CLASS ACTIONS AT THE CLOVERLEAF

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The papers on which I am to comment demonstrate that the conveners of this conference fell short of the full truth when they called it "Class Actions at the Crossroads." Today's class action situation does resemble a crossroads in one way: we face far-reaching choices[1] without fully understanding what confronts us.[2]

But on the whole, the situation looks more like a cloverleaf. Different groups of litigants drive in on a variety of roads, swerve about along confusing curves, and then zoom out in different directions. Drawing on the excellent papers of Stephen Calkins, James Cox, Francis McGovern and Jack Greenberg, I will sketch two maps of the terrain. Then I will present some criticisms of Professor McGovern's hints that pragmatism provides a straight path through the hubbub for mass tort settlement class actions.

I. SUBSTANCE DRIVES PROCEDURE?

In recent years, innovations changing class actions in specific substantive fields of law have proliferated. One of the clearest examples is found in the Private Securities Litigation Reform Act of 1995, discussed by two Articles in this symposium.[3] In addition to modifying securities litigation in other ways, the Act

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1. *See* Robert Frost, *The Road Not Taken*, *in* COMPLETE POEMS 131 (1949); ERWIN PANOFSKY, STUDIES IN ICONOLOGY (1989) (Hercules at the crossroads, choosing between virtue and pleasure).

2. *See* SOPHOCLES, OEDIPUS REX, lines 707–834 (Dudley Fitts & Rubert Fitzgerald trans., 1977).

3. Pub. L. No. 104–67, 109 Stat. 737 (1995); James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 ARIZ. L. REV. 497 (1997); Richard H. Walker et al., *The New Securities Class Action: Federal Obstacles, State Detours*, 39 ARIZ. L. REV. 641 (1997). *See also* Joel Seligman, *The Private Securites Reform Act of 1995*, 38 ARIZ. L. REV. 717 (1996).

contains detailed class action provisions concerning the selection of class representatives and counsel, attorney fees, security for costs, and settlement procedures.[4]

There are many other instances. In the civil rights area, Professor Greenberg sets forth recent legislation increasing the preclusive effect of employment discrimination class actions and slashing the relief available in prison reform suits.[5] Stephen Calkins describes how Congress has authorized states to bring *parens patriae* antitrust actions on behalf of their citizens, and the FTC to bring somewhat similar actions.[6] Professor McGovern portrays the acceptance by a few courts of settlement class actions in mass tort cases.[7] In 1974, Congress amended the Truth in Lending Act to limit the recovery of liquidated damages in class actions.[8] In 1996, it prohibited Legal Services Corporation lawyers from bringing class actions for their clients—a provision not explicitly directed at any substantive area, but obviously limiting certain kinds of class actions, such as those concerning AFDC and disability benefits.[9]

We are witnessing the decline of a single, transsubstantive system of civil procedure where class actions are concerned. Legislators have, in effect, amended Rule 23, not across the board, but in specified substantive areas, and for substantive reasons. While scholars were debating the merits of transsubstantive procedure,[10] Congress acted. The resulting fragmentation parallels the increasing geographic fragmentation of federal civil procedure.[11]

The breach in transsubstantive procedure concerned class actions because class actions involve an unusual interplay of substance and procedure. They provide an unusually powerful way of enforcing substantive law, and hence draw the attention of those who want to promote or discourage enforcement. Their mass production

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4. 15 U.S.C. §§ 77z-1(a), 78u-4(a) (1994 & Supp. I. 1995).

5. Civil Rights Act of 1991, Pub. L. No. 102-166, § 108, 105 Stat. 1076 (1991) (codified at 42 U.S.C. § 2000e-2(n) (1994)); Prison Litigation Reform Act, Pub. L. No. 104-134, §§ 801, 802, 110 Stat. 1321 (1994) (codified at 18 U.S.C. § 1836 (West 1984 & Supp. 1997)).

6. 15 U.S.C. §§ 5c, 53(b) (1994); Stephen Calkins, *An Enforcement Official's Reflections on Antitrust Class Actions*, 39 ARIZ. L. REV. 413, 433, 437 (1997).

7. Francis McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595 (1997). *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995). On the rise of mass tort class actions, see Judith Resnik, *From "Cases" to "Litigation,"* LAW & CONTEMP. PROBS., Summer 1991, at 5 (1991).

8. Pub. L. No. 93-495, 88 Stat. 1518 (1974) (codified at 15 U.S.C. § 1640(a) (1994)). *See also* Truth in Savings Act, Pub. L. No. 102-242, § 271, 105 Stat. 2236 (1991).

9. Pub. L. No. 104-134, § 504(a)(7), 110 Stat. 1321 (1996). Indeed, Section 504(a)(16) prohibits all Legal Services Corporation litigation "involving an effort to reform a Federal or State welfare system."

10. *See, e.g.*, Symposium, *Introduction: The 50th Anniversary of the Federal Rules of Civil Procedure 1938-1988*, 137 U. PA. L. REV. 1873 (1989); Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975).

11. *See* Symposium, *Reinventing Civil Litigation: Evaluating Proposals for Changes*, 59 BROOK. L. REV. 655 (1993).

procedures modify the law being enforced,[12] and those who shape that law have now turned their attention to class action procedure.

Although class action law is moving in substantive directions, procedure may still have a hand on the wheel. Often, indeed, it is hard to separate changes in substantive law from class action changes, particularly in areas where class actions have become the predominant remedy. Professor Greenberg persuasively treats as class action changes modifications in the remedial law of school desegregation and prisoner rights, even though these modifications make no explicit reference to class actions, because in practice they are applied in class actions. The "safe harbor" provisions of the Private Securities Litigation Reform Act of 1995[13] contain no procedural or remedial clauses, but would they have been enacted without the growth in securities class action that made securities litigation important to corporate management?

The congressional origin of most class action changes links with their substantive impetus. Procedural rulemakers have continued to write general, transsubstantive rules. Because so many groups have conflicting interests in class action rules, no consensus supporting significant class action changes of transsubstantive impact has arisen. Interest groups seeking narrower changes have found Congress a more receptive audience whether the changes they sought were substantive, procedural, or both.

Because most of the recent changes originated with interest groups working through Congress, they have usually aided defendants. It was defendants who felt the impact of class actions, and who enjoyed access to recent conservative Congresses. Potential class members are usually unorganized—that is one justification for class actions—and even the plaintiffs' bar has had more success in resisting some legislative proposals it opposes than in promoting those it favors. The Civil Rights Act of 1991 is a rare example of an organized group obtaining a pro-plaintiff change in class action law.

Like rule-makers, judges have been stymied by the complex and unpredictable impact of transsubstantive class action changes. In recent years, the judiciary has created only two class action changes, each of ambivalent nature and uncertain future. One is the settlement class action, which helps mass tort defendants prevent individual suits and imposes on all claimants uniform terms negotiated with a few plaintiffs' lawyers.[14] The other is the Fifth Circuit's holding—reached in reliance on the wording of recent legislation and defiance of its intent—that in a diversity jurisdiction class action only the named plaintiffs need satisfy the jurisdictional

12. *See, e.g.*, Geoffrey Hazard, Jr., *The Effect of the Class Action Device upon the Substantive Law*, 58 F.R.D. 307 (1973).

13. Pub. L. No. 104-67, § 102, 109 Stat. 749 (1995) (codified at 15 U.S.C. §§ 77z-2, 78u-5 (1994 & Supp. I. 1995)).

14. *See* Symposium, *Mass Tortes: Serving Up Just Desserts*, 80 CORNELL L. REV. 811 (1995) [hereinafter *Mass Tort Symposium*]. *See infra* notes 21-33 and accompanying text.

amount requirement.[15] Even if the Supreme Court upholds such innovations, we can probably expect most future class action changes to come from Congress and to be substantively oriented.

II. CURVES OF DISTRUST

Although substantive discontent provides the impetus that propels innovation, procedural theories steer the innovators toward particular class action changes. Recently, these have been theories of distrust: distrust of plaintiffs' lawyers and distrust of judges.

Distrust of plaintiffs' lawyers has many sources. Academics have developed a series of critiques of class action lawyers, focusing on conflicts within classes, on the lack of effective client monitoring of most class lawyers, and on lawyers' temptation to place their own ideological or economic interests ahead of those of class members.[16] Defendants complain of lawyers who bring groundless suits, and feel no fondness for those who bring grounded suits yielding large recoveries. Some politicians gladly direct an ancient tradition of anti-lawyer feeling against the plaintiffs' bar.

This distrust marks some recent class action legislation. The Private Securities Litigation Reform Act of 1995 seeks to control baseless allegations and excessive attorney fees, as well as to promote designation of lead plaintiffs whose large stakes will spur them to control class lawyers. Prohibiting Legal Services Corporation lawyers from bringing class actions rests in part on portrayals of them as leftist zealots. Authorizing state attorneys general to bring *parens patriae* antitrust actions for state citizens reflects a desire to limit the role of the private bar.

Civil rights litigators are one group of lawyers that has so far managed to escape distrust leading to legislation. Apparently its members are too poor to be considered greedy. The Supreme Court promoted this poverty, while showing its faith in the disinterestedness of this part of the bar, by upholding class action settlement offers requiring the plaintiffs' lawyer to waive attorney fees.[17] The Civil Rights Act of 1991, by allowing damage recovery in employment discrimination actions, has given rise to a resurgence of class actions that may in turn make it possible for some to apply the greedy lawyer stereotype to some of the civil rights bar.[18]

Distrust for judges has also inspired class action changes. The Prison Litigation Reform Act and the Supreme Court's recent school desegregation decisions[19] both

15. *In re* Abbott Lab., 51 F.3d 524 (5th Cir. 1995).

16. *See, e.g.*, Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987). *See also* John Leubsdorf, *Co-opting the Class Action*, 80 CORNELL L. REV. 1222 (1995).

17. Evans v. Jeff D., 475 U.S. 717 (1986). *See also* City of Burlington v. Dague, 505 U.S. 557 (1992).

18. 42 U.S.C. § 1981a (1994 & Supp. I 1995).

19. Missouri v. Jenkins, 115 S. Ct. 2038 (1995); Freeman v. Pitts, 503 U.S. 467

limit the powers of judges to grant broad, class-wide relief in institutional reform litigation. Restrictions on Legal Services Corporations lawyers indicate not only distrust for the lawyers themselves, but distrust of what they may persuade judges to decree. Of course, this distrust of judges shades into distrust of the law that they enforce, and that class actions enable them to enforce more effectively. But it also builds on criticism of judicial activism in class actions.[20]

We might have expected that the growth of class actions would lead to distrust of participating lawyers and judges. Distrust of the government led many in the 1960s and 1970s to welcome the class action brought by the "private attorney general" as an alternative. Now, the conflicting values and the disbelief in a common good that fostered distrust of the government have infected trust in class actions. Those who want to cut back government also want to cut back class actions.

Distrust of class action defendants has now joined other distrusts to motivate much of the opposition to recent settlement class actions. We opponents see in cases such as *Georgine*[21] and *Ahearn*[22] the misuse by defendants of class actions to reduce their liability. More precisely, we see a structure of procedures and incentives that tempts defendants to seek such reductions, plaintiffs' lawyers to accept inadequate deals, and judges to confirm them.[23] That brings me to Professor McGovern's proposal to cut a pragmatic highway through the mass tort problem.

III. TWO PRAGMATISMS

My criticism of Professor McGovern's paper[24] concerns some of its implicit "pragmatic"—the word is his—arguments for defensive settlement class actions in mass tort cases. Pragmatism can be useful; but even pragmatic arguments for a proposal rest on assessments of what consequences the proposal will produce, and on judgments of what consequences are desirable or undesirable. Professor McGovern presents two arguments, one narrow in scope and in my opinion defensible, the other broader and indefensible. I will try to distinguish these two pragmatisms.

Professor McGovern's pragmatisms appear in the interstices of his characteristically perceptive and entertaining exploration of why "unlikely allies" from left and right have opposed defendants' use of settlement class actions. This is a wonderful topic for him to have discovered, and there is much to be learned from his

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(1992).

20. *See, e.g.*, PETER SCHUCK, AGENT ORANGE ON TRIAL (1986); Colin S. Diver, *The Judge as Political Power-Broker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979).

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

22. Ahearn v. Fibreboard Corp., 162 F.R.D. 505 (E.D. Tex. 1995), *aff'd sub nom., In re* Asbestos Litig., 90 F.3d 963 (5th Cir. 1996).

23. *See, e.g., In re* Asbestos Litig., 90 F.3d 963, 993 (5th Cir. 1996) (Smith, J., dissenting); *Mass Tort Symposium*, *supra* note 14; Coffee, *supra* note 7, at 1343.

24. McGovern, *supra* note 7.

discussion, although at times his leftists and rightists take on the unrealistic character of scarecrows.

My own objections to settlement class actions are twofold. First, as already mentioned, they tempt defendants and plaintiffs' lawyers to profit at the expense of class members. Second, they impose what amounts to nationwide tort reform legitimized neither by legislation, adjudication on the merits, or genuine consent.[25] These two objections are related. When a class is properly represented by lawyers prepared to bring the action to trial, it is easier to argue that a settlement represents the probable result of adjudication or rests on adequate consent.

Professor McGovern's analysis suggests—in its narrower form—that properly represented plaintiffs and defendants could, in some circumstances, agree to class settlements benefitting both. For mature tort claims, some form of alternative dispute resolution system such as a settlement might institute could save both sides litigation costs. It could also speed up claims resolution, relieving plaintiffs from delays that may be longer than their lives—or from arriving at the head of the line only to find that the defendant's assets are exhausted—and defendants from uncertainty as to their total liability.

This seems to me a possibility worth exploring, although not one realized in *Georgine* or *Ahearn*, the two settlement class actions most familiar to me. The settlements there benefitted defendants, plaintiffs' lawyers, and perhaps plaintiffs not in the class, but at the expense of class members. The simplest proof is that the average recovery projected for class members was substantially less than what was received by clients of the class lawyers who settled simultaneously outside the class action. Arguments purporting to justify this short-changing persuaded the district courts, but are nevertheless deficient.[26]

Some of Professor McGovern's comments show how the settlement class action, as presently crafted, falls short of what the narrower pragmatic argument could justify. He notes that, if settlement classes had to meet the requirements of Rule 23 for trial purposes, defendants "would be extremely reluctant to agree to a trial class even in conjunction with a settlement class for fear that the settlement class might fail, leaving them in the untenable position of facing a trial class."[27] Those arranging settlement class actions need not consider any similar reluctance to agree of class members: members will not be consulted, but will be represented by lawyers, often

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25. *See* Paul D. Carrington & Derek Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass Tort Settlements Negotiated Under Federal Rule 23*, 39 ARIZ. L. REV. 461 (1997); Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858 (1995); James A. Henderson, Jr., Comment, *Settlement Class Actions and the Limits of Adjudication*, 80 CORNELL L. REV. 1014 (1995).

26. *See* Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045, 1064–78 (1995); Ahearn v. Fibreboard Corp., 1995 U.S. Dist. LEXIS 11532, at 78–79, 102–04, 108, 226–29 (E.D. Tex. 1995), *aff'd sub nom., In re* Asbestos Litig., 90 F.3d 963 (5th Cir. 1996).

27. McGovern, *supra* note 7, at 603.

selected by defendants, with interests pressing them to approve a settlement. Had class members been as well represented as defendants, how many of them would have approved the mass tort settlements arranged in their names?

Later, Professor McGovern mentions how Judge Weiner helped bring about class and other settlements "[b]y not allowing trials of plaintiffs' asbestos personal injury cases in federal court" and thus increasing "financial pressures on plaintiffs and their counsel" to settle.[28] This scarcely sounds like an environment in which plaintiffs and defendants accepted settlements simply because they are mutually beneficial.

At any rate, Professor McGovern's broader and more disturbing pragmatic theory relies not so much on the consent of plaintiffs and defendants to an alternative dispute resolution system benefitting all of them as on the specter of unlimited liability. For asbestos, and perhaps other mass torts, "litigation is highly elastic in that the reservoir of potential plaintiffs is virtually limitless and plaintiffs will emerge as long as damages can be obtained cost effectively.... There is no light at the end of the asbestos tunnel...."[29] If uncountable plaintiffs are converging on the courts, pragmatism might counsel that almost any measure that can actually be pushed through might be better than inaction. Under this Malthusian analysis, the fertility of plaintiffs' lawyers can be checked only by plagues, famines, or global settlements.

Whether a virtually limitless array of asbestos plaintiffs waits in the wings is at least questionable. In *Georgine* and *Ahearn*, the settlers introduced expert testimony, which the court accepted, that they *could* predict the volume of future asbestos claims, and that the settlement would suffice to pay them.[30] On the other hand, similar predictions approved by past courts proved woefully inadequate.[31] We simply do not know how many asbestos claims will appear—which is not the same thing as having reason to believe that there will be no limit to them. And we have even less knowledge about mass torts other than those involving asbestos.

Should the number of asbestos or other claims indeed grow without bound, one of two conclusions will apply. One is that something is very wrong with our tort law: it is upholding myriads of claims that it should reject. In that case, we should change the law. If judges are willing to approve settlement class actions, with all their perils, why should they be unwilling to change the judge-made law of torts should it appear that asbestos liability will be limitless? If legislators are willing to limit liability for

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28. *Id.* at 611. In 1991, all federal personal injury asbestos cases had been transferred to Judge Charles R. Weiner by *In re* Asbestos Prods. Liab. Litig., 771 F. Supp. 415 (J.P.M.L. 1991). Thereafter, none were set for trial except in extreme instances. Koniak, *supra* note 26, at 1071 & n.127.

29. McGovern, *supra* note 7, at 605.

30. Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 286–88 (E.D. Pa. 1994), *rev'd*, 83 F. 3d 610 (3d Cir.), *cert. granted sub nom.* Amchem Prods., Inc. v. Windsor, 117 S. Ct. 379 (1996); Ahearn v. Fibreboard Corp., 1995 U.S. Dist. LEXIS 11532, at 69–72, 154–62 (E.D. Tex. 1995), *aff'd sub nom. In re* Asbestos Litig., 90 F.3d 963 (5th Cir. 1996).

31. *In re* Joint E. & S. Dist. Asbestos Litig., 982 F.2d 721 (2d Cir. 1992), *modified in other respects*, 993 F.2d 7 (2d Cir. 1993).

cigarettes, medical malpractice, and securities fraud,[32] must we predict that they will ignore reasonable claims for protection against unbounded litigation?

The other possible conclusion, of course, is that some defendants have committed a lot of torts. If so, they should not be able to cap their liability at the expense of those they injured. Should their liabilities exceed their assets, bankruptcy is the logical solution. That solution has the advantages of having been approved by Congress, of providing principles and procedures for dividing assets among claimants, and of permitting viable businesses to continue while divesting their owners of their interests.

Before courts approve the creation of an alternative procedure in the guise of a class action, they should recall that Congress swept away just such an alternative, the equity receivership. Like those settlement class actions, equity receiverships were often initiated by corporations eager to shed liabilities in a propitious forum, with the help of a nominally adverse but actually friendly creditor. Like those actions, receiverships gave rise to charges of collusion, conflicts of interest, and freezing out some subclasses of creditors.[33] So perhaps the Bankruptcy Code should be added to the list of legislation modifying class actions with which this Comment began. And perhaps cutting a road for settlement class actions through the cloverleaf would simply make it easier for those so disposed to transport the rest of us toward an undesirable destination.

32. Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) (statutory preemption of some cigarette suits); Randall R. Bovbjerg, *Legislation on Medical Malpractice: Further Developments and a Preliminary Report Card*, 22 U.C. DAVIS L. REV. 499 (1989); Walker et al., *supra* note 4 (securities fraud).

33. *See, e.g.*, Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 21–23 (1995); Edward H. Levi & James W. Moore, *Bankruptcy and Reorganization: A Survey of Changes I*, 5 U. CHI. L. REV. 1, 4–5 (1937); Edward H. Levi & James W. Moore, *Bankruptcy and Reorganization: A Survey of Changes II*, 5 U. CHI. L. REV. 219, 225–36 (1937). *Cf.* William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837, 841 (1995) (describing mass tort settlement class action as "a creature that resembles a cross between an equity receivership and a bill of peace"). For good discussions of other precursors of the settlement class action, see Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 ARIZ. L. REV. 687 (1997); Thomas D. Rowe, Jr., *A Distant Mirror: The Bill of Peace in Early American Mass Torts and Its Implications for Modern Class Actions*, 39 ARIZ. L. REV. 711 (1997).