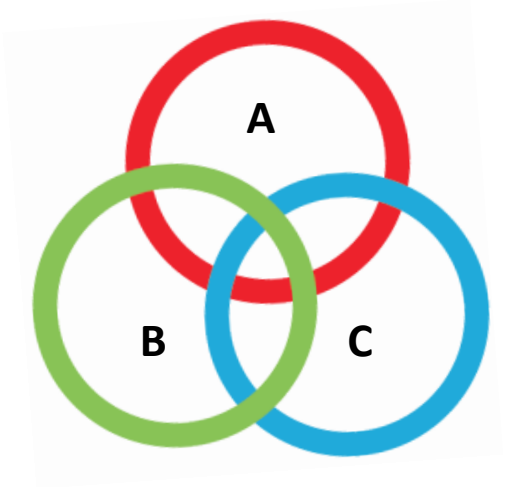


# MTMP

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# Pitfalls and Cures in Seeking Multiple Remedies in Class Action Litigation When One Remedy Can Negatively Impact the Other

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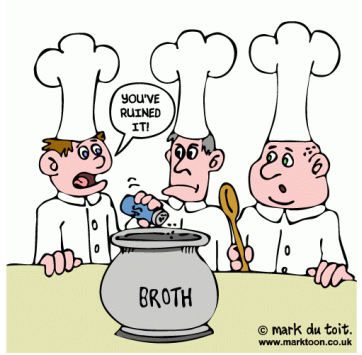


# I. The Purpose and Benefits of Class Actions

- A single-action litigation of multiple claims in a representative capacity. A few Plaintiffs bring suit on behalf of all similarly situated Plaintiffs against common Defendants.
- Main purposes: Judicial economy, addresses small claims too expensive to pursue individually, cuts costs for Plaintiffs and Defendants and prevents separate adjudications resulting in inconsistent results.
- Principal downside: Sacrifices individual autonomy and risks inadequate or unfair representation. Also facilitates "sharp elbow" competition among members of a common or competing classes.
- Almost all class actions settle.
- The Problem: (Know when to say when): Class Counsel and Defendants are incented to pack as many claimants into the class as possible, eroding the "predominance of common issues" and "manageability" required by Rule 23, and Class Counsel love to add bells and whistles to the remedies, eroding the "typicality" aspects of the class.

  Ex.: Amchem finding that "the health consequences of asbestos" could not meet the predominance requirement. 521 US 591 at 624 (1997).

# II. Illustrating the Problem When Designing the Remedy

Ex 1: Win-Lose (Zero Sum Game)

## A. THE ZERO SUM GAME

1. Classic Zero Sum Game: In re Literary Works In Electronic Database Copyright Litigation (2dCir. 2007)

- Plaintiff authors accused Defendants of publishing their articles in Lexis/Nexis without their permission or payment
- A single class settlement structure in 3 categories:
  - Class A – eligible for statutory damages under the Copyright Act - $1,000 per claim
  - Class B – registered at Copyright Office but not eligible for statutory damages - $150 per claim
  - Class C – other (99% of the claims) – $60 per claim
- If too many claims against the limited funds, then the C's would be equally reduced.

# COURT FOUND: THE CLASS SETTLEMENT FAILED DUE TO INTRACLASS CONFLICTS OF INTEREST:

"Only the creation of subclasses, and the advocacy of an attorney representing each subclass, can insure that the interests of a particular subgroup are in fact adequately represented.

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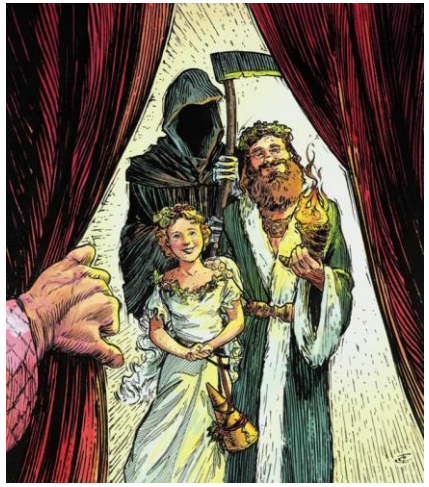
The rationale is simple: How can the value of any subgroup of claims be properly assessed without independent counsel pressing its most compelling case?"


2. Subtle Zero Sum (Look Before You Leap): Cendant Corporation Litigation, 264 F3d 201(3rd Cir 2001) provides a less obvious zero-sum illustration when what is given to one subset of a class is taken away from another.

- Defendants gave false information to the market that artificially boosted the company's stock price, which then dropped when the truth was known, to the loss of the stockholders.
- Some Plaintiffs had sold all their stock and just wanted a recovery, while others had sold some stock and still held more and wanted the company to prosper.
- The conflict was not revealed at the Trial Court stage, with the Circuit Court opining that, if the conflict was brought to the attention of the Trial Court, it would require the formation of subclasses to deal with it.

3. Be a Zero Sum Whisperer: Other Zero-Sum Conflicts Triggering Subclassing Concerns:

- Pension Plan litigation where some Plaintiffs are retired and others still work for the company and the company must pay for the settlement.
- Employment discrimination settlement involving present and former employees.
- False statements made by management of an acquisition target and some class members become shareholders of the acquiring firm.
- Class action against insurance company by present and former insureds.
- Class action against a franchisor with some franchisees having and others remaining.



# B. PRESENT VS. FUTURE CLAIMS

- Possibly disqualifying conflict between current claimants wanting a large compensation now and future not yet existing claimants who may want a generous inflation-protected fund to pay their claims in the future if they get sick. The two classic asbestos cases -

  Amchem (U.S. 1997) at 626: "Class-action certification sought to achieve global settlement of current and future (unknown) asbestos claims." The conflicts between the two groups defeated certification of the class.

- Accord, Ortiz, (U.S. 1999) – "A (single) class divided between holders of present and future claims requires division into homogeneous subclasses under Rule 23".
- Q: Are Class Counsel inherently biased in favor of present claimants who brought them the case?
- Q: Is it an inherent conflict for Class Counsel to have some present clients but no future ones (that don't exist yet)?


## C. Tailoring the Opt-Out Right (when in doubt allow opt out)

1. Wal-Mart v. Dukes (U.S. 2011): "Claims for individualized (injunctive) relief do not satisfy Rule 23(b)(2)."
2. Resulting Issue: MDL 2406: Blue Cross Antitrust Litigation (2021 and 2022)

- Settlement remedy for some premium subscribers administrative services only organizations ("ASO's") allowing a second Blue Bid, so that they can receive a bid from two different Blue Cross companies for their services.
- Originally thought possibly to be 23(b)(2) injunctive relief, not requiring an opt-out right, but subsequently decided by the Court to be a (b)(3) right for individual injunctive relief, so that a second opt-out notice to the ASOs was required.
- "The Second Blue Bid provision is properly characterized as divisible relief. It is not afforded to all Class Members."

2. Other Due Process Challenges to the Class Device, A Practitioner's Guide to Class Actions CH 30 (Chorba and Evanston) (2nd Ed. 2021)

- When in doubt allow to Opt-Out in hybrid cases involving both monetary and equitable relief, Courts differ on whether absent class members must be able to opt-out. Several Courts have held that due process requires opt-out rights in hybrid classes.
- An illustration would be individualized and not across the class injunctive relief such as in Blue Cross.
- Many Courts have granted opt-out rights in Rule 23(b)(2) classes, relying on the discretionary authority.

3. Defendants don’t like opt-outs. Illustrations of deciding what you have: (b)(2) or (b)(3)?

- Automobile insurance class settlement allowing class members to receive a refurbished engine, if future covered repairs are estimated to exceed $10,000.
- Health insurance company settlement with medical providers allowing some providers future reimbursements if they receive insurance reimbursement payments below agreed levels.
- Name, image and likeness settlement between a university and its present and future football players requiring a future split of monetary payments and set percentages among the whole football team.

# III. First Cure: Rigorous Subclassing (What Can It Hurt?)

- Rule 23(c)(5): When appropriate, a class may be divided into subclasses that are each treated as a class under this Rule 23.
- An exquisite remedy in Nationwide Class Actions with differing applicable laws: Telectronics, 172 F.R.D. 271 (S.D. Ohio 1997): Plaintiffs were subclassed among states with similar legal standards, with two negligence subclasses, four strict liability subclasses and three punitive damages subclasses, with respect to pacemaker liability.

Klay v. Humana, 382 F3d 1241 (11th Cir. 2004): Nationwide class settling state law causes of action divided into subclasses with materially identical legal standards.

- **ALWAYS HAVE SEPARATE COUNSEL FOR EACH SUBCLASS**:

In re Payment Credit Card Interchange Fee and Merchant Discount Antitrust Litigation (2d Cir. 2016) – 2nd Circuit overturned District Court's approval of class settlement of merchants divided into two subclasses: Those who accepted Mastercard from 2004 to a date in 2012, and those accepting Mastercard from the date in 2012 onward because the two subclasses were represented by common counsel despite the conflicting interests of the two classes with respect to a limited fund.

## SUBCLASSING MONEY TIP

- Corollary: If the subclassing occurs following tentative resolution of major deal points, a **MEDIATOR** is strongly recommended to facilitate negotiations between the subclasses through their respective counsel on how to divide the pie. MDL 2406, Blue Cross/Subscriber Settlement, using the services of Kenneth Feinberg to mediate the allocation of the monetary recovery between the ASO Class and the Retail Subscribers Class, and the total recovery having already been determined.

# IV. Second (Innovative and Controversial) Remedy: Up-Front Engagement of a Court-Appointed Guardian as Potential Objector

- Instead of waiting for professional objectors almost inevitably to appear in your class action settlement (Frank v. Target (7th Cir. 2020), suggest to the Court a "good housekeeping seal" with a Court-Appointed Guardian.
- MDL 926 Breast Implant Settlement – Appointed Special Guardians for each subclass so that the Settlement was negotiated in a virtual fishbowl of public disclosure and debate. Coffee, 95 Colum L.Rev. at 1420, 1406 (2000).
- Guardian would represent the interests of the absent and future class members and thereby monitor the behavior of the class reps and class counsel, and defense counsel during the settlement negotiations. Mullane, 339 US at 311 (1950).
- Guardians provide this sort of adversary substitute by providing a degree of adversary proceedings often lacking in class action settlements. Serves as a "devil's advocate" to provide a voice from the Court.