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Cover Page Footnote

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THE OPTIMAL LAW ENFORCEMENT WITH MANDATORY DEFENDANT CLASS ACTION

Nelson Rodrigues Netto[*]

INTRODUCTION

The mass production society has evolved with great intensity since the enormous progression of the communications network, especially the Internet, which provides services and goods (tangible and intangible) to hundreds of millions of people. The twenty-first century conceives a technologically savvy society with the propensity for massive unlawful behavior. The broad range of relationships set through the Internet and other communication systems, sometimes agglomerating millions of people, allows for a very considerable number of illegal transgressions. With such a scenario as a backdrop, this work aims to analyze the law enforcement system and the optimal mechanism to prevent and redress harm in the mass information society—obtaining optimal deterrence, insurance, and redistribution by means of mandatory defendant class actions.

The article also addresses one of the most problematic issues related to defendant class actions: the reluctance of the respondents to assume class representation and the absence of an appropriate legal fees mechanism to motivate defendant class lawyers. The premise is that individuals are rational, meaning that they seek their maximum welfare. Hence, the ideal legal system should improve individuals' well-being by minimizing the costs of accident risk. This task is best achieved by compulsory aggregation of claims and defenses. An aggregation of defenses would encourage the use of defendant class actions by the plaintiff's bar, as well as by the defendants, in order to exploit the scale of investment and economy in common questions of the class defense. This paper urges that in order to increase the access to justice, the modern rules of civil procedure have to step forward into a combined strategy of substantive law and procedural law by embracing collective litigation. This argument shall be developed from the respondent's perspective and under a theoretical frame to attain optimal individual well-being and, consequently, a general social welfare.

Concerning mass accidents, collective litigation is used to consider the victims' angle, i.e., the plaintiffs' side in litigation. This happens

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because, commonly, the liability remains on the enterprises that create the risk and are responsible for accidents due to defective designs of products, hazardous safety measures for employees, unhealthy environment for the population, etc. This article, however, focuses on the defendant's side of litigation in order to resolve, once and for all, common questions within the defenses of the multitude of respondents to a lawsuit. Although the defendant class action has shown to be a very useful procedure for the plaintiffs, it is important to demonstrate that it is also a functional device for the defendants. As mentioned previously, the aggregation of defendants and defenses benefits everyone, making the defendant class action an essential legal instrument for optimal law enforcement.

The objective of this article is to suggest an enhancement of law enforcement through mandatory aggregation of defendants and improvement of the defendant class action to incentivize the class lawyer. In Part I, some examples of conflicted relationships that arise out of the so-called "information society" are selected and then briefly analyzed through different litigation strategies. First, under an individual litigation, i.e., on case-by-case lawsuits; second, by bringing lawsuits against parties held responsible for secondary liability on a theory of contributory or vicarious infringement; and third, in a defendants' aggregate system. Part II depicts the normative theory of individual rational choice, which achieves the optimal law enforcement system. It maximizes the individual's well-being, putting everyone behind a veil of ignorance. In this sense, it requires legal procedures mandating aggregation of claims and defenses. Part III summarizes an explanatory view of the defendant class action, its origins, and the requisites for its certification and maintenance under the current federal statute. Part IV analyzes the optimal aggregation of defendants. With this objective, I examine the advantages of exploiting investment and economy scales through aggregation of defenses.

In addition, this article also challenges the assertion that the value of a day in court is antagonistic towards mandatory class action, with the argument that individuals' well-being is attained by representative suits. Moreover, I demonstrate that the defendant class action is a legal device that, while enhancing everyone's welfare, is useful for the plaintiff's bar as well as for defendant's, because it works as a protective device against threats of nuisance value suits. This paper seeks to furnish the appropriate incentives for aggregation of defendants by adequate attorney fee methods. With a propositional approach, I compile the current methods of granting attorney fees in class actions and their application to the defendant class counsel.

I. THE TWENTY-FIRST CENTURY MASS SOCIETY

The idea of "mass society" has evolved in time. First, it reflected the beginning of the industrialization in the eighteenth century, when the transformation of the means of production from artisan craftwork to large scale machinery work forged the concept of mass production of tangible goods. Since then, the notion of "mass society" has been part of the collective conscience.

However, in the twenty-first century, we are living in an information society, where furnishing services and goods are made by sophisticated communication links, especially the Internet. In addition, many tangible goods are now intangible (for example, a book can be obtained by downloading a program from the Internet and may be read without being touched, with no physical contact, just rolling the computer bar). Business performs faster with new ways of expressing consideration, and parties are located anywhere in the world. To a similar degree, it is quite fair to say that one of the most extraordinary advancements in the contemporary society has been the creation and diffusion of the Internet. To have an idea of the immense growth of the Internet it is enough to reveal that in the United States, in four years, the number of users has reached 50 million; in comparison, it took the television 13 years, the personal computer 16 years, and the radio 38 years to get to that number.[1] The ability of people to communicate with each other from a computer connection, to access banking data or to accomplish business all over the globe, is a phenomenon of integration and development of the civilization.

The so-called "information society" resembles the new face of the "mass society." It generates a new step in the relationship among nations, influencing political and economical systems and even the sovereignty of each people. In Brazil, for example, the Information Society Program intends to impose a shared responsibility among private initiative sectors (entrepreneurial and civil society) and the public sector, aiming at

> integrating, coordinating and incentivizing actions for the use of communication and information technologies as a means to contribute to the social inclusion of all Brazilian citizens in the new society and, at the same time, to contribute to the economy of the country to gain conditions to compete in the global market.[2]

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[1] Data obtained from the Sociedade da Informação no Brasil - Livro Verde, 3 (title translated as, Information Society in Brazil - Green Book). This study is the result of work developed by the Brazilian Science and Technology Ministry that contains the goals for the implementation of the Information Society Program and is formed by a consolidated summary of the applications of the information technologies.

[2] *Id.* at 10.

The great challenge is to make use of the advanced communication knowledge and the Internet to promote the enrichment of modern culture under a human and ethical perspective and not just to employ it as a technological device without achieving better living conditions for the entire information society. Lawyers, judges, and public prosecutors (in summary, the whole legal community), much more than being alert to the mentioned advent, should act affirmatively by proposing changes and attempting to furnish normative elements for the relationship created by this new "mass society."[3]

Consequently, the mass offering of goods and services to hundreds of thousands of people induces lawful and unlawful behaviors. For instance, concerning satellite television networks, one may assume that most of the consumers act in a proper manner by paying for the service; nonetheless, others may utilize some sort of gadget in order to receive the transmission without cost. Similarly, when downloading music and films from the Internet, some users will pay for obtaining the music and films and others will simply illegally download and infringe the copyrighted works.

In this sense, there is a substantial modification to the law enforcement that has to be performed by the law operators and a choice of solutions to be made in order to achieve the optimal enforcement level. On one hand, there is the possibility to file lawsuits separately, one by one, against individual wrongdoers. It is easy to verify that this path accomplishes the objectives of compensation and deterrence. This strategy has been largely employed by DirecTV, a company that broadcasts television programs through satellite transmissions. The satellite technology used by DirecTV requires the installation of a satellite dish, an integrated receiver/decoder, and an access card.

DirecTV sent thousands of letters to persons alleging that they were stealing the company's satellite signal by using modified DirecTV access cards ("smart cards") and offered a settlement agreement.[4] The smart cards

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[3] I use the locution "legal community" to express a broader meaning than "law operators," i.e., lawyers, judges and public prosecutors. Referring to "legal community," one may include a person or an entity that is directly involved with and influenced by any specific domain or area of the law. For example, tenants, in general, are part of the legal community in regards to proposed legislation that may interfere with their lease agreements.

[4] The settlement agreement inserted in the "cease and desist" letters consisted of the following provisions:

> (1) surrender all illegally modified Access Cards or other satellite signal theft devices in your possession, custody, or control; (2) execute a written statement to the effect that you will not purchase or use illegal signal theft devices to obtain satellite programming in the future, nor will you have any involvement in the unauthorized reception and use of the DIRECTV's satellite television programming; and (3) pay a monetary sum to DIRECTV for your past wrongful conduct and the damages thereby incurred by the company.

are said to be a device that may be used for legal and meaningful purposes.[5] In addition, DirecTV has created an internet site that "provides information concerning . . . civil actions brought by DIRECTV against those who fraudulently obtain DIRECTV programming without authorization by and proper payment to DIRECTV or illegally design, manufacture, market, sell, or use devices that allow access to satellite signals without payment to DIRECTV."[6] According to the referred website, over 25,000 individuals were sued for fraud and piracy for stealing a television satellite signal. This is a small number compared with the estimate for this year, in which the number of violators of DirecTV's signal may reach 3.3 million people, according to the Carmel Group, a communication-consulting firm, cited by Forbes Magazine journalist, Dorothy Pomerantz.[7]

Instead of filing separate suits against individual defendants, the ideal solution is to aggregate all claims and defenses, thus uniting plaintiffs and defendants in collective litigation. In some instances, litigation directed to the commonly-called "gatekeepers"—that is, bringing a lawsuit against persons or entities that furnish the market with the resources that allow wrongful behavior—may be the ideal solution to resolve the conflict over unnumbered parties.[8] If lawsuits were brought separately, the suit would be

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Electronic Frontier Found. & Stanford Ctr. for Internet & Socy. Cyberlaw Clinic, *DirecTV Defense Cease and Desist Letters,* http://www.directvdefense.org/ files/letter1 (Oct. 11, 2002).

[5]

> Smartcards are an important, and legal, branch of emerging technology, but satellite TV giant DirecTV has launched a legal campaign that threatens smartcard researchers and innovators. Over the past few years, the company has sent hundreds of thousands of demand letters and filed nearly 24,000 federal lawsuits in response to the mere purchase of smart card readers, emulators, unloopers, reprogrammers, bootloaders, and blockers. The satellite TV company accuses techies – some of whom threw out their televisions in favor of the Internet long ago – of using these devices to illegally intercept its signals. But the smart card readers and their various derivatives are capable of so much more: they secure computer networks, enable user-based identification, and further scientific discovery. People who intercept DirectTV's satellite signal are breaking the law. However, DirecTV's cease and desist letter campaign does not distinguish the legitimate users from the thieves. This website is meant as a legal resource for the legitimate computer scientists, technology workers, and hobbyists who are being harassed by DirecTV's no holds-barred slash-and-burn legal strategy. This site provides scientists, researchers, innovators and their lawyers with the resources necessary to fight DirecTV and protect their right to own and use multi-purpose technology for its legal applications – and without fear of reprisal.

Electronic Frontier Found. & Stanford Ctr. For Internet & Socy. Cyberlaw Clinic, *DirecTV Defense*, http://www.directvdefense.org/ (accessed Oct. 16, 2007).

[6] DirecTV's Office of Signal Integrity, *The Truth*, http://www.hackhu.com (accessed Oct. 16, 2007).

[7] Dorothy Pomerantz, *Stealing the Show*, http://www.forbes.com/2003/05/29/cz_dp_0529directv.html (accessed Oct. 16, 2007).

[8] The strategy of enforcing the law against the "gatekeepers" as third-party liability is fully discussed in Reiner H. Kraakman, *Gatekeepers, The Anatomy of Third-Party Enforcement Strategy,* 2 J.L., Econ., & Org. 53 (1986), and Reiner H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 Yale L.J. 857 (1984). *See also* Assaf Hamdani, *Gatekeeper Liability*, 77 S. Cal. L. Rev. 53 (2003). For the view of the plaintiffs' attorneys as the system gatekeepers, *see* David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 Ind. L.J. 561, 574-75

filed against hardware manufacturers and/or the computer technicians that develop and produce tools enabling unauthorized satellite television transmission. If litigation was directed to gatekeepers, however, the action would be brought against the enterprises that provide file-sharing services through peer-to-peer networks ("p2p") or freely distribute software that permits downloading copyrighted works through the Internet without any remuneration to the copyright holders.[9]

In one of the most recent cases, the Supreme Court held companies secondarily liable on the theory of contributory and vicarious infringement, because they provided software to consumers that use them to violate copyrighted works:

> The argument for imposing indirect liability in this case is, however, a powerful one, given the number of infringing downloads that occur every day using StreamCast's and Grokster's software. When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement. One infringes contributorily by intentionally inducing or encouraging direct infringement, and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it.[10]

Notwithstanding the ability to sue gatekeepers, the focus in this article is on an alternative solution for law enforcement in the information society: the defendant class action.[11] The option for a defendant class action takes into consideration the deterrence function of the law as well as its insurance objective. As a result, the ideal of distributive justice is better served. The procedural law has to be considered as a tool to achieve the principles enacted in the substantive law.[12] Regardless of the eternal debate concerning the distinction between substantive law and procedural law, which is beyond the scope of this work, it is important to realize that the

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(1986-1987) [hereinafter Rosenberg, *Class Actions*]; David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 Harv. L. Rev. 851, 889-92 (1984) [hereinafter Rosenberg, *The Causal Connection*].

[9] *See MGM Studios, Inc. v. Grokster Ltd.*, 545 U.S. 913 (2005); *In re Aimster Copy. Litig.*, 334 F.3d 643 (7th Cir. 2003); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

[10] *MGM Studios, Inc.*, 545 U.S. at 930-31 (citations omitted).

[11] *See* Elizabeth J. Cabraser, *Enforcing the Social Compact through Representative Litigation*, 33 Conn. L. Rev. 1239, 1239-40, 1254-56 (2001) (analyzing the mass tort in the twenty-first century and reinforcing the use of class actions).

[12] *See infra* pt. II.

science of law has matured over the years and no longer considers procedural law an appendix of substantive law, or even, a domain of law that has an end of its own.[13] Procedural law has to be applied in order to carry out the objectives of the substantive law. The legal process is the instrument to perform the goals of social peace, equality, and welfare, which are within the principles of the substantive law. Hence, use of the tools that are provided by legal proceedings shall not be considered as violating the Rules Enabling Act[14] or Rule 82 of the Federal Rules of Civil Procedure.[15]

This article urges that to promote access to justice, the rules of civil procedure must step forward into a combined strategy of substantive law and procedural law through collective litigation developed from a defendant's perspective and under a theoretical economic feature to attain optimal individuals' well-being.[16] This paper aims to demonstrate that the

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[13] For further discussion about the distinction between substantive law and procedural law, *see generally* Elizabeth Barke Brandt, *Fairness to the Absent Members of a Defendant Class: A Proposed Revision of Rule 23*, 1990 BYU L. Rev. 909 (1990) (criticizing the decision in *U.S. v. Trucking Employers, Inc.*, 72 F.R.D. 98 (1976), that allowed a certification of class action with expansion of jurisdiction and venue, therefore, violating Fed. R. Civ. P. 82); Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 Duke L. J. 281 (1989) (discussing an ambivalent nature, substantive-procedural, of the statutes of limitation); Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws,* 42 Yale L.J. 333 (1933) (discussing that the purpose of the characterization is the element that distinguishes a law as substantive or procedural); Carole E. Goldberg, *The Influence of Procedural Rules on Federal Jurisdiction*, 28 Stan. L. Rev. 397 (1976) (criticizing, in the class action context, the decisions in *Snyder v. Harris*, 394 U.S. 332 (1969), and *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), which did not permit procedural changes to influence jurisdictional decisions and suggesting that a procedural rule was consistent with the provisions of Rule 82 of the Federal Rules of Civil Procedure solely if it has a procedure purpose whose implementation is not barred by a jurisdictional rule); Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. Cal. L. Rev. 842 (1974) (discussing the issue within a consumer class action context, starting from an analysis of *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), and *Hanna v. Plumer*, 380 U.S. 460 (1965), and proposing a "widespread public controversy" test to define the substantive or procedural nature of the statute).

[14] 28 U.S.C. § 2072 (1990). The Act provides:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.
> (c) Such rules may define when ruling of a district court is final for the purposes of appeal under section 1291 of this title.

Id.

[15] Fed. R. Civ. P. 82. The rule states:

> These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions in those courts. An admiralty or maritime claim underof Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1391-1392.

Id.

[16] This position advances the three "waves" for the access to justice generated from the meticulous world survey concerning that matter, chiefly organized by Professor Mauro Cappelletti, by reinforcing that distributive justice demands joint theoretical and pragmatical application of substantive and procedural laws. *See Access to Justice*, vol. I, book I, 5-124 (Mauro Cappelletti & Bryant Garth eds., A. Giuffrè 1978).

defendant class action is the law enforcement mechanism that protects the individual's welfare under both *ex ante* and *ex post* perspectives.[17] Distinguishing wrongdoers from the law-abiding public, the defendant class action operates as a deterrent, impeding the under-deterrence that occurs when the mentioned difference is not made. Assuredly, the lack of distinction induces and awards the illegal conduct, as the wrongdoers know that they are not going to be prosecuted, and their harm will not be redressed.

The collectivized litigation resolves, once and for all, all common questions involving claims, issues, and defenses, and therefore optimizes investment in precautionary measures to perform the best deterrence and enhances judicial and process resources resulting in the ideal compensation.[18] In addition, from the wrongdoers' perspective, the class action procedure confers multiple defendant economy of scale for the litigation; consequently, the advantage for exploiting it to maximize their resources in common defenses, which achieves the desired *ex post* litigation *status*. The early lesson of Justice Oliver Wendell Holmes questioning how desirable it is for the public to insure safety against liability is still relevant.[19] The answer that is advocated is an ideal model of law enforcement system that grants everyone the best well-being, before and after the fact of a given situation, due to optimal deterrence of unreasonable risks, optimal insurance of reasonable risks, and optimal redistribution of wealth by progressively funding the preceding two elements.

II. THE NORMATIVE THEORY OF INDIVIDUAL RATIONAL CHOICE

A. Introduction

The premise of this analysis is that the defendant class action is an important legal instrument to enforce the law and it should be be optimally employed. Hence, despite the fact that collectivized litigation was highly considered from the plaintiffs' perspective by legislative authorities and the

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[17] *See infra* pt. II(B).
[18] *See infra* pt. II(C).
[19] Holmes wrote:

> Our law of torts comes from the old days of isolated, ungeneralized wrongs, assaults, slanders, and the like, where the damages might be taken to lie where they fell by legal judgment. But the torts with which our courts are kept busy to-day are mainly the incidents of certain well known businesses. They are injuries to person or property by railroads, factories, and the like. The liability for them is estimated, and sooner or later goes into the price paid by the public. The public really pays the damages, and the question of liability, if pressed far enough, is really the question how far it is desirable that the public should insure the safety of those whose work it uses.

Oliver W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 467 (1897).

academia, it is undeniable that the aggregation of defenses is a powerful device. Therefore, it should not be disregarded and should be contemplated globally with the plaintiff's class action in an effort of enhancing optimal law enforcement.

It is important to note that the aggregation of defendants may serve the interests of the plaintiff, because ordinarily it is the plaintiff who requires the certification of a defendant class. However, the defendant class action also operates on behalf of the defendants.[20] The justification of this proposition is based on the argument that individuals are rational, meaning that they seek their maximum well-being. Hence, the ideal legal system should improve individuals' welfare by improving the law enforcement. As a consequence, optimal social welfare is accomplished. This task is best achieved by the aggregation of claims and defenses and with proper incentives an aggregation of defenses would encourage the use of defendant class action.[21]

Regardless of the fact that the theory is methodologically developed in relation to tort law, it is a normative theory of rational individual choice concerning law enforcement, and so the word "accident" is employed in a broader sense of wrongful conduct violating the law.[22] Economists refer to this method of policy assessment dependent on individuals' well-being as welfare economics, as explained by Professors Kaplow and Shavell: "The welfare economic conception of individuals' well-being is a comprehensive one. It recognizes not only individuals' level of material comfort, but also

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[20] *See infra* pt. IV.

[21] Much of the text developed here is based upon Professor David Rosenberg's theory of mass tort law enforcement, presented throughout several works. *See* Charles Fried & David Rosenberg, *Making Tort Law: What Should be Done and Who Should Do It* (AEI Press 2003) [hereinafter Fried & Rosenberg, *Making Tort Law*]; Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 Notre Dame L. Rev. 1377 (2000); David Rosenberg, *Adding a Second Opt-Out to Rule 23(b)(3) Class Actions: Cost Without Benefit*, 2003 U. Chi. Leg. Forum 19 (2000) [hereinafter Rosenberg, *Adding a Second Opt-Out*]; David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 Va. L. Rev. 1871 (2002) [hereinafter Rosenberg, *Decoupling Deterrence*]; David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 Harv. L. Rev. 831 (2002) [hereinafter Rosenberg, *Mandatory-Litigation*]; David Rosenberg, *Mass Tort Class Action: What Defendants Have and Plaintiffs Don't*, 37 Harv. J. on Legis. 393 (2000) [hereinafter Rosenberg, *Mass Tort Class Action*]; David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass Exposure Cases*, 71 N.Y.U. L. Rev. 210 (1996) [hereinafter Rosenberg, *Individual Justice*]; David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. Rev. 695 (1989) [hereinafter Rosenberg, *Of End Games*]; Rosenberg, *Class Actions*, *supra* n. 8, at 561; Rosenberg, *The Causal Connection*, *supra* n. 8, at 849; David Rosenberg, *Avoiding Duplicative Litigation of Similar Claims: The Superiority of Class Action vs. Collateral Estoppel vs. Standard Claims Market* (Harv. L. Sch., Public Law Research Paper No. 44, 2002) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=354100) [hereinafter Rosenberg, *Avoiding Duplicative Litigation*].

[22] *Mutatis mutandis*, *see* Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale U. Press 1970). *See also* David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 Notre Dame L. Rev. 913, 920 n. 12 (1998) (stating that the distinction between tort and contract is hard to draw because the former often arises in the context of a contractual arrangement, which justifies the inclusion of the latter, a class action analysis, in the same category of the torts).

their degree of aesthetic fulfillment, their feelings for others, and anything else that they might value, however intangible."[23] This article employs an operational, functional method of study, based on an economic analysis of the defendant class action. Thus, it is important to expunge the myth that economics deals with money; rather, it is related to resources, its uses, and scarcity.[24] In addition, there is some contention concerning the economic approach to the law; however, a defense of its appropriateness is out of the scope of this work.[25]

This paper simply argues that questions, for instance, concerning the morality of compensation with money damages for the contraction of asbestosis, or, about the justice of taking the doctor's eye to redress the patient's loss of an eye due to medical negligence, are meta-juridical, in my view, and so far, they are out of the range of this article. The economic perspective applied herein does not serve any ideology; there is no intention to approach the substantive law in a critical manner. The normative description of the law is a meta-discussion in relation to the optimal enforcement system under an economic perspective.

B. The Social Welfare and the Ex Ante *and* Ex Post *Perspectives*

Imagine the following scheme where a driver is preparing for a car trip and has to choose between two different roads. The first highway has a toll that charges ten dollars per automobile. The price of the toll is justified

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[23] Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 Harv. L. Rev. 961, 968 (2001).

[24] Richard A. Posner, *Economic Analysis of Law* 6 (Aspen 2003) [hereinafter Posner, *Economic Analysis*]; Richard A. Posner, *Some Uses and Abuses in Economics in Law*, 46 U. Chi. L. Rev. 281 (1979). For precursors' works about the economic analysis of the law, *see generally* Guido Calabresi, *Some Thoughts of Risk Distribution and the Law of Torts*, 70 Yale L.J. 499 (1961); Calabresi, *supra* n. 22; R. H. Coase, *The Problem of Social Cost*, 3 J.L. & Econs. 1 (1960). For some major modern works, *see generally* Kaplow & Shavell, *supra* n. 23; William M. Landes & Richard A. Posner, *Joint and Multiple Tortfeasors: An Economic Analysis*, 9 J. Leg. Stud. 517 (1980); A. Mitchell Polinsky, *An Introduction to Law and Economics* (3d. ed., Aspen 2003); Posner, *Economic Analysis*, *supra* n. 24, at 3-16; Steven Shavell, *Foundations of Economic Analysis of Law*, ch. 1-5 (Harv. U. Press 2004) [hereinafter Shavell, *Foundations of Economic Analysis*].

[25] If interested in a critique of the economic analysis of the law, *see* Edward J. Bloustein, *Privacy is Dear at any Price: A Response to Professor Posner's Economic Theory*, 12 Ga. L. Rev. 429 (1978) (criticizing Posner's theory of privacy for being simplistic and, therefore, avoiding rather than confronting the complexity of the legal rules); Ronald Dworkin, *Is Wealth a Value?* 9 J. Leg. Stud. 191, 220 (1980) (affirming that "the descriptive claims of economic analysis as they have so far been presented, are radically incomplete"); Ronald Dworkin, *Why Efficiency? A Response to Professors Calabresi and Posner*, 8 Hofstra L. Rev. 563 (1979); Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. Leg. Stud. 227 (1980) (arguing that wealth maximization is an absurd principle and an unsound ideal); Arthur Allen Leff, *Law and*, 87 Yale L.J. 989 (1978) (a broader critique to the possibility of a scientific analysis of the law); Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 Va. L. Rev. 451 (1974) (arguing that Posner's theory belongs to the American Legal Nominalism, which bestows on circular vicious rationale concepts that neither consider arbitrary normative propositions of Formalism nor empirical propositions of Realism and cannot adequately analyze human activity); Gary Minda, *Toward a More 'Just' Economics of Justice – A Review Essay*, 10 Cardozo L. Rev. 1855 (1989); Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 Harv. L. Rev. 384 (1985).

to fund the cost of several safety features such as new pavement, four paths, wide paths, hard shoulders, night illumination, and assistance phones every five miles, etc. The second road does not charge a toll, but the pavement is old and in some places it is ruined. In addition, on this second highway there is only one path to go and another to return, the path is narrow, and there is no assistance phone, etc. Assuming that individuals are rational and, hence, seek to maximize their well-being, the driver will prefer to take the first road aiming to avoid any accident. In accordance with this rationale, this is a decision that he makes *before* traveling. Before traveling the driver will choose the safer road even though he has to pay a ten dollar toll fare.[26] "Behind a veil of ignorance," an expression created by the juris-philosopher John Rawls, the driver would prefer to pay the toll to use the better road. He changes his decision after being certain to have made a secure trip.[27]

In accordance to John Rawls' theory, people in the original position are "behind a veil of ignorance" so that any principles agreed to will be just. The only particular facts parties know of are that their society is subject to circumstances of justice, whatever it implies, and general facts that affect their choice of the principles of justice. No considerations of a concept of justice can be advanced unless it is a rational one, supplementing the lack of knowledge of the original position. The evaluation of principles is made in harmony with its general and public recognition and universal application because it will be complied with by everyone. A rational deliberation, assuming certain conditions and restrictions, would reach a certain conclusion that a certain concept of justice would be chosen in the original position. However, the original position is not an original pact or agreement; it is one that, under certain conditions and restrictions, anyone at any time can adopt its perspective. These requirements are the veil of ignorance.[28]

The evolution of John Rawls' thoughts merged his comprehensive liberal theory into a political conception of justice and fairness. He reinforced the idea of the veil behind ignorance where the parties are rational, distinguishing rationality from reasonableness and from special psychologies like envy and spite. Rationality is understood in an economic way; thus, the parties can rank their final ends consistently. In order to

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[26] Throughout this article masculine pronouns are used for generic reference and not in a gendered sense.

[27] John Rawls, *A Theory of Justice* (Harv. U. Press 1971). Working on welfare economics and theory of risk-taking, John Harsanyi had reached a similar conception, approximating cardinal utility function (marginal utility of money) in both systems. Giving individuals an "equal chance of being 'put in the place of' any particular member of society" maximizes cardinal utility function for both welfare economics and theory of choices involving risk, as they both are based on this same principle of equal chance without previous knowledge of fate. John C. Harsanyi, *Cardinal Utility in Welfare Economics and in Theory of Risk-Taking*, 61 J. Pol. Econ. 434 (Oct. 1953).

[28] Rawls, *supra* n. 27, at 118-23. For a critique of the theory of rational behavior and the response thereto, *see* Rosenberg, *Adding a Second Opt-Out*, *supra* n. 21, at 25 n. 13.

establish the concept of justice as fairness, Rawls enumerates five primary goods to guide the parties as they are behind the veil of ignorance, which prevents them from being aware of the doctrines and conceptions of goods of the persons they represent.[29]

The choice an individual makes in order to maximize his well-being is sensibly different when he knows, or does not know, the situation yet to come. Arguing that individuals are rational, meaning that they seek their maximum well-being, the ideal legal system should augment individuals' welfare by minimizing the sum of accident costs. This is optimally obtained by reinforcement of the legal mechanism for the aggregation of claims and defenses. Consequently, optimal social welfare is obtained. Relying on these premises, Professor Rosenberg states:

> My argument proceeds from the premises that the legal system should aim to improve individuals' well-being and that individuals seek to maximize their own welfare. In short, in the face of accident risks, the legal system should do what an individual seeking maximum welfare would prefer. To explain what such a legal regime would look like, I adopt and justify the "ex ante" perspective, which places individuals "behind a veil of ignorance," without information about their particular situations in the "ex post" world-to-come of accident risk and scarce resources.[30]

The rational individual makes different choices whether he is facing an uncertainty or a certain state of the world. In other words, there is a sensible difference in an individual's choice between two states of the world: before and after a certain situation.

Now consider the same individual *after* the trip in my previous example. Contrary to his *ex ante* choice, after performing a safe trip, the driver would prefer to save the toll money and travel upon the unsafe highway. Discovering his fate, "the luck of the draw," the individual changes his mind and disregards the optimal legal system, i.e., the driver no longer cares to fund the cost for the better highway for everyone. *Ex post*, he cares only about his self-interest of saving the toll money.

> Crucially, ex ante and ex post preferences are mutually exclusive concerning the fundamental purpose of the legal

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[29] John Rawls, *Justice as Fairness: A Restatement* 87-88 (Erin Kelly ed., Harv. U. Press 2001). The goods, as things that political citizens need to be free and equal persons living a complete life, are: "(i) [t]he basic rights and liberties: freedom of thought and liberty of conscience . . . (ii) [f]reedom of movement and free choice of occupation against a background of diverse opportunities . . . (iii) [p]owers and prerogatives of offices and positions of authority and responsibility . . . (iv) income and wealth . . . [and] (v) [t]he social bases of self-respect." *Id.* at 58-59.

[30] Rosenberg, *Mandatory-Litigation*, *supra* n. 21, at 48; *see also* Rosenberg, *Decoupling Deterrence*, *supra* n. 21, at 1879; Rosenberg, *Individual Justice*, *supra* n. 21, at 252-57.

> system in managing accident risk. Ex ante, before knowing the relevant accident and legal fates, individuals would rationally prefer a legal system that promotes the collective interest in minimizing the sum of accident costs, particularly through optimal precautions, insurance, and redistribution. In contrast, ex post, after knowing the "luck of the draw," individuals rationally prefer a legal system that promotes their separate interests regardless of the consequences for minimizing total accident costs . . . .[31]

Accordingly, the mutually exclusive preference is made between a world of "uncertainty" *ex ante* (before the fact) and another made under a world of "certainty" *ex post* (after the fact). The individual's response is absolutely contrary in each one of these situations. Before knowing the future, the fate, or the accident, he chooses a secure highway in order to prevent any accident; after the safer trip, he would have chosen to save the toll money and to drive along the less safe highway. The individual, *ex ante*, prefers a legal system that accomplishes the collective goal of minimizing the sum of accidents; however, *ex post*, he chooses one that enhances his private interests despite the goal of ideal reduction of the costs of accidents.

Three elements should constitute the ideal legal system to optimally reduce the sum of cost of accidents: optimal precautions to avoid unreasonable risks, optimal insurance for the residual reasonable risks, and distributive mechanism to fund the preceding functions. The reasoning developed demonstrates that the optimal social welfare is achieved with an aggregative solution, conferring the best well-being to each and every individual, no matter if they become a plaintiff or defendant in a future lawsuit.

C. The Elements for the Optimal Legal System to Reduce the Costs of Accidents

The first function of civil liability law is to employ precautions to avoid risks. Employing a legal system that minimizes the cost of accidents, and therefore distributes more welfare, increases everyone's well-being in any state of the world, in both *ex ante* and *ex post* perspectives.[32] It is common sense that it is better to prevent than to redress, and, in general, the deterrence function of the law precedes its compensation function.[33] The

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[31] Fried & Rosenberg, *Making Tort Law*, *supra* n. 21, at 14.

[32] *Id.* at 17.

[33] However, it is important to note David Rosenberg's alert that, even though deterrence is assumed to be a "public good," the private claim market (the analysis is not considering possible defenses market) fails to maximize that good, because plaintiffs' attorneys gain nothing of its production as they are interested in their investment return from the expected judgment of a claim and not the claim deterrent effect. Rosenberg, *The Causal Connection*, *supra* n. 8, at 901. Regarding public vision of class action,

deterrent function or effect of a legal provision is always prescribed in the primary norm of the rule, establishing the conduct that is either permitted, prohibited, or mandated, according to the three deontic modals of the law. In some sense the deterrent effect is compared to a behavior modification feature. Although, the primary norm of the rule stipulates the conduct, while the secondary norm of the same rule carries the sanction for the violation of the former.[34] Hence, the deterrence purpose of the law should provide the force for the performance of its provisions by threatening firms with liability for full recovery of costs of the harms provoked by them.

The optimal deterrence prevents risks that are more costly to incur than to avoid, the so-called unreasonable risks. To achieve social welfare and maximize the individuals' well-being, the investment of social resources in preventing risks must go further—to the point that any additional unit of expense in precautionary measures exceeds the benefit of additional risk avoided.[35]

On the one hand, above the ideal level, investments to prevent risks of accidents will produce an over-deterrence effect. The excessive cost for precautions will be internalized by firms as over-priced goods and services that unbalance the market. Ordinarily, there is a constraint of the demand due to the elevation of the price of the goods and services that no longer correspond to their expected utility. On the other hand, failure to threaten firms with liability for the complete cost of their accidents might create an under-deterrence effect. Firms will invest less than the optimal pattern to avoid risk, which would probably increase the number of accidents and make everyone worse off. Under optimal deterrence, there is a social gain as well as an individual gain. The social gain is a result of the individual's expected utility as one internalizes the total costs and benefits of the optimal precaution model that prevents unreasonable risk.[36]

The second function of civil liability law is to compensate the harm inflicted to victims. In the optimal legal system that seeks to confer

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see also Abram Chayes, *The Role of the Judge in Public Litigation*, 89 Harv. L. Rev. 1282 (1976) (comparing the separate litigation system ("case-by-case litigation"), the collective litigation system ("class action"), and the interference with the traditional adversarial model of litigation); Owen Fiss, *The Political Theory of the Class Action*, 53 Wash. & Lee L. Rev. 21 (1996) (discussing the private and public function of the class actions and the question of adequate representation in relation to the Supreme Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974)); Rosenberg, *Class Actions*, *supra* n. 8, at 561, passim (discussing the conflict between the ideal of individual justice and collective process of class actions, and especially, arguing in favor of mandatory class action for mass torts).

[34] Besides behavior modification, access to justice and judicial economy are the three stated goals of Canadian class actions according to Craig Jones. Craig Jones, *Theory of Class Actions* 4 (Irwin Law, Inc. 2003).

[35] Rosenberg, *Decoupling Deterrence*, *supra* n. 21, at 1880; Rosenberg, *Mandatory-Litigation*, *supra* n. 21, at 843-44. Craig Jones asserts with clarity: "[A] situation [optimal tort deterrence] in which very few are negligent because it will cost more to compensate the victim than to take appropriate precautions." Jones, *supra* n. 34, at 32.

[36] Rosenberg, *Decoupling Deterrence*, *supra* n. 21, at 1881-82; Rosenberg, *Mandatory-Litigation, supra* n. 21, at 844.

maximum well-being to rational individuals by reduction of sum of the cost of accidents, the best way to compensate victims is via optimal insurance for injures that arise out of reasonable risks.[37] The reasonable risk is the one that costs society more to avoid than to compensate; hence, it is not worth investing any extra social resources in precaution as there will be no gain of the additional risk avoidance.

What would consist of the optimal insurance for compensating the reasonable risk? The answer is full coverage for the optimal insurance for the risk-averse individuals once it covers all the residual risk that is not prevented by deterrence. Moreover, the optimal insurance reflects the ideal coverage where an additional investment in the premium yields negative marginal benefits, i.e., does not generate any return from the insurance policy.

> Essentially, full insurance coverage equalizes the individual's marginal utility from wealth between the accident and no-accident states and thus increases expected utility. The individual effectively employs insurance to transfer wealth from the no-accident state to the accident state up to the point at which an additional dollar of wealth yields the same marginal utility in either state.[38]

The characteristic of a risk-averse person is that the marginal utility of his money diminishes as his wealth increases. The more money he has, the less utility he obtains from getting more money. In other words, the reduction of utility is greater if one loses a certain amount of money compared with the increased utility for gaining the same amount of money.[39] The high number of insurance policy acquisitions evidences that most people are risk-averse in most of life's risk situations.[40] The preference for optimal deterrence instead of compensation is more than a common sense idea, as noted above. The individual *ex ante* would prefer a legal system that employs scarce resources in attaining optimal deterrence rather than insuring unreasonable risk.[41]

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[37] Steven Shavell states that "[a]n insurance premium is said to be actuarially fair if it equals the expected cost of coverage to the insurer. For instance, if a policy pays coverage of $1,000 with probability 10 percent, the fair premium is $100, for the expected cost of coverage is $100." Shavell, *Foundations of Economic Analysis*, *supra* n. 24, at 258 n. 2.

[38] Rosenberg, *Mandatory-Litigation*, *supra* n. 24, at 845.

[39] Posner, *Economic Analysis*, *supra* n. 24, at 10-11; Shavell, *Foundations of Economic Analysis*, *supra* n. 24, at 258.

[40] According to Professor Shavell's references, approximately 86% of the population possesses health insurance and approximately 85% of husband-wife families with children possess life insurance on at least one family member. In 2000, approximately 88% of the adult population was covered by the Social Security system and over 50% of the workforce possessed some kind of private disability coverage. Shavell, *Foundations of Economic Analysis*, *supra* n. 24, at 266-67 n. 11.

[41] Rosenberg, *Adding a Second Opt-Out*, *supra* n. 21, at 23; Rosenberg, *Mandatory-Litigation*, *supra* n. 21, at 846.

Furthermore, even a full *restitution in integrum* for exclusive money damages compensation may not bring the victim back to his original position before the injury. This happens because there are other elements that are not completely recouped with money, such as time dispensed with recovery measures, distress due to the violation of the right, etc.[42] The current tort system, combining deterrence and compensation functions for damages, may lead to a misinterpretation in the sense that optimal insurance of unreasonable risk should prevail over its optimal deterrence. The solution to this problem, as proposed by Professor Rosenberg, is to decouple the deterrence and compensation effects of civil tort liability.[43]

In class action litigation, this objective is reached by creating an insurance fund judgment that separates deterrence and compensation in two different stages. The judgment determines the *an debeatur* by establishing liability and fixing a common amount for compensation. The court then stipulates the *quantum debeatur* to be paid individually according to the severity of harm. In the first stage, the deterrence function of the law, the court imposes liability and stipulates the aggregate damages.[44] In the second stage, compensation operates in an optimal insurance function by averaging specific-claim variables unrelated to the severity of loss. Hence, the redistribution of wealth due to the claims incorporates the severity of each loss, averaging other variables not related to the severity of the loss, in accordance with the evidence produced in this phase of the action.[45] In a nutshell, another solution with the same theoretic basis of separating the deterrence and insurance effects of the law would require modification of the actual statutory and contractual governing laws. Deregulating insurance subrogation would allow governmental and commercial first-party insurers to acquire complete ownership and control of claims, including non-pecuniary, punitive, and other forms of damages. The insured, on the other hand, would get a premium discount according to an average amount of the prospective recovery of damage-claims.[46]

The third function of an optimal civil liability law is a distributive

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[42] *See generally* Nelson Rodrigues Netto, *Tutela Jurisdicional Específica: Mandamental e Executiva 'Lato Sensu'* (Forense 2002).

[43] Rosenberg, *Decoupling Deterrence*, *supra* n. 21, at 1883-1900; David Rosenberg, *Deregulating Insurance Subrogation: Towards an Ex Ante Market in Tort Claims* (Harv. L. Sch. Public Law Research Paper No. 43, 2002) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=350940) [hereinafter Rosenberg, *Deregulating Insurance Subrogation*].

[44] Rosenberg, *Decoupling Deterrence*, *supra* n. 21, at 1883-85.

[45] *Id.* at 1885-88. For a discussion about averaging method and application in collective litigation, *see* Bruce Hay & David Rosenberg, *The Individual Justice of Averaging*, http://law.harvard.edu/programs/olin_center/ papers/pdf/285.pdf (last updated Sept. 26, 2007).

[46] Rosenberg, *Deregulating Insurance Subrogation*, *supra* n. 43. *See also* Kenneth S. Reinker & David Rosenberg, *Improving Medical Malpractice Liability By Allowing Insurers to Take Charge*, (unpublished discussion paper, Harv. U., Aug. 2007) (available at http://www.law.harvard.edu/programs/olin_center/ papers/pdf/Rosenberg_et%20al_556.pdf) (discussing the proposal in the context of medical malpractice liability).

mechanism to fund the two preceding functions. Considering the wealth differences between people in the real world and the huge social resources that are consumed in an ideal legal system to perform optimal deterrence and insurance, which is funded by the beneficiaries through market prices paid for products, services, labor, and taxes for government, the *ex ante* rational individual prefers a system that mandates funding these provisions for redistribution to the less fortunate.[47]

> Because such redistribution may depress incentives for productive enterprise and thus the availability of the goods at any level, the individual ex ante rationally prefers that the system optimize the trade-off between wealth variation to motivate work on the one hand and on the other wealth invariance to fund progressively the availability of basic goods.[48]

The mutually exclusive preference between the *ex ante* and the *ex post* perspectives, previously discussed, attempts to undermine the optimal progressive funding for the legal system. The "lucky" individual tends to exit or underfund the arrangement as he does not have, *ex post*, incentives to support it. However, these difficulties can be obviated, as explained by Professors Fried and Rosenberg, because the rational individual prefers some level of the so-called progressive funding of optimal deterrence and insurance consistently with any level of wealth redistribution that optimizes the trade-off between redistribution to the less well-off and productive enterprise.[49]

Another feature has to be pointed out. The individual's preferences are mutually exclusive in the *ex ante* and *ex post* universes. Before being aware of his luck, he prefers an optimal legal system to minimize the costs of accidents; but after the concretization of fate, he chooses to maximize his

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[47] Fried & Rosenberg, *Making Tort Law*, *supra* n. 21, at 22-23.

[48] *Id.* at 23.

[49] *Id.* Charles Fried and David Rosenberg depict the individual's diminishing marginal utility from money by equating the square root of a given amount of wealth with the welfare the individual would derive from that wealth. Then, they illustrate the choice for the progressive funding with an example of a firm valued at $100,000 and a neighbor that owns $50,000 of wealth. In addition, in order to provide optimal precautions and insurance against pollution produced by the firm costs $15,000, "being $10,000 the value for optimal precautions and $5,000, the actuarially fair premium" (for the concept of optimum actuarial insurance premium, *see* Jones, *supra* n. 34). *Id.* Two regimes follow: one, the neighbor assumes all the costs as the system does not progressively fund the referred expenses. The total net expected welfare is 251.66 resulting from 50% chance of owning the firm with welfare of 316.23 (the square root of $100,000) plus 50% of being the neighbor with welfare of 187.08 (the square root of $35,000 (the original wealth of $50,000 minus funding of $15,000 for deterrence and insurance)). Otherwise, in a progressive funding system for wealth redistribution, the firm assumes one third of the costs, obtaining a wealth of 308.22 (square root of $95,000, corresponding the original wealth of $100,000 minus $5,000 for funding the system of precaution and insurance). Add 50% of 308.22 to 50% of the neighbors' wealth of 200 (corresponding to the square root of $40,000 which is the result of the original wealth of $50,000 minus the two thirds of the costs of optimal system that is $10,000). The final result makes everyone better off, whether the firm or the neighbor, with a wealth of 254.11. Fried & Rosenberg, *Making Tort Law*, *supra* n. 21, at 24.

interests, disregarding the consequences of reducing total accident costs. Consequently, the individual would choose, *ex ante*, a legal system that impedes one from opting-out or acting in conflict to it *ex post*. Charles Fried and David Rosenberg named this mechanism "mast tying," because it prohibits individuals, *ex post*, from opting out of the system or acting in conflict with its rules in a manner that makes it inefficient to provide optimal deterrence, compensation, and redistribution that the individuals have chosen *ex ante*.[50]

Choices of firms to refrain from investing optimally in precautions, because the accidents have already occurred; or choices of individuals not to compensate those who suffered accidents, because they were lucky and escaped; or even, choices of the wealthy not to fund redistribution by granting benefits to the less wealthy, would destroy the optimal legal system of precaution and insurance, which is founded on an absence of knowledge of the world to come, the world behind the veil of ignorance.

> The individual would choose a legal system that minimized the sum of accident costs through progressively funded optimal precautions and optimal insurance and precluded individuals ex post from opting out of that mandate or otherwise acting in conflict with it. Individuals wish to "tie themselves to the mast" to ensure that the socially optimal and individually beneficial preferences they chose ex ante will be carried out in the ex post world.[51]

Therefore, the rational individual would choose an optimal legal system that attains ideal social welfare and individuals' well-being, making everyone better off before and after the fact of the accident, with optimal precautions to avoid unreasonable risks, optimal insurance to compensate reasonable risks, progressive funding with optimal redistribution of wealth, and mandatory aggregation of claims and defenses.

III. EXPLANATORY VIEW OF THE DEFENDANT CLASS ACTION

A. The Antecedents of the Defendant Class Action

1. The English Courts of Chancery

In its roots, representative suits were formed by a group or class of defendants in a lawsuit. The legal action was brought by a plaintiff against some certain respondents acting on behalf of the whole group, due to the

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[50] Fried & Rosenberg, *Making Tort Law*, *supra* n. 21, at 24-25.

[51] *Id.* *See also* Hay & Rosenberg, *supra* n. 21, at 1383-89; Rosenberg, *Mass Tort Class Action*, *supra* n. 21, at 402-12, 414-19; Rosenberg, *Individual Justice*, *supra* n. 21, at 224-52; Rosenberg, *Of End Games*, *supra* n. 21, at 698-707; Rosenberg, *Class Actions*, *supra* n. 8, passim.

common interests that united this designated class of persons and because their large number would make impracticable to order them all to appear before the court. The work of the chapter solicitor of Canterbury, C. R. Bunce, in the late-eighteenth and early-nineteenth centuries, to organize the dean and chapter's muniments by separating the documents that concern the activities of the ecclesiastical courts of Canterbury, made it possible to acknowledge the probable origin and time of the collective litigation, especially the defendant class action.[52]

Master Martin, rector of Barkway c. Parishioners of Nuthampstead, the ancient name for *Martin v. Parishioners of Nuthampstead*, is a dispute accepted to be the oldest group litigation presently known.[53] The case is dated circa 1199 and involved some parishioners as respondents, representing the whole group of parishioners, in a lawsuit brought by the rector of Barkway, concerning his rights to tithes and obventions from the chapel and their correlative duties.[54] The modern class action has its origins in the equity procedures of the English Chancery courts (the bills of peace), where a plaintiff sued several defendants as a class.[55]

In the Medieval era, defendant class actions were as frequent as plaintiffs' actions.[56] Nowadays, it is said that the number of plaintiffs' group litigation supersedes the number of defendant class actions.[57] The

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[52] *Select Cases from the Ecclesiastical Courts of the Province of Canterbury c. 1200-1301*, vol. XCV, 1-119 (Norma Adams & Charles Donahue, eds., Selden Socy. 1981) [hereinafter *Ecclesiastical Courts*].

[53] *Id* at ix. *See also* Stephen Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 Ariz. L. Rev. 687, 688 (1997) [hearinafter Yeazell, *Past and Future*]; Stephen Yeazell, *From Medieval Group Litigation to the Modern Class Action* 38 (Yale U. Press 1987) [hereinafter Yeazell, *Medieval Group Litigation*]. Professor Yeazell makes an interesting sociological review of the parties in *Martin v. Parishioners of Nuthampstead* (if I may say the "opposing powers"), concluding that, in earlier times, the class action was not yet a device used to defend the weak party in the litigation. He illustrates the modern aspect of the class action with the phrase "historic mission of taking care of the smaller guy," which is attributed to Judge and Professor Benjamin Kaplan by Martin Frankel in *Amended Rule 23 from a Judge's Point of View*, 32 Antitrust L.J. 295, 299 (1966). Yeazell, *Past and Future*, *supra* n. 53, at 688-89. For comments and critiques of the referred work, *see* Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. Rev. 213 (1990); Robert Klonoff & Edward Bilich, *Class Actions and Other Multi-Party Litigation, Cases and Materials* 18-24 (West 2000).

[54] *Ecclesiastical Courts*, *supra* n. 52, at 8-10.

[55] This assertion is undisputed. *See Action Under the Codes Against Representative Defendants*, 36 Harv. L. Rev. 89 (1922); Angelo N. Ancheta, Student Author, *Defendant Class Actions and Federal Civil Rights Litigation*, 33 UCLA L. Rev. 283, 286 (1985); Zechariah Chafee, Jr., *Some Problems of Equity* 153-97, 200 (U. of Mich. L. Sch. 1950); *Manual for Complex Litigation, Fourth*, §21, 243 (West 2004) [hereinafter *MCL 4th*]. In a bill of peace, an equity court could resolve a controversy between an individual, the adversary, and several persons (called the multitude), where there were common questions of law or fact, or both, involving each and every one of them, and where there was no basis for a party joinder under the common law.

[56] Professor Chafee states: "The older cases draw no distinction between a class of defendants and a class of plaintiffs." Chafee, *supra* n. 55, at 203.

[57] Ancheta, *supra* n. 55, at 283 n. 2, 284 (stating that civil rights actions constitute the largest percentage of class action suits filed in federal courts, with percentages of 38.6% in 1983 and 37.3% in 1984). However, Ancheta argues in favor of defendant class action for a greater vindication of constitutional statutory civil rights. *Id.; Developments in the Law – Class Actions*, 89 Harv. L. Rev. 1318, 1325 n. 30 (1976) (asserting that by far the largest group of class actions on federal court dockets

general rule was that the bill should contain all proper parties, unless justice would be better served by a representative *modus*, as presented by an earlier commentator: "All persons interested must, in general, be parties to the suit, unless justice will be best administered by entrusting the interest of numerous bodies to the protection of a few, or of remote to near claimants."[58] Three distinct circumstances authorized representative litigation: when from the number of persons a few may act on behalf of the whole;[59] where claimants are remote;[60] and where necessary parties cannot be brought before the court.[61] According to Basil Montagu, the first group embraced, similar to the case of *Martin v. Parishioners of Nuthampstead*, suits concerning commoners and rights to tithes: "A suit may be instituted by a lord of the manor against some of the tenants, or by some of the tenants against the lord on a question of common."[62] Also belonging to the same category are suits involving terre-tenants,[63] committees of large bodies,[64] ship companies,[65] creditors, legatees and trustees,[66] and large bodies in nature of partnerships.

Adair v. New River Co., a case involving a large body in the nature of a partnership and designating the New River Company and more than one hundred other persons as respondents, established:

> The general rule, requiring all persons interested to be parties, dispensed with, where it is impracticable, or, extremely difficult. In such a case, to obtain a decree, to establish the right of suit to a mill, for instance, the Court only requires parties sufficient to secure a fair contest; and, the right being established in that way, consequential relief may be had against the rest in another suit.[67]

Similarly, in *Cockburn v. Thompson*, a case concerning a bilateral aggregative procedure, the bill was filed by several persons on behalf of

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are civil rights cases filed by plaintiffs, with approximately 50% of the total cases according to statistics for the years 1973-1976). The percentage seems to remain the same, as shown by the chart published by the Administrative Office of the U.S. Courts available at http://www.uscourts.gov/judicialfactsfigures/2006/Table404.pdf.

[58] Basil Montagu, *A Digest of Pleading in Equity* vol. I, 47 (J. & T. Clarke 1824).

[59] *Id.* at 57-63.

[60] *Id.* at 63-65.

[61] *Id.* at 65-66.

[62] Montagu, *supra* n. 58, at vol. II, 164 n. EN (citing *York v. Pilkington*, (1737) 1 Atk. 283).

[63] *See A-G v. Heelis*, (1824) 57 Eng. Rep. 270.

[64] "A suit may be maintained against the committee who contract on behalf of a society." Montagu, *supra* n. 58, at vol. I, 60 (citing *Cousins v Smith*, (1807) 13 Ves. 544) (authority citation in Montagu, *supra* n. 58, at vol. II, 170 n. EX).

[65] In *Good v. Blewitt*, the Master of the Rolls, Sir W. Grant, ruled: "Bill by one of the Officers and crew of a Privateer against the owners for an account of captures, according to the articles. Leave given to amend by stating, that the Bill was on behalf of the Plaintiff and all others; and upon that amendment the account was decreed." 13 (1807) 33 Eng. Rep. 343, 397.

[66] *See Leigh v. Thomas*, (1751) 28 Eng. Rep. 201.

[67] (1805) 32 Eng. Rep. 1153.

themselves and all others, including the proprietors of a philanthropic institution, against Thompson and other bankers, Lord Chancellor [Eldon] ruled:

> The strict rule, that all persons, materially interested, must be parties, dispensed with, where it is impracticable, or very inconvenient: as in the case of a very numerous association in a joint concern; in effect a partnership. Defect of parties the subject of Demurrer, or Plea; as it appears, or not, on the face of the Bill.[68]

The second set of cases, where claimants are remote, are related to contingent estates and entails,[69] and lessees and mortgagees.[70] The third and last group of the classification concerns cases in which necessary parties cannot be brought before the court, especially when one is out of the jurisdiction of the court.[71]

Nonetheless, other commentators emphasize some different topics to classify the old English collective procedures without much difference in substance. For instance, James W. Moore affirms:

> At an early date the class action was recognized as proper in three situations: (1) where the number of interested persons was so great that joinder was impracticable; (2) if joinder were effected, continued abatement by death or otherwise would prevent a decree; and (3) where effective joinder of certain interested persons was impossible because they were not subject to the jurisdiction of the court.[72]

As well, Zechariah Chafee, Jr. points out: a) representation by rule of law; b) where there is a large and indefinite number of persons; and c) when the claim is by or against definite persons who are very numerous, this case, according to the author, is considered the closest to the modern class suit.[73] Furthermore, Joseph Story proposes:

> The most usual cases arranging themselves under this head of exceptions are, (1). where the question is one of a common or general interest, and one or more sue, or defend for the benefit of the whole; (2). where the parties form a

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[68] (1809) 33 Eng. Rep. 1005.

[69] "When real property is subject to an entail, or contingent limitation or executory devise, it is generally sufficient to make the first person *in esse*, in whom an estate of inheritance is vested, a party, with those claiming prior interests." Montagu, *supra* n. 58, at vol. I, 63-64.

[70] "Persons who claim under the possession of a party whose title to real property is disputed, are not necessary parties, unless their rights are to be prejudiced by the suit." *Id.* at 64.

[71] *See A-G v. Baliol College*, Dec. 11, 1744 (Ch.), *apud.* Montagu, *supra* n. 58, at vol. I, 65 n. (e).

[72] James W. Moore, *Moore's Federal Practice* vol. 5, § 23, App. 100, 20 (Daniel R. Coquillette et al. eds., 3d ed., Matthew Bender 2007).

[73] Chafee, *supra* n. 55, at 209-13.

> voluntary association for public or private purposes, and those, who sue, or defend, may fairly be presumed to represent the rights and interests of the whole; (3). where the parties are very numerous, and although they have, or may have separate distinct interests; yet it is impracticable to bring them all before the Court.[74]

2. The American Law and Jurisprudence

a) The Federal Equity Rule 48 (1842)

Following the English bills of peace, which permit a representative suit in exception to the rule of compulsory joinder of all interested parties to an action, the United States adopted a similar legal provision. At the time, it was ordinary to have representative groups of litigants, either on the defendants' or the plaintiffs' side of the procedural relationship. Hence, one single rule, the Federal Equity Rule 48 of 1842 ("Equity Rule 48"), prescribes plaintiffs' and defendants' class actions.[75] Equity Rule 48 depicted the collective litigation in one paragraph with two sentences. The first one provided, in a very simple and straightforward manner, that whenever the parties on either side (therefore, expressly adopting representative lawsuits either of plaintiffs or defendants), were so numerous that all could not be brought before the court without manifesting inconvenience or oppressive delay in the suit, the court discretionarily could order the suit to proceed with sufficient parties representing all the adverse interests of the plaintiffs and the defendants. However, the second sentence was in conflict with an aggregative procedure, because it read: "But, in such cases, the decree shall be without prejudice to rights and claims of all the absent parties."[76] The Rule does not make sense, as it authorized a representative party to pursue claims or present defenses on behalf of a whole class of persons with similar interests, while at the same time released them from the binding effect of the judgment.

The result of this incongruity would be that only the representative parties of the plaintiffs or of the defendants, or even both of them, would be bound by the ruling. Meanwhile, the other members of the classes would be able to proceed, indefinitely, arguing and defending the common adverse interests. In each new lawsuit, the enforcement of the decision would only

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[74] Joseph Story, *Commentaries on Equity Pleadings* § 97, 123-24 (Little, Brown, and Co. 1892).

[75] Rules of Practice for the Courts of Equity, 17 R. 48 (E. Morgan and Co. 1842) (superseded by Equity R. 38, 1912) ("Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the Court, in its discretion, may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties.")

[76] *Id.*

be made upon the representative parties, and, once again, would permit a new class action to be filed with different class representatives. Nevertheless, the literal interpretation of the provision was not adopted by the Supreme Court. In one of the first class action cases in American jurisprudence, *Smith v. Swormstedt*, Mr. Justice Nelson, delivering the opinion of the Court, ruled:

> An object was taken, on the argument, to the bill for want of proper parties to maintain the suit. We think the objection not well founded. . . . For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and *the decree binds all of them the same as if all were before the court.*[77]

Therefore, the class action principle in which some represent a group of persons with the same common interests and the judgment binding the whole was preserved by the Supreme Court's interpretation of Equity Rule 48.

b) The Federal Equity Rule 38 (1912)

The rule of representative actions with classes of defendants or plaintiffs was duly incorporated into the statutes and, consequently, provided in the new Federal Equity Rule 38 ("Equity Rule 38"). The successor of the equity rule of 1842, Equity Rule 38 of 1912, revoked the clause concerning the nonbinding effect of the decision and established two requirements for the collective procedure: a common or general question *and* the impracticability to bring before court all members of the class due to its large number. Equity Rule 38 reads: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

Moreover, the Equity Rule 38 was integrated into the procedural code of many states. Some of them used the same language requiring both requisites to the class action.[78] Others used the disjunctive *or* and admitted the class suit in equity if the class was numerous *or* if there was a common interest.[79] Even in the latter cases, some courts interpreted the rules as

[77] 57 U.S. 288, 302-03 (1854) (emphasis added).

[78] For example, Colorado, Florida, Delaware, Connecticut have adopted this model. *Cf.* Carl C. Wheaton, *Representative Suits Involving Numerous Litigants*, 19 Cornell L.Q. 399, 400 (1934). *See also* William W. Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits*, 30 Mich. L. Rev. 878 (1932) (discussing the requisites for representative suits and its binding effects); Chester B. McLaughlin, *The Mysteries of the Representative Suit*, 26 Geo. L.J. 878 (1938); Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil* vol. 7A, § 1751, 14-15 (3d ed., West 2005).

[79] For example: California, New York, Ohio, Washington. *Cf.* Wheaton, *supra* n. 78.

requiring the fulfillment of both requisites in order to allow the collective suit to proceed.[80]

Under the rule, the Supreme Court reaffirmed the doctrine established in *Smith v. Swormstedt*, creating the leading case for the twentieth century concerning the binding effect upon the absent parties in a class suit. Mr. Justice Day was emphatic when delivering the opinion of the Court in *Supreme Tribe of Ben-Hur v. Cauble*, affirming that

> [i]f the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree when rendered must bind all of the class properly represented. The parties and the subject-matter are within the court's jurisdiction. It is impossible to name all of the class as parties, where, as here, its membership is too numerous to bring into court. The subject-matter included the control and disposition of the funds of a beneficial organization and was properly cognizable in a court of equity. The parties bringing the suit truly represented the interested class. If the decree is to be effective and conflicting judgments are to be avoided all of the class must be concluded by the decree.[81]

In previous cases, the Supreme Court had already given binding effect to all members of a life insurance policy or of a fraternal benefit scheme represented in a collective suit.[82] Those cases are considered the precedents for the "limited fund" class actions, as cited in *In re Joint Eastern & Southern District Asbestos Litigation*, 129 B.R. 710 (1991).[83] Consideration concerning adequate representation to produce *res judicata* to all members of a class is still the most intricate aspect of collectivized litigation, and it

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[80] *See* Wright, Miller & Kane, *supra* n. 78, at 15.

[81] 255 U.S. 356, 367 (1921).

[82] *Hartford Life Ins. Co. v. Barber*, 245 U.S. 146 (1917); *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662 (1915); *Sup. Council of the Royal Arcanum v. Green*, 237 U.S. 531 (1915).

[83]

> In 1912, Rule 48 of the Federal Equity Rules was rewritten as Rule 38. The new rule allowed representative suits where the parties were too numerous for joinder. In contrast with the prior rule, absent parties could be bound by subsequent judgments pursuant to this provision. One of the best examples of a limited fund case from this time period is *Hartford Life Ins. Co. v. Ibs, 237 U.S. 632, 59 L. Ed. 1165, 35 S. Ct. 692 (1915)*. The case involved an insurer's contingency fund created through contributions from policyholders. The Supreme Court found that the policy was properly treated as a unit and that the adjudication of rights to it had to be determined in a single suit in which all policyholders were joined. . . . See also *Sovereign Camp of the Woodmen of the World v. Bolin, 305 U.S. 66, 78-79, 83 L. Ed. 45, 59 S. Ct. 35 (1938)* (group challenge to reorganization of fraternal benefit association necessitated compulsory joinder).
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> *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 804 (1991). *See also* Alba Conte & Herbert Newberg, *Newberg on Class Action* vol. 1, § 1:9, 31-32 (West 2002).

seems not yet totally settled by the Supreme Court.[84]

c) The Federal Rules of Civil Procedure (1938) – Rule 23

On September 16, 1938, the Federal Rules of Civil Procedure became effective,[85] producing a major alteration of the law, ceasing the equitable basis for the class actions as the federal statute merged the procedures in Law and Equity, and establishing just one form of civil of action in Rule 2.[86] The Advisory Committee Notes of 1937 to original Rule 23 stated that the new rule was "a substantial restatement of Equity Rule 38 (Representatives of Class) as that rule has been construed. It applies to all actions, whether formerly denominated legal or equitable."[87] In accordance with legal tradition, Rule 23 established that if the persons constituting a class (of defendants or plaintiffs or both) were so numerous as to make it impracticable to bring them all before court, one or more could represent the whole class. Regarding the representation, the rule accentuated that conducting parties should fairly insure the adequate representation of the absent parties.[88]

In addition, Rule 23 stipulated a classification of the collective suits, considering the character of the right sought to be enforced for or against the class. Hence, three different types of class actions existed in clauses (1), (2) and (3) of Rule 23(a), and became known, respectively, as "true," "hybrid," and "spurious"—where the rights were several, and there is a common question of law or fact affecting the several rights and a common relief is sought. The denomination of "true," "hybrid," and "spurious" types of class actions is attributed to Professor Moore. Although it is lengthy, I kindly ask to be excused to reproduce his lesson explaining each and every one of

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[84] *See* Chafee, *supra* n. 55, at 230; Wright, Miller & Kane, *supra* n. 78, at § 1751, 17.

[85] *Cf.* Fed. R. Civ. P. 6.

[86] Fed. R. Civ. P. 2 states: "There shall be one form of action to be known as 'civil action.'"

[87] Fed. R. Civ. P. 23 (Advisory Committee Notes 1937). Of course it was already part of the History of Law the rigid proceedings of the old common law writs, similar to the five *legis actiones* of the ancient Roman Law, where a de facto situation should strictly reproduce a writ, otherwise the action could not be prosecuted.

[88] Fed. R. Civ. P. 23 (amended 1966) states:

> (a) REPRESENTATION. 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, when the character of the right sought to be enforced for or against the class is
> (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

Id.

them:

> Under original Rule 23(a) there were three types of class actions, all of which involved a class of persons which was so numerous as to make it impracticable to bring all its members before the court, so that a suit on behalf of or against the class could be brought by or against one or more members of the class who would insure adequate representation of the whole class. The distinction between the types of class suits under original Rule 23(a) depended upon the jural relationship among the class members with regard to the right sued upon. Thus subdivision (a)(1) of original Rule 23 dealt with the *true* class suit which involved a class in which the right sought to be enforced by or against the class was "joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it." This class suit involved principles of compulsory joinder, since had it not been for the numerosity of the class members all should have been before the court. A judgment in a true class suit, whether favorable or unfavorable to the class, was binding under res judicata principles upon all the members of the class, whether or not they were before the court. It was the nondivisible nature of the right sued on which determined both the membership of the class and the res judicata effect of the final determination of the right.
>
> Subdivision (a)(2) of original Rule 23 dealt with the *hybrid* class suit, which involved situations in which the rights sought to be enforced by or against the class were several, and the object of the action was the adjudication of claims affecting specific property. A judgment under (a)(2) was binding under *res judicata* principles upon all the members of the class, but only with regard to claims involving the specific property which it was the object of the action to settle.
>
> Subdivision (a)(3) of original Rule 23 dealt with the *spurious* class action, where the character of the right sought to be enforced for or against the class was several, and there was a common question of law or fact affecting the several rights and a common relief was sought. The

> spurious class action was a permissive joinder device. Once a spurious class action was brought, with a class of sufficient numerosity, by representatives of the class who could adequately represent the interests of the class, other members of the class were free to come forward and join the action. If they did not do so, they were not bound, under principles of *res judicata*, by the outcome of the action, whether favorable or unfavorable to the class. The spurious class action thus provided a means for the adjudication in one lawsuit of a number of separate claims involving common questions of law or fact where a common relief was sought.[89]

At the outset, the rule was well regarded as an endeavor to improve the use of class actions,[90] but the practice evidenced otherwise, with courts facing insurmountable difficulties to distinguish the categories of rights to be enforced with the adjectives employed of "joint," "several," and "common." Besides, it was very difficult to conform the cases into the format of the types of the classes prescribed in Rule 23.[91] Early

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[89] Moore, *supra*, n. 72, at 24-25 (emphasis added). For further explanation of Professor Moore's doctrine, *see* Marcus Cohn & James Moore, *Federal Class Actions*, 32 Ill. L. Rev. 307, 314-20 (1937); Marcus Cohn & James Moore, *Federal Class Actions - Jurisdiction and Effect of Judgment*, 32 Ill. L. Rev. 555 (1937); James W. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Geo. L.J. 551, 571-76 (1937). *See also* Hiram L. Lesar, *Class Suits and the Federal Rules*, 22 Minn. L. Rev. 34, 40-56 (1938).

[90] "Rule 23 as to class actions is simple and intelligible, which is more than can be said of any rule that I know of heretofore promulgated either by statute or court rule." Edson R. Sunderland, *The New Federal Rules*, 45 W. Va. L.Q. & B. 5, 16 (1938). *See also* William VanDercreek, *The "Is" and "Ought" of Class Action under Federal Rule 23*, 48 Iowa L. Rev. 273 (1963).

[91] Extensive critique had been made by the Advisory Committee of 1966 to the revision of Rule 23:

> Difficulties with the original rule. The categories of class actions in the original rule were defined in terms of the abstract nature of the rights involved: the so-called "true" category was defined as involving "joint, common, or secondary right"; the "hybrid" category, as involving "several" rights related to "specific property"; the "spurious" category, as involving "several" rights affected by a common question and related to common relief. It was thought that the definitions accurately described the situations amenable to the class-suit device, and also would indicate the proper extent of the judgment in each category, which would in turn help to determine the res judicata effect of the judgment if questioned in a later action. Thus the judgments in "true" and "hybrid" class actions would extend to the class (although in somewhat different ways); the judgment in a "spurious" class action would extend only to the parties including intervenors. In practice the terms "joint", "common" etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain. The courts had considerable difficulty with these terms. Nor did the rule provide an adequate guide to the proper extent of the judgments in class actions. First, we find instances of the courts classifying actions as "true" or intimating that the judgments would be decisive for the class where these results seemed appropriate but were reached by dint of depriving the word "several" of coherent meaning. Second, we find cases classified by the courts as "spurious" in which, on a realistic view, it would seem fitting for the judgments to extend to the class. The "spurious" action envisaged by original Rule 23 was in any event an anomaly because, although denominated a "class" action and pleaded as such, it was supposed not to adjudicate the rights or

commentators of the federal statute affirmed that "Rule 23 then is not a rule at all; at most it is a restatement of law somewhat comparable to the volumes of American Law Institute, or better, a caveat therein."[92]

A point to be noted is that the "spurious" class action, as above explained by Professor Moore, adopted an *opting-in* system, i.e., in order to be bound by the decision, whether favorable or unfavorable to the class, the members ought to come forward and join the action.[93] Today, Rule 23 in effect stipulates two mandatory class actions under subdivision (b)(1) and subdivision (b)(2) and one *opting-out* provision under subdivision (b)(3) as established by the subdivision (c)(2).[94]

> liabilities of any person not a party. It was believed to be an advantage of the "spurious" category that it would invite decisions that a member of the "class" could, like a member of the class in a "true" or "hybrid" action, intervene on an ancillary basis without being required to show an independent basis of Federal jurisdiction, and have the benefit of the date of the commencement of the action for purposes of the statute of limitations. These results were attained in some instances but not in others. The results, however, can hardly depend upon the mere appearance of a "spurious" category in the rule; they should turn on more basic considerations. Finally, the original rule did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness, particularly giving notice to members of the class, which may in turn be related in some instances to the extension of the judgment to the class.

Fed. R. Civ. P. 23 (Advisory Committee Notes 1966) (citations omitted).

[92] Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. Chi. L. Rev. 684, 706 (1941). Professor Chafee asserted: "This tribute to the memory of Wesley Hohfeld would be more suitable in a law review article than in an enactment which is to guide the actions of practical men day in and day out." Chafee, *supra* n. 55, at 246. *See also Binding Effects of Class Actions*, 67 Harv. L. Rev. 1059, 1059-67 (1954); Conte & Newberg, *supra* n. 82, at § 1:10, 33; *Developments in the Law – Multiparty Litigation in the Federal Courts*, 71 Harv. L. Rev. 877, 928-43 (1958); *Federal Class Actions: A Suggested Revision of Rule 23*, 46 Colum. L. Rev. 802, 818-36 (1946); Irving A. Gordon, *The Common Question Class Suit under the Federal Rules and in Illinois*, 42 Ill. L. Rev. 518, 518-33 (1947); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 380-86 (1967); Arthur J. Keeffe, Stanley M. Levy & Richard P. Donovan, *Lee Defeats Ben Hur*, 33 Cornell L.Q. 327 (1948); Richard L. Marcus & Edward F. Sherman, *Complex Litigation* 210 (West 1998); Joseph J. Simeone, *Procedural Problems of Class Suits*, 60 Mich. L. Rev. 905 (1962); Jack B. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 Buff. 433 (1960); Wright, Miller & Kane, *supra* n. 78, at § 1752.

[93] *See also* Chafee, *supra* n. 55, at 259 et seq.; Kaplan, *supra* n. 92, at 396-98. *But see* Kalven & Rosenfield, *supra* n. 92, at 711 (advocating a *secundum eventum litis* effect of the judgment in order to allow the absent plaintiffs to join the suit if the decision was favorable and not to be bound by its decree if it is unfavorable); Wright, Miller & Kane, *supra* n. 78, at § 1752, 30-42.

[94] Fed. R. Civ. P. 23(c)(2).

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the case if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

B. The Characteristics of the Defendant Class Action

1. Introduction

The use of defendant class action is ample and there is no legal restriction for its application in any field of law. However, it is more frequent in lawsuits involving civil rights,[95] disputes challenging constitutionality of state and local law and practices enforced by public officials, and suits against unincorporated associations, e.g., labor unions. Defendants' classes have also been certified in other contexts, such as patent infringement, antitrust, securities, and environmental law.[96]

The multiple goals or principles of collective suits are applicable both to plaintiffs' and defendants' class actions: (i) access to justice; (ii) deterrence or policing behaviors; (iii) equilibrium of the parties in litigation; (iv) judicial and process resources economy; and (v) avoidance of incompatible adjudication.

Without analyzing the defendants' point of view, one commentator has enumerated five advantages plaintiffs can gain with defendant class action: prosecution of low stakes claims (goals of access to justice and parties' equilibrium); tolling of the limitations period against the whole class (goal of resources economy); prevention of collateral estoppel (goal of resources economy); avoidance of incompatible decisions (goal of avoidance of incompatible adjudication); and overcoming problems of personal jurisdiction and venue (goal of access to justice).[97] It is noteworthy that the advantages of the defendant class action are not limited to those of the plaintiffs. The defendant class action is a collective device that is operational and functional and favors, indistinctively, complainants or respondents in representative suits. As a consequence, the efficiency of law enforcement, by means of collective litigation, might diminish or cease, where there is the possibility for class members (either plaintiffs or defendants) to exit from the lawsuit. This happens with the opting-out

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Id. See also Martin H. Redish, *Class Action and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Leg. Forum 71, 130-32 (2003) (arguing for a replacement of the opt-out rule with an opting-in mechanism).

[95] *See supra* pt. III (A)(1); *supra* n. 57.

[96] *See* Ancheta, *supra* n. 55, at 283 n. 2, 284; Conte & Newberg, *supra* n. 82, at § 4:51, 352 n. 1, 353 nn. 2-5, 354 nn. 6-9, 355 nn. 10-11; *Defendant Class Actions*, 91 Harv. L. Rev. 630, 632 nn. 11-15 (1978) [hereinafter *Defendant Class Actions – Harvard*]; *Developments in the Law – Class Actions*, *supra* n. 57, at 1325, 1325 n. 30; Debra J. Gross, *Mandatory Notice and Defendant Class Actions: Resolving the Paradox of Identity Between Plaintiffs and Defendants*, 40 Emory L.J. 611, 616 n. 18 (1991); Frederick B. Kruger & John M. Rogers, Student Authors, *Personal Jurisdiction and Rule 23 Defendant Class Actions*, 53 Ind. L.J. 841, 844 (1978); A. Peter Parsons & Kenneth W. Starr, *Environmental Litigation and Defendant Class Actions: The Unrealized Viability of Rule 23*, 4 Ecol. L.Q. 881, 882 n. 6 (1975); Spencer Williams, Student Author, *Some Defendants Have Class: Reflections on the Gap Securities Litigation*, 89 F.R.D. 287 (1981); Barry M. Wolfson, *Defendant Class Actions*, 38 Ohio St. L.J. 459, 459 n. 4 (1977).

[97] Wolfson, *supra* n. 96, at 459-60.

mechanism provided for classes certified under Rule 23(b)(3). Although disciplined only in Rule 23, the procedures for either plaintiff or defendant class actions cannot be identical as if one is the mirror-image of the other.[98] There are many specifics that differ from each other's perspective.

Rule 23, in its current version, is much more elaborate than the past statutory rule concerning representative suits in the United States. A variety of details of the class action procedure and its effects are established in Rule 23, in eight subsections (including those related to the requisites, 23(a), and the types, 23(b), of the class actions). Subsection 23(c) disciplines the timing and the elements for the class certification order; the appropriateness of notice and its contents; and the effect of the judgments. Subsection 23(d) is concerned with the orders in conduct of the actions. Subsection 23(e) is related to settlement, voluntary dismissal, and compromise. Subsection 23(f) deals with appeals; subsection 23(g) provides for class counsel;[99] and, finally, subsection 23(h) is about attorney fee awards.[100] The provisions that define the requisites for certification and maintenance of a class action are stated in subsections 23(a) and 23(b). In the following sections, I will concisely scrutinize the referred rules under the standpoint of a defendant class action.

a) Rule 23(a) Prerequisites for Certification of the Class Action

The 1966 Amendment to Rule 23 of the Federal Rules of Civil Procedure completely rewrote the rule in order to overcome major difficulties that the courts and the commentators recognized in the original version of 1938. The Advisory Committee Notes to the revised Rule 23 made a profound critique of the 1938 version of Rule 23,[101] and pointed out that the amended rule is "describe[d] in more practical terms the occasions for maintaining class actions . . . ."[102]

Rule 23(a) establishes four prerequisites to every class action, either plaintiffs' or defendants': numerosity, commonality, typicality, and adequate representation.[103]

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[98] *See* Conte & Newberg, *supra* n. 82, at § 4:46, 336; Gross, *supra* n. 96, at 664.
[99] *See infra* pt. IV(D)(2)(a).
[100] *Infra* pt. IV(D)(2)(b).
[101] *See supra* pt. III(A)(2)(c); *supra* n. 91.
[102] Fed. R. Civ. P. 23 (Advisory Committee Notes 1966), *supra* n. 96.
[103] Fed. R. Civ. P. 23(a).

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Id.

Concerning the first prerequisite, the test stipulated by the statute is the impracticability of joinder of the whole members of the class due to its numerosity. There is no minimum number of people since impracticability of joinder is not impossibility of joinder.[104] The circumstances surrounding the case have to be examined in order to check the fulfillment of the numerosity requirement.[105] Although the number of the putative class is the primary factor to certify a class action in relation to the numerosity requirement, one commentator has pointed out that a court should consider, for the impracticability of joinder, other elements, such as: (i) judicial economy arising from avoiding multiple actions; (ii) the geographic dispersion of the class members; (iii) the financial resources of the class members; (iv) the claimants' ability to institute individual suits (in plaintiff's actions), and (I add) the defendants' ability to individually defend themselves; and (v) requests for prospective and injunctive relief that could affect future class members.[106] The standard is applied with more flexibility to the defendants' class action than to the plaintiffs' to enhance the collective litigation goal of economical use of judicial resources. It is more likely that many individuals' lawsuits may be brought in the case of denial of certification of a defendant class, than would occur with a plaintiff class action. In the latter case, just one or a few plaintiffs shall resort to an individual suit, after the class certification has been denied.[107]

The second prerequisite of Rule 23(a) is commonality of questions of law or fact to the class. Despite the fact that the provision is in the plural ("questions"), its objective is to obtain efficiency by collective adjudication and to protect absentees' interests by solving at least one relevant, nuclear question of law or fact.[108] Courts have not had much difficulty in asserting the commonality requirement,[109] but rather have given it a cursory treatment because it is considered to be superfluous or overlapping with other provisions of Rule 23(a) and (b).[110] Moreover, the Supreme Court, in the case *General Telephone Company of the Southwest v. Falcon*, has stated that

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[104] *See Dale Elecs., Inc. v. R.C.L. Elecs., Inc.*, 53 F.R.D. 531, 534 (D.N.H. 1971) (certifying a class with only thirteen defendant members); *Mgt. TV Sys., Inc. v. Natl. Football League*, 52 F.R.D. 162 (E.D. Pa. 1971) (certifying a class with only twenty-six defendants).

[105] *See e.g. Town of New Castle v. Yonkers Contracting Co., Inc.*, 131 F.R.D. 38, 40 (S.D.N.Y. 1990). *See also* Ancheta, *supra* n. 55, at 298 n. 72; *Defendant Class Actions – Harvard*, *supra* n. 96, 633 n. 20; *Notes: Federal Rules of Civil Procedure 23: A Defendant Class Action with a Public Official as the Named Representative*, 9 Val. U. L. Rev. 357, 365-66 nn. 30-33 (1975) [hereinafter *Named Representative*].

[106] Moore, *supra* n. 72, at § 23.22.

[107] Conte & Newberg, *supra* n. 82, at § 4:57, 370. *See also* Robert E. Holo, *Defendant Class Actions: The Failure of the Rule 23 and a Proposed Solution*, 38 UCLA L. Rev. 223, 229, 229 nn. 24-27 (1991).

[108] *Baby Neal for & by Kanter v. Casey*, 43 F.3d 48, 56 (3rd Cir. 1994); *Appleton Elec. Co. v. Adv.-United Expressways*, 494 F.2d 126 (7th Cir. 1974); *Technograph Printed Circuits, Ltd. v. Methode Elec., Inc.*, 285 F. Supp. 714, 719 (N.D. Ill. 1968). *See also* Robert H. Klonoff, *Class Action and other Multi-Party Litigation in a Nutshell* § 3.9, 37 (2d ed., West 2004); Moore, *supra* n. 72, at § 23.23; Parsons & Starr, *supra* n. 96, at 884-87.

[109] *See* Holo, *supra* n. 107, at 230.

[110] *See* Moore, *supra* n. 72, at § 23.23; *Named Representative*, *supra* n. 105, at 369 n. 40.

commonality and typicality tend to merge together and with the requisite of adequate representation.[111] The common questions of law or fact in a defendant class action may emerge out of the context, i.e., a suit challenging the constitutionality of a statute enforced by several public officials. The constitutionality of the legal rule gives rise to an identical defense for the entire class of public law enforcers.

Typicality is the third prerequisite to a class action and, according to the Supreme Court interpretation, it tends to merge with the commonality and adequate representation prerequisites. The optimal example of the presence of this prerequisite is the verification of the defense of the proposed class representative and the absence of conflicting interests with the class members. Further, the defenses for all class members should be grounded in the same legal theory.[112] In addition, a defense would lack typicality if it could only be applied to the class representative. Therefore, the defense shall be considered typical if it protects the interests of the putative members of the class, notwithstanding that "[t]ypicality does not require that the defenses be identical or perfectly coextensive; substantial similarity is sufficient."[113]

Another test for typicality is the so-called "juridical link" doctrine, emerged from the case *La Mar v. H & B Novelty & Loan Co.*, positing that where the defendants are "juridically related in a manner that suggests a single resolution of the dispute would be expeditious" the class action procedure should be applied.[114] The *La Mar* decision denied certification of a bilateral class action because the representative plaintiff had a relationship with only one defendant, and so he did not have a cause of action against all the other defendants. Therefore, there was lack of typicality of claims. In this case, the Ninth Circuit Court asserted: "In brief, typicality is lacking when the representative plaintiff's cause of action is against a defendant unrelated to the defendants against whom the cause of action of the

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[111]

> The *commonality and typicality* requirements of Rule 23(a) *tend to merge*. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. *Those requirements* therefore also *tend to merge with the adequacy-of-representation* requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest. In this case, we need not address petitioner's argument that there is a conflict of interest between respondent and the class of rejected applicants because an enlargement of the pool of Mexican-American employees will decrease respondent's chances for promotion.

Gen. Tel. Co. of the S.W. v. Falcon, 457 U.S. 147, 158 n. 13 (1982) (emphasis added).

[112] *See* Conte & Newberg, *supra* n. 82, at § 4:59, 373-74; Klonoff, *supra* n. 108, at 43; Ancheta, *supra* n. 55, at 303; *Named Representative*, *supra* n. 105, at 376.

[113] *Thillens, Inc. v. Comm. Currency Exchange Assn. of Ill.*, 97 F.R.D. 668, 678 (N.D. Ill. 1983).

[114] 489 F.2d. 461, 466 (9th Cir. 1973).

members of the class lies."[115] The exceptions to the above-explained theory, in accordance to the *La Mar* court, would be those "in which all injuries are the result of a conspiracy or concerted schemes between the defendants at whose hands the class suffered injury."[116] Besides the existence of a conspiracy or a concerted scheme, another exception, as pointed out, is the presence of the "juridical link."[117] Although, it may be considered that the juridical link test establishes a higher standard of typicality, it is useful in the definition of the scope of a defendant class, and to protect the absent members by means of presenting typical defenses to the whole class.[118]

The fourth prerequisite for certification of any class action is that "the representative parties will fairly and adequately protect the interests of the class."[119] The adequacy of the representation is the most complex prerequisite and reveals the basis of collective litigation, i.e., one or more persons litigating in the name of a crowd.[120] Accordingly, it is consistent with the due process of law clause, by which an individual cannot be bound by a judgment where he was not a party to the judgment nor had an opportunity to intervene in the action.[121]

In a plaintiff class action context, the Supreme Court has established that due process of law is observed when the interests of the class are duly represented by the named party:

> It is familiar doctrine of the federal courts that 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, or where they actually participate in the conduct of the litigation in which members of the class are present as parties, or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in

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[115] *Id.* at 465.

[116] *Id.* at 466. For the application of the juridical link doctrine, *see Barker v. FSC Securities Corp.*, 133 F.R.D. 548, 553 (W.D. Ark. 1989) (certifying defendant class); *U.S. v. Trucking Employers, Inc.*, 75 F.R.D. 682, 690 (D.D.C. 1977) (certifying defendant class); *Coleman v. McLaren*, 98 F.R.D. 638, 654 (N.D. Ill. 1983) (certifying defendant class); *Mudd v. Busse*, 68 F.R.D. 522, 527-28 (N.D. Ind. 1975) (denying defendant class certification); *Monaco v. Stone*, 187 F.R.D. 50, 62 (E.D.N.Y. 1999) (certifying defendant class); *Leer v. Wash. Educ. Assn.*, 172 F.R.D. 439, 447-49 (W.D. Wash. 1997).

[117] *See generally* Samuel L. Shafner, *The Juridical Links Exception to the Typicality Requirement in Multiple Defendant Class Actions: The Relationship between Standing and Typicality*, 58 B.U. L. Rev. 492 (1978).

[118] Ancheta, *supra* n. 55, at 283, 303-05. *See also* Conte & Newberg, *supra* n. 82, at § 4:66, 401; Wright, Miller & Kane, *supra* n. 78, at § 1770, 484-86.

[119] Fed. R. Civ. P. 23(a)(4).

[120] For different theories explaining the conception of representative lawsuits, *see Developments in the Law – Class Actions*, *supra* n. 57, at 1329-72; Fiss, *supra* n. 33, at 24-26.

[121] *See Intl. Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945).

> judgment for the latter. In all such cases, so far as it can be said that the members of the class who are present are, by generally recognized rules of law, entitled to stand in judgment for those who are not, we may assume for present purposes that such procedure affords a protection to the parties who are represented though absent, which would satisfy the requirements of due process and full faith and credit.[122]

Particular questions concerning the adequate representative in defendant class actions require special analysis and "closer scrutiny" in order to ascertain if the named parties can actually protect, fairly and adequately, the interests of the entire class.[123]

There are three foremost concerns related to the choice of adequate representation in defendant class actions: (i) the choice of the representative is made by the plaintiff; (ii) the absence of incentive for any defendant to bear the expenses of defending a lawsuit on behalf of the entire class when the costs of litigation are disproportionate to the representative party's stake; and (iii) the difficulty of compensating class counsel for the benefits conferred upon the class. In a very well-known phrase, Professor Chafee Jr. states: "It is a strange situation where one side picks out the generals for the enemy's army," implying that the plaintiff would select a weak representative for the defendant class.[124] However, the plaintiff's choice of an incapable class representative shall be challenged by any absent members, a fact that would jeopardize a favorable adjudication to the plaintiff.[125] Likewise, the court has a broad power to conduct the action (Rule 23(d)) in a manner that is "fair and efficient," as affirmed in the Advisory Committee Notes. Hence, the court may replace the class representative in circumstances where he does not vigorously prosecute the class defense or has a conflict with the class interests. The court may also permit intervention of a new representative in addition to the current one, or just designate another person to represent the class. Similar to the appointment of an interim class counsel (Rule 23(g)(2)(A)), the same

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[122] *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940) (emphasis added and citations omitted); *see also Mgt. TV Sys., Inc.*, 52 F.R.D. at 164-65 (defendant class action).

[123] Conte & Newberg, *supra* n. 82, at § 4:66, 401; Wright, Miller & Kane, *supra* n. 78, at § 1770, 476 (affirming that "some special problems or questions have surfaced that require particular attention [to check the adequacy of the defendant representative]"); Theodore W. Anderson & Harry J. Hoper, *Limiting Relitigation by Defendant Class Actions from Defendants Viewpoint*, 4 Mar. J. Prac. & Proc. 200 (1971) (urging the parties and the courts for special considerations about class representatives in defendant actions); *Federal Rule of Civil Procedure 23 Class Action in Patent Infringement Litigation*, 7 Creighton L. Rev. 50, 59-60 (1973) (discussing the problems the defendant class inherited in patent litigation context); Kalven & Rosenfield, *supra* n. 92, at 697 n. 39; Wolfson, *supra* n. 96, at 478 (affirming that "problems of adequacy are more serious in defendant class actions than in plaintiff class actions").

[124] Chafee, *supra* n. 55, at 237.

[125] *See* Wolfson, *supra* n. 96, at 478-82.

procedure may be adopted in relation to the class representative in defendant class actions where the indication was made by the plaintiff.[126]

The other two problems directly involve the incentives for the class attorney to assume the lawsuit. Only economy of scale in investment in the lawsuit can overcome the problem of the reluctance of defendants to assume the litigation as class representative. This objective is achieved with incentives for the class counsel through an optimal mechanism of compensation for his performance.[127]

b) Rule 23(b) Maintenance of the Class Action

The prerequisites of Rule 23(a) are a necessary condition to each and every class action, either of plaintiffs' or defendants' or even bilateral suit, but they are not a sufficient condition for the maintenance of a collective litigation. This section focuses on the additional elements described in Rule 23(b) that must be fulfilled for the use of the defendant class action and that give rise to distinct types of class actions on account of the diverse objectives of each one.[128]

Defendant class actions have been certified under all of the subdivisions of Rule 23(b). It is noteworthy that, recently, one commentator has stressed the lack of solid doctrinal basis for class action categories specified in Rule 23(b), blurring them together and promoting its

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[126] *Cf. MCL 4th*, *supra* n. 55, at § 21.26, 277. *See Shankroff v. Advest, Inc.*, 112 F.R.D. 190 (S.D.N.Y. 1986); *In re Telectronics Pacing Sys.*, 172 F.R.D. 271 (S.D. Ohio 1997).

[127] *Infra* pt. IV(A), (D).

[128] Fed. R. Civ. P. 23(b) states:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of:
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

manipulation by litigants and courts.[129] The class actions regulated in subsections Rules 23(b)(1) and 23(b)(2) are considered to be mandatory; that is, every member of the class shall be bound by the judgment. Consequently, there is no option for the class members to be excluded from the lawsuit. The rationale for the mandate is to avoid the risk of inconsistent judgments in relation to the parties, creating incompatible standards of conduct, and to avoid the possibility of impairment or impediment to some of the class members to exercise or protect their interest should individual lawsuits be filed. For this exact reason, Professor Kaplan has classified as "natural" or "necessary," classes certified under Rule 23(b)(1) and (b)(2).[130] It is necessary or natural that people in equal circumstances should be treated equally. Otherwise, the principle of justice and the courts themselves would be disrespected. Those elements, in certain ways, describe the provisions for necessary joinder of parties stated in Rule 19 of the Federal Rules of Civil Procedure.[131] The avoidance of incompatible adjudication of rights among individuals placed in the same situation is one of the goals of class actions.

Defendant class actions have been certified in both subdivisions 23(b)(1)(A) and 23(b)(1)(B). Certification of defendant classes under Rule 23(b)(1)(A) is made in order to impose a compatible pattern of conduct to the plaintiff in relation to the defendants. The objective of this provision is to try to avoid inconsistent or varying adjudications with respect to individual defendants. Multiple lawsuits, instead of one collective procedure, would establish incompatible standards of conduct for the party opposing the class (the plaintiff). The functional utility of Rule 23(b)(1)(A) defendant class actions has been discussed in patent infringement cases, due to the offensive collateral estoppel doctrine conceived by the Supreme Court in *Blonder-Tongue Laboratories Inc., v. University of Illinois Foundation.*[132] In such a case, the judicial decree of invalidity of a patent could be used as collateral estoppel against the original plaintiff in any other future suit.[133]

Regardless, some authorities have decided that there is no incompatible standard of conduct if:

> [a] plaintiff patent-holder may be required to act differently with respect to different parties if the validity of its patent is upheld in one case and rejected in another, the plaintiff would not be subjected to incompatible standards of

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[129] Linda S. Mullenix, *No Exit: Mandatory Class Actions in the New Millenium and the Blurring of Categorical Imperatives*, 2003 U. Chi. Leg. Forum 177, 185, 214-38, 243-46 (2003).

[130] Kaplan, *supra* n. 92, at 386.

[131] Geoffrey C. Hazard, Jr., *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 Colum. L. Rev. 1254, 1259-60 (1961).

[132] 402 U.S. 313 (1971). *See also* Wolfson, *supra* n. 96, at 474 n. 72, 475 n. 74.

[133] *See Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979) (applying offensive collateral estoppel in a securities context).

> conduct. Incompatibility would exist only if one court order permitted the enforcement of the patent against an alleged infringer and another court order prohibited the enforcement of the patent against that same alleged infringer. The party opposing the class would not have to violate one judgment in order to satisfy another judgment.[134]

It seems that this interpretation is in conflict with the express provisions of the statutes and their goal, in addition to being illogical. The legal rule is based on the logic law of the excluded middle (*tertium non datur*): either the patent is *valid and enforceable* against everyone, or, it is *invalid and unenforceable* to everybody—there is no third option. This is the reason that the subject matter "necessarily" has to be decided in a homogenous way to the whole class of alleged patent infringer. The incompatible standard of conduct to the plaintiff would occur if, at the same time, the patent could be enforced and could not be enforced.

Defendant class actions have also been certified, under subdivision 23(b)(1)(A), in the securities litigation context.[135] Rule 23(b)(1)(A) contemplates defendant class actions because the prosecution of separate actions against individual members, while not technically excluding the other members, might do so as a practical matter. Under Rule 23(b)(1)(A), there is no risk of inconsistent adjudications due to separate suits; rather, without the class action procedure, absent class members shall have their interests impaired or impeded. The Advisory Committee Notes have expressly affirmed the utilization of *class actions by or against representative members*, under the theory of "limited fund":

> In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by a separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem.[136]

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[134] Moore, *supra* n. 72, at § 23.41. *Cf. Winder Licensing, Inc. v. King Instrument Corp.*, 130 F.R.D. 392 (N.D. Ill. 1990); *Webcrafi Techs., Inc. v. Alden Press, Inc.*, 228 U.S.P.Q. 182 (N.D. Ill. 1985).

[135] *See e.g. Weinberger v. Jackson*, 102 F.R.D. 839 (N.D. Cal. 1984); *McFarland v. Memorex Corp.*, 96 F.R.D. 357 (N.D. Cal. 1982); *In re Itel Secs. Litig.*, 89 F.R.D. 104 (N.D. Cal. 1981); *In re Alexander Grant & Co. Litig.*, 110 F.R.D. 528 (S.D. Fla. 1986). *But see In re Seagate Techs. Secs. Litig.*, 115 F.R.D. 264 (N.D. Cal. 1987).

[136] Fed. R. Civ. P. 23 (Advisory Committee Notes 1966).

Nonetheless, defendant classes have been certified in "limited fund" cases in very special circumstances, since it is rare that defendants are seeking money from a fund as it is usual to plaintiff classes. The first scenario concerns interpleader defendant classes where, for example, the plaintiff seeks to distribute funds from trust to the defendants.[137] The second situation is related to a "common fund" from insurance policies for professional liability. In that situation, separate lawsuits against the partners may drain the common policy, making those that are prosecuted in the future to bare their own court adjudication and litigation costs.[138] In other circumstances, courts have certified defendants classes based on Rule 23(b)(1)(B) in cases concerning property rights.[139]

Rule 23(b)(2)'s primary concern is with the type of relief sought. The intention is to provide final injunctive or declaratory relief. As the rule states: "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . ."[140] The 1966 Advisory Committee Notes explained that the subdivision is not intended for cases where the plaintiff is "exclusively or predominantly" seeking money damages. Some courts have interpreted Rule 23(b)(2) literally, asserting that "the party opposing the class" should be understood the defendant opposing the plaintiffs' class, hence precluding defendant class actions.[141] This construction is not in accordance with the provision of Rule 23, where many subections expressly prescribes for both plaintiff and defendant, such as 23(a), 23(a)(3), 23(b)(1), 23(b)(3), and 23(d). Some commentators have considered the term "party" as the plaintiff's class, collectively, in the context of bilateral civil rights litigation.[142] Others have argued that the useful approach to certified defendant class actions is to employ the "juridical link test."[143] It seems correct that the singular reference to "party" in Rule 23 should normally be construed as including the plural unless expressly provided to the contrary.[144] The most relevant domain of law where defendant class actions

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[137] *See e.g. N. Nat. Gas Co. v. Grounds*, 292 F. Supp. 619 (D. Kan. 1968); *U.S. Trust Co. v. Alpert*, 163 F.R.D. 409 (S.D.N.Y. 1995). *See also Defendant Class Actions – Harvard*, supra n. 96, 634 n. 22.

[138] *See e.g. Alexander Grant & Co. v. McAlister*, 116 F.R.D. 583 (S.D. Ohio 1987); *In re Chambers Dev. Secs. Litig.*, 912 F. Supp. 822 (W.D. Pa. 1995).

[139] *See e.g. Canadian St. Regis Band of Mohawk Indians v. N.Y.*, 97 F.R.D. 453 (N.D.N.Y. 1983); *Cayuga Indian Nation v. Carey*, 89 F.R.D. 627 (N.D.N.Y. 1981); *Oneida Indian Nation of Wis. v. N.Y.*, 85 F.R.D. 701 (N.D.N.Y. 1980).

[140] Fed. R. Civ. P. 23(b)(2).

[141] *See e.g. Tilley v. TJX Cos.*, 345 F.3d 34 (1st Cir. 2003); *Henson v. E. Lincoln Township*, 814 F.2d 410 (7th Cir. 1987); *Natl. Union Fire Ins. Co. of Pitt. v. Midland Bancor, Inc.*, 158 F.R.D. 681 (D. Kan. 1994).

[142] Ancheta, *supra* n. 55, at 305; *Class Standing and the Class Representative*, 94 Harv. L. Rev. 1637, 1651 (1981).

[143] Scott Douglas Miller, *Certification of Defendant Class Actions under Rule 23(b)(2)*, 84 Colum. L. Rev. 1371 (1984).

[144] *Cf.* Conte & Newberg, *supra* n. 82, at § 4:66, 398.

have been certified under Rule 23(b)(2), pertains to civil rights.[145] However, there are cases involving housing or property rights,[146] government benefits,[147] and sex discrimination.[148]

The main difference between class actions under Rule 23(b)(3) and those under rules mentioned previously is the mechanism for members of the class to opt out of the litigation, obviating the binding effect of the aggregate judgment. Therefore, it is said that this type of class action "is not particularly suited to defendant classes, because members of Rule 23(b)(3) classes have the right to opt out of a class judgment."[149] Notwithstanding, defendant class actions have been certified under Rule 23(b)(3).[150] There is evidence throughout this article showing that opting out of a defendant class action makes everyone (members that opt-out; members that stay in, and plaintiffs) worse off. The Advisory Committee Notes asserted that the last type of class action prescribed in Rule 23(b)(3) "encompasses those cases in which a class action would achieve economies of time, effort, and expenses, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."[151] A defendant class action should be maintained under Rule 23(b)(3) if common questions predominate over the questions affecting individual members, and the collective procedure is superior to any other method to deal with the case, so that it ought to confer "fair and efficient adjudication of the controversy."[152]

IV. THE OPTIMAL AGGREGATION OF DEFENDANTS

A. Exploiting Investment and Economy Scales in the Aggregation of Defenses

As previously mentioned, the optimal law enforcement system to confer individuals' ideal well-being is only achieved by aggregation of claims and defenses. It is true that separate litigation, i.e., case-by-case litigation, precludes economy of scale for the plaintiffs, undermining deterrence and compensation functions of the law. Only mandatory aggregation of claims breaks the asymmetric advantage that defendants have

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[145] *See e.g. Marcera v. Chinlund*, 595 F.2d 1231 (2d Cir. 1979); *McKay v. Co. Election Commrs.*, 158 F.R.D. 620 (E.D. Ark. 1994); *U.S. v. Rainbow Fam.*, 695 F. Supp. 314 (E.D. Tex. 1988).

[146] *Metro. Area Hous. Alliance v. H.U.D.*, 69 F.R.D. 633 (N.D. Ill. 1976).

[147] *Luyando v. Bowen*, 124 F.R.D. 52 (S.D.N.Y. 1989).

[148] *Kane v. Fortson*, 369 F. Supp. 1342 (N.D. Ga. 1973).

[149] Conte & Newberg, *supra* n. 82, at § 4:67, 405. *But see Defendant Class Actions – Harvard*, *supra* n. 96, at 635.

[150] *See e.g. Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473 (2d Cir. 1995); *In re Gap Stores Secs. Litig.*, 79 F.R.D. 283 (N.D. Cal. 1978); *Alvarado Partners, L.P. v. Mehta*, 130 F.R.D. 673 (D. Colo. 1990); *In re Alexander Grant & Co. Litig.*, 110 F.R.D. 528 (S.D. Fla. 1986); Williams, *supra* n. 96, at 294.

[151] Fed. R. Civ. P. 23 (Advisory Committee Notes 1966).

[152] *See* Weinstein, *supra* n. 92, at 438-54.

over plaintiffs, which skews adjudication in favor of the former.[153] Also, the lack of aggregation of defendants precludes the plaintiff, in a single class action, to obtain adjudication of liability against several wrongdoers; for instance, in cases of various environmental polluters. The advantages of defendant class action are not limited to the plaintiff's bar. The defendant class action is operational and functional, either for plaintiffs or defendants. The same phenomenon that affects plaintiffs in most mass tort litigation where a defective design of a product or service provided by a firm affects numerous victims may be present within a dispersed class of defendants threatened with nuisance value suits by one or more plaintiffs.

Alba Conte and Herbert Newberg have challenged the general assertion that Rule 23(b)(3) is unsuitable to defendant class actions, because of the high probability of numerous members opting out of the class:

> In fact, some circumstances will actually create incentives not to opt out of a defendant class. For example, a plaintiff who commences a defendant class against a group of underwriters of a new stock offering may also threaten and be able to commence litigation against each of the underwriters individually. Given the certainty of having to make a choice between remaining in a defendant class or defending individual litigation, the economics of a joint defense considerably outweighs those of defending an individual action, and defendant class members would have an incentive to remain in the class.[154]

Despite the validity of the argument, the proposal made in this paper goes further, urging that the optimal economy of scale for investment in litigation requires the compulsory reunion of the defendants and their defenses.[155]

It is a general consensus that the primary advantage of class actions is to override the transactional cost of low stake claims, which would not be individually prosecuted because the costs of litigation (process, judicial expenses, and attorney's fees) supersede the expected utility from the adjudication.[156] Nevertheless, there are some criticisms against this position asserting that, instead of promoting judicial and process economy, class action increases litigation. Various arguments evidence to the contrary. The first refusal arises from the lack of a parameter for comparison and statistics to justify the assertion that the level of filing suit increments due to class

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[153] Rosenberg, *Adding a Second Opt-Out*, *supra* n. 21, at 27.

[154] Conte & Newberg, *supra* n. 82, at § 4:62, 385. *See also supra* pt. III(B)(1)(b).

[155] *See* Holo, *supra* n. 107, at 266 (proposing a modification to Rule 23 of the Federal Rules of Civil Procedure in order to prohibit defendant members from opting out of the class action without further theoretical rationale).

[156] *See generally Developments in the Law – Class Actions*, *supra* n. 57, at 1355-59.

actions is in detriment of promoting economy of judicial resources.[157] In addition, the deterrent effect of the law multiplies with the amplified probability of filing a lawsuit. Consequently, there is a decreasing number of individuals engaging in the violation of the law, which would give rise to potential lawsuits.[158] The second critique passes by the fact that collective litigation of low-stake claims operates as a deterrent to bad behavior in addition to compensating the wronged.[159] Wrongdoers will not take appropriate steps to prevent harm if they are aware that, due to transactional costs, it is unlikely that the victims will bring lawsuits against them. This situation evidences that, notwithstanding the size of the stake of the claim, the absence of vindication produces an under-deterrence effect. The third and most important reason is that this argument seems to be alluding that judicial economy is just one of the principles that guides collective litigation.

Class action had at one time multiple goals: equalize the parties in litigation, promote access to justice, deter or police behaviors, and avoid incompatible adjudication. In some situations, an order of priority must to be established. That does not mean that the other goals are to be unconsidered. The goals of aggregation of claims and defenses are principles that guide the enhancement of the law. Therefore, all have the same strength or status, and thus will not eliminate each other. However, in some circumstances, one goal has to bestow prominence to another. If there is a conflict within the goals of the collective litigation, the preference for an optimal law enforcement system must select which one should prevail. In my view, the access to justice takes primacy, predominating over judicial economy.[160]

On the other hand, allowing class members to opt-out in suits with high-stake claims and certified under Rule 23(b)(3) is considered an important feature of class action. By definition, high-stake claims are those that would be individually viable, notwithstanding the existence of class action procedures.

This line of reasoning follows the "anti-redistribution principle" (expression created by Professor Rosenberg) that has been established by the Supreme Court in *Amchem v. Windsor*,[161] which "determines the

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[157] *See* John Coffee Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1347 (1995).

[158] Professor Posner states: "The likelier a suit is, the greater is the deterrent effect of whatever legal principle the suit would enforce, and hence the less likely the potential defendants to engage in the forbidden conduct that would create a right to sue." Posner, *Economic Analysis*, *supra* n. 24, at 585.

[159] *See* Kalven & Rosenfield, *supra* n. 92, at 686; Posner, *Economic Analysis*, *supra* n. 24, at 586-87; Rosenberg, *Adding a Second Opt-Out*, *supra* n. 21, at 30 n. 24.

[160] *See* Jones, *supra* n. 34, at 82-83.

[161] 521 U.S. 591 (1997).

'fairness' of using Rule 23(b)(3) to resolve claims by trial or settlement."[162] Briefly, the "fairness test" requires that class member recoveries with high-stake claims should reflect their expected value claims under the separate action market; thereby justifying the opting-out of the class.[163] The marketability of a claim in a separate action, instead of in a collective procedure, takes into consideration other and more important factors, such as litigation costs and litigation risks, both measured in accordance with types and difficulty of proof, complexity of the law, the facts, and related public policies, etc.[164]

At this point, it is important to remember that allowing individuals to alter to *ex post* preferences that are diametrically opposite and mutually exclusive to their previous choices *ex ante* disrupts the optimal legal system for law enforcement, undermining the deterrence objective of collective adjudication and increasing litigation costs and risks while failing to provide any increased benefits for compensation.[165]

Another aspect of transactional costs of litigation that commentators have given very little or no attention to, concerns aggregation of low stakes defenses. The deficiency of fully exploiting investment and economy scales in litigation due to fractional aggregation is not an event that plaintiffs exclusively incur. Even in a situation of dispersed plaintiffs, filing multiple individual lawsuits, the absence of mast-tying, as in mandatory class action, impedes the defendant from maximizing his economy and investment in litigation.[166] In certain circumstances, the defendant can invest once and for all, as in preparing experts' opinions or depositions. However, in other circumstances, several overlapping lawsuits may provoke a substantial increase of coordination costs. This augment is a result of the managing costs for several actions throughout different jurisdictions, employment of

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[162] Rosenberg, *Adding a Second Opt-Out*, *supra* n. 21, at 22. *See also* Rosenberg, *Mandatory-Litigation*, *supra* n. 21, at 838.

[163] *See Excerpt of the Report of the Judicial Conference Committee on Rules of Practice and Procedure* 8, http://www.uscourts.gov/rules/supct1202/ExcerptCV.pdf (accessed Oct. 3, 2007).

> [T]he second opt-out opportunity gives class members the same opportunity to accept or reject a proposed settlement as persons enjoy in individual law suits. This proposal introduces a measure of class-member self-determination and control that best harmonizes the class action with traditional litigation. . . . [A] second opt-out opportunity could relieve individuals from the unforeseen consequences of inaction or decisions made at the time of certification, when limited meaningful information was available. The proposed second opt-out opportunity may provide added assurance to the supervising court that a settlement is fair, reasonable, and adequate. It is just the sort of 'structural assurance of fairness,' mentioned in *Amchem Products Inc.*, that permits class actions in the first place.

Id.

[164] Rosenberg, *Mandatory-Litigation*, *supra* n. 21, at 831, 838 n. 19.

[165] *Supra* pt. II(B).

[166] *See supra* pt. II(C).

different lawyers or law firms with varied experts, and increased expenses with transportation and accommodations for witnesses, etc.[167] Moreover, the situation is more acute when there are innumerous dispersed defendants with common defenses, either facing a plaintiff class action or multiple individual lawsuits. Mandatory aggregation of defendants confers optimal scale of investment and economy with optimal incentives to class representatives as well as to the class counsel.

Any violation or abuse of the law has to be rectified, and the value of adjudication functions either in favor of prospective plaintiffs or of defendants.[168] In an optimal law enforcement system, it is not socially or individually desirable that claims or defenses should not vindicate for the sole reason of litigation transactional costs, which makes it economically unviable to file a lawsuit or to present a legal defense.[169]

Ideal welfare to individuals is obtained with economy of scale in the investment in litigation. Aggregation of claims and defenses confers the ideal investment, either for plaintiffs or defendants, in collectivized procedures. The dimension of the claims at stake, either low or high, is irrelevant. Furthermore, it is functionally indifferent if the lawsuit concerns a class of plaintiffs or defendants or both. It is operationally meaningless, for the best law enforcement, if the purpose of the certification of a defendant class action serves the interests of the plaintiffs or of the defendants.[170]

B. Nuisance Value Suits

The defendant class action is more frequently used as a procedural device for the plaintiffs. However, it is a strong instrument to be used by defendants to avoid nuisance value lawsuits, creating a class action in individual lawsuits brought by plaintiffs. Nuisance value suits, or negative value suits, may be put into a model design described as a lawsuit where the expected benefits of litigation are outweighed by their costs.[171] In addition, it is a model of litigation where there is a presumptively small cost for the plaintiff to bring the suit and a relatively high cost for the defendant to

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[167] Professor Rosenberg points out that even firms with close and long-standing pre-litigation commercial relationships incur high expenses in the coordination of actions, as for example in the Firestone Tire/Ford Explorer litigation. He adds that courts can mandate the aggregation of defendants, in a defendant class action, "to overcome collective action problems and costs that prevent multiple defendants from fully exploiting scale economies, thereby promoting defendants' optimal investment in developing shared positions on common questions." Rosenberg, *Adding a Second Opt-Out*, *supra* n. 21, at 28 n. 22.

[168] *See* Assaf Hamdani & Alon Klement, *The Class Defense*, 93 Cal. L. Rev. 685, 708-09 (2005).

[169] For example, several clients do not file lawsuits in order to be refunded of illegal banking charges, and numerous individuals prefer to settle when threatened with nuisance value suits alleging television signal piracy, despite the fact that they have not committed any violation or have a consistent defense.

[170] As I have continuously sustained, the defendant class actions may serve either the interests of a class of plaintiffs or a class of defendants. *See also infra* pt. IV(B), (C), (D).

[171] Shavell, *Foundations of Economic Analysis*, *supra* n. 24, at 420.

defend himself.[172] Thus, in a nuisance value lawsuit, the plaintiff will most likely file the action, but it will be unlikely to go to trial, as the defendant will probably settle for any amount inferior to his costs to present a defense.

The situation is better illustrated with numeric examples, furnished by David Rosenberg and Steven Shavell.[173] Imagine, for example number one, a plaintiff that has a low expected utility from a judgment corresponding to 1% of $1,000. His cost to file a lawsuit is only $30 and an additional cost of $150 if he goes to trial. On the other hand, the defendant would bear a $200 cost to present his defense. As I have sketched the case, the plaintiff is willing to file the lawsuit as his cost is very low. In doing so, the defendant is facing an expense of $200 to defend himself. Therefore, he is willing to settle for any amount below his litigation costs. This results in the defendant settling with the plaintiff in order to avoid the cost of the defense. He prefers an expected utility from settlement in comparison to higher costs of litigating the case.

The plaintiff is also looking for a settlement, as he is unwilling to go to trial because the case is weak and the cost of the trial ($150) supersedes the adjudication of the judgment (1% of $1,000 = $10). The filing expenses are a sunk cost that he does not care for at this phase of the procedure.[174] I assume that the plaintiff is risk-neutral or risk-averse, but would not bluff and risk a chance of the defendant choosing to litigate instead of settling. In this case, the settlement amount is the one that the plaintiff feels certain that the defendant will agree with; thus, the settlement value has to be any value below $200. Also, it is irrelevant for the settlement if the defendant has information about the strength of the plaintiff's case, considering that the amount for settlement is going to be less than the defense cost.

Any other conduct of the parties would be irrational. If the defendant does not settle or appear in court to defend himself, he will lose $1,000 by a default judgment. If the defendant litigates, he would bear a cost of $200, instead of a settlement agreement for any amount below this. The plaintiff, on the other hand, would probably withdraw the case and avoid spending $150 more at trial for an expected judgment of only $10. I

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[172] *Id.* at 422. *See also* Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 Va. L. Rev. 1849, 1851 (2004) (defining nuisance-value settlement as "a payoff extracted by a threat to litigate a meritless claim or defense that both parties know the court would readily dismiss as 'untriable' or otherwise legally untenable on an applicable dispositive motion for merits review, like a motion for summary judgment[,]" and proposing a mandatory summary judgment to resolve it).

[173] David Rosenberg & Steven Shavell, *A Model in Which Suits are Brought for their Nuisance Value*, 5 Intl. Rev. L. & Econ. 3, 4-6 (1985). *See also* Lucian Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. Leg. Stud. 1 (1996) (arguing that legal costs are not incurred at once but in stages and this divisibility increases the likelihood of plaintiffs to sue or threat to sue defendants, even if the costs of litigation, at the beginning of the litigation, exceeds the expected judgment amount).

[174] *See* Posner, *Economic Analysis*, *supra* n. 24, at 7.

emphasize that the mere threat of filing a lawsuit is enough to obtain the settlement, because the threat is verisimilar under an economic analysis; hence it makes the plaintiff eager to bring the action in case an out-of-court settlement is not reached.

Assume another example, where the plaintiff has a high expected utility from the judgment, corresponding to 70% of $300, with a trial cost of $250. The costs for filing the suit and the defense remain the same, respectively, $30 and $200. There is no qualitative difference from the first example, because the defendant would settle for any value inferior to the amount of his litigation costs ($200). On the plaintiff's side, he would be willing to file the suit if he does not get an out-of-court settlement (costs of only $30). But also, the plaintiff does not want to go to trial even if he possesses a meritorious case if the trial costs ($250) overcome the expected adjudication of $210 (70% of $300 = $210). According to the adopted definition, situations where the plaintiff has a merit case, with high expectation from the judgment that overrides the costs of litigation, making him eager to go to trial, would not be considered a nuisance value suit.[175]

The above assertions were made focusing on individual lawsuits. In cases where there are innumerous and dispersed defendants, there is a major incentive for the collectivization of the defenses, in order to achieve economy of scale to invest in the litigation instead of settling in a negative value suit. Assume that a plaintiff is suing or threatening to sue 100 people to obtain nuisance-value settlements. Suppose these figures for each individual litigation: (i) $500, costs to file each suit; (ii) $1,500, trial costs; (iii) $4,000, defense costs; (iv) $2,000, plaintiff's offer to settle; and (v) 1% of 100,000 = $1,000, expected judgment. As previously argued, any single defendant would rather settle than litigate, even though the plaintiff has a weak or meritless case. However, aggregating all defendants, considering that the above numbers maintained unchanged, the cost per defendant is $40, which incentivizes the defendants to litigate, not to settle. Regardless of the fact that defendant class actions are more frequently used for plaintiffs, and in their own interests, the goals of collective litigation—access to justice, equilibrium within the parties in litigation, deterrence or policing behaviors, and avoidance of incompatible adjudication—are also achieved by the defendants' requirement for aggregation of their class.

In *Otero v. New York City House Authority*, the district court filed an order permitting the intervention of 171 defendants. That order moved for a defendant class action, which was certified due to impracticability of joinder, common questions at law, and, typicality of claims.[176] The precedent evidences that, although it is rare, a defendant is allowed to move

[175] *See e.g.* Rosenberg & Shavell, *supra* n. 173, at 5.
[176] 354 F. Supp. 941, 945, 945 n. 7 (S.D.N.Y. 1973).

for certification of a class, which should reach optimal economy of scale in litigation by forbidding members to opt-out of the class.[177] Alternatively, the defendants may file, with the exact same advantages, a class action for declaratory and/or injunctive relief.

For example in the *DirecTV* case,[178] a class of consumers filed a class action lawsuit against DirecTV, claiming that the satellite television provider violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C.S. §§ 1961-1968, by mailing demand letters that accused plaintiffs of illegally accessing the provider's signal. The U.S. District Court for the Central District of California dismissed the action on the basis that the provider's sending of the letters was conduct immunized from RICO liability under the Noerr-Pennington doctrine.[179] In upholding the trial court judgment, the U.S. Court of Appeals for the Ninth Circuit held that RICO and the predicate statutes at issue did not permit the maintenance of a lawsuit for the sending of a prelitigation demand to settle legal claims that did not amount to a sham. Because the demand letters at issue sought settlement of claims against plaintiffs under the Federal Communications Act and no sham was claimed, they could not form the basis of liability under RICO.[180]

A different use of defendant class action was employed in *Georgia Power Co. v. Hudson*,[181] where the plaintiff, a public service company that operated a power dam, filed a suit to enjoin the prosecution by defendants, owner of lands, lying along the river below the dam, of a number of actions for damages based on the plaintiff's operation of the dam overflowing bottom lands that were instituted by the defendants against the plaintiff in several state courts.[182] In a certain manner, the objective was to consolidate all the land owners' actions brought in state courts into a federal court, which even today is not possible.[183]

Completely diverse from my line of argument, concerning the

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[177] *See supra* pt. II(C).

[178] *See supra* pt. I.

[179] *Sosa v. DirecTV*, 437 F.3d 923 (9th Cir. 2006).

[180] *Id.*

[181] 49 F.2d 66 (4th Cir. 1931).

[182] The suit was dismissed based on three different grounds: failure to meet the jurisdictional amount requirement; federal courts were forbidden by statute (28 U.S.C. § 2283 (2006)) to enjoin state court actions; and a federal court of equity has no jurisdiction, for the purpose of avoiding a multiplicity of suits, to enjoin the prosecution of such actions, irrespective of the court in which they are pending. (Note that the decision is dated before the enactment of the Federal Rules of Civil Procedure that unified procedures in law and at equity.) *See supra* pt. III (A)(2)(c).

[183] A procedural mechanism, such as the Multidistrict Litigation Panel ("MDL"), that allows coordination of federal civil cases and their reunion for united discovery does not exist under 28 U.S.C. §1407. *See* Klonoff, *supra* n. 108, at 371 et seq. The Manual for Complex Litigation states: "No single forum has jurisdiction over these groups of cases. Unless the defendant files for bankruptcy, no legal basis exists for exercising exclusive federal control over state litigation. Interdistrict, intradistrict, and multidistrict transfer statutes and rules apply only to cases filed in, or removable to, federal court." *MCL 4th*, *supra* n. 55, at §20.31, 230 (citations omitted).

aggregation of defendants and their common defenses, there is the possibility that a single defendant in a plaintiff class action could file a counterclaim creating a defendant class action (or more precisely a bilateral class action). The counterclaim, as the name indicates, is a "pleading which sets forth a claim for relief"[184] whose parameters are established in Rule 13 of the Federal Rules of Civil Procedure.[185] Under the procedural viewpoint, the defendant class action initiated by the defendant follows the same pattern of any class action concerning the requisites of Rule 23(a) and Rule 23(b).[186] The key element is the mandatory aggregation of defendants that would halve the asymmetric advantage of plaintiff's litigation, conferring the defendants scale advantage in economy and investment, which would result in marketable defense and incentivize class counsel to assume the defense.

C. The Individuals' Well-Being and the "Fairness" of a Day in Court

There is an idea spread amongst law operators that collectivized litigation and individuals' rights in conducting a civil action are antagonistic concepts. Corresponding to this belief, the Supreme Court established that the parties in mandatory class actions carry the burden to justify the exception to the individuals' fairness of having a day in court, which is a "deep-rooted historic tradition":

> Second, and no less important, mandatory class actions aggregating damages claims implicate the due process "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process," it being "our 'deep-rooted historic tradition that everyone should have his own day in court[.]'" Although "'[w]e have recognized an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party,'" or "where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in

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[184] Fed. R. Civ. P. 8.

[185] *See e.g. Blake v. Arnett*, 663 F.2d 906 (9th Cir. 1981); *Jones v. H.U.D.*, 68 F.R.D. 60 (E.D. La. 1975); *Cotchett v. Avis Rent A Car Sys., Inc.*, 56 F.R.D. 549 (S.D.N.Y. 1972).

[186] The defendant class action, certified on behalf of the defendant requirement, is superior to mandatory joinder, because mandatory joinder is impractical when the number of defendants is extent and a defendant class action does not need any drastic modification of actual statutes. For proposal of mandatory joinder in patent litigation, *see* Edward Hsieh, Student Author, *Mandatory Joinder: An Indirect Method for Improving Patent Quality*, 77 S. Cal. L. Rev. 683 (2004); *see also* Charles Silver, *Comparing Class Action and Consolidations*, 10 Rev. Litig. 495 (1991) (a comparison between consolidation under multidistrict litigation panel and class action).

> bankruptcy or probate," the burden of justification rests on the exception.[187]

Correspondingly, as the argument goes, individuals should have the right to opt-out of class actions and individually litigate their claims and defenses.

Rhetorical as it is, this "historical tradition" of an individual's right to a day in court,[188] a commentator has gone even further affirming that the day in court is based on "natural law": "Underlying our tradition of individual claim autonomy in substantial tort cases is the natural law notion that this is an important personal right of the individual."[189] Another scholar, while criticizing the "natural and inalienable" right of individual conduction of process in contrast to collectivized procedure as "somewhat embarrassing," still purports the "popular . . . presupposition of individual dignity, and its political counterpart, self-determination. . . ."[190]

The assertion that the "first purpose of our civil justice system is and should be to offer corrective justice in disputes arising between private parties"[191] fails to consider that any law provision should enhance two functions, in this order: deterrence and compensation. As a result, an optimal legal system should favor deterrence of unreasonable risks and compensation solely for reasonable risks.[192] Even the argument that "our system operates mainly on the assumption that economic decisions are best made by the true owner of property rather than by any other person,"[193] (supposedly an economic one), does not suffice. The economic decisions in modern society are made by experts who manage individuals' assets, such

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[187] *Ortiz v. Fiberboard Corp.*, 527 U.S. 815, 846 (1999) (citations omitted).

[188] For a profound and extensive critique of the "fairness of a day in court," *see* Fried & Rosenberg, *Making Tort Law*, *supra* n. 21, at 27-31; Rosenberg, *Adding a Second Opt-Out*, *supra* n. 21, at 44-47, 49-55 (demonstrating the lack of deontological justification for opt-out in mass tort litigation, which would be based on satisfaction due to a right-duty relationship between the wrongdoer and the victim); Rosenberg, *Mandatory-Litigation*, *supra* n. 21, at 863-66 (arguing that court-awarded fees to class counsel based the on opportunity cost of class settlement is more cost effective than "autonomy" in order to solve the supposed collusion in class settlements); Rosenberg, *Of End Games*, *supra* n. 21, at 701-03 (demonstrating the absence of meaning in individual control of the litigation). *See also* Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. Rev. 193, 199, 288 (1992) (arguing that the justification of a day in court is based on a process-oriented theory "that values participation for its own sake not just for its tendency to improve outcome quality" and concludes that "[t]he assumption basic to the conventional account of the day in court ideal – that each person has an individual right to control her own lawsuit – is wrong on positive and normative grounds"); Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. Leg. Stud. 307, 389 et seq. (1994) (challenging the process value of allowing individuals to be heard).

[189] Roger H. Transgrud, *Mass Trial in Mass Tort Cases: A Dissent*, 1989 U. Ill. L. Rev. 69, 74 (1989).

[190] Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Elridge*: Three Factors in Search of a Theory of Value*, 44 U. Chi. L. Rev. 28, 49 (1976); *See also* Richard A. Epstein, *The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal*, 10 J.L. & Com. 1 (1990); Patricia Anne Solomon, Student Author, *Are Mandatory Class Actions Unconstitutional?* 72 Notre Dame L. Rev. 1627 (1997).

[191] Transgrud, *supra* n. 189, at 74.

[192] *See supra* pt. II(C).

[193] Transgrud, *supra* n. 189, at 75.

as it happens in corporations, governments, trade unions, investment funds, company foundation funds, life insurance policies, etc.[194]

Of significant importance is the fact that, in most tort law cases, lawyers assume the risks of litigation, evidenced by contingent fees. Statistics demonstrate that 90% of tort litigation, individual or collectivized, are governed by contingent attorney fees agreements.[195] Litigation strategies under contingent fee arrangements are made on the lawyer's assessment of expected gains and losses. Hence, he will only bring a suit if the expected value is positive.[196] The contingent fee compensates the lawyer's legal services and the loan of such services, with a higher risk of default than the ordinary market loan, remaining unpaid for many years without any interest and to be repaid only if the lawsuit is successful. Of course, these facts make the lawyers very careful in analyzing the expected value of the judgment.[197] Even if the contention is true, that contingent fees produce a competing interest among class and class attorney (I do not consider this a "conflict of interest," because both are seeking to maximize the expected utility of the claims or defenses, according to the respective position in litigation), the attorney's financial stake in a class action is many times superior to an individual lawsuit, making him invest optimally, approximating or equalizing the investment parties would make if they were to finance their own litigation.[198]

The individual's welfare is duly protected by aggregation of claims and defenses regardless of a personal day in court. This assertion is based on the rational choice theory. Assuming that individuals are rational, seeking their optimal well-being, this is achieved by an ideal legal system through optimal precautionary measures, insurance protection, and progressive funding thereto. In addition, the model prohibits individual's self exclusion of the system or conduct in conflict with the system.[199] Positing aggregation of claims and defenses and the right of "a day in the court" as mutually exclusive, the assertion resembles a narrow view of the law enforcement device provided by class actions.

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[194] Jones, *supra* n. 34, at 74.

[195] Rosenberg, *Class Actions*, *supra* n. 8, at 582.

[196] Donald N. Dewees, J. Robert S. Prichard & Michael J. Trebilcock, *An Economic Analysis of Cost and Fee Rules for Class Actions*, 10 J. Leg. Stud. 155, 166 (1981). The commentators propose nine different rules for attorneys' fees with varieties between the American rule (no shifting of litigation costs) and the English rule (litigation costs shifting); in five of them in which there are contingent fees, the lawyers take the risks of litigation and make the decision of filing the lawsuit. *Id.* at 163-66.

[197] *See* Posner, *Economic Analysis*, *supra* n. 24, at 584.

[198] Rosenberg, *Class Actions*, *supra* n. 8, at 583.

[199] Only free-riders would prefer to litigate alone because of their appropriation and capitalization over the works developed by the others.

D. Appropriate Incentives for Class Counsel

1. The 2003 Amendment to the Rule 23 of the Federal Rules of Civil Procedure

In 2002, the United States Judicial Conference adopted the proposed amendments to Rule 23 of the Federal Rules of Civil Procedure made by the Advisory Committee of the Civil Rules after over a decade of studies.[200] It has been the most comprehensive modification of the discipline of class actions since the 1966 Amendments.[201] The modifications are concentrated in four major areas.[202] Before analyzing the new subsections 23(g) and (h), which concern the appointment of the class counsel and the attorney fees award, that are the object of our proposal, it seems appropriate to make a brief comment of the previous three.

The first area considers the timing of the class certification decision under subsection 23(c)(1), establishing that the court decision whether to certify a class or not has to be "at an early practicable time," instead of the previous expression, "as soon as practicable after the commencement of an action."[203] Also, the certification decision is no longer "conditional," and it may be altered or amended before "final judgment," instead of the "decision on the merits."[204] The second modifications involve the notice provisions in subsection 23(c)(2), authorizing the court to direct appropriate notice to the class certified under Rule 23(b)(1) or (2),[205] and prescribing the mandatory

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[200] *See* Administrative Office of the U.S. Courts, *New Release, Judicial Conference Judgeship Recommendations Endorsed by Administration* 2, http://www.uscourts.gov/Press_Releases/judconf902.pdf (Sept. 24, 2002).

[201] *See* Mullenix, *supra* n. 129, at 177-78.

[202] Wright, Miller & Kane, *supra* n. 78, at § 1753.1, 53-54.

[203] According to the Manual for Complex Litigation, the "early practical time" is considered the moment when the court has sufficient information to decide whether the action meets the certification criteria of Rules 23(a) and (b). *MCL 4th*, *supra* n. 55, at § 21.133, 252-53. In addition, it is important to observe the Advisory Committee Notes to the 2003 Amendments, which state:

> Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is appropriate to conduct controlled discovery into the 'merits,' limited to those aspects relevant to making the certification decision on an informed basis.

Fed. R. Civ. P. 23 (Advisory Committee Notes 2003 Amendment).

[204] The Advisory Committee Notes to the 2003 Amendment explain the modification as follows:

> This change avoids the possible ambiguity in referring to 'the decision on the merits.' Following a determination of liability, for example, proceedings to define the remedy may demonstrate the need to amend the class definition or subdivide the class. In this setting the final judgment concept is pragmatic. It is not the same as the concept used for appeal purposes, but it should be flexible, particularly in protracted litigation.

Id.

[205] Nevertheless the Advisory Committee Notes make it clear that

notice requirements under a Rule 23(b)(3) class. The third set of alterations is related to the process of settlement, voluntary dismissal, and compromise. Subsection 23(e)(1)(A) clarifies that the settlement, voluntary dismissal, or compromise concerns claims, issues, or defenses of a certified class.[206] According to subsection 23(e)(1)(B), in any of the mentioned situations the court must direct notice "in a reasonable manner" to all binding class members in any class certified under subdivisions 23(b)(1), (2), or (3).[207] Also, in order to approve the settlement, voluntary dismissal, or compromise, the court must find through a mandatory hearing that it is fair, reasonable, and adequate. Subsection 23(e) also establishes the requirements and process for filling or objecting a settlement, voluntary dismissal, or compromise.

2. The Appointment of the Class Counsel and the Attorney Fees

The fourth group of alterations made by the 2003 Amendments to Rule 23 of the Federal Rules of Civil Procedure deals with the appointment of class counsel and the attorney fees award.

a) Subsection 23(g)

Subsection 23(g) improved the guidelines, requisites, and procedure for the appointment of the class counsel. As set by the Advisory Committee Notes, the new provision does not create an "entirely new element" but is built upon the judicial experience recognizing the importance of the court's evaluation of proposed class counsel. Before the amendment, the sole provision that guided courts in selecting the class representative and counsel was that they must "fairly and adequately protect the interests of the class," as stated in Rule 23(a)(4). In contrast to what happens in an individual litigation, where "a client . . . chooses a lawyer, negotiates the terms of the

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> [t]he authority to direct notice to class members in a (b)(1) or (b)(2) class action should be exercised with care. For several reasons, there may be less need for notice than in a (b)(3) class action. There is no right to request exclusion from a (b)(1) or (b)(2) class. The characteristics of the class may reduce the need for formal notice. The cost of providing notice, moreover, could easily cripple actions that do not seek damages. The court may decide not to direct notice after balancing the risk that notice costs may deter the pursuit of class relief against the benefits of notice.

Id. However, if a Rule 23(b)(3) class is certified in conjunction with a (b)(2) class, the (c)(2)(B) notice requirements must be satisfied as to the (b)(3) class.

[206] *Cf.* Moore, *supra* n. 72, at § 23.160; Wright, Miller & Kane, *supra* n. 78, at § 1753.1, 53.

[207] *Cf. MCL 4th*, *supra* n. 55, at § 21.31, 285; *id.* at § 21.312, 293; Wright, Miller & Kane, *supra* n. 78, at § 1797.6, 196. Nonetheless, while Wright, Miller & Kane affirm that the 23(e)(1)(B) notice is not to be sent to those that have already opt-out in a 23(b)(3), the Manual of Complex Litigation asserts that even those persons should once again be notified to check their interests "to opt back into the class and participate in the proposed settlement." *MCL 4th*, *supra* n. 55, at § 21.312, 294. For a broad and deep critique to this second opt-out notice in Rule 23(b)(3) classes, *see* Rosenberg, *Adding a Second Opt-Out*, *supra* n. 21, passim.

engagement, and monitors the lawyer's performance," in class actions, this task is performed by the judge "who creates the class by certifying it and must supervise those who conduct the litigation on behalf of the class. The judge must ensure that the lawyer seeking appointment as class counsel will fairly and adequately represent the interest of the class."[208]

Hence, with almost the same content as subsection 23(a)(4), concerning the class representative, subsection 23(g)(1)(B) establishes that "an attorney appointed to serve as class counsel must fairly and adequately represent the interest of the class."[209] However, this mandatory rule does not purport to supersede or affect the interpretation of other legislations that provide otherwise. For instance, the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in various sections of §15 U.S.C.), contains provisions that bear on the selection of a lead plaintiff and the retention of counsel. In this sense, it is valid to affirm that the class counsel, conducting the class action, has a much higher responsibility to the members of the class than a lawyer in an individual lawsuit.

The new subsection also provides a method by which the court may make directions, from the outset, about the potential fee award to class counsel in the event the action is successful (Rule 23(g)(2)(C)). The Advisory Committee Notes asserts that "[c]lass counsel must be appointed for all classes, including each subclass that the court certifies to represent divergent interests."[210] In such a case, the logical appropriate conduct is to appoint counsel for each different class, exactly because there are divergent interests within them and a single lawyer would not be able to perform his duties because of the conflicting interests.[211]

Moreover, the new subsection (g)(1)(C) stipulates the issues that the court must and may consider in appointing the class counsel. The

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[208] *Cf. MCL 4th*, *supra* n. 55, at § 21.27, 278. The Advisory Committee Notes to the 2003 Amendment state:

> Paragraph 1(B) [of subdivision 23(g)] recognizes that the primary responsibility of class counsel, resulting from appointment as class counsel, is to represent the best interests of the class. The rule thus establishes the obligation of class counsel, an obligation that may be different from the customary obligations of counsel to individual clients. Appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it. The class representatives do not have an unfettered right to "fire" class counsel. In the same vein, the class representatives cannot command class counsel to accept or reject a settlement proposal. To the contrary, class counsel must determine whether seeking the court's approval of a settlement would be in the best interests of the class as a whole.

Fed. R. Civ. P. 23 (Advisory Committee Notes 2003 Amendment).

[209] Fed. R. Civ. P. 23(g)(1)(B).

[210] Fed. R. Civ. P. 23 (Advisory Committee Notes 2003).

[211] *See MCL 4th*, *supra* n. 55, at § 21.27, 278.

subsection serves also to inform class counsel seeking appointment, as explained by the notes of the Advisory Committee. The court must consider: a) the work counsel has done in identifying or investigating potential claims in the action; b) the counsel's experience in handling class actions, other complex litigation, and claims in type asserted in the action; c) the counsel's knowledge of the applicable law; and, d) the resources counsel will commit to representing the class. The court may: "consider any other matter pertinent to the counsel's ability to fairly and adequately represent the interest of the class," and "direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs," and "make further orders in connection with the appointment."[212]

b) Subsection 23(h)

Even though the Advisory Committee Notes affirmed that "[f]ee awards are a powerful influence on the way attorneys initiate, develop, and conclude class actions,"[213] the new subsection 23(h) made no substantial modification, whatsoever, to the traditional system of awarding attorney fees in class actions. In summary, the rule stipulates the need of a motion for the award of attorney fees to be made according to Rule 54(d)(2) by authorizing any class member or the party whom the payment is sought to object the motion, prescribing the possibility of a court's hearing and findings for its conclusion, and referring to a special master or magistrate judge the issues related to the amount of the award.

3. Attorney Fee Award

Although a lawyer as a class counsel in a collective litigation has a very peculiar position different from the position he holds in ordinary, separate litigation, the main incentive is the same in both situations: compensation for exercising his job.[214] Setting aside other factors that may stimulate the lawyer, such as personal satisfaction, social recognition, or ideological, religious, or political motivations, the enticement for the work done is the fee that compensates the investment (of time, resources, expertise, etc.) spent in the litigation.[215]

The plaintiff's counsel in class actions is usually identified as a "private attorney general," the lawyer that prosecutes actions on behalf of numerous individuals similarly situated, which they would not do

[212] Fed. R. Civ. P. 23(g)(1)(C)(ii)–(iv).
[213] Fed. R. Civ. P. 23 (Advisory Committee Notes 2003).
[214] *See supra* pt. IV(D)(2)(a).
[215] Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 952 (1995); *Developments in the Law – The Paths of Civil Litigation: V. Class Actions: Market Models for Attorneys' Fees in Class Action Litigation*, 113 Harv. L. Rev. 1827, 1829 (2000).

individually. It is said that the expression "private attorney general" was created by Judge Frank in delivering the opinion of the Second Circuit in *Associated Industries of New York State v. Ickes*.[216] Consequently, there is often a great inducement for the attorney to prosecute the action because of the large expected reward. On the other hand, the attorney for a defendant class does not have enough incentive to litigate the defense for the class. This is a consequence of the absence of a system that optimizes the scale economy of aggregating the defendants to distribute the costs of the litigation among all the class members.[217]

The most conventional method of compensating the plaintiff's class counsel is the "common fund," where he creates or preserves a fund for the benefit of the whole class and is paid with money from this fund.[218] The court award of attorney fees is justified under the doctrine that members of the class in the collective suit, who obtained a benefit from the lawsuit without compensating for its costs, are unjustly enriched. There are two major methods, with some variations and combinations within them, to calculate the attorney fees in "common fund" cases: (i) the "percentage method," a percentage of the fund generated by the lawyer activity; or; (ii) the "lodestar method," based on the number of hours reasonably expended multiplied by the market rate of the lawyer's services.[219] Hence, in defendant class actions where there is a preexisting common fund or an escrow account, the legal expenses that the representative party has incurred, especially the attorney fees, are to be paid from those sources.[220]

Nevertheless, this is a very unlikely situation. In any lawsuit, a favorable adjudication to the plaintiff will confer him either a monetary

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[216] 134 F.2d 694 (2d Cir. 1943).

> Instead of designating the Attorney General, or some other public officer, to bring such proceedings [to vindicate of the public or the government], Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then, in like manner, there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, *private Attorney Generals.*

Id. at 704 (emphasis added). *See* Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 71-73 (Rand Inst. 2000); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669 (1986).

[217] *See supra* pt. IV(A).

[218] *See e.g. Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375 (1970); *C. R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885); *Trustees v. Greenough*, 105 U.S. 527 (1882).

[219] For commentaries and critiques of both methods of calculating the attorneys' fees, *see MCL 4th*, *supra* n. 55, at §14.12, 186-96.

[220] *See Cranston v. Hardin*, 504 F.2d 566 (2d Cir. 1974); *German Evangelical St. Marcus Congregation v. Archambault*, 404 S.W.2d 705 (Mo. 1966).

award or injunctive or declaratory relief. On the contrary, to the defendant a victory is always a declaratory judgment. The advantage that the lawyer confers upon the defendant class is to impede any money disbursement or to establish by the court's decision that the plaintiff has no rights or claims enforceable against them. In those scenarios, there would be no money collected that could be partially used to compensate the lawyer's work.

Alternatives to compensate the class counsel, based on the appointment of a wealthy class representative, or one that has a high stake in the dispute, results invariably in fractional aggregation of defendants.[221] This rationale lacks consideration of the primary scope of the collectivized procedures, that is to aggregate the defendants in order to attain economy and investment scales in the litigation. Another solution involving the creation of special interest organizations[222] does not suffice either, especially in cases where the defendants' stakes are low, as it happens in television signal piracy (*DirecTV* case) or copyrighted works violated through the Internet (*Grokster* case).[223] First, there is no incentive for the aggregation of the defendants in such organizations. Second, these sorts of associations frequently have deficient resources to engage in class action litigation.[224]

The optimal law enforcement system requires mandatory aggregation of plaintiffs and defendants, and in turn, the optimal incentive to the defendant class counsel is achieved by awarding attorney fees by means of a fee-shifting system. The method of awarding attorney fees to the prevailing party in the litigation by taxing the defeated party, is a rule in England and in most of civil law countries. It is often referred to as "English rule" or "indemnity rule." In the United States, the so-called "American rule" or "statutory rule" stipulates that each party bears its own litigation expenses, including the compensation for the lawyer.[225]

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[221] *See e.g.* Wolfson, *supra* n. 96, 485-88.

[222] I use the expression "special interest organization" because these organizations are concerned about the interest of a special sector of the society. Therefore, organizations need not, at least not all of them, seek public goals in order to be called "public interest organizations."

[223] In the Internet music downloading case, a special interest organization has been created—the "Electronic Frontier Foundation ("EFF")." In spite of the fact that the EFF has helped individuals in separate lawsuits brought by the copyright holders, it has not stepped up and required the certification of a defendant class. However, the EFF filed a class-action lawsuit against AT&T on January 31, 2006, "accusing the telecom giant of violating the law and the privacy of its customers by collaborating with the National Security Agency ("NSA") in its massive, illegal program to wiretap and data-mine Americans' communications." *See* Electronic Frontier Foundation, *EFF's Class-Action Lawsuit Against AT&T for Colaboration with Illegal Domestic Spying Program*, http://www.eff.org/legal/cases/att (accessed May 30, 2006).

[224] *See* Hensler, *supra* n. 216, at 71 ("Organizations such as the American Liberties Union ("ACLU"), NAACP, and the National Organization for Women ("NOW") do bring class actions. But, in practice, most public interest organizations also have insufficient resources to engage in systematic monitoring of corporate behavior and extensive class action litigation.").

[225] *See Alyeska Pipeline Serv. Co. v. Wilderness Socy.*, 421 U.S. 240 (1975). "In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Id.* at 247. "[T]he general practice of the United States is in opposition [sic] to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute." *Id.* at 249-50 (citation omitted).

Nevertheless, fee-shifting rules are provided in several statutes and mostly "serve[] the public policy of encouraging private enforcement of statutory or constitutional rights."[226] In addition, Rule 11 of the Federal Rules of Civil Procedure provides for legal ethics and good faith in litigation, establishing sanctions for frivolous representation to the court, which includes the payment of "some or all the reasonable attorneys' fees" in favor of the movant party. The "prevailing party" in a fee-shifting case was defined by the Supreme Court in *Buckhannon Board & Care Home, Inc. v. West Virgina Department of Health & Human Resources*, as the one that has altered its legal relationship with its adversary through a judgment or consent decree entered by the court.[227]

Although there is vast literature on the economic analysis of fee-shifting, my assumption advances the subject of the attorney fees for the defendant class lawyer.[228] Even though it is my understanding that defendant-favoring fee-shifting is the optimal mechanism for every defendant class action, this paper's focus is on the analysis of suits where the defendants' stakes are low, stimulating nuisance value suits brought by plaintiffs.

Defendant-favoring fee shifting is considered fee-shifting on a one-way (or one-side) basis, granting fees only to the defendant's attorney when the defendants prevail in the lawsuit, but not awarding fees to the plaintiff's lawyer even if he wins the case. The proposed model addresses the problem of motivating the attorney, the class representative, to present a defense instead of settling with the plaintiff in nuisance value suit. The settlement is the likely solution in this kind of suit because of the asymmetry between the costs of separate litigation and the settlement offered by the plaintiff due to the absence of the defendant class action. The settlement makes the defendant better off in separate litigation, but not in a collective procedure because the cost of litigation is shared with the members of the class. The aggregation of defendants and the optimal attorney fee award leads to the

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[226] *Cf. MCL 4th*, *supra* n. 55, at § 14.13, 196. "Although, as will be seen, Congress has made specific provision for attorneys' fees under certain federal statutes, it has not changed the general statutory rule that allowances for counsel fees are limited to the sums specified by the costs statute." *Alyeska*, 421 U.S. at 254-55. "[A]bsent statute or enforceable contract, litigants pay their own attorneys' fees." *Id.* at 257.

[227] 532 U.S. 598, 604 (2001).

[228] For a survey of literature on fee-shifting, *see* Kathryn M. Christie, *Attorney Fee-Shifting: A Bibliography*, 47 L. & Contemp. Probs. 347 (1984). For empirical studies of fee-shifting, *see* James W. Hughes & Edward A. Snyder, *Litigation and Settlement under the English and American Rules: Theory and Evidence*, 38 J.L. & Econs. 225, 249 (1995) (concluding that the English rule likely reduces the frequency of low-merit claims and lessens the overall probability of litigation); Edward A. Snyder & James W. Hughes, *The English Rule for Allocating Legal Costs: Evidence Confronts Theory*, 6 J.L., Econ., & Org. 345, 377 (1990) (arguing that fee shifting encourages parties to litigate). For the effect of the different methods of allocation of legal costs on the level of litigation, *see* Dewees, Prichard & Trebilcock, *supra* n. 196; Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs*, 11 J. Leg. Stud. 55 (1982).

optimal law enforcement system.[229]

Similar to contingent fee arrangements on the plaintiff's side, the class counsel in a defendant class action assumes the risk of the litigation. Consequently, the strategies for the lawsuit are made on the lawyer's assessment of expected gains and losses; thus, he will only represent the defendants if the expected value of the litigation is positive to him. The investment made by the lawyer equals the compensation he is expecting to obtain with the fees. The one-side fee-shifting compensates the lawyers' legal services and the loan of such services with a higher risk of default than an ordinary market loan remaining in cases for many years outstanding without any interest and to be repaid only and if the lawsuit is successful.[230] Although there is no conclusive analysis, based on empirical studies about fee-shifting effects on the level of litigation or the tendency of going to trial instead of settling the case or even the increment of legal expenditures in trial, the use of defendant-favoring fee-shifting achieves the collective procedure goals of access to justice and equilibrating the parties to the suit.[231]

In addition, the one-way use of indemnification is socially desirable in order to prevent nuisance value suits. A plaintiff unwilling to go to trial because it would not be cost effective would refrain from filing a nuisance suit, as stated by Professors Rosenberg and Shavell: "Under the British system, a plaintiff who would be unwilling to litigate would never file a claim; in particular, *nuisance suits would never occur*."[232] The fee-shifting system impedes nuisance value suits, since there are no actual economic threats against the defendant because the judgment in his favor would shift the costs that the former has incurred retaining a lawyer and other taxable litigation costs to the plaintiff.

Of course in circumstances where the plaintiff shows to be judgment-proof, the fee-shifting rule would be inefficient. But this is not a peculiar situation for defendants' attorneys, as it can happen as well to the plaintiff's lawyer. The solution would require a security for costs posted in the outset of the lawsuit.[233] Considering that there is no money changing hands when the defendant prevails, the appropriate scheme to award the class counselor fees is the lodestar method.[234] The court order certifying a

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[229] *See supra* pt. IV(B) (numerical examples).

[230] *See* Posner, *Economic Analysis*, *supra* n. 24, at 584.

[231] *Id.* at 590; *see also* Shavell, *Foundations of Economic Analysis*, *supra* n. 24, at 429-32.

[232] Rosenberg & Shavell, *supra* n. 173, at 5 (emphasis added). *See also* Lucian Arye Bebchuk & Howard F. Chang, *An Analysis of Fee Shifting Based on the Margin of Victory: On Frivolous Suits, Meritorious Suits, and The Role of Rule 11*, 25 J. Leg. Stud. 371 (1996); Shavell, *Foundations of Economic Analysis*, *supra* n. 24, at 399.

[233] *See* Phillip J. Mause, *Winner Takes All: A Re-Examination of the Indemnity System*, 55 Iowa L. Rev. 26, 52-53 (1969).

[234] *See MCL 4th*, *supra* n. 55, at § 14.13, 197.

defendant class action should appoint the class counsel (Rule 23(c)(1)(B) combined with Rule 23(g)(1)(A)), requiring him to formulate a proposal of fees. The proposal should present an estimate of the number of hours that reasonably should be spent in the lawsuit, and the market value of the hourly charges for lawyers' services (Rule 23(g)(1)(C)(iii)). The advantages of the defendant-favoring fee-shifting system include: (i) overcoming the asymmetric costs between separate litigation and collective suit, aggregating the multitude of defendants, (ii) compensating the class counsel by equalizing his investment in the litigation with the amount of the fees award; and (iii) precluding nuisance value suits.

V. CONCLUSIONS

In the twenty-first century, the idea of "mass society" has deeply evolved. We live in an information society, where the offering of services and goods are made by sophisticated communication links, especially the Internet. These massive and expeditious relationships induce lawful and unlawful behaviors. Therefore, law operators must make a substantial modification of law enforcement and choose a solution to achieve the optimal enforcement level. In order to achieve this goal, the ideal model of the law enforcement system grants everyone the best well-being, before and after the fact of a given situation, due to optimal deterrence of unreasonable risks, optimal insurance of reasonable risks, and optimal redistribution of wealth by progressively funding the preceding two elements. This theory is based on the individuals' rational choice of their maximum well-being.

The best solution is to use mandatory defendant class action, because it confers to individuals' maximum well-being and takes into consideration the deterrence function of the law as well as its insurance objective. The result is that the ideal of distributive justice is better served, with the procedural law being considered as a tool to achieve the principles enacted in the substantive law. The mandatory defendant class action permits dispersed individuals to exploit the scale of economy and investment in the common defenses in the litigation. Furthermore, the compulsory aggregation of defendants and defenses avoids the threat of nuisance value suits brought by a single plaintiff, or even a plaintiffs' class.

Besides the mandatory aggregation of the defendants, the optimal law enforcement system requires optimal incentive to the defendant class counsel. Different from the plaintiff's perspective, a victory in the litigation to the defendant is always a declaratory judgment. The advantage that the lawyer confers upon the defendant class is to impede any money disbursement or to establish by the court's decision that the plaintiff has no rights or claims enforceable against them. Usually, there is no money to be collected that could be partially used to compensate the lawyer's work.

Consequently, the optimal incentives to the defendant lawyer might be obtained by awarding attorney fees by means of a fee-shifting method.

The specific model proposed is of a defendant-favoring fee-shifting, where the fees are granted to the defendant attorney only when the defendant prevails in the lawsuit, but no fee is awarded to the plaintiff's lawyer, even if he wins the case. This method of awarding attorney fees considers the fact that the lawyer is assuming the risk of the litigation. All strategies for the lawsuit are made on the lawyer's assessment of expected gains and losses; thus, he will only represent the defendants if the expected value of the litigation is positive to him.

Because no money changes hands when the defendant prevails, the appropriate scheme to award the class counselor fees is the lodestar method, when the court should require, at the moment of certification of the defendant class and appointment of the counselor, an estimate of reasonable number of hours to be spent in the lawsuit and the respective market rate for the legal fees. The investment made by the lawyer equals the compensation he is expecting to obtain with the fees. The one-side fee-shifting compensates the lawyers' legal services and the loan of such services, with a higher risk of default than ordinary market loan, remaining in cases for many years outstanding without any interest and to be repaid, only if the lawsuit is successful.