ETHICS, ETC. *By Geoffrey C. Hazard Jr.*

RAND reviews class suits

THE CLASS action is a uniquely American institution, unusual in its evolution, multifarious in its possibilities and very controversial. More than 40 years ago, the Federal Committee on Practice and Procedure revised Rule 23 in ways that liberated it from deep analytic confusion. The class suit has become a prime mechanism for bringing judicial authority to bear on questions of public policy. Witness the asbestos litigation, the tobacco cases, design defect cases and, of course, civil rights claims of all kinds. Ask Ford and Firestone.

The class action combines several special features. The multiplicity of claims can establish circumstantial evidence of liability much more strongly than could be developed if the claims were prosecuted one by one. The suits' real authors are not the claimants but plaintiffs' lawyers.

The certification of a class action can pose the question of whether "nuisance value" claims should be transformed into potential "bet the ranch" liability. If certification is granted, the pressure on defendants to settle is intense.

The definition of a proper class suit has defied the rule-making process, despite valiant efforts to clarify Rule 23. Determination of whether a class suit yields a conclusive judgment has produced some opaque decisions by the Supreme Court, notably in *Amchem Products v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

There is much anecdotal lore about class actions: and every lawyer, most judges and many legislators "have their opinions," as we say. But information about how class suits work has been in short supply.

Gathering background

A new study by the RAND Institute of Civil Justice, however, casts some light on the picture. The product of its research is titled *Class Action Dilemmas*, which indicates that it is providing information and not answers. The findings will certainly not end the debate, but they may sharpen the issues, particularly concerning products liability class litigation.

The RAND report (ISBN 0-8330-2601-1 for the paperback) is based on intensive case studies of 10 major class actions. The most conspicuous common element is that all resulted in settlements. Of course, that is an immediate consequence of the selection of cases. In fact, there are some class suits that actually go to trial, but they are rare.

Hence, the RAND study tends to confirm that class actions, particularly suits for damages, as distinct from civil rights injunction cases, are settlement proceedings, not cases for trial.

There may be an unexplored underlying problem here. Ordinary suits settle because lawyers on either side can calculate the probability of outcomes. A class suit, however, fuses into one all the cases on of which probability can be estimated. The ordinary logic of trial vs. settlement, therefore, may be inapposite. Perhaps we should think of class actions as similar to reorganization in bankruptcy, in which everything is brought together and nothing is conclusively decided in terms of right and wrong.

A finding in the RAND study is that the share received by plaintiffs' lawyers, relative to the payout to the class members, covers a substantial range. That is, plaintiffs' lawyers receive a hefty share in some cases, while in others their share is relatively modest—especially considering that the plaintiffs' lawyers work on a risky contingent fee basis.

Select purview

A related inference is that class action litigation appears to be growing concentrated in the hands of a relatively few plaintiffs' firms, with defense similarly concentrated in even fewer defendant firms.

A third finding confirms that the question of certification is absolutely key, but also that the proper basis for certification remains elusive. It would seem that damages actions ought to be framed in terms of a right of members of the class easily to "opt out." Establishing such a right would mean that those who remain in the class are closer to being volunteers, rather than conscripts. The study also tends to confirm the importance of affording appellate review of the certification question, as has been provided in the federal courts in the recent amendment of Rule 23.

The RAND study is rich in other details. It suggests that the class suit for damages should not be disparaged, let alone abolished. Serious discussion should focus on changes in the rules governing class actions, including those administered in state courts. The study will be a helpful guide.

Mr. Hazard, a law professor at the University of Pennsylvania, is one of the nation's leading experts on legal ethics and a regular NLJ columnist.

LAW AND LAUGHTER

"Oh, sorry. I thought this was the co-defendants meeting."

When will they ever learn?

By Harvey A. Silverglate SPECIAL TO THE NATIONAL LAW JOURNAL

THE FINGER-POINTING proceeds in true Washington style. Federal District Judge James A. Parker of Albuquerque, having swallowed hook, line and sinker the claim of the FBI and the Department of Justice that the fate of the nation could well hang on former Los Alamos National Laboratory scientist Dr. Wen Ho Lee being held incommunicado, blamed the cabinet officials and FBI director who, he said, misled him.

President Clinton's initial criticism of his enigmatic attorney general was later blunted by the suggestion of a larger group of culprits, himself excluded of course. Mr. Clinton admitted that from the start he was skeptical of the charges leveled against the Taiwan-born scientist who had downloaded classified defense secrets on to an unsecure computer.

Nevertheless, he claimed that it would have been "completely inappropriate" for him to have intervened while the case was pending—before it ended with a plea bargain in which the guts of the government's case were dropped and Dr. Lee was sentenced by an embarrassed judge to time served.

Congress announced plans to hold hearings. Presumably, the congressmen who at the start of the case were decrying an administration too soft on Chinese espionage, would now holler from the other side of their mouths. And the president's press secretary naturally blamed the media for covering the case in too sensationalistic a manner at the start (translation—the press was too quick and perhaps too gullible when it ran with FBI leaks).

A lesson lost

The real problem, however, lay in the institutional culture of the internal security folks at DOJ and FBI. History repeats itself, but we're condemned to reliving it, rather than learning from it. I'd heard cries of "national security" before. In a 1983 Boston case in which my firm represented an East German physicist charged with espionage. Thereafter, I could never again believe at face value anything a prosecutor or agent would say in a "spy" case.

Dr. Alfred Zehe, a physicist at Dresden University who spent half the year at the University of Puebla in Mexico, had gained permission to travel in exchange for his agreement to advise with respect to Western technology that the East German government either coveted or had obtained. He was what we would call a "government consultant," much like the typical professor at, say, the Massachusetts Institute of Technology.

The FBI was under pressure to counter Eastern Bloc intelligence efforts. The State Department was eager to capture enough Eastern Bloc spies to trade for Soviet dissident Anatoly Shcharansky. The FBI sent a Naval Intelligence undercover agent to Embassy Row in Washington to peddle documents containing outdated and useless, but still classified, submarine sonar technology. The East Germans bit. The documents were sent to Mexico, where Dr. Zehe explained them to his government. When he came to Boston, he was arrested for conspiracy to commit espionage.

Preparing to defend Prof. Zehe, I sought access to the documents. The government objected. The documents remained classified, prosecutors argued, and I had no security clearance. I pointed out that my partner and I were native-born American citizens with no history nor record of disloyalty (dissent, yes, but disloyalty, no), and our government was seeking to prevent us from viewing documents that the FBI had sold to the East Germans!

A total mess

The Zehe case, from start to finish, was out of *Alice in Wonderland*. The only good that came of it was that it terminated when a back-channel agreement was negotiated by the famed German lawyer Wolfgang Vogel, in which Shcharansky and a number of other victims of the cynical East-West spy game were traded. (The story is ably told by *New York Times* correspondent Craig R. Whitney in his 1993 book, *Spy Trader*.)

Eventually, East Germany and the Soviet Bloc dissolved. What was not dissolved, nor even put under effective controls, was the national security apparatus in Washington that too eagerly cries "fire" under even benign circumstances and is believed uncritically by judges and journalists.

Judges in national security prosecutions need to heed former President Reagan's formula for dealing with the Gorbachev government: "Trust but verify." Interestingly, the Lee prosecution fell apart shortly before the deadline by which the government had been scheduled to turn over to Judge Parker documents that would have shed light on the origins of the case. As Justice Louis Brandeis once said, "Sunlight is the best disinfectant."

Mr. Silverglate is a bimonthly NLJ columnist and a partner at Boston's Silverglate & Good.