

Rule 23 Class Actions - Efficient or Deficient?

Are class-actions as efficient as the legal community thinks they are? There is no argument class actions save plaintiffs money, time, and resources. With the Class Action Fairness Act of 2005 (CAFA) expanding federal jurisdiction over many large class action lawsuits, it is apparent that Congress and courts favor this method of dispute resolution over hearing cases numerous individually.¹ But has the focus on efficiency garbled the real purpose of the courts - namely an equitable administration of justice? One has to balance the advantages to the disadvantages of class actions to answer this question.

Background

Rule 23 of the Federal Rules of Civil Procedure requires certification for any class entails numerosity, commonality, typicality, and adequacy of representation. The court will also take into account whether the same common questions of law or fact predominate and whether a class action is the superior method to resolve the issue. Per General Telephone v. Falcon, when applying Rule 23(a) and 23(b), the courts need to conduct a “rigorous analysis” which may include an evidentiary hearing beyond the briefs and documents that counsel typically submits.²

Advantages to Class Actions

Rule 23 allows lots of plaintiffs to obtain recovery in a relatively speedy time-frame. Justice Scalia recently questioned Rule 23 in Wal-Mart Stores Inc. v. Dukes.³ The Supreme Court ruled that the plaintiffs did not have enough in common to satisfy a class. The plaintiffs were left to: (a) form a different class where their interests are more similar, (b) sue individually, or (c) not sue at all. There are problems with these alternatives. The individual class member

¹ Lee, Emery G.; Willging, Thomas E. The Impact of the Class Action Fairness Act of 2005 on the Federal Courts (2008), available at [http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/\\$file/cafa0408.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf)

² Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 161 (1982)

³ Wal-Mart Stores v. Dukes, 2010 U.S. 277 (2011)

may be discouraged from going to court again because there is not that same “strength in numbers.” Strength in numbers refers to the multi-party impact of so many plaintiffs that would make the defendant look guiltier.⁴ The former class members might be hesitant to sue their employer individually and risk losing their job. A lone class member may not have the funds to hire counsel; sharing the burden of cost with other class members would make the care more affordable. Without class actions, countless claims go unheard, damages go unallocated, and unlawful practices persist. The failure to certify a class can be seen as unjust because it leaves potentially deserving parties uncompensated.

Class actions make “unmarketable claims marketable.” This idea is known as small-claims class actions.⁵ Locating Investment Asymmetries and Optimal Deterrence in the Mass Tort Class Action illustrates an example of small-claims class actions with securities fraud.

The firm committing the fraud might cause only a small change in the price of its stock, leading each customer who was duped by fraud to incur a loss of \$5 per share. Since most shareholders probably will not have held hundreds or thousands of shares of the stock, it is likely that most shareholders would have a difficult time attracting lawyers to litigate their individual claims for such a paltry maximum payoff.⁶

A plaintiff may have difficulty convincing an attorney to invest time and resources to litigate such a small amount of money, but (with the amount) in the aggregate via class actions, an attorney would be more likely to take on the suit. Although small-claims class actions give the courts more work, this allows plaintiffs (who would not otherwise seek recovery) to get compensation. With class actions, the injured party will more likely obtain recovery and the defendant will be deterred from their transgressions.

⁴ Class Action, Zeldes & Haeggquist, LLP (2011), available at <http://www.zhlaw.com/Class-Action/>

⁵ Locating Investment Asymmetries and Optimal Deterrence in the Mass Tort Class Action, 117 Harv. L. Rev. 2665 (2004)

⁶ Id. at 2670.

Class actions create social change. Class action suits were filed against BP for their negligent oil spill in 2010.⁷ Enron, Tyco International, Cendant, AOL Time Warner, and Nortel Networks were all sued through class actions for securities and stock fraud.⁸ There have been class action suits against Toyota and Zyprexa for products liability.⁹ Classes have sued companies for discriminatory employment practices. Most notably, Brown v. Board of Education was a class action case that ended racial segregation in public schools.¹⁰ Class actions have historically been used to: preserve the environment, protect investors from fraudulent practices, promote companies to develop better testing procedures and safer products for consumers, maintain a discrimination-free workplace, and attain civil rights.¹¹ Class actions encourage corporations, workplaces, and manufacturers to act with a higher standard of care. Over time, class actions have shaped our society because they hold wrongdoers, who might have gone unperturbed (if it were not for the suits), accountable for their actions and deter them from wrongful actions.

Class actions are efficient because they aid judges. The judge can focus on one large trial instead of having to sit through numerous time-consuming small ones. Class actions conserve judicial economy and allow for greater uniformity of recoveries among similarly situated

⁷Fifield, Anna, Lawyers file class action suits against BP (2010), available at <http://www.ft.com/intl/cms/s/0/f7b6db16-74d2-11df-aed7-00144feabdc0.html#axzz1fEaCp2PP>

⁸ In re Enron Corp. Secs. Litig., 2002 U.S. Dist. Ct. 723 (S.D. Tex. 2007); In re Tyro Int'l, Ltd., Secs. Litig., 2002 U.S. Dist. Ct. Motions 1335A (2006); In re Cendant Corp. Secs. Litig., 1998 U.S. Dist. Ct. Motions 555505 (2007); In re AOL Time Warner, Inc., Secs. Litig., 2002 U.S. Dist. Ct. Motions 5575 (S.D.N.Y. 2006); In re Nortel Networks Inc., 2009 U.S. Bankr. Ct. Motions 10138 (2010)

⁹ Estate of Miller v. Toyota Motor Corp., 2007 U.S. Dist. Ct. Motions 545253 (2009); In re Zyprexa Prod. Liab. Litig. v. Eli Lilly & Co., 2007 U.S. Dist. Ct. Motions 1596 (2007)

¹⁰ Brown v. Bd. of Educ., 347 U.S. 483 (1954)

¹¹ How Class Action Lawsuits Can Change the Law, LawInfo (July 9, 2010), <http://resources.lawinfo.com/en/Articles/Class-Action/Federal/how-class-action-lawsuits-can-change-the-law.html>; Common Types of Class Action Lawsuits, LawInfo (July 14, 2010), <http://resources.lawinfo.com/en/Articles/class-action/Federal/common-types-of-class-action-lawsuits.html>

plaintiffs and for defendants.¹² Administratively, the courts would benefit from being more concerned about the quality over the quantity of their rulings. Class actions are useful because of their efficiency and ability to make rapid judgments for large quantities of plaintiffs.

Disadvantages to Class Actions

Although class actions provide several advantages, there are many disadvantages as well. 23(b)(1) and 23(b)(2) class actions do not require the notification of class member parties to the suit. The idea that someone is in a lawsuit without their knowledge is incongruous. Unlike 23(b)(3), 23(b)(1) and 23(b)(2) do not mandate opt-out options, leaving class members bound to decisions of litigations they did not consent to. Representation without consent is erroneous because it takes away the right to (knowingly) represent one's self. This also presents problems with res judicata if a plaintiff were to sue individually. The level of notice and lack of an "opt-out" option is insufficient in 23(b)(1) and 23(b)(2) class actions.

Legal scholars are concerned about defendants "forum shopping."¹³ The defendant counsel has incentive to look at jurisdictions that do not have the proper resources to handle large class actions and venues that are historically sympathetic toward defendants. This problem arose In Re: Baycol Products where there were multiple parties in multiple states presenting the same issues of fact.¹⁴ This raised additional concerns over personal jurisdiction, res judicata, collateral estoppel, and overall fairness. Sullivan v. DB Investments, Inc. elaborated on these difficulties, noting how class actions can create interstate conflicts with the Full Faith and Credit Clause,

¹² The Advantages and Disadvantages of Class Action Lawsuits, LawInfo (2010), available at <http://resources.lawinfo.com/en/Articles/Class-Action/Federal/the-advantages-and-disadvantages-of-class-act.html>

¹³ The Doctrines Underlying Class Action Lawsuits, LawInfo (2010), available at <http://resources.lawinfo.com/en/Articles/class-action/Federal/the-doctrines-underlying-class-action-lawsuit.html>

¹⁴ In re Baycol Prods. Litig., 2001 U.S. Dist. Ct. Motions 11431 (2006)

where states are obligated to recognize the rulings of other states.¹⁵ This “Erie-like” problem can induce inequitable administration of law.

Having a large number of plaintiffs can make a trial disorganized and confrontational. The judge has to hear burdens of a larger number of parties which may make it difficult for him members because he has more details to look at.¹⁶ These plaintiffs likely have varying personal interests which may be better addressed if they sued individually. There might be problems with conflicting claims, business relationships, family relationships, unions, subclasses, etcetera which take away from the efficiency that class actions are meant to provide and prolongs the evidentiary hearing/certification process.¹⁷ Likewise, there might be many attorneys and firms that are forced to work together from a far distance apart, creating intra-counsel conflict. Class actions may be inadequate because they force plaintiffs to lose some of their autonomy, can be disorganized, and can promote intra-party conflict.

Class actions do not always ensure a quality ruling. Most class actions suits end in settlement because the defendant does not want to enter a publicized litigation where they can lose a large sum of money. Cases may settle for financial compensation, coupons, or rebates. In Scott v. Blockbuster Entertainment, a \$500 million settlement was reached and plaintiffs received their damages in \$1.00 Blockbuster coupons.¹⁸ The attorneys left with \$9.25 million while the large majority of the coupons went unredeemed. In this instance, justice was not served; victims went uncompensated while the plaintiff counsels were the main beneficiaries. Another problem (which may affect a quality ruling) is that a class party may abuse class actions

¹⁵ Sullivan v. DB Invs., Inc., 619 F.3d 287 (3d Cir. 2010)

¹⁶ Mersol, Gregory V. Ethical Issues in Class Action Employment Litigation, BakerLaw (2004), available at http://www.bakerlaw.com/files/publicdocs/doc_fb923597531848cc9e5cd7c06d736fdd.pdf

¹⁷ Id. at 2.

¹⁸ Scott v. Blockbuster, Inc., No. D 162-535 (Jefferson County, TX, 2001)

and file a frivolous lawsuit to hurt a defendant who did nothing wrong. Even if the defendant is innocent, he does not want bad publicity or to jeopardize his business's reputation. Because of the pressure of a class action lawsuit, the defendant may opt to pay a large sum rather than risk ruinous loss.¹⁹ There are many situations where class actions can lead to unjust results.

Class actions may end up hurting the plaintiff. Locating Investment Asymmetries and Optimal Deterrence in the Mass Tort Class Action addresses the inequality of (financial) resources in class action suits.²⁰ A defendant might not care as much about a small individual lawsuit, but has incentive to invest more time and money into building a better defense for a larger one. Thus, it would be cheaper for defendants to hurt plaintiffs this way.²¹ Class actions are supposed mechanisms meant to help plaintiffs (get compensated), but taken in this light, class actions might be detrimental to plaintiffs.

Possible Solutions to Class Action Problems

There are several modifications I would make to class actions. To deal with 23(b)(1) and 23(b)(2) cases where a party can represent someone without their accord, I would impose a stricter notification process and a mandatory “opt-out” option. This law derives from the idea that nobody should be subject to a ruling they did not consent to.

To end forum shopping, I would make class actions with multi-state plaintiffs immediately go to federal court.²² Because federal judges serve for life, they are immune to local pressures and they have more resources and experience suitable for a complex class action suit.

¹⁹ Liptak, Adam. When a Lawsuit is Too Big, New York Times, Apr. 2, 2011, at WK1.

²⁰ Id. at 2673.

²¹ Donovan, Brian J., Why Class Actions May Not be in the Best Interests of Potential Plaintiffs (2010), available at <http://donovanlawgroup.wordpress.com/2010/05/09/bp-oil-spill-of-april-2010-why-class-action-lawsuits-may-not-be-in-the-best-interests-of-potential-plaintiffs/>

²² Just Compensation: Restoring Fairness and Efficiency to America's Civil Justice System, Hope Street Group (2004), available at <http://www.hopestreetwork.org/content/images/stories/documents/TortReform.pdf>

However, in a case where more than half of the plaintiffs are from the same state, the trial can continue in state court. This preserves federalism and allows states to look out for their citizens.²³

To relieve judicial economy, I would increase the amount of judges and funding for judicial resources. This way, a judge would be more organized with his caseload, have more time to go over the particulars of the case, and be more meticulous in the certification process and rulings. This would also speed up the trial, something that would benefit both parties cost-wise. Although implementing this would cost more, if our real interest is in efficiency, justice, and a quality ruling, this is an investment. To prevent the abuse of class actions, I would impose a penalty on plaintiff parties and attorneys for filing frivolous lawsuits. Frivolous suits waste our resources and stall other viable cases from being heard. Both these measures seek to improve judicial economy.

To deal with the problem of class action settlements ending in unused coupons and rebates, I would make a law whereby all 23(b)(1) and 23(b)(3) class action suits are to be resolved only in money damages which guarantees relief for all plaintiffs.

Resolving resource asymmetry is challenging. There will always be disparities between the plaintiff and the defendant's financial resources. However, it would be illogical to put a minimum or maximum on what a party can spend on legal aid. However, if there were a ratio (for instance, a party cannot spend more than 25% than the other party on legal resources), this would make the trial more fair. This ratio can be set at the pretrial conference and can be changed at any time with both parties' consent. Here, the idea is to level the playing field and give parties a similar opportunity to win the case (based on a similar access to legal counsel).

²³ Id. at 7.

Class actions start with a party's alleged misconduct. Cases would not exist if defendants were abiding by the law. By improving enforcement of anti-discrimination, environmental, securities, and products liability law, we are attacking the source of these cases.²⁴ This would reduce the number of class action suits to preserve judicial economy.

Conclusion

Class actions are effective and necessary procedures given the enormous scale of economic activity in our society. The elimination class actions would result in the dissolution of small-claims class actions; a proven method to deter nationwide misconduct and a way for courts to reach final resolutions of disputes affecting many.

Although class actions have numerous advantages, they also come with their disadvantages. Arguably no legal mechanism is perfect; there is always room for improvement. If we recall the original reason why this legal instrument was devised, we would make slight modifications to improve class actions. My solutions center on several ideas – improving the process of how class actions are heard, keeping legal costs low, and improving judicial economy. With these adjustments, we can enhance the efficiencies and advantages of class actions even more.

²⁴ Dam, Kenneth W. Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest, 4 U. Chi. L. Rev. 47 (1975)