadth of this

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Home Prods. Corp. (*In re* Diet Drugs Liability Litigation), Nos. 1203, 99-20593, 2000 WL 1222042, at \*1 (E.D. Pa. Aug 28, 2000); *Lindsey v. Dow Corning Corp.* (*In re* Silicone Gel Breast Implant Prods. Liab. Litig.), No. CV 92-P-10000-S, 1994 WL 578353, at \*1 (N.D. Ala. Sept. 1, 1994).

70. See, e.g., Mark C. Weber, *A Consent-Based Approach to Class Action Settlement: Improving Amchem Products, Inc. v. Windsor*, 59 OHIO ST. L.J. 1155, 1193 (1998) (discussing the importance of consent of individual class members); Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571, 603-04 (1997) (highlighting the importance of the participation of individuals in complex litigation).

71. See MARTHA DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973, at 56-70 (1993) (discussing civil rights class actions in the south); MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 1-19 (2009) (criticizing modern class actions); Kaplan, *supra* note 38, at 499-500 (expressing optimism for the future of class actions); Arthur John Keefe et al., *Lee Defeats Ben Hur*, 33 CORNELL L.Q. 327, 327 (1948) (“The existing confusion and uncertainty surrounding the nature of the class action, and the failure of this procedural device to accomplish the ends of which it is capable, suggest that a critical inquiry into the present-day doctrines of the class suit might well be in order,

literature, this Article's treatment of the problems with modern class litigation does not purport to be comprehensive. Instead, this Part focuses on describing the issues that have most strongly undermined representative litigation's ability to capture the efficiency and equity gains envisioned by the revisionists. Five aspects of modern class action practice bear primary responsibility for the mechanism's poor reputation: (1) inappropriate denials of class certification, (2) inadequate representation of class members' interests, (3) failures to screen out meritless suits at early stages, (4) use of inept mechanisms to distribute damages and settlement awards, and (5) the heavy administrative burden these cases place on courts.

1. *Inappropriate Denials of Class Certification.* Increasing the availability of the class action device was one of the main impetuses that led to the development of the modern version of Rule 23. While the 1966 reform was not instituted for the benefit of any one type of claimant, it is clear that the revisionists wanted to provide access to class-based litigation to individuals who possessed small claims that would be impractical to litigate in a non-group capacity.<sup>72</sup> Examples of these groups would be consumers who purchased a particular commercial product that was unfit for its ordinary purpose or whose label contained inaccurate claims about the product<sup>73</sup> and groups of employees who have been discriminated against by their

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and that attention might well be given to [their] drawbacks."); Francis R. Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 205-07 (1976) (criticizing consumer class actions); Miller, *supra* note 20, at 666-67 (arguing that much of the criticism of class actions is based on erroneous assumptions); William Simon, *Class Actions—Useful Tools or Engine of Destruction*, 55 F.R.D. 375, 375-76 (1973) (highlighting problems of class actions); Woolley, *supra* note 70, at 571-73 (arguing that individual class members "may not be properly represented in class action suits").

72. *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997); Macey & Miller, *supra* note 61, at 8-9; Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1167-68 (2009).

73. See Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 305-07 (2010) ("[I]t should be fairly uncontroversial to observe that small claims consumer cases are a—if not the—primary reason why class actions exist."); see also *Kristian v. Comcast Corp.*, 446 F.3d 25, 59 (1st Cir. 2006) ("[I]t is often not rational for individual consumers or attorneys to bring small claims.").

employer.<sup>74</sup> Creating a procedural avenue that would allow these types of groups to pursue their claims served dual purposes—not only did it give individuals an effective means by which they could vindicate violations of their rights, it also helped deter illegal activity by increasing the likelihood that wrongdoers would be held accountable for their behaviors.<sup>75</sup>

While the revised Rule initially succeeded in providing these groups with a way to efficiently pursue their claims, recent shifts in class certification doctrines have resulted in these groups once again being denied access to the courthouse.<sup>76</sup> Throughout the 1970s, '80s, and '90s courts certified small-claims consumer class actions on a regular basis.<sup>77</sup> Class certification of these groups, however, has decreased dramatically over the past decade.<sup>78</sup> This shift is due to an increasing number of judges refusing to certify a class unless it can be demonstrated that the identity of the members of the class is “ascertainable.”<sup>79</sup> Judges have linked the “ascertainability” requirement to the manageability requirement set forth in 23(b)(3), claiming that adjudicating a case involving a class of consumers that

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74. See HENSLER ET AL., *supra* note 20, at 16-17; see also *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011) (“We think it clear that individualized monetary claims [in a class action suit asserting sex discrimination claims against an employer] belong in Rule 23(b)(3).”); *Abron v. Black & Decker (U.S.) Inc.*, 654 F.2d 951, 973 (4th Cir. 1981) (stating that class actions are necessary for employees to have a viable way to sue discriminatory employers).

75. Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 109 (2009).

76. See generally Gilles, *supra* note 73 (discussing the growing hostility of courts to small-claims consumer class actions).

77. *Id.* at 308; Alec Johnson, *Vioxx and Consumer Product Pain Relief: The Policy Implications of Limiting Courts’ Regulatory Influence over Mass Consumer Product Claims*, 41 LOY. L.A. L. REV. 1039, 1047 (2008) (discussing the expansion of consumer class actions in the 1980s and 1990s).

78. Johnson, *supra* note 77, at 1066-69 (noting the increasingly heavy restrictions courts have placed on class action suits).

79. See, e.g., *Gray v. Bayer Corp.*, Civil Action No. 08-4716, 2011 WL 2975768, at \*8 (D.N.J. July 21, 2011); *McBean v. City of New York*, 228 F.R.D. 487, 492 (S.D.N.Y. 2005); *Van West v. Midland Nat’l Life Ins. Co.*, 199 F.R.D. 448, 451 (D.R.I. 2001); *Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544, 556 (D. Minn. 1999).

has not been fully identified at the beginning of the suit poses insurmountable problems when it comes to issues such as providing notice to class members, proving actual injury, and distributing damages that might be awarded.<sup>80</sup>

Even though the manageability worries expressed by today's courts appear to be legitimate judicial concerns, it is questionable whether such concerns are strong enough to justify foreclosing the only viable avenue consumers have for filing certain types of suits.<sup>81</sup> Decreasing the ability of individuals to seek vindication of their rights through representative litigation has caused the very harms that led to the revision of Rule 23.<sup>82</sup> Contracting access in this way creates an environment where individuals are prevented from asserting their rights whenever the potential recovery from an individualized suit is less than the transactional costs associated with such litigation, and corporations can commit minor violations of consumer laws with impunity.<sup>83</sup> Given the high costs of litigation, this means that a number

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80. See cases cited *supra* note 79.

81. For instance, it is typically not the case that the judge's options are limited to dismissing the suit or certifying the class exactly as plaintiff's counsel proposes it. Judges have attempted to work around the "ascertainability" problems in various ways—by working with the parties to develop a feasible way to identify class members, utilizing a recovery mechanism that does not depend on *ex ante* knowledge of class members' identities, bifurcating a suit into a class-wide liability proceeding and individualized damages proceedings, etc. See, e.g., *In re Bendectin Litig.*, 857 F.2d 290, 294 (6th Cir. 1988) (affirming a district court's decision to trifurcate a multi-district litigation by trying two liability issues jointly and, if necessary, remanding individual cases to their originating districts for damages trials); *Yaffe v. Powers*, 454 F.2d 1362, 1365 (1st Cir. 1972) ("[Denial for] vaguely-perceived management problems . . . discount[s] too much the power of the court to deal with a class suit flexibly, in response to difficulties as they arise."); *In re Bristol Bay, Alaska, Salmon Fishery Antitrust Litig.*, 78 F.R.D. 622, 628 (W.D. Wash. 1978) ("[D]ismissals for management reasons, in view of the public interest involved in class actions, should be the exception rather than the rule.").

82. Kaplan, *supra* note 38, at 497.

83. See, e.g., *In re Am. Reserve Corp.*, 840 F.2d 487, 489 (7th Cir. 1988) (discussing the role that class action suits have in deterring corporations from engaging in unlawful conduct); *Simer v. Rios*, 661 F.2d 655, 676 & n.43 (7th Cir. 1981) (same); *Abron v. Black & Decker (U.S.), Inc.*, 654 F.2d 951, 973 (4th Cir. 1981) ("Without the backing of a comprehensive class, individual plaintiffs or their lawyers will find it difficult to muster the resources and incentives sufficient to tackle industrial giants.").



of the rights and protections that lawmakers have afforded individuals are essentially unenforceable.<sup>84</sup>

2. *Inadequate Representation of Class Members' Interests.* One of the more challenging problems that the revisionists had to tackle when revising Rule 23 was to find a way in which the use of representative litigation could be expanded without unduly impairing individuals' constitutionally protected property interests in their claims. They addressed concerns that individuals' claims could be unfairly extinguished by the resolution of a representative suit they had little to no control over (or, often, knowledge of) in several ways.<sup>85</sup> First, the class certification process was designed to ensure that groups would only be certified as classes if they could show that class counsel would adequately represent class members' interests and that the class members shared key common interests.<sup>86</sup> Second, for damages actions, the revised Rule required groups to show that proceeding with the suit as a class action would be superior to having each individual file a separate claim.<sup>87</sup> Third, the Rule mandated that all class members in 23(b)(3) classes be given an opportunity to opt out of the suit and retain their ability to pursue their claims individually.<sup>88</sup> Finally, the revisionists granted courts the ability to divide classes into independently represented subclasses whenever they felt there were problematic conflicts of interests between class members.<sup>89</sup>

The sad reality is that, despite the revisionists' best attempts to head these problems off at the pass, it has become commonplace for class counsel to ignore class

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84. See Fisk & Chemerinsky, *supra* note 2, at 79-80 (discussing the impact of *Wal-Mart v. Dukes* on class actions); Gilles, *supra* note 73, at 309 ("As some district judges have candidly acknowledged, the rigorous application of the ascertainability requirement will often entail impunity for corporate defendants who perpetrate harms in relatively modest increments upon large numbers of consumers.").

85. Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 599-605 (2006).

86. See discussion *supra* Part I.C.2.

87. FED. R. CIV. P. 23(b)(3).

88. FED. R. CIV. P. 23(c)(2)(B)(v); Rabiej, *supra* note 13, at 344.

89. FED. R. CIV. P. 23(c)(5).

members' interests or to trade the interests of some class members off against the interests of others.<sup>90</sup> Supreme Court precedent has established that representation can only be considered adequate when class counsel recognizes the relative economic value of different classes of claims and acts in ways that protect the value of each class of claims.<sup>91</sup> Modern procedural rules dictate that whenever a suit succeeds in procuring a recovery for class members, decisions made by class counsel will end up playing a significant role in determining how that award is allocated among class members.<sup>92</sup> While there are certain situations where class counsel performing this role will not be inherently problematic—determining award amounts where the fund is large and class members have suffered identical or easily quantifiable injuries, for instance—there are other instances where it will. For example, it is questionable whether it is even *conceptually* possible for class counsel to adequately represent the interests of an entire class when, upon settlement, the different subsets of the class seek to maximize their recovery from a very limited fund. While Rule 23 mandates that suits may not be settled unless the presiding judge approves of the settlement after conducting a fairness hearing, this safeguard has proven to be anything but foolproof.<sup>93</sup> Modern class action procedure does not

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90. See Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979, 1008-10 (2010) (highlighting lawyer-client conflicts in the all-or-nothing settlement model, such as lawyer compensation structure and differing interests within the represented class); Macey & Miller, *supra* note 61, at 45 (describing the improper incentive for plaintiffs' lawyers to structure or negotiate class settlements depending on the lawyers' fee arrangement); Redish & Kastanek, *supra* note 85, at 599-605 (criticizing Rule 23 for not adequately protecting the interests of class members).

91. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626-28 (1997).

92. See Jonathan R. Macey & Geoffrey P. Miller, *Judicial Review of Class Action Settlements*, 1 J. LEGAL ANALYSIS 167, 188-90 (2009) (discussing factors courts use to scrutinize allocation by class counsel).

93. See *Alleghany Corp. v. Kirby*, 333 F.2d 327, 347 (2d Cir. 1964) (Friendly, J., dissenting) (discussing the inadequate nature of judicial scrutiny of proposed settlements, stating that once the adversaries have agreed, "[a]ll the dynamics conduce to judicial approval of [the] settlement[]"), *aff'd en banc by equally divided court*, 340 F.2d 311 (2d Cir. 1965), *cert. dismissed sub nom. Holt v. Alleghany Corp.*, 384 U.S. 28 (1966); see also Bronsteen & Fiss, *supra* note 36, at 1448 ("When a court reviews a settlement, . . . it gives great deference to the parties' choices in the bargaining process and does not exercise its independent judgment for the remedy."); Macey & Miller, *supra* note 61, at 46-47 (identifying

provide any mechanism that can reliably ensure that settlements do not ignore, subordinate, or undervalue certain class members' claims.<sup>94</sup>

The settlement reached in the *Agent Orange* litigation serves as a perfect example of a case in which these types of adequacy of representation problems surfaced.<sup>95</sup> In *Agent Orange*, class counsel represented all veterans who had been exposed to the Agent Orange chemical weapon while serving in Vietnam and, as a result of this exposure, were more likely to develop various types of cancer.<sup>96</sup> The suit resulted in a court-approved settlement under which the manufacturers of the chemical compound created a large fund that class members could file claims with.<sup>97</sup> The parties' lawyers and the judge created a distribution plan that categorized class members and dictated the amount of compensation that members of each category were entitled to receive.<sup>98</sup> While the settlement purported to represent the interests of the entire class, the plan provided that veterans whose injuries manifested after 1994 would not receive any form of monetary compensation.<sup>99</sup> It is difficult to see how

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various reasons why judges have been ineffective at screening out abusive settlements); Andrew Rosenfield, *An Empirical Test of Class-Action Settlement*, 5 J. LEGAL STUD. 113, 119 figs. 1 & 2 (1976) (finding that settlements of class action suits tend to result in monetary bonuses to attorneys at the expense of class members' interests).

94. Aside from the requirement that settlements be approved by the judge presiding over the matter, the only solutions to these problems that are commonly employed involve (1) the creation of subclasses for each group with divergent interests and appointment of separate counsel to represent each subclasses's interests, or (2) employing third parties or mediators to assist lawyers with deciding how the settlement should be distributed among different groups of class members. Because use of either of these solutions tends to impose significant costs on the settlement fund and is discretionary, neither can be relied upon to adequately protect class members' interests. See, e.g., Erichson, *supra* note 90, at 1011 (discussing the high cost of mediators and other third parties).

95. See Patrick Woolley, *Collateral Attack and the Role of Adequate Representation in Class Suits for Money Damages*, 58 U. KAN. L. REV. 917, 935-38 (2010) (arguing that the *Agent Orange* plaintiffs' lawyers' self-interest led them to neglect the interests of segments of the class).

96. *Id.*

97. *Id.* at 935.

98. *Id.*

99. *Id.*

the court could have considered class counsel's representation of the interests of future claim plaintiffs to be adequate, given counsel's failure to procure any form of relief for this subclass of individuals.<sup>100</sup> The fact that the *Agent Orange* settlement was approved by the trial court showcases how the status quo's minimal procedural safeguards can fail to protect individuals from the dangers inherent in bundling claims together and adjudicating them en masse.<sup>101</sup>

Modern procedure has also fostered adequacy of representation problems by providing inadequate checks against class counsel engaging in settlement-related practices that place their own interests ahead of class members.<sup>102</sup> The misalignment in the interests of class counsel and class members is both obvious and widely-recognized—class counsel are interested in their

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100. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626-27 (1997) (decrying a proposed settlement that denied future claim plaintiffs any relief, finding that “[t]he settling parties . . . achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected”).

101. The Second Circuit recognized that individuals who developed injuries after 1994 had not been adequately represented by class counsel in the first action and issued a decision allowing such individuals to collaterally attack the preclusive effect of the settlement. *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 257-59, 261 (2d Cir. 2001), *aff'd in relevant part*, 539 U.S. 111 (2003). While some might argue that the Second Circuit's reversal indicates that the status quo contains adequate protections for absent class members, such an argument misses the mark. The fact that the appellate safety net has, at times, identified and reversed abusive settlements that have been approved by district courts does not establish that the class settlement procedures work well. Rather, it merely indicates that a separate procedural system—the appellate review process—is performing its function.

102. John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 714-16 (1986) (“Although courts have long recognized [the danger of collusive settlements] and have developed some procedural safeguards intended to prevent [them], these reforms are far from adequate to the task.”); Alon Klement, *Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers*, 21 REV. LITIG. 25, 38-47 (2002) (describing the factors that have contributed to the prevalence of abusive settlement practices); see also *Epstein v. MCA, Inc.*, 126 F.3d 1235, 1250 (9th Cir. 1997) (refusing to recognize the binding effect of a class action settlement because class counsel did not adequately represent the class's interests when brokering the deal); sources cited *supra* notes 91-95.

contingency fee, whereas class members are interested in maximizing their own recoveries.<sup>103</sup> For instance, it is common for lawyers involved in protracted litigation to feel immense pressure to settle their cases, as doing so guarantees that they will recover at least some of the expenses and fees that they have incurred in litigating the case thus far.<sup>104</sup> Certain aspects of class action litigation create a uniquely high risk that these pressures will drive class counsel to inadequately represent their clients and seek settlements that are contrary to the class's interests.<sup>105</sup> For example, defendants in class action suits will commonly tell class counsel that they will only agree to enter into a settlement if counsel can get all (or substantially all) of the plaintiff class to agree to be bound by it.<sup>106</sup> These all-or-nothing style settlement offers place substantial pressure on class counsel to get every class member to agree to the proposed settlement, even if doing so requires them to mislead, deceive, or bully their clients into doing so.<sup>107</sup> Similar disregard for class members' interests can be seen in the collusive "sweetheart deals"<sup>108</sup> or "reverse auctions"<sup>109</sup>

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103. See John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 391 (2000) (discussing reasons why class counsel are typically more risk averse than class members); Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1657 (2008) (highlighting the interest of class counsel in quickly achieving a settlement); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1056 (1996) (arguing that lawyer abuse in class actions is rampant); Macey & Miller, *supra* note 61, at 12-13 ("[Attorneys'] interests are rarely perfectly aligned with those of the client.").

104. Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 470-74 (2000).

105. Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1171-72 (2010).

106. Erichson, *supra* note 90, at 979.

107. *Id.* at 1018-19.

108. John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 883 (1987) ("The classic agency cost problem in class actions involves the 'sweetheart' settlement, in which the plaintiff's attorney trades a high fee award for a low recovery."); George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 530 (1997) (recognizing the sweetheart settlement as the "most basic concern" voiced by academic critics of the class action). Sweetheart settlements have been widely documented in the

that occur in the settlement class context.<sup>110</sup> In these situations, class counsel agree to settle class claims for less than they are worth and defendants award counsel with either higher than normal attorneys' fees or, if certification has not yet occurred and multiple attorneys are seeking to represent the class, by agreeing to consent to class counsel's proposed representation of the class.<sup>111</sup> These types of self-dealing settlement agreements are particularly likely in the class action context because it is only in exceedingly rare situations that members of the class will monitor class

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context of settlement-only class actions. *See generally* Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 CORNELL L. REV. 811 (1995) (discussing the conflicts created by sweetheart settlements, notably where defendant's counsel selects plaintiffs' counsel and where future claimants are absent from the proceedings); Darren M. Franklin, *The Mass Tort Defendants Strike Back: Are Settlement Class Actions a Collusive Threat or Just a Phantom Menace?*, 53 STAN. L. REV. 163 (2000) (critiquing sweetheart settlements as bad policy).

109. *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1370-73 (1995). ("[A reverse auction is] a jurisdictional competition among different teams of plaintiffs' attorneys in different actions that involve the same underlying allegations. The first team to settle with the defendants in effect precludes the others . . . ."); Geoffrey P. Miller, *Competing Bids in Class Action Settlements*, 31 HOFSTRA L. REV. 633 (2003) (suggesting ex post competing bids as a mechanism to solve the "reverse auction" problem). Judge Posner discussed reverse auctions in *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282-83 (7th Cir. 2002), noting, "[a]lthough there is no proof that the settlement was actually collusive in the reverse-auction sense, the circumstances demanded closer scrutiny than the district judge gave it." *See also* Crawford v. Equifax Payment Servs., 201 F.3d 877, 882 (7th Cir. 2000) (rejecting class settlement because "Crawford and his attorney were paid handsomely to go away; the other class members received nothing . . . and lost the right to pursue class relief").

110. *See* Klement, *supra* note 102, at 45-46 (discussing the inability of courts to obtain enough information to assess the adequacy of proposed settlements).

111. *See Reynolds*, 288 F.3d at 282-83 ("The ineffectual lawyers are happy to sell out a class they anyway can't do much for in exchange for generous attorneys' fees, and the defendants are happy to pay generous attorneys' fees since all they care about is the bottom line."); Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 81 (2007) (stating that class counsel's actions are rarely monitored by class members because individual members rarely possess the type of information and financial incentives that would encourage them to become actively involved in the suit).

counsel's behavior.<sup>112</sup> Again, the only check against these abuses that can be found in Rule 23 is the requirement of judicial approval of settlement via a fairness hearing.<sup>113</sup> Examples of how this procedure has failed to safeguard class members' rights are legion.<sup>114</sup>

3. *Failures to Screen Out Meritless Suits at Early Stages of Litigation.* The revised version of Rule 23 does not appear to have any provisions that are specifically designed to protect parties from overzealous plaintiffs' attorneys' potential abuse of the class action device. This should not be surprising—since class action suits are merely another form of civil suit, it would have made sense for the revisionists to assume that the procedural devices created by other rules (for example, Rule 12's motions to dismiss, Rule 11's motions for sanctions) would provide sufficient protection to parties involved in representative suits. Further, the revisionists might have believed that the class certification requirements set forth in 23(a) and (b) would weed out frivolous class claims at an early stage of litigation.

Despite these procedural protections, opportunistic plaintiffs' attorneys have been able to engage in highly

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112. The literature analyzing the class member-class counsel monitoring problem is robust. See, e.g., John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625, 628-34 (1987) (discussing the effect of the agency cost problem on class member participation); Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1532 (2004) (finding that class members rarely opt-out or object); Leslie, *supra* note 111, at 81; Adam Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 512-13 (2011).

113. Richard Frankel, *The Disappearing Opt-Out Right in Punitive-Damages Class Actions*, 2011 WIS. L. REV. 563, 616-19 (discussing the ineffectiveness of the fairness hearing).

114. See, e.g., *Kamilewicz v. Bank of Boston*, 100 F.3d 1348, 1352 (7th Cir. 1996) (denial of petition for rehearing) (Easterbrook, J., dissenting) (finding that the attorneys behind the settlement of a class claim “may even put one over on the court, in a staged performance”); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1047-96 (1995) (discussing rampant collusion between plaintiffs' counsel and defendants in a massive asbestos class action suit and the failure of the presiding court to protect the rights of class members); see also *Reynolds*, 288 F.3d at 282-83; *Crawford v. Equifax Payment Servs.*, 201 F.3d 877, 882 (7th Cir. 2000).

abusive uses of the class action device.<sup>115</sup> While popular accounts give widely varying estimates as to the prevalence of frivolous class action lawsuits, it is unquestionable both that meritless suits are filed every year and that these suits end up imposing significant costs on the parties that they target.<sup>116</sup> While strike suits are no stranger to non-class litigation, they are a larger concern in the class action context for several reasons. First, by aggregating the claims of a large number of individuals into a single suit, a class action greatly increases the potential losses an unfavorable verdict could impose on defendants, making a defendant's stance on settlement a "bet-your-company decision" and putting "insurmountable pressure on defendants to

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115. Class action suits filed against breast implant manufacturers are one of the most well-known examples of frivolous litigation. Despite the fact that there was no scientific evidence in support of the claim that silicone breast implants increased an individual's risk for developing cancer, suits based on these claims ended up driving Dow Corning, a Fortune 500 business, into bankruptcy. See Peter A. Drucker, *Class Certification and Mass Torts: Are "Immature" Tort Claims Appropriate for Class Action Treatment?*, 29 SETON HALL L. REV. 213, 221-24 (1998) (discussing the risk of sympathy for multitudes of plaintiffs overriding logic in class action litigation); see also *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1295-96 (7th Cir. 1995) (discussing a class action suit filed by hemophiliacs against the supplier of AIDS-infected blood solids); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784-85 (3d Cir. 1995) ("[C]lass actions create the opportunity for a kind of legalized blackmail [where] a greedy and unscrupulous plaintiff . . . use[s] the threat of a large class action, which can be costly to the defendant, to extract a settlement far in excess of the individual claims' actual worth.").

116. Compare *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1015-16 (7th Cir. 2002) ("Aggregating millions of claims on account of multiple products manufactured and sold across more than ten years makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims."), *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d at 1298 (describing the intense pressure placed on defendants to settle class actions), and David Rosenberg & Steven Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3, 3 (1985) (describing situations in which plaintiffs file meritless suits in order to extort a settlement recovery from defendant), with Allan Kanner & Tibor Nagy, *Exploding the Blackmail Myth: A New Perspective on Class Action Settlements*, 57 BAYLOR L. REV. 681, 682 (2005) (refuting the class action-as-legalized-blackmail argument as "neither objectively accurate nor legally sound"), and Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003) (rejecting the class action-as-legalized-blackmail argument espoused by Handler, Friendly, Posner, and Easterbrook).



settle.”<sup>117</sup> This pressure is often sufficient to force defendants to settle even when the merits of the underlying claims are dubious.<sup>118</sup> Second, the expansive discovery obligations that defendants can be saddled with from the very beginning of a class action suit compel defendants to expend significant resources at the earliest stages of litigation.<sup>119</sup> Plaintiffs’ attorneys, well aware of this dynamic, often seek to take advantage of it, harassing defendants with extraordinarily broad discovery requests and hoping that the prospect of handling similar requests throughout pretrial proceedings will bully them into agreeing to a premature settlement.<sup>120</sup> The prevalence and success of these practices establishes a major deficiency in the status quo.

4. *Use of Inept Mechanisms to Distribute Damages and Settlement Awards.* As discussed earlier, one of the reasons

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117. Szabo v. Bridgeport Machines, Inc., 249 F.3d 672, 675 (7th Cir. 2001) (“Such a claim puts a bet-your-company decision to . . . managers.”); Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) (“Class certification creates insurmountable pressure on defendants to settle.”); see also *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 148 (2d Cir. 2001) (Jacobs, J., dissenting).

118. *E.g.*, Thorogood v. Sears, Roebuck & Co., 547 F.3d 742, 745 (7th Cir. 2008) (discussing how the aggregation of claims creates a risk asymmetry that pressures defendants into settling claims); *In re Bridgestone/Firestone Inc. Tires Prods. Liab. Litig.*, 288 F.3d at 1016; Szabo, 249 F.3d at 677; Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 8-9 (1971) (stating that defendants facing massive antitrust class actions suits have no choice but to settle and describing such suits as “legalized blackmail”).

119. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007); see also JAMES HAMILTON, PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995: LAW & EXPLANATION 72 (1996) (stating that the Private Securities Litigation Reform Act of 1995 (“PSLRA”) was intended to lower costs imposed on public companies by combating frivolous “strike” suits); Adam C. Pritchard, *Should Congress Repeal Securities Class Action Reform?*, POL’Y ANALYSIS, Feb. 27, 2003, at 1, 1 (“The high costs of litigation were a powerful weapon with which to coerce companies to settle claims.”).

120. See, e.g., *Twombly*, 550 U.S. at 558-59 (“The threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [trial.]”); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 81 (2006) (stating that one of the main factors leading to the enactment of the PSLRA was the legislature’s concern that abuses of the discovery process in securities class actions were effectively strong-arming defendants into settling meritless claims).

the revisionists expanded access to the class action procedural device was to enable parties to aggregate claims whose small monetary worth made them effectively unenforceable via traditional litigation. Expansion of the availability of the class action device seems, at least conceptually, like a viable way to ensure that the law provides groups of individuals with small claims a feasible way to recover what they are due. Unfortunately, even when groups are able to obtain certification and establish an opposing party's liability, modern class action procedure often fails to ensure that wronged individuals actually receive compensation for their harms.

The main reason that the expansion of class action litigation has not led to a greater number of aggrieved plaintiffs being made whole is the high rate at which members of successful suits fail to file award claims.<sup>121</sup> It is well established that class members in large class action suits typically file claims at rates that are much lower than one would expect.<sup>122</sup> Indeed, one academic has estimated that over ninety percent of class members will never claim the damages relief that they are awarded by courts.<sup>123</sup> Commentators have ventured a variety of different explanations for this phenomenon—the difficulty of notifying class members, the overly complex and technical notifications that class members receive, the effort required to pursue a claim, the lack of interest of class members in the types of relief available, and the failure of fund designers to design claim procedures in ways that take into

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121. See HENSLER ET AL., *supra* note 20, at 427-30; Tiana Leia Russell, *Exporting Class Actions to the European Union*, 28 B.U. INT'L L.J. 141, 149-50 (2010) (discussing the low settlement participation rates in American class actions); Adam S. Zimmerman, *Funding Irrationality*, 59 DUKE L.J. 1105, 1107 (2010).

122. See Shay Lavie, *Reverse Sampling: Holding Lotteries to Allocate the Proceeds of Small-Claims Class Actions*, 79 GEO. WASH. L. REV. 1065, 1066-67 (2011) ("For many class members, it is not economically viable to redeem their meager awards. The result is unclaimed compensatory damages commonly in the range of millions of dollars." (footnote omitted)); Leslie, *supra* note 111, at 119-20 ("In many cases, the vast majority of class members neglect to collect the money due them under the settlement[,] . . . [w]hen settlements require class members to file . . . proofs of claim in order to receive their share of the common fund.").

123. Zimmerman, *supra* note 121, at 1107.

account cognitive biases.<sup>124</sup> Regardless of the specific reasons why claim rates are so low, it is evident that our class action system has failed to ensure that parties who have suffered legal harms are actually compensated for their injuries.

5. *Heavy Administrative Burden Placed on Courts.* One of the primary motivations that led to the adoption of the current version of Rule 23 was a desire to exploit the economies of scale offered by increased use of representative litigation.<sup>125</sup> By instituting a more liberal class certification procedure, the revisionists thought they could make inroads into reducing the backlog of suits building up in the federal judiciary.<sup>126</sup> Because class action suits could distill what might have been numerous individualized suits into a single unit of litigation and prevent repetitive litigation of the same issues, the revisionists hoped that increasing the use of such suits would take some of the burden off of the overtaxed judiciary.<sup>127</sup>

The extent to which the armchair efficiencies of representative litigation have panned out in the real world, however, is questionable. First, data collected on class action cases shows that these suits exert extraordinary demands on the courts tasked with adjudicating them and that class certification can actually increase the time it

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124. See, e.g., Lavie, *supra* note 122, at 1066-68 (highlighting the difficulty in locating class members and stating that it is often not economically viable for class members to redeem awards); Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 618-19 (2010) (noting the problems of meager awards, difficulties in notifying class members of their awards, and the uncertainty if absent class members are fully aware of their membership in the class); Zimmerman, *supra* note 121, at 1155 (arguing that reforms have not taken cognitive bias into account).

125. Kaplan, *supra* note 38, at 497; Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1110 (2006) ("Class actions generate subsidies for litigants by relying on economies of scale to induce lawyers to serve a wider set of claimants.").

126. While comprehensive data is difficult to come by, a recent study done by the Federal Judicial Center indicates that federal courts continue to experience ever-increasing caseloads. JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL* 21 (2011) (reporting that civil case filings increased seven percent from 2006 to 2010 in the twenty-three districts studied).

127. Kaplan, *supra* note 38, at 497.

takes plaintiffs to recover on their claims.<sup>128</sup> Second, the supposed efficiency gains created by reducing duplicative litigation have come under attack due to data showing that consolidation has not occurred and that a large percentage of the claims in federal class action suits overlap with claims asserted in other federal suits.<sup>129</sup> Third, as noted earlier, the expansion of representative litigation has led to an increase in the number of frivolous suits that are filed.<sup>130</sup> It is unlikely that courts would have had to handle these cases absent the revisionists' reforms, and, hence, it is fair to weigh the burdens that are imposed by such suits against any efficiency gains that have resulted from the reforms. Finally, suits involving representative parties, like other complex civil matters, are a haven for highly inefficient pretrial practices.<sup>131</sup> Parties to class action suits commonly engage in expansive discovery fishing expeditions, endless attempts to score points via motion practice, and other dilatory tactics. These behaviors have caused class action suits to have pretrial phases that last years, worsening courts' already overwhelming caseloads and consuming an immense amount of judicial resources.<sup>132</sup> Taken together,

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128. JAMES S. KAKALIK ET AL., INST. FOR CIVIL JUSTICE, DISCOVERY MANAGEMENT 90 tbl. A-3 (1998); Dam, *supra* note 39, at 52; Frankel, *supra* note 113, at 616-18; cf. George E. Farrell, *Multidistrict Litigation in Aviation Accident Cases*, 38 J. AIR L. & COM. 159, 161-62 (1972) (noting that pretrial consolidation of aviation accident cases increases the workload of the courts).

129. THOMAS E. WILLGING & EMERY G. LEE III, FED. JUDICIAL CTR., THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: THIRD INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 24 tbl. 1 (2007) (“[A]pproximately 37% of class actions overlapped with or duplicated other federal class actions.”).

130. See discussion *supra* Part II.A.3.

131. See THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS 56-58 (1996) (discussing the myriad objections raised by class members at settlement hearings); Roger Bernstein, *Judicial Economy and Class Actions*, 7 J. LEGAL STUD. 349, 360-63 (1978) (analyzing a sample of cases filed in the Eastern District of Pennsylvania and the Southern District of New York and finding that attorney time consumption—including judicial and nonjudicial time—in class actions is between 1.1 and 3.4 times that of nonclass actions).

132. See, e.g., *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 551-56 (E.D. La. 2009) (describing the factual background and procedural posture of the dispute); *Brown v. Am. Home Prods. Corp.* (*In re Diet Drugs Prods. Liab. Litig.*), Nos. 1203, 99-20593, 2000 WL 1222042, at \*1-6 (E.D. Pa. Aug. 28, 2000) (discussing the procedural history of the case leading up to its disposition);

these effects have frustrated the hope that expanded use of representative litigation would ease judicial burdens.

### B. *Public Harms*

The shortcomings in modern class action procedure identified in Part II.A do not exclusively harm parties who are actively involved in class action suits, but impose serious costs on the public as a whole. These society-wide impacts have not received much attention in discussions of class action procedure, which have tended to focus on the consequences that our rules have for the litigants and judges involved in suits. While omitting discussion of the broader impacts of modern class action practice might be harmless in the context of other reform proposals, analysis of these effects is mandatory here, as they play an important role in the Public Advocate reform proposed in Part III.

Just as a well-functioning class action system benefits the public, a set of poorly operating procedures harms the public. Take, for instance, the failure of the current system to grant class certification to plaintiffs whose claims merit group treatment.<sup>133</sup> While this practice obviously has its most direct impact on the individuals before the court, it also creates tangible harms for members of the public. When courts consistently deny class certification for claims based on consumer protection laws, for instance, courts signal to private actors that they can violate these laws without having to fear that they will be held accountable.<sup>134</sup> While transgressors might still face liability stemming from

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Dawn M. Barrios, Practitioner's Note, *The Long and Winding Road for Spitzfaden, Louisiana's Breast Implant Class Action: Ad Astra per Aspera*, 74 TUL. L. REV. 1941 (2000) (detailing the timeline of breast implant class action litigation in Louisiana from the perspective of one plaintiffs' counsel).

133. See *supra* Part II.A.1.

134. Fisk & Chemerinsky, *supra* note 2, at 77; Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond "It Just Ain't Worth It": Alternative Strategies for Damage Class Action Reform*, 64 LAW & CONTEMP. PROBS., Spring/Summer 2001, at 137, 146 (arguing that absent the threat of liability to an entire class of individuals, defendants will be free to cause small harms to individuals without regard for legal restrictions); Patrick A. Luff, *Bad Bargains: The Mistake of Allowing Cost-Benefit Analyses in Class Action Certification Decisions*, 41 U. MEM. L. REV. 65, 74-78 (2010) (discussing the importance of the deterrence function of class action suits).

individual suits, the deterrent effect of such suits is magnitudes smaller than that of representative actions.<sup>135</sup> Further, individualized actions are unlikely to deter parties from committing minor infractions, given that the costs of filing such suits will usually outweigh any potential recovery.<sup>136</sup> Less deterrence will lead to a greater number of violations, further harm to citizens, and will undermine the efficacy of the laws themselves.<sup>137</sup> These violations, of course, are harms in and of themselves, but the consequent inability of individuals to seek relief from them can lead to secondary, less tangible harms, such as feelings of political helplessness or antipathy towards the legal system.

Some of the status quo's most harmful public impacts can be attributed to its failure to adequately recognize the broader societal impacts that the verdicts and settlements reached in representative suits will have on non-parties. Consider, for example, a hypothetical class action suit brought by the owners of a certain model of car that alleges that a defect in brake installation has caused a number of serious accidents. Assume further that, because the installation was clearly faulty, that class counsel and the manufacturer have agreed to a settlement agreement that will permit class members to obtain new brakes, absolve the manufacturer of liability for brake-related claims, and (of course) award class counsel a hefty fee. The parties would submit this settlement for judicial approval, emphasizing the ways in which it would benefit both parties.<sup>138</sup> With only this information before it, a court would likely find that such a settlement constitutes a fair deal for the parties and

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135. See, e.g., *Landsman & Funk PC v. Skinder-Strauss Assocs.*, 640 F.3d 72, 94-95 (3d Cir. 2011) (discussing the greater deterrent effect of class action suits); *In re Am. Reserve Corp.*, 840 F.2d 487, 489 (7th Cir. 1988) (discussing the role that class action suits have in deterring corporations from engaging in unlawful conduct); *Simer v. Rios*, 661 F.2d 655, 676 & n.43 (7th Cir. 1981) (same).

136. See *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 744 (7th Cir. 2008) (stating that, absent class actions, many small claims would never be litigated); see also sources cited *supra* notes 114-15.

137. *Fisk & Chemerinsky*, *supra* note 2, at 77-78.

138. *Frankel*, *supra* note 113, at 617-18; Susan P. Koniak, *How Like a Winter? The Plight of Absent Class Members Denied Adequate Representation*, 79 NOTRE DAME L. REV. 1787, 1797-98 (2004); *Leslie*, *supra* note 111, at 86.

approve it.<sup>139</sup> Given class counsel and the manufacturer's interests in seeing the settlement approved, neither is likely to highlight the potentially significant public burdens that would flow from the settlement and, absent an advocate, such concerns will receive little consideration. Unless the settlement is structured properly, it is likely that most class members will fail to redeem the free repair offer,<sup>140</sup> and accidents caused by the defect will continue to pile up, inflicting physical and economic harms on third parties. Additionally, because the proposed settlement imposes minimal costs on the car manufacturer, it will signal to automobile companies that the penalties for producing unsafe products will be minimal and increase the likelihood that such products will enter and remain in the market. A real world example of these types of public externalities can be seen in the proposed *Google Books* settlement.<sup>141</sup> If it had been accepted, the settlement would have had massive impacts on individuals who were not before the court: at minimum, it would have (1) pushed all future creators of written works into a contractual relationship with Google, (2) increased individuals' ability to access out-of-print written works, and (3) imposed a Google-centric structure on the digital books market that the entire public would have had no choice but to accept.<sup>142</sup>

The other flaws in modern class action practice noted earlier are also responsible for public harms:

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139. See, e.g., Christopher Jensen, *Judge Approves Preliminary Settlement of Honda Brake Suit*, N.Y. TIMES BLOG (May 3, 2010, 10:58 AM), <http://wheels.blogs.nytimes.com/2010/05/03/judge-approves-preliminary-settlement-of-honda-brake-suit/>; see also J. Brendan Day, Comment, *My Lawyer Went to Court and All I Got Was This Lousy Coupon! The Class Action Fairness Act's Inadequate Provision for Judicial Scrutiny Over Proposed Coupon Settlements*, 38 SETON HALL L. REV. 1085, 1116-21 (2008) (discussing the rubber-stamp nature of judicial settlement reviews).

140. See sources cited *supra* Part II.A.5.

141. See *supra* notes 8-11 and accompanying text.

142. See generally Frosio, *supra* note 9 (discussing the Google Books project and the proceedings in *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011)); Samuelson, *supra* note 11, at 1308-11 (discussing the ramifications that judicial approval of the *Google Books* settlement would have had); Glorioso, *supra* note 9, at 971 (summarizing the goals of the Google Books project).

- The inability of class action procedures to adequately distribute damages awards and ensure that class members' interests are sufficiently represented have fostered popular skepticism about the worth of representative litigation.<sup>143</sup> This skepticism has led to less public interest in becoming involved in representative litigation, which, in turn, has reduced the likelihood that injured individuals will ever be compensated for harms they have suffered. Further, there are signs that members of the judiciary have become skeptical of the worth of class actions, perhaps leading them to subject such suits to heavy scrutiny and deny requests for class certification (or rule against classes on other motions) that should have been granted.<sup>144</sup>

- The current system's failure to screen out meritless suits at an early stage of litigation most directly impacts members of the public in their roles as consumers. Corporations, the typical targets of such suits, end up having to spend significant sums to litigate and settle these suits, and these costs end up being passed on to those who purchase these companies' goods and services.<sup>145</sup> Coercive class action suits also harm the public by causing corporations to avoid entering markets with high liability exposures and impairing the ability of the public to obtain certain types of goods.<sup>146</sup>

- The heavy administrative burden that class action suits have placed on courts, as well as the frivolous suits that Rule 23 has enabled, have impeded the public's ability

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143. See Adam Liptak, *When a Lawsuit Is Too Big*, N.Y. TIMES, Apr. 3, 2011, at WK1 (discussing the criticisms of class action litigation articulated by leading academics and jurists).

144. See *id.*

145. See Samuel M. Hill, *Small Claimant Class Actions: Deterrence and Due Process Examined*, 19 AM. J. TRIAL ADVOC. 147, 150 (1995) ("Some commentators and judges recognize that this . . . begs the question of whether it is 'fair' or 'efficient' to spend vast private and judicial resources to produce little or no benefit for the plaintiff class members, while generating a huge fee for class counsel.").

146. See Victor E. Schwartz et al., *The Supreme Court's Common Law Approach to Excessive Punitive Damage Awards*, 60 S.C. L. REV. 881, 904 (2009) (discussing how non-meritorious class action suits filed against a drug manufacturer ended up "depriving women of the only Food and Drug Administration-approved medication that blunted the hard symptoms of morning sickness").



to obtain efficient adjudication of suits they file in federal court and imposed costs on public coffers.<sup>147</sup>

Given the above, it is clear that the public has a large interest in the way that class action suits are litigated. Because of the significance of this interest, it stands to reason that courts should take the public's interest into account when adjudicating these suits. Modern procedural rules, however, provide no guarantee that the public's interest will be taken into account in *any manner* at *any point* in the adjudication of a class action suit. Given the dyadic adversarial nature of American procedure, it is typically the case that the only views considered by the court are those of the opposing parties. It is rarely (if ever) the case that the public's interest completely overlaps with the interests of either party; it is similarly uncommon for there to be significant judicial advocacy on the behalf of the public's interest.<sup>148</sup>

That class action procedure fails to formally recognize the public's interest in the proper resolution of claims should be considered one of the construct's primary deficiencies. Not only is reforming the federal rules to address this concern an important goal in and of itself, but, as will be discussed in the following Part, such reform could also prove to be an effective way to combat the other problems plaguing representative litigation.

### III. HOW TO FIX CLASS ACTION LITIGATION

This Part proposes a novel solution—the introduction of Public Advocates to federal class actions—that has the potential to resolve the issues described above and revitalize

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147. See *supra* notes 108-14 and accompanying text.

148. Judicial advocacy of this type is rare both because it would likely be viewed as compromising a judge's ability to fulfill her institutional role as a dispassionate adjudicator and because the structure of our court system prevents judges from being able to effectively take such advocacy positions. See *Haas v. Pittsburgh Nat'l Bank*, 77 F.R.D. 382, 383 (W.D. Pa. 1977) ("To require the judge to occupy an adversary position . . . is highly inconsistent with his acknowledged duty to act as an impartial arbitrator. The appointment of a guardian for the class obviates this considerable problem of judicial schizophrenia."); see also Paula Batt Wilson, Note, *Attorney Investment in Class Action Litigation: The Agent Orange Example*, 45 CASE W. RES. L. REV. 291, 336-38 (1994) (discussing the institutional barriers that prevent judges from being able to act as advocates on behalf of class members).

modern class action practice. It begins by looking at the current state of representative litigation from a macro-level perspective and discusses, at a similarly abstract level, the types of reform that could remedy the status quo's maladies. Next, the Public Advocate proposal is set forth: detailed descriptions are given of the role that Public Advocates would play in suits, where Public Advocates could be situated within the federal government, and the ways in which Public Advocates resemble advocates that our legal system has recognized in other areas of law. Finally, an examination of the reasons why this reform would help eliminate collective litigation's shortcomings is provided.

A. *What Kind of Reform Is Needed?*

Given the large number of problems identified with modern class action practice, it is somewhat surprising that the majority of suggested reforms have consisted of minor doctrinal modifications, tweaks to pre-existing rules, or changes that would affect only a single phase of litigation.<sup>149</sup> Given the seeming consensus among scholars that the status quo is broken, one would expect such a state of disrepair to prompt proposals introducing bigger, bolder, and more comprehensive changes to how things currently operate. The reform set forth in this Article embraces the idea that large problems require large solutions and, accordingly, advocates changing one of the fundamental aspects of class action litigation.

Identifying which aspect of the status quo should be modified and how it should be changed is a complicated task, and one that is more art (or guesswork) than science. This Article's attempt begins with the observation that, for the most part, class action suits proceed in a manner much

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149. See, e.g., Coffee, *supra* note 109, at 1421-57 (outlining a number of doctrinal and procedural changes that could address problems associated with modern class action suits); Linda S. Mullenix, *Dropping the Spear: The Case for Enhanced Summary Judgment Prior to Class Certification*, 43 AKRON L. REV. 1197, 1197-1203, 1242-43 (2010) (recommending modifying Rule 23 to explicitly authorize courts to hear summary judgment motions before approving or denying requests for class certification); Tidmarsh, *supra* note 105, at 1139 (advocating for a "recasting" of the doctrine of adequate representation); Weber, *supra* note 70, at 1193 (arguing for an emphasis on class member consent); Woolley, *supra* note 70, at 604 (arguing for the right of class members to participate).

like traditional non-class suits. Both forms of litigation see two (or more) adversarial parties contesting matters through the same discrete phases of litigation—pleading, discovery, trial, and post-trial—in front of a judge, who is charged with deciding which party should prevail on all of the legal issues that arise. While there are procedural differences between these two types of suits—most notably the class certification and counsel selection processes as well as the modification of rules concerning notice and settlement—their similarities outweigh their differences.

Yet, if the two types of suits are really so similar, why is it that representative suits capture advantages and create problems that non-representative suits do not? The answer lies in recognition of the fact that very different sets of interests tend to be implicated by class and non-class litigation. As established earlier,<sup>150</sup> the size and scope of the issues addressed in representative suits—and the large positive and negative externalities associated with the resolution of these suits—cause them to bear on public interests in a way that traditional litigation does not.

The procedural rules governing both types of suits contain no recognition of this difference. This disconnect, coupled with the fact that modern class action practices harm public interests, identifies a deficiency in current procedural law and suggests an area where reform would be particularly fruitful. While it would be unfair to attribute all of the problems associated with modern class action practice to the system's failure to incorporate the public's interests in the adjudication of suits, creating a formalized process to recognize the public issues at play in representative suits could fix a number of problems.

There are a variety of procedural reforms that could be instituted in order to ensure that the public's interest is considered during the adjudication of class action suits. For instance, Rule 23 could be changed so that subsection (a) of the Rule requires prospective classes to show that certification of a class is in the public's interest. Alternatively, Rule 23(e) could be modified so that it requires judges to determine that a settlement is in the public's interest at settlement fairness hearings. Such reforms would be in line with the conservative reform

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150. *See supra* Part II.B.

proposals that other commentators have offered.<sup>151</sup> Because analysis of every modification of this type would be a Herculean task, this Article focuses on exploring a single, less modest reform: mandating that federal suits involving proposed or certified classes include Public Advocates—government attorneys charged with representing the public's interests—as third-party litigants.<sup>152</sup>

### B. *The Public Advocate Proposal*

The reform beneath the Public Advocate proposal is relatively simple—lawmakers would alter existing procedural law to require that Public Advocates be included as third-party litigants in all suits involving actual or proposed Rule 23 classes. By adding a litigant that is focused on representing the public's interest to the most problematic class action suits, this reform would directly address a fundamental flaw in modern procedure—the failure of the system to ensure that courts consider the public impacts of their decisions.<sup>153</sup> Further, this change would help address the problems with class action litigation that were identified in Part II: the failure of courts to certify proposed classes that should have their claims heard on a class basis, the fact that class counsel and judges regularly ignore the interests of class members, and the inability of the status quo to screen out frivolous suits.<sup>154</sup> Before

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151. See, e.g., sources cited *supra* note 149.

152. The idea that class action litigation would benefit from the introduction of a third-party has been a part of other reform proposals. For a discussion of the history of third-party intervention in class actions and the benefits associated with such interventions, see Edward Brunet, *Improving Class Action Efficiency by Expanded Use of Parens Patriae Suits and Intervention*, 74 TUL. L. REV. 1919 (2000).

153. It is worth noting that public interest groups have, on occasion, successfully intervened into suits and represented the public interest. See Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 456-63 (describing several public interest groups' actions and summarizing the results of studies analyzing such groups' contributions to the suits they intervened in). While it appears as though these groups help combat the problems identified in Part II, they lack the resources to become involved in more than a handful of suits and, hence, cannot be relied on to fix the system's problems. *Id.* at 449.

154. See *infra* Part III.C.2.

considering such matters, however, a more detailed description of the Public Advocate is necessary.

1. *The Role Public Advocates Would Play in Class Action Suits.* Public Advocate positions would be created within the federal government and staffed with attorneys experienced in litigating class action suits. As described in Part III.B.3, these individuals would be distributed across the country and would be responsible for representative suits filed within their jurisdictions. Public Advocates would join any suit filed in federal court that involved class-based claims.<sup>155</sup> Public Advocates would have standing similar to that of third-party litigants who intervene in a suit in accordance with Rule 24 of the Federal Rules of Civil Procedure.<sup>156</sup> They would possess full authority to file briefs and motions concerning any matters that arise during the course of litigation—for example, motions to dismiss, motions for sanctions, petitions supporting or opposing class certification, motions for summary judgment, motions to be considered at settlement fairness hearings, and so on. Additionally, as parties to the suit, they would be able to participate in pretrial conferences and the discovery process.<sup>157</sup> Like the principal parties to the action, Public Advocates would be able to express their views on the reasonableness of the parties' proposed timetables and the adequacy of their disclosures to the court during pretrial conferences or by filing separate motions. In essence, as well

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155. As part of the larger reform, the legislature would enact a procedural rule requiring that parties notify the appropriate circuit's Public Advocate office when filing a suit involving class-based claims. Additionally, trial courts would be able to contact their jurisdiction's office and indicate that one of its cases contains representative claims.

156. *See* FED. R. CIV. P. 24. Because inclusion of Public Advocates in federal suits involving classes would be mandatory, Public Advocates would not have to abide by the notice requirements set forth in Rule 24(c). This Article does not advocate for the introduction of a procedural mechanism for handling the addition of Public Advocates to suits, but this aspect of the proposed reform should not be problematic. The legislature could pass a statute that recognizes the public's interest in the adjudication of class action suits and vests the power to represent this interest in Public Advocates.

157. While it is unlikely that Public Advocates would have the resources needed to review all of the materials disclosed by the parties, even limited involvement would put them in a good position to police the parties' behavior and raise objections when egregious abuses occur. For an example of how this would pan out in practice, see *infra* note 164.

as in procedural capability, Public Advocates would be endowed with (and limited to) all of the abilities that the main parties to actions possess.

Given this identity of procedural capability, it should be clear that the Public Advocate proposal does not attempt to revolutionize representative litigation by adding a new player to class action suits that possesses powers that the currently existing players lack. This reform also does not attempt to revolutionize representative action litigation by rewriting the procedural rules governing how courts handle class-based claims. Rather, the reform simply seeks to increase the quality of the existing structure's output by introducing a litigant who will ensure that the public's interests are duly recognized.<sup>158</sup>

2. *How Public Advocates Determine What Is in the "Public's Interest."* Given that the defining characteristic of Public Advocates is the fact that they represent the interests of the public, a critical aspect of the reform is how "the public's interest" is determined. Abstracted away from a specific factual situation, it is difficult to provide a description of "the public's interest" that is not either uselessly vague or tautological. Most simply put, anything that creates a net benefit for members of the public will be in the public's interest. Conversely, anything that causes a net harm to the public will be contrary to the public's interest. While accurate, these descriptions are not particularly helpful as they do not explain what "net benefit" and "net harm" mean in this context. Rather than continue too far down the rabbit hole of analytic term definition, it will suffice to say that one can think of "net benefits" as the types of efficiency and equity gains that were discussed in Part I and "net harms" as the detrimental effects outlined in Part II.

Thankfully, whereas generating a description of what constitutes the "public's interest" in the abstract is difficult, defining the concept by providing examples of how it applies in particular situations is easy. Three hypothetical class action suits that have critical motions either pending or potentially pending are described below. For each suit, a sample analysis is provided of the way that a Public

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158. Their role would not be dissimilar from that played by Public Advocate-like attorneys in Section 303 administrative hearings by the U.S. International Trade Commission. See *infra* note 164 and accompanying text.

Advocate assigned to these cases might determine what actions she should take to satisfy her duty to represent the public's interest.

• **Hypothetical #1**—A suit has been filed on behalf of all individuals who purchased SkinnyWoman Margarita Mix—a low calorie cocktail mix marketed towards upper-crust party-goers who are watching their waistlines—against the product's manufacturer. The complaint alleges that, due to the manufacturer's negligence, every bottle of the mix produced in the past two years had been contaminated with certain manufacturing waste products. The Public Advocate assigned to this case is currently debating whether to file a memorandum in support of or against class certification. While she recognizes that the proposed class poses certain manageability problems (such as the identification and provision of notice to class members), she also feels as though the class members' claims are similar enough that adjudicating them in a class suit would provide large efficiency gains over individualized litigation. Further, documents produced by the plaintiffs indicate that the class claims are probably meritorious, reducing her concerns that this is a frivolous suit that will end up negatively impacting the public's ability to enjoy affordably-priced adult beverages. Finally, she is aware that drink manufacturers have increasingly been releasing contaminated products into the stream of commerce and all indications are that, absent a strong deterrent, this trend is unlikely to stop. Taking all of these factors into consideration, the Public Advocate determines that it is in the public's interest to support class certification.

• **Hypothetical #2**—A federal court recently certified a plaintiff class in the *Frankelle v. Zarinne Fabrics* case. The class complaint alleges that Zarinne Fabrics owns textile mills that have made improper use of dangerous chemicals, that large groups of tourists were exposed to these chemicals while taking the mildly popular behind-the-scenes tour of these plants, and that these individuals now face an increased risk of developing certain skin cancers. In the course of doing a targeted review of documents produced by the parties, the Public Advocate working on this suit discovered a series of e-mails that conclusively prove there is extremely little scientific support for plaintiffs' claims, and there doesn't appear to be evidence establishing that the class members were actually exposed to dangerous chemicals. Upon notifying Ms. Beansimmon, the in-house

lawyer representing Zarinne Fabrics, he is surprised to learn that, despite the strength of this evidence, Ms. Beansimmon is recommending that the company continue with discovery. Zarinne Fabrics intends to follow her advice, waiting to file a motion for summary judgment until plaintiffs have complied with their onerous discovery requests and the company has had the chance to identify every document that could support its motion. Given that the suit is based upon meritless claims, the Public Advocate feels as though further litigation can serve no public interest and that it would benefit the judicial system to have this case removed from the courts as soon as possible. Because he can find no countervailing public interest that weighs against his intuition, he decides that it is his duty to immediately file a motion seeking summary judgment against plaintiffs' claims.

• **Hypothetical #3**—Stockholders of Brava Cable Entertainment filed a high-profile securities fraud suit against the company several months ago. The parties have been attempting to come to an agreement concerning the scope and timing of discovery, but negotiations reached a standstill several weeks ago over the disclosure of documents related to a specific issue. Both sides have filed a series of discovery-related motions with the judge, and the Public Advocate assigned to the case is considering whether she should weigh in on the matter. After reviewing the parties' motions, the Public Advocate feels as though the requests and arguments being advanced by both parties are reasonable. Further, at this stage of the proceedings, she cannot tell whether a pro-plaintiff or pro-defendant ruling on this particular issue would be in the public's interest. Due to this ambivalence the Public Advocate decides that she should not file a motion on this issue.

These hypothetical scenarios highlight several important aspects of the "public's interest" concept and the role that Public Advocates would (and, perhaps more importantly, would not) play in class action suits. First, it should be clear that Public Advocates are meant to consider "the public's interest" as it exists as an analytic construct, not as an empirical fact (i.e., not as whatever interest the majority of individuals actually hold). Public Advocates would use their best judgment to analyze the facts of the case before them and determine what actions are likely to create the best result for the public. Second, Public Advocates will not consistently side with either plaintiffs or



defendants. Whether the public's interest aligns with those of the plaintiffs or defendants will depend entirely on case-specific facts, so one would expect Public Advocates to exhibit bipartisan tendencies across different cases. Finally, when a contested issue in a case does not raise significant public concerns or when it is unclear which result would benefit the public, Public Advocates will abstain from weighing in on how it should be resolved.

While the Public Advocate assigned to a case will end up bearing ultimate responsibility for making determinations as to what is in the public's interest, their discretion will be cabined by several institutional factors. First, as discussed in the following Part, there will be a head attorney in each Public Advocate office, and part of this individual's duties will be supervising their office's Public Advocates. Not only will these supervisors hold Public Advocates accountable for their decisions, but they will also assist Public Advocates in making difficult determinations. Second, the Public Advocate Organization, also discussed below, will issue guidelines describing specific factors that Public Advocates must consider when deciding what actions to take. These guidelines would largely track the different issues discussed in Part II, but would also describe specific issues and behaviors that have been identified as being of concern to the public. By providing a standard by which a Public Advocate's interest determinations can be judged, the guidelines would help ensure that the public interest analysis is being conducted in a consistent manner.

3. *Where Public Advocates Fit Within the Federal Government's Infrastructure.* Another important issue to address is how Public Advocates would function on organizational and administrative levels. While it is not necessary to discuss the minutiae of how the Public Advocate reform could be instituted, it is vital to describe where these attorneys would fit in the federal government's umbrella of organizations and how the Public Advocate program would be structured internally.<sup>159</sup> Fleshing out

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159. It should be noted that there is nothing about the Public Advocate proposal that would prevent it from being enacted at a state, rather than federal, level. Given the larger degree of variation in state class action laws and the smaller political hurdles associated with enacting state-level reforms, it is actually more likely that a state would adopt the proposal.

these types of details demonstrates the pragmatic nature of the proposal and provides insight into the types of political forces that will affect Public Advocates.

The Public Advocate Organization (“PAO”) would govern all Public Advocates. Drawing heavily from the way that the Federal Public Defender program has been organized, the PAO would operate within the Administrative Office of the U.S. Courts.<sup>160</sup> The PAO itself would contain thirteen offices, with each office being tasked with handling suits that arise within their designated federal circuit.<sup>161</sup> The head Public Advocate for each office would be appointed by a majority vote of the judges of the relevant court of appeals and would serve a four-year term.<sup>162</sup> The head Public Advocate for an office would have the authority to hire attorneys and personnel, with such authority being contingent on the approval of the relevant court of appeals and the Director of the Administrative Office of the U.S. Courts.<sup>163</sup> Each circuit’s head would be responsible for supervising his or her office and, as discussed earlier, would regularly provide Public Advocates with guidance.

The Federal Public Defender system is a strong model for the Public Advocate proposal to copy for several reasons. First, modeling the organization of the PAO after the Federal Public Defender system allows the Public Advocate proposal to utilize an organizational blueprint that has already proven to be viable. Second, by hosting the PAO in the Administrative Office of the U.S. Courts and vesting Article III judges with the power to select head Public Advocates, this structure isolates Public Advocates from certain political forces. Because Public Advocates will often be involved in cases that are of great importance to powerful political bodies and corporations, it is crucial that the PAO be structured in a way that provides Public Advocates with as much protection from coercion as possible. Third, dividing the PAO’s operational bodies into circuit-specific offices and permitting these subdivisions to handle hiring

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160. *See* 18 U.S.C. § 3006A (2006) (setting forth the organizational structure of the Federal Public Defender program).

161. *See id.* § 3006A(2)(A).

162. *See id.*

163. *See id.*

decisions allows the PAO to enjoy a large degree of flexibility when it comes to staffing. This flexibility is important given the large variation in the number and type of class action suits that are filed in different jurisdictions. Giving the head Public Advocates of each subdivision control over staffing decisions will help guarantee that circuits that handle a large number of suits with certain types of claims (e.g., derivatives suits or mass tort cases) have Public Advocates with experience in the relevant areas, as well as help ensure that different divisions are not chronically under- or over-staffed.

4. *Why Public Advocates Are Novel, But Not “Too Novel”—Analogous Legal Entities.* When confronted with the Public Advocate proposal, skeptics might object that the proposal is not feasible because it is based around the creation of an entity that is unlike any that our legal system has recognized. While it is true that the Public Advocates do not have any identical comparators in the American legal system, they would not be utterly unique. Indeed, the roles played by attorneys in a number of situations are analogous to that of the Public Advocate:

- When the U.S. International Trade Commission institutes a Section 337 trademark investigation, it assigns one of its staff attorneys to serve as a “Commission Investigative Attorney” who serves as an independent trial attorney whose primary function is to protect the public interest by ensuring that all issues are fully explored and that a complete factual and legal record is developed. The Staff Attorney fully participates in discovery and may present witnesses at trademark hearings.<sup>164</sup>

- Numerous states have appointed “Consumer Advocates,” whose duties include representing the public’s

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164. Michael L. Doone & Peter D. Martine, *Frequently Asked Questions Regarding Section 337*, INT’L TRADE COMM’N TRIAL LAW. ASS’N, <http://www.itctla.org/faq.cfm> (last visited April 1, 2012); see also AM. BAR. ASS’N, INT’L TRADE COMM’N, 1988 SEC. PATENT, TRADEMARK & COPYRIGHT 269, 270 (1988) (“[B]ut for the [Commission Investigative Attorney’s] performance . . . fewer Section 337 investigations would be fully and fairly adjudicated and fewer settlement agreements would be affirmed by the Commission.”); Jack Q. Lever, Jr., *Unfair Methods of Competition in Import Trade: Actions Before the International Trade Commission*, 41 BUS. LAW. 1165, 1182 (1986) (“[The Commission Investigative Attorney] will not independently take discovery but, instead, will monitor and participate in the discovery taken by the parties.”).

interest in all regulatory hearings and civil proceedings involving utilities-related matters.<sup>165</sup>

- Many states permit courts to appoint attorneys to serve as guardians ad litem for minors (who are generally deemed incapable of representing their own interests and who would otherwise have no independent representation) in family law matters.<sup>166</sup>

- Courts have occasionally appointed attorneys to act as guardians ad litem representing the interests of absent class members in disputes concerning whether proposed settlements and class counsel fees are reasonable.<sup>167</sup> Similarly, federal bankruptcy rules authorize a trustee to conduct widespread inquiries concerning “the acts, conduct, or property or . . . the liabilities and financial condition of the debtor, or . . . any matter which may affect the administration of the debtor’s estate” upon a demonstration of cause during discovery.<sup>168</sup>

These examples are sufficient to rebuff skepticism about whether introducing Public Advocates to class action suits is a procedurally viable solution.<sup>169</sup> Even though the

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165. See, e.g., 220 ILL. COMP. STAT. 40/5 (West 2012); IND. CODE ANN. § 8-1-1-1 to 8-1-1-4.1 (West 2012); IOWA CODE § 475A.1-A.5 (2011); TENN. CODE ANN. § 65-4-118 (2011).

166. See, e.g., CAL. CIV. PROC. CODE § 372 (West 2004); FLA. STAT. § 61.403 (2011); MINN. STAT. § 518.165 (2010); OKLA. STAT. tit. 43, §§ 107.3, 109 (2006).

167. *In re Asbestos Litig.*, 90 F.3d 963, 972 (5th Cir. 1996) (appointing an individual to serve as guardian ad litem for the subclass of plaintiffs with future claims and ordering him to make sure this subclass’s interests were not ignored by class counsel); *Haas v. Pittsburgh Nat’l Bank*, 77 F.R.D. 382, 383 (W.D. Pa. 1977) (appointing an attorney as “guardian *ad litem* and counsel . . . to represent the interests of the class in conjunction with the determination of reasonable fees for class counsel”); *Miller v. Mackey Int’l, Inc.*, 70 F.R.D. 533, 535 (S.D. Fla. 1976) (same); see also Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 949-51 (1998) (discussing the desirability of appointing an independent representative for claimants to combat the risk that class counsel will fail to advocate on behalf of the entire class).

168. FED. R. BANKR. P. 2004; Greg M. Zipes, *Discovery Abuse in the Civil Adversary System: Looking to Bankruptcy’s Regime of Mandatory Disclosure and Third Party Control Over the Discovery Process for Solutions*, 27 CUMB. L. REV. 1107, 1142 (1997).

169. While this Article does not propose a specific mechanism for implementing the Public Advocate proposal, one way in which this reform could be enacted is discussed *supra* note 156.

introduction of Public Advocates to class action suits would affect a major change in the way such suits operate, the role that they would play is not entirely foreign to our legal system and has been recognized in a number of different contexts.

C. *How Public Advocates Would Help Fix Class Action Litigation*

Having addressed both the role that Public Advocates would play in class action suits and the way that the Public Advocate reform could be instituted, it is time to discuss how introduction of such advocates would improve representative litigation.

1. *Specific Actions Public Advocates Would Take to Advance the Public's Interest.* Part II identified five aspects of modern class action litigation that are responsible for the device's troubled state. Once involved in a suit, Public Advocates would be able to directly address each of these problems:

- Public Advocates could combat inappropriate denials of class certification by filing motions in support of certification;
- Public Advocates could address the inept way that damages or settlement funds are distributed by advocating that courts only permit the use of distribution techniques that have been empirically proven to be effective;
- Public Advocates could fight the misrepresentation and non-recognition of the interests of class members and the public by objecting to collusive or otherwise unfair settlement proposals;
- Public Advocates could help courts screen out meritless suits by filing motions to dismiss, motions opposing class certification, and motions seeking summary judgment; and
- Public Advocates could further help reduce the burden that representative litigation imposes on courts by filing motions in opposition to abusive discovery requests and schedules, as well as by moving to have suits with overlapping claims consolidated.

2. *Why Actions Taken by Public Advocates Would Improve Class Action Suits.* Simply reciting the actions that Public Advocates could take to address these problems,

however, does not fully explain why introduction of Public Advocates would succeed in rehabilitating the status quo. Skeptics of the proposal might point out that the majority of the motions filed by Public Advocates would likely be duplicative of those that are already filed by one of the parties. Why, they would ask, should we believe that the actions taken by Public Advocates would be more effective than those taken by the parties themselves? Where is the value added?

The unique nature of Public Advocates and their relationship with the suits in which they are involved provide a number of answers to such concerns. First, it is crucial to note that the actions taken by Public Advocates will not always be duplicative, as their duties will often cause them to fill certain advocacy roles that are commonly left vacant in the status quo. For instance, many of the current system's problems can be attributed to the fact that the interests of absent class members are inadequately represented. Similarly, the system lacks a party that can be relied upon to advocate on behalf of the public's interest in having judicial resources spent in the most efficient way possible. Introducing a litigant to represent these interests would not only help to ensure that the court is presented with the voices of all interested parties, but would also create a means by which judges could be apprised of factual information that settlement-eager plaintiffs' attorneys and defendants might otherwise neglect to raise.<sup>170</sup> By ensuring that these groups have a party who will look out for their interests, the proposed reform would help fix many of the problems discussed earlier.

Second, even if a Public Advocate and one of the primary parties to a suit take the same action, it is likely that the different systemic roles occupied by these actors

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170. See Macey & Miller, *supra* note 61, at 47-48 (stating that representation of absent class members' interests "is almost entirely missing under current practice" and opining that introduction of an advocate for these interests with the power to bring additional attention to the trial court would help remedy problems related to unfair settlements); Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2190 (2000) (describing how "public employees, paid without regard to the outcomes of settlements, could provide 'independent' evaluations and represent groups within aggregates" and resolve the problems associated with class counsel failing to represent certain plaintiffs' interests).

will result in the court according different meanings to their actions. When a defendant in a mass tort class action suit files a motion opposing class certification, their action, in and of itself, does not signify anything particularly noteworthy. This can be attributed to the fact that defendants in these types of suits will *always* oppose class certification. When a Public Advocate involved in such a suit files a motion opposing class certification, however, a very different signal is sent to the court. Because Public Advocates have a choice between abstaining from weighing in and filing a motion that opposes or approves of class certification, motions filed by Public Advocates would signal to the courts that a sophisticated lawyer who owes no fealty to either party thinks that strong reasons exist for the court to decide an issue a certain way. Because only actions taken by Public Advocates impart these types of messages, it seems likely that courts would view their arguments in a somewhat different light than similar arguments articulated by one of the primary parties.

Additionally, Public Advocates would add value by ensuring that all of the key factual and legal issues are presented to the court. There are typically two reasons informational gaps occur in class action suits. First, the current system provides no safeguard against incompetent advocacy leading to results that run contrary to the interests of law and equity. This is not as large a concern in standard litigation, where individual parties select their representative and can retain alternative counsel at any time. But it becomes more worrisome in class action litigation, where class members cannot select who will serve as class counsel and fail to properly monitor class counsel's behaviors.<sup>171</sup> Mandating the inclusion of Public Advocates in representative suits would provide some level of assurance that suits with potentially massive public consequences are not derailed from their proper adjudicatory course due to inept counsel. Second, there are often instances where it will be in both class counsel's and defendant's interests to keep the court from being aware of certain information.<sup>172</sup>

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171. Klement, *supra* note 102, at 31 (describing how the economic dynamics present in most class action suits cause class members to under-monitor class counsel's conduct).

172. *See id.* at 46-47 (discussing the reasons why collusion between parties is a significant risk in class action suits and why courts cannot rely upon class counsel and defendants to supply the information they need in order to

This most commonly arises when both of these groups want a judge to approve the settlement they have proposed, but fear that a full disclosure of certain information would cause the judge to deny the settlement.<sup>173</sup> In the status quo, conspiring counsels' attempts to keep information from the court are likely to succeed, as judges lack the investigatory resources to independently discover key facts.<sup>174</sup> The addition of Public Advocates to class action suits would make it much more difficult for parties to hide relevant information.

Finally, there is reason to believe that the mere act of instituting the Public Advocate reform, divorced from any actual actions taken by Public Advocates, would exert a broad chilling effect on undesirable behavior. In order to understand why this effect would exist, it is helpful to consider the perspective of an unscrupulous class action plaintiff's lawyer. In the status quo, such an attorney feels as though he is taking a relatively small risk when he initiates a suit of dubious quality or files endless dilatory motions.<sup>175</sup> While he might end up having his suit dismissed

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determine the fairness of a settlement); *see also* Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 808 (1997) ("Perhaps in no other context do we find courts entering binding decrees with such a complete lack of access to quality information and so completely dependent on the parties who have the most to gain from favorable court action.").

173. *See* discussion *supra* Part II.A.2.

174. *Haas v. Pittsburgh Nat'l Bank*, 77 F.R.D. 382, 383 (W.D. Pa. 1977) ("To require the judge to occupy an adversary position . . . is highly inconsistent with his acknowledged duty to act as an impartial arbitrator. The appointment of a guardian for the class obviates this considerable problem of judicial schizophrenia."); *see also* Redish & Kastanek, *supra* note 85, at 574-75 ("American judges lack the investigatory resources available to judges in an inquisitorial system.").

175. *See, e.g.*, Stephen J. Choi & Robert B. Thompson, *Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA*, 106 COLUM. L. REV. 1489, 1508 (2006) ("[The PSLRA's] sanction provision has been little used as a weapon against possibly abusive class actions."); Danielle Kie Hart, *And the Chill Goes On—Federal Civil Rights Plaintiffs Beware: Rule 11 Vis-à-vis 28 U.S.C. § 1927 and the Court's Inherent Power*, 37 LOY. L.A. L. REV. 645, 662 (2004) (discussing survey results establishing that courts have imposed significantly fewer sanctions since the 1993 Amendment to Rule 11); Howard A. Cutler, Comment, *A Practitioner's Guide to the 1993 Amendment to Federal Rule of Civil Procedure 11*, 67 TEMP. L. REV. 265, 292 (1994) (discussing why the modern version of Rule 11 is likely to undermine its ability to deter bad behavior).



or having his motion denied, it is unlikely that he will lose anything other than his own labor if this occurs, and there is always the chance that his actions will pay off in the form of a settlement from a risk-adverse defendant. Introduction of Public Advocates to class action suits, however, would radically change this lawyer's calculus. Because Public Advocates will help courts filter out frivolous suits more quickly, the likelihood that such a lawyer will ever benefit from these types of actions will decrease substantially. Further, any attorney who consistently files non-meritorious class action lawsuits will build a bad reputation within the relatively small community of Public Advocates. This would lead Public Advocates to subject future suits filed by such attorneys to increased scrutiny, further reducing the chance that their suits will pay off and increasing the risk that they could suffer judicial sanctions. Hence, adoption of the proposal would create a strong incentive for attorneys to abstain from filing frivolous suits or motions.

#### CONCLUSION

If one were looking for low-hanging fruit in the world of procedural reform, the status quo's representative litigation system would have to be considered an obvious choice. The seemingly endless amount of negative attention that is showered upon this area of the law by academics, legal commentators, practitioners, and the media can only be interpreted as a clear sign that class action procedure is an area of the law that is ripe for reform. The diversity and complexity of the problems that have been identified with the current system make it impossible for minor reforms to put this type of litigation back on track. A major reform, one that affects a major change in the way that class action suits operate, is warranted. The Public Advocate proposal constitutes this type of reform and should be considered a viable idea of how we could address modern procedure's flaws.