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SYMPOSIUM

Studying Civil Litigation Through the Class Action

BRYANT G. GARTH*

INTRODUCTION

Class actions rest on a relatively simple proposition: self-selected class representatives and their lawyers, properly supervised by the court, can represent class members as a group sufficiently well to overcome members' individual rights to be heard. As a general, non-legal, principle, this statement seems straightforward and even natural: interests are represented by persons and institutions not necessarily selected by their constituencies in much of everyday life.[1] As a legal principle, however, it excites considerably more controversy. The flood of legal scholarship, here and abroad,[2] on the class action continues unabated. The work produced for this symposium shows that we are as willing as ever to re-examine class actions. The fascination of foreign scholars with class actions is fairly easy to explain: this principle of representation remains unacceptable to almost the entire legal world outside of the United States.[3] The continuing preoccupation of proceduralists

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1. On questions of representation in class action litigation, see, e.g., Garth, *Conflict and Dissent in Class Actions: A Suggested Perspective,* 77 NW. U.L. REV. 492 (1982); Rhode, *Class Conflicts in Class Actions,* 34 STAN. L. REV. 1183 (1982); Simon, *Visions of Practice in Legal Thought,* 36 STAN. L. REV. 469 (1984); Yeazell, *From Group Litigation to Class Action Part II: Interest, Class, and Representation,* 27 UCLA L. REV. 1067 (1980).

2. *See, e.g.,* ONTARIO LAW REFORM COMMISSION, REPORT ON CLASS ACTIONS (1982); Koch, *Class and Public Interest Actions in German Law,* 5 CIV. JUST. Q. 66 (1986); Uff, *Class, Representative and Shareholders' Derivative Actions in English Law,* 5 CIV. JUST. Q. 50 (1986).

3. *See generally* Cappelletti & Garth, *Finding an Appropriate Compromise: A Comparative Study of Individualistic Models and Group Rights in Civil Procedure,* 2 CIV. JUST. Q. 111 (1983).

in the United States, however, requires more thought. Surely it is no longer the novelty of class actions as a legal matter in this country.

A better explanation takes us beyond class actions. My suggestion is that much of the most instructive scholarship in this area uses the class action to gain access to puzzling issues that underlie civil procedure itself. Class actions are interesting but not just because they connote high powered and fancy litigation. The reliance on an expanded principle of representation highlights the conflicts and dilemmas of legal representation generally. In addition, the swollen and somewhat distorted character of litigation in the form of the class action enables us to see some features of ordinary litigation that are normally hidden. While I do not want to exaggerate the lessons to be learned, it is useful to see what can be found by looking at class actions as a species of ordinary litigation.

Class actions from this perspective help us rethink some basics of civil procedure. A number of fundamental procedural questions can be seen, for example, in the discussions of class actions collected for this symposium. The most obvious of such questions include the following: What is a party?[4] How important in a procedural system are such social values as law enforcement, economic efficiency, and access to the legal system?[5] Can individualized judicial systems serve a mass public? What should be the role of lawyers as compared to the litigants? What kinds of factors affect the critical decisions made by lawyers? What is the appropriate social role of the courts, federal and state?[6] Part of the appeal of class action research, it might be noted, stems from the difficulty of these questions. They are not very much fun to try to resolve in the abstract.

This Introduction in any event is not the place to try any overly ambitious reconsideration of class actions, much less of civil litigation. If we take the connection of class actions and ordinary litigation as an organizing theme, however, a couple of interesting points might be made as a way to introduce the following articles. First, the articles might be read more profitably if we relate them to more than just the class action literature. Second, I can add to the contributed articles a one-idea, mini-essay on class actions focusing on the problem of certification. And finally, perhaps stretching a bit, I shall try to subject my mini-essay to the theme of this Introduction: what class actions teach about ordinary litigation. The suggestion will be that we ought to think about civil litigation more from the perspective of what will be termed "settlement events."

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4. *See, e.g.*, J. Vining, Legal Identity (1978).

5. *See, e.g.*, R. Posner, The Federal Courts: Crisis and Reform (1985); Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. Chi. L. Rev. 494 (1986).

6. *See, e.g.*, F. James & G. Hazard, Civil Procedure 279-300 (1986).

I. Class Action Essays as Studies in Civil Procedure

Professor Sherman's article uses the class action to raise basic questions that proceduralists have not dealt with well. He asks how courts in different jurisdictions should resolve questions of duplicative litigation. While such problems occurring on a small scale can often be ignored as a matter of serious concern, we cannot avoid such questions when the choice is between one swollen but manageable lawsuit and a series of individual suits set all over the country and in different kinds of courts. Once we confront the general concern in the class action setting, however, we can see that the principles of analysis are essentially the same ones that could be developed for other duplicative litigation. And they will become increasingly important as courts get bombarded with repetitive situations and cases.

Professor Rosenburg's article addresses the related problems of justice in settings of mass torts. He uses the context of class action litigation to wrestle with the perplexing problem of how individual or private justice relates to collective or bureaucratic justice. The class action poses the issue, which relates to Professor Sherman's concern about when duplication should be permitted or denied. The broad question is how resources should be allocated between individualized, costly justice and a mass, wholesale form of justice.[7] Using class actions as a take-off point, Professor Rosenburg thus illuminates the approaches that can be taken to particularly troubling cases like the asbestos litigation, contamination by Agent Orange, and mass disasters such as that involving Union Carbide in Bhopal.

Professor Wood's article indirectly raises a comparable question. How much should we be permitted to draw in parties in order to concentrate litigation into one proceeding? Her specific analysis concerns the difficulties that have occurred in the application of principles of personal jurisdiction to the class action context. As she points out, that analysis "in turn has suggested . . . more general difficulties [in the area of personal jurisdiction]."[8] The fragments and interests comprising class action "parties" raise questions of the role of state sovereignty in personal jurisdiction and of which kinds of interests can be bound from a distance in the name of efficiency.

Professor Coffee takes class action litigation and uses it to develop a new wrinkle on the understanding of attorney behavior: how "agency costs" and "asymmetrical stakes" affect the litigation choices and settlement conduct of the parties and especially the lawyers. While specifically directed to class actions, it is clear that the hypotheses he works with have considerable explanatory power for much of ordinary litigation as well. There are specific economic reasons to expect lawyers to make certain kinds of choices and

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7. *See, e.g.,* Calabresi, *Access to Justice and Substantive Law Reform: Legal Aid for the Lower Middle Class,* in Access to Justice: Emerging Issues and Perspectives 169 (M. Cappelletti & B. Garth eds. 1979).

8. Wood, *Adjudicatory Jurisdiction and Class Actions,* 62 Ind. L.J. 597 (1987).

also to explain why clients may assert very little control over these choices. Much empirical and theoretical work is needed to explore these incentives and their impact on the world of lawyers and clients.

Finally, Professor Bogart, writing from a Canadian perspective, finds that he cannot discuss class actions without moving quickly to the fundamental questions about the role of the courts. The growing interest in class actions in Canada relates in important respects to the transformation in courts supported by the Canadian Charter of Rights and Freedoms and the system of judicial review it brought. To return to a point raised earlier, the simple legal principle underlying class actions gains appeal only where certain ideas about courts also gain ascendancy. Britain, for example, has the same heritage of equity that we do in the United States, but the class action has prospered out of that heritage here while becoming a relatively unimportant feature of civil litigation in Britain.[9]

Each of these authors writes about the class action but inevitably confronts more fundamental questions of civil litigation. The exaggerated events of class litigation thus help us to see some more or less hidden questions about civil courts and society. Indeed, to make the point even more obvious, all writers on the subject of class actions must somehow confront or finesse the threshold questions, raised specifically by Professor Bogart, about the appropriate role of the courts. One cannot really define the "function" of the class action without considering the question of what courts are for. We are in a period in the United States where the appropriate role of courts is the subject of intense political debate.[10]

II. Another Perspective: Certification and Settlement in Class Action Litigation

Moving now to matters of empirical detail, this section will add a brief discussion of the certification decision in class action litigation. This switch in topics can be defended in several ways. Each of the other articles about the United States relates closely to the court's decision whether or not to certify a class. At that stage, the court specifies the contours of the class and decides how far it will go to allow or defeat competing individual lawsuits. For present purposes, however, I will draw more on the approach taken by Professor Coffee before trying, as noted before, to relate findings about certification to general themes in civil litigation.

In one sense the centrality of the certification decision is obvious.[11] In the federal courts or state courts with rules analogous to Federal Rule 23, a lawsuit cannot proceed as a class action unless it is certified under one of

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9. "English law has not so far developed a 'class' action of a kind similar to those already existing or proposed in North America . . . ." Uff, *supra* note 2, at 60.

10. *See* sources cited *supra* notes 5-6; Fiss, *Against Settlement,* 93 Yale L.J. 1073 (1984).

11. *See* 2 H. Newberg, Class Actions 2-12 (1985); Manual for Complex Litigation (Second) § 30.1 (1985).

the three subdivisions of 23(b).[12] There is no necessary reason why that important decision should be more important than any other crucial procedural step, but the consensus is that certification is the major event. Some empirical data collected as part of a study by Ilene Nagel, S. Jay Plager, and myself of class action litigation in the Northern District of California,[13] support this assertion and provide a starting point for further reflection.

First, most class actions, like most litigation, settle prior to trial. Of the forty-six certified class actions[14] that we studied in the Northern District of California, thirty-six were settled and ten litigated. While the number litigated may seem high compared to non-class actions, five of the litigated class actions involved governmental defendants. Governmental defendants, for a variety of reasons, tend to litigate more often than private defendants.[15] What is much more striking, however, is that none of the seventy-three uncertified class actions in the Northern District resulted in litigation. Eleven were settled formally, thirty-two were dismissed, and defendants won summary judgment nineteen times. Plaintiffs succeeded in winning the non-class suits only four times, through summary judgment.[16] The comparison between the two sets of suits filed as class actions suggests very strongly that the failure to win certification reduces the bargaining power of the plaintiff and the will to continue the fight.

The importance of the certification decision is also made clear by the attention paid to it by the litigants. According to our data, certification was contested in thirty-five of the forty-six certified class actions; and obviously it was not conceded in the actions that were not certified. The tactics used to fight certification included the production of massive documents in opposition and the use of quite aggressive discovery tactics; twenty-seven cases involved at least one deposition of a named plaintiff; and it was not unusual to attack all the elements of Rule 23 necessary for class certification. One lawyer whom we interviewed characterized defense tactics as follows: first they attack the plaintiff, next the competence of plaintiff's lawyers, and then the ethics of plaintiff's lawyers.[17]

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12. The two most often used subdivisions are 23(b)(2) for primarily injunctive relief and 23(b)(3) for damages.

13. Grant No. SES 82-18926 from the National Science Foundation to a project entitled, "Dispute Transformation and the Dynamics of Legal Representation in Class Action Litigation."

14. Our data actually refer to class action clusters: cases grouped together for purposes of pretrial and trial proceedings.

15. The most obvious reasons stem from the fact that the government, as a "repeat-player litigant," faces different incentives for litigation and settlement. *See* Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change,* 9 LAW & SOC'Y REV. 95 (1974).

16. The characteristics of certified and non-certified cases are discussed in Garth, Nagel, & Plager, The Institution of the Private Attorney General: Perspectives from the Empirical Study of Class Action Litigation (unpublished manuscript). It should be noted that motions to certify were not made in two-thirds of the uncertified cases, but that does not suggest less importance for the decision, only that it became clear that certification would not be possible.

17. We have interview data from 43 plaintiffs' lawyers who handled class actions terminated in the period 1979-1983.

After the class certification struggle, however, the process somehow tends to cool. The named plaintiff recedes into the background and the lawyers for both sides begin to negotiate in earnest.[18] The image recalls a border dispute between two nations who fight a couple of battles very tenaciously and then decide to negotiate a settlement on the basis of a mix of perceived power and international principle. The battles may be extraordinarily hard fought, but the contestants nevertheless are able to switch to a new stage where the dispute is contested quite differently. Certainly there are exceptions to this pattern, but the shift in approaches before and after certification is pronounced enough to merit some explanation.

There are no obvious reasons for the centrality of the certification decision in determining the parties' settlement behavior. Most of negotiation theory contemplates a continuing reevaluation of a case as more expenditures are made and more information obtained.[19] While not necessarily wrong, that approach requires some further elaboration to account for the dynamics of settlements in class actions.

Some plausible reasons can be enumerated to explain the importance of certification in the conduct of settlement discussions. (1) Class certification makes such a difference in the settlement value of the case that defendants will not take plaintiffs' claims seriously until certification is achieved. (2) The result of certification is to clear up uncertainty. It lets the parties know just how far the lawsuit extends in terms of the defendant's conduct, the number of plaintiffs' potentially making claims, and the potential remedy. (3) The lawyers on each side can demonstrate in the pre-certification skirmishes their quality and commitment to the litigation. (4) By the time of certification, the parties have some sense of the attitude of the trial judge to the case. (5) It is in the interests of lawyers on both sides to clock a substantial number of billable hours but not an "excessive" amount.[20] (6) Settlements can be evaluated and compared better if they are made at roughly the same stage of the lawsuit. (7) A busy lawyer with a diverse portfolio of cases can manage the portfolio by checking on the value of the investment at certain strategic times. (8) Finally, it may be that the pattern of fight and settle, once set, assumes a kind of ritualistic character that serves to reinforce the pattern.

All these factors require some specific investigation, even as applied to class action litigation. For present purposes, however, I want to ask if this approach suggests any lines of inquiry for ordinary litigation. Might we be witnessing part of a more general phenomenon?

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18. Sometimes, it should be noted, the parties see certification coming and negotiate a settlement in conjunction with the certification.

19. On negotiation theory, see, e.g., H. Raiffa, The Art and Science of Negotiation (1982); Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory,* 1983 Am. B. Found. Res. J. 905.

20. On the factors that affect lawyer effort in terms of hours, see H. Kritzer, W. Felstiner, A. Sarat & D. Trubek, The Impact of Fee Arrangement on Lawyer Effort (Disputes Processing Research Program, University of Wisconsin-Madison, Working Paper 7-3, 1984).

III. Settlement Events: A Neglected Perspective?

There has been a tremendous surge of interest recently in the settlement of civil litigation prior to trial on the merits. One focus has been on the managerial behavior of judges.[21] Another has been on new mechanisms that provide an alternative trial-like proceeding, such as the summary jury trial, or court-annexed arbitration.[22] What has happened to these experiments, however, is that they are defended less because they put a stop to the proceeding and more because they somehow precipitate settlements. For example, court-annexed arbitration is economically viable only if the vast percentage of the non-mandatory arbitration proceedings is not appealed to a trial de novo. It turns out that appeals typically are filed, but then the cases are settled out of court.[23] The arbitration experiment, like the managerial judge, is then praised mainly for the contribution to the settlement process.

As critics have noted, however, it is not clear whether any of these artifices actually increases the settlement rate.[24] The percentage of settlement in civil litigation has been very high for some time, and it has not changed significantly with these innovations. It is tough to develop data to see who is right, but we might clarify the matter by borrowing from the preceding discussion of class action certification and settlements. Perhaps these two positions on alternative mechanisms to promote settlement can be explained by thinking more about what can be termed the "settlement event." It is quite possible that the new mechanisms are quite effective in promoting settlements but still have no impact on settlement rates.

A settlement event can be defined as a point in the litigation process that generates serious settlement negotiations. Mandatory arbitration or conciliation may or may not be such an event. The 120-year French experience with mandatory conciliation, inspired by the ideals of the French revolution, suggests that conciliation failed miserably and became just another formality.[25] Commentators suggested that the parties and counsel simply knew too little about their own cases and those of their opponents at the time of conciliation to allow meaningful negotiations. Conciliatory talk is not enough if parties are not positioned to settle. French conciliation did not become a successful settlement event.

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21. *See, e.g.*, Galanter, "*. . . A Settlement Judge, not a Trial Judge:" Judicial Mediation in the United States*, 12 J.L. & Soc'y 1 (1985); Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. Rev. 485 (1985).

22. *See* Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning, and Alternative Dispute Resolution*, 37 Rutgers L. Rev. 235 (1985).

23. *See, e.g.*, E. Lind & J. Shapard, Evaluation of Court-Annexed Arbitration in Three Federal District Courts (1983).

24. Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374, 417-31 (1982).

25. The *grande conciliation* before the French *tribunal civil* was required from the mid-19th century until 1949. Reportedly only nine percent of such conciliation attempts in later years, such as 1942, ended with successful conciliation. *See* Thery, *Access to Justice in France*, in Access to Justice: A World Survey 479, 510 (M. Cappelletti & B. Garth eds. 1978).

On the other side, however, the settlement event need not be one designed explicitly with the idea of promoting settlement. My suggestion is that the certification decision in class actions is one such event, and the question is whether there are analogs in ordinary litigation. We might look to see if factors such as those mentioned in the context of class certification apply to certain events of ordinary litigation. Such events, for example, would (1) affect substantially the potential value of a settlement; (2) clarify uncertainty about the value of the case; (3) allow lawyers to demonstrate their quality and commitment; (4) let lawyers gauge the approach of the judge; and (5) permit lawyers to work the number of hours they believe is economically appropriate.

If these factors promote settlement linked to certain events, such as certain motions like summary judgment, then a further dynamic can be hypothesized. First, the lawyer would gain more information cheaply by being able to compare settlements at similar stages of lawsuits, thus facilitating decisions on whether or not proposals are desirable. Second, and probably more significantly, lawyers could manage their portfolio of cases by evaluating cases only at certain strategic times. No one has the time to evaluate every case or investment continuously. Settlement events can become convenient times to take a look at the case as a lawyer investment. And finally, it may also make sense to see these events as becoming parts of customary practice or litigation ritual.

We can thus theorize why there might be particular settlement events in ordinary litigation, and the class action certification material at least suggests the idea has explanatory power in certain cases.[26] The next question is what this perspective adds to existing debates on civil procedure and civil litigation.

An understanding of how settlement events work may enable us to avoid "reforms" that may or may not themselves work better. Some aspects of ordinary litigation, for example, may generate settlements better than a novel reform such as court-annexed arbitration. The reform, as noted before, may not serve well as a settlement event. Unfortunately, we tend now to evaluate the settlement-inducing power only of artifices designed to pressure parties *explicitly* toward settlement. Neglecting the ordinary processes may cause us

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26. There is also evidence of shortcuts to settlement in other cases. *See, e.g.*, H. Ross, Settled Out of Court (2d ed. 1980); M. Melli, H. Erlanger & E. Chambliss, The Process of Negotiation: An Explanatory Investigation in the Divorce Context 15-16 (Disputes Processing Research Program, University of Wisconsin-Madison, Working Paper 7-1, 1985) (suggesting how in the divorce context 82% of parties tend to stipulate a final child support award based only on a temporary order designed specifically not to influence the final order); *see also* H. Kritzer, The Form of Negotiation in Ordinary Litigation 27 (Disputes Processing Research Program, University of Wisconsin-Madison, Working Paper 7-2, 1985) (noting, *inter alia*, that "negotiation in most cases involves two or fewer exchanges of offers and counteroffers"); H. Kritzer, The Lawyer as Negotiator: Working in the Shadows 12-15 (Disputes Processing Research Program, University of Wisconsin-Madison, Working Paper 7-4, 1986) (suggesting how decisions on motions by the judge "might be instrumental in leading to a settlement").

to contrive events that raise the costs to parties without improving the settlement rate, or to coerce the parties when they ordinarily would not have needed such external pressure to settle. Neither of those alternatives is very attractive. We should understand the settlement processes better before adding all kinds of new devices and changing judicial behavior. There may not be a problem to solve, or at least there may be less intrusive solutions.

CONCLUSION

It is difficult to conclude this Introduction with anything definitive. We have a serious literature on class actions, which I think is further enriched by the articles in this symposium. We also are in a period of tremendous intellectual ferment about civil litigation, the role of lawyers, and the role of courts. Both kinds of scholarly literature are made much stronger by a sense of detail and of the actual behavior of lawyers and clients. I have tried to draw on these three kinds of approaches in this Introduction, but have not had the time or space to develop the ideas sketched preliminarily here. I hope to persuade readers that this kind of inquiry makes sense and justifies more attention than can be focused here. I hope also that tentative ideas mentioned specifically will justify further investigation. Thinking of class certification as one of many possible settlement events may turn out to allow us to understand the processes of ordinary litigation better and prevent mistakes that come from a neglect of those processes.