Class Actions: Consumer Sword Turned Corporate Shield

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Class Actions: Consumer Sword Turned Corporate Shield?

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I should begin by making full disclosure. For those of you who do not know, although my firm and I are frequently called "plaintiff's lawyers," our practice is mixed: in approximately half of our cases we represent plaintiffs, and in the other half we represent defendants. We find ourselves on both sides of class action cases every day, in courts around the country.

I. INCREASING JUDICIAL HOSTILITY TO CLASS ACTIONS

A. A Vignette of Judicial Hostility to Class Actions: Rhone-Poulenc

Let me start by discussing a case that is well known, especially in the hallowed halls of The University of Chicago Law School. The case is *In re Rhone-Poulenc Rorer, Inc*¹—written in 1995 by the Law School's very own Judge Richard Posner. The *Rhone-Poulenc* case reached the Seventh Circuit on a writ of mandamus after the trial judge certified a class of hemophiliac

¹ Managing Partner, Susman Godfrey L.L.P., Houston, Texas. This article is based on remarks delivered at The University of Chicago Legal Forum Symposium, November 1–2, 2002. I would like to thank Suyash Agrawal, an associate at Susman Godfrey and an alumnus of The University of Chicago Law School for valuable research and editorial assistance. The title of this talk is adapted from John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum L Rev 370, 371 (2000).

¹ 51 F3d 1293 (7th Cir 1995).
patients who contracted HIV through exposure to the defendant’s contaminated treatment products. For our purposes, Rhone-Poulenc is not as important for its holding’s effect on class action law as it is for the insight it provides into the attitude of many courts toward class actions in general. You see, the problem for Judge Posner was not that he found certification improper; rather, the problem was that the Federal Rules at the time did not provide for appellate review of certification decisions. Judge Posner, therefore, had to adjudicate the case without completely abandoning his jurisdiction. How did he do this? He grafted his decertification ruling onto the extraordinary writ of mandamus. Judge Posner was concerned that the certification question was the be-all and end-all for the defendants in the litigation. Thus, he said that defendant corporations in class action suits had to either “stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability.” So much for judicial restraint.

The illuminating aspect of Rhone-Poulenc is not its outcome, but rather the lengths to which Judge Posner went to decertify the class. His maneuvering illustrates a broad trend in American courts today: a significant and increasing hostility to the class action mechanism, the result of which is diminished accountability of large corporate actors.

B. Legitimizing Rhone-Poulenc’s Activism: Interlocutory Appeals Under Rule 23(f)

In 1996, Federal Rule of Civil Procedure 23(f) was adopted as a response to Judge Posner’s procedural acrobatics in Rhone-Poulenc. Specifically, Rule 23(f) provides a mechanism for federal appellate courts to participate in the certification game without having to wait for a final adjudication on the merits or to resort to so extraordinary an action as a writ of mandamus. Under Rule 23(f), an appellate court has the discretion to grant an interlocutory appeal of a district court’s certification decision.

The Rutstein v Avis Rent-A-Car Systems, Inc case demonstrates the dangers of this new power of the federal appellate courts. In Rutstein, Jewish plaintiffs brought a civil rights law-
suit against the Avis Rent-A-Car company for denying them corporate accounts on the basis of religion, ancestry, and ethnicity. The proposed class involved:

All Jewish individuals and Jewish-owned businesses who . . . have attempted to contract, have contracted, or will in the future contract with Avis to open an account for use in their business, and who were refused an account, had their account canceled, or were given a less advantageous account because of their religion, ancestry, and/or ethnicity.

After the district court certified the class—concluding that all of the Rule 23(a) and Rule 23(b)(3) requirements were satisfied—Avis appealed certification under Rule 23(f). The Eleventh Circuit reversed, finding that simply having a policy of discrimination against Jewish businesses in awarding corporate accounts did not sufficiently meet the Federal Rules’ predominance requirement. Instead, each individual plaintiff would have to prove that Avis denied him or her a corporate account as a result of discrimination. Moreover, the Court held that, because the plaintiffs sought damages, each individual plaintiff would have to prove his or her own actual losses.

The Rutstein case highlights at least two major flaws with Rule 23(f). First, Rule 23(f) provides no standard of review to guide an appellate court’s interlocutory review of certification questions. As a result, although the Eleventh Circuit purported to apply the abuse of discretion standard of review, the opinion clearly reflects application of a clean-slate de novo review. Second, the case demonstrates a lack of restraint in determining when it is proper to grant permissive appellate review.

In the first Seventh Circuit case to address appeals under Rule 23(f), Blair v Equifax Check Services, Inc, Judge Frank H. Easterbrook (also of The University of Chicago Law School) proposed to deal with the lack of judicial restraint by establishing

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7 Id at 1232.
8 Id.
9 Id at 1233.
10 Rutstein, 211 F3d at 1233–36.
11 Id at 1235.
12 Id at 1239–40.
13 Id at 1233.
14 181 F3d 832 (7th Cir 1999). See also In re Delta Air Lines, 310 F3d 953, 957 (6th Cir 2002) (noting that Blair was the first Rule 23(f) case).
some guidelines governing when 23(f) appeals should be granted. To Judge Easterbrook, interlocutory appeals under Rule 23(f) are generally appropriate in the following circumstances:

1. "Death knell" cases: An appellate court should review a district court’s refusal to certify a class when that refusal is likely to end the litigation because individual actions would become uneconomical.\(^{15}\)

2. "Reverse death knell" cases: Appellate courts should review certification decisions in cases where certification would provide the defendant an irresistible motive to settle.\(^{16}\)

3. "Law clarification" cases: Rule 23(f) review might be appropriate to clarify law that would otherwise remain undecided. As Judge Easterbrook put it, "[b]ecause a large proportion of class actions settles or is [sic] resolved in a way that overtakes procedural matters, some fundamental issues about class actions are poorly developed."\(^{17}\)

Although not all the federal circuit courts have adopted Blair’s approach wholesale, a number of other circuits have drawn upon this framework in deciding whether to accept interlocutory appeals under Rule 23(f).\(^{18}\) These categories strike me as entirely questionable on the merits. The reverse death knell, in particular, seems to me unjustified. Certification is never the last chance for a defendant to avoid trial; summary judgment always remains available to defendants to prevent frivolous claims from forcing settlements.

But the merits of these categories are not the real point. The real point is that these categories do little genuinely to restrict judges intent on cabining the scope of class action practice. Indeed, almost all the circuit courts have specifically disclaimed any notion that the Blair categories comprise an exhaustive list

\(^{15}\) Blair, 181 F3d at 834.

\(^{16}\) Id at 834–35.

\(^{17}\) Id at 835.

of the instances in which they will grant an appeal.\textsuperscript{19} Rule 23(f) essentially gives an appellate court complete license to retry the certification question and substitute its judgment for that of the trial judge—exactly what Judge Posner did in \textit{Rhone-Poulenc}.

C. The Trend Spreads to the State Courts

For some time there has been a general perception that state courts are more receptive to class actions than are federal courts.\textsuperscript{20} And for a long time, that was perhaps a fairly accurate perception. Traditionally state courts were the venue of choice for plaintiffs’ class action counsel. But I am convinced that whatever particular solicitude state courts once showed toward class actions has disappeared in recent years.

For example, like the Seventh and Eleventh Circuits, the Texas Supreme Court recently exhibited its activism in reviewing a trial court’s class certification decision. In Texas, class certification orders have been made subject to interlocutory appeal as a matter of right.\textsuperscript{21} But the appeal goes only to the intermediary appellate court. The decision of a Texas Court of Appeals is supposed to be final unless that ruling conflicts with the decision of another appellate court or the state supreme court.\textsuperscript{22} Nevertheless, in \textit{Henry Schein, Inc v Stromboe},\textsuperscript{23} the Texas Supreme Court went out of its way to find that it had jurisdiction to review an appeals court’s decision affirming certification of a nationwide

\textsuperscript{19} See, for example, \textit{Blair}, 181 F3d at 834 (refusing to adopt a “bright-line” or “catalog of factors” approach). See also \textit{In re Lorazepam}, 289 F3d at 105 (“[W]e caution that the[se] standards represent guidance, not a rigid test.”); \textit{In re Sumitomo Copper}, 262 F3d at 140 (“[W]e leave open the possibility that a petition failing to satisfy either of the foregoing requirements may nevertheless be granted where it presents special circumstances that militate in favor of an immediate appeal.”); \textit{Newton}, 259 F3d at 165 (“It is, of course, difficult to foresee all the permutations to which this rule will apply, and courts will have the task of exercising their best judgment in making these decisions.”); \textit{Lienhart}, 255 F3d at 145 (rejecting “stringent standards” for review of 23(f) petitions); \textit{Prado-Steiman}, 221 F3d at 1276 (“We do not create any bright-line rules or rigid categories for accepting or denying Rule 23(f) petitions today. Our authority to accept Rule 23(f) petitions is highly discretionary, and the foregoing list of factors is not intended to be exhaustive.”); \textit{Mowbray}, 208 F3d at 294 (“[W]e do not foreclose the possibility that special circumstances may lead us either to deny . . . or conversely, to grant leave to appeal.”).

\textsuperscript{20} See, for example, Linda S. Mullenix, \textit{Abandoning the Federal Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters?}, 74 Tulane L Rev 1709, 1715 (2000) (noting that “the prevailing sense among some practitioners is that in many venues in the Gulf States—most notoriously Louisiana, Texas, and, until recently, Alabama—judges are more than willing to certify almost anything that walks through the courtroom doors”).

\textsuperscript{18} See Tex Civ Prac & Rem Code Ann §51.014(3) (Vernon 1997).

\textsuperscript{21} Tex Govt Code Ann § 22.225(c) (Vernon 1988).

\textsuperscript{22} 102 SW3d 675 (Tex 2002).
class of purchasers of dental practice management software from a Texas company. The Texas Supreme Court found that, although the appellate court had correctly stated Texas law, it had misapplied it to the facts of the case. Of course, if mere misapplication is the test, then any class certification decision becomes subject to review by the state supreme court.

Most of the twenty thousand class members in Schein had written contracts agreeing to the application of Texas law if a dispute arose. But instead of suing only for breach of contract and restitutionary damages, the plaintiffs' lawyers pled everything under the sun. They asserted causes of action for fraud, breach of express warranty, negligent misrepresentation, promissory estoppel, and deceptive trade practices, and they sought consequential, exemplary, and statutory damages. In addition, in order to avoid removal to federal court under 28 USC § 1332, they pled that no class member would attempt to recover more than $74,000 in damages. (As an aside, this is one failing that plagues a great number of lawyers these days: uncertain of which claims are strongest, they are inclined to plead the kitchen sink. In reaching for too much, the lawyers often get nothing for their clients.) The Texas Supreme Court held that on most claims it could not determine whether a class could be certified. However, looking at the specific facts of the case before it, the court found that common issues did not predominate because:

1. Reliance was an element of each of these "kitchen-sink" allegations;
2. Consequential damages would have to be proven on an individual basis;
3. Because exemplary damages must be related to actual damages, a jury could not determine this on a class-wide basis prior to determination of all damages to the class, and,
4. While Texas law would apply to the claims of the class members who had written contracts so specifying, many in the

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24 See id at 687–88 (finding that jurisdiction was appropriate because the appeals court's decision "holds differently from a prior decision of another court of appeals or of the supreme court," citing Tex Govt Code §§ 22.225(b)(3), (c); 22.001(a)(2)).
25 Id at 689.
26 Id at 684.
27 Henry Schein, 102 SW3d at 679–81.
28 Id at 681.
29 Id at 693.
30 Id at 694.
31 Henry Schein, 102 SW3d at 695.
class did not have such contracts. Texas law would not necessarily apply to the latter claims simply because the products were sold from Texas, and analysis of the laws of other states would destroy predominance.\footnote{Id at 697–99. “This is a particularly untenable conclusion. Analysis of other states’ laws does not create a single individual question; at most, it creates fifty different but nevertheless common questions.” See id.}

The \textit{Schein} court went on to hold that the class representatives could not cure the deficiencies precluding certification by abandoning the claims that required reliance or their requests for punitive and consequential damages. Such abandonment would require notice, would destroy superiority if plaintiffs had to give up substantial rights, and destroy typicality if it were not clear that the other twenty thousand class members were willing to give up their other claims.\footnote{Id at 691–92.}

In addition, the court stated that a class action was not superior because each individual class member could afford to file his own suit. Although class counsel represented that each class member’s restitutory damages did not exceed $10,000, the Court said that trebling would give an individual enough incentive to sue.\footnote{Id at 700.} But what really made the Court suspicious was the pleading that no class member would seek more than $74,000 in damages.\footnote{Henry Schein, 102 SW3d at 699.}

The court concluded by quoting from a long passage in Judge Easterbrook’s decision in the Bridgestone tire products liability case\footnote{In re Bridgestone/Firestone, Inc Tires Products Liability Litigation, 288 F3d 1012 (7th Cir 2002).} which concludes: “[w]hen courts think of efficiency (in connection with class actions) they should think of market models rather than central-planning models.”\footnote{Henry Schein, 102 SW3d at 700, citing In re Bridgestone, 288 F3d at 1020.} Thus, Chicago School economics, which crippled enforcement of the antitrust laws, is now being used to eviscerate class actions.

\section*{II. Distinguishing Types of Class Actions}

What all the cases I have just discussed have in common is that they are all mass tort cases. They are not securities fraud or antitrust cases, and they were arguably not the type of cases the framers of Rule 23 had in mind in 1966. This is an important dis-
tinction for purposes of keeping corporations honest, and it is a distinction that courts have largely ignored.

In the first decade after Rule 23’s enactment, a wave of consumer rights statutes expanded the substantive legal grounds for damage class actions, and with that came a number of overblown class actions—like the one that sought to recover hotel telephone overcharges. During the mid-1970s, the business community was up in arms calling for legislative change, but as time passed and courts pulled back from their initial enthusiasm, the clamor for revision receded. Class actions were safe for two decades.

Two things happened in the mid-1990s that put class actions in the spotlight again (and when class actions are in the spotlight, they are always in trouble). First, the Private Securities Litigation Reform Act of 1995 (“PSLRA”) put many plaintiff class action lawyers out of the securities fraud business, and they began to look for new causes of action to pursue on a class basis. Second, mass tort cases involving asbestos, tobacco, drugs, and the like began to clog up our courts and threaten corporate defendants with bankruptcy. The class action was viewed—mainly by the courts and corporate defendants—as a source of the problem, and the class action defense bar jumped in to preempt the personal injury trial lawyers.

These pressures caused the plaintiffs’ bar to push the envelope on Rule 23 and its state analogues. They also led to the kinds of criticism that are found in the Rand Report on Class Actions from a few years ago and the just-published book by Catherine Crier, The Case Against Lawyers. The Rand Report is a balanced and somewhat scientific effort to study consumer and mass tort class actions. My only complaint is that its title and general conclusions do not indicate that any attempt was made to study securities fraud and antitrust class actions. Ms. Crier’s book, by contrast, is nothing more than a shrill attack on lawyers in general and trial lawyers in particular, and her chapter on class ac-

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38 In re Hotel Telephone Charges, 500 F2d 86 (9th Cir 1974) (alleging nationwide conspiracy among hotel chains to increase room rent in violation of federal antitrust laws and state laws).
42 Catherine Crier, The Case Against Lawyers (Broadway Books 2002).
tions simply summarizes the posterboard cases of the tort reformers, none of which were brought under the securities or antitrust laws. She is clearly more troubled by her perception that plaintiffs’ lawyers are overcompensated than she is with the adequate deterrence of corporate wrongdoing.

It is troubling that the current clamor over class actions does not distinguish antitrust and securities class actions from other types of class actions and that general changes in Rule 23 will throw out the baby with the bath water. Weakening the class action mechanism, particularly in this context, will embolden corporate America to continue to think of itself as above the law.

III. HOSTILITY TO SECURITIES AND ANTITRUST CLASS ACTIONS: MUZZLING THE CORPORATE WATCHDOGS

I believe that the meltdown of corporate giants we have witnessed this past year is at least partly attributable to the hostility of courts and legislatures to antitrust enforcement and securities fraud suits—generally plaintiffs’ class action litigation. Because I am not an academic, my goal is not to prove the empirical claim that weakening the class action weapon promotes corporate misconduct. Instead, I offer my commentary as an observer and admittedly biased player.

A. What Makes Securities and Antitrust Class Actions Unique

Why do we have securities and antitrust class actions? These are two types of class actions that, in the most general sense, are designed to protect our marketplace, namely, the way we do business. Other types of class actions—for example, mass torts and employment discrimination suits—generally function to ameliorate and deter specific types of improper tortious conduct.

Without class actions, very few securities and antitrust actions would be pursued. These tend, after all, to be the prototypical class action scenarios. Both frequently involve small losses to large numbers of victims, such that bringing an individual action would be uneconomical. Both are characterized by high levels of complexity requiring substantial litigation resources. And both securities and antitrust actions are likely candidates for efficient resolution of claims in terms of party and judicial resources.

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61 Id at 3.
By contrast, mass torts and employment discrimination actions are far more likely to be brought as individual actions. Individual losses in those cases tend to be much higher and therefore may require less consolidation. And, unlike the general securities and antitrust case, the subjects of the suits are frequently not fungible commodities—which, of course, reduces the likelihood of typicality. In other words, many of the criticisms that everyday commentators level against class actions are just not as applicable in the securities and antitrust contexts.\footnote{Many of these criticisms are also not applicable to class actions brought under consumer protection statutes (such as deceptive trade practice laws and the like) seeking remedies for fraudulent corporate misconduct.}

B. Hostility to Securities Litigation

When thinking about the recent corporate meltdowns, I am firmly convinced that the well-publicized cases of abuse that have come to light are connected in a way that is more than coincidental to a general hostility among governmental elites toward securities class actions.

1. Congressional hostility to securities litigation.

In 1997, at the Tulane Corporate Law Institute, I delivered a paper evaluating the PSLRA in action during its first year. The PSLRA, you may recall, was part of the 1994 Republican Contract with America.\footnote{Gzedit, \textit{Fraud Law Makes Recovery Tough}, Charleston Gazette 4A (Oct 18, 2002).} It was passed—over Clinton’s veto—to curb perceived securities litigation abuses.\footnote{Id.} Specifically, the Act seemed to target famed securities plaintiffs’ lawyer Bill Lerach of the Milberg Weiss firm—both names that are well known at this law school.\footnote{See Josh Goldberg, \textit{Firm Settles Lexecon Case for $50 Million}, Chi Daily Law Bull, vol 145 no 71 (Apr 13, 1999) (describing a suit involving the former dean of The University of Chicago Law School, Daniel Fischel, against the Milberg Weiss firm for abuse of process and resulting in a fifty million dollar settlement for Fischel and his Lexecon partners).} Instead, the PSLRA made Lerach even richer and more powerful by making him a monopolist. The PSLRA provides that the lead plaintiff is to be the party with the greatest financial interest in the suit,\footnote{15 USC §78u-4(a)(3)(B)(iii)(bb) (2000).} often a large institutional investor who holds substantial blocs of securities.\footnote{Samantha M. Cohen, Note, \textit{“Paying-to-Play” Is the New Rule of the Game: A Practical Implication of the Private Securities Litigation Reform Act of 1995}, 1999 U Ill L Rev 1331, 1333.} The lead plaintiff, in turn,
has the power to appoint class counsel.\footnote{See 15 USC § 78u-4(a)(3)(B)(v) (2000).} Guess who they tend to appoint?

I concluded in 1997 that although the PSLRA contained some sensible and useful provisions it also contained a number of questionable provisions. In particular, I questioned the holdings of a case that had raised the pleading standard to require a “knowing misrepresentation”—actual intent—on the part of the defendants.\footnote{In re Silicon Graphics, Inc Securities Litigation, 1996 US Dist LEXIS 16999, *21 (N D Cal).} Even today, there is divergence in the courts over how high the pleading standard is.\footnote{See, for example, In re Baker Hughes Securities Litigation, 136 F Supp 2d 630, 638–39 (S D Tex 2001) (discussing the conflicting authority among the federal courts over this pleading issue).} The PSLRA has proven to be a cure worse than the illness: corporate wrongdoing is now significantly underdeterred.

Even outside the courts, there is widespread belief that the PLSRA has come back to roost. According to one newspaper editorial, “[a]t the time, opponents of the act presciently said it would lead to more securities and accounting fraud. Now that act is coming back to haunt investors . . . .”\footnote{Gzedit, Fraud Law Makes Recovery Tough at 4A (cited in note 45).} Even former Securities and Exchange Commission Chairman Arthur Levitt, Jr. has said that “[t]he anti-trial-lawyer feeling in the Congress is so great that it’s in the way” of reforming the damage done by the PSLRA.\footnote{Lisa Girion, Crisis in Corporate America: 1995 Tort Reform Act Said to Provide Safe Harbor for Fraud; Legislation: Critics Say Curbs on Shareholder Suits Have Contributed to the Rash of Scandals, but Some Lawmakers Still Stand Behind the Law, LA Times C1 (July 21, 2002).}

2. Judicial hostility to securities litigation.

Alongside congressional hostility to securities class action litigation, judicial hostility has reinforced the corporate shield. For example, the United States Supreme Court has sanctioned the use of mandatory arbitration provisions, even in the face of contrary state law, where interstate commerce is affected.\footnote{See Allied-Bruce Terminix Companies v Dobson, 513 US 265, 269–70 (1995) (broadly interpreting Section 2 of the Federal Arbitration Act, 9 USC §2, to preempt Alabama’s law forbidding the enforceability of arbitration contracts and overturning an Alabama Supreme Court decision enforcing the state rule). See also Mastrobuono v Shearson Lehman Hutton, Inc, 514 US 52, 64 (1995) (enforcing mandatory arbitration provision in securities context).} Brokerages have used this power to force new customers to sign onto
compulsory arbitration. And because this takes any litigation outside of the public view and often removes any possibility of class action treatment, small investors have a harder time seeking recovery for their losses. Indeed, it is not clear that a class action-type suit can even be maintained in an arbitration proceeding, absent a specific agreement to that effect, as the law on this is unsettled. If Judge Posner's position in Champ v Siegel Trading Co— that class actions in arbitration are not sustainable without a specific provision to that effect in the agreement—is adopted, a great number of suits that might have been brought as class actions in the courts will become simply uneconomical to prosecute. Consequently, we can expect systematic underenforcement of securities laws designed to protect consumers. Along the same lines, in 1994, the Supreme Court created an exemption from liability for people or companies that "aid and abet" securities fraud—for example, auditors and bankers. Is it any wonder that we are now witnessing massive involvement by auditors and bankers in cooking the books of corporations that have melted down?

C. Hostility to Antitrust Litigation During the 1980s

Hostility to antitrust litigation has likewise led to a sense of invulnerability among corporations. This sense of invulnerability has, in turn, lead to a greater willingness to strain the boundaries of acceptable corporate behavior, often at the expense of consumers, shareholders, and employees.

55 F3d 269 (7th Cir 1995).

Compare Champ v Siegel Trading Co, 55 F3d 269, 275–77 (7th Cir 1995) (Posner) (holding that courts cannot impose the class action mechanism of Rule 23 onto arbitration agreements unless the agreement itself provides for consolidation of actions) with New England Energy, Inc v Keystone Shipping Co, 855 F2d 1, 5 (1st Cir 1988) (applying Massachusetts statute providing for consolidation of arbitration claims, even though the specific arbitration agreement in question did not provide for such consolidation). See also Green Tree Financial Corp-Alabama v Randolph, 531 US 79, 92 n 7 (2000) (refusing to reach respondent's argument that an arbitration agreement could be unenforceable if it required respondent to give up the ability to bring a right of action under the Truth In Lending Act, 15 USC § 1601 et seq, as a class action).

57 55 F3d 269 (7th Cir 1995).

58 See Central Bank of Denver, NA v First Interstate Bank of Denver, NA, 511 US 164, 177 (1994) (holding that private civil liability under Section 10(b) of the Securities Exchange Act, 15 USC § 78j(b), does not extend to parties who merely aid and abet manipulative or deceptive practices), superceded in part by statute, 15 USC § 78(ff).
1. Decline of the antitrust class action.

Antitrust class actions used to be a core part of antitrust enforcement. Starting with the 1966 amendments to Federal Rule 23, which established the framework of the modern class action mechanism, and through the 1970s, antitrust class actions thrived in the United States. Then, just as we recently saw in the securities context, an air of hostility toward antitrust actions seemed to permeate government. No doubt this attitude in the courts was an extension of The University of Chicago School of Antitrust Thought, which can be summarized as: the best antitrust policy is no antitrust policy. Bigger became better as mergers proceeded unchecked. Commercial banks and accounting firms ventured into many other businesses, such as strategic management consulting.

Here are some numbers to put the decline in concrete terms: between 1971 and 1976, by one count, the Justice Department initiated 196 horizontal price-fixing prosecutions. In contrast, between 1983 and 1987, only twenty-six indictments charged horizontal price fixing. This general hostility to a vigorous antitrust policy at the Justice Department had a subsequent impact on antitrust class actions as well. In a great number of antitrust actions, the government—with the power of the grand jury—is in the best position to build an adequate record documenting the illegal practices that give rise to later liability. Thus, the lack of enforcement in Washington has significantly raised the costs of bringing antitrust class actions, doing real harm to consumers and competitors in the process.

2. Indirect hostility to antitrust class actions in the courts.

In the antitrust context, judicial hostility toward class actions tends to flow from judicial hostility toward treble-damages private enforcement actions altogether. The 1998 case of *Campos v Ticketmaster Corp* is a prime example of judicial hostility toward consumer class actions involving antitrust injuries. In *Ticketmaster*, a proposed class of music fans sued Ticketmaster for damages and injunctive relief claiming that Ticketmaster engaged in price fixing and monopolization. Because of a long-term

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60 140 F3d 1166 (8th Cir 1998).

61 Id at 1168.
exclusive arrangement with just about every large scale concert producer, Ticketmaster was able to extract supracompetitive fees for its ticket distribution services from the consumers—us! The Eighth Circuit affirmed the lower court’s dismissal of the case. The court relied on the indirect purchaser rule from *Illinois Brick Co v Illinois.* But the court’s definition of “indirect purchaser” was quite extraordinary: a person “who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another, independent purchaser.” This was *not* a situation where Ticketmaster sold to a middleman, who in turn sold to the consumer. The concertgoers were buying their tickets *directly* from Ticketmaster. Therefore, the only private parties with any interest in bringing a suit and any basis for asserting a harm were barred from raising a treble damages claim. Here, the hostility came under the guise of the substantive antitrust law of standing.

III. PROPOSED CHANGES TO CLASS ACTION PRACTICE

Before I wrap up, let me say a few words about some of the proposals I have seen to “reform” the class action procedure.

A. Federalizing Class Actions

In just about every recent Congressional term, proposals have been made to federalize the class action mechanism, in order to preempt the various state class action rules. For example, in the 106th Congress, Representative Bob Goodlatte (R-Va) introduced the Interstate Class Action Jurisdiction Act of 1999 (“ICJA”). The motivating force behind this bill was the fear of

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62 Id at 1168–69.
63 Id at 1174 (affirming the district court’s dismissal for lack of standing under Section 4 of Clayton Act and remanding case for ruling on standing to sue under Section 16).
65 Id.
66 Id at 1171.
69 HR 1875, 106th Cong, 1st Sess (May 19, 1999).
class actions "flooding into certain state courts." In particular, Goodlatte feared state court favoritism toward local lawyers when facing off against out-of-state corporations, and the fact that state courts often lacked the resources to properly litigate complex interstate class actions, "which often involve thousands (and sometimes millions) of purported class members." Furthermore, Goodlatte was convinced that, with the rules structured as they currently are, attorneys could manipulate loopholes in federal jurisdiction to get into state court—a form of forum-shopping that should be discouraged—and that some state courts utilize such lenient certification requirements that almost any controversy can be subjected to class treatment. In essence, Representative Goodlatte, and those individuals who signed on as cosponsors, demonstrated a distrust of state courts' ability to litigate massive class actions fairly and competently.

In order to remedy the problems that Representative Goodlatte perceived, the ICJA would have altered federal jurisdiction requirements for diversity-based class actions and would have eliminated the complete diversity requirement. It would have prevented plaintiffs' counsel from keeping certain class actions in state court by naming an in-state defendant who is not the true target of the suit. It would have altered federal jurisdiction for class actions by allowing district courts to aggregate plaintiffs' claims to meet the amount in controversy requirement. It would also have provided for liberal removal jurisdiction in federal court. Class actions could be removed to federal court either by: (1) any defendant without consent of all other defendants; or (2) any member of the plaintiff class, other than the named or representative class member, without consent of all of the class members. Finally, in a small show of deference to state prerogatives, the bill would have directed district courts to refuse to exercise jurisdiction if the suit in question met one of three criteria: (1) it was an intrastate action; (2) it was a limited scope case; or, (3) it was a state-action case.

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71 Id.
72 Id.
73 HR 1875, 106th Cong, 1st Sess (May 19, 1999).
74 Therefore, the Interstate Class Action Jurisdiction Act rejects the Supreme Court's interpretation of the diversity jurisdiction statute in Snyder v Harris, 394 US 332 (1969), which held that plaintiffs in class action lawsuits may not aggregate their claims to satisfy the amount in controversy. See id.
This proposal has been criticized as making it more difficult for individuals to challenge corporate wrongdoing. Given the theme of my talk today, you might expect that I would oppose proposals to federalize class action practice. I must confess, however, that I doubt this issue is all that important. The criticisms are generally premised on the notion that state courts are more conducive to class action practice than federal courts. To advocates of federalizing class actions, state courts are recklessly biased and need to be cabined. To opponents of federalizing class actions, it is not that state courts are inappropriately "friendly," but that federal courts are comparatively hostile. As noted above, however, I reject the notion that there is any significant difference between federal and state courts (at least the state courts in Texas). I really do not believe that, at this time at least, the perception of differential treatment is accurate. Judicial hostility to class actions is a real problem when it comes to regulating corporate wrongdoing, but that hostility is every bit as much a problem in state courts these days as it is in federal courts.

B. Proposed Advisory Committee Changes to Rule 23

Finally, a number of changes to Rule 23 were recently recommended by the Judicial Conference and approved by the United States Supreme Court. If Congress does not enact legislation to reject, modify, or defer the rules, they will go into effect on December 1, 2003. As I see it, there are three major changes:

1. Second Opt-Out Chance After Settlement (Rule 23(e)(3)): This amendment gives trial judges the discretion to refuse to approve a class settlement unless class members have a second

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75 See David Nivens, Goodlatte's Class Action Reform Passes: Bill Eases Transfer to Federal Court, The Daily News Leader (Staunton, Va) 3A (Sept 24, 1999) (noting that opponents to the ICJA were worried that the bill would force class actions lawsuits into federal court, where the certification requirements are stricter); Harvey Berkman, Tort Reform Measure, Facing Stiff Opposition, Unlikely to Become Law, Natl L J A5 (Oct 4, 1999). See also Interstate Class Action Jurisdiction Act of 1999, HR Rep No 106-320, 106th Cong, 1st Sess 37-38 (1999) (dissenting view) ("[W]ith respect to those States which have enacted a counterpart to Rule 23, the Federal courts are likely to represent a far more difficult forum for class certification to occur. This is because in recent years a series of adverse Federal precedent . . . have [sic] made it more difficult to establish the 'predominance requirement' necessary to establish a class action under the Federal rules.").

76 See Part I C.

chance to opt out of the class once the settlement terms are known.

2. Appointment of Class Counsel (Rule 23(g)): Procedures for appointing class counsel would emphasize the "work counsel has done in identifying or investigating potential claims" over "experience in class actions."

3. Regulating Attorney's Fees (Rule 23(g)(1)(C)): This amendment allows a court to mandate that potential class counsel provide additional information on proposed attorneys fees. Furthermore, Rule 23(h) establishes uniform procedures for awards of attorneys fees and nontaxable costs in class actions. Claims for attorneys fees must be made by motion, the court may hold a hearing, and the court must find the facts and state its conclusions of law on the motion.

Again, I simply do not expect these proposals will substantially impact class action practice, and in the abstract, I have no strong opinions on them. Indeed, they generally strike me as sensible. The second opt-out provision, in particular, is understandable for certain types of settlements such as those involving coupon settlements. These are settlements that entitle class members to a discount on their next purchase of a similar or related product from the defendant. As one commentator has noted, each coupon that is not redeemed represents a "win" for the defendant. There may be good reason to believe that very few such coupons are ever redeemed, and therefore such settlements are really a way for the plaintiffs' attorneys to get paid full price while the defendant escapes for a mere fraction of the actual dollar figure of the settlement. I might have addressed this problem differently. One possible remedy would be to delay attorney compensation and base it on the number of coupons actually redeemed. This would be more equitable, and it would provide the attorneys with an incentive to push for a fair settlement rather

78 For a general discussion of the advantages and disadvantages of coupon settlements, see Geoffrey P. Miller and Lori S. Singer, Nonpecuniary Class Action Settlements, 60 L & Contemp Probs 97 (1997).
79 See Christopher R. Leslie, A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation, 49 UCLA L Rev 991, 1005-06 (2002) ("For the defendant, each Non-Use Outcome constitutes a win because the defendant pays nothing to that class member. . . . Taken to an extreme, if few class members redeem their coupons, then the defendant can eliminate liability without providing any settlement compensation to the majority of class members.").
than merely a quick one. But the second opt-out is not an unreasonable approach.

What is most notable about the Advisory Committee changes, though, is not what they did, but what they left undone. The Committee was altogether too timid in addressing the problems that are ruining the ability of the class action mechanism to serve as a tool of consumer protection.

CONCLUSION

For most of the last ten years, we have experienced a remarkable period of prosperity, and therefore, we have been willing to look the other way as judges and legislators undercut the legal mechanisms long established for protecting consumers, employees, and shareholders and for keeping corporations in line. We are now paying the price for that inattention as massive corporate wrongdoing comes to light. It is high time that we return once again to using the class action mechanism for its intended purposes—as a consumer sword, rather than as a corporate shield.