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The Class Action, the Federal Court and the Upper Class: Is Notice, and its Consequent Cost, Really Necessary?

WILLIAM WEINER*

INTRODUCTION

Ever since the English Chancery employed the bill of peace¹ as a class action device in 1676,² courts and commentators have offered a variety of reasons for its creation and use.³ Like archenemies united to achieve a common goal, justifications wholly inconsistent in both theory and practice have joined to sustain the continued use of the class mechanism. One justification holds that the class device achieves economy of time, effort, and expense by eliminating multiplicity of suits (and promoting uniformity of decisions) which involve common issues of law and/or fact.⁴ In this view, the class suit

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1. Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 611 (1971); Z. CHAFEE, *SOME PROBLEMS OF EQUITY* 200-01 (1950) [hereinafter cited as Z. CHAFEE]; 7 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1751 (1972); 1 H. NEWBERG, *NEWBERG ON CLASS ACTIONS* §§ 1004, 1212 (1977) [hereinafter cited as H. NEWBERG]; Note, *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 928 (1958) [hereinafter cited as *Developments*].

2. In 1676, *Brown v. Vermuden*, 22 Eng. Rep. 796 (Ch. 1676), was decided and is generally recognized as the first reported example of a class action. See Z. CHAFEE, *supra* note 1, at 164; 1 J. POMEROY, *EQUITY JURISPRUDENCE* § 246 (5th ed. 1941); J. STORY, *COMMENTARIES ON EQUITY PLEADINGS* §§ 94-121 (1879); Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254, 1260 (1961); Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 HARV. L. REV. 589, 590 (1974). But see Marcin, *Searching for the Origin of the Class Action*, 23 CATH. U.L. REV. 515, 521-24 (1974) (where the author claims that two cases, decided in 1309 and 1565, both originating in the Channel Islands, were the “first judicial creation of the class action”).

3. See *Adair v. New River Co.*, 32 Eng. Rep. 1153 (Ch. 1805); *West v. Randall*, 29 F. Cas 718 (C.C.D.R.I. 1820) (no. 17,424); 3B J. MOORE, *FEDERAL PRACTICE* ¶ 23.02[1] (2d ed. 1948); 1 H. NEWBERG, *supra* note 1, at §§ 1004, 1212; F. CALVERT, *A TREATISE UPON THE LAW REPEATING PARTIES TO SUITS IN EQUITY* (2d ed. 1847); 7 C. WRIGHT & A. MILLER, *supra* note 1, at § 1751; Yeazell, *From Group Litigation to Class Action Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067, 1087 (1980).

4. 1 H. NEWBERG, *supra* note 1, at § 1004; *Developments*, *supra* note 1, at 928; 7 C. WRIGHT & A. MILLER, *supra* note 1, at § 1751; Z. CHAFEE, *supra* note 1, at 200-13; Marcin, *supra* note 2, at 519. As Professor Moore explains: “The convenient procedural device of a class action enjoys a continuing utilization because of a growing number of instances where parties to the litigation are multitudinous; and because of the need to eliminate or reduce multiplicity of suits.” 3B J. MOORE, *supra* note 3, at ¶

is useful because it encourages only one lawsuit to grow where many grew before.⁵ A diametrically opposed justification promotes the class device as the only means of providing redress to large numbers of people who have suffered similar injuries due to the acts or conduct of powerful defendants, but who, because each individual's injury is small and the cost of litigation is high, are precluded from obtaining individual remedies.⁶ This justification encourages one lawsuit to grow where none grew before.

It is the continued vitality of this latter use of the class action suit to which this Article is addressed. It is no exaggeration to suggest that without the class action mechanism people who are deprived of constitutional and civil rights, and consumers who are the victims of fraud or antitrust violations, may be effectively deprived of any remedy.⁷ Equally important, government policies aimed at correcting and curbing such abuse would be undermined.⁸

23.02(1); see also Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 HARV. L. REV. 664 (1979).

5. Chafee, *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297 (1932). It appears that even in its fetal stage, the courts recognized that some actions should not merely be encouraged but should be compelled to proceed as class actions or not at all. See *infra* note 196 and accompanying text.

6. Framing the issue quite succinctly, Chief Justice Burger in *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980), said:

The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

Professors Wright and Miller agree, "The class action was an invention of equity . . . mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals united in interest from enforcing their equitable rights nor grant them immunity from their equitable wrongs." 7 C. WRIGHT & A. MILLER, *supra* note 1, at § 1751 (citing *Montgomery Ward & Co. v. Langer*, 168 F.2d 182, 187 (8th Cir. 1948)).

7. Judge Weinstein has poignantly stated the issue:

The matter touches on the issue of the credibility of our judicial system. Either we are committed to make reasonable efforts to provide a forum for adjudication of disputes involving all our citizens—including those deprived of human rights, consumers who overpay for products because of antitrust violations and investors who are victimized by insider trading or misleading information—or we are not. There are those who will not ignore the irony of courts ready to imprison a man who steals some goods in interstate commerce while unwilling to grant a civil remedy against the corporation which has benefited, to the extent of many millions of dollars, from collusive, illegal pricing of its goods to the public. When the organization of a modern society, such as ours, affords the possibility of illegal behavior accompanied by widespread, diffuse consequences, some procedural means must exist to remedy—or at least to deter—that conduct.

Weinstein, *The Class Action is Not Abusive*, N.Y.L.J., May 2, 1972, at 4, col. 3.

8. Judge Weinstein's opinion in *Dolgow v. Anderson*, 43 F.R.D. 472, 484-85, (E.D.N.Y. 1968), explains and advances this view:

It is the duty of the federal courts to render private enforcement practicable.

One major hurdle for any plaintiff class action suit is the cost of notifying absent class members, prior to any merit determination, of the pendency of the class suit [hereinafter referred to as "pendency notice"]. If the class representative must pay the cost of pendency notice,⁹ and that cost is high,¹⁰ only the wealthy litigant or individuals with large claims will seek redress; the courts will have taken

Other than the class action, the procedures available for handling proliferated litigation—joinder, intervention, consolidation, and the test case—cannot serve this function in a situation like the one presented here. These alternative devices presuppose "a group of economically powerful parties who are obviously able and willing to take care of their own interests individually through individual suits or individual decisions about joinder or intervention."

See also Frankel, *Amended Rule 23 From a Judge's Point of View*, 32 ANTITRUST L.J. 295, 298 (1966).

The class action is particularly appropriate where those who have allegedly been injured "are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive." Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941). Its "historic mission" has been to "[take] care of the smaller guy." Statement of Professor Benjamin Kaplan, Reporter of the new Federal Rules of Civil Procedure, quoted in Frankel, *supra* at 299. The California Supreme Court emphasized this view in *Vasquez v. Superior Court*, 4 Cal. 3d 800, 808, 484 P.2d 964, 968, 94 Cal. Rptr. 796, 800 (1971), when it said:

Frequently numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all. Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct. A class action by consumers produces several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices [and] aid to legitimate business enterprise by curtailing illegitimate competition. . . .

Often statutes award attorney fees to the prevailing party so that private attorneys will have an incentive to prosecute cases involving important rights and thereby act as private attorneys general. The rationale for both the private attorney general provisions and the deterrent/redress aspect of the plaintiff class action suit are similar. See generally *Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1030 (D.C. Cir. 1974).

9. The Supreme Court, in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1973) [hereinafter cited as *Eisen IV*], a landmark decision concerning the requirement of pendency notice, paid little attention (less than one paragraph and less than seventy words) to the crucial issue of which side must pay for the cost of pendency notice when it is required. The Court merely said, at 178-79:

In the absence of any support under Rule 23, petitioner's effort to impose the cost of [pendency] notice on respondents must fail. The usual rule is that a plaintiff must initially bear the cost of [pendency] notice to the class. . . . Where, as here, the relationship between the parties is truly adversary, the plaintiff must pay for the cost of [pendency] notice as part of the ordinary burden of financing his own suit.

It is clear from the quoted language that the Court's decision was based upon its interpretation of rule 23 rather than the Constitution. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 349-50 (1978).

California's Consumers Legal Remedies Act (CAL. CIV. CODE §§ 1750-1785 (West 1981)), provides that the cost of pendency notice may be born by either the plaintiff or defendant depending upon certain factors. CAL. CIV. CODE § 1781 (West 1981). This cost-shifting provision has withstood constitutional scrutiny. *Civil Serv. Employees Ins. Co. v. Superior Court*, 22 Cal. 3d 362, 374, 584 P.2d 497, 504, 149 Cal. Rptr. 360, 367

sides by facilitating the preservation of the status quo and closing their doors to small claimants.¹¹

A perfect, and unfortunate, example of this result is illustrated by the Supreme Court decision in *Eisen v. Carlisle & Jacquelin (Eisen IV)*.¹² Plaintiff filed a class action suit on behalf of himself and six million odd-lot securities purchasers alleging that defendant sellers¹³ overcharged the class by violating federal antitrust laws.¹⁴ After conducting a preliminary hearing on the merits, the federal district court judge found that the class would "more than likely" prevail at trial.¹⁵ Despite this finding, the Supreme Court "dismiss[ed] the class action"¹⁶ because the named plaintiff would not pay the \$315,000 cost of pendency notice.¹⁷ Plaintiff's individual claim was small, as the Court said:

A critical fact in this litigation is that [plaintiff's] individual stake in the damages award he seeks is only \$70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that [plaintiff's] suit proceed as a class action or not at all.¹⁸

(1978). See generally Comment, *Cost Allocation in California Class Actions*, 13 CAL. W.L. REV. 65 (1976).

Nonetheless, the Supreme Court's opinion in *Eisen IV* that plaintiff should bear the cost of pendency notice is likely to be followed by the states. The Court said its rule was the usual rule, unaltered by rule 23. Most states have adopted, in some form, the provisions of rule 23. (Twenty-two states have adopted rule 23 in toto; fourteen states have adopted rule 23 in a modified form; eight states have adopted the 1938 rule 23. 1 H. NEWBERG, *supra* note 1, at §§ 1210(b) & 1220(a) (Supp. 1984)). It is, therefore, unlikely that states will decide differently than the Court on this issue. Indeed, other than California, only four states permit their courts, under special circumstances, to shift or allocate part of the cost of pendency notice to either party to the suit (New Jersey, New York, Oregon and West Virginia). 1 H. NEWBERG, *supra* note 1, at § 1220(b) (Supp. Feb. 1980 and Feb. 1984).

10. In *Eisen IV*, the Court noted that the cost of pendency notice, at ten cents first class postage, would be \$315,000. Today the cost of first class postage is twenty-two cents and of course, inflation has greatly added to the cost of printing, paper and stuffing. *Eisen IV*, 417 U.S. at 167 n.7.

11. The class action is one of the few legal remedies the small claimant has against those who command the status quo. I would strengthen his hand with the view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth.

Eisen IV, 417 U.S. at 186 (Douglas, J., dissenting) (footnotes omitted).

12. 417 U.S. 156 (1974).

13. The defendants were two brokerage firms dealing on the New York Stock Exchange. While it appears that other dealers handled odd-lot purchases, the two defendants "together handled 99% of the Exchange's odd-lot business." *Id.* at 160. It can therefore be presumed that the defendants were rich and powerful; individual purchasers, by definition those that purchased less than 100 shares (odd-lot purchases), were probably not.

14. *Id.* at 160.

15. *Id.* at 168.

16. *Id.* at 179.

17. *Id.* at 167 n.7, 179.

18. *Id.* at 161.

The Supreme Court was willing, or perhaps compelled,¹⁹ to deprive each class member of a remedy²⁰ in order to ensure that the absent members received pendency notice.

The unfairness of the result is highlighted by the fact that the same federal district court judge, after holding an evidentiary hearing, found that the class was adequately represented.²¹ That finding was never disputed by either the Second Circuit Court of Appeals²² or the Supreme Court.²³ Thus, although there was no question that the absent class members' interests were being adequately represented, and that without the class action device no absentee would or could pursue his/her claim, the cost of pendency notice caused the termination of what appeared to be a meritorious suit against defendants who bilked millions of people of millions of dollars.²⁴

19. In *Eisen IV*, the Court held that plaintiff must pay for the cost of pendency notice as part of the cost of financing the law suit. See *supra* note 9. Commentators disagree as to whether or not due process requires plaintiff to pay for the cost of pendency notice. See generally McCall, *Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance—Class Action Issues*, 25 HASTINGS L.J. 1351 (1974); Note, *Recent Developments, Eisen III: Fluid Recovery, Constructive Notice and Payment of Notice Costs by Defendant in Class Action Rejected*, 73 COLUM. L. REV. 1641 (1973); Note, *Allocation of Identification Costs in Class Actions: Sanders v. Levy*, 91 HARV. L. REV. 703 (1978).

20. Aside from the Supreme Court recognizing the obvious, it is interesting to note that plaintiff, in an attempt to avoid the procedural rigors of rule 23(b)(3), tried to certify the class as a rule 23(b)(1)(A) class. The Court in *Eisen IV* noted with approval that the Second Circuit Court of Appeals

[H]eld subdivision (b)(1)(A) inapplicable on the ground that the prospective class consisted entirely of small claimants, none of whom could afford to litigate this action in order to recover his individual claim and that consequently there was little chance of "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. . . ."

Eisen IV, 417 U.S. at 163-64 n.4 (citing 28 U.S.C. App. 7766 (Proposed FED. R. CIV. P. advisory committee notes)). Clearly, by requiring plaintiff to pay for pendency notice, the Court effectively deprived each individual class member of a remedy against the defendants.

21. *Id.* at 165.

22. *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973) [hereinafter cited as *Eisen III*].

23. Indeed, the Supreme Court properly assumed that the representation was adequate when it rejected one of plaintiff's arguments, that adequate representation in lieu of pendency notice was sufficient under rule 23. *Eisen IV*, 417 U.S. at 177-78. Further, it should be briefly noted that the federal district court in 1966 dismissed plaintiff's class suit in part because it feared that Eisen might not fairly and adequately represent the class. *Id.* at 162. In *Eisen II*, the court of appeals reversed the district court indicating that the district court's reasoning on the adequacy point was erroneous and directing reconsideration. *Id.* at 162-63. After that remand, and a full evidentiary hearing, the district court found that Eisen would fairly and adequately represent the class. *Id.* at 165. As indicated, neither the court of appeals in *Eisen III* nor the Supreme Court in *Eisen IV* questioned this finding.

24. Eisen claimed between \$22,000,000 and \$60,000,000 at the start of his action. *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253, 265 (1971). However, on appeal, Eisen raised the estimate to \$120,000,000. *Eisen III*, 479 F.2d at 1009.

It is the position of this Article that adequate representation of absent class members, rather than pendency notice to absent class members, satisfies the due process clause and permits the entry of a valid binding class judgment. It is argued that such a judgment conclusively binds the rights of all class members, both present and absent.

Part I of this Article will discuss the issue of whether or not pendency notice or adequate representation is the constitutional mandate. Part II will discuss whether or not Federal Rules of Civil Procedure rule 23's requirement of pendency notice to rule 23(b)(3) class members reflects a constitutional mandate or merely a statutory directive. Part III explores the pendency notice requirement of rule 23 and the ability of the parties to manipulate the rule so as to achieve a desired result. Part IV will propose a new rule which, while comporting with due process safeguards, will also permit the class device to function as a tool which deters antisocial activity and provides redress to individuals with small claims.²⁵

I. ADEQUACY OF REPRESENTATION VERSUS PENDENCY NOTICE: WHICH IS THE CONSTITUTIONAL MANDATE?

A. *The Two Leading Contenders: Hansberry v. Lee for Adequacy of Representation and Mullane v. Central Hanover Bank & Trust Co. for Pendency Notice*

The arguments concerning what is needed in order to give binding effect to class action judgments revolve around two Supreme Court decisions which were decided a decade apart.

In the case of *Hansberry v. Lee*,²⁶ the Supreme Court held that a prior class judgment was not binding on the petitioners because they were not adequately represented in the prior suit.

25. Philosophers may debate whether or not a right exists when no remedy is provided to redress its violation; the issue is of practical concern to the small claimant. If procedural rules bar redress as effectively as if no substantive right exists, then realistically no substantive right can be said to exist. It is clear that the government which creates substantive rights and procedural roadblocks is only fooling people who can least afford the joke. With reference to rights created by the Constitution, Chief Justice Marshall said: "The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation, if the law furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Whether a constitutional right or any other right, the rule is the same: if there is no remedy, then no right exists. "In the whole field of law there is no right without a remedy. . . . [T]he only useful test as to the existence of a right is that some legal remedy is provided. . . . [W]here no legal remedy is provided there is neither right nor duty." 5 A. CORBIN, *CONTRACTS*, § 990 (2d ed. 1964). See also H. McCLINTOCK, *PRINCIPLES OF EQUITY* 76 (2d ed. 1948).

26. 311 U.S. 32 (1940) [hereinafter cited as *Hansberry*].

As a method of enforcing segregation in Chicago, restrictive agreements were utilized to deny homeowners the power to sell their homes to blacks.²⁷ In 1934, Burke brought suit in the Superior Court of Cook County on behalf of himself and others, against Kleiman and three other individuals to enforce the provisions of a restrictive covenant and thereby restrain defendants from selling to blacks.²⁸ The restrictive features of the covenant involved were not effective unless ninety-five percent of the homeowners signed the agreement.²⁹ Both plaintiffs and defendants stipulated that that precondition had been satisfied.³⁰ The court found in favor of the plaintiffs and enforced the agreement.³¹ Later, the Hansberrys, who were blacks, purchased a home within the restricted area.³² Lee and others brought suit to enjoin the breach.³³ The Hansberrys defended on the ground that the agreement was invalid and unenforceable because ninety-five percent of the appropriate homeowners had not signed. Lee pleaded *res judicata*, claiming that that issue was finally resolved in *Burke v. Kleiman*,³⁴ the prior suit. Since the Hansberrys were not parties to the prior suit,³⁵ and had not received notice of the prior suit, they claimed that to bind them to the result of that suit denied them due process of law.³⁶ After a trial on the merits, the trial court found only fifty-four percent, not the required ninety-five percent, had signed the agreement and that the only support for the decree in *Burke* was the false and fraudulent stipulation concerning the ninety-five percent figure. Notwithstanding this finding, the lower court applied *res judicata* and the Hansberrys appealed. The Supreme Court of Illinois reviewed the

27. The practice was finally exposed and held unconstitutional in *Shelley v. Kraemer*, 334 U.S. 1 (1948).

28. *Hansberry*, 311 U.S. at 39. See *Burke v. Kleiman*, 277 Ill. App. 519 (1934) [hereinafter cited as *Burke*]. (The case was appealed directly to the Illinois Supreme Court, *Burke v. Kleiman*, 355 Ill. 390 (1934), which transferred the case to the court of appeals where it was affirmed).

29. *Hansberry*, 311 U.S. at 37-38.

30. *Id.* at 38. Actually it appears that the case was tried entirely on stipulated facts. The only issue presented was whether or not changes in the restricted area rendered the covenant unenforceable. The apparent and rather obvious goal of the litigants was to establish the covenant's validity so as to assure its continued utility. See *infra* note 44 and accompanying text.

31. *Hansberry*, 311 U.S. at 38.

32. *Id.*

33. Counsel for respondents (Lee and others) argued for a decree ordering specific performance, requiring that the Hansberrys return the home they purchased and in turn receive the price they had paid. *Id.* at 37.

34. *Id.* at 38. See *supra* note 28.

35. *Id.* Nor were the Hansberrys in privity with any of the parties to the prior suit.

36. *Id.* The Court stated that the petitioners pleaded "that denial of their right to litigate" was a denial of due process. This, of course, is merely an elliptical way of stating that they had not received pendency notice. This view is reinforced by the Court's discussion of the notice issue and by the fact that petitioners' counsel argued that the Hansberrys had not received "the benefit of notice." *Id.* at 33.

entire record of the *Burke* case and determined that the controversial stipulation was indeed untrue, but further found that it was not based upon fraud or collusion. It, therefore, applied the principle of *res judicata*, despite the concededly incorrect decision in *Burke*, and affirmed the lower court.³⁷ The Hansberrys then petitioned the United States Supreme Court for review.

Justice Stone, speaking for the Court, began by stating the general rules concerning notice and the binding effect of judgments:

It is a 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. . . . [J]udicial action enforcing [a judgment] against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require.³⁸

However, the Court then specifically recognized the class suit as an exception to the general rule:³⁹ "To these general rules there is a recognized exception that . . . the judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it."⁴⁰

As to whether adequate representation as opposed to pendency notice is the key ingredient necessary in obtaining a binding class judgment, the Court said: "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. . . ."⁴¹

Regarding the issue of adequate representation, the Court stated that it is one thing to permit representation of a class where the sole and common interest of the class is to assert a common right or to challenge an asserted obligation,⁴² but as the Court said:

37. *Id.* at 39-40. If the stipulation was merely untrue as opposed to being fraudulent or collusive, then the Illinois Supreme Court's application of *res judicata* based upon a case known to be erroneously decided is an example of why Judge Clark admitted in *Riordan v. Ferguson*, 147 F.2d 983, 988 (2d Cir. 1945) (dissenting opinion): "The defense of *res judicata* is universally respected, but actually not very well liked." See generally Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317 (1978).

38. *Hansberry*, 311 U.S. at 40-41.

39. Class actions were originally maintained to avoid the rigors of the necessary/indispensable party rule which required all parties interested in the controversy be joined. J. STORY, COMMENTARIES ON EQUITY PLEADINGS §§ 97-135 (2d ed. 1840); Hazard, *supra* note 2, at 1266; see also *infra* notes 192-195 and accompanying text. Indeed, even today the class action is excepted from the necessary/indispensable party rule. FED. R. CIV. P. 19(d).

40. *Hansberry*, 311 U.S. at 41.

41. *Id.* at 42-43.

42. *Id.* at 44-45.

It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group, merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative.⁴³

The Court reversed.

Perhaps it was the fraudulent aspect of the prior suit, combined with the nature of the right sought to be enforced, which caused the Court to employ unnecessarily broad language to effectuate the reversal of an obvious injustice.⁴⁴ Read literally, the Court's language might easily be interpreted so as to defeat all class actions where class interests are not joint and thus individual interests could be

43. *Id.* at 45. On this point and particularly referring to this quoted paragraph, commentators noted:

[D]oes the Court mean to base its holding on the distinction attempted to be drawn in the above paragraph? It is submitted it does not, because the distinction is one without substance. There is no such thing as a class action in which it can be said that each and every one of the absent members—those without notice of the proceedings—wishes the representatives of the class to assert a right in his behalf.

Keeffe, Levy & Donovan, *Lee Defeats Ben-Hur*, 33 CORNELL L.Q. 327, 338 (1948). As an example of the difficulty in finding the shining line which the Court attempts to draw, the authors cite the earlier Supreme Court case of *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921), which was cited with approval in *Hansberry*. In *Ben-Hur*, the Tribe, a fraternal organization, was going broke and could not pay off benefits it had promised its members. In an attempt to solve this problem, it undertook a reorganization which required one group of insureds to pay premiums at a different rate than another group of insureds. After reorganization, plaintiffs, all non-residents of Indiana, for themselves and the other members in their group, sued the Tribe, an Indiana corporation, requesting the Indiana federal district court enjoin the reorganization. After a hearing on the merits, the district court ruled against the class and dismissed the suit. Almost five years later, Indiana members of the class filed suits in the Indiana state court seeking to challenge the same reorganization plan. The Tribe then sought an injunction from the Indiana federal district court so as to prevent relitigation of what was settled by that district court's decree. The Hoosiers argued that they were not members of the class because their presence in the prior suit would have ousted the court of diversity jurisdiction. The Indiana federal district court agreed; on appeal, the Supreme Court reversed. The Court held that absent, non-diverse class members fell within the ancillary jurisdiction of the federal court and thus did not oust the district court of diversity jurisdiction. The rights of the absentees, according to the Court, were concluded by the prior decree. The Court did not discuss the very likely possibility that some members of the class would prefer to pay a bit more in premiums rather than possibly cause the Tribe to become insolvent and thus lose everything. See *infra* note 45 and accompanying text.

44. After trial, the lower court found the stipulation was fraudulent: The Illinois Supreme Court found that it was untrue. Plaintiffs and defendants in the prior suit had stipulated to all facts and tried only one issue. Everything pointed toward a collusive lawsuit brought to secure the continued validity of the restrictive covenant, see *supra* note 30, but the Supreme Court had to accept the Illinois Supreme Court's findings. The Supreme Court's soon to be realized distaste for the enforcement of restrictive covenants (see *Shelley v. Kraemer*, 334 U.S. 1 (1945), *supra* note 27), coupled with the restrictions placed upon the Court by the Illinois Supreme Court's findings, may explain why the Court was compelled to use the language employed to reverse. See Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFFALO L. REV. 433, 460 (1960).

divergent. For instance, in a taxpayers' or ratepayers' suit to enjoin the operation of a nuclear power plant, it is obvious, given our political divisions on the subject, that not all class members wish to enjoin such activity. A class suit brought to compel desegregation by the use of busing may certainly include class members who do not want their children bused to a particular place or who do not want desegregation.⁴⁵ Yet, such suits and others like them are common class suits in the federal courts.⁴⁶ In such circumstances, subclasses may be utilized to accommodate differing interests⁴⁷ or the defendant can be said to properly represent those interests not represented by the class representatives.⁴⁸

The pendency notice argument was given a big boost in 1950 when the Supreme Court decided *Mullane v. Central Hanover Bank*

45. In such a suit, one of the lawyers representing the plaintiff class felt the conflict so strongly that he eventually withdrew from representation. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

46. Rule 23(b)(2) class actions (Title VII antidiscrimination actions), have by far been "the most popular type of class action under the present Federal Rule 23." 1 H. NEWBERG, *supra* note 1, at § 1145.

47. FED. R. CIV. P. 23(c)(4) provides: "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."

As Professors Wright and Miller explain:

The usual situation in which a court will divide a class into subclasses under Rule 23(c)(4)(B) is when the class is found to have members whose interests are divergent or antagonistic. The court may group members into nearly homogeneous subclasses, thereby separating adverse as well as atypical members. But a class need not be subdivided merely because different groups within it have alternative legal theories for recovery or because they have different factual bases for seeking relief.

7A C. WRIGHT & A. MILLER, *supra* note 1, at § 1790.

48. The Supreme Court in *Hansberry* said as much, but because the defendants in the prior suit were only nominal at best, the Court did not apply this principle to the case. In countering respondent's argument on the point, the Court approved of the principle in appropriate cases. The Court said:

The defendants in the first suit were not treated by the pleadings or decree as representing others or as foreclosing by their defense the rights of others; and, even though nominal defendants, it does not appear that their interest in defeating the contract outweighed their interest in establishing its validity. For a court in this situation to ascribe to either the plaintiffs or defendants the performance of such functions on behalf of petitioners here, is to attribute to them a power that it cannot be said that they had assumed to exercise, and responsibility which, in view of their dual interests it does not appear that they could rightly discharge.

Hansberry, 311 U.S. at 46.

In *Supreme Tribe of Ben-Hur v. Cauble*, *supra* note 43, 255 U.S. 356 (1921), the Supreme Court applied *res judicata* to bind the Hoosiers to a prior class judgment. In doing so, the Court presumed that the plaintiff class which consisted of 574 members from 15 states and Canada, although losing, adequately represented the Hoosiers; of course, any Hoosier who did not want the reorganization challenged could properly be viewed as being adequately represented by the Tribe which, unlike the defendants in *Burke v. Kleiman*, was literally fighting for its very survival. See *supra* note 43.

& Trust Co.,⁴⁹ a case which was not filed as a class action suit. In *Mullane*, the New York Banking Law had provided trustees with authority to place various trusts in a common trust fund, thereby achieving the advantages of diversification of risk and economy in management.⁵⁰ Within a specified time after establishing the common trust fund, the trustee was required to petition the New York court for the settlement of accounts of all persons interested in the fund.⁵¹ Both residents and non-residents were beneficiaries of the fund,⁵² which included income, principal and contingent beneficiaries.⁵³ At the appropriate time, the trustee petitioned the court for the settlement of accounts. Pursuant to the New York Banking Law, the court appointed two guardians, one to represent all the income beneficiaries and one to represent all those interested in the principal.⁵⁴ Notice of the settlement proceeding was provided by newspaper publication in compliance with the Banking Law.⁵⁵ The guardians were present at the settlement proceeding; no beneficiary appeared.⁵⁶ The court purported to enter a decree which had the effect of terminating "every right which beneficiaries would otherwise have against the trust company . . . for improper management of the common trust fund during the period covered by the [action]."⁵⁷

The question before the Court was "the constitutional sufficiency of notice to beneficiaries on judicial settlement of accounts. . . ."⁵⁸

49. 339 U.S. 306 (1950) [hereinafter cited as *Mullane*]. An earlier Supreme Court case just barely hinted at the problem. See *Wabash R.R. v. Adelbert College*, 208 U.S. 38, 58 (1908), where Justice Moody, in language that was not merely unnecessary to the decision but adverse to it suggested *inter alia* that a prior "class action" could not bind absentees because "some possibly had never heard of the pendency of the suit". Later, explaining the rejection of the class suit in *Wabash*, the Supreme Court never mentioned pendency notice or the lack thereof, but rather stated that *Wabash* stood for the simple notion that merely saying a suit is a class suit does not make it such: "That allegation, of course, would not by itself determine the character of the proceeding." *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662, 671-72 (1915) (citing *Wabash R.R. v. Adelbert College*, 208 U.S. at 58).

50. *Mullane*, 339 U.S. at 308-09.

51. *Id.* at 309.

52. *Id.* Although there were 113 trusts involved, "[t]he record [did] not show the number or residence of beneficiaries, but they were many and it is clear that some of them were not residents of the State of New York." *Id.*

53. *Id.* at 310.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 311. Of course, every court hopes to finally adjudicate the dispute before it so as to avoid needless repetition and waste of time, effort and resources. However, it is universally recognized that only a second court reviewing a prior decision is permitted to determine whether or not the first proceeding is binding. See generally *Cleary, Res Judicata Reexamined*, 57 YALE L.J. 339 (1948). Cf. *Pennoyer v. Neff*, 95 U.S. 714 (1877); *York v. Texas*, 137 U.S. 15 (1890).

58. *Mullane*, 339 U.S. at 307. Justice Jackson, speaking for the Court, actually

Another issue raised and discussed by the Court was “the right of [the New York] courts to adjudicate at all as against those beneficiaries who reside[d] without the State of New York.”⁵⁹

As to this latter issue, the Court recognized that the New York proceeding had some characteristics of, and yet was wanting in some features of, proceedings both *in rem* and *in personam*.⁶⁰ Without attempting to label the action or employ traditional terminology, the Court held:

It is sufficient to observe that, whatever the technical definition of its chosen procedure, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or non-resident, provided its procedure accords full opportunity to appear and be heard.⁶¹

framed the issue as follows: “This controversy questions the constitutional sufficiency of notice to beneficiaries on judicial settlement of accounts by the trustee of a common trust fund established under the New York Banking Law.” *Id.*

The fact that the “trust fund established under the New York Banking Law” was in question is significant in light of the Court’s recognition that 31 other jurisdictions had adopted such legislation. Those jurisdictions might have been more interested in attracting funds and/or business for their resident trustees than in protecting the rights of the beneficiaries of those funds. Indeed, New York since World War I, has been the financial center of the world. *See W. GREENLEAF, AMERICAN ECONOMIC DEVELOPMENT SINCE 1860*, at 357 (1968). In competing for funds to feed investments, New York may have been less concerned with beneficiaries and more concerned with its own trust companies. *See infra* notes 83-84 and accompanying text.

59. *Mullane*, 339 U.S. at 311. By separating the two issues the Court itself recognized that notice without the compulsion to appear or vice versa is insufficient to require a defendant’s appearance. *See also Shaffer v. Heitner*, 433 U.S. 186, 213 n.40 (1977).

60. *Mullane*, 339 U.S. at 312. Since the proceeding compelled the trustees to appear and account for a fund within the jurisdiction of the court, it appeared to be a proceeding *in rem*, *quasi-in-rem* and in the nature of a proceeding *in rem*. However, since the rights of the beneficiaries against the trustees for misfeasance and/or malfeasance extended beyond the fund which was before the court and to the trustees personally, the proceeding looked more like an *in personam* proceeding than any other, if any other at all. As the court said in *Shaffer v. Heitner*, 433 U.S. at 199:

If a court’s jurisdiction is based on its authority over the defendant’s person, the action and judgment are denominated “*in personam*” and can impose a personal obligation on the defendant in favor of the plaintiff. If jurisdiction is based on the court’s power over property within its territory, the action is called “*in rem*” or “*quasi in rem*.” The effect of a judgment in such a case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he is not before the court.

61. *Mullane*, 339 U.S. at 313. The Court did not cite any authority whatsoever for its position. Justice Field in *Pennoyer v. Neff*, 95 U.S. at 734-35, left little room for any growth in jurisdictional concepts although he did go to pains “[t]o prevent any misapplication of the views expressed in the opinion” to state: “Nor do we doubt that a State, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall not require other than personal service upon their officers or members.” Justice Field was obviously speaking of a suit by others against

On the main issue, the notice issue, the Court held that the notice provided did not meet constitutional standards of due process: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."⁶²

The Court concluded that as to those beneficiaries whose names and addresses were known to the trustees, those with whom the trustee regularly communicated, individual mailed notice was required. As to unknown and conjectural beneficiaries, the statutory (publication) notice was sufficient.⁶³

B. *Distinctions Between Mullane and the Plaintiff Class Suit*

Since *Mullane* is the germinal case regarding the constitutional requirement of notice, and the case most often advanced as requiring pendency notice to absent class members,⁶⁴ it is appropriate to point out the distinctions between *Mullane* and the plaintiff class action suit,⁶⁵ distinctions which justify pendency notice in the former situation but not in the latter.

In *Mullane*, three different types of conflict of interest existed, none of which exist in the plaintiff class suit:

CONFLICT I — In *Mullane*, there was a conflict of interest among the beneficiaries. Beneficiaries interested in income are not interested in principal; income beneficiaries' interests are adverse to the principal and contingent beneficiaries' interests. Such a conflict

the corporation within the state of incorporation, not, as in *Mullane*, a suit by the corporation (trust) against others in the state of incorporation (the state that created the trust).

62. *Mullane*, 339 U.S. at 314. Compare the language of Justice Field in *Pennoyer v. Neff*, 95 U.S. at 720, where in 1877 he stated that the territorial power theory of jurisdiction "express[ed] a principle of general, if not universal, law." Confined and intimidated by such overpowering rhetoric, the courts struggled for 100 years, establishing fiction upon fiction so as not to offend that universal principle. See Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts—From Pennoyer to Dencla: A Review*, 25 U. CHI. L. REV. 569 (1958); Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657 (1959); Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33 (1978). Finally, in *Shaffer v. Heitner*, 433 U.S. at 196, "the continued soundness of the conceptual structure founded on the century-old case of *Pennoyer v. Neff*" . . . was reviewed and found wanting. Universal and fundamental principles, when announced by the Supreme Court, are difficult to discard.

63. *Mullane*, 339 U.S. at 317-18.

64. See *infra* notes 103-153 and accompanying text.

65. Although this Article is primarily concerned with plaintiff class action suits, Part IV of this Article will suggest a rule concerning pendency notice which will apply to all class suits, including defendant class suits.

may not be hospitable to class resolution.⁶⁶

CONFLICT II—In *Mullane*, there was a conflict of interest between the beneficiaries and their guardians. The Court in *Mullane* insisted that two factors combined to trigger the pendency notice requirement. One factor was that the beneficiaries’ “interests are . . . subject to diminution in the proceeding by allowance of fees and expenses to [the guardian] who, in their names, but without their knowledge, may conduct a fruitless or uncompensatory contest.”⁶⁷ Unlike the class suit, the guardians were not hired by their clients, but rather appointed by the court.⁶⁸ Since no beneficiary

66. Professor Scott explains the conflict between these beneficiaries and the dilemma it poses for a trustee, such as the trustee in *Mullane*:

Where there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them. This principle has its commonest application where there are successive beneficiaries. Where the trustee is directed to pay the income to a beneficiary during his life and on his death to pay the principal to another beneficiary, the interests of the two beneficiaries are to a certain extent antagonistic, and the trustee is under a duty so to administer the trust as to preserve a fair balance between them. He is under a duty to the former beneficiary to take care not merely to preserve the trust property but to make it productive so that a reasonable income will be available for him. He is under a duty to the latter beneficiary to take care to preserve the principal of the trust property for him. He is not under a duty to the beneficiary entitled to risk the safety of the principal in order to produce a larger income, but he is under a duty to him not to sacrifice income for the purpose of increasing the value of the principal. Thus, he is under a duty to the beneficiary entitled to the income not to purchase unproductive property or property which yields an income substantially lower than that which is normally earned by trust investments although it may be probable that the property will appreciate in value. On the other hand, he is under a duty to the beneficiary who is ultimately entitled to the principal not to purchase property which is certain or likely to depreciate in value, although the property yields a large income. Similarly if the trust property at the creation of the trust includes wasting or unproductive property, the trustee is ordinarily under a duty to dispose of such property.

A. SCOTT, LAW OF TRUSTS, § 232 (3d ed. 1967). See also *infra* note 75.

67. *Mullane*, 339 U.S. at 313.

68. In *Mullane*, the New York court, pursuant to the New York Banking Law § 100-C(12), appointed the guardians. *Id.* at 310. It is typical where trust funds are involved for the court to appoint guardians to protect all the various interests. 39 C.J.S. *Guardian and Ward* § 17 (1976). It is quite a different thing to represent the interests of a client while hired or appointed by a third party, than when the attorney is directly accountable to the client. On this subject, canon 5 of the American Bar Association Code of Professional Responsibility (MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (amended 1982)) [hereinafter cited as Old ABA] states that “A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client.” This canon is backed up by both disciplinary rules [hereinafter cited as DR] and ethical considerations [hereinafter cited as EC]. DR 5-107 provides in part:

DR 5-107 Avoiding Influence by Others Than the Client.

(A) Except with the consent of his client after full disclosure, a lawyer shall not:

(1) Accept compensation for his legal services from one other than his client.

(2) Accept from one other than his client anything of value related to his representation of or his employment by his client.

(B) A lawyer shall not permit a person who recommends, employs, or pays

appeared, the guardians never consulted with their clients concerning their clients' wishes nor did they report to their clients concerning the progress of the case.⁶⁹ Hence, the guardians in *Mullane* who did not report to any client were paid fees and costs regardless of results, whereas attorneys in a plaintiff class suit are in continuous contact with their clients and are paid fees and reimbursed costs only in the event of success.⁷⁰ The plaintiff class attorney's interest

him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

The relevant EC's state in part:

Desires of Third Persons

EC 5-21 The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence.

EC 5-22 Economic, political, or social pressures by third persons are less likely to impinge upon the independent judgment of a lawyer in a matter in which he is compensated directly by his client and his professional work is exclusively with his client. On the other hand, if a lawyer is compensated from a source other than his client, he may feel a sense of responsibility to someone other than his client (footnotes omitted).

The American Bar Association Model Rules of Professional Conduct are virtually identical. MODEL RULES OF PROFESSIONAL CONDUCT 5.4(c) (adopted 1983) [hereinafter cited as New ABA].

Aside from the inherent conflict problem, a competence problem may exist. Those appointed by the court may not have the experience necessary for effective representation (*see Lewis v. State Bar of Cal.*, 28 Cal. 3d 683, 621 P.2d 258, 170 Cal. Rptr. 634 (1981)) or the time to devote to the case (*see Lopez v. Larson*, 91 Cal. App. 2d 383, 400 153 Cal. Rptr. 912, 922 (1979)). Worst yet are attorneys appointed as guardians who answer to no client and are paid regardless of success, because such attorneys will most likely not wish to vigorously protect their client's interest if to do so will distress the court that made the lucrative appointment.

69. The Court stated that "[n]ot even the special guardian is required or apparently expected to communicate with his ward and client. . . ." *Mullane*, 339 U.S. at 316.

The New ABA, *supra* note 68, rule 1.4 specifically requires communication concerning the status and progress of the case. New ABA rule 1.4 provides: "(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." In the plaintiff class suit, the attorney for the class is ethically required to consult and report to his/her client(s).

70. Many federal courts have stated that a highly relevant factor in establishing fees for plaintiffs' attorneys in class actions is "the contingent nature of the fees, with the accompanying risk of wasting hours of work, overhead and expenses (for it is clearly established that compensation is awarded only in the event of success)." *Angoff v. Goldfind*, 270 F.2d 185, 189 (1st Cir. 1959). *See also Freeman v. Ryan*, 408 F.2d 1204, 1206 (D.C. Cir. 1968); *McKittrick v. Gardner*, 378 F.2d 872, 875 (4th Cir. 1967); *Harris v. Chicago Great W. Ry. Co.*, 197 F.2d 829, 834 (7th Cir. 1952); *Newmark v. RKO Gen., Inc.*, 332 F. Supp. 161, 164 (S.D.N.Y. 1971). *See generally* MANUAL FOR COMPLEX LITIGATION § 1.47(b)(2) (5th ed. 1982) [hereinafter cited as MANUAL] which federal courts are increasingly relying upon in determining attorney fees. 1 and 4 H. NEWBERG, *supra* note 1, at §§ 1120n and 7518j; *Smith, Standards for Judicial Approval of Attorneys' Fees in Class Action and Complex Litigation*, 20 How. L.J. 20 (1977).

and the interest of the plaintiff class are the same.⁷¹ Thus, the intent of the attorney is to avoid fruitless contest and vigorously advocate the interest of the plaintiff class so that both may be compensated. Moreover, unlike *Mullane* where the trust assets were available to pay for the costs of suit, in the plaintiff class suit the named plaintiff or the plaintiff class is ultimately responsible for

71. Both the attorney for the class and the class can only be compensated in the event of success. The conflicts, if any, are minimized or eliminated by a variety of rules and decisions on the subject. The MANUAL, *supra* note 70, § 1.46, at 66, states that fees should be negotiated separately from class recovery because "[w]hen counsel for the class negotiates simultaneously for the settlement fund and for individual counsel fees, there is an inherent conflict of interest."

Further and more importantly, an attorney is disqualified from representing the class if there is a chance that a conflict exists between the attorney and the class. Hence, an attorney is disqualified if the attorney:

(1) Attempts to act as both class attorney and class representative, *see* Second Circuit: *Lowenschuss v. Bluhdorn*, 613 F.2d 18, 20 (2d Cir. 1980); *Davidson v. Yeshiva Univ.*, 555 F. Supp. 75, 78 (S.D.N.Y. 1982); *Housler v. First Nat'l Bank of E. Islip*, 524 F. Supp. 1063 (E.D.N.Y. 1981); *Cotchett v. Avis Rent A Car Sys.*, 56 F.R.D. 549 (S.D.N.Y. 1972). Third Circuit: *Kramer v. Scientific Control Corp.*, 534 F.2d 1085, 1090 (3d Cir. 1976); *Charal v. Andes*, 81 F.R.D. 99 (E.D. Pa. 1979); *Hedges Enter. v. Continental Group*, 81 F.R.D. 461 (E.D. Pa. 1979); *Residex Corp. v. Farrow*, 20 Fed. R. Serv. 2d (Callaghan) 97 (E.D. Pa. 1975); *In re Goldchip Funding Co.*, 61 F.R.D. 592 (M.D. Pa. 1974). Fourth Circuit: *Clark v. Cameron-Brown Co.*, 72 F.R.D. 48 (M.D.N.C. 1976). Fifth Circuit: *Phillips v. Joint Legislative Comm.*, 637 F.2d 1014 (5th Cir. 1981); *Garonzik v. Shearson Hayden Stone, Inc.*, 574 F.2d 1220 (5th Cir. 1978); *Zylstra v. Safeway Stores, Inc.*, 578 F.2d 102, 104 (5th Cir. 1978). Sixth Circuit: *Turoff v. May Co.*, 531 F.2d 1357 (6th Cir. 1976). Seventh Circuit: *Susman v. Lincoln Am. Corp.*, 561 F.2d 86 (7th Cir. 1977); *Eovaldi v. First Nat'l Bank of Chicago*, 57 F.R.D. 545 (N.D. Ill. 1972). Eighth Circuit: *Lamb v. United Sec. Life Co.*, 59 F.R.D. 25 (S.D. Iowa 1972). Ninth Circuit: *In re Hotel Tel. Charges*, 500 F.2d 86 (9th Cir. 1974); *Shields v. First Nat'l Bank of Ariz.*, 56 F.R.D. 442 (D. Ariz. 1972).

(2) Is related to the class representative, *see* Second Circuit: *Cohen v. Bloch*, 507 F. Supp. 321 (S.D.N.Y. 1980); *Wellman v. Dickinson*, 79 F.R.D. 341 (S.D.N.Y. 1978); *Fischer v. IT&T Corp.*, 72 F.R.D. 170 (E.D.N.Y. 1976); *Dennis v. Saks & Co.*, 20 Fed. R. Serv. 2d (Callaghan) 994 (S.D.N.Y. 1975); *Stull v. Pool*, 63 F.R.D. 702 (S.D.N.Y. 1974). Third Circuit: *Lewis v. Goldsmith*, 95 F.R.D. 15 (D.N.J. 1982); *Bogus v. Am. Speech & Hearing Ass'n*, 20 Fed. R. Serv. 2d (Callaghan) 859 (E.D. Pa. 1975); *Sommers v. Abraham Lincoln Fed. S. & L. Ass'n*, 66 F.R.D. 581 (E.D. Pa. 1975). Seventh Circuit: *Helfand v. Cenco, Inc.*, 80 F.R.D., 1 (N.D. Ill. 1977). Ninth Circuit: *In re Hotel Tel. Charges*, 500 F.2d 86 (9th Cir. 1974); *Shields v. First Nat'l Bank of Ariz.*, 56 F.R.D. 442 (D. Ariz. 1972); *Lyon v. Arizona*, 80 F.R.D. 665 (D. Ariz. 1978).

(3) Has a business relationship with the class representative, *see* Second Circuit: *Brick v. CPC Int'l, Inc.*, 547 F.2d 185 (2d Cir. 1976); *Wellman v. Dickinson*, 79 F.R.D. 341 (S.D.N.Y. 1978). Third Circuit: *Kramer v. Scientific Control Corp.*, 534 F.2d 1085 (3d Cir. 1976). Fifth Circuit: *Zylstra v. Safeway Stores, Inc.*, 578 F.2d 102 (5th Cir. 1978); *Byrnes v. IDS Realty Trust*, 70 F.R.D. 608 (D. Minn. 1976).

(4) Is a member of the class, *see* District of Columbia: *Bachman v. Pertschuk*, 437 F. Supp. 973 (D.D.C. 1977). Third Circuit: *Kramer v. Scientific Control Corp.*, 534 F.2d 1085 (3d Cir. 1976). Seventh Circuit: *Susman v. Lincoln Am. Corp.*, 561 F.2d 86 (7th Cir. 1977). Ninth Circuit: *In re Hotel Tel. Charges*, 500 F.2d 86 (9th Cir. 1974); *Shields v. First Nat'l Bank of Ariz.*, 56 F.R.D. 442 (D. Ariz. 1972).

Many of these cases suggest that the reason for disqualification is to assure that the class will not place blind reliance on the attorney so that the class's interest is respected. *See* cases collected and cited in *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978).

costs,⁷² (although in the event the plaintiff class loses, the attorney for the class rarely seeks reimbursement for costs advanced and merely suffers the loss).⁷³

CONFLICT III—In *Mullane*, there was a conflict between the trustee and its beneficiaries. The other factor stated by the *Mullane* court for requiring pendency notice to the beneficiaries was that the judicial settlement proceeding “cut off their rights to have the trustee answer for negligent or illegal” acts concerning their interests.⁷⁴ Ordinarily beneficiaries expect that their trustee, their caretaker, will care for and protect their interest,⁷⁵ yet “it is their caretaker who in the accounting [became] their adversary.”⁷⁶ This expectation was particularly strong in *Mullane* because the trustee periodically communicated with the beneficiaries, thereby inducing a reasonable expectation that the trustee would continue to protect their interest unless otherwise notified. Unlike *Mullane*, in the

72. The Old ABA *supra* note 68 is clearly on point. DR 5-103(B) provides: While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

The New ABA *supra* note 68, rule 1.8(e) appears to comport with reality (*see infra* note 73). It states in part:

Rule 1.8 Conflict of Interest: Prohibited Transactions

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

- (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
- (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

One commentator interpreted proposed rule 1.8(e), prior to its adoption, to mean that a lawyer could pay for litigation costs only if the lawyer was serving without a fee. The commentator argued that it is unclear whether repayment is contingent only on recovery of costs or must be contingent on prevailing on the merits. It is too early to predict how the language will be construed, and there is no explanation in the commentary to the rule. Yet, the very ambiguity of the wording may mean that the drafters did not intend a strict construction. Lynch, *Ethical Rules in Flux: Advancing Costs of Litigation*, 7 LITIGATION 19, 21 (Winter 1981).

It should be noted, however, that as of this writing only New Jersey, Arizona and Pennsylvania have adopted the New ABA Rules. L.A. Daily Journal, Dec. 7, 1984, at 1, col. 2.

73. Findlater, *The Proposed Revision of DR 5-103(B): Champerty and Class Actions*, 36 BUS. LAWYER 1667, 1671 (1981).

74. *Mullane*, 339 U.S. at 313.

75. The trustee is under a duty to beneficiaries to administer the trust solely in the interest of the beneficiaries. Further, in dealing with the beneficiaries on the trustee's own account, the trustee has a duty to deal fairly and to communicate to the beneficiaries all facts regarding the transaction. RESTATEMENT (SECOND) OF TRUSTS § 170 (1959). *See also supra* note 66 and accompanying text.

76. *Mullane*, 339 U.S. at 316.

plaintiff class suit the action is prosecuted by the class for the benefit of the class rather than by the class's trustee against the class.

Other significant distinctions exist:

(1) *Mullane* was not a class suit.⁷⁷ Indeed, the Court by ordering pendency notice converted the suit to a defendant class suit. In *Mullane*, the plaintiff trustee bank brought suit against the guardians as representatives of the beneficiaries. If the Court had not performed the metamorphosis, then plaintiff alone would have been permitted to choose the representatives for the defendant class. As Professor Chafee said, "It is a strange situation where one side picks out the generals for the enemy's army."⁷⁸ Indeed, perhaps plaintiff should never be permitted to choose the opponents' representatives.⁷⁹ In order to avoid this result, the Court ordered pendency notice, emphasizing that enough beneficiaries would receive actual

77. No class certification procedure was ever utilized because no class member ever appeared in the action. See *supra* note 69 and accompanying text.

78. Z. CHAFEE, *supra* note 1, at 237.

79. In *Richardson v. Kelly*, 191 S.W.2d 857 (Tex. 1945), cert. denied, 329 U.S. 798 (1947), an insurance company was adjudged insolvent and Kelly was appointed as its receiver. Each of the 3200 members were severally liable for the debts of the company. Kelly first sued 200 members for a large sum of money, but when they began to put up a vigorous fight, Kelly dismissed without prejudice. He then filed a second suit against 28 members and all others similarly situated. None of the original 200 members were named as defendants. Of the 28 named, 21 were liable for less than \$200.00 and the highest possible liability was only \$800.00, while the possible liability to unnamed members was many thousands of dollars each. No notice was provided unnamed members. Prior to trial, the action against two named members was dismissed, six defaulted, and seventeen paid and/or settled; only three proceeded. The judgment went for the receiver. Notice of appeal was filed by three named defendants; two then settled favorably, and the other, who owed only \$18.00, failed to perfect the appeal. The judgment became final. Later, two of the original 200 filed suit to vacate the judgment. They alleged lack of actual or constructive notice and claimed that Kelly purposely chose the particular named defendants because they had little incentive to defend and/or little resources to properly defend, i.e., inadequate representation. The Texas courts upheld the judgment as a valid class judgment binding on the absentees and the Supreme Court denied certiorari. The plain unfairness of the procedure, if not the result (see Z. CHAFEE, *supra* note 1, at 242) is possibly the reason for both the Court's decision in *Mullane* and rule 23's notice requirements concerning the (b)(3) class. The advisory committee notes to rule 23, 39 F.R.D. 95 (1966) [hereinafter cited as ACN], when speaking to the issue of notice, refer to commentators who criticize the *Richardson* decision. These commentators suggest that such a result would have been avoided if pendency notice was provided the class. See Z. CHAFEE, *supra* note 1, at 239-42; Note, *Binding Effect of Class Actions*, 67 HARV. L. REV. 1059, 1061, 1064 (1954); Note, *Federal Class Actions: A Suggested Revision of Rule 23*, 46 COLUM. L. REV. 818, 829 (1946). The case has caused a great deal of criticism, aside from that noted by the ACN, *supra*. See Jaworski and Padgett, *The Class Action in Texas: An Examination and a Proposal*, 12 HOUS. L. REV. 1005, 1018 (1975); Starrs, *The Consumer Class Action-Part II: Considerations of Procedure*, 49 B.U.L. REV. 407, 487 (1969); VanDercreek, *The "Is" and "Ought" of Class Action Under Federal Rule 23*, 48 IOWA L. REV. 273, 278 (1963); Simeone, *Procedural Problems of Class Suits*, 60 MICH. L. REV. 905, 945 (1962); Note, *Due Process Requirements of a State Class Action*, 55 YALE L.J. 831 (1946); Note, *Denial of Due Process Through Use of the Class Action*, 25 TEX. L. REV. 64 (1946).

notice so that some might appear and protect the interest of the others as against both the trustees and the guardians.⁸⁰ Since the New York law purported to bind all beneficiaries, as if it were a defendant class action, *Mullane* merely sought to assure that a sufficient number of interested parties would appear so that the interests of all would be protected.⁸¹ Unlike the danger presented to the absent defendant class members in *Mullane*, the absent class members in a plaintiff class action are fully protected by the plaintiff class representative and the plaintiff class attorney who have only one interest: to pursue the action vigorously on behalf of the class so that all may be compensated.⁸²

(2) In *Mullane*, jurisdiction (the power to adjudicate) was based on New York's creation of the common trust fund mechanism. The economy of investment envisioned by the fund would have been destroyed if the trustee were required to sue each beneficiary in each state or country in which each was domiciled. In competing for trust funds with other states, the state's interest in encouraging the use of New York state trustees had to be restrained so as to protect the beneficiaries.⁸³ And, while it is true that notice by itself lacks the compulsion to appear, nonetheless, when the basis of jurisdiction turns on necessity rather than established theories of jurisdiction, it is proper to presume that notice, the second ingredient necessary in obtaining jurisdiction over a defendant, will be more strongly assessed.⁸⁴ Indeed, it is even doubtful that a plaintiff or

80. "Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objection sustained would inure to the benefit of all." *Mullane*, 339 U.S. at 319.

81. Whether a plaintiff can ever constitutionally choose class representatives for a defendant class, even assuming adequate representation and appropriate notice, is discussed in Van Dercreek, *supra* note 79, at 278. See also 7 C. WRIGHT & A. MILLER, *supra* note 1, at § 1770. But see *United States v. Cantrell*, 307 F. Supp. 259 (E.D. La. 1969) where the district court permitted the government to file a defendant class action alleging racial discrimination in the operation of bars and cocktail lounges, so long as all class members were notified.

82. The plaintiff, the litigant that takes the initiative in filing the class suit, is likely to pursue it or not file the suit at all; it is the defendant that is the involuntary litigant. This distinction has been advanced as a safeguard to litigants in those jurisdictions which have abandoned the concept of mutuality of collateral estoppel. Those jurisdictions tend to place great weight on whether or not the litigant against whom collateral estoppel is used had the initiative in the prior proceeding, thereby assuring that that litigant had a full and fair hearing on the issues involved. See Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957); Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25 (1965). In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979), the Supreme Court rejected Professor Currie's "initiative test" as a rule of thumb, but acknowledged that it was an important factor in adjudging whether or not to permit a stranger to use collateral estoppel against a litigant who was a party at a prior proceeding. See *infra* note 282.

83. The Court listed 31 jurisdictions which had adopted similar legislation concerning common trust funds. *Mullane*, 339 U.S. at 308 n. See *supra* note 58.

84. In *Hess v. Pawlowski*, 274 U.S. 352 (1927), the Supreme Court upheld a non-

defendant class representative can confer jurisdiction over the class in a foreign forum without consent, authorization or service of process.⁸⁵

resident motorist long-arm statute, which implied that the non-resident motorist consented to service of process upon the registrar of motor vehicles should an accident occur while the non-resident was using the forum's highways. The statute read in part: "[P]rovided, that notice of such service and a copy of process are forthwith sent by registered mail by the plaintiff to the defendant, and the defendant's return receipt and the plaintiff's affidavit of compliance herewith are appended to the writ and entered with the declaration." *Id.* at 354. The Court upheld the statute based on the forum state's need to protect its residents from such dangerous and mobile instruments of destruction as automobiles. The Court was willing to stretch its view of both the meaning of the privileges and immunity clause of the Constitution, and *Pennoyer v. Neff*, 95 U.S. 714 (1877), but *only* because actual notice was mandated by the statute. *Cf. Wuchter v. Pizzutti*, 276 U.S. 13, 19 (1928), where the Supreme Court invalidated a similar New Jersey non-resident motorist statute because it did not expressly require that notice be provided to the defendant even though the defendant in that case actually did receive notice.

Further, notice requirements have been strictly applied whenever the state is the litigant involved. In *Mullane*, the state created the entity and accounting procedure and notice was strictly scrutinized. In *Walker v. City of Hutchinson*, 352 U.S. 112 (1962), the state sought to condemn defendant's property providing only published notice. The Court held that the notice to defendants by the state was insufficient. Most recently, the Court held that when the state conducts any proceeding that affects a legally protected property interest of any party (e.g., a mortgagee's interest), the state must provide actual notice if the identity and location of the party is reasonably ascertainable. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983).

Perhaps more importantly, since *Shaffer v. Heitner*, 433 U.S. 186 (1977), the Court has required that the non-resident defendant expect to be "haled before a [foreign] court." *Kulko v. Superior Court*, 436 U.S. 84, 97-98 (1978) (quoting *Shaffer v. Heitner*, 433 U.S. at 216). This standard was reiterated in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) and *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174, 2183 (1985). See generally Comment, *Constitutional Limitations on State Long Arm Jurisdiction*, 49 U. CHI. L. REV. 156 (1982). This expectation, in the usual case, is supplied by defendant's contacts with the foreign forum. Yet, in *Mullane* it is the state's interest that supplies the basis for jurisdiction rather than the beneficiaries' contacts. In such a case, it is only fair that the state be required to assure that notice be provided to the defendant beneficiaries.

85. In a case where the *res*, the subject of the dispute, was not before the court, the Supreme Court refused to bind non-resident absentees to a judgment which went against a defendant class. In *Christopher v. Brusselback*, 302 U.S. 500 (1938), decided just prior to the adoption of the original Federal Rules of Civil Procedure (FED. R. CIV. P. 308 U.S. 645 (1939)), creditors of an Illinois bank filed suit in the Illinois federal district court naming the bank and its stockholders as defendants. The Illinois district court found the bank to be insolvent and the stockholders were assessed a statutory liability. The creditors then filed suit in the Ohio federal district court against defendants who were stockholders of the bank but who were not served with process in the Illinois action and were non-residents of Illinois. The creditors claimed that the prior Illinois decree was binding on these stockholders. The Supreme Court stated that the obligation imposed was "personal" and that the stockholders "can be held to respond to it only by a suit maintained in a court having jurisdiction to render a judgment against them *in personam*." *Christopher v. Brusselback*, 302 U.S. at 502. Without ever referring to whether the stockholders were adequately represented, the Court explained that a stockholder consents to representation by a corporation either when (1) a statute warns the stockholder of such a procedure, or (2) the rules governing the corporation do so. In the case before the Court, neither applied. *Id.* at 504. The Court distinguished prior Supreme Court class action cases which were held binding on absentees,

(3) It should be noted that while the Court in *Mullane* ordered notice, which was reasonably likely to reach interested parties, it continuously emphasized that the notice requirement was limited both by the nature of the case and the expense of the endeavor.⁸⁶ The trust fund itself was available to pay the cost of notice, yet the Court, mindful of the nature of the case (common trust fund aimed at economy), did not require personal service of process, the best method of notifying beneficiaries.⁸⁷ Rather, the less expensive mailed notice⁸⁸ was ordered, and even then the ordered notice was limited to those beneficiaries that the trustee could easily, with little cost and effort, identify.⁸⁹ Moreover, and perhaps most significant, was the fact that the trust fund contained three million dollars and involved a small number of beneficiaries with large claims.⁹⁰ The plaintiff class suit, with which we are particularly concerned, has no fund from which to pay for pendency notice and involves large numbers of victims, each with small claims.

(4) In a class action the court must determine early on, as part of the class certification motion, whether or not the class is adequately represented and only then may the action proceed as a class action.⁹¹ In *Mullane*, although no hearing took place, it was obvious

by stating that in those cases the *res* was before the court rendering the judgment, whereas in *Christopher* the creditors were seeking an *in personam* judgment. It is clear that for the Court, consent to corporate representation included consent to personal jurisdiction whereas adequate representation had nothing to do with consent to personal jurisdiction. Therefore it is understandable why the Court had to and did discuss the consent issue (that by itself could bind the absentees), and it is likewise understandable why the Court did not discuss adequacy of representation (since that by itself would not confer personal jurisdiction).

It is important to note that in both *Christopher* and *Mullane* the action was *in personam* (see *supra* note 60 and accompanying text) and the absentees were defendants, not other members of a plaintiff class. In both, the Supreme Court refused to bind the absentees.

86. The Court used the word "practical" or its equivalent eighteen times and stressed that "due regard for practicalities and peculiarities of the case" is necessary in determining whether "constitutional requirements are satisfied." *Mullane*, 339 U.S. at 314-15.

87. As the Court stated "[w]e need not weigh contentions that a requirement of personal service of citation on even the large number of known resident or nonresident beneficiaries would, by reasons of delay if not of expense, seriously interfere with the proper administration of the fund." *Id.* at 318-19.

88. The Court's statement that "the mails today are recognized as an . . . inexpensive means of communication," *id.* at 319, is no longer true. See *supra* note 10 and accompanying text.

89. Keeping in mind the cost involved and the nature of the proceeding, the Court did not require what might have been a costly search for the names and addresses of all beneficiaries. On this point, the Court said: "Whatever searches might be required in another situation under ordinary standards of diligence, in view of the character of the proceedings and the nature of the interests here involved we think them unnecessary." *Id.* at 317.

90. *Id.* at 309.

91. FED. R. CIV. P. 23(c)(1) provides that: "As soon as practicable after the com-

that the class, i.e., the beneficiaries, were not adequately represented.⁹² It was also clear, due to the practicality of expense, that an accounting of all interests had to take place in one forum or not at all. In other words, necessity called for resolution of the matter in one forum.⁹³ Hence, notice to the beneficiaries permitted the Court to presume that some would protect all and therefore the class would be adequately represented.

(5) A class action is strictly controlled by the court and no settlement or compromise may occur without court approval.⁹⁴ Nothing in the New York Banking Law required or encouraged such control.⁹⁵

Despite the clear language of *Hansberry* and other prior Supreme Court decisions,⁹⁶ and the features of *Mullane* which distinguish it

mencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained.”

In order to be maintained as a class action, rule 23(a) provides certain prerequisites. Specifically, rule 23(a)(4) provides that: “the representative parties will fairly and adequately protect the interests of the class.” FED. R. CIV. P. 23(a)(4). For state equivalents *see supra* note 8.

This is not to say that merely finding that the adequate representation prerequisite to the maintenance of a class action is satisfied is sufficient to bind absent class members to the class judgment. A finding of adequate representation under rule 23(a)(4) does not preclude a later suit attacking the binding effect of the class judgment on the basis of inadequate representation. The requirement of adequate representation as a prerequisite is intended to ensure satisfaction of due process concerns so that a class judgment *can* be held binding if later attacked, thereby avoiding needless relitigation. Of course, whether the absentee has been adequately represented throughout the class action litigation is always open for review. *See infra* note 110.

92. *See supra* notes 66-76 and accompanying text.

93. *See supra* note 61 and accompanying text.

94. Because of the representative nature of a class action, the court has more control over it than over ordinary actions, and must assume “a more active role than it normally does.” Rule 23(d), added in 1966, spells out in some detail the flexible powers the court has over the conduct of the action. The action may not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise must be given to all members of the class in such manner as the court directs (footnotes omitted).

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95. In New York, the lower court fully discussed the provisions of the New York Banking Law. *In re Central Hanover Bank and Trust Co.*, 75 N.Y.S.2d 397 (1947).

96. *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921) (*see supra* note 43); *Smith v. Swormstedt*, 57 U.S. 288 (1853); *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662 (1915) (*see supra* note 49). All these cases held (although in *Smith* it was dictum), that absentees are bound by a class judgment so long as the class was adequately represented. *Hartford* is a particularly sharp example.

The facts of *Hartford* are simple enough. The insurance company set up a Mortuary Fund from which life insurance benefits would be paid. Members, such as Ibs, were required to pay assessments properly levied by the insurance company. Ibs was assessed \$35.95, which he did not pay. Shortly thereafter, he died and his wife claimed death benefits against the fund. The insurance company denied the benefits because of Ibs's failure to pay the \$35.95. The plaintiff/widow brought suit in a Minnesota state court claiming that the assessment was improperly levied and, therefore, nonpayment by Ibs was excused. In defense, the company set up a decree rendered by the Connecticut court which adjudged that the company properly made the assessment. The plaintiff/

from the plaintiff class action suit, many federal courts had applied *Mullane* to all types of class action suits,⁹⁷ ordering the plaintiff class to pay for and provide some type of pendency notice to absent class members.⁹⁸

C. Does *Mullane's* Notice Requirement Extend to All Class Actions Under the Federal Rules?

1. *A History of Confusion: After Mullane But Before Eisen IV and Its Progeny.*—To be maintainable as a class action in the federal courts, a suit must meet all the requirements set forth in rule 23(a)⁹⁹ and fall within one of the three subsections of rule 23(b).¹⁰⁰ Fur-

widow objected on the ground that she was not a party to the Connecticut proceeding. The Minnesota trial court sustained the objection, directed a verdict in the plaintiff/widow's favor and the Minnesota Supreme Court affirmed. In the prior Connecticut action thirty-one members, all residing in different states, brought a class action against the insurance company. The suit claimed that various assessments levied by the company, including the Ibs assessment, were invalid. The Connecticut decree found in favor of the insurance company, and thus the Ibs assessment was adjudged to have been properly levied.

In finding against the plaintiff/widow and compelling Minnesota to give full faith and credit to the Connecticut decree, the Supreme Court did not rely on the notice issue (indeed it was not discussed), but rather relied on (1) the fact that Mrs. Ibs was adequately represented in the Connecticut action (after all, 31 representatives from different jurisdictions joined to prosecute the plaintiff class action), and (2) the need for equal application of the fund to members wherever they are located.

97. This Article is limited to the federal cases. However, the federal cases are relevant to understanding the direction that state cases may take. Most states follow the federal lead in the class action area. See *supra* note 9.

98. See *infra* notes 103-153 and accompanying text.

99. FED. R. CIV. P. 23(a) provides:

(a) Prerequisites to a Class Action. 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.

100. FED. R. CIV. P. 23(b) provides:

(b) Class Actions Maintainable. 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 interest; 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 mem-

ther, rule 23(c)(2) directs the court to provide pendency notice to members of a class action maintained pursuant to rule 23(b)(3) so that an individual member may opt out of the class if he/she wishes.¹⁰¹ Rule 23(d)(2) permits the court, in its discretion, to provide pendency and/or post judgment notice to any class or part thereof if the interests of justice will thereby be served.¹⁰²

Six years before *Eisen IV* was decided by the Supreme Court, the Second Circuit in *Eisen v. Carlisle & Jacqueline (Eisen II)*¹⁰³ stated that *Mullane's* notice requirement was applicable to all class actions. *Eisen* attempted to have the action classified under subsection (b)(1) or (b)(2) of rule 23. He was induced by what the Second

bers 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.

101. FED. R. CIV. P. 23(c)(2) provides:

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 him from the class if he 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 he desires, enter an appearance through his counsel.

102. FED. R. CIV. P. 23(d)(2) provides:

Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action. . . .

103. 391 F.2d 555, 564 (2d Cir. 1968) [hereinafter cited as *Eisen II*]. *Eisen* went up and down the federal court system, scouting unknown procedural terrain, only to meet an unhappy end. *Eisen's* first attempt at certification failed and the district court dismissed the class allegations. *Eisen v. Carlisle & Jacquelin*, 41 F.R.D. 147 (S.D.N.Y. 1966) [hereinafter cited as *Eisen I*]. In *Eisen I*, he appealed to the Second Circuit and the defendants challenged the jurisdiction of the Second Circuit to hear the appeal. The defendants lost. *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966) *cert. denied*, 386 U.S. 1035 (1967). In *Eisen II*, the Second Circuit reversed the district court on the certification issue. On remand, the district court certified the class, ordered a certain type of notice, and allocated a portion of the notice costs to defendants. *Eisen v. Carlisle & Jacquelin*, 54 F.R.D. 565 (S.D.N.Y. 1972). The defendants appealed these orders to the Second Circuit. In *Eisen III*, the Second Circuit reversed the district court and dismissed the case. *Eisen III*, 479 F.2d 1005 (2d Cir. 1973). *Eisen* appealed the Second Circuit's decision to the Supreme Court. In *Eisen IV* the Supreme Court vacated *Eisen III* and, after hearing, dismissed the case because the plaintiff would not pay the cost of pendency notice to ascertainable class members.

Circuit referred to as “his erroneous theory that notice is not ‘mandatory’ under [those] sections.”¹⁰⁴ Putting Eisen straight and relying on *Mullane*, the court stated:

This theory is based on the assumption that 23(c)(2) provides the only “mandatory” notice required by the new rule. Since this particular section refers exclusively to actions brought under 23(b)(3), other suits cognizable under either 23(b)(1) or 23(b)(2) would only be subject to “discretionary” notice under 23(d)(2). Nevertheless, we hold that notice is required as a matter of due process in all representative actions, and 23(c)(2) merely requires a particularized form of notice in 23(b)(3) actions.¹⁰⁵

104. *Eisen II*, 391 F.2d at 564.

105. *Id.* at 564-65 (citations and footnotes omitted). The court, in addition to citing and relying upon the *Mullane* case, also cited and thereby relied on portions of the ACN, *supra* note 79, 39 F.R.D. 95 at 106-07. The court’s reliance on *Mullane* is understandable (see *supra* notes 49-63 and accompanying text), but its citation to the ACN is not. The portion of the ACN cited states:

Indeed, under subdivision (c)(2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class. This mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject. See *Hansberry v. Lee*, 311 U.S. 32 (1940); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); cf. *Dickinson v. Burnham*, 197 F.2d 973, 979 (2d Cir. 1952), and studies cited at 979 n.4; see also *All American Airways, Inc. v. Elderd*, 209 F.2d 247, 249 (2d Cir. 1954); *Gart v. Cole*, 263 F.2d 244, 248-49 (2d Cir. 1959), *cert. denied*, 359 U.S. 978 (1959).

ACN, *supra* at 106-07.

The language of the ACN clearly states that notice to the (b)(3) class is mandatory pursuant to (c)(2) and discretionary otherwise. Further, the cases cited in the ACN, excluding *Hansberry* and *Mullane*, merely require that notice be provided the class after a judgment regarding liability is obtained so that each class member can choose to claim his/her damages and thereby be bound by the judgment. For a further discussion of the meaning of these cases, see *infra* note 270.

It should be emphasized that the court in *Eisen II* did understand the dual function of the class device. The court explained: “By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation.” *Eisen II*, 391 F.2d at 560.

The court was particularly aware of the small claimants’ plight, recognizing “the desirability of providing small claimants with a forum in which to seek redress for alleged large scale anti-trust violations. . . .” *Id.* at 567. Indeed, the court was quite aware that the cost of pendency notice could effectively deprive small claimants of a remedy. Thus, despite the clear language of rule 23(c)(2) commanding individual notice to identify able class members, the court said:

[P]ublished notice may amount to the “best notice practicable,” particularly where requirement of a different form of notice would, in effect, prevent potentially meritorious claims from being litigated. In this connection we must note that in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), the party required to furnish individual notice was a large banking institution and not a small individual claimant. Similarly, in other cases publication has been rejected as insufficient notice where it was sought to be used by the City of New York, *Schroeder v. City of New York*, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d 255 (1962), the New Haven Railroad,

The court held that Eisen's class action was a (b)(3) action,¹⁰⁶ thereby relegating its broad constitutional pronouncements on (b)(1) and (b)(2) class actions to nothing more than dicta. Nonetheless, the Sixth and Seventh Circuits followed the reasoning of *Eisen II* in a series of cases involving the *res judicata* effect of the district court decision in *Gregory v. Hershey*.¹⁰⁷ In that case plaintiff Gregory, for himself and all others similarly situated, brought suit against the defendant, the Selective Service, requesting the district court to issue an injunction requiring the defendant to grant the class fatherhood deferments. The district court found the action was a (b)(1) and (b)(2) action and entered judgment in favor of the class. Notice was not ordered, since "[n]otification of members of the class is impractical because of the number of members and the absence of any reasonable way of identifying them. . . ."¹⁰⁸

In an attempt to stop induction into military service, several members of the class initiated actions in other jurisdictions to obtain the benefits of the *Gregory* decision.¹⁰⁹ Refusing to review the propriety of the original finding that *Gregory* was an appropriate

City of New York v. New York, New Haven & Hartford R.R., 344 U.S. 293, 73 S.Ct. 299, 97 L.Ed. 333 (1953) and the City of Hutchinson, Kansas, Walker v. City of Hutchinson, 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178 (1956).

Id. at 569-70.

The court attempted to relieve plaintiff from the heavy cost of notice by distinguishing *Mullane* from the small claimant plaintiff class suit in two ways: One, the fact that in considering what the "best notice practicable" is, a court should realize that unlike *Mullane*, no trust fund is available to the small claimant and, two, that *Mullane's* notice requirement has been vigorously applied when the suit is a traditional suit between private parties. Nonetheless, the court did state that some type of notice was required by the due process clause.

106. *Eisen II*, 391 F.2d at 565.

107. 311 F. Supp. 1 (E.D. Mich. 1969), *rev'd on other grounds sub nom.*, *Gregory v. Tarr*, 436 F.2d 513 (6th Cir. 1971), *cert. denied*, 403 U.S. 922 (1971). The judgment and order of the district court is found at 51 F.R.D. 188 (E.D. Mich. 1970).

108. *Gregory v. Hershey*, 51 F.R.D. at 189.

109. Although the *Gregory* court ordered the National Director of the Selective Service System to re-classify any registrant that was a member of the *Gregory* class, the National Director did not do so. Suits were, therefore, brought by *Gregory* class members attempting to enforce the *Gregory* decision. *Schrader v. Selective Serv. Sys.*, 470 F.2d 73, 75 n.4 (7th Cir. 1972), *cert. denied*, 409 U.S. 1085 (1972). Indeed, after *Gregory* was reversed, registrants who were members of the *Gregory* class sought, nonetheless, to have the *Gregory* decision enforced on the ground that the National Director had acted lawlessly by not abiding by the *Gregory* decision. *Id.* at 77 (Eschbach, J., dissenting).

It is odd that the National Director never questioned the jurisdiction of the *Gregory* district court to issue an order extending beyond the border of its district. The validity of that order was questioned by the court in *Gregory v. Tarr*, 436 F.2d 513 (6th Cir. 1971) (which reversed the district court decision), wherein the court stated:

Defendants have not . . . questioned the jurisdiction of the court over the State Directors of Selective Service, the Local Boards and their members for the states of Indiana, Illinois and Minnesota.

Allowing class actions to be brought by Selective Service registrants to enjoin not only their own induction, but the induction of others similarly situ-

(b)(2) class action, the district court in *Whitmore v. Tarr*¹¹⁰ applied *res judicata* because “[true] class suits . . . ‘bind all of the class properly represented.’”¹¹¹ In *Germonprez v. Director of Selective*

ated throughout the nation, can have a far-reaching and disruptive effect on the operation of the Selective Service System.

. . . .
 Query: Suppose that the District Court in the present case had ruled that the plaintiffs and others similarly situated were not entitled to [deferments]. Would such a decision be binding on a registrant from another state. . . ?

Id. at 514 n.2.

In *Christopher v. Brusselback*, 302 U.S. 500 (1938), the Supreme Court clearly stated that the court had no personal jurisdiction over class members except to the extent of the *res* brought before the court. Following this view, although without citing *Christopher*, the court in *Bijeol v. Benson*, 513 F.2d 965, 968-69 (7th Cir. 1975), limited the effect of a class judgment concerning prisoners’ rights to the federal prison situated within the district court’s district, stating:

The District Court could properly conclude that in this case a representative action was appropriate, but not, we believe, with respect to prisoners outside the Southern District of Indiana. By so limiting the representative proceeding, we avoid the possibility that respondents, the members of the Board of Parole, whose responsibilities extend throughout the United States, will be subjected, even temporarily, to inconsistent judgments by courts of coordinate jurisdiction, and we give the other courts of appeals the respect and comity which are their due.

Moreover, a true representative action cuts both ways. Allowing wider representation . . . might very well result in injustice to absent prisoners within the represented class, who, if entitled to the benefits of the action, would also be . . . bound, by an adverse determination. We think it best that . . . the representation be limited to other prisoners within the district.

Id. (footnotes omitted).

The government, as we will see, takes varying positions on this issue depending on the facts of the case. See *infra* note 198 and accompanying text.

110. 318 F. Supp. 1279 (D.Neb. 1970), *vacated*, 443 F.2d 1370 (8th Cir. 1971), *cert. denied*, 403 U.S. 922 (1971). The district court did state without explanation that “[t]his court, then, cannot and will not look behind those findings,” thereby rendering such findings immune from collateral attack. 318 F. Supp. 1281. Clearly, the district court’s view is wrong. See *Hansberry v. Lee*, 311 U.S. 32 (1940); *Woolen v. Surtran Taxicabs, Inc.*, 684 F.2d 324, 325-26 n.1 (5th Cir. 1982) (wherein the court said, “Although there may be no right to opt out in a (b)(2) action, the judgment is always subject to attack on the premise that those absent members were inadequately represented and thus are not bound. For this reason it is essential that representation of absent class members be adequate from the start.”); *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973) (class action may be collaterally attacked on adequacy grounds, see *infra* notes 246-253 and accompanying text).

111. *Whitmore v. Tarr*, 318 F. Supp. at 1285 (quoting *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921), as authority for its position). Professor Moore explained that *Ben-Hur* was binding on absent class members because, under the old rule 23 jargon, it was a true class suit. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 570-76 (1937). Commentators have questioned and criticized this categorization of the *Ben-Hur* case. Z. CHAFEE, *supra* note 1, at 255-56. At any rate, present rule 23 does not employ the same language or categories as old rule 23 so that the court’s explanation was woefully inadequate. Compare (Old rule 23) FED. R. CIV. P. 23, 308 U.S. 689 (1939) with (New rule 23) FED. R. CIV. P. 23; see generally ACN, *supra* note 79, 39 F.R.D. 95, at 98-99.

Consistent with the *Whitmore* court’s deferential, indeed almost supplicant attitude toward decisions of other federal judges, the court, after reviewing the cases, expressed its belief that Judge Smith, in *Gregory*, did not have subject matter jurisdiction to grant

Service,¹¹² the district court, in reliance on *Gregory*, granted plaintiff's request for a preliminary injunction forbidding the Selective Service to "requir[e] plaintiff to report for induction into the military service. . . ."¹¹³ In reviewing *Gregory*, the court found that "[t]he plaintiff herein is a member of the class determined in the *Gregory* case, but is not a named party therein, nor was he notified of the *Gregory* action prior to the judgement therein."¹¹⁴ Without further discussion, the court concluded that since *Gregory* was favorable to the class, "plaintiff has established a substantial likelihood that he will prevail on the merits" and entered a preliminary injunction in plaintiff's favor.¹¹⁵

The notice issue achieved recognition rather than honorable mention in *Schrader v. Selective Service System*.¹¹⁶ The defendant in *Schrader*, as in the other cases, conceded the plaintiff was "a member of the *Gregory* class but contend[ed] that the *Gregory* judgment [did] not have binding effect . . . because notice was not given to the . . . class."¹¹⁷ The defendant attempted to assert the mutuality of estoppel principle,¹¹⁸ claiming that it was unfair to permit plaintiff to bind defendant when the due process clause would not permit the defendant to enforce an adverse *Gregory* judgment upon plaintiff and other class members who had not received notice.¹¹⁹ The court avoided the notice issue by choosing to abandon the mutuality principle,¹²⁰ explaining that whether or not plaintiff and the plain-

pre-induction relief but, nonetheless, felt bound by Judge Smith's determination. *Whitmore*, 318 F. Supp. at 1285.

112. 318 F. Supp. 829 (D.D.C. 1970).

113. *Id.* at 830.

114. *Id.*

115. *Id.* The district court appears to have used the *Gregory* decision merely as evidence that plaintiff will likely "prevail on the merits" enabling it to issue a preliminary injunction. The court must have believed that lack of notice prevented the application of *res judicata*, because it did not issue a permanent injunction. It thus left the merit issue open (rather than barred) for determination at the trial for a permanent injunction.

116. 329 F. Supp. 966 (W.D. Wis. 1971).

117. *Id.* at 967.

118. Simply stated, the mutuality of estoppel principle only permits a party to use *res judicata* and/or collateral estoppel if the opposing party could do the same, i.e., both proponent and opponent must be bound by *res judicata* and/or collateral estoppel. See generally Currie, *supra* note 82, 9 STAN. L. REV. 281 and 53 CALIF. L. REV. 25. For a good description of how the principle works, see *Ralph Wolff & Sons v. New Zealand Ins. Co.*, 248 Ky. 304, 58 S.W.2d 623 (1933), and for an explanation of the reasons for its abandonment see *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n*, 19 Cal. 2d 807, 122 P.2d 892 (1942).

119. The defendant also advanced an argument similar to that raised in *Eisen II*, that even though rule 23 did not require the members of the (b)(1) or (b)(2) class to receive pendency notice, the due process clause did. *Schrader*, 329 F. Supp. at 967.

120. When mutuality is abandoned, a stranger, one not bound by a prior suit, may nonetheless use collateral estoppel to bind a party who, in the prior suit, had a full and fair opportunity to litigate. See *supra* note 118.

tiff class are bound is irrelevant to whether or not defendant had the opportunity to fully litigate the issues in the previous case.¹²¹ The court found that the defendant fully litigated the issues in the previous case and therefore bound the defendant to the result of the *Gregory* decision.¹²²

Defendants were the winners in two other district court cases, *McCarthy v. Director of Selective Service System*¹²³ and *Pasquier v. Tarr*.¹²⁴ *Pasquier*, upon which *McCarthy* relied, quite clearly stated that "it is the holding of this Court that notice was not given to the members of the *Gregory* class and that such failure to notify constitutes a violation of due process."¹²⁵ The *Pasquier* court rejected authorities which held that adequacy of representation rather than pendency notice is the key to a binding class judgment and instead

121. The court said:

A judgment in favor of the defendant against the class may not be binding upon members of the class who later sue the defendant and argue that they were not adequately represented in the class action. But the rationale for this view is that every man must be guaranteed his day in court. This rationale has no application to the converse situation in which defendants have had the opportunity fully to litigate the issues in a previous case. The very purpose of Rule 23 was to reduce multiple litigation of the same issues. I see no good reason why the government should be permitted continual relitigation of an issue already judicially determined.

Shrader, 329 F. Supp. at 467 (footnote omitted).

Perhaps the court was purposefully glib. By not mentioning the word "notice" and by not citing any authority which might explain its reasoning, it is possible to uphold the court's position regardless of whether or not pendency notice is constitutionally required in order to bind members of a class to a prior judgment. The passage is hospitable to either view. So long as a person had his/her day in court, that person should be bound by the result. Whether or not the class is bound, because it was or was not adequately represented, is irrelevant. The implication is that a class judgment can be attacked for inadequate representation, i.e., no day in court, rather than for merely not receiving notice. On the other hand, it is at least equally convincing to argue that a class is inadequately represented when it does not receive pendency notice. This latter position is the stronger since the court's statement was made in response to defendant's contention regarding notice.

122. *Id.* If the class was inadequately represented (either because the representation was itself inadequate or because the representatives failed to provide pendency notice to class members), then, according to the court, the class could not be bound, but the class could bind defendant who had its day in court. If pendency notice was a requirement, then the shrewd class representative would not provide pendency notice to the class, and go on to litigate the merits. If the representative was successful, the class, according to the court, could take advantage of the representative's win. If the representative lost, then the defendant, according to the court, could not take advantage of the loss because the class was inadequately represented. Hence, each time a representative lost, another could take up the banner, until one won so that the class could then use the victory of the winning member for the benefit of the entire class. This no win situation for the defendant was a major reason that old rule 23 was amended. *ACN*, *supra* note 79, 39 F.R.D. 95, at 105-06.

123. 322 F. Supp. 1032 (E.D. Wis. 1970), *aff'd*, 460 F.2d 1089 (7th Cir. 1972).

124. 318 F. Supp. 1350 (E.D. La. 1970), *aff'd*, 444 F.2d 116 (5th Cir. 1971).

125. *Id.* at 1352.

embraced the reasoning of *Eisen II*.¹²⁶ The court noted that the plaintiff was not objecting to the fact that he and other class members had not received notice. However, adhering to the mutuality principle,¹²⁷ the court stated that:

[T]he matter should be viewed from both sides, not just from the point of view of the plaintiff. . . . For if a court rules on the merits in favor of the class, the absent members can reap the benefits of such a decision. But if the court should rule against the class on the merits, then, as we have hitherto noted, they [sic] can argue that they [sic] were not adequately represented. This leaves a defendant to a Rule 23(b)(1) or 23(b)(2) class action in a most precarious position, and we simply cannot subscribe to a rule of law with such unfair consequences.¹²⁸

The court appears to presume that the receipt of pendency notice satisfied any possible objection the class member may have had concerning class representation and, therefore, provides for the entry of a valid binding class judgment for or against the class. For the *Pasquier* court, once pendency notice is provided, a class member can no longer collaterally attack the class judgment on inadequacy grounds because, presumably, the member could do so by direct attack in the case itself.¹²⁹

None of the cases which discussed the notice issue, *Eisen II*, *Schrader*, and *Pasquier*, attempted to explain how or why pendency notice performs its magic.¹³⁰ The reason must be that pendency notice provides class members with a means of assenting to representation, by doing nothing after receipt of such notice, or objecting to the representation in the proceeding itself. The *Pasquier* court did not want to sanction a rule which would permit a class member to take advantage of a class win, but challenge a class loss. Hence, pendency notice provided a means of compelling the class member to choose to be bound or object before the member knows who the winner is. It sounds fair enough, but this reasoning collapses when it is examined in practice rather than in theory. Let us suppose that

126. *Id.* at 1353.

127. Although applying the mutuality principle, the court did not mention it by name.

128. *Id.* at 1353-54.

129. One could read *Hansberry*, which sustained a collateral attack on a class judgment where the class did not receive notice, as authority for the *Pasquier* court's view. See Keffe, Levy & Donovan, *supra* note 43, at 338-39, where the authors argue that the *Hansberry* court held, albeit imperfectly stated, that pendency notice is required by the due process clause before a binding class judgment may be entered.

130. The difference in the ultimate result between *Schrader* and *Pasquier* (and *McCarthy*) lies primarily with the mutuality doctrine. *Pasquier* (and *McCarthy*) did not apply *res judicata*/collateral estoppel and, therefore, went on to the merits, holding that the federal courts lacked subject matter jurisdiction to grant pre-induction relief; defendant won. *Schrader*, concealing its view of the notice issue, did not apply the mutuality doctrine and, therefore, estopped the defendant; plaintiff won.

Mr. Pasquier, while living in New Orleans, Louisiana,¹³¹ received notice of the *Gregory* action, which included an explanation of the nature of the proceeding, the name of the class representative and his attorneys, the court and cause, and the fact that it was being prosecuted in Detroit, Michigan.¹³² The question remains, what is Mr. Pasquier expected to do? Rule 23 does not permit a (b)(1) or (b)(2) class member as in *Gregory* to opt out.¹³³ Pasquier and other class members would have to travel to Detroit and somehow investigate and monitor the proceedings, the parties, or the attorneys so as to ascertain whether each was being adequately represented. Assuming, somehow, Pasquier and others manage to do all that, what happens if they become dissatisfied with the representation? Each must hire counsel so as to properly object.¹³⁴ If they object and win, they have lost a great deal of time, energy, and money and have merely maintained the status quo.¹³⁵ If they object and lose, they must continue to use their time, energy and money to seek review of the court's determination regarding their objection.¹³⁶

131. Pasquier brought suit in the United States District Court for the Eastern District of Louisiana. *Pasquier*, 318 F. Supp. 1350.

132. Pendency notice in a class action (b)(2) suit must include the identity of the class representative, the court in which the action is pending, the name and address of the attorney(s) representing the class, the name of the defendant(s) against whom the action is filed, and a broad description of the type of claims and responses which have been alleged. 2 H. NEWBERG, *supra* note 1, at § 2475c (1977).

133. The federal circuit courts of appeal do not allow a class member to opt out of a (b)(1) and/or (b)(2) class. 3B J. MOORE, *supra* note 3, at ¶ 23.31(3) (1984); 7A C. WRIGHT & A. MILLER, *supra* note 1, at § 1787 (1972); 2 H. NEWBERG, *supra* note 1, at § 2560a (1977). As will be discussed, the Fifth and Eleventh Circuits appear to require notice to (b)(2) class members who are alleged to be entitled to monetary relief. *Johnson v. General Motors Corp.*, 598 F.2d 432 (5th Cir. 1979); *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983); *see also* *Marshall v. Kirkland*, 602 F.2d 1282 (8th Cir. 1979). A close reading of these cases reveals that these courts only require post judgment notice to class members so as to permit each to opt in or out of the damage portion of the case rather than permitting (b)(1) and (b)(2) class members to opt out of the traditional (b)(1) and (b)(2) type action.

Commentators agree that (b)(1) and (b)(2) class members should not be permitted to opt out of the class. Benjamin Kaplan, the federal advisory committee reporter, stated that rule 23(b)(1) and (2) was the "natural class action, . . . [where] final relief had to be unitary in order to protect the interests of those deliberately or inevitably affected ((b)(1)) or . . . [where it was] unitary because it extended only to common rights (. . . (b)(2))." 2 H. NEWBERG, *supra* note 1, at 107 (1977). *See also* 3B J. MOORE, *supra* note 3, at ¶ 23-440-41 (1984). For a full discussion of this issue, *see infra* notes 192-200, 236 and accompanying text.

134. FED. R. CIV. P. 23(c)(2) permits only members of a (b)(3) class to "enter an appearance through counsel." Presumably, counsel would also be required if intervention was permitted in a (b)(1) and (b)(2) class suit. *See generally* *Woolen v. Surtran Taxicabs, Inc.*, 684 F.2d 324 (5th Cir. 1982).

135. Actually, they must remain vigilant. The named representative may appeal the adequacy issue and prevail, resulting in a remand and a possible certification of the class. It is to be recalled that Eisen lost the certification of his class—on adequacy grounds—only to win reversal, remand and certification three years later. *See supra* note 23.

136. The appealability or reviewability of the denial and/or grant of a class certifica-

These courts have refused to examine the consequences of their own rule. By simply stating the incantation: *notice satisfies due process*, reality is easily ignored. The truth is that most members of small claimant classes who receive pendency notice will simply not understand its provisions.¹³⁷ Certainly, such persons cannot afford to do anything to monitor the pending action, even if it were filed nearby, let alone hire counsel to investigate, intervene, object and appeal. Notice, therefore, satisfies nothing, except perhaps the conscience of the court. Even this is not deserved. For, while ostensibly eager to be fair to both plaintiff class and defendants, noble sounding slogans that require pendency notice and its consequent costs deprive small claimant class members of their only remedy—the class action.¹³⁸

The consequences of a pendency notice requirement were not discussed by the circuit courts when *Gregory* and some of its progeny were appealed. The Sixth Circuit reversed *Gregory* in *Gregory v. Tarr*¹³⁹ on the ground that *Gregory* lacked subject matter jurisdiction (pre-induction relief was outside the jurisdiction of the federal courts).¹⁴⁰ Thereafter, in short *per curiam* opinions, the Fifth Circuit affirmed *Pasquier*¹⁴¹ and the Seventh Circuit affirmed *McCar-*

tion order (which includes the adequacy finding of rule 23(a)(4)) is still subject to dispute. Generally, class rulings are considered interlocutory and are therefore unappealable, although a few exceptions have developed. Neither the so-called "death knell" doctrine, *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), nor 28 U.S.C. 1292(a)(1), nor *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978), may be invoked in support of appellate jurisdiction to review an order denying class certification. An order denying class certification has been successfully appealed using FED. R. Civ. P. 54(b) when the district court certifies the order denying certification and dismisses the complaint as to the absent class members. 1 H. NEWBERG, *supra* note 1, at §§ 2175 and 2184.

The Supreme Court has not yet determined whether immediate review of an order granting certification is permissible. The Second Circuit, citing the enormous costs imposed upon a defendant in a class suit, has articulated a three-prong test for reviewability of a class certification order. In *Herbst v. I.T.T. Corp.*, 495 F.2d 1308, 1312-13 (2d Cir. 1974) the court formulated the following guidelines: 1) class determination must be fundamental to the further conduct of the case; 2) the order must be separable from the merits; and 3) the order will cause irreparable harm to the defendant in terms of time and money spent in defending the class action. Reception of the Second Circuit's three-prong test has been mixed. See 3B J. MOORE, *supra* note 3, at ¶ 23.97 (1984).

137. Most people who receive class notice do not understand its contents. T. BARTSH, F. BODDY, B. KING & P. THOMPSON, A CLASS ACTION SUIT THAT WORKED, 106-12 (1978); Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L.J. 1123, 1149 (1974); Miller, *Problems in Giving Notice in Class Actions*, 58 F.R.D. 313, 321-22 (1973); see generally *Watson v. Branch County Bank*, 380 F. Supp. 945, 959 (W.D. Mich. 1974), *rev'd on other grounds*, 516 F.2d 902 (6th Cir. 1975).

138. Note, *supra* note 137, at 1161.

139. 436 F.2d 513 (6th Cir. 1971), *cert. denied*, 403 U.S. 922 (1971).

140. *Id.* Indeed, the defendants never even "questioned the validity of the [*Gregory*] class action although no notice to the members of the class was given. . . ." *Id.* at 514 n.2.

141. 444 F.2d 116 (5th Cir. 1971).

thy,¹⁴² both on reliance in *Gregory v. Tarr*, holding there was no subject matter jurisdiction. However, the Seventh Circuit, in reversing *Schrader*,¹⁴³ specifically relied on *Eisen II* stating: "The Michigan District Court in *Gregory* erred in not requiring notice to be given in some manner to absent class members, and the Wisconsin District Court erred applying the principle of *res judicata* to the *Gregory* ruling."¹⁴⁴

After this decision, the Sixth Circuit in *Zeilstra v. Tarr*¹⁴⁵ was called upon to decide what effect, if any, *Gregory* had on cases which were pending before *Gregory v. Tarr* was decided. The court first held that the *Gregory* order "was not a valid order because the Court was without jurisdiction to enter it, and the order was a nullity."¹⁴⁶ Apparently, insecure in this holding, the *Zeilstra* court, in reliance on the Seventh Circuit's position in *Schrader* and the Second Circuit's view as expressed in *Eisen II*, went on to "hold that *Gregory* was not a valid class action since no notice was ever given to the members of the class."¹⁴⁷

The result of this series of cases is that both the Sixth and Seventh Circuits embraced *Eisen II's* reasoning without any analysis or in-

142. 460 F.2d 1089 (7th Cir. 1972).

143. *Schrader v. Selective Serv. Sys.*, 470 F.2d 73 (7th Cir. 1972).

144. *Id.* at 75. After concluding that the National Director was not bound by the *Gregory* decision, the court disposed of plaintiff's individual claim by holding that the federal courts lacked subject matter jurisdiction to grant pre-induction relief. One judge dissented on the ground that the National Director acted lawlessly by disobeying the *Gregory* order prior to *Gregory* being reversed. See *supra* note 109.

145. 466 F.2d 111 (6th Cir. 1972).

146. *Id.* at 113. The court found that *Gregory's* mandatory order was invalid because the *Gregory* court lacked subject matter jurisdiction. It, therefore, reversed. Great debate has ensued since the United Mine Workers Union and its leader, John L. Lewis, were fined \$3,500,000 and \$10,000 respectively. During World War II, members of the Union, led by Lewis, struck the coal mines, although the mines had been taken over by the United States to ensure their continued production during the time of national emergency. Despite provisions of the Norris-La Guardia Act which prohibit federal courts from issuing restraining orders in cases growing out of labor disputes, the district court issued a temporary restraining order restraining the threatened strike pending its determination concerning the union's right under the collective bargaining agreement. Lewis and the union were held in contempt and fined. *United States v. United Mine Workers of Am.*, 330 U.S. 258 (1947). In upholding the contempt rulings (although modifying the union's fine), the Court stated: "[T]he District Court unquestionably had the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction." *Id.* at 290. "Orders outstanding . . . [are] to be obeyed until they expire or [are] set aside by appropriate proceedings, appellate or otherwise." *Id.* at 294. See also *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

The difference between the *Gregory* order and the *Mine Workers* order is twofold: (1) the *Mine Workers* court had subject matter jurisdiction, while the *Gregory* court did not, and (2) the *Mine Workers* court issued a passive order seeking to preserve the status quo, while the *Gregory* court issued a mandatory order which, if obeyed, would have changed the status quo. See also *supra* note 109; see generally D. DOBBS, *REMEDIES* 85-87 (1973).

147. *Zeilstra*, 466 F.2d at 113.

quiry into the bedrock upon which that decision was based. Indeed, the Sixth Circuit's statement concerning notice was merely an afterthought and thus was quickly rejected by the district courts as dictum.¹⁴⁸

The Second Circuit's gratuitous edict in *Eisen II*—notice is required in all representative actions¹⁴⁹—is no longer followed by the Sixth¹⁵⁰ and Seventh Circuits¹⁵¹ and has been abandoned by the Second Circuit itself.¹⁵² Moreover, the Supreme Court in a number of cases beginning with its decision in *Eisen IV* has clearly, albeit implicitly, held that pendency notice is not constitutionally required in all class suits.¹⁵³

2. *A History of Less Confusion: The Supreme Court Decides That Pendency Notice is Not Required in the (b)(1) and (b)(2) Class Actions.*—After remand in *Eisen II*, the district court certified the action as a (b)(3) class action. In lieu of mailed notice to the 2,225,000 ascertainable class members, the court ordered a scheme of notification consisting of individual mailed notice to a few thousand class members combined with publication.¹⁵⁴ The district

148. See *Watson v. Branch County Bank*, 380 F. Supp. 945 (W.D. Mich. 1974), *rev'd on other grounds*, 516 F.2d 902 (6th Cir. 1975); *Branham v. General Electric Co.*, 63 F.R.D. 667 (N.D. Tenn. 1974).

149. See *supra* note 105 and accompanying text.

150. See *infra* note 179 and accompanying text.

151. See *infra* notes 180-182 and accompanying text.

152. See *infra* note 177 and accompanying text. Even before the Second Circuit discarded the *Eisen II* dicta, the more enlightened view was persuasively expressed in *Lynch v. Household Fin. Corp.*, 360 F. Supp. 720, 722 n.3 (D. Conn. 1973), wherein the three-judge court said: "Although it is suggested that dictum in [*Eisen II*] requires notice in all class actions, . . . we read [*Eisen II*] simply to say that notice is required in all class actions when due process so requires." The court went on to hold that adequate representation rather than pendency notice, sufficiently safeguards the rights of (b)(1) and (b)(2) class members, so that a valid judgment, binding all members, may be entered.

153. Even before *Eisen IV* was decided, the Supreme Court upheld the *res judicata* (binding) effect of class judgments on absent class members who had not received any type of pendency notice. *Hartford Life Ins. Co. v. Barber*, 245 U.S. 146 (1917); *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662 (1915) (*see supra* note 49); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921) (*see supra* note 43); *Smith v. Swormstedt*, 57 U.S. 288 (1853) (dictum).

154. Actually, the district court ordered a four-part notification scheme; (1) individual notice to all members of the New York Stock Exchange (the market in which the defendants traded stocks) and to commercial banks with large trust departments; (2) individual notice to some 2,000 class members with ten or more odd lot transactions during the relevant period; (3) individual notice to an additional 5,000 class members randomly selected; and (4) prominent publication notice in the Wall Street Journal and other newspapers in New York and California. The total cost, at the time of the district court's order, was \$21,720. The district court, after a hearing, shifted "90% of the cost of notice, or \$19,548" to the defendants. *Eisen IV*, 417 U.S. at 167-68.

The district court seems to have acted upon Judge Medina's hints in *Eisen II*: "the desirability of providing small claimants with a forum" compels a practical approach to the pendency notice problem. *Eisen II*, 391 F.2d at 567; *see also supra* note 105. If so

court, after conducting a hearing on the merits, shifted ninety percent of the notice cost to defendant.¹⁵⁵ The defendant appealed; the Second Circuit reversed and dismissed.¹⁵⁶ Eisen petitioned the Supreme Court for review.

The Supreme Court in *Eisen IV* found “the District Court’s resolution of the notice problems was erroneous . . . [because] it failed to comply with the notice requirements of Rule 23(c)(2), and . . . [because] it imposed part of the cost of notice on respondents.”¹⁵⁷ The Court quoted and emphasized the pertinent portion of rule 23(c)(2) which requires individual notice to be provided to all class members who can be identified through reasonable effort and claimed that the “import of this language is unmistakable.”¹⁵⁸ Nonetheless, Eisen argued that individual notice should not be required because (1) its expense would frustrate vindication of anti-trust policy, and (2) it is unnecessary because no class member will opt out since each member’s claim is small and the cost of litigation is high. The Court supplied a short answer (one suspects because a sound, reasoned response was unavailable):

The short answer to these arguments is that individual notice to identifiable class members is not . . . to be waived. . . . It is, rather, an unambiguous requirement of Rule 23. . . . There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs.¹⁵⁹

Last, and perhaps most importantly for us, Eisen tried to persuade the Court to dispense with notice because “adequate representation, rather than notice, is the touchstone of due process . . . and therefore satisfies Rule 23.”¹⁶⁰ Again, the Court’s response was short:

We think this view has little to commend it. To begin with, Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided. Moreover, petitioner’s argument proves too much, for it quickly leads to the conclusion that no notice at all, published or otherwise, would be required in the present case. This cannot be so, for quite apart from what due process may require, the command of Rule 23 is clearly to the

the district court clearly misconceived Judge Medina’s remarks in *Eisen II*, because in *Eisen III*, 479 F.2d 1005, Judge Medina reversed the district court and dismissed the class action, stating “our prior opinion [in *Eisen II*] . . . stated unequivocally that actual notice must be given to those whose identity could be ascertained with reasonable effort and that ‘in this type case’ of course plaintiff must pay the expense of giving notice to these members of the class.” *Id.* at 1009.

155. *Eisen IV*, 417 U.S. at 167-68. See *supra* note 154.

156. *Eisen III*, 479 F.2d at 1020; see also *supra* note 154.

157. *Eisen IV*, 417 U.S. at 172-73.

158. *Id.* at 173.

159. *Id.* at 176 (footnote omitted).

160. *Id.*

contrary. We therefore conclude that Rule 23(c)(2) requires that individual notice be sent to all class members who can be identified with reasonable effort.¹⁶¹

Clearly, the Court relied on the rule and not the Constitution to reach its result. It was not called upon to interpret, nor should it have interpreted, the Constitution, because a statutory interpretation resolved the issue.¹⁶² But the Court's phrase, "*for quite apart from what due process may require*,"¹⁶³ can mean: (1) without the rule, due process would require the same result at least in a rule 23 (b)(3) action; (2) without the rule, due process is satisfied with less than individual notice, such as publication; (3) without the rule, due process is satisfied by adequate representation; or, (4) due process is irrelevant since the rule speaks clearly to the issue. Some assistance is provided when the Court explained that it was "concerned . . . only with the notice requirements of . . . (c)(2), which are applicable to class actions maintained under . . . (b)(3)," and indicated that (c)(2) is inapplicable to (b)(1) and (b)(2) class actions.¹⁶⁴ As indicated earlier, the Court dismissed the suit because Eisen would not pay the \$315,000 pendency notice cost.¹⁶⁵

In terms of providing guidance to the lower courts and litigants, *Eisen IV* clearly held that rule 23 required individual pendency notice to ascertainable members of a (b)(3) class. The Court implied that the same analysis would not be followed for the (b)(1) and (b)(2) class actions although whether or not some type of pendency

161. *Id.* at 176-77.

162. There must be a strict necessity for disposing of an issue on constitutional grounds. Chief Justice Marshall's rationale for judicial review was that it be absolutely essential for the Court to decide cases in conformity with the Constitution before doing so. Hence, while he was the architect of judicial review, he demanded judicial restraint. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Doctrines related to advisory opinions, mootness, collusiveness, ripeness, prematurity, abstractness, standing, and other rules of judicial restraint, are generally functions of the basic judicial duty to avoid discussion of constitutional questions. See *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341-56 (1936) (Brandeis, J., concurring); *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947); see generally J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980).

One commentator has, nonetheless, suggested that *Eisen IV* did not necessarily rest on rule 23 alone. "A close reading of Mr. Justice Powell's opinion [in *Eisen IV*] suggests that he did not want to base the notice holding on the Constitution. Yet, his plain meaning methodology in interpreting the Rule apparently does not satisfy even him. He returns time and again to due process considerations to give plausibility to his literalist interpretation of the Rule." Dam, *Class Action Notice: Who Needs It?*, 1974 SUP. CT. REV. 97, 110 (1975). It is submitted that whether the rule or the Constitution is the basis of the Court's decision (although clearly it is the former), the pendency notice requirement remains an implausible, unjustifiable impediment to the redress of legally protected rights.

163. *Eisen IV*, 417 U.S. at 177 (emphasis added).

164. *Id.* at 177 n.14.

165. *Id.* at 179; see *supra* notes 16-20 and accompanying text.

notice was constitutionally required in those class actions á la *Eisen II*, was left open. However, eight months later in *Sosna v. Iowa*,¹⁶⁶ the Supreme Court put that issue to bed by holding that pendency notice is not constitutionally required in order to bind class members to a (b)(1) and (b)(2) class judgment.

Mrs. Sosna moved to Iowa and, after one month residency, petitioned the Iowa court for a dissolution of marriage. The Iowa court dismissed the case because Mrs. Sosna did not comply with Iowa's one-year residency statute. Mrs. Sosna then filed a class action in the district court for the Northern District of Iowa asserting that the Iowa residency statute was unconstitutional and requesting that an injunction against its enforcement be issued.¹⁶⁷ The three-judge court found that the class action complied with the prerequisites enumerated in rule 23(a)¹⁶⁸ and held Iowa's residency statute constitutional.¹⁶⁹ The case was then brought to the Supreme Court. As to the type of class action certified and whether notice was required, the Court said:

Although the complaint did not so specify, the absence of a claim for monetary relief and the nature of the claim asserted disclose . . . a Rule 23(b)(2) class action. . . . Therefore, the problems associated with a Rule 23(b)(3) class action, which were considered . . . in [*Eisen IV*], are not present in this case.¹⁷⁰

Holding the action was not a (b)(3) class action and that therefore pendency notice was not required, was essential for the Court's decision. Without so holding, the Court could not proceed, as it did, to a decision on the merits. As it turns out, by the time the case reached the Court, Mrs. Sosna had not only fulfilled the requirement of Iowa's residency statute, but had also obtained a divorce.¹⁷¹ As the Court explained, the case, nonetheless, was not moot:

If appellant had sued only on her own behalf, both the fact that she now satisfies the one-year residency requirement and the fact that she has obtained a divorce . . . would make this case moot and require dismissal. But appellant brought this suit as a class action and sought to litigate the constitutionality of the . . . residency requirement in a representative capacity. When the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant.¹⁷²

166. 419 U.S. 393 (1975).

167. *Id.* at 395.

168. *Id.* at 397-98.

169. *Id.* at 396.

170. *Id.* at 397 n.4.

171. *Id.* at 398.

172. *Id.* at 399 (citations and footnote omitted). The Court elaborated:

The certification of a suit as a class action has important consequences for the unnamed members of the class. If the suit proceeds to judgment on the mer-

Hence, it was the absent class members who kept the case alive or justiciable because each was still subject to the requirements of Iowa's residency statute.¹⁷³ Underscoring the view that adequate representation rather than pendency notice is the key to the entry of a valid, binding class judgment, the Court said: "Since it is contemplated that all members of the class will be bound by the ultimate ruling on the merits, Rule 23(c)(3), the district court must assure itself that the named representative will adequately protect the interests of the class."¹⁷⁴

The court upheld the certification of the rule 23(b)(2) class, sanctioned the lack of pendency notice to class members, and went on to rule against the entire class on the merits.¹⁷⁵

Following the decisions of the Supreme Court in *Eisen IV* and *Sosna* (and similar cases),¹⁷⁶ the circuit courts have uniformly held

its, it is contemplated that the decision will bind all . . . members of the class. Rule 23(c)(3); Advisory Committee Note, 28 U.S.C. App. pp. 7765-66. Once the suit is certified as a class action, it may not be settled or dismissed without the approval of the court. Rule 23(e).

Id. at 399 n.8.

173. *Id.* at 401.

174. *Id.* at 403. The Court used a *Hansberry* analysis to find that there was a "homogeneity of interests" amongst the class members. Indeed, the court found it "difficult to imagine why any person in the class . . . would have an interest in seeing [Iowa's residency statute] upheld." *Id.* at 403 n.13. The Court, therefore, concluded:

In the present suit, where it is unlikely that segments of the class appellant represents would have interests conflicting with those she has sought to advance, and where the interests of the class have been competently urged at each level of the proceeding, we believe that the test of Rule 23(a) is met. We therefore address ourselves to the merits of appellant's constitutional claim.

Id. at 403 [footnote omitted].

175. *Id.* at 396, 400.

176. Although there is no Supreme Court decision directly on point, the Court has refused to overturn, on due process grounds, a (b)(1) or (b)(2) type suit where no pendency notice was ordered by the lower court. See *Quern v. Jordan*, 440 U.S. 332 (1979); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980); *Zablocki v. Redhail*, 434 U.S. 374 (1978).

In *Zablocki*, a (b)(2) class suit was brought on behalf of divorced fathers alleging that a Wisconsin statute denied them their fundamental right to remarry because they were delinquent in their child support payments. 434 U.S. at 374. Pendency notice was not at issue in the opinion. However, Justice Marshall's plurality opinion mentioned, without discussion, the district court's ruling that "neither Rule 23 nor due process required prejudgment notice to members of the plaintiff or the defendant class." *Id.* at 379-80. No other justices either supported or criticized the district court's ruling.

In *Quern*, plaintiffs instituted a (b)(2) action for denial of past welfare benefits. 440 U.S. at 332. The lower court decision was appealed post-judgment on eleventh amendment grounds. Justice Rehnquist stated: "Because this was a class action qualifying under Fed. Rule Civ. Proc. 23(b)(2), the class members had never received notice of the complaint. . . . Under Rule 23(d)(2), however, a court may require appropriate notice 'for the protection of the members of the class or otherwise for the fair conduct of the action.'" *Id.* at 335 n.3.

United States Parole Comm'n v. Geraghty presented the Court with an issue similar to that presented in *Sosna*; whether the mootness of the representative's claim after denial of certification also causes the (b)(2) class's claims to expire. 445 U.S. at 388. In

that pendency notice is not constitutionally required in (b)(1) and (b)(2) class actions.¹⁷⁷ The Second Circuit itself abandoned *Eisen II's* dictum. Citing *Sosna*, Judge Friendly said, "And we do not regard the statement with respect to notice in [*Eisen II*], as applying to class actions under . . . (b)(2). . . ."¹⁷⁸ The Sixth Circuit has discarded its offhand citation to *Eisen II* without even acknowledging its error.¹⁷⁹ The Seventh Circuit has retracted its reliance on *Eisen II* in *Bijeol v. Benson*,¹⁸⁰ where it affirmed a *habeas corpus* class action brought by prisoners,¹⁸¹ holding that "due process did not require notice" and suggesting that the *Schrader* decision in light of *Eisen IV* "will have to be reexamined."¹⁸²

his dissent from the holding that the class suit was still alive, Justice Powell stressed that class certification is necessary to "a judicial finding that injured parties other than the named plaintiff exist." *Id.* at 415 n.8. "After certification, class members can be certain that the action will not be settled or dismissed without appropriate notice." *Id.* Nowhere did he mention that pendency notice was required.

The commentators are in substantial agreement. 2 H. NEWBERG, *supra* note 1, at 207 (1977); 3B J. MOORE, *supra* note 3, at ¶ 23-440-42 (1984).

177. District of Columbia Circuit: *Larionoff v. United States*, 533 F.2d 1167 (D.C. Cir. 1976); *Childs v. United States Bd. of Parole*, 511 F.2d 1270 (D.C. Cir. 1974). First Circuit: *Yaffe v. Powers*, 454 F.2d 1362 (1st Cir. 1972). Second Circuit: *Ives v. W.T. Grant Co.*, 522 F.2d 749 (2d Cir. 1975); *Frost v. Weinberger*, 515 F.2d 57 (2d Cir. 1975). Third Circuit: *Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3d Cir. 1974); *Mattern v. Weinberger*, 519 F.2d 150 (3d Cir. 1975); *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239 (3d Cir. 1975). Fourth Circuit: *Gilbert v. General Elec. Co.*, 519 F.2d 661 (4th Cir. 1975). Fifth Circuit: *Woolen v. Surtran Taxicabs, Inc.*, 684 F.2d 324 (5th Cir. 1982); *Penson v. Terminal Transp. Co.*, 634 F.2d 989 (5th Cir. 1981); *Johnson v. General Motors Corp.* 598 F.2d 432 (5th Cir. 1979); *Satterwhite v. City of Greenville*, 578 F.2d 987 (5th Cir. 1978); *Bogard v. Cook*, 586 F.2d 399 (5th Cir. 1978); *Bolton v. Murray Envelope Corp.*, 553 F.2d 881 (5th Cir. 1977); *Robinson v. Union Carbide Corp.*, 538 F.2d 652 (5th Cir. 1976), *opinion on rehearing*, 544 F.2d 1258 (5th Cir. 1977), *cert. denied*, 434 U.S. 822 (1977); *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826 (5th Cir. 1975); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Bing v. Roadway Express, Inc.*, 485 F.2d 441 (5th Cir. 1973); *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969). Sixth Circuit: *Alexander v. Aero Lodge No. 735*, 565 F.2d 1364 (6th Cir. 1977), *cert. denied*, 436 U.S. 946 (1978); *Senter v. General Motors Corp.*, 532 F.2d 511 (6th Cir. 1976). Seventh Circuit: *Crowder v. Lash*, 687 F.2d 996 (7th Cir. 1982); *Bijeol v. Benson*, 513 F.2d 965 (7th Cir. 1975); *Jimenez v. Weinberger*, 523 F.2d 689 (7th Cir. 1975). Eighth Circuit: *Marshall v. Kirkland*, 602 F.2d 1282 (8th Cir. 1979). Ninth Circuit: *Elliot v. Weinberger*, 564 F.2d 1219 (9th Cir. 1977); *Molina v. Weinberger*, No. 74-1611, slip. op. (9th Cir. Oct. 1, 1975). Tenth Circuit: *Ryan v. Shea*, 525 F.2d 268 (10th Cir. 1975). Eleventh Circuit: *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983).

178. *Frost v. Weinberger*, 515 F.2d 57, 65 (2d Cir. 1975).

179. In *Senter v. General Motors Corp.*, 532 F.2d 511 (6th Cir. 1976), the district court did not certify the (b)(2) class until deciding favorably upon the merits; hence, pendency notice was obviously not provided to the class. The Sixth Circuit upheld the decision because the prerequisites of rule 23(a) were satisfied and the action was properly maintained as a (b)(2) class action under Title VII, even though the class also sought back pay money awards.

180. 513 F.2d 965 (7th Cir. 1975).

181. *Id.* at 966-67.

182. *Id.* at 968 and n.3. In *Jimenez v. Weinberger*, 523 F.2d 689, 700 (7th Cir.

II. DOES RULE 23'S REQUIREMENT THAT A (b)(3) CLASS RECEIVE PENDENCY NOTICE REFLECT A CONSTITUTIONAL MANDATE OR MERELY A STATUTORY DIRECTIVE?

A. Why Pendency Notice in (b)(3) and Not (b)(1)?

The Advisory Committee Notes to rule 23 [hereinafter referred to as ACN] state, in pertinent part:

In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum. These indicators suggest that notice under subdivision (d)(2) may be particularly useful and advisable in certain class actions maintained under subdivision (b)(3), for example, to permit members of the class to object to the representation. Indeed, under subdivision (c)(2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class. This mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject. See *Hansberry v. Lee*, 311 U.S. 32 (1940); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). . . .¹⁸³

It can be argued that the Supreme Court in *Eisen IV* suggested that the ACN citation to *Mullane* was intended to explain the intent of the (c)(2) notice requirement, rather than expound a due process notice requirement for that section. Indeed, the due process standard was expounded by the ACN citation to *Hansberry*; hence, notice only aids in satisfying the due process standard which is the adequacy of representation standard.¹⁸⁴ However, the circuit courts of appeal imply that the difference between the (b)(1) and (2)

1975), the Seventh Circuit once again skirted the issue and, again, suggested that its former holding in *Schrader* should be "reexamined."

183. ACN, *supra* note 79, 39 F.R.D. at 106-07.

184. The *Eisen IV* Court discussed and liberally quoted from the ACN. The Court said: "The Advisory Committee described subdivision (c)(2) as 'not merely discretionary' and added that the 'mandatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject . . .'" *Eisen IV*, 417 U.S. at 173. The Court explained that the ACN citation to *Mullane* meant, as *Schroeder v. City of New York*, 371 U.S. 208 (1962) explained, that published notice is not available where names and addresses are ascertainable. Using *Schroeder* to explain the ACN citation to *Mullane*, the Court explained: "Viewed in this context, the express language and intent of Rule 23(c)(2) leave no doubt that individual notice must be provided to those class members who are identifiable through reasonable effort." *Eisen IV*, 417 U.S. at 175. It is, therefore, quite reasonable to view *Eisen IV* as not merely interpreting the requirements of rule 23, but also as strongly suggesting that it is only rule 23 that compels pendency notice, and even then only to (b)(3) class members. *But see* Dam, *supra* note 162.

classes and the (b)(3) class is such that the Constitution requires pendency notice to the latter, but not to the former.

The District of Columbia Circuit decision in *Larionoff v. United States*¹⁸⁵ attempted analysis of the issue. The seven named plaintiffs in *Larionoff* were sailors who signed up for a certain training program and extended their enlistment period in consideration of receiving a money bonus. When the Navy refused to provide the bonus, the seven sailors, for themselves and others similarly situated, filed suit. The district court certified the class as a (b)(1) class,¹⁸⁶ granted the plaintiff class summary judgment and ordered payment of the money bonus, approximately \$700,000.¹⁸⁷ The government appealed, claiming the district court erred in both certifying the class and granting summary judgment.¹⁸⁸ As to the class issues, the government argued two points: (1) the district court erred in certifying the class at the same time it ruled on the merits (in favor of the class), and (2) "that due process required personal prejudgment notice to the easily identifiable members of this Rule 23(b)(1) class. . . ."¹⁸⁹

The court responded to the first point by explaining that if the action were a (b)(3) class action, reversal would be required because (b)(3) class members must be provided an opportunity to opt out of the class. Pendency notice, the means of providing that opportunity, was obviously not provided to class members because the district court decided the certification issue and the merits of the action simultaneously.¹⁹⁰

Despite some authority to the contrary,¹⁹¹ it is clear that the (b)(1) and (b)(2) class actions are designed to bind each member of the class and not permit any member to proceed individually.¹⁹² The definition of the (b)(1)(A) & (B) class action mirrors the definition of rule 19, the necessary/indispensable party rule,¹⁹³ which like rule 23, was amended in 1966 to provide for a functional rather

185. 533 F.2d 1167 (D.C. Cir. 1976).

186. *Id.* at 1181.

187. *Id.* at 1187. The court indicated that "[p]laintiffs' counsel asked the District Court to award them attorneys' fees in the amount of \$175,000, approximately 25% of their estimate of total class recovery." *Id.* Simple mathematics provides the total class recovery figure.

188. *Id.* at 1172.

189. *Id.* at 1182.

190. *Id.* at 1182-83.

191. *See supra* note 133.

192. ACN, *supra* note 79, 39 F.R.D. at 105-06; *see supra* note 133 and *infra* notes 193-201 and accompanying text.

193. FED. R. CIV. P. 23(b)(1)(A) & (B) provides:

(b) . . . An action may be maintained as a class action if . . .

(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 mem-

than theoretical application.¹⁹⁴ The purpose of rule 19 is to compel all persons interested in the controversy to be joined as parties to the suit so that complete justice can be achieved. The rule is concerned with the adverse affect a judgment will have on absentees (i.e., distribution of a limited fund) and on parties before the court

bers 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. . . .

FED. R. Civ. P. 19 provides:

(a) . . . A person . . . shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. . . .

Indeed, the ACN to rule 23(b)(1) recognizes that similar concerns are addressed by rule 23(b)(1) and rule 19. "The consideration stated under clauses (A) & (B) are comparable to certain of the elements which define the persons whose joinder is desirable as stated in Rule 19(a), as amended." ACN, *supra* note 79, 39 F.R.D. at 100. This identity of definition is no coincidence. The vigorous application of the necessary/indispensable party rule forced the birth of the class action device. At about the time the class action device began to emerge as a procedural mechanism, the necessary/indispensable party rule acquired a strict application so as to oust the court of jurisdiction if such parties were not joined. Therefore, during the seventeenth century, the courts, with few exceptions, required the joinder of all persons interested in a controversy to be joined in any suits involving that controversy. Hazard, *supra* note 2, at 1257. Further, the prevailing rule, providing that a suit abated at the death of a party, practically required the suit to be started all over again. See *Brown v. Howard*, 21 Eng. Rep. 960 (Ch. 1701). Hence, if one were suing a great many persons, all of whom had to be joined because each was interested in the controversy, the necessary/indispensable party rule required that all be served as parties, but the death abatement principle made it virtually impossible to comply. Hazard, *supra* note 2, at 1260-62. The class action device provided a way out of this catch-22 situation. *Id.* at 1260-66. In the well publicized case of *Adair v. New River Co.*, 32 Eng. Rep. 1153 (Ch. 1805), which was heavily relied upon by Justice Story in formulating his views on class actions (see *West v. Randall*, 29 F.Cas. 718 (C.C.D.R.I. 1820) (No. 17,424)), Lord Eldon recognized the necessary/indispensable party rule, but insisted that if it was applied where it were actually impracticable to bring all such parties into the action, the very purpose of the rule, to achieve substantial justice for all interested parties, would be defeated. Lord Eldon did not follow the necessary/indispensable party rule but, nonetheless, held that the absentees were bound because those before the court were "so many, that it can be justly said, they will fairly and honestly try the legal right between themselves, all other persons interested, and the Plaintiff. . . ." *Adair v. New River Co.*, 32 Eng. Rep. at 1159. An early American example of the interrelationship of the class action device and the necessary/indispensable party rule can be found in *Sprague v. Stevens*, 37 R.I. 1, 91 A. 43 (1914), where Rhode Island joinder rules required joinder of all landowners in a suit to claim dower rights, while the death abatement principle prevented the many hundreds of parties from being served. The court eventually permitted those served to represent the unnamed new landowners.

Today, rule 19 recognizes the class action as an exception to the rigors of its provisions. Rule 19(d) states: "This rule is subject to the provisions of Rule 23." FED. R. Civ. P. 19(d).

194. ACN, *supra* note 79, 39 F.R.D. at 90-94 (rule 19) and 98-107 (rule 23).

(multiple suits with varying results and perhaps multiple liability).¹⁹⁵ Rule 23(b)(1) provides a means of litigating such a controversy without the necessity of joining numerous necessary and indispensable parties while still achieving the goals of rule 19. Hence, rule 23(b)(1) works, as does rule 19, to protect the defendant from multiple suits, inconsistent adjudications and multiple liability and to protect the interests of absentees (to limited funds).¹⁹⁶ The purpose of rule 23(b)(1) would be undermined if absentees were able to opt out. The only reason *Larionoff* was maintained as a (b)(1) class action¹⁹⁷ was because the government stated that if it lost on

195. *Id.* at 91. When a person, not joined, will as a practical matter, be adversely affected by the judgment, that person is a necessary party or a rule 19(a) person. If that person cannot be joined and complete relief cannot be obtained without his/her presence, or despite the shaping of relief a judgment will adversely affect that person, then the matter ought to be dismissed, that person being an indispensable party or rule 19(b) person. See generally *Provident Traders Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968).

196. Protecting the defendant and courts from multiplicity of suits over the same issues is certainly one of the primary reasons for the creation of the class suit. See *supra* notes 1-4 and accompanying text.

Protecting absentees' interests in limited funds has, even at the inception of the class suit, been one of its chief aims. Indeed, so strong was this concern, that certain actions were not permitted to proceed unless brought on behalf of the class rather than individual members of the class. In *Leigh v. Thomas*, 28 Eng. Rep. 201 (Ch. 1751), two crew members of a privateer ship brought suits for their share of prize-money. (Privateers were mercenaries who fought with the regular British Navy and were paid prize-money; See generally G. WILLIAMS, *HISTORY OF THE LIVERPOOL PRIVATEERS AND LETTERS OF MARQUE WITH AN ACCOUNT OF THE LIVERPOOL SLAVE TRADE* (1897)). The Chancellor, in dismissing the suit, indicated that it must be brought on behalf of all crew members:

No doubt but a bill may be by a few creditors in behalf of themselves and the rest, to have an account of real and personal estate for relief of all; and then the decree lets in all the others; and they are considered as plaintiffs, that bill not being confined to a select number: but there is no instance of a bill by three or four to have an account of the estate, without saying they bring it in behalf of themselves and the rest of the creditors: otherwise the executor may account to all the other creditors in other bills.

Leigh, 28 Eng. Rep. at 201.

Justice Story suggested that such a situation compels class treatment so as to avoid unfairness to other creditors (unequal distribution) and avoid unfairness to the defendant who would suffer multiple suits by other creditors. J. STORY, *EQUITY PLEADINGS* 99 (9th ed. 1879).

Further, in *Terry v. Little*, 101 U.S. 216, 217-18 (1879), Chief Justice Waite, speaking on the subject, said:

So, too, it is clear that the obligation is one that may be enforced by the creditors; but as it is to or for all creditors, it must be enforced by or for all. The form of the action, therefore, should be one adapted to the protection of all. A suit at law by one creditor to recover for himself alone is entirely inconsistent with any idea of distribution.

See generally old rule 23(a)(2), FED. R. CIV. P. 23, 308 U.S. 689 (1939), and Professor Moore's discussion of the hybrid class suit, Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551 (1937); Moore, *Federal Class Actions*, 32 ILL. L. REV. 307 (1937); Moore, *Federal Class Actions—Jurisdiction and Effect of Judgment*, 32 ILL. L. REV. 555 (1938).

197. The court, in a long detailed footnote, expressed doubt as to the propriety of

the merits then it was obliged to apply the ruling, regardless of the principle of *res judicata*, equally to all those similarly situated.¹⁹⁸

Because the *Larionoff* plaintiffs sought money damages rather than injunctive relief, the (b)(2) classification was unavailable.¹⁹⁹

maintaining the suit as a (b)(1)(A) suit and suggested that it might better be categorized as a (b)(1)(B) suit. Since the suit did not fit the (b)(2) category (*see infra* note 199 and accompanying text), and plaintiff obviously wanted to avoid the rigors of a (b)(3) suit, the court shrugged and said, “[i]n any event, the failure of the Government to challenge on appeal the propriety of the class designation eliminates the need for us to resolve that issue.” *Larionoff*, 533 F.2d at 1181-82 n.36.

198. If Mr. *Larionoff* lost, and lost on appeal, then others in his situation (other class members) would as a practical matter (the *stare decisis* effect of the *Larionoff* loss) be affected by the disposition of the *Larionoff* suit. This type of issue was presented in *LaMar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 467 (9th Cir. 1973) wherein the court said:

Neither the *stare decisis* consequences of an individual action nor the possibility of false reliance upon the improper initiation of a class action can supply either the practical disposition of the rights of the class, or the substantial impairment of those rights, at least one of which is required by Rule 23(b)(1)(B). To permit them to do so would make the invocation of Rule 23(b)(1)(B) unchallengeable. There is no indication in the Advisory Committee's Note that any such “boot/strap” effect was intended.

See also Green v. Occidental Petroleum Corp., 541 F.2d 1335, 1340 n.10 (9th Cir. 1976). The government nonetheless argued that it was required to treat all class members alike, so that win or lose, the result would apply directly to the benefit or detriment of the class regardless of *res judicata*.

The position of the government is at odds with the facts. First, the government certainly doesn't always abide by a court determination and apply the results class-wide. Remember, despite the *Gregory* court order, the government refused to reclassify *Gregory* class members, forcing each class member to sue to enforce the *Gregory* order. Indeed, the government was accused of acting lawlessly in the face of the *Gregory* order, almost disposing one court to uphold the reclassification order on that ground alone. *Shrader v. Selective Serv. Sys.*, 470 F.2d 73, 77 (7th Cir. 1972) (Eschbach, J., dissenting); *see generally supra* note 109. In *Larionoff*, the court noted that the issue concerning the sailors' contract rights was litigated and decided in other courts.

This identical question was recently presented . . . to the District Court for the Eastern District of Virginia, . . . to the District Court for the District of Hawaii, . . . to the District Court for the Southern District of California, . . . and to the District Court for the District of Connecticut. . . . Those courts reached the same conclusion as we reach today.

We are aware that the Fourth Circuit has reversed the District Court [for the District of Connecticut] on the ground [of contract construction].

Larionoff, 533 F.2d at 1180 n.35. Perhaps as President Nixon once threatened, the government required a “definitive opinion,” rather than merely four district court opinions and a circuit court of appeals opinion.

In any event, if the government will apply individual decisions which have national implications to all parties similarly situated, then perhaps the district courts ought to require that the action proceed as a class action. If, indeed the class will be directly affected by the result, the class would appear to fit within the (b)(1) category (the necessary/indispensable party category, *see supra* note 196). As with the limited fund cases, it may be best to protect the class by securing for it the main reason for the prerequisites listed in rule 23(a), to wit: adequate representation. Of course, adequate representation may properly be discounted when plaintiff is made an involuntary representative of a class. If plaintiff declines the court's invitation, then the court ought to appoint other counsel, at the government's expense, to represent the absentees' interests, since it is the government's position that the individual case becomes the test case for the class.

199. FED. R. CIV. P. 23(b)(2) states: “(b) . . . An action may be maintained as a

Rule (b)(2) class actions (overlapping with (b)(1)(A) class actions) are primarily maintained against a common enemy when common relief is sought, such as Title VII actions to enjoin civil rights violations.²⁰⁰ It would be highly impractical, if not impossible, for a defendant to be enjoined in one suit and not in others, or ordered to act a certain way in one suit and yet a different way in another. The class suit is, therefore, not only essential to victims of civil rights violations, but is also quite helpful to defendants. Further, judicial administration is streamlined and legitimized because multiple suits over similar, complex issues resulting in inconsistent adjudications are avoided. If in these suits, members of the class were able to opt out, those salutary effects would not be achieved.²⁰¹ However, as the court correctly perceived, the fact that a class member is not

class action if . . . (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. . . ." The ACN states that this "subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." ACN, *supra* note 79, 39 F.R.D. at 102. It is "final relief of an injunctive nature or of a corresponding declaratory nature" that is involved in the (b)(2) category. *Id.*

In *Larionoff*, the plaintiffs requested, in addition to the \$700,000 in money damages, that "the contracts of the plaintiffs be deemed rescinded and declared of no further force and effect." *Larionoff*, 533 F.2d at 1180 (emphasis in original). The district court rejected this claim and the *Larionoff* court affirmed, stating that "[t]he payment of [money] to the plaintiffs is an adequate legal remedy, and we have been offered no evidence indicating that there are exceptional circumstances in this case that justify the grant of equitable relief." *Id.* at 1181.

It seems clear that subsection (b)(2) of rule 23 was inapplicable. Rule 23(b)(3) was clearly the appropriate subdivision, but forced by that subdivision to order pendency notice (rule 23 (c)(2)), the *Larionoff* court accepted the district court's unchallenged designation. *See supra* note 197.

200. As the ACN to rule 23(b)(2) explains, "[i]llustrative [of (b)(2) class actions] are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class. . . ." ACN, *supra* note 79, 39 F.R.D. at 102.

201. Class members who opt out of the (b)(1) and (b)(2) class actions destroy the purpose of those class actions, to wit: to finally resolve the contest at one time so that all class members are treated fairly (i.e., limited fund type action), and the defendant is not faced with multiple suits, liability or court orders requiring standards of conduct which are incompatible. Worse, the defendant gains little from a win (*stare decisis* on a legal issue which is appealed) and loses a great deal if an individual member of the class wins.

The doctrine of mutuality of estoppel was first modified by the Supreme Court in *Blonder-Tongue v. University Found.*, 402 U.S. 313, 320-27 (1971), where the Court quoted from and used the reasoning of Justice Traynor's famous opinion in *Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 19 Cal. 2d 807, 122 P.2d 892 (1942), wherein the California Supreme Court abandoned the mutuality doctrine. *See supra* note 118. Hence, as Justice Stevens (then judge) said in *Jimenez v. Weinberger*, 523 F.2d 689, 701 (7th Cir. 1975) (footnote omitted): "From the standpoint of defendant . . . there seems to be little difference between a class determination after the ruling on the merits and a test case brought by an individual litigant followed promptly by a class action if the individual should prevail." Therefore, a smart individual would opt out of the (b)(1) and (b)(2) class, wait and hope that the class prevailed, and, if so, use collateral estoppel against the defendant and obtain the same result as the class. Or, if the class lost, the individual not bound by the judgment against the class because she/he opted out, would

permitted to opt out of the class does not necessarily mean that notice of the pendency of the suit should not be provided to members of the class.

Moving to the pendency notice issue, the court in *Larionoff* decided to follow those cases which, in reliance on *Eisen IV* and *Sosna*, have not required pendency notice in (b)(1) and (b)(2) class actions.²⁰² However, it did so only after quoting and adopting the analysis of Professors Wright and Miller concerning the differences between (b)(1) & (2) class actions and (b)(3) class actions which, the court reasoned, warrant and justify different treatment concerning pendency notice. That analysis, because it was and continues to be relied upon, deserves repetition here:

In representative actions brought under [23(b)(1) and (2)], the class generally will be more cohesive—for example, in many instances each member will be affected as a practical matter by a judgment obtained by another member if individual actions were instituted. Similarly, it is less likely that there will be special defenses or issues relating to individual members of a Rule 23(b)(1) or Rule 23(b)(2) class, than in the case of a Rule 23(b)(3) class. This means that there is less reason to be concerned about each member of the class having an opportunity to be present. Thus, in suits under subdivisions (b)(1) or (b)(2), once the court determines that the members are adequately represented as required by Rule 23(a)(4), it is reasonably certain that the named representatives will protect the absent members and give them the functional equivalent of a day in court.

In keeping with this philosophy, class members in Rule 23(b)(1) and Rule 23(b)(2) actions are not provided an opportunity by the rule to exclude themselves from the action as is true in Rule 23(b)(3) actions. Because they do not have the alternative of bringing a separate suit, notice really serves only to allow those members the opportunity to decide if they want to intervene or to monitor the representation of their rights.²⁰³

The court concluded by noting that:

Unlike the situation with respect to members of a Rule 23(b)(3)

prosecute the same matter in the hope that a different court or jury would decide the other way.

As Justice Stevens suggested, this permits the class to manipulate the judicial system by sending individual class members out to fight the defendant in the hope that one of them will win, thereby permitting the class to use collateral estoppel to obtain the same result. If the individual lost, the class and other individual class members could still litigate in an attempt to obtain a better result. The Supreme Court has clearly abandoned the mutuality doctrine so that this scenario would likely be common rather than aberrant. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

202. *Larionoff*, 533 F.2d at 1185-86. Actually the court followed its own former opinion in *Childs v. United States Bd. of Parole*, 511 F.2d 1270 (D.C. Cir. 1974) although Judge McGowan, writing for the court, did thoroughly survey the district and circuit court opinions on both sides of the issue.

203. *Larionoff*, 533 F.2d at 1186 n.44.

class, the members of a Rule 23(b)(1) class are likely to be more unified in the sense that there will probably be little interest on the part of individual members in controlling and directing their own separate litigation on the question at issue in the class suit.²⁰⁴

The court's conclusion has little to do with reality and indeed little to do with theory.²⁰⁵ As indicated earlier, the force which binds (b)(1) members is not their cohesiveness. Indeed, it may very well be the individual member's selfish interest which compels the (b)(1) action and its binding effect.²⁰⁶ "In various situations an adjudication as to one or more members of the class will necessarily . . . have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit."²⁰⁷ On the other hand it may be the defendant's unenviable position (multiple lawsuits-inconsistent standards) which requires that a (b)(1) lawsuit be binding on the class. "The class action device can be used effectively to obviate the actual or virtual dilemma which would thus confront the [defendant]."²⁰⁸ Therefore, it is *not* the cohesive nature of the class or *lack* of interest in directing one's own litigation which prohibits exclusion of class members and thereby dispenses with the need for providing pendency notice in order to bind the class. On the contrary, if anything it is the strong individual interests of class members and the individual interest of the defendant that compel class treatment.

The question which the court failed to answer is why Eisen and

204. *Id.* at 1186.

205. *See supra* note 193, which briefly traces the relationship of the necessary/indispensable party rule and the emergence of the class device including present rules 23(b)(1) and 19. That history and the present rules refute the court's conclusion. Even under old rule 23(a)(1) and (2), the so-called true and hybrid class actions, the court picks up no support. Under the old rule 23(a)(1) (the true class), class members were joint obligees or joint obligors and each member's interest was identical to the other because under the necessary/indispensable party rule all members had to be joined unless the action proceeded as a class action. Hence, the true class was bound by the result. Old rule 23(a)(2) (the hybrid class), was created to ensure equal distribution of a debtor's assets to creditors. A single creditor sued for all on the liability issue and then, after notice, other creditors came in to the suit and the fund was distributed. Those creditors that declined the invitation could still maintain a separate suit against the debtor, although those assets of the debtor which had been distributed in the class suit were no longer available to such creditors.

The common law, the old equity rules, the old rule 23 and present rule 23 all strongly suggest that the individual member of (b)(1) type action has every reason to want to litigate first and separate from the class. By doing so, the individual controls the litigation rather than leaving it to unknown and possibly less capable litigants, who may present weak cases and/or hire the least able lawyers. Further, if a limited fund is involved, the litigant who wins first may see 100 cents on the dollar rather than a pro rata share distributed amongst class members.

206. *See supra* notes 193 and 196.

207. ACN, *supra* note 79, 39 F.R.D. at 101.

208. *Id.* at 100.

his (b)(3) class are any less cohesive than the *Larionoff* (b)(1) class or the *Gregory* (b)(2) class. On the initial issue of liability, all class actions—(b)(1), (2) & (3)—are cohesive by definition.²⁰⁹ Eisen hoped the district court would find that the defendants violated the antitrust laws by fixing the price of their commission rate.²¹⁰ On this issue, all class members had the identical interest. As with *Larionoff*, once the liability issue was decided, money damages could then be determined.²¹¹ In *Gregory*, once liability was determined an injunction issued. However, in *Gregory* the issue of fatherhood deferments to all members of the class was a far more important concern to class members than the loss or gain of \$70. Yet in *Gregory*, all courts agree that pendency notice is not constitutionally required.²¹² Pasquier, Schrader, McCarthy, Germonprez, Zeilstra and others like them, would certainly have preferred to choose their own champion, on their local turf, to argue whether they might remain home with their wives and children rather than go fight in Vietnam. But they were given no choice. Eisen and his class must be given a choice simply because each wants \$70. *Larionoff* escaped the imposition of pendency notice cost even though his class sought \$700,000 in money damages, merely because the court held that the

209. Rule 23(a)(1)-(4) requires, as a prerequisite to each class action, *inter alia*, that the class members share common questions of law or fact and that the claims or defenses of the class members be the same. The main, if not the only, question in a (b)(1) and (2) class action is the class-wide liability of the defendant. For instance, did the government classify registrants properly? Did the government pay sailors in accordance with an enlistment contract? If the liability issue is decided favorably to the class, an injunction or declaratory relief follows or, in addition to such relief, monetary relief is provided based upon class-wide proof or the presentation of individual claims. See *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239 (3rd Cir. 1975) and *infra* notes 229-230 and accompanying text. In a (b)(3) action, by definition the main question common to the class must "predominate over any questions affecting individual members." FED. R. CIV. P. 23(b)(3). Indeed "[t]he court is required to find, as a condition of [the (b)(3) class action], that the questions common to the class predominate over questions affecting individual members. . . . [Hence] a fraud . . . by the use of similar misrepresentations [is appropriate for class resolution] despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class." ACN, *supra* note 79, 39 F.R.D. at 103.

210. *Eisen IV*, 417 U.S. 156, 158. See *supra* note 14 and accompanying text.

211. It appears that the government was going to pay each sailor who re-enlisted under the program which formed the basis of the suit without any need for individual claims and/or adjudications. The plaintiffs in *Larionoff* requested that the government disclose the names and addresses of the members of the *Larionoff* class. The plaintiffs appeared to seek this information without suggesting a reason for its disclosure. The government did not want the names and addresses of those persons disclosed. The district court denied plaintiffs' request and the court of appeals affirmed because plaintiffs had not explained why "a disclosure order would be necessary to protect the interest of absent class members. . . ." *Larionoff*, 533 F.2d at 1187. It therefore can be concluded that the district court, without evidence to the contrary, believed the government would pay each class member what she/he was entitled to, without the need for plaintiff to monitor the method the government used in determining who was paid, and how much.

212. See *supra* notes 166-176 and accompanying text.

class was a (b)(1) class. Yet in *Larionoff* because of the amount of each member's stake, each member may have preferred to pursue his/her claim individually—whereas Eisen and his class will never seek nor obtain redress without the class device.

Larionoff is no more a (b)(1) action than *Eisen*. Both sought a determination that defendant had violated the law. A class win would require the members of the class to come forward and/or otherwise claim and prove entitlement to damages based upon the proven class liability.²¹³ Looking at the definition of the (b)(1)(B) class, the question to consider is whether adjudication of individual claims will “as a practical matter be dispositive . . . or impair . . .” the interests of other class members.²¹⁴

First, let us examine what would happen if *Eisen* or *Larionoff* class members pursued individual actions and prevailed. Since both *Eisen* and *Larionoff* did not involve limited funds, individual judgments would not disproportionately distribute assets.²¹⁵ Hence, an individual member's win could only benefit the class (whether (b)(1), (2) or (3)) because of the abandonment of the mutuality doctrine.²¹⁶ That is, strangers with claims consisting of identical issues (price fixing/bonus money) may use collateral estoppel to prove, without litigation, that defendant price-fixed or unlawfully denied bonus money. On the other hand, if the individual class member lost his/her action and lost the legal issue on appeal, then *stare decisis* would operate against future litigants on the same issue resolved on appeal. But that by itself has never been a reason for permitting (b)(1)(B) treatment of a class, for if it were, then all class actions including *Eisen* would be of that variety.²¹⁷ Indeed, it is precisely because of the *stare decisis* problem that *Larionoff* (and Gregory) may very well wish to pursue their own claims first so as not to be bound by the efforts of those they did not choose, whereas the *Eisen* class members have every reason to hope a representative will take up their cause, because they cannot do it alone.

Rule 23(b)(1)(A) applies when individual adjudications may vary “establish[ing] incompatible standards of conduct” for the defend-

213. In both *Eisen IV* and *Larionoff*, it was possible to determine the amount of damages by merely examining the defendant's records. Hence, in *Larionoff* the government re-enlistment records, if accurate, would determine the persons who should be paid. See *supra* note 211. In *Eisen IV*, the defendants' records should indicate who should be paid and how much (based upon the number of transactions of each class member for the relevant period and the amount of overcharge on each commission paid). For a discussion of the methods used to determine class wide damage awards, see 5 H. NEWBERG, *supra* note 1, at § 9715c.

214. See *supra* notes 193-196 and accompanying text.

215. *Id.*

216. See generally *supra* note 201.

217. *LaMar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 467 (9th Cir. 1973). See *supra* note 198.

ant.²¹⁸ It is inapplicable to both *Eisen* and *Larionoff*. Given two suits by individuals, one which wins and one which loses, the defendant in *Larionoff* must give bonus money in one and not the other, and the defendant in *Eisen* must fork over \$70 in one and not the other. Providing money damages to one group of similarly situated persons and not another may be disconcerting to the defendant but it does not establish incompatible standards of conduct; although it surely counsels against conduct which causes such loss. If mere inconsistent money judgments which involved the same questions of law and fact were all it took, then all consumer class actions would be of the (b)(1)(A) variety.

The results achieved by the courts are understandable.²¹⁹ *Eisen IV* clearly held that rule 23(c)(2) commands individual pendency notice be provided to ascertainable (b)(3) class members. *Sosna* just as clearly indicated that neither the Constitution nor rule 23 requires pendency notice be provided to (b)(1) or (2) class members. The federal courts are faced with a dilemma: either certify the action as a (b)(3) class and effectively deprive the class and all its members of a remedy because of the cost of pendency notice (*Eisen IV*) or certify the action as a (b)(1) or (2) class, thereby dispensing with the need for and cost of pendency notice so that class-wide redress is permissible (*Larionoff* and *Gregory*). This dilemma is presented most clearly when the plaintiff class sues under Title VII (civil rights violations)²²⁰ and requests damages in addition to, or in lieu of, injunctive relief.

B. Why Pendency Notice in (b)(3) and Not (b)(2)?

A Third Circuit opinion which has received great notoriety provides an example of the contortions which the federal courts go through in order to avoid depriving plaintiff class of a remedy by compelling pendency notice and its consequent cost.²²¹ In *Wetzel v.*

218. See *supra* notes 193-196 and accompanying text.

219. See *infra* notes 221, 256 and accompanying text.

220. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 (1970) (as amended, Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000 (Supp. II, 1972)).

221. *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239 (3rd Cir. 1975). See generally Note, *Civil Procedure—Class Action Suits—Applicability of Rule 23(b)(2) to Class Actions in Which the Need for Injunctive Relief Has Been Obviated—Wetzel v. Liberty Mutual Insurance Co.*, 37 OHIO ST. L.J. 386 (1976); Rutherglen, *Title VII Class Action*, 47 U. CHI. L. REV. 688, 711 (1980); Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 320 (1982); Jackson & Matheson, *The Continuing Violation Theory and the Concept of Jurisdiction in Title VII Suits*, 67 GEO. L.J. 811, 826 (1979); Steinman, *The Party Status of Absent Plaintiff Class Members: Vulnerability to Counterclaims*, 69 GEO. L.J. 1171, 1199 (1981); Spahn, *Resurrecting the Spurious Class: Opting-in to the Age Discrimination in Employment Act and the Equal Pay Acts Through the Fair Labor Standards Act*, 71 GEO. L. J. 119, 140 (1982); Garth, *Conflict and Dissent in Class Actions: A Suggested*

Liberty Mutual Insurance Co.,²²² two former female employees filed suit with the Equal Employment Opportunities Commission pursuant to Title VII, alleging sex discrimination in the company's hiring and promotion policies. Thereafter, the company changed its discriminatory policies and offered the named plaintiffs promotions. The women declined the offer and filed suit in the federal district court requesting injunctive relief and back pay awards for present and future employees on a nationwide basis.²²³ The district court certified the class as a (b)(2) class action and refused to order pendency notice or recertify the class under the (b)(3) category.²²⁴ "No notice had been sent to any member of the class as of the date of [the] appeal."²²⁵ The district court granted partial summary judgment, ruling that the company's policies had violated Title VII, but denied injunctive relief because the company had discontinued those policies.²²⁶ Since injunctive relief was unnecessary, the circuit court, framing the inquiry in Shakespearean terms, said, "[w]hether (b)(2) or not (b)(2) is indeed *the* question."²²⁷ The company vigorously contended that the matter could proceed only as a (b)(3) class action since only damages (back pay awards) were involved and therefore pendency notice to ascertainable class members was required. The circuit court first held that the action was properly certified as a (b)(2) class action and, second, held that due process did not require pendency notice in (b)(2) class actions. The court reasoned as follows:

A (b)(2) suit is permitted when the opposing party has acted or refused to act on grounds generally applicable to the class. . . . By its very nature, a (b)(2) class must be cohesive as to those claims tried in the class action. . . . Because of the cohesive nature of the class, Rule 23(c)(3) contemplates that all members of the class will be bound.

. . . .

By the very nature of a heterogeneous (b)(3) class, there would be many instances where a particular individual would not want to be included as a member of the class. To respect these individual interests, Rule 23(c)(2) was written to afford an opportunity to every potential member to opt out of the class. . . . For the

Perspective, 77 NW. U.L. REV. 492, 514 (1982); Diver, *The Judge As Political Pawnbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 67 (1979); Rutherglen, *Notice, Scope, and Preclusion in Title VII Class Actions*, 69 VA. L. REV. 11, 23 (1983); Boardman & Vining, *The Role of Probative Statistics in Employment Discrimination Cases*, 46(4) LAW & CONTEMP. PROBS. 189, 193 (1983); Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 595 (1983).

222. 508 F.2d 239 (3rd Cir. 1975).

223. *Id.* at 244.

224. *Id.*

225. *Id.*

226. *Id.* at 245.

227. *Id.* at 248.

opt out procedure to be effective, 23(c)(2) also provides for notice to be sent to all potential members prior to the final determination of the class.

. . . With the potential unfairness to members of the (b)(3) class eliminated by the opt out procedure, 23(c)(3) contemplates that all members of the (b)(3) class, as well as members of the (b)(2) class, will be bound by the *res judicata* effect of the judgment.²²⁸

Because the company acted or refused to act on grounds generally applicable to the class,²²⁹ the court concluded that the action was a (b)(2) action and that the back pay awards were merely part of the equitable relief envisioned by Title VII actions.²³⁰ The court avoided pulling the pendency notice trigger by simply characterizing the action as a (b)(2) action rather than a (b)(3) action, even though no injunctive relief was ordered. It was precisely this sort of fudging or misuse of the old rule 23 categories of class actions that led to the adoption of the present rule 23.²³¹

228. *Id.* at 248-50 (citations and footnotes omitted).

229. FED. R. CIV. P. 23(b)(2), *supra* notes 199-200 and accompanying text.

230. *Wetzel*, 508 F.2d at 250-51.

231. Professor Moore, noting that the proposed Federal Rules of Civil Procedure did not deal specifically with class actions, drafted a rule which he hoped would solve problems concerning joinder, subject matter jurisdiction, and the *res judicata* effect of class judgments. Professor Moore divided class actions into three categories, true, hybrid and spurious. The true type class action compelled joinder of all interested persons, such as joint obligees/obligors, common right holders (creditors given a common right, rather than an individual right, to enforce liability), and shareholders in a shareholder derivative suit. The hybrid type class action involved several rights where the object of the actions affected the disposition of specific property in which all were interested. Moore, *Federal Rules of Civil Procedure: Some Problems Raised By the Preliminary Draft*, 25 GEO. L.J. 551, 570-71 (1937). The difference between the true and hybrid is suggested to be that a "true class suit" decree binds all and must involve a fund in which all plaintiffs have a common interest, but a hybrid action, that does not bind all, involves a personal liability of the money. The hybrid action is assimilated to a proceeding *in rem*. Note, *Recurrent Problems in Action Brought on Behalf of a Class*, 34 COLUM. L. REV. 118, 133 (1934). The spurious category defined rights that were several where common questions of law or fact were involved. This category was nothing more than a permissive joinder device, enabling large numbers of litigants to bypass diversity requirements by permitting the courts to look to the named plaintiff's citizenship rather than the intervening class members' citizenship. The judgment rendered in the spurious action was conclusive only on parties that joined, not on absentees. Moore, *supra*, at 575.

Moore's final proposal dealt specifically with the effect of a class judgment; it stated:

(b) *Effect of Judgment*. The judgment rendered in the first situation is conclusive upon the class; in the second situation it is conclusive upon all parties and privies to the proceeding . . . insofar as [it does] or may affect specific property involved in the proceeding; and in the third situation it is conclusive upon only the parties and privies to the proceeding.

Moore, *supra*, at 571. The final draft of the rules omitted Moore's labels and their consequent effects. See FED. R. CIV. P. 23(a)(1), (2) & (3) (1939) (old rule). Despite this omission, the courts read his labels and the consequences he attributed to each category into the then newly adopted rule 23. Concerning this omission by the drafters of the rule and resurrection by the courts of Moore's proposed subsection on the effects of judgments, one commentator stated:

Old rule 23 provided three different categories of class actions. The "true" (old rule 23(a)(1)) and "hybrid" (old rule 23(a)(2)) class actions were binding on all class members while the "spurious" (old rule 23(a)(3)) was not.²³² Eventually, the federal courts used (abused) these categories as a way of describing a result which they sought to achieve rather than a method of achieving proper decisions pursuant to the definitions of each category.²³³ In a similar manner, the approach of the court in *Wetzel* benefited the class and vindicated government policy but only by "dint of depriving the [definition of a (b)(2) class] of coherent meaning."²³⁴

Having decided that (c)(2) notice was not applicable, the court next had to deal with whether any type of pendency notice was constitutionally required even though not required by the rule. Once again it was the cohesive/homogeneous nature of the (b)(2) class upon which the court relied in concluding that notice was not constitutionally required. As the court explained:

In the instant case, determination of liability on the part of Liberty Mutual to each member of the class depends on whether it discriminated on the basis of sex. This question is common to the claims of all members of the class. . . .

The very nature of a (b)(2) class is that it is homogeneous without any conflicting interests between the members of the class. Since the class is cohesive, its members would be bound either by the collateral estoppel or the stare decisis effect of a suit brought by an individual plaintiff. Thus, as long as the representation is adequate and faithful, there is no unfairness in giving res

His recommendation was rejected by the Committee as a matter of substance beyond the scope of the rules of procedure, but the courts have virtually adopted the excluded paragraph in deciding cases. Even assuming the Committee to be correct, one might challenge the wisdom of assembling so elaborate a mechanism and omitting its engine.

Note, *Federal Class Actions: A Suggested Revision of Rule 23*, 46 COLUM. L. REV. 818, 824 (1946). Moore's definitions, or more precisely, the old rule 23 categories, were not easy to apply. "In practice the terms [in old rule 23(a)(1), (2) and (3)] . . . proved obscure and uncertain. . . . The courts had considerable difficulty with these terms." ACN, *supra* note 79, 39 F.R.D. at 98. Courts classified actions depending upon the effect of the judgment which was wanted, reaching results "by dint of depriving [these terms] of coherent meaning." *Id.*

The present rule 23 was enacted so as to describe class actions in "practical terms" so that classification will be easy and judgments will be binding. *Id.* See also Z. CHAFEE, *supra* note 1, at 255-56; Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 707-14 (1941).

232. See *supra* note 231.

233. *Id.* See also *supra* note 79, *Binding Effect of Class Actions*, at 1062-65.

234. The courts arrived at results which they desired "by dint of depriving" the definitional terms of old rule 23 "of coherent meaning." ACN, *supra* note 79, 39 F.R.D. at 98. As one commentator observed, "Analysis of the cases engenders a suspicion that the generic appellations derived from Rule 23(a) are used to describe results rather than reach decisions." Note, *Federal Class Actions: A Suggested Revision of Rule 23*, 46 COLUM. L. REV. at 823. See generally *supra* note 231.

judicata effect to a judgment against all members of the class even if they have not received notice. Adequacy of representation of the class is a mandatory requirement for the maintenance of a class action under Rule 23(a). If the representation proves inadequate, members of the class would not be bound. [*Hansberry*; *Gonzales*].²³⁵

The rhetoric is superficially convincing and the equities are in favor of permitting redress by avoiding pendency notice costs. Hence, most circuit courts adhere to the Third Circuit's view.²³⁶ Yet, despite the salutary effect of the court's reasoning on civil

235. *Wetzel*, 508 F.2d at 255-56.

236. So long as the class is seeking injunctive and or declaratory relief (pursuant to Title VII), the fact that additional relief in the form of back pay damage awards is sought has not caused the courts to alter the fundamental character of the class suits—hence, suits remain (b)(2) type actions and therefore do not compel the individual pendency notice mechanism associated with the (b)(3) action. *See supra* note 133 and accompanying text.

However, because such suits contain features of both the (b)(2) (injunctive) and (b)(3) (money damage) actions, some courts have dealt with these "hybrid" class actions using a Solomon type approach. A lengthy, rambling and mostly confusing discussion of this hybrid class suit can be found in *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983). In *Holmes* many class members objected to the monetary features of the settlement and claimed a right to opt out of the settlement and pursue their claims individually. The court canvassed the cases which dealt with these "hybrid" class actions and agreed that such actions are (b)(2) actions. It therefore concluded that rule 23's mandatory individual pendency notice provision was inapplicable. In light of the individual damages claims sought by class members and such members' desire to press those claims individually and not join in the settlement, the court, using the discretionary powers provided by section (d) of the rule, concluded that notice must be provided to each claimant/class member and that: "Such claimants must be permitted to exclude themselves from the class and must be given an opportunity to prove entitlement to a larger individual award in the same court that hears the claims of the class." *Id.* at 1160.

The court, on the facts of the case, merely required post-judgment notice, that is, notice to class members that the class has prevailed on the discrimination issue and that the class will seek money damages for each class member unless an individual member opts out and seeks such damages him/herself in the same court. This approach is not only fair to each class member, but may indeed be required by the due process clause. Even in a (b)(3) class action, once the liability issue is determined, notice would be required if it is necessary for class members to prove individual damage claims in order to obtain the benefits of the proven class-wide liability. Hence, this type of notice is not pendency notice, rather it is post judgment notice—provided to enable the class member to choose whether he/she wishes to (1) exclude him/herself and relinquish all claims to money damages, (2) exclude him/herself and proceed to litigate or otherwise resolve the issue of individual damage claims, or (3) permit the class representative to settle the damage issue on a specified basis.

The *Holmes* court arrived at the appropriate result, but only after a useless analysis of the homogenous/heterogeneous distinction to which courts adhere in order to justify the imposition of the pendency notice requirement in a (b)(3) case and avoid the same in the (b)(1) & (2) cases. Since pendency notice was not ordered by the *Holmes* court, reliance on that supposed distinction was unnecessary and confused the issue of the type of notice ordered. Worse yet, it reinforced the validity of the distinction by adding yet another circuit court to the list of authorities which adhere to that rationale. As the count increases, changes become more difficult. Justice Field, speaking of the Swift doctrine, the pre-*Erie* doctrine (*Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)) which was the law of the federal courts for almost 100 years before being overruled, under-

rights plaintiff class actions, when analyzed and compared with a typical (b)(3) class action, the court's reasoning comes up short. For our discussion, the question, to paraphrase the court, is why (b)(2) and not (b)(3)? If Eisen sought an injunction from future price fixing as (b)(2) clearly permits,²³⁷ would that sleight of hand have magically transformed his heterogeneous class into a homogeneous class so that he would no longer be forced to pay the \$315,000 pendency notice cost? And, if Eisen also added a request for damages as Wetzel did, the primary feature of the action would remain the same, to wit: the defendants in *Eisen* acted or refused to act on grounds generally applicable to the class. Indeed, the very reason *Eisen* was a class action was that those common issues predominated over all other issues leaving, as in *Wetzel*, the issue of damages to be determined after the main event.²³⁸ *Wetzel's* reasoning can easily be used to fit *Eisen*. To paraphrase Circuit Judge Rosenn:²³⁹

In the instant case, determination of liability on the part of [Jacqueline & Carlisle] to each member of the class depends on whether it [illegally price fixed]. This question is common to the claims of all members of the class.

. . . .

Since the class is cohesive, its members would be bound either by collateral estoppel or the stare decisis effect of a suit brought by an individual plaintiff. Etc. . . .

As stated earlier, a stranger cannot be bound by collateral estoppel or *res judicata*,²⁴⁰ so if *Wetzel* brought suit alone and lost, the defendant would not be permitted to use collateral estoppel or *res*

scored the difficulty involved in changing an oft repeated principle when he stated in *Baltimore & O. R.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893):

I am aware that what has been termed the [Swift Doctrine] . . . has been often advanced in judicial opinions of this court. . . . I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of [deciding the issue]. And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, in many instances, unhesitatingly and confidently, but I think now erroneously, repeated the same doctrine. But, notwithstanding the great names . . . and . . . the frequency with which the doctrine has been reiterated [the doctrine should be overruled].

So too, as the homogeneous/heterogeneous distinction gathers endorsements, the sheer numbers of them make it nearly impossible to question its validity.

237. The ACN to rule 23(b)(2) states in part:

Thus an action looking to specific or declaratory relief could be brought by a numerous class of purchasers, say retailers of a given description, against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential.

ACN, *supra* note 79, 39 F.R.D. at 102.

238. *See supra* note 209.

239. *Wetzel*, 508 F.2d at 255-56. *See supra* note 235 and accompanying text.

240. *See supra* notes 120-21 and accompanying text.

judicata against other class members. If on appeal Wetzel lost on the discrimination issue, then *stare decisis*, a matter of precedent, would apply to other such suits (at least in that circuit). Likewise, with Eisen, if he brought suit and lost, no stranger could be bound by collateral estoppel or *res judicata*—and if on appeal he lost on the price-fixing issue, then *stare decisis* would apply to any other suits brought.

The other possibility—Wetzel sues alone and wins—is also not distinguishable from *Eisen*. If she wins, others similarly situated would likely be permitted to apply collateral estoppel against the company and thereby litigate only the damage issue—the amount of pay to which each is entitled under the facts of each individual's case (non-hiring or non-promotion). The same is true for Eisen. Although the court's reasoning applies with equal force to *Eisen*, solely because *Eisen* is categorized as a (b)(3) action, Mr. Eisen must pay \$315,000 pendency notice costs in order to permit a class member to either opt out or intervene. It is pure fantasy to think that an *Eisen* class member would desire to opt out since no individual's stake is great enough to allow for the luxury of individual prosecution and therefore no redress whatever will be obtained by such a class member. "It is an axiom of modern social and economic life that we all wish to command more of the world's wealth; there is not much sense in asking someone whether he would rather have one dollar or two."²⁴¹ And, of course, an *Eisen* class member could not possibly afford the time, money and effort necessary in order to monitor the action, sift through the court file, investigate the class attorneys, and plaintiffs' motives and interests and/or intervene in the action "through his counsel."²⁴²

C. Adequate Representation Protects All Absent Class Members

Perhaps it is reflective of our capitalist society to provide greater "safeguards" when money is at stake. In truth, it is the nature of the human character, at least in our society, that makes the (b)(3) (money damage) class the most homogeneous while the (b)(1) and (b)(2) classes are least homogeneous. The issues which confront the court in a (b)(1) and (b)(2) action are of such great importance that it is more likely that the individual would rather pursue his/her

241. See Yeazell, *supra* note 3, at 1111. It is extremely unlikely that such a class member would not want redress. While counter-examples can be conjured up, they are fanciful and reflect aberrant, not typical behavior. As Justice Rehnquist said when pondering whether or not the class in *Sosna* was of sufficiently similar interest, it is "difficult to imagine why any persons in the class . . . would have an interest in seeing [Iowa's residency statute] upheld." *Sosna*, 419 U.S. 393, 403 n.13 (1975). See also *supra* note 174.

242. See *supra* notes 134-38 and accompanying text.

claim alone. Moreover, the individual's interest in the outcome will vary in those actions. Some class members will want less, more or none of what the class representative is requesting. This is only natural, since those class actions deal with political and social issues and, therefore, reflect the diversity of opinion which exists on such issues in our society.²⁴³ Yet the courts categorize these groups as homogeneous, while the money groups are categorized as heterogeneous. If anything, it is the other way around.

Depending on the facts of the particular case a group may be more or less homogeneous/heterogeneous in interest. The importance of the prerequisites listed in rule 23(a), the threshold inquiries, are to guard against material conflicts and assure homogeneity of interest by requiring that "questions . . . common to the class" are involved, that "the claims . . . of the representative . . . are typical of the claims . . . of the class," and most importantly, that "the representative . . . will fairly and adequately protect the interests of the class."²⁴⁴ In addition to rule 23(a) safeguards, the district court "may make appropriate orders . . . for the protection of the members of the class"²⁴⁵ and, at any time prior to the merit decision, the action may be decertified if in the best interest of the class.²⁴⁶ Moreover, the action may not be dismissed or settled with-

243. See Bell, *supra* note 45.

244. FED. R. CIV. P. 23(a) provides:

(a) Prerequisites to a Class Action. 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.

245. FED. R. CIV. P. 23(d) provides:

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

246. FED. R. CIV. P. 23(c)(1) provides: "(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional and may be altered or amended before the decision on the merits." See also *supra* note 94.

out court approval and notice to the class.²⁴⁷ The combination of these procedural safeguards assures the requisite homogeneity of interest, whether a (b)(1), (b)(2) or (b)(3) class action, so that it is fair to say that the absentee received his/her day in court, i.e., the absentee was adequately represented.

Long before the Supreme Court held that (b)(1) and (2) class actions constitutionally require adequate representation of class members, rather than pendency notice to class members, the Fifth Circuit in *Gonzales v. Cassidy*²⁴⁸ underscored the preeminent role played by the adequacy of representation requirement of rule 23(a)(4) and the *Hansberry* decision. The question before the court was whether *Gonzales* and the class were bound by the res judicata effect of a prior class suit brought by *Gaytan* involving the same class, the same defendant and the same issues.²⁴⁹ The court noted that mandatory pendency notice was not given nor required to be given to class members in the first suit because it was a (b)(2) rather than a (b)(3) action, stating: “[A]s a result of these distinctions class members in (b)(1) and (b)(2) actions must necessarily rely on the representative to protect their interests.”²⁵⁰ The court held that due process would be violated “unless the court applying res judicata can conclude that the class was adequately represented in the first suit.”²⁵¹ With this in mind, the court advanced a two pronged inquiry:

- (1) Did the trial court in the first suit correctly determine, initially, that the representative would adequately represent the class? and, (2) Does it appear, after the termination of the suit, that the class representative adequately protected the interest of the class? The first question involves us in a collateral review of the *Gaytan* trial court’s determination to permit the suit to proceed as a class action with *Gaytan* as the representative, while the second involves a review of the class representative’s conduct of the entire suit—an inquiry which is not required to be made by the trial court but which is appropriate in a collateral attack on the judgment such as we have here.²⁵²

247. FED. R. CIV. P. 23(e) provides: “(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.” See also *supra* note 94.

248. 474 F.2d 67 (5th Cir. 1973). See *supra* note 110.

249. *Id.* at 69.

250. *Id.* at 74 n.12. The implication of the reasoning is that a (b)(3) class member who must receive notice and an option to exclude him/herself, can protect him/herself by opting out, intervening and or monitoring the suit before doing either. As discussed earlier, economics precludes most, if not all, class members from doing either and, therefore, the notice rule only provides an obstacle to the redress of substantive rights. See *supra* notes 134-38, 241-42 and accompanying text.

251. *Gonzales*, 474 F.2d at 74.

252. *Id.* at 72.

As to the first inquiry, the court concluded that the district court's initial rule 23(a)(4) determination was correct because "(1) the representative . . . [had] common interests with the unnamed members of the class; and (2) it . . . appear[ed] that the representative [would] vigorously prosecute the interests of the class through qualified counsel."²⁵³ However, reviewing the entire suit, with the hindsight of the appellate process, the court noted that the judgment in *Gaytan* was applied prospectively to each member of the class except *Gaytan*, who alone received retrospective relief, and that *Gaytan* did not pursue retrospective relief for any other class member. The court, speaking through Judge Ingraham, concluded that the representation was not adequate and, therefore, *Gonzales* and the class was not bound by the *Gaytan* judgment.²⁵⁴

Since the two pronged test is to be utilized by reviewing courts, the first inquiry appears to be a fruitless one. What purpose would the first inquiry serve if the reviewing court determined that the lower court was incorrect in its initial determination concerning adequate representation, but the second inquiry nevertheless demonstrated that the representative did in fact adequately represent the class? In such a case, a judgment that went against the class should certainly bind the class. Hence, a reviewing court need only use the second prong of the test to determine the adequacy issue. However, the first prong of Judge Ingraham's inquiry does serve to underscore the great importance of the adequacy requirement and the seriousness with which that issue ought to be treated by the district courts. If the initial inquiry is made correctly, it is less likely that a class action judgment will be subject to a collateral attack on the ground of inadequate representation.²⁵⁵

253. *Id.* (footnote omitted).

254. *Id.* at 75.

255. To satisfy itself that the representation fulfills the requirements of rule 23(a)(4), the district court must find that (1) the representative's interests and the unnamed members' interests are common, and (2) the representative will vigorously prosecute the interests of the class through qualified counsel. *Id.* at 72. Once this determination is made, practical considerations will virtually always dictate that the entire representation will be adequate. First and foremost, neither plaintiff nor plaintiff's attorney will be rewarded unless the action prevails or is settled favorably to the class with court approval. See *supra* notes 70-71 and accompanying text. Additionally, the defendant may challenge class certification on adequacy grounds at any time prior to a decision on the merits. See FED. R. CIV. P. 23(c)(1) *supra* note 246. The defendant has a strong incentive to make this challenge, for if the defendant prevails, no other class-wide relief may be sought and, therefore, the defendant may escape class-wide relief. Further, the class size will shrink because the statute of limitations will begin to run on individual members' claims when the action is dismissed. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). Any win or settlement for the defendant will only be as good as the judgment is safe from collateral attack. Thus, the defendant will attempt to secure a final result which will bind the class and which will be immune from attack on the grounds of inadequacy of representation.

III. THE PENDENCY NOTICE REQUIREMENT OF RULE 23(b)(3) ENCOURAGES MANIPULATION OF THE CLASS MECHANISM BY THE PARTIES AND THE COURTS

A. *The Defendant is Placed in a No Win Situation*

Larionoff and *Wetzel* are consistent with *Gonzales* in that each of those circuit court opinions, albeit in different language, sought to ensure that absent class members' interests were adequately represented. Each regarded pendency notice as a useless, costly procedure which, instead of providing safety for absentees, created an insurmountable and unnecessary procedural obstacle toward achieving redress of substantive rights. Confined by the mandatory pendency notice requirement when (b)(3) class actions are involved, it is understandable that courts will stretch the language of (b)(1) and (2) in order to avoid the (b)(3) category.

Paradoxically, other courts have embraced the (b)(3) category in order to assist a plaintiff class, by holding that a prior class action in which pendency notice was not provided to class members was not *res judicata* (as the defendant contended), thereby permitting the plaintiff class to obtain redress where it would otherwise be barred.²⁵⁶ Recall that in *Wetzel*, it was the defendant that objected to the lack of pendency notice to the plaintiff class. By holding that notice was not required, the *Wetzel* court permitted the class to obtain the redress to which it was found to be entitled.

In *Johnson v. General Motors Corp.*,²⁵⁷ the Fifth Circuit was confronted with a collateral attack on a prior class judgment by the plaintiff class which sought to escape the result of that prior judgment. (The Fifth Circuit and the newly created Eleventh Circuit²⁵⁸ have heard most of the (b)(2) actions which request back pay money awards in addition to injunctive relief).²⁵⁹ In the prior suit, *Rowe*, on behalf of the same class against the same defendant, brought a Title VII class suit which sought and obtained certain injunctive relief.²⁶⁰ "No class-wide monetary relief was sought or granted in *Rowe*."²⁶¹ *Johnson* brought a class action suit requesting additional injunctive relief and monetary relief. The district court

256. A similar practice by the courts under old rule 23 caused the promulgation of the new rule 23. See ACN, *supra* note 79, 39 F.R.D. at 98-99; see also *supra* note 231.

257. 598 F.2d 432 (5th Cir. 1979).

258. The Eleventh Circuit Court of Appeals was created on October 1, 1981 and adopted as precedent all former Fifth Circuit cases. *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1147 n.3 (11th Cir. 1983).

259. "These types of actions have especially blossomed in this Circuit." *Penson v. Terminal Transp. Co.*, 634 F.2d 989, 994 (5th Cir. 1981).

260. *Johnson*, 598 F.2d at 434.

261. *Id.*

dismissed the case, holding that the *Johnson* action was barred by the *res judicata* effect of the *Rowe* action. On appeal Johnson asserted, *inter alia*, that he and his class were not bound by *Rowe* because pendency notice was not provided to the class and because the *Rowe* named plaintiffs, who each received \$1,000 in back pay awards, inadequately represented the class by failing to pursue class-wide monetary claims.²⁶²

The court acknowledged that notice was not mandatory in all (b)(2) class actions.²⁶³ However, the court stated:

It does not follow that because notice in (b)(2) actions is not made mandatory by Rule 23, every (b)(2) action in which notice is absent will automatically bar all subsequent efforts by members of the class to litigate claims that might have been brought in the original class action. Before the bar of *res judicata* may be applied to the claim of an absent class member, it must be demonstrated that invocation of the bar is consonant with due process. [*Hansberry*; *Gonzales*].²⁶⁴

The facts would appear to be guided by the Fifth Circuit's own opinion in *Gonzales*, particularly since the court cited *Hansberry* and *Gonzales*, both of which dealt exclusively with the adequacy requirement rather than the issue of notice. But the court was faced with a dilemma:

Johnson does not assert that the representation in *Rowe* was inadequate insofar as the named *Rowe* plaintiffs sought injunctive or declaratory relief. Indeed, the plaintiffs in *Rowe* were ultimately successful in obtaining such relief. Rather, Johnson relies on the failure of the named *Rowe* plaintiffs to pursue class-wide monetary awards.²⁶⁵

The court skirted the dilemma by avoiding the adequacy issue and grasping the handy notice issue. The court held:

Before an absent class member may be forever barred from pursuing an individual damage claim, however, due process requires that he receive some form of notice that the class action is pending and that his damage claims may be adjudicated as part of it.²⁶⁶

The *Johnson* class, therefore, was not barred by *Rowe* on its monetary claims and yet could take advantage of *Rowe* by using collateral estoppel against the defendant to establish liability on the discrimination issue. In this way, the *Johnson* class would be able to litigate only how much was owed rather than whether anything

262. *Id.*

263. *Id.* at 436.

264. *Id.*

265. *Id.* at 438.

266. *Id.*

was owed.²⁶⁷

There are three major flaws with the court's reasoning:

(1) The court relied on the premise that the *Rowe* suit could not adjudicate a money claim without notice to the class, when in fact the *Rowe* suit did not adjudicate a money claim and the *Rowe* plaintiffs did not request that a money claim be adjudicated. Since monetary claims existed at the time *Rowe* sued, and as in *Gonzales*, the class representative did not pursue the full relief available, *res judicata* should not have been applied because the class was inadequately represented rather than because the class did not receive notice.

(2) The court's position places a defendant in a no win situation. If the *Rowe* class sues only for an injunction and wins, then the *Johnson* class can use the win to obtain damages. If on the other hand, the *Rowe* class sues only for injunctive relief and loses, then the *Johnson* class can sue anew, at least for damages. In this situation, a court which awards the *Johnson* class damages could do so only if it found that the defendant violated Title VII. Would such a court deny injunctive relief and merely award damages? Such a position not only provides high grade fuel for those who mock our judicial system but worse, it would undermine the purpose of Title VII, which is to stop discrimination in employment, "one of the most deplorable forms of discrimination known to our society. . . ." ²⁶⁸ It is, therefore, likely that the court would provide both injunctive and monetary relief.²⁶⁹ The situation encourages

267. This consequence clearly follows from the court's summary at the conclusion of its opinion. The court said:

Under our analysis . . . an absent class member is bound by the *res judicata* effect of a (b)(2) class action to the extent that the judgment concerns injunctive or declaratory relief, even when no notice was provided. . . . [W]e noted that *Johnson* does not complain of the representation in *Rowe* with regard to the injunctive and declaratory relief obtained in that suit. Under this analysis, *res judicata* would bar *Johnson's* entitlement to relief duplicative of that already granted in *Rowe* or to relief which could have been sought in that action.

Id. If *Johnson* is bound by *res judicata*, then of course *Johnson* can use *res judicata*.

268. *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1152 (11th Cir. 1983) (quoting *Hardin v. Stynchcomb*, 691 F.2d 1364, 1369 (11th Cir. 1982) (quoting *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970))).

269. Since *Johnson* conceded that the *Rowe* representation was adequate as to the injunctive relief sought and obtained, the *Johnson* court never had to reach the adequacy issue. See *supra* note 267. But if *Rowe* had lost and had only sought injunctive relief, then *Johnson* would have sought both an injunction and damages, claiming that he and his class were not bound by *Rowe* because of both inadequate representation and lack of notice. That is, *Johnson* would not concede *Rowe* was an adequate representative as to any issue in the first suit. The *Johnson* court would then have had to decide whether any part of *Rowe* barred *Johnson*. The court would have likely found that the *Rowe* representatives, in failing to seek monetary relief, failing to provide notice, and failing in their efforts at injunctive relief, did not adequately represent the class, and would therefore likely permit *Johnson* to seek both injunctive and monetary relief.

manipulation. The sharp class attorney would sue first for an injunction only, knowing that should the suit prevail the class would be able to take advantage of the liability determination and litigate damages only. This same attorney would also know that if the class lost the first suit, the same class, with a different representative, would be able to litigate anew in the hope of prevailing in a second suit, or third suit and so on. Even before rule 23 was amended, this situation was seen as unfair. “[L]egal technicalities aside—it is unfair to afford the absentees all the benefits of winning but impose upon them none of the burdens of losing. . . . The absentees are permitted . . . in effect to place their bets after the race is over.”²⁷⁰

(3) The court hedged on the timing of the notice it said was required. As to whether it was speaking of prejudgment notice (pendency notice) or post-judgment notice, the court merely compromised: “In some cases it may be proper to delay notice until a more advanced stage of the litigation; for example, until after class-wide liability is proven.”²⁷¹

No one will quarrel with a requirement that notice of the judgment be provided the class so that the class members can present individual claims. “Such notice is not a novel conception. For example, . . . members of the class have been notified to present individual claims after the basic class decision.”²⁷² Unfortunately, the

270. *Kalven & Rosenfield*, *supra* note 8, at 713.

271. *Johnson*, 598 F.2d at 438.

272. *ACN*, *supra* note 79, 39 F.R.D. at 106. Rule 23(d)(2) *supra* note 245, permits the court to order notice if necessary for the protection of the class. The advisory committee notes to rule 23(d)(2) cite five circuit court and district court opinions in an attempt to explain the meaning and circumstances in which such notice might be ordered. Each of the cited cases deals with post judgment notice, which was issued to notify members of their right and obligation to present their individual claims based upon the favorable determination of defendant’s liability. *Dickinson v. Burnham*, 197 F.2d 973 (2d Cir. 1952) (old rule 23(a)(2) class action wherein notice was provided after the liability determination so as to afford class members the right to share in the disposition of the property before the court); *All Am. Airways, Inc. v. Elder*, 209 F.2d 247 (2d Cir. 1954) (old rule 23(a)(3) class action wherein the court approved of deciding the liability issue and then permitting class members to intervene in the suit); *Brendle v. Smith*, 7 F.R.D. 119 (S.D.N.Y. 1946) (old rule 23(a)(1) class action wherein notice provided by newspaper publication of class settlement was held sufficient when at a prior date, mailed notice of the proposed settlement was provided the class); *Gart v. Cole*, 263 F.2d 244 (2d Cir. 1959), *cert. denied*, 359 U.S. 978 (1959) (old rule 23 (a)(1) class action judgment, explaining that even though no notice was provided, *Hansberry* permitted such a result particularly when the attorneys representing the class in the state suit were the same as those in the present federal suit); *Cherner v. Transitron Elec. Corp.*, 201 F. Supp. 934 (D. Mass. 1962) (old rule 23(a)(1) and (3) action wherein the court refused to order notice to the class until trial on the merits, stating that, thereafter, notice can be ordered so that absent members can come in and present claims); *Hormel v. United States*, 17 F.R.D. 303 (S.D.N.Y. 1955) (old rule 23(a)(3) action where the court stated that plaintiff, who won on the merits, could then notify absent members so they could intervene and take advantage of plaintiff’s judgment). *See also supra* note 236.

If, on the other hand, the *Johnson* court was suggesting that a civil rights plaintiff

court reinforced the supposed differences between the (b)(1) and (b)(2) class actions and the (b)(3) class actions by blindly repeating the homogeneous/heterogeneous distinction in order to arrive at the notice requirement for the money damage claim, even though all class actions in which class members must present individual claims require post-judgment notice.²⁷³

Johnson wanted his cake and was able to eat it too. He accepted the favorable result in *Rowe*, e.g., liability, but not the unfavorable result, e.g., no monetary relief. If the *Johnson* court ruled that Johnson was inadequately represented, as *Hansberry* and *Gonzales* appear to require, then it would have had to deal with the effect that such a decision would have on the *Rowe* litigation in terms of waste of court and litigant time and resources.²⁷⁴ The answer to all this was provided by Judge Ingraham's strong language in *Gonzales*, wherein he demanded that district courts conscientiously and meticulously assure that the class is adequately represented.²⁷⁵ Assuming that the adequacy determination is properly decided, it is likely that the class *will* be adequately represented throughout the suit.²⁷⁶ Such a determination not only protects the class, it also protects the defendant because a defendant's win in the first suit will be upheld and given *res judicata* effect in a second suit. Both the plaintiff class and the defendant are bound regardless of outcome. As the Supreme Court stated: "[I]t [is] unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one."²⁷⁷

Had the *Johnson* court relied on the adequacy of representation issue, it would have enforced Judge Ingraham's command and thereby assured that all plaintiff classes and all defendants receive a full, fair and final day in court. It is true that to do so the court would have had to remand the case so as to retry what was already litigated in the *Rowe* suit, but it is to be remembered that in the long run such cost is slight if it assures that both plaintiff class and defendant are treated equally and fairly. The court's reluctance to "overturn" *Rowe*, in light of court congestion and defendant's reliance upon the injunction, is understandable. However, court deci-

class which seeks damages as well as an injunction is entitled to pendency notice and the ability of individual members to opt out, then the court has sown the seeds of destruction for (b)(1) and (b)(2) actions. The utility of both those actions require one suit with one result which will bind all. See *supra* notes 100-200 and accompanying text.

273. See *supra* note 272.

274. In *Rowe*, the district court held that the defendant's promotional practices were non-discriminatory. The *Rowe* suit was appealed, reversed, and remanded. The district court then found in favor of the plaintiff class. *Johnson*, 598 F.2d at 434.

275. See *supra* note 255 and accompanying text.

276. *Id.*

277. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974).

sions must transcend the immediate concerns of one case and endure for all future cases. In reliance on *Hansberry* and *Gonzales*, the *Johnson* court should have reversed because the *Rowe* representatives did not adequately represent the class. Such a decision, aside from being honest and intellectually sound, would inure to the benefit of future litigants and the courts. The district courts would certify class suits only after closely scrutinizing the representation and assuring that throughout the litigation the representation remains adequate. Defendants would seek decertification based upon inadequacy grounds in the hope of delaying, perhaps forever, class wide recovery, and/or securing a favorable class judgment which would not be subject to collateral attack by disgruntled class members. The *Rowe* class attorneys probably did not request money damages because of the fear that the district court would order them (or the plaintiffs) to pay for notice to the class (otherwise the incentive of attorneys' fees would have worked to secure the fullest relief possible).²⁷⁸ Hence, *res judicata* should never apply against the class if the class was inadequately represented, regardless of whether or not notice (of any type) was provided the class.

Even if the class was adequately represented, *res judicata* should not bind class members concerning claims which were rejected by the district court because of the limitations inherent in the class mechanism (e.g., manageability). This situation should be distinguished from a case where claims are rejected because of a decision on the merits of the claim or because class counsel, for tactical reasons, omitted the claim.²⁷⁹ For example, in a prior class suit where the district court certified the class concerning claims for economic

278. See *supra* notes 70-71 and accompanying text.

279. *Res judicata* ordinarily applies to what was litigated and to what might have been litigated in the prior proceeding. RESTATEMENT (SECOND) OF JUDGMENTS § 61 (Tent. Draft No. 5, 1978). See also Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339, 342-44 (1948). But if plaintiff class counsel did raise the issue and it was specifically rejected because of the limitations of the class device, then the public policy of treating litigants fairly would except such a situation from the application of the usual rule. See MOORE, *supra* note 3, at ¶ 0.405[1]. The court in *Bogard v. Cook*, 586 F.2d 399, 408 (5th Cir. 1978), suggested a similar analysis when it excused the plaintiff's personal injury claims from being barred by the *res judicata* effect of a prior class judgment in which plaintiff was a member because the court had "no way of knowing that [the prior suit] would have been manageable as a class action if individual damage relief had been requested."

The only other choices are to bind individual class members to a judgment wherein the court rendering the judgment is either unable to adjudicate such claims or is unable to prohibit class relief entirely because the entire relief to which the class is entitled cannot be litigated in one action. The first alternative is plainly unfair to class members. The second alternative deprives the class device of its dual objectives: eliminating multiplicity of suits and providing redress to small claimants. See *supra* notes 4-6 and accompanying text. The only realistic solution is to accept claims which the district court excludes because of the limitations of the class device from the usual application of the law of prior adjudication.

damages, rejecting the plaintiff class's personal injury damage claims as unmanageable (uncommon issues, atypical claims, etc.), a member of the class should be permitted to litigate, individually, his/her personal injury claim in a second suit even though the class lost in the prior suit.²⁸⁰ More importantly, fairness to the defendant requires that if in such a case the class wins, then individual class members should not be permitted to apply the principle of collateral estoppel/*res judicata* so as to bind the defendant in a suit over the unlitigated claim.²⁸¹ Further, as a corollary to this fairness doctrine, the class should never be able to send one of its members on a sole mission to do battle with defendant in order to use collateral estoppel against the defendant should the scout win, but not be bound should she lose. As the Supreme Court said in *Parklane Hosiery Co. v. Shore*,²⁸² the offensive use of collateral estoppel should "not . . . reward a . . . plaintiff who could have joined [a] previous action. . . ."²⁸³ In other words, the plaintiff class should never be permitted dry runs by some of its members, only to take advantage of a win and not be bound by a loss.²⁸⁴

In short, the factors necessarily determined before the adequacy requirement is satisfied, coupled with the factors which must be found in order for a class to use collateral estoppel against a defendant, ensure that both the plaintiff class and the defendant will be protected by one class judgment which binds all.

280. The class would be bound by the district court's determination of unmanageability (uncommon issues, atypical claims, etc.), which of course it could appeal in the first action. But each individual member should not be deprived of his/her day in court on a claim merely because of the limitations of the class device. See *supra* note 279.

281. See *supra* notes 270, 277 and accompanying text.

282. 439 U.S. 322 (1979).

283. *Id.* at 332.

284. The *Johnson* court permitted, indeed encouraged, a similar type of manipulation by ruling that *res judicata* did not bar the damage claims of the class because the class was not provided notice. See *supra* notes 267-70 and accompanying text. The Supreme Court in *Parklane*, 439 U.S. at 330, described the danger of permitting a stranger to use collateral estoppel offensively:

Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a "wait and see" attitude, in the hope that the first action by another plaintiff will result in a favorable judgment.

After *Johnson*, the class attorney might best serve the class's interests by suing first for an injunction and no money damages, then "wait and see." If this suit is successful, the class can then join in for damages (because the class received no notice, the class is not barred). On the other hand, if the class loses the injunction issue, the class attorney will then file a second suit claiming the representation in the first suit was inadequate because the class did not seek damages, did not give notice and lost on the injunction issue.

B. Why Permit a (b)(3) Class Member to Opt Out of the Class?

Why does rule 23 provide members of the (b)(3) class with the opportunity to opt out? Once again, the usual response is that there is a philosophical difference represented by the homogeneous/heterogeneous distinction between the (b)(1) and (2) class action and (b)(3) class action. "In keeping with this philosophy class members in Rule 23(b)(1) and Rule 23(b)(2) actions are not provided an opportunity by the rule to exclude themselves from the action as is true in (b)(3) actions."²⁸⁵ As the ACN state: "Indeed, under subdivision (c)(2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class."²⁸⁶

One of the major reasons old rule 23 was overhauled was that class members were "permitted to intervene *after* a decision on the merits favorable to their interests, in order to secure the benefit of the decision for themselves, although they would . . . be unaffected by an unfavorable decision. . . ." The new rule attempted to rectify that unfairness. "[U]nder . . . (c)(3), one-way intervention is excluded . . . and . . . the judgment whether or not favorable, will include the class. . . ."²⁸⁷ Rule 23(c)(3) states:

The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.²⁸⁸

Clearly, the thrust of the rule is to bind all members of the class to the judgment, favorable or not, except those members who opt out of the money type, or (b)(3) class.²⁸⁹ Yet, what good is served by allowing an adequately represented (b)(3) class member to opt

285. *Molina v. Weinberger*, No. 74-1611 (9th Cir. Oct. 1, 1975) (available Mar. 7, 1985, on LEXIS, Genfed Library, Cir. file).

286. ACN, *supra* note 79, 39 F.R.D. at 106-07; *see also* FED. R. CIV. P. 23(c)(2), *supra* note 101.

287. ACN, *supra* note 79, 39 F.R.D. at 106.

288. FED. R. CIV. P. 23(c)(3).

289. Although thus declaring that the judgment in a class action includes the class, . . . (c)(3) does not disturb the recognized principle that the court conducting the action cannot predetermine the *res judicata* effect of the judgment; this can be tested only in a subsequent action. The court, however, in framing the judgment . . . must decide what its extent or coverage shall be, and if the matter is carefully considered, questions of *res judicata* are less likely to be raised at a later time and if raised will be more satisfactorily answered.

ACN, *supra* note 79, 39 F.R.D. at 106 (citations omitted).

out? Such an individual opts out because the individual either does not want to make any claim against the defendant²⁹⁰ and/or does not want any redress.²⁹¹ Therefore, pendency notice provides a costly method for such an atypical individual to voice protest. If on the other hand, an individual opts out and can afford to pursue his/her claim alone,²⁹² one-way intervention is once again encouraged and facilitated by the class action rule. The individual who opts out will wait in the wings and hope the class will prevail on the main liability issue; for certainly such an individual will be permitted to advance collateral estoppel in order to prevent the defendant from denying liability and simply go straight to his/her individual damage claim.²⁹³ If the class loses the liability issue, then and only then, will the individual truly go it alone. Punishing the opting out member by denying to him/her the use of collateral estoppel really punishes the defendant and the courts because such a rule would compel multiple lawsuits (with the potential of inconsistent adjudications) and consequent waste of litigant (particularly the defendant) and court resources. To permit opting out is to sanction special treatment only to litigants that can afford the cost of this type of manipulation at the expense of the plaintiff class (because of the cost of pendency notice), the defendant and the courts. Worse

290. Such an individual need not make a claim against the defendant whether or not provided with notice and/or the opportunity to opt out. By satisfying the prerequisites of rule 23(a)(1)-(4), the class has demonstrated that sufficient numbers of persons with common issues want redress and will be adequately represented.

291. See *supra* note 241.

292. The appropriate statute of limitation is tolled for each class member by the filing of the class action. Once the individual opts out, the statutory period for commencing an action would presumably begin running again on that individual's claim. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 552-53 (1974).

293. It is "the interests of the individuals in pursuing their own litigations . . . [which allow] each [class] member to be excluded from the class upon his request." ACN, *supra* note 79, 39 F.R.D. at 104-05. The idea is to give vent to individual desires, because unlike the (b)(1) and (b)(2) class actions, class members and the defendant will not be substantially affected by individual suits. See *generally supra* notes 192-201 and accompanying text. Therefore, permitting the opting out individual to wait in the wings so as to take advantage of a class win, and not be bound by a class loss, does not comport with the rationale for allowing the individual to opt out. On the other hand, it seems unlikely that a court would "punish" the opting out individual by not permitting him/her to use collateral estoppel against a defendant who lost on the issue in a class suit. In such a case, it would be hard to argue that the defendant did not use its full resources in defense of the class action. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). By punishing the opting out individual, the court burdens the defendant (further resources will be expended in defense, or in working out a settlement) and the already congested courts. Moreover, it will always be difficult to determine whether the opting out individual deliberately waited in the wings, as typical litigation delays can cause the class suit to be tried first. Motivation (*mens rea*) is an important ingredient in determining whether a stranger may use collateral estoppel offensively, although that being so time consuming in itself, the better rule, in light of defendant's class loss and court congestion, is simply to allow any opting out individual to take advantage of a class win regardless of motivation. See *generally*, Dam, *supra* note 162.

yet, this luxury is only available when money is at issue rather than when claims concerning individual civil and constitutional rights are at stake.

It is clear from this analysis that the pendency notice requirement of rule 23 is founded on a distinction not based upon reason. It is arbitrary in both theory and practice and contrary to the concerns subsumed under the umbrella of the due process clause.²⁹⁴ It is time to amend rule 23 so that all persons, including those with small claims, can utilize its provisions while still affording procedural protection to absentees.

IV. THE PROPOSED NEW RULE 23

The proposed rule recognizes that providing redress to large numbers of people with identical small claims is a proper use of the class action device. It proceeds on the premise that providing such redress is an important state interest, one that is more important than the supposed benefits obtained by a rule which requires pendency notice to all ascertainable absent class members. Pendency notice is very costly. Under the present rule, the pendency notice requirement effectively forecloses the use of the class action mechanism to those with small claims. Such claimants cannot afford to pursue individual remedies because of the high cost of litigation, particularly when compared to the size of their claims. Hence, as it now stands, both individual and classwide relief is denied merely because those injured haven't the funds to pursue claims. Pendency notice is mandated by the present rule in order to permit absent class members an opportunity to opt out of the class action and go it alone. Such a concept of individualism may be lost on absent class members with \$70 claims. It is both curious and bizarre that this concept of individualism is not activated when our cherished individual rights are at stake. The present rule does not require pendency notice to absent class members whose civil and constitutional rights are in issue. So long as those persons are adequately represented they will be bound by the class judgment. The justifica-

294. Due process protects one's right to participate in the process by which decisions are made and thus expresses the dignity of the person. When individuals cannot participate in the redress of their rights because of limited finances, due process is implicated. The class action is the means of providing such class members with redress, i.e., participation in the process. Hence, the due process clause should welcome, rather than defeat, this use of the class device. There is a functional value to the due process clause as well. Due process intends to minimize substantially unfair or mistaken deprivations and ensure that actions accurately reflect substantive rules and accuracy of process. The adequately represented class member, by definition, will participate in the action such that both procedural and substantive due process are satisfied. The *Hansberry* case and the factors listed in proposed rule 23(a) assure such a result. See generally, L. TRIBE, CONSTITUTIONAL LAW 502-03 (1978).

tion for this ironic turn in positions is that the present (b)(1) and (2) class actions require uniform results for the protection of all parties and, therefore, do not permit individual class members to opt out. Hence, there is no need for pendency notice. The necessity which compels uniformity in result in (b)(1) and (2) class actions is employed to justify dispensing with pendency notice. The proposed rule takes the position that the necessity which compels the state to provide redress to small claimants justifies dispensing with pendency notice to absent class members in (b)(3) class actions. Further, and equally important in dispensing with the pendency notice requirement, is the fact that pendency notice, in such cases, is a useless and costly exercise which secures nothing for its exorbitant cost. A small claimant cannot (1) afford to monitor the action to determine whether or not to go it alone, and (2) afford to go it alone. Only a wealthy, small claimant can afford to opt out. When he/she does, it will be at the expense of the class (the cost of pendency notice), the defendant (who will suffer repeated lawsuits concerning identical issues even if defendant wins in the pending class action), and the courts (more congested calendars).

The rule proposed is as follows:

RULE 23. CLASS ACTIONS

(a) Prerequisites to a Class Action. 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.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition 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: (1) the extent to which a class suit will likely avoid inequity amongst class members; (2) the interest of the courts and the party opposing the class in avoiding multiple suits, multiple liability, inconsistent adjudications (particularly those which establish incompatible standards of conduct); (3) the extent to which individual adjudications would, as a practical matter, substantially impair the interest of other class members; (4) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (5) the desirability or undesirability of concentrating the litigation of claims in the particular forum; (6) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgement; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) The judgment in a class action, whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class and shall be binding upon all class members pursuant to the usual rule concerning the law of prior adjudication. The law of prior adjudication shall not apply to those matters which were not litigated because the court specifically excluded them pursuant to the requirements of this rule rather than the merits of such matters. Such exclusion by the court shall be made by order, in writing, and shall contain a plain statement stating that the exclusion is not based upon the merits of the matters excluded.

(3) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that the least costly method of notice appropriate to the case be given to some or all of the class members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of class members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court and notice to some or all the members of the class. The notice ordered pursuant to this subsection shall be the least costly method of notice appropriate to the case and shall describe the proposed settlement and/or dismissal and provide those notified with a

reasonable time with which to object or otherwise intercede.²⁹⁵

295. Proposed rule 23(a) is identical to rule 23(a) and its goals: to ensure that a sufficient number of persons are involved so that the class device is useful and/or necessary ((a)(1)), and, most importantly, to ensure that the absent class members will be adequately represented ((a)(2), (3) and (4)).

Proposed rule 23(b) departs from, and changes the definition of, class actions maintainable under present rule 23(b). In the proposed rule, the boundary of class actions properly maintained is primarily defined by the broad scope of present rule 23(b)(3). Proposed rule 23(b)(1)-(6) provides the district court with the matters to be considered in deciding whether or not to permit the action to proceed as a class action. The first three subparts of proposed rule 23(b) echo the concerns subsumed under present rule 23(b)(1) and (2) class actions. Hence, the primary concern is with rule 19 indispensable/necessary party type problems: Will individual suits prejudice absentees and/or parties and, if so, is the prejudice sufficient to demand or permit class treatment or insufficient so as to reject it? Even if insufficient, proposed rule 23(b)(4) may be available. Proposed rule 23(b)(4) is very important to the fair administration of the class action device and is the heart of the changes which are proposed. Pursuant to proposed rule 23(b)(4), the district court must decide whether to permit the maintenance of a class suit even though it is unnecessary to do so under subparts (1), (2) and (3). Here, individual suits will not prejudice the absent class members or parties before the court. However, another type of necessity is involved: providing redress for persons with small claims. This subpart recognizes that without the class action mechanism, class members will not obtain redress and/or wrongdoers will not be deterred. This may occur because class members are either unaware of the violation of their rights or because the cost of litigating individual suits is too high. If, on the other hand, the case is of the type where class members are likely to both know of their rights and desire to pursue individual remedies, then the class suit is inappropriate. For example, if Mr. Eisen was suing on behalf of class members whose average claim was \$20,000 rather than \$70, each member of the class would probably prefer to choose their own attorney and sue locally. Convenience, the difficulty of engineering separate individual suits by class members, the likelihood that a wrongdoer will escape justice, and the backlog and congestion which individual suits will cause the courts, are factors to be considered under this subsection. The remaining subsections (proposed rule 23(b)(4) and (5)) are identical to present rules 23(b)(3)(C) and (D), although in the proposed rule both are factors which must be considered in all class actions maintained. Under the present rule, they limit the application of the rule 23(b)(3) class actions only.

Proposed rule 23(c)(1) and (3) and 23(d) are identical to present rule 23(c)(1) and (4) and 23(d). They call for certification as soon as practical and allow for decertification, if appropriate. They permit the use of subclasses if appropriate and provide the district court with broad control in order to protect both present and absent parties. Within the district court's discretion, is the authority to order pendency notice if that will guard the right of absentees or otherwise serve the ends of justice. Hence, if plaintiff chooses a defendant(s) to represent a defendant class, the district court will likely wish to order pendency notice so that other defendant class members may join the defense. Further, by way of example, if the district court, after hearing, has grounds to believe that a conflict exists within the class between the class and the class attorney, communication with class members may be the only way of establishing whether or not the class is adequately represented, or that subclasses are needed, or that the class attorneys should be disqualified.

Proposed rule 23(c)(2) drastically changes the present rule (rule 23(c)(2) and (3)). Pendency notice is no longer required in order to enter a binding class judgment. Exclusion by individual class members (and one-way intervention) is avoided. The proposed rule recognizes and adopts the general principle of law, which holds that only a second court may determine whether or not the rules of prior adjudication are applicable. As with the present rule, the district court is required to describe the class in such a manner that a second court can easily apply the rules of prior adjudication should it be appropriate. One exception to the usual rules of prior adjudication is proposed. It is that a class member not be bound by such rules in those circumstances wherein the

Clearly, the present rule is not working. The federal courts are using the present rule's categories to achieve a desired end rather than as a means to determine whether or not and how to proceed with a class action. The proposed rule provides a realistic approach to the problem. It comports with both the theory of class actions and the practice of the courts while still providing due process safeguards to parties and absentees.

district court, by order, in writing, specifically rejects a class claim because of the limitations of the class device rather than because of the merits of the claim. Further, in such a case the proposed rule contemplates that a class member will not be permitted to benefit from the first suit when the party opposing the class could not do so.

Lastly, proposed rule 23(e), as with present rule 23(e) provides that a class action cannot be settled or dismissed without court approval and notice to the class. However, the proposed rule explicitly states that the notice must be of the type that is the least costly and need not reach or even be required to attempt to reach all class members.