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# State and Foreign Class-Action Rules and Statutes: Differences from - and Lessons for? - Federal Rule 23

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# STATE AND FOREIGN CLASS-ACTION RULES AND STATUTES: DIFFERENCES FROM — AND LESSONS FOR? — FEDERAL RULE 23

*By Thomas D. Rowe, Jr.\**

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## I. INTRODUCTION

When I served as a member of the federal Advisory Committee on Civil Rules in the 1990s, among other proposals the Committee considered were possible changes to Federal Rule of Civil Procedure 23 on class actions. I brashly asked at one point whether we had information about what if any significant variations existed in state class-action rules and statutes. My best recollection is that the response was a somewhat guilty silence, and that we proceeded to consider revisions to the federal rule without looking at state practice—which none of us had time to research.<sup>1</sup> This symposium gives me

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1. By way of mitigation, two leading references--on which I rely extensively in this Article--were not available then: *See* Linda S. Mullenix, *STATE CLASS ACTIONS: PRACTICE AND PROCEDURE* (2000, with annual updates to 2007; the Mullenix treatise is divided into two volumes, hereafter cited as 1 or 2); *SURVEY OF STATE CLASS ACTION LAW*, an annual report of the State Laws Subcommittee of the Class Actions and Derivative Suits Committee of the ABA Section of Litigation. The annual Survey seems to have begun appearing in 2001. *See* [http://catalog.library.duke.edu/F/K6E4HIFFIT4EP6B4AI36EKPL4YNC4EYARN9ERXN7FR6IK2MHSE-07657?func=find-acc&acc\\_sequence=082106274](http://catalog.library.duke.edu/F/K6E4HIFFIT4EP6B4AI36EKPL4YNC4EYARN9ERXN7FR6IK2MHSE-07657?func=find-acc&acc_sequence=082106274) (accessed Nov. 22, 2007).

the welcome if belated opportunity to remedy that knowledge gap. I hope that an exploration of state—and some foreign—class-action rules with an eye to key differences from and alternatives to Federal Rule 23 will be not just of academic interest but of use to federal, state, and foreign rulemakers when they consider whether to change their own rules.

*A. Widespread Tracking of 1966 Version of Federal Rule 23*

A first point I should make clear is that a considerable majority of American states track Federal Rule 23, at least in its 1966 version before the 1998 and 2003 amendments and the 2007 style revisions, closely and in a good many cases word for word.<sup>2</sup> In addition, some states explicitly draw on Federal Rule 23 case law even when state language does not closely parallel the federal text.<sup>3</sup> So significant variations from the 1966-style federal rule—apart from states not having tracked the recent amendments—do not exist in profusion, but there are several including some quite interesting and thoughtful provisions. I plan to give a quick survey of major variations and then discuss those of particular significance or interest in more detail later.

*B. Significant State Variations*

*1. No class-action rule*

A first variant is not having any general class-action rule. Only Mississippi<sup>4</sup> and Virginia<sup>5</sup> fall into this category. Each does have partial if quite limited exceptions: Mississippi plaintiffs may be—or may have been—able to make liberal use of non-class permissive-party joinder.<sup>6</sup> And Virginia

2. See generally 1 Mullenix, *supra* n. 1, at xi (“after the Advisory Committee amended Federal Rule 23 in 1966, many states amended their class action rules, adopting provisions similar to the revised federal class action rule.”).

3. See e.g. *id.* Cal. § 1.03, at 6013 (“Section 382 [the general provision of the California Civil Procedure Code authorizing class actions] and Fed. R. Civ. P. 23 bear no relation to one another except that decisions pursuant to Rule 23 are helpful in the determination of cases brought under Section 382.”) (footnote omitted); American Bar Association, Section of Litigation, Survey of State Class Action Law 2007 at 39 (hereafter “Survey”):

While California’s legislature has never formally adopted Rule 23 of the Federal Rules of Civil Procedure . . . the California Supreme Court has effectively tapped it as a resource, both by direct reliance upon the rule and upon federal decisions interpreting it.

See also e.g. *infra* n. 20 and accompanying text (N.C.); text accompanying note 15 (Wis.).

4. See 1 Mullenix, *supra* n. 1, Miss. § 1.03(A), at 26,011 (“In enacting its Rules of Civil Procedure, the Mississippi Supreme Court intentionally omitted Rule 23, which would have covered class actions . . . [T]he court has since reaffirmed that class actions are not available in Mississippi under any circumstances.”) (footnotes omitted); Survey, *supra* n. 3, at 275 (“The Mississippi rules contain no section permitting class actions.”).

5. See 2 Mullenix, *supra* n. 1, Va. § 1.01, at 48,011 (“Virginia does not have a state class action rule”) (footnote omitted); Survey, *supra* n. 3, at 516 (“There is no class action under state law in Virginia.”).

6. See 1 Mullenix, *supra* n. 1, Miss. § 1.03(A), at 26,011 (footnote omitted):

[P]laintiffs have increasingly attempted to utilize Miss R. Civ. P. 20, which governs joinder, in order

statute allows “condominium, time-share, and property owners’ associations to bring class actions on behalf of their members.”<sup>7</sup> Virginia also has “a Multi Claimant Litigation Act, which provides a means to join, coordinate, consolidate, or transfer six or more civil actions.”<sup>8</sup> Further, in Virginia “[t]here is also case law addressing the equity proceeding known as ‘parties by representation,’”<sup>9</sup> a remotely possible carry-over from earlier practice allowing “one or more named parties to represent a larger group.”<sup>10</sup> But in both states the exceptions are at best quite limited, and it seems fair to say that anyone wanting to engage in class-action practice in Mississippi or Virginia must find one or another basis for federal-court jurisdiction.

## 2. *Field-Code provisions*

Three states—California, Nebraska, and Wisconsin—retain short class-action provisions based on the nineteenth-century Field Code. Nebraska’s statute is illustrative. When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.<sup>11</sup>

Practice under these provisions appears to vary considerably. “[T]he Nebraska Supreme Court has construed the statute in such a way that bringing a successful class action suit in Nebraska [state court] is difficult.”<sup>12</sup> Wisconsin case law under the state’s parallel provision<sup>13</sup> is somewhat scant<sup>14</sup> but fairly friendly to class certification, looking to federal-court constructions of Federal Rule 23 for non-binding guidance but requiring only commonality, adequate representation, and numerosity as criteria for class certification.<sup>15</sup> California

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to consolidate numerous claims into one proceeding . . . Although trial courts have broad discretion to join claims, the Mississippi Supreme Court has made it clear that joining parties where the requirements of Rule 20 are not satisfied constitutes an abuse of discretion.

Recent developments, however, may have made liberal permissive joinder a thing of the past; “liberal joinder of individual claims has given way to a strict construction.” Survey, *supra* n. 3, at 276.

7. 2 Mullenix, *supra* n. 1, Va. § 1.01, at 48,011 (footnote omitted).

8. Survey, *supra* n. 3, at 516.

9. *Id.*

10. *Id.* at 517. *But see generally id.* at 517-518 (discussing cases and citing only one under a century old, and none under 65 years old).

11. Neb. Rev. Stat. § 25-319 (2004).

12. Survey, *supra* n. 3, at 303 (citing C.L. Robinson & Thomas H. Dahlk, *Class Actions—The Nebraska Procedure*, 61 NEB. L. REV. 30 (1982)); *See id.* at 30-31 (footnote omitted) (“the Nebraska class action statute is much more restrictive than Rule 23 of the Federal Rules of Civil Procedure and has seldom been applied by the Nebraska Supreme Court in a manner favorable to the plaintiff.”) Despite the age of the Robinson & Dahlk article, from the paucity of Nebraska state-court class-action activity reported in the ABA survey their statement appears to reflect current reality. *See* Survey, *supra* n. 3, at 303-305.

13. Wis. Stat. Ann. § 803.08 (West 1994).

14. Survey, *supra* n. 3, at 542.

15. *See id.* at 538.

has a lively class-action practice under its Field-Code provision,<sup>16</sup> drawing significantly on interpretations of Federal Rule 23.<sup>17</sup> Both California and Wisconsin also have consumer-protection statutes that authorize class actions and track much of the language of the Federal Rule.<sup>18</sup>

### 3. *North Carolina's pre-1966 Federal Rule language*

North Carolina stands alone among the states in retaining language drawn from the pre-1966 federal text (but somewhat similar to Field-Code provisions) for its class-action rule:

If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued.<sup>19</sup>

North Carolina practice, despite the use of text that does not track the current federal rule, relies significantly on concepts from and case law construing modern Federal Rule 23.<sup>20</sup>

### 4. *Uniform Class Actions Act (UCAA) or Model Class Action Rule states*

Although the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved its Uniform Class Actions Act/Model Class Action Rule in 1976,<sup>21</sup> the dominance of the Federal-Rule model has been such that only two states—Iowa and North Dakota—have adopted it. The UCAA is somewhat more detailed than Federal Rule 23, with some novel and thoughtful provisions that will be discussed later in coverage of specific variations.

### 5. *Pennsylvania's hybrid rules*

Pennsylvania has a set of class-action rules<sup>22</sup> that are a hybrid of Federal

16. Cal. Civ. Proc. Code § 382 (West 2004).

17. See Survey, *supra* n. 3.

18. See Cal. Civ. Code § 1781 (West 1998); Wis. Stat. Ann § 426.110 (West 2005).

19. N.C. R. Civ. P. 23(a). Compare *id.* with Fed. R. Civ. P. 23(a), 308 U.S. 663, 689 (1938) (identical language up to end of North Carolina text but continuing with categories of class actions).

20. See *e.g.* *Pitts v. Am. Sec. Ins. Co.*, 144 N.C. App. 1, 10-12 (2001) (identifying as basic prerequisites for class certification existence of class, adequate representation, and numerosity, with common issue of law or fact and its predominance over individual issues as necessary for existence of class; requiring finding of superiority of class action once prerequisites satisfied; viewing federal cases and reference as possibly instructive although not binding), *aff'd by an equally divided Court*, 356 N.C. 292 (2002) (per curiam). Affirmances by an equally divided North Carolina Supreme Court leave the decision below standing but without precedential value, see *id.* at 293; the relevant parts of the Court of Appeals' *Pitts* opinion appear, though, to distill North Carolina law accurately.

21. See Survey, *supra* n. 3, at 169.

22. Pa. R. Civ. P. 1701-16.

Rule and UCAA provisions, plus some rules that appear to be unique to Pennsylvania. I postpone discussion of the Pennsylvania variations, which include some quite thoughtful provisions that could bear consideration elsewhere, for the category-by-category treatment that follows in Parts II-VII.<sup>23</sup>

C. *Major Areas in Which Significant Numbers of States Differ from Federal Rule 23*

Again, the dominant pattern is that most states more or less track the 1966 version of Federal Rule of Civil Procedure 23, with much drawing on federal case law although without a sense of obligation to follow decisions interpreting and applying the federal rule. Even in some states with Federal Rule-based provisions, though, and in some with more independent approaches, in text or in practice states do vary to some extent from federal language and interpretations. I will survey the non-trivial variations that my research has found but pause here to highlight what may be the three most important. First, a few states do not have the typicality requirement of Federal Rule 23(a)(3).<sup>24</sup> Second and more significantly, several states and foreign jurisdictions do not apply the requirement of Federal Rule 23(b)(3) that common issues predominate over individual ones with the zeal of some federal courts, or lack the requirement to begin with.<sup>25</sup> Third, in a considerable variety of ways several states water down the rigorous requirement of Federal Rule 23(c)(2)(B) that for Rule 23(b)(3) common-question class actions “the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.”<sup>26</sup>

D. *No Formal Certification Requirement in Australian Federal Class Actions*

As a reminder not to confuse the familiar with the necessary, it is instructive to consider a key feature of Australian federal class-action practice. In American class litigation, we are accustomed to a more or less early court ruling on whether to certify an action for class status, which is often a heavily contested, make-or-break decision. Looking at that experience in the United States and elsewhere, Australian law reformers successfully argued against an up-front certification requirement. Instead, a class action in the Australian federal court system is properly commenced if it meets only numerosity and

23. For a summary of differences between Federal Rule 23 and the Pennsylvania rules, see Survey, *supra* n. 3, at 423-425.

24. Fed. R. Civ. P. 23(a)(3) (class action permissible only if, inter alia, “the claims or defenses of the representative parties are typical of the claims or defenses of the class.”) For discussion of American states and foreign jurisdiction that appear not to require typicality, see *infra* Part II-D.

25. See *infra* Parts III-B-2 (predominance), V (issue classing).

26. Fed. R. Civ. P. 23(c)(2)(B). For discussion of the variations from the federal notice requirement, see *infra* Part VI-A.

commonality requirements, with contest over appropriateness of the class form coming later in connection with decisions on propriety of particular procedural steps or on challenge by the defendant. This reverse approach of proceeding in class form unless the court decides otherwise does not, however, appear to have been particularly successful or to have drawn much imitation.<sup>27</sup>

## II. PREREQUISITES

### A. *Definability*

It is often said that an implicit first prerequisite for a federal class action is that there must exist a sufficiently identifiable class.<sup>28</sup> Louisiana, alone among the states insofar as I have seen, makes this requirement explicit:

One or more members of a class may sue or be sued as representative parties on behalf of all, only if:

...

(5) The class is or may be defined objectively in terms of ascertainable criteria, such that the court may determine the constituency of the class for purposes of the conclusiveness of any judgment that may be entered in the case.<sup>29</sup>

Practice under this provision appears to be fairly flexible. “Although the definition must adequately describe the class, those seeking certification are not required to identify every potential class member.”<sup>30</sup> And while defining an affected geographical area may be needed, precise geographical definition is not always essential.<sup>31</sup> Redefinition after an inadequate initial definition is possible,<sup>32</sup> as is redefinition in light of evidence coming into the record as the case proceeds—which tends to insulate initial certifications from appellate challenges based on claims of inadequate definition.<sup>33</sup>

### B. *Numerosity*

Numerosity requirements of some sort for class treatment are of course universal, at least in the limited sense that a claim by or against a sole party cannot involve a “class” on the relevant side of a case. In American state class actions, I have not found significant variations from the federal practice

27. See Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* at 23-29 (Hart Publishing 2004). The Australian numerosity requirement is notably low—seven or more class members with claims against the same defendant. See *id.* at 117. Only Sweden appears now to use the no-certification approach. See *id.* at 24.

28. See e.g. 5 James Wm. Moore et al., *MOORE’S FED. PRAC.* § 23.21 (3d ed. 2007).

29. La. Code Civ. P. Ann. art. 591(A) (1999).

30. 1 Mullenix, *supra* n. 1, La. § 4.01(A), at 20,035 (footnote omitted).

31. See *id.*

32. See *id.* at 20,036.

33. See *id.*

requiring a finding of some number making joinder of all members impracticable. The more divergent alternatives appear in some foreign systems, where rather small specific numbers sometimes suffice rather than the indefinite, sizeable numbers required in the United States. Australia's federal regime requires just seven or more members,<sup>34</sup> and the number in Ontario and British Columbia is as small as possible—"an identifiable class of two or more persons."<sup>35</sup> Having this minimal number does not appear to result in certification of very small classes, though; it may have the salutary effect of eliminating litigation over class size and channeling it instead into whether the class form would be preferable to alternatives for dealing with common issues.<sup>36</sup> American imitation of such an approach seems unlikely, but it can at least serve as a helpful reminder of the possibility of de-emphasizing litigation over numbers and placing more weight on the suitability of class proceedings for the case before a court. De-emphasizing sheer numbers could also ease the use of subclassing if dividing a larger class resulted in some groups that might have difficulty meeting a numerosity requirement on their own.

### C. *Commonality*

Without some common issue of law or fact between class members, no basis for class litigation exists. With just one exception I have found nothing worthy of note on different treatments of the basic commonality prerequisite, as opposed to the requirement of predominance of common over individual issues.<sup>37</sup> The exception is that Australia's federal regime makes it explicit that class proceedings are permissible even if separate transactions, acts, or omissions are involved, as long as they arose out of related circumstances and involve a substantial common issue of law or fact.<sup>38</sup>

### D. *Typicality*

The federal prerequisite that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class"<sup>39</sup> is also widespread in American state practice. The requirement may serve some valuable functions in preventing outlier representatives and trying to assure that class representatives keep the interests of class members at least somewhat to heart. However, it tends to merge to some degree with the requisites of

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34. See Mulheron, *supra* n. 27, at 117.

35. See *id.* at 126. Beyond this minimal specification, "there is no explicit 'numerosity' requirement such as exists under U.S. Rule 23." Craig Jones, *Theory of Class Actions* at 119 (2003) (footnote omitted). Nor need "the precise numbers or identities of the class members . . . be known before certification will be granted." *Id.*

36. See Mulheron, *supra* n. 27, at 128.

37. See *infra* Parts III-B-2 (predominance), V (issue classing).

38. See Edward F. Sherman, *American Class Actions: Significant Features and Developing Alternatives in Foreign Legal Systems*, 215 F.R.D. 130, 151 (2003).

39. Fed. R. Civ. P. 23(a)(3).



commonality and adequacy of representation,<sup>40</sup> and it is not on the books in a significant handful of states. Illinois' class-action statute requires numerosity, commonality, and adequacy, but omits any mention of typicality.<sup>41</sup> Similarly, the UCAA and its adopting states of Iowa and North Dakota lack the typicality prerequisite.<sup>42</sup>

The picture in the Field-Code states, and in North Carolina with its somewhat Code-like rule, is mixed. The text of all these provisions makes no mention of typicality, but constructions vary considerably. Case law in Nebraska and North Carolina follows federal practice in requiring typicality.<sup>43</sup> Wisconsin seems to be at the opposite extreme: its rule has been construed "to present only one set of criteria"—namely, commonality, adequate representation, and numerosity."<sup>44</sup> California appears to take an intermediate position, treating typicality as a factor to be considered without requiring it.<sup>45</sup>

The Canadian provinces that have class actions, and the Australian federal courts, have no typicality requirement: the "typicality criterion in FRCP . . . has no equivalent in the regimes of the Canadian provinces."<sup>46</sup> "Typicality is not an express requirement" in the statutes of Ontario or Australia.<sup>47</sup> Atypicality, of course, might raise questions about the appropriateness of class proceedings or the adequacy of representation; but typicality is not a separate base that courts in these several jurisdictions need to touch.

### E. Adequacy of Representation

In the United States, adequacy of representation is a fundamental federal constitutional requirement for federal and state class actions alike.<sup>48</sup> Federal Rule 23 and state rules and statutes also universally include the adequacy requirement in their text. Application focuses on both lack of conflict between the putative representatives and the class, and the adequacy of the representation that putative class counsel will provide. In federal practice a

40. See *General Tel. Co. v. Falcon*, 457 U.S. 147, 157 n. 13 (1982) ("The commonality and typicality requirements of Rule 23(a) tend to merge . . . Those requirements . . . also tend to merge with the adequacy-of-representation requirement.").

41. See 735 Ill. Comp. Stat. 5/2-801(1)-(3) (2003); Survey, *supra* n. 3, at 145 ("The Illinois statute does not have the typicality requirement of Fed. R. Civ. P. 23(b)(3).").

42. See Iowa R. Civ. P. 1.261, 1.262(2) (requiring numerosity, commonality, "fair and efficient adjudication," and adequacy); N.D. R. Civ. P. 23(a), (b)(2) (same).

43. See Survey, *supra* n. 3, at 304 (Neb.) ("the claims of the representative must be typical of the class"); *id.* at 352 (N.C.) ("The claims of the class representatives must be typical of the claims of the class.").

44. See *id.* at 538.

45. See *id.* at 39; *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 709 (1967) (footnote omitted) ("We . . . find of interest the [Federal Rule 23(a) prerequisites];" quoting prerequisites, including typicality, in footnote but not otherwise using "typical" or "typicality" in opinion).

46. Mulheron, *supra* n. 27, at 161.

47. *Id.* at 211.

48. See *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940) ("members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present.").

separate Rule 23(g), adopted in 2003 and as yet little followed in the states,<sup>49</sup> regulates the appointment of class counsel; under earlier federal practice and as far as I have seen in most states, the requirements for the representatives and for class counsel tend to be administered under the single adequacy prerequisite.<sup>50</sup> A significant issue on which lower federal courts are divided and the Supreme Court has not yet ruled in federal practice is to what extent a finding of adequacy in a class action is preclusive against collateral attacks upon adequacy by later challengers who seek to litigate the underlying merits of a previously settled or litigated class action.<sup>51</sup> State courts that have faced such issues appear to be divided as well, both between states and internally.<sup>52</sup>

#### F. “Negative-Value” Class Actions

South Carolina has a unique prerequisite that appears to bar “negative-value” class actions aggregating large numbers of small monetary claims: “[I]n cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy [must] exceed[] one hundred dollars for each member of the class.”<sup>53</sup> According to history of this provision, “It is intended to limit class actions when the amount sought may be small in comparison with the costs incurred in the litigation.”<sup>54</sup> The provision reflects skepticism sometimes expressed about class actions that deliver relatively small recoveries to class members along with large fees to class counsel, but it also runs counter to one significant purpose of modern class actions—to provide aggrieved persons a remedy when individual litigation is economically unrealistic.<sup>55</sup> It may also be undercut by two recent developments that might let such negative-value class actions be brought in federal court. First, for cases that can qualify for general federal diversity jurisdiction, the Supreme Court held in 2005 that the supplemental-jurisdiction statute overrules a previous federal decisional requirement that all members of a class in most federal diversity class actions had to have jurisdictionally

49. I skimmed the current state provisions reproduced in Survey, *supra* n. 3, and found counterpart rules only in Minn., N.J., and Tex. See *id.* at 272-273 (quoting Minn. R. Civ. P. 23.07); Survey, *supra* n. 3, at 328 (quoting N.J. R. Civ. P. 4:32-2(g)); Survey, *supra* n. 3, at 498-499 (quoting Tex. R. Civ. P. 42(g)).

50. On federal practice before the 2003 amendment, see e.g. *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 247 (3d Cir. 1975) (for Rule 23(a)(4) adequate representation, putative representatives must show lack of “interests antagonistic to other members of the class” and that “their attorney is capable of prosecuting the instant claim with some degree of expertise”).

51. See American Law Institute, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.14 Reporters’ Notes at 286-287 (Discussion Draft No. 2, 2007) (hereafter “PRINCIPLES”) (discussing division in federal case law and in commentary).

52. Compare e.g. *Lamarque v. Fairbanks Capital Corp.*, 927 A.2d 753 (R.I. 2007) (majority favoring strong approach allowing preclusion, over dissent), with e.g. *Wilkes ex rel. Mason v. Phoenix Home Life Mut. Ins. Co.*, 587 Pa. 590 (2006) (majority expressing doubt about broad preclusion, but with partial concurrence questioning majority’s view).

53. S.C. R. Civ. P. 23(a)(5).

54. 2 Mullenix, *supra* n. 1, S.C. § 1.02, at 42,012.

55. 5 Moore’s, *supra* n. 28, § 23.03, at 23-35.

sufficient claims.<sup>56</sup> Second, the Class Action Fairness Act of 2005 authorizes federal jurisdiction over minimal-diversity class actions with at least 100 class members and aggregate damages exceeding \$5,000,000.<sup>57</sup>

### III. CLASS-ACTION TYPES AND MAINTAINABILITY

Federal Rule 23(b) establishes basic types of class actions and includes criteria for maintaining actions of the various types. In a broad sense two types exist—mandatory and opt-out. Mandatory class actions, from which members cannot opt out, are class proceedings by necessity—under Rule 23(b)(1) when separate actions would create the risk of either (A) inconsistent adjudications establishing incompatible conduct standards for the class’s adversary or (B) practical effects on the interests of others not parties, and under Rule 23(b)(2) when injunctive or declaratory relief would be appropriate for the class as a whole. Rule 23(b)(3) class actions, sometimes referred to as common-question actions, almost invariably involve pooling of individual damage claims; by rule, the unnamed members must be given an opportunity to withdraw from the class proceeding. Here as elsewhere, a significant majority of the states track the federal phrasing verbatim; but some significant variants exist.

#### A. (b)(1) and (b)(2) Types

State variants on by-necessity class actions are few and appear less significant than those with common-question actions. New Hampshire’s general class-action rule tracks Federal Rule 23(a)’s prerequisites and then adds Federal Rule 23(b)(3)’s superiority requirement<sup>58</sup> plus a separate item on adequate representation of class interests by the representatives’ attorney,<sup>59</sup> yielding a six-factor list of prerequisites for what seems to be a single type of class action. Neither New Hampshire Superior Court Rule 27-A(a), listing the six prerequisites, nor any other part of the basic state class-action rule, picks up on the federal action-by-necessity types. Oddly, though, the state has a consumer class-action statute that tracks all the types in Federal Rule 23(b).<sup>60</sup> Under the general rule, other provisions like notice and opt-out apply to class actions generally,<sup>61</sup> making it appear that as a practical matter New Hampshire

56. See *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005) (holding that 28 U.S.C. § 1367 (2000) overrules holding in *Zahn v. Intl. Paper Co.*, 414 U.S. 291 (1973), that any unnamed class member in separate-claim diversity class action who does not satisfy jurisdictional-amount requirement individually must be dismissed).

57. See 28 U.S.C.A. § 1332(d) (2), (5)(B), (6) (2006).

58. Compare Fed. R. Civ. P. 23(b)(3) (requiring finding that “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy”) with N.H. Super. Ct. R. 27-A(a)(5) (identical phrasing to pre-2007 federal provision, same as 2007 federal provision except for using “the fair and efficient adjudication of”).

59. N.H. Super. Ct. R. 27-A(a)(6) (“the attorney for the representative parties will adequately represent the interests of the class.”).

60. See N.H. Rev. Stat. Ann. § 358-A:10-a(II) (1995 & Supp. 2007).

61. See N.H. Super. Ct. R. 27-A(e).

lacks counterparts to the mandatory federal types except under the consumer statute. South Carolina also lacks a counterpart to Federal Rule 23(b),<sup>62</sup> but what I have not encountered in these two states or elsewhere is any apparent deliberate variations on the mandatory types. Such variations do, though, appear in significant number when we turn to the federal 23(b)(3) type, particularly with respect to its predominance requirement.

B. *(b)(3) Types*

1. *Superiority*

Most states with modern-era class-action rules more or less track the federal requirement, for common-question actions, “that a class action [be] superior to other available methods for fairly and efficiently adjudication the controversy.”<sup>63</sup> New Hampshire’s general rule, as we have seen, has superiority as a prerequisite but appears to have no real counterpart to the federal rule’s by-necessity actions.<sup>64</sup> The one significant American variation I have found is that Illinois, which also omits the typicality prerequisite of Federal Rule 23(a)(3) and most state rules, adds as a fourth general prerequisite that the class action be “an appropriate method for the fair and efficient adjudication of the controversy.”<sup>65</sup> This certification-friendly articulation is reinforced by judicial gloss that if “the first three prerequisites” of numerosity, commonality, and adequate representation are met, then it is “evident that the fourth requirement has been fulfilled.”<sup>66</sup> Accordingly, “Illinois has become an attractive forum for those parties whose claims do not readily satisfy the federal rule’s superior means of adjudication requirement.”<sup>67</sup>

Finally, in the three Canadian provinces of British Columbia, Ontario, and Quebec the parallel inquiry seems to be whether “a class proceeding [would] be the preferable procedure for the fair and efficient resolution of the common issues”<sup>68</sup>—which notably focuses not on fairness and efficiency in “adjudicating the controversy” as a whole as does the American federal rule. The Canadian focus on fairness and efficiency in resolving *the common issues*

62. See Survey, *supra* n. 3, at 454 (“Conspicuously lacking from the state rule . . . is the language contained in Fed. R. Civ. P. 23(b).”) As a result South Carolina appears to offset its provision ruling out small-claim class actions, see *supra* text accompanying notes 53-54, with the at least theoretical possibility of a common-question damage class action not satisfying the predominance or superiority requirements of Federal Rule 23(b)(3). See Survey, *supra* n. 3, at 455-456 (discussing limited and somewhat inconsistent case law on appropriateness of class actions under South Carolina rule). The lack of a counterpart to Federal Rule 23(b) does mean that South Carolina has no textual provision for mandatory class actions. Such actions also appear to be unknown in Canada. See Jones, *supra* n. 35, at 126 (“there has never been a ‘mandatory’ class certified in Canada”).

63. Fed. R. Civ. P. 23(b)(3).

64. See *supra* text accompanying note 60.

65. 735 Ill. Comp. Stat. 5/2-801(4) (2003).

66. *Clark v. TAP Pharm. Products, Inc.*, 343 Ill. App. 3d 508, 552 (2003).

67. 1 Mullenix, *supra* n. 1, Ill. § 1.03(C)(2), at 15,014 (footnote omitted).

68. Jones, *supra* n. 35, at 120.

seems friendlier toward maintenance of actions in class form. Indeed, “the preferability of a class action is largely determined by whether there are sufficient common issues.”<sup>69</sup>

## 2. Predominance

To begin with, a few states’ rules or statutes treat predominance as one factor in a multi-factor list rather than something that a court must find. That is true in the Uniform Class Action Act states of Iowa<sup>70</sup> and North Dakota,<sup>71</sup> and also in Oregon<sup>72</sup> and Pennsylvania<sup>73</sup> with their provisions that do not track the federal rule in cookie-cutter fashion. In the many state systems with a predominance requirement like that of Federal Rule 23(b)(3),<sup>74</sup> a first point of note is that state courts do give it a good deal of attention.<sup>75</sup> Interpretations, though, appear to vary considerably—from strictness like that seen in some federal decisions<sup>76</sup> to considerable liberality.<sup>77</sup> And, as will appear in consideration of issue classing,<sup>78</sup> it can be vital whether an applicable predominance requirement holds for the litigation as a whole or can focus on individual issues. Ontario and British Columbia also appear somewhat liberal in this regard; courts may not refuse to certify a class solely “because damages require individual assessment.”<sup>79</sup>

### C. Individual Viability and “Costs and Burdens” Factors, and Settlement-Class Type, in Louisiana

Three apparently unique provisions in Louisiana’s class-action statute

69. *Id.* at 123.

70. *See* Iowa R. Civ. P. 1.263(1) (predominance as fifth criterion in thirteen-factor list).

71. *See* N.D. R. Civ. P. 23(c) (1) (same).

72. *See* Or. R. Civ. P. 32B (predominance as one of eight matters relevant to required finding of superiority).

73. *See* Pa. R. Civ. P. 1708(a) (predominance as first of seven criteria relevant to required determination “whether a class action is a fair and efficient method of adjudicating the controversy” in money-relief cases).

74. Fed. R. Civ. P. 23(b)(3) (court needs to find “that the questions of law or fact common to class members predominate over any questions affecting only individual members”).

75. The Mullenix treatise takes up predominance in § 5.03 of each of its state chapters, and most that I looked at in a spot check had at least some, and often considerable, discussion of state decisions on the predominance requirement. *See* Mullenix, *supra* n. 1, § 5.03, *passim*.

76. *See e.g.* 1 Mullenix, *supra* n. 1. Del. § 5.03, at 9045 (footnote omitted) (“common law fraud claims cannot be brought as Rule 23(b)(3) classes . . . Also, individual causation issues predominate over common issues in nondisclosure mass tort cases (multiple-event disasters as opposed to single incident).”).

77. *See e.g.* 1 Mullenix *supra* n. 1 *id.* Ark. § 5.03, at 5031 (footnote omitted) (“The predominance element can be satisfied if preliminary common issues can be resolved before the individual issues.”); 1 *id.* Conn. § 5.03, at 8030 (footnote omitted) (“that individual class members have differing monetary claims will not defeat the predominance requirement”); 2 *id.* Ohio § 5.03, at 37,052 (Ohio “courts have granted certification for” “mass tort claims and mass accidents”).

78. *See infra* Part V.

79. Jones, *supra* n. 35, at 120.

derive from proposed, but unadopted, revisions to Federal Rule of Civil Procedure in the late 1990s.<sup>80</sup> First, the state adds the following two factors to Federal Rule 23(b)'s four-factor list of matters pertinent to the required findings of predominance and superiority for a (b)(3) class action:

(e) The practical ability of individual class members to pursue their claims without class certification;

(f) The extent to which the relief plausibly demanded on behalf of or against the class, including the vindication of such public policies or legal rights as may be implicated, justifies the costs and burdens of class litigation;<sup>81</sup>

Second, Louisiana allows a fourth type of class for situations in which parties seek certification for settlement purposes but might not be able to gain certification of a common-question class for all purposes:

(4) The parties to a settlement request certification under Subparagraph B(3) for purposes of settlement, even though the requirements of Subparagraph B(3) might not otherwise be met.<sup>82</sup>

The "costs and burdens" provision has apparently not led to a refusal to certify "negative-value" class actions involving aggregations of small individual claims.<sup>83</sup> As for the (b)(4) type, while as yet little used it seems likely to make the settlement-class approach relatively easy to use in Louisiana state court, perhaps more so than in federal court;<sup>84</sup> it also appears, though, that in deciding whether to certify for settlement-class purposes, Louisiana state courts are not to look ahead to the likely fairness of a proposed settlement.<sup>85</sup>

#### D. *Merits as Certification Factor*

A fixture of American federal class-action practice is the that the apparent strength or weakness of a class's claim or defense on the substantive merits is supposed to have no bearing on a court's procedural decision whether or not to certify a class action.<sup>86</sup> Whatever the extent to which this rule may just drive the likely merit of a class claim underground in trial judges' certification decisions rather than submerging it entirely, the states addressing

80. See Report of the Advisory Committee on Civil Rules 37 (May 17, 1996), accessible at <http://www.uscourts.gov/rules/Reports/CV5-1996.pdf> (accessed Dec. 12, 2007).

81. La. Code Civ. P. Ann. art. 591(B)(3)(e)-(f) (1999).

82. *Id.* art. 591(B)(4). The need for such a provision in Federal Rule 23 appears to be at least reduced by the Supreme Court's disapproval in *Amchem Prods. Inc., v. Windsor*, 521 U.S. 591, 619 (1997) of a requirement that class actions proposed for purposes of settlement only had to be certifiable for trial as well: "The Third Circuit's opinion stated that each of the requirements of Rule 23(a) and (b)(3) 'must be satisfied without taking into account the settlement' . . . Settlement is relevant to a class certification. The Third Circuit's opinion bears modification in that respect."

83. See Survey, *supra* note 3, at 200 (class actions are even "favored when the involve vindication of the rights of persons with negative value lawsuits").

84. See *id.* at 201.

85. See 1 Mullenix, *supra* n. 1, La. § 3.03(E), at 20,030.

86. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 (1974) ("We find nothing in the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.").

the role of the likely merits in class certification follow the federal exclusion rule with virtual unanimity.<sup>87</sup> Australian and Canadian class-action also “are unanimous in their views—none of them expressly permits the merits of the claim, the probability of its success, to be considered at the commencement stage of class litigation.”<sup>88</sup>

Such exceptions as I have found are extremely limited or tentative at best. Indeed, Oregon has eliminated a former provision that required courts to consider “whether the plaintiffs’ chances of prevailing were so minimal as to preclude proceeding as a class action.”<sup>89</sup> California has refused to rule out a court’s denying class certification for lack of substantive merit as a matter of law “in the exceptional case where the defense has no other reasonable pretrial means to challenge the merits of a claim to be asserted by a proposed class.”<sup>90</sup> The relevance of likely substantive merit appears somewhat unclear in Colorado.<sup>91</sup> On the whole, though, the rejection of apparent substantive merit or lack thereof as a certification factor appears widely entrenched.

#### IV. MERITS MOTIONS BEFORE CERTIFICATION?

Federal practice before late 2003 had been not entirely settled on whether, in cases with class certification sought, courts could act on dispositive motions to dismiss or for summary judgment before ruling on certification. The language of then-effective Federal Rule 23(c)(1), requiring a ruling on certification “as soon as practicable,”<sup>92</sup> had led to some division over whether courts could enter judgment on a non-class basis without ever ruling on class certification.<sup>93</sup> The seemingly minor change to the current federal rule’s “at an early practicable time”<sup>94</sup> in 2003 was intended to end uncertainty by recognizing, among other things, the legitimacy of ruling on dispositive motions before deciding whether to certify.<sup>95</sup>

87. See e.g. Mullenix, *supra* n. 1, Ark. § 3.03(B), at 5021; *Id.* Del. § 3.03(B), at 9026; *Id.* La. § 3.03(B), at 20,030. See generally *id.* §§ 3.03(B), *passim*.

88. Mulheron, *supra* n. 27, at 134. See generally *id.* 130-136 (discussing issue including arguments for contrary approaches and suspicions of possible covert or semi-covert role of likely merits in certification rulings despite their supposed irrelevance).

89. 2 Mullenix, *supra* n. 1, Or. § 3.03(B), at 39,022.

90. 1 *id.* Cal. § 3/03(B), at 6040-41. California also allows consideration of the merits to the extent that they bear on procedural certification issues such as commonality and predominance, see *id.* 6040, but that is different from letting likely substantive merit or lack thereof enter into the decision whether to certify.

91. See 1 *id.* Colo. § 3/03(B), at 7020.

92. See 5 Moore’s, *supra* n. 28, § 23.81[1], at 23-374 (3d ed. 2007).

93. See Richard L. Marcus & Edward F. Sherman, *Complex Civil Litigation: Cases & Materials on Advanced Civil Procedure* at 368-369 (4th ed. 2004) (describing evolution in judicial thinking about merits rulings before certification under pre-2003 language).

94. Fed. R. Civ. P. 23(c)(1)(A).

95. See Fed. R. Civ. P. 23(c)(1)(A) advisory committee’s note to 2003 amendment:

Other considerations [than gathering information needed to decide whether to certify] may affect the timing of the certification decision. The party opposing the class may prefer to win dismissal or summary judgment as to the individual

State practice, often under the “as soon as practicable” language, shows some variation but with a majority of states facing the issue seeming to allow rulings on dispositive motions before decisions on certification.<sup>96</sup> Apparent exceptions, at least to some extent, include Georgia,<sup>97</sup> Minnesota,<sup>98</sup> and North Carolina.<sup>99</sup>

## V. ISSUE CLASSING

The federal Courts of Appeals are sharply split on the interrelation between the predominance requirement of Federal Rule 23(b)(3)<sup>100</sup> and the issue-classing authorization of subdivision (c)(4) of the same rule.<sup>101</sup> The Fifth Circuit forbids use of issue classing as a way of avoiding problems with finding predominance as to a claim as a whole: a “district court cannot manufacture predominance through nimble use” of issue classing. “The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial.”<sup>102</sup> The Second Circuit flatly disagrees, rejecting the Fifth Circuit’s view and holding that “a district court may certify a class as to specific issues regardless of whether the entire claim satisfies Rule 23(b)(3).”<sup>103</sup>

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plaintiffs without certification and without binding the class that might have been certified.

96. Author’s impression formed from review of § 3.03(A) in every chapter of Mullenix, *supra* n. 1, yielding negative or mostly negative answers in only three out of 28 states plus District of Columbia listed as having dealt with issue (although some show treatment only at lower-court level).
97. *See Sta-Power Indus., Inc. v. Avant*, 134 Ga. App. 952, 954 (1975) (“the first issue to be resolved is not whether the plaintiffs have stated a cause of action or may ultimately prevail on the merits but whether the [statutory] requirements . . . have been met”). “This rule is not absolute, however, and in some cases Georgia courts will address the merits first.” Survey, *supra* n. 3, at 118.
98. 1 Mullenix, *supra* n. 1, Minn. § 3.03(A), at 25,030 (footnote omitted):  
As a general rule, Minnesota courts consider the issue of class certification before a case is decided on the merits. However, when the merits of the litigation involve the judicial interpretation of a controlling state statute fully determinable as a matter of law, this general rule does not apply.
99. 2 *id.* N.C. § 3.03(A), at 35,018 (footnotes omitted):  
Generally, trial courts should not consider a dispositive motion before ruling on a motion for class certification. This general rule applies with particular force when the motion for class certification is filed contemporaneously with the filing of the complaint.
100. Fed. R. Civ. P. 23(b)(3) (for common-question class action, court must inter alia find “that the questions of law or fact common to class members predominate over any questions affecting only individual members”).
101. Fed. R. Civ. P. 23(c)(4) (“When appropriate, an action may be brought or maintained as a class action with respect to particular issues.”).
102. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n. 21 (5th Cir. 1996).
103. *In re Nassau Co. Strip Search Cases*, 460 F.3d 219, 226 (2d Cir. 2006) (initial capitalization removed). *See also Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) “Even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the



Many states have the federal combination of a predominance requirement and an authorization for issue classing,<sup>104</sup> but a relatively small number seem to have addressed the sort of issue that divides the federal circuits. Most of these few have taken liberal approaches more or less along the lines of the Second Circuit's view. Texas, for example, permits certification as to some issues while it is denied as to others, and does not require that the issue certified for class treatment be dispositive of the litigation.<sup>105</sup> Other states taking apparently liberal approaches include Connecticut, where "partial class actions" call for reading certification requirements "to refer only to those issues for which the court has granted certification";<sup>106</sup> Minnesota, where "predominance of a common issue of liability over individual questions of damage has been frequently recognized";<sup>107</sup> and New Jersey, where the "trial court may certify a class based on limited issues without certifying all common claims for adjudication."<sup>108</sup>

The only possible exception found is Illinois, where "some courts have refused to allow plaintiffs to utilize a limited issue class in order to satisfy the requirement th[at] common questions predominate."<sup>109</sup> The permissibility of issue-class certification when common questions do not predominate as to a class action as a whole seems best resolved on policy rather than interpretive grounds.<sup>110</sup> Yet the phrasing of many states' rules may force their courts, like the federal ones, into interpretive arguments unless the rules' text is amended.

## VI. NOTICE AND OPT-OUT

### A. *Variations on Individual-Notice Requirement*

A prominent feature of Federal Rule 23 is its requirement that for (b)(3) common-question class actions, "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."<sup>111</sup> The

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common issues under [Rule 23(c)(4)] and proceed with class treatment of these particular issues.").

104. Massachusetts appears to be the only state with a predominance requirement and *no* authorization for issue classes. See Mass. R. Civ. P. 23(c) (predominance requirement); *Fletcher v. Cape Cod Gas Co.*, 394 Mass. 595, 602 (1985) (omission of limited-issue provision from Massachusetts rule reflects choice not to have limited-issue class actions available). States that treat predominance as a factor rather than a requirement seem not to have to rely on their issue-classing authority to find a way to certifying a class action. See generally *supra* Part III-B-2.

105. See 2 Mullenix, *supra* n. 1, Tex. § 5.05, at 45,097.

106. 1 *id.* Conn. § 5.05, at 8032.

107. 1 *id.* Minn. § 5.05, at 25,056 (footnote omitted).

108. 2 *id.* N.J. § 5.05, at 32, 051 (footnote omitted).

109. 1 *id.* Ill. § 5.05, at 15, 048 (footnote omitted).

110. See PRINCIPLES, *supra* n. 51, § 2.03(a) ("Courts . . . should consider whether the aggregate treatment of common issues will materially advance the disposition of multiple civil claims by comparison to other realistic procedural alternatives."); *Id.* Reporters' Note to cmt. B (discussing factors bearing on aggregation decisions).

111. Fed. R. Civ. P. 23(c)(2)(B).

rule has been interpreted strictly,<sup>112</sup> and class actions in many states are governed by identical language. On this point, however, one finds the single largest number of variations from federal practice. All are in the direction of less stringent requirements, which seems to reflect a fairly widespread sense that the Federal Rule's text—despite due-process concerns in the background<sup>113</sup>—does not coincide with a constitutional mandate.

The two most common types of variation are express judicial discretion as to the notice to be provided and the enumeration of lists of factors to be balanced in deciding on notice—which amounts to a form of guided discretion. Illinois,<sup>114</sup> Maryland,<sup>115</sup> Pennsylvania,<sup>116</sup> and South Carolina<sup>117</sup> in one way or another all expressly confer discretion on trial judges. California,<sup>118</sup> Iowa,<sup>119</sup>

112. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974) (“individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23.”).

113. *See id.* at 174 (quoting advisory committee note to 1966 revision) (“the ‘mandatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject.”).

114. *See* 735 Ill. Comp. Stat. 5/2-803 (2003) (“the court in its discretion may order such notice that it deems necessary to protect the interests of the class and the parties”).

115. *See* Md. R. Civ. P. 2-231(e) (“In a class action maintained under subsection (b)(3), notice shall be given to members of the class in the manner the court directs.”).

116. *See* Pa. R. Civ. P. 1712(b):

(b) The court may require individual notice to be given by personal service or by mail to all members who can be identified with reasonable effort. For members of the class who cannot be identified with reasonable effort or where the court has not required individual notice, the court shall require notice to be given through methods reasonably calculated to inform the members of the class of the pendency of the action. Such methods may include using a newspaper, television or radio or posting or distributing through a trade, union or public interest group.

Pennsylvania also provides factors to guide judicial discretion. *See* Pa. R. Civ. P. 1712(a):

(a) In determining the type and content of notice to be used and the members to be notified, the court shall consider the extent and nature of the class, the relief requested, the cost of notifying the members and the possible prejudice to be suffered by members of the class or by other parties if notice is not received.

117. *See* S.C. R. Civ. P. 23(d)(2) (“The court . . . may order that notice be given in such a manner as it may direct of the pendency of the action by the party seeking to maintain the action on behalf of the class.”).

118. *See* Cal. R. Ct. 3.766(e):

In determining the manner of the notice, the court must consider:

- (1) The interests of the class;
- (2) The type of relief requested;
- (3) The stake of the individual class members;
- (4) The cost of notifying class members;
- (5) The resources of the parties;
- (6) The possible prejudice to class members who do not receive notice; and
- (7) The res judicata effect on class members.

*See* Cal. R. Ct. 3.766(f):

(f) If personal notification is unreasonably expensive or the stake of individual class members is insubstantial, or if it appears that all members of the class cannot be notified personally, the court may order a means of notice reasonably calculated to apprise the class members of the pendency of the action-for

New York,<sup>120</sup> North Dakota,<sup>121</sup> and Pennsylvania<sup>122</sup> list factors to guide discretion. The Uniform Class Action Act states of Iowa and North Dakota add provision to protect class members with non-trivial claims or against whom such claims are made. In the words of the North Dakota version:

Each member of the class, not a representative party, whose potential monetary recovery or liability is estimated to exceed \$100 must be given personal notice, mailed notice, or notice via third-party commercial carrier if the person's identity and whereabouts can be ascertained by the exercise of reasonable diligence.<sup>123</sup>

Oklahoma tempers its notice requirement, which tracks the federal language, with an exception for cases involving more than 500 class members identifiable with reasonable effort.<sup>124</sup> New Jersey punts on any constitutional issues by requiring for (b)(3) actions "the best notice practicable under the circumstances, consistent with due process of law."<sup>125</sup> And

Canadian class proceedings legislation is remarkably flexible on the question of notice. While setting out the factors which the court must consider

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example, publication in a newspaper or magazine; broadcasting on television, radio, or the Internet; or posting or distribution through a trade or professional association, union, or public interest group.

119. *See* Iowa R. Civ. P. 1.266(3) ("In determining the manner and form of the notice to be given, the court shall consider the interests of the class, the relief requested, the cost of notifying the members of the class, and the possible prejudice to members who do not receive notice.").

120. *See* N.Y. C.P.L.R. § 904(c) (McKinney 2006):

In determining the method by which notice is to be given, the court shall consider

1. the cost of giving notice by each method considered
2. the resources of the parties and
3. the stake of each represented member of the class, and the likelihood that significant numbers of represented members would desire to exclude themselves from the class or to appear individually, which may be determined, in the court's discretion, by sending notice to a random sample of the class.

121. *See* N.D. R. Civ. P. 23(g)(3) ("In determining the manner and form of the notice to be given, the court shall consider the interests of the class, the relief requested, the cost of notifying members of the class, and the possible prejudice to members who do not receive notice.").

122. *See supra* n. 116.

123. N.D. R. Civ. P. 23(g)(4). The Iowa version omits the third-party carrier aspect but is otherwise essentially the same. *See* Iowa R. Civ. P. 1.266(4);

124. *See* Okla. Stat. Ann. tit. 12, § 2023(C)(2) (West 1993):

Where the class contains more than five hundred (500) members who can be identified through reasonable effort, it shall not be necessary to direct individual notice to more than five hundred (500) members, but the members to whom individual notice is not directed shall be given notice in such manner as the court shall direct, which may include publishing notice in newspapers, magazines, trade journals or other publications, posting it in appropriate places, and taking other steps that are reasonably calculated to bring the notice to the attention of such members, provided that the cost of giving such notice shall be reasonable in view of the amounts that may be recovered by the class members who are being notified. Members to whom individual notice was not directed may request exclusion from the class at any time before the issue of liability is determined, and commencing an individual action before the issue of liability is determined shall be the equivalent of requesting exclusion from the class.

125. N.J. R. Civ. P. 4:32-2(b)(2).

when determining what notice is required in the circumstances, Ontario and B.C. also allow that the court “may dispense with notice if . . . the court considers it appropriate to do so.”<sup>126</sup>

In short, federal and state rulemakers seeking models for modified notice provisions have no shortage of sources—and perhaps, with further research, experience in how well the several variations seem to work.

### *B. Costs of Notice*

Along with its no-exceptions interpretation of the notice provision, the Supreme Court has also held that Federal Rule 23 as now phrased does not permit federal courts to require defendants to front any of the costs of giving notice.<sup>127</sup> In some states and the District of Columbia,<sup>128</sup> though, courts may require defendants to bear the cost of notice; the states include New Jersey<sup>129</sup> and New York.<sup>130</sup> In California<sup>131</sup> and Colorado,<sup>132</sup> a court may require the class’s adversary to provide notice. And in Pennsylvania, a court may require a defendant to cooperate in minimizing plaintiff’s notice expenses<sup>133</sup>—a power that some other courts may well feel they have even without explicit rule authorization.<sup>134</sup>

### *C. Advance Notice to Putative Defendant*

126. Jones, *supra* n. 35, at 126.

127. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) (“petitioner must bear the cost of notice to the members of his class”).

128. See D.C. R. Civ. P. 23(c)(2) (“The cost of notice shall be paid by the plaintiff unless the Court . . . concludes (1) that the plaintiff class will more likely than not prevail on the merits and (2) that it is necessary to require the defendant to pay some or all of that cost in order to prevent manifest injustice.”).

129. See N.J. R. Civ. P. 4:32-2(b)(3) (“The cost of notice may be assessed against any party present before the court, or may be allocated among present before the court, pending final disposition of the cause.”).

130. See N.Y. C.P.L.R. § 904(d)(1) (McKinney 2006) (plaintiff to bear notice costs unless court orders otherwise, but court “may, if justice requires, require that the defendant bear the expense of notification, or may require each of [the parties] to bear a part of the expense in proportion to the likelihood that each will prevail upon the merits”).

131. See Cal. R. Ct. 3.766(a) (“If the class is certified, the court may require either party to notify the class of the action in the manner specified by the court.”).

132. See *Mountain States Tel. & Tel. Co. v. District Court*, 778 P.2d 667, 673 (Colo. 1989) (although usual rule is for representative plaintiff to bear notice costs, in some cases “it is appropriate to relieve the plaintiff of the burden of such costs and to require the defendant to perform the task of sending the class notices to class members”).

133. See Pa. R. Civ. P. 1712(c):

The court may require a defendant to cooperate in giving notice by taking steps which will minimize the plaintiff’s expense including the use of the defendant’s established methods of communication with members of the class, provided, however, that any additional costs thereby incurred by the defendant shall be paid by the plaintiff.

134. Cf. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 355 (1978) (footnote omitted) (Rule 23(d) “authorizes a district court in appropriate circumstances to require defendant’s cooperation in identifying the class members to whom notice must be sent”).

Oregon has an apparently unique notice provision dealing not with notice to class members but with notice to a putative damage class-action defendant. First, the potential class representative must give the intended defendant thirty days' notice of the claim with a demand for correcting the alleged wrong.<sup>135</sup> Then the class action may not go forward if the defendant shows that it has identified, or made reasonable efforts to identify, the class members; has notified them that on request it will rectify the alleged wrong; has done so or will within a reasonable time; and that it has ceased the allegedly wrongful conduct (or, in case of impossibility or unreasonable expense of immediate cessation, will cease within a reasonable time).<sup>136</sup> This ingeniously framed measure is apparently intended to avoid unnecessary litigation when a defendant is willing to deal in full with an alleged wrong suffered by many; but the lack of reported cases in its multi-decade existence makes it questionable whether the mechanism has significant effect.<sup>137</sup>

D. *Opt-Out and Opt-In Variations*

1. *Opt-outs*

The basic federal opt-out approach for damage class actions, requiring that notice in (b)(3) class actions include information of members' right to opt out,<sup>138</sup> is widely followed in the states. Variations seem to be few, with Massachusetts' general class-action rule uniquely lacking any mandatory notice provision or authorization for opting out. All class-action notice in Massachusetts is discretionary with the trial judge, and due-process protection comes mainly from adequacy of representation rather than notice.<sup>139</sup> These choices, even if they improve the flexibility of the state rule, have the consequence that Massachusetts does not meet federal due-process requirements for multistate actions with binding effect on out-of-state members of damage class actions.<sup>140</sup> The only other variations found on opt-out approaches involve the rare defendant class action. Under the phrasing of the federal and many state rules, the opt-out right seems to extend to members of defendant classes in damage actions, which could greatly reduce the

135. See Or. R. Civ. P. 32H.

136. See Or. R. Civ. P. 32I.

137. See Survey, *supra* n. 3, at 410-411 (reporting lack of published case law). It could be that successful use of the notice-and-remedy mechanism has resulted in no reported decisions; it would take a dispute about some aspect of its use to produce litigation.

138. See Fed. R. Civ. P. 23(c)(2)(B) ("The notice must clearly and concisely state in plain, easily understood language . . . (v) that the court will exclude from the class any member who requests exclusion").

139. See 1 Mullenix, *supra* n. 1, Mass. § 7.05, at 23,051.

140. See Survey, *supra* n. 3, at 240-241; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-812 (1985) (due process requires that for valid interstate class action in state court, plaintiff class members without minimum contacts with foreign state receive notice with opportunities to be heard or opt out).

effectiveness of such actions. The Uniform Class Action Act states of Iowa and North Dakota respond by forbidding opt-outs from defendant classes,<sup>141</sup> which might raise due-process questions.

## 2. *Opt-in approaches*

The reverse approach of having unnamed class members opt in rather than regarding them as in and bound unless they opt out is possible and has received some discussion in connection with possible federal rule revisions. The idea did, though, raise controversy for possibly reducing the effectiveness of the class device, and was not pursued.<sup>142</sup> On both federal and state levels it is little used, with federal use limited to the context of the Fair Labor Standards and Age Discrimination in Employment Acts.<sup>143</sup> Pennsylvania allows its courts to switch from opt-out to opt-in on a finding that class members' individual claims are substantial enough that they may be able to litigate on their own or that other special circumstances exist.<sup>144</sup> British Columbia deals with the *Shutts* problem of binding effect on non-forum class members in multijurisdictional class actions<sup>145</sup> by applying an opt-out approach for B.C. residents and requiring those from elsewhere to opt in if they wish to be included.<sup>146</sup> The English group litigation regime, the counterpart to class actions there, works entirely on an opt-in basis.<sup>147</sup> This still relatively new approach, on the books since 2000,<sup>148</sup> may not be working particularly well<sup>149</sup> but may result partly from problems other than its opt-in approach.<sup>150</sup> In this area unlike some others, it appears that opt-in approaches on the books in legal contexts similar to ours may be few enough to provide little by way of models or useful

141. See Iowa R. Civ. P. 1.267(4) ("A member of a defendant class may not elect to be excluded."); N.D. R. Civ. P. 23(h)(4) (same).

142. See generally 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. 137, 144-147 (Spring/Summer 2001) (discussing and critiquing opt-in proposal).

143. See 29 U.S.C. §216(b) (2000) (Fair Labor Standards Act) ("No employee shall be a party plaintiff to any [FLSA] action [for unpaid minimum wages or unpaid overtime wages] unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."); 29 U.S.C. § 626(b) (Age Discrimination in Employment Act) (incorporating FLSA procedure by reference). The Second Circuit rejected a similar approach in a Federal Rule 23 action for plaintiff class members whom a district court allowed to opt into American litigation arising from a ski-train fire in Austria, if they waived their right to sue in Austria (where they could have relitigated an American judgment). See *Kern v. Siemens Corp.*, 393 F.3d 120, 124-129 (2d Cir. 2004), cert. denied, 544 U.S. 1034 (2005).

144. See Pa. R. Civ. P. 1711(b).

145. See *supra* n. 140.

146. See Jones, *supra* n. 35, at 118; Mulheron, *supra* n. 27, at 31 n. 47

147. See Mulheron, *supra* n. 27, at 99. So, apparently, does the regime in the Australian state of Victoria, which requires written consent from class members. See Sherman, *supra* n. 38, at 152.

148. See Mulheron, *supra* n. 27, at 94.

149. See *id.* at 99 (suspicion "that the English multi-party schemas . . . are still too faint-hearted to permit recovery of damages for an unknown mass of plaintiffs appears true, given the opt-in requirement").

150. See *id.*

experience.

### 3. *Second opt-out in connection with damage settlement*

Since 2003, Federal Rule of Civil Procedure 23(e)(4)—as yet little if at all followed in state rules—has allowed federal courts to condition settlement approval on a second opt-out chance for class members who had and did not exercise that opportunity after class certification but when no settlement had been reached:

If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.<sup>151</sup>

Limited experience to date indicates that federal courts have rarely allowed such a second opt-out,<sup>152</sup> at least in considerable part because both sides in settlement approval have incentives to argue against it.<sup>153</sup> This pattern has led the current American Law Institute project on Principles of Aggregate Litigation to propose a strong presumption in favor of a second opt-out,<sup>154</sup> and Texas makes the second opt-out not just presumptive but mandatory.<sup>155</sup> The idea in some form seems to be gaining adherents; empiricists can only hope for enough adoptions of the various possible forms to provide some experience in which variety may work best.<sup>156</sup>

## VII. OTHER FEATURES

State class-action rules and statutes are too numerous and far too multifaceted for this survey to attempt anything close to exhaustiveness.

151. Fed. R. Civ. P. 23(e)(4).

152. See PRINCIPLES, *supra* n. 51, § 3.11 cmt. a (“the rule has not had a substantial impact. It applies only as a matter of discretion, and few courts have ordered a second opt-out.”).

153. Class counsel may receive smaller amounts for fees if members opt out, and the settlement may even come apart. “[N]either class counsel nor defense counsel wants to urge a procedure—not mandated by law—that may undo the settlement (especially when, as is common, the settlement gives the defendant the right to abandon the agreement if more than a specified number of class members opt out).” *Id.*

154. See *id.* § 3.11:

In any class action in which the terms of a settlement are not revealed until after the initial period for opting out has expired, class members should ordinarily have the right to opt out after the dissemination of notice of the proposed settlement. If the court chooses not to grant a second opt-out right, it must make a written finding that compelling reasons exist for refusing to grant a second opt-out.

155. See Tex. R. Civ. P. 42(e)(3) (“In an action previously certified as a class action under Rule 42(b)(3), the court may not approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.”).

156. See also Jones, *supra* n. 35, at 126-128 (in connection with aggregate assessment of damages on statistical basis, which is permissible in Canada but constitutionally questionable in the United States, British Columbia courts may allow or refuse to permit withdrawal from averaged assessments).

Discussion to this point has covered several of the most important aspects that are treated in Federal Rule 23 and key contrasting state and foreign variants. This Part will deal with some remaining features of class-action practice with which the federal rule does not deal directly but that some state rules address: counterclaims against class members, discovery, offers of judgment, and relief.

#### A. *Counterclaims Against Class Members*

Lack of provision in Federal Rule 23 for handling of counterclaims against class members leaves defendants' efforts to bring such claims for treatment under Federal Rule 13 and decisional law, to deal with both legitimate efforts to bring claims that defendants may have against class members and such problems as possible abusive tactics trying to drive class members to opt out in large numbers.<sup>157</sup> The Uniform Class Action Act provides one model of an approach to express treatment of the area for rulemakers who might wish to consider making explicit provision for counterclaims in the class-action context. The UCAA draws lines between counterclaims against the plaintiff class as a whole or a subclass, which the defendant may plead if the court certifies those counterclaims as a class action, and claims against individual class members, which require leave of court.<sup>158</sup> A parallel provision governs counterclaims by a defendant class or members thereof,<sup>159</sup> and potential counterclaims in class actions are shielded against the preclusive effect commonly applied to omitted compulsory counterclaims in non-class actions.<sup>160</sup>

#### B. *Discovery*

Discovery from unnamed class members, like counterclaims against them, poses problems of potential abuse and harassment while sometimes reflecting legitimate need on such issues as class cohesion for purposes of litigating certification.<sup>161</sup> The UCAA states of Iowa and North Dakota require leave of court for discovery against absent class members and provide a list of factors to guide judges' decisions on such requests.<sup>162</sup> California allows

157. See e.g. *Donson Stores, Inc. v. Am. Bakeries Co.*, 58 F.R.D. 485, 489 (S.D. N.Y. 1973) (noting possible tactical abuse).

158. See Iowa R. Civ. P. 1.270(1); N.D. R. Civ. P. 23(k)(1).

159. See Iowa R. Civ. P. 1.270(4); N.D. R. Civ. P. 23(k)(4).

160. See Iowa R. Civ. P. 1.270(6); N.D. R. Civ. P. 23(k)(6).

161. See generally 7B Charles Alan Wright et al., *FEDERAL PRACTICE AND PROCEDURE* § 1796.1 (3d ed. 2005) (discussing issues involving discovery in class actions).

162. See Iowa R. Civ. P. 1.269(1); N.D. R. Civ. P. 23(j)(1):

Discovery [under applicable discovery rules {present in North Dakota rule; absent in Iowa rule}] may be used only on order of the court against a member of the class who is not a representative party or who has not appeared. In deciding whether discovery should be allowed the court shall consider, among other relevant factors, the timing of the request, the subject matter to be covered, whether representatives of the class are seeking discovery on the subject to be



depositions via subpoenas to unnamed class members with the burden on them to seek protective orders, while allowing interrogatories to such members only with leave of court; it provides a single list of criteria similar to those in UCAA states for court decisions on discovery issues in both contexts.<sup>163</sup> Maryland and Texas, finally, exclude unnamed class members from those viewed as “parties” for discovery purposes, with Maryland requiring motion for discovery against a class member other than a representative<sup>164</sup> and Texas apparently relegating the class’s opponents to whatever discovery devices and procedures may be available against nonparties.<sup>165</sup> Here, it seems that the lack of treatment in the Federal Rule may have contributed to somewhat disparate treatment in the states—which need not, of course, be a bad thing.

### C. *Offers of Judgment*

Offer-of-judgment or offer-of-settlement rules, like Federal Rule of Civil Procedure 68 and parallel state rules, provide for formal offers with teeth: the offeror, always or often a defending party, may offer to have judgment entered against it in a certain amount, with adverse consequences such as liability for post-offer costs of the offeror if the offeree does not accept and does not do better than the offer at trial.<sup>166</sup> The relationship between formal offer rules and class actions is troubled, because offer rules presume autonomy on the part of offerees in deciding whether to accept, while class actions require court approval of settlements.<sup>167</sup> The result is a somewhat inconsistent pattern when it comes to whether and how formal offer rules apply in class actions.<sup>168</sup>

Florida has an apparently unique procedural response to one aspect of these problems. For putative class actions, it extends “the time for acceptance of a proposal for settlement . . . to 30 days after the order granting or denying certification is filed.”<sup>169</sup> This approach at least reduces potential conflict between class representatives facing a favorable offer and possible duties to the class: “Now, proposed representatives can honor their commitment to the proposed class and know whether a class has been certified before deciding whether to accept a proposal for settlement.”<sup>170</sup>

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covered, and whether the discovery will result in annoyance, oppression, or undue burden or expense for the members of the class.

163. *See* Cal. Ct. R. 3.768.

164. *See* Md. R. Civ. P. 2-231(g) (“For purposes of discovery, only representative parties shall be treated as parties. On motion, the court may allow discovery by or against any other member of the class.”).

165. *See* Tex. R. Civ. P. 42(f) (“Unnamed members of a class action are not to be considered as parties for purposes of discovery.”).

166. *See generally* 13 Moore’s, *supra* n. 28, ch. 68 (discussing offers of judgment under Federal Rule of Civil Procedure 68).

167. *See id.* § 68.03[3] (discussing application of Federal Rule 68 to class and derivative actions).

168. *See id.* (reflecting conflict in federal decisions on application of offer rule in class actions).

169. Fla. R. Civ. P. 1.442.

170. Survey, *supra* n. 3, at 109.

*D. Cy Pres and Fluid-Class Recoveries*

Problems arise when damage awards in class actions cannot be fully distributed to the class members who suffered losses. Sometimes, for example, they cannot all be identified; other times they may not present necessary proofs of their claims. That leaves leftover funds and brings the system into a world of less than fully satisfactory alternatives: return the money to the defendant (and reduce class counsel's fee?); give extra recoveries to identified class members?; give the money to charity?; give it to the government?; etc. Responses have varied, among federal courts<sup>171</sup> and in the states. The American Law Institute's Aggregate Litigation project currently proposes that cy pres settlements be permissible, even if courts would lack authority to order a cy pres remedy in a contested case, under limited circumstances: When leftover funds remain and could not economically be distributed to participating class members, then the money could go to "a recipient involving the same subject matter as the lawsuit that best approximates the interests being pursued by the class"<sup>172</sup> (rather than the judge's favorite charity).

Many states appear not to have dealt with cy pres issues,<sup>173</sup> and those that have take a considerable range of approaches. To give prominent examples: California case law is fairly friendly to cy pres distributions and provides detailed guidance for the state's courts, refusing to return the money to defendants and specifying a range of possible approaches.<sup>174</sup> Illinois case law approves "fluid recovery" distribution of funds left over after payments to identifiable class members, in the form of reduced charges or to fund a project likely benefiting class members.<sup>175</sup> The state now has new legislation, effective July 1, 2008, allowing residual funds from class-action settlements to go to tax-exempt organizations under various conditions.<sup>176</sup> A Louisiana appellate court has recently approved cy pres distribution of class-settlement proceeds, requiring as close as possible a parallel to intended use of the funds.<sup>177</sup>

The Missouri Supreme Court has approved the possibility of parties agreeing on a cy pres distribution "for the indirect benefit of the class," or in the absence of such a provision "appropriate" court orders for distribution of surplus funds including "to the appropriate state or political subdivisions where the class members reside."<sup>178</sup> A state appellate court, though, has disapproved

171. See generally 5 Moore's, *supra* n. 28, § 23.171 (discussing general approval of cy pres distributions and some limits imposed on them).

172. PRINCIPLES, *supra* n. 51, § 3.07(c).

173. Or at least for many states the Mullenix treatise contains no discussion under its pertinent heading. See Mullenix, *supra* n. 1, § 8.04(A)(4) *passim*.

174. See *State v. Levi Strauss & Co.*, 41 Cal. 3d 460, 473-476 (1986).

175. See *Gordon v. Boden*, 224 Ill. App. 3d 195, 204-206 (1991).

176. See Ill. Pub. Act 095-0479, accessible at

<http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=095-0479> (accessed Dec. 14, 2007).

177. See *Cavalier v. Mobil Oil Corp.*, 898 So. 2d 584, 588-589 (La. Ct. App. 2005).

178. *Buchholz Mortuaries, Inc., v. Director of Revenue*, 113 S.W.3d 192, 193 n. 1 (Mo. 2003).

distribution, without notice to the parties and opportunity, to a charity unrelated to the parties' activities or to the relevant area.<sup>179</sup> Texas appears to ban escheat of unclaimed funds to the state on statutory and constitutional grounds<sup>180</sup> while allowing other public-use distributions at least in the absence of authority disallowing such settlements.<sup>181</sup> Canadian provinces finally, have allowed cy pres distributions—including to third parties—to *benefit* class members even if they do not individually receive *monetary relief*, with the approach being justified at least in part on deterrence grounds emphasizing the defendant's having to internalize costs of harm it inflicted.<sup>182</sup> In the absence of rule guidance, decisional approaches are likely to remain diverse; but the temptations for judges and parties to indulge favorite causes with other people's leftover money may call for observance of the Aggregate Litigation project's cautionary suggestions.

### VIII. CONCLUSION

For those steeped in American federal class-action lore, it is indeed important to remember that the familiar is not to be confused with the necessary. Decades of practice may have made it difficult to contemplate some kinds of changes in Federal Rule of Civil Procedure 23, but state and foreign practices provide a significant number of alternatives on some key points. The three most important seem to be reduced emphasis on sheer numbers in some foreign systems, and relaxation of the predominance and notice requirements for common-question damage class actions. Deeper research, particularly empirical investigation of experience under major alternatives, would be well advised before opening what could be Pandora's boxes when it comes to significant changes in familiar language. But both federal and state rulemakers are not lacking for models.

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179. See *Kan. Assn of Priv. Investigators v. Mulvihill*, 159 S.W.3d 857, 861-862 (Mo Ct. App. 2005).

180. See *State v. Snell*, 950 S.W.2d 108, 112-113 (Tex. App. 1997).

181. See *Northrup v. Southwestern Bell Tel. Co.*, 72 S.W.3d 16, 22 (Tex. App. 2002).

182. See *Jones*, *supra* n. 35, at 128.