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CO-OPTING THE CLASS ACTION

John Leubsdorf†

When the Georgine court denied leave to thirty-seven teachers of Professional Responsibility to file an amicus brief opposing designation of proposed class counsel,¹ its opinion observed that "(with all due respect) the moving law teachers have only limited knowledge of the underlying facts and issues before the Court."² As the main author of that brief, I must be the only participant in this conference whose ignorance of the case around which it centers has been judicially certified. For that reason, and because I generally agree with what she says, I will not comment on Susan Koniak's cogent criticism of Georgine.³ Nor will I try to answer most of Carrie Menkel-Meadow's thoughtful questions,⁴ except to express the belief (which she would surely join) that the number and difficulty of those questions will not excuse us from taking positions on the issues that mass torts raise.

I

My starting point is a single one of Professor Menkel-Meadow's questions: "Has anyone else noted the irony that many of the critics of mass tort class action settlements were often proponents of class actions in other contexts—civil rights, consumer fraud, etc.?"⁵ As such a critic and proponent, I have an explanation and justification to propose for myself and others.

† Professor, Rutgers Law School-Newark. The author was the main author of a Brief of Law Teachers as Amici Curiae sought to be filed in opposition to the designation of proposed class counsel in Georgine v. Amchem Prods., Inc., 157 F.R.D. 246 (E.D. Pa. 1994), and has since been retained as an expert by persons opposing the proposed settlement in Ahearn v. Fibreboard Corp., No. 93-526 (E.D. Tex. Sept. 9, 1993). The author has also served as class counsel in school desegregation and prison reform cases. Many thanks to Kathleen A. Sullivan for her help.


⁵ Id. at 1219 n.229.
We see in *Georgine* and some of its progeny a possible future in which, once again, the "haves" will come out ahead. We are afraid that the class action will be co-opted—that an institution that lawyers and scholars have shaped to assist the relatively powerless will be turned against the powerless by the powerful. We fear that what was meant to provide a remedy for those who would otherwise lack one, enabling them to pool their voices and finances, will become a device to take away remedies from those who could otherwise invoke them.

Whatever judgment courts and commentators will ultimately render on *Georgine*, that case poses in stark terms the possibility of such an upset. When those who have brought separate tort suits do better than comparable class members, when hundreds of thousands of possible claimants seek to opt out of the class action during the twelve weeks available, one naturally asks who is benefiting from the action and at whose expense. Defenders of *Georgine* may claim that those who benefit are potential claimants who might recover nothing were asbestos claims to drive these defendants out of business. So far as I can tell, these defendants are in no immediate danger of bankruptcy, and the real beneficiaries of the settlement are defendants that reduce their liabilities, courts that reduce their backlogs, and lawyers who increase their fees. In any event, even the possibility that class actions are being used to reduce and extinguish claims is enough to make those of us who value class actions for other reasons worry that our baby is being taken from us.

II

In retrospect, one can see that criticism of the potential misuse of the class action has gone through three stages of development. These stages grow out of the traditional debate about whether and when class members can properly be bound by a litigation to which they are not parties.

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8 Obviously, this is not the only function that class actions have served. See, e.g., Fleming James, Jr. et al., *Civil Procedure* § 10.20 (4th ed. 1992) (stating that class actions, in addition to permitting the pooling of resources, provide a mechanism for enforcing the laws, joining or protecting the interests of all necessary parties, and permitting suits by entities not otherwise recognizable as legal entities).

ically and temporally. All three stages represent the views of scholars with much sympathy for the potential of class actions to provide collective remedies, as opposed to the extremist view of those who have spoken of the class action as a Frankenstein's monster preying upon defendants.10

Derrick Bell's critique of school desegregation lawyers exemplifies the first stage of concern about class actions.11 His critique was part of a broader questioning of public interest lawyers,12 which in turn was part of the 1970s critique of the 1960s. Professor Bell feared that desegregation lawyers, taking advantage of the relative freedom from client control that class actions afford, would neglect client interests to pursue their own ideals or those of the national civil rights organizations with which they were associated. It awakens some nostalgia to look back to a time when the prime worry of scholars was that zeal for their own visions of the public interest would lead lawyers astray. Nevertheless, this recognition that the interests of lawyers could diverge from those of the represented class focused our attention on the need for scrupulous investigation of class action lawyers.

A second stage of concern developed during the 1980s. Commentators such as John Coffee argued that class-action and derivative-suit lawyers were seeking fees regardless of their clients' interests. Coffee argued, for example, that such lawyers were settling class actions without real benefit to the class.13 Once again, this argument was part of a broader view—in this instance, one of lawyers as economic actors14—that itself reflected a trend in the decade's thought. Greed

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12 See, e.g., Kenney Hegland, Beyond Enthusiasm and Commitment, 13 ARIZ. L. REV. 805 (1971) (discussing whether the public interest firm is capable of assuming adequate representation of underrepresented interests and people); Gary Bellow & Jeanne Kettleston, From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice, 58 B.U. L. REV. 337 (1978) (discussing ethical dilemmas in public interest practice).
14 See, e.g., Kevin M. Clermont & John D. Currivan, Improving on the Contingent Fee, 63 CORNELL L. REV. 529 (1978) (discussing the contingency and hourly fee systems and proposing a third alternative); John Leubsdorf, The Contingency Factor in Attorney Fee Awards, 90 YALE L.J. 473 (1981) (discussing the application of a contingency multiplier to attorney fees); Ronald J. Gilson & Robert Mnookin, Coming of Age in a Corporate Law Firm: The Economics of Associate Career Patterns, 41 STAN. L. REV. 567 (1989) (discussing the "up-or-out" career path among lawyers); see also Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)
was recognized and practiced before the 1980s, even among lawyers. But this economic viewpoint has unfortunately tended to foster the behavior it purports to describe by treating greed as normal and inescapable.¹⁵

This symposium exemplifies the third stage of concern, which moves beyond a focus on the temptations of class counsel to an analysis of how those opposing the class—that is, defendants and their lawyers—can manipulate those temptations for their own benefit. We scholars now know that class actions can benefit the party opposing the class, by shielding it from further litigation,¹⁶ and that settlement negotiations can put class counsel under pressure to let their clients down for the sake of their fees.¹⁷ Of course defense counsel know this too. Some defense counsel may feel obligated to put that knowledge to work to persuade class members to settle for less. Some courts will accept the resulting behavior of defense and class counsel as a reasonable response to real incentives. Everyone benefits, except the class members. In any event, none of the participants had a choice, did they? One hopes that such a system of actors whose interacting temptations draw them like an invisible hand to a bad result will not some day be recalled as typifying the world of the 1990s.

III

That class actions can be turned around in this way should cause little surprise. Powerful persons usually have good lawyers. And procedural law usually has an ambiguous and changing impact. When reformers established small claims courts to assist poor claimants, other reformers arrived some decades later to find collection agencies using those courts against the poor.¹⁸ When legislators and judges established long-arm statutes so that local plaintiffs could stay at home when suing multistate defendants, some multistate plaintiffs were able to use those statutes to drag local defendants into distant courts.¹⁹

¹⁹ E.g., Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).
Procedural mutability sometimes helps the less powerful. The labor injunction, dispatched in the federal courts pursuant to the Norris-La Guardia Act, was revived in a better form as the civil rights injunction. Edward Purcell describes the downfall, as well as the rise, of defendants' use of removal to federal court to place obstacles in the way of the victims of industrial accidents.

The justification and impact of class actions have varied over the years, as did those of other procedural institutions. Certainly, the class action did not arise to help the relatively powerless, who figure in some of the earlier precedents as members of defendant classes. If any single theme pervades the development of the class action, as Stephen Yeazell memorably describes it, it is not the protection of the weak but the use of the class action to permit suit by and against groups that did not qualify as legal entities.

Indeed, as late as 1940 the class action appeared in *Hansberry v. Lee* as, if anything, a menace to the class members. In that case, the Illinois courts took an adjudication upholding the validity of a racially restrictive covenant and, based on inaccurate factual stipulations, turned it retroactively into a class action judgment. Had the Supreme Court not read the Due Process Clause to prohibit this result, opponents of the covenant would have been bound by the result of a proceeding in which no one represented their interests. At the time, it would have been hard to predict that civil rights litigators and others would soon reshape the class action.

The modern analysis of the class action dates only from Harry Kalven and Maurice Rosenfield's article published in 1941, which argued that class actions could provide mass remedies and deter unlawful behavior. Even then, the subsequent transmutation of the class action proceeded under a cloud of rhetoric, much of which spoke of judicial efficiency—a goal that class actions have rarely forwarded, at least until very recently.
The class action, in short, has always been up for grabs. Whether it helps the powerless or the powerful, whether it makes remedies available or extinguishes them, will depend on the choices that lawyers, scholars, judges, and legislators make. Those of us who see the class action as a tool for equal justice under law will have to struggle to implement that vision.