INTRODUCTION

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Welcome to beautiful Tucson. It is a particular pleasure to greet those of you who have flown here from the uninhabitable regions of the country.

Today the class action stands at a crossroads that has eventuated from numerous causes, including the skill of both plaintiffs' and defendants' attorneys in expanding the scope of the class action, the amendments to the federal rules of civil procedure proposed by the Advisory Committee on Civil Rules earlier this year, and the granting of certiorari in the *Georgine* case.

Originally adopted by the United States in 1938, Rule 23 represented an attempt to encourage more frequent use of class actions.[1] The earlier use of simple language was set aside in pursuit of a more sophisticated analysis and a strategic effort to solve collateral issues, such as subject matter jurisdiction for class actions, combining "to produce a text burdened with a categorization of rights at a high pitch of abstraction."[2] The greatest ambiguity was found within Rule 23(a). It initially required such numerousness of the class so as to make joinder of all the members infeasible. The Rule continued to expand the definition to an extent that all actions ever considered class actions could fall within the definition:

> "[T]he character of the right" to be asserted for or against the class must be "joint" or "common" or "secondary"—[a] category of class actions which came to be called "true"; or the right must be "several" with the action directed to the adjudication of claims affecting specific property—the "hybrid" category; or the right must be "several," with a common question of law or fact affecting the right and common relief sought—the "spurious" category.[3]

While the Advisory Committee of that day considered it beyond their

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1. Advisory Committee Note to the original Rule 23, *reprinted in* 12 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, appendix, at 406 (1st ed. 1973) (Rule 23 of the Federal Rules of Civil Procedure was based on Equity Rule 38, making the procedure available in action for legal relief as well as equitable proceedings.).

2. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 376–77 (1967).

3. *Id.* at 377 (footnotes omitted).

functions to address the effect of judgments on persons who were not parties, thus neglecting to comment on the typing of class actions as true, hybrid and spurious, the Advisory Committee nevertheless accepted the typing itself.[4] Over twenty-five years later, acknowledging that the Rule had serious defects, a revision of Rule 23 was adopted in 1966.[5]

The current version sought to substitute functional tests for a more conceptually realistic viewpoint that better characterized practice under the former rule.[6] First, the Committee concluded that Rule 23(a)'s terms "joint," "common or secondary" and "several" providing a basis for the "true," "hybrid" and "spurious" classifications, had little or no clear ascertainable meaning in or out of the context of class actions.[7] Second, the original Rule failed to "provide an adequate guide to the proper extent of the judgments in class actions." Third, the Committee felt that the original Rule did not adequately address measures that might be taken by the court to assure procedural protections (i.e. notice to class members).[8] The Committee started with an agreed upon proposition that there was no basis for a class action unless the class was so numerous as to make individual joinder impracticable; common questions of law or fact existed among the class; and the representative parties were "proper champions" of class. Subdivision (a) set out these "prerequisites."[9] Specifically, subdivision (a) set forth four prerequisites in order to maintain a class action. While these prerequisites were implied in the original Rule, subdivision (a) expressed them more clearly: first, the class should be so numerous that joinder of all members would be impracticable; second, there must be questions of law or fact common to the class; third, the claims or defenses of the representative class should be typical of the claims or defenses of the members of the class; and fourth, the representative parties must fairly and adequately protect the interests of the class.

In addition to meeting the prerequisites of subdivision (a), the case must also fall within one of three categories of class actions described in Rule 23(b). Subdivision (b)(1)(A) attempted to address those situations in which litigation, if carried on, one by one, by individual members, would produce adjudications applying inconsistent or incompatible standards of action against the party opposing the action. Subdivision (b)(1)(B) addressed those situations where lawsuits brought by individual members within a class may impair the abilities of the other members to protect their interests. Subdivision (b)(2) comprised those situations in which an individual lawsuit, brought on grounds that apparently

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4. *Id.* at 378 & n.81 (incorporating rule 23(a) in accord with Professor Moore's formula, acting as Chief Draftsman).

5. Sherman L. Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204 (1966); Note, *Federal Class Actions: A Suggested Revision of Rule 23*, 46 COLUM. L. REV. 818 (1946).

6. *See generally* 7B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1752 (2d ed. 1986).

7. For a discussion of cases facing such problems with these terms, see Kaplan, *supra* note 2, at 380–84.

8. *Id.* at 393–94.

9. *Id.* at 387.

applied to an entire group, mainly involving civil rights actions, might prove both to be inadequate and inefficient. The last and most controversial of the new subdivisions was (b)(3). The objective of this subdivision was to take cases in which a party's action or omission had affected a large number of people, yet there was no clear indication as to whom those affected individuals might be, but in which a class action would promise to provide judicial economy and uniformity without jeopardizing the procedural safeguards for class members or the opposing party.[10]

Rule 23(c) set forth the various procedural aspects of class actions. Generally, these included: first, whether, as a court determines, the action should be maintained as a class action; second, a requirement that informal notice be given to class members in an action brought under Rule 23(b)(3), including individual notice to those members who can be identified by reasonable effort, and the content of that notice; third, the content and scope of a judgment in a class action; and fourth, the possibility that only part of an action may be conducted as a class action or that the class may be divided into subclasses. Specifically, subdivision (c)(2) provided an "opt out" provision for any member of a (b)(3) action by informing the court that he or she requests exclusion. In effect, this left the individual outside the class, allowing the pursuit of his or her own action.

Subdivision (d) provided guidance to the court regarding the management of these cases, expressly stating that orders under Rule 23 may be made, subject to amendment, in the context of pretrial conferences.

Rule 23(e), based on subdivision (c) of the original Rule, dealt with the dismissal or compromise of class actions. Though the 1966 amendment completely revised the structure of Rule 23, the most significant modification to the 1938 rule is that notice to class members in actions under Rule 23, regarding the dismissal or settlement of an action, was required.

There is evidence suggesting that the dominant purpose behind the 1966 amendment was to "enable" litigation by creating effective enforcement mechanisms under subdivision (b)(2), primarily but not exclusively for civil rights cases, and by facilitating the prosecution of small claims susceptible to group adjudication but otherwise uneconomical to litigate under subdivision (b)(3).[11]

The revised Rule 23 has been both praised and criticized since its inception. Until the end of the 1980's, the development of the class action had been described as "slow and halting." In 1988 the *New York Times* reported that class actions appeared to be "dying" and the "use of the courts as a vehicle of social change had subsided."[12] Federal courts were uniformly resisting attempts to certify mass tort actions. The concerns pervading the minds of the courts were twofold: first, the

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10. *See generally* WRIGHT ET AL., *supra* note 6, §§ 1772–80.

11. William W. Schwarzer, *Structuring Multiclaim Litigation: Should Rule 23 Be Revised?*, 94 MICH. L. REV. 1250, 1252 (1996).

12. Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858 (1995) (quoting Douglas Martin, *The Rise and Fall of the Class Action Lawsuit*, N.Y. TIMES, Jan. 8, 1988, at B7).

concern that the interests of the individual litigant would be "submerged" within large-scale proceedings;[13] second, the legislative history of the 1966 amendment to Rule 23 stated that the class action device is "ordinarily not appropriate" for a 'mass accident' resulting in injuries to numerous persons because of the presence of significant issues that would impact individual class members differently.[14] Even when trial courts did certify mass tort cases, they were often reversed.[15] Nevertheless, as mass tort actions matured during the 1980's both lawyers and judges, many of the latter of whom were initially quite hostile to the idea of a class action, recognized Rule 23 as a device capable of addressing the need for an aggregation device (one purpose the drafters did not have in mind). The class action became a case management device capable of minimizing duplicative action in the adjudication of related claims, producing a proliferation of highly controversial types of cases, particularly in the mass tort area.[16]

Of particular consequence to us today are several proposed amendments to Rule 23. Rule 23(b)(3) which provides the standards for when class actions are maintainable will add a new subpart Rule 23(b)(3)(A). The practicability of individual class members to pursue their claims without class certification will now be a weighing factor that the court must take into account when considering whether the class action is superior to other available methods for the fair and efficient adjudication of a controversy. As the relevant Committee note explains this new factor will discourage, but will not forbid, class certification when individual class members can practicably pursue individual actions.

Rule 23(b)(3)(F) is proposed to be added "to effect a retrenchment in the use of class actions to aggregate trivial individual claims."[17] Specifically, the new Rule 23(b)(3)(F) asks the court to analyze "whether the probable relief to individual class members justifies the costs and burdens of class litigation."[18]

A new Rule 23(b)(4) is proposed also to be added. This new Rule requires analysis of certification under subdivision (b)(3) for purposes of settlement even though the requirements of subdivision (b)(3) might not be met for purposes of trial. This proposal attempts to resolve the controversy generated by such cases as

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13. *See, e.g.*, Robert L. Rabin, *Continuing Tensions in the Resolution of Mass Toxic Harm Cases: A Comment*, 80 CORNELL L. REV. 1037, 1040 (1995) ("[T]he dominant tension in achieving a satisfying resolution of mass tort cases has been a tension between our continuing impulse to do individual justice and a more modern compensation-driven conception of collective justice.").

14. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1356–57 (1995) (quoting Amendments to Rules of Civil Procedure, 39 F.R.D. 69, 103 (1966)).

15. *See generally* Steve Baughman, Note, *Class Actions in the Asbestos Context: Balancing the Due Process Considerations Implicated by the Right to Opt Out*, 70 TEX. L. REV. 211 (1991) (discussing cases).

16. Illustrations include Georgine v. Amchem Prods., Inc., 157 F.R.D. 246 (E.D. Pa. 1994), *rev'd* , 83 F.3d 610 (3d Cir. 1996), *cert. granted sub nom.* Amchem Prods., Inc. v. Windsor, 117 S. Ct. 379 (1996).

17. Proposed Rule 23, advisory committee note.

18. Proposed Rule 23(b)(3)(F).

Georgine. The *Georgine* case held that a class cannot be certified for settlement purposes unless the same class would be certified for trial purposes. *Georgine* was particularly concerned about the poignancy of future claims of "exposure-only plaintiffs that today might be extinguished even though they have not yet accrued." Rule 23(b)(4) if adopted may prove to be the most consequential new aspect of the proposed amendments.

Our purpose in holding this conference is to broaden the context in which consideration of the class action and proposed amendments to Rule 23 occurs. We have divided the conference into three sessions.

Session I will provide a retrospective of class action practice and its links to the present status of Rule 23. We will begin with a very distant mirror, a fascinating paper by Professor Steve Yeazell which suggests that some of the origins of the current defense side enthusiasm for the class action can be traced back as long ago as a decision dated 1199 in the court of the Archbishop of Canterbury.

Steve's analysis will be complemented by that of several commentators including Tom Rowe, who will provide another distant mirror when he looks at the bill of peace; John Harkins, who will focus on experience under the pre-1966 Rule 23; Ed Labaton, who will address the 1966 Rule 23 in the early years after its adoption and Professor Charles Ares, who will pose a series of policy questions prompted by recent history.

Between Session I and Session II we will have a particularly interesting luncheon session. Joining us will be Richard Walker, the General Counsel of the SEC, to discuss that agency's experience under the Private Securities Litigation Reform Act, which was addressed in part to securities class actions.

Our second session provides a different contextual analysis. The purpose of Session II will be to contrast the experience in several leading practice areas including antitrust, where Steve Calkins will make a presentation; securities law, where Professor Jim Cox will speak; mass torts, which will be addressed by Francis E. McGovern; and civil rights, where Jack Greenberg will articulate his views. Session II will be lead by moderator Steve Burbank and include a number of commentators: Harvey Goldschmid, Mel Goldman, Stanley Grossman, Sherrie Savett, John Leubsdorf, and Bill Hirsch. Each of the commentators has expressed enthusiasm for proceeding in a transsubstantive way and addressing more than one of the specific topical areas.

Session III will then focus on the current initiatives for change. This session will be moderated by Ed Cooper and will include as presenters Paul Carrington whose draft paper begins with the modest assertion: "We contend that the Supreme Court of the United States has not been empowered and cannot constitutionally be empowered to promulgate draft Rule 23(b)(4) as presently under consideration by the Advisory Committee on Civil Rules."[19] Professor Linda Mullenix will then

19. Working Draft, Paul D. Carrington & Derek P. Apanovitch, The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated

articulate a more sympathetic view of the current effort to amend Rule 23, and Professor Jill Fisch will address the aspects of the Private Securities Litigation Reform Act of 1995 which bear on the class action. These presenters will be joined by commentators Bill Lerach and Elliott Weiss and, as a special unannounced treat, John Frank, who brings us the wisdom of having participated in amendment processes, both in 1966 and in 1996.

This session will conclude with closing remarks from Judge Paul V. Niemeyer who is now the chairman of the Judicial Committee's Advisory Committee on Civil Rules. He will not only once more remind us of the claims of history in addressing the potential of amending Rule 23, but offer his views as one who has been long involved in the process of consideration of rule change.

Under Federal Rule 23 (final version published in this issue of the *Arizona Law Review* at page 461).