DEVELOPMENTS IN THE LAW

CLASS ACTIONS

Men have changed their views as to the relative importance of the individual and of society; but the common law has not. Indeed, the common law knows individuals only. . . . It tries questions of the highest social import as mere private controversies between John Doe and Richard Roe. And this compels a narrow and one-sided view . . . .

Roscoe Pound,
DO WE NEED A PHILOSOPHY OF LAW?,
5 COLUM. L. REV. 339, 346 (1905)

The appropriate action for this Court is to affirm the district court and put an end to this Frankenstein monster posing as a class action.

Lumbard, C.J. (dissenting),
Eisen v. Carlisle & Jacquelin,
391 F.2d 555, 572 (2d Cir. 1968)

The Hindoos give the world an elephant to support it, but they make the elephant stand upon a tortoise. Invention, it must be humbly admitted, does not consist in creating out of void, but out of chaos; the materials must, in the first place, be afforded: it can give form to dark, shapeless substances, but cannot bring into being the substance itself. In all matters of discovery and invention, even of those that appertain to the imagination, we are continually reminded of the story of Columbus and his egg. Invention consists in the capacity of seizing on the capabilities of a subject, and in the power of moulding and fashioning ideas suggested to it.

Mary Shelley,
FRANKENSTEIN 8 (1831)

When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.

Mr. Justice Holmes,
The Path of the Law,
10 HARV. L. REV. 457, 469 (1897)
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I. INTRODUCTION

In 1966, the Supreme Court promulgated an amended rule 23 of the Federal Rules of Civil Procedure, replacing a rule that had remained unchanged since 1938. The 1938 rule, which was understood to reflect Professor Moore’s famous distinctions among “true,” “hybrid,” and “spurious” class suits, proved to be a source of confusion almost from its date of promulgation, and by 1966 courts were having great difficulty applying the concepts of joint and several rights the rule relied upon to define cases appropriate for class treatment. Commentators ignored the terms of the rule and sought justification for conclusive adjudication of absentee claims through class suit in other, more pragmatic considerations. Although no unified, well-accepted theory of the purpose and function of the class suit had emerged by 1966, there was a consensus that the historic criteria defining the propriety of class suit had no contemporary meaning and that therefore the class action device needed to be rethought.

By 1966, three answers could be found in the commentary to the question: Why have class suits? First, class suit was

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2 By 1946, for example, the Columbia Law Review had concluded:

The federal courts have, in general, uncritically accepted Professor Moore’s terminology and the analysis of representative actions in terms of jural relationships and joinder, to their own confusion and the frustration of the purpose of representative actions.

Note, Federal Class Actions: A Suggested Revision of Rule 23, 46 COLUM. L. REV. 818, 822 (1946) (emphasis added). This conclusion was based in part on the case of Deckert v. Independence Shares Corp., 27 F. Supp. 763 (E.D. Pa.), rev’d on other grounds, 108 F.2d 51 (3d Cir. 1940), remanded, 311 U.S. 282 (1940), on remand, 39 F. Supp. 592 (E.D. Pa.), aff’d on remand, Pennsylvania Co. for Insurances v. Deckert, 123 F.2d 979 (3d Cir. 1941). See Note, supra at 823 n.24. In Deckert, the district court allowed the suit to go forward as a “class bill,” 27 F. Supp. at 769, without specifying what type of class suit it was. The court of appeals subsequently labelled it “spurious,” 108 F.2d at 55. On remand, the district court concluded that the suit was “hybrid,” 39 F. Supp. at 595, and the court of appeals affirmed, opining that “[n]ames are not important,” 123 F.2d at 983.


Original rule 23 provided in relevant part:

[One or more persons may bring suit on behalf of a class] when the character of the right sought to be enforced for or against the class is

(1) joint or common . . . ;
(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.


seen to be useful, perhaps necessary, in situations where an action, regardless of its individual form, would itself either affect the interests of nonparties or alternatively create a potential for conflicting obligations for one of the parties. The second answer, rather than justifying class suit in terms of fairness to absentees or to the class opponent, asserted that class suits provide convenient and economical forums for disposing of similar lawsuits. The third answer, which has developed into the theory of the consumer class suit, was that class suits provide a device for aggregating substantially similar claims, thereby prorating the cost of litigation among numerous litigants and making suit feasible where it would not be otherwise.

The draftsmen of the 1966 rule, while acknowledging these three functions in framing rule 23(b)'s categories of class suits, did not fully explore the consequences of such functions.

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5 This position is well-stated by Louisell and Hazard:

The felt necessity for a class action is greatest when the courts are called upon to order or sanction the alteration of the status quo in circumstances such that a large number of persons are in a position to call on a single person to alter the status quo, or to complain if it is altered and the possibility exists that [the] actor might be called upon to act in inconsistent ways.


6 See, e.g., Z. CHAFEE, SOME PROBLEMS OF EQUITY 149 (1950); Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 BUFFALO L. REV. 433, 437-38 (1960). Convenience in disposing of multiple litigations has been a central justification of the class suit, see Z. CHAFEE, supra at 280; however, such convenience was traditionally understood not from the 1966 perspective of the legal system as a whole, but from the perspective of an individual litigant against whom, or in whose favor, a multiplicity of actions would otherwise have been brought, see id. at 201.

7 The classic statement of this theory is in Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 U. CHI. L. REV. 684 (1941). See also Weinstein, supra note 6, at 435.

8 Rule 23(b) provides:

(b) Class Actions Maintainable. 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 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 interests; 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 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. . . .

Sections (b)(1)(A) and (b)(1)(B) were intended to describe the first, or
in defining class action procedure subsequent to a determination that an action could go forward as a class suit. Instead, the rulemakers framed their treatment of class procedure primarily in terms of two problems that had emerged in the post-1938 period: due process and res judicata.\(^9\) The result of the rulemakers' efforts is a hodgepodge of pragmatic and occasionally conflicting objectives.\(^10\) On the one hand, in some class suits courts are specifically instructed — on the basis of such extrinsic considerations\(^11\) — to afford class members notice and an opportunity to exclude themselves from the suit.\(^12\) On the other hand, in those class suits where self-exclusion would not be practically possible, the rulemakers left all such subsequent procedural decisions to the discretion of trial courts.\(^13\) Beyond allowing some class members to opt out, in no case does the rule offer the courts any guidance as to how to protect absentee interests.\(^14\)

Although one might suppose that the superabundance of necessity theory. See Advisory Comm. Note, 39 F.R.D. 100–01 (1966). Section (b)(2) also seems to represent a situation where the litigation would necessarily have an impact on absentees: it would in fact conclude their opportunity to seek relief. How this situation differs from section (b)(1)(B) is not clear. Section (b)(3) was apparently intended to encapsulate both the second and third theories, although only a passing reference is made to the third theory in the Advisory Committee Note. See 39 F.R.D. at 104. Justice Kaplan, the Committee's Reporter, has also indicated that rule 23(b)(3) was intended to implement the consumer suit. See Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure I, 81 Harv. L. Rev. 356, 397–98 (1967); Kaplan, Prefatory Note, The Class Action—A Symposium, 10 B.C. Ind. & Com. L. Rev. 497, 497 (1969).

\(^10\) See pp. 1341–42 infra.
\(^11\) These included the Advisory Committee's concern for due process, see Advisory Comm. Note, 39 F.R.D. 107 (1966), and its determination to allow individuals to control their own litigation in the rule 23(b)(3) situation, see id. at 105.
\(^12\) See Fed. R. Civ. P. 23(c)(2).
\(^13\) See id. 23(c)(4), 23(d).
\(^14\) To some extent, the findings that must be made to certify a suit as a class action protect absentee interests, since these findings should ensure at least a threshold level of correspondence between the substantive claims and interests of the class representative and others in the class. But see pp. 1474–75 infra. Fed. R. Civ. P. 23(a), which establishes criteria for certification, provides: (1) that the class be "so numerous that joinder of all members is impracticable"; (2) that there be "questions of law or fact common to the class"; (3) that "the claims or defenses of class representatives be "typical of the claims or defenses of the class"; and (4) that the class representative be able "fairly and adequately [to] protect the interests of the class." In addition, if the class action is settled, Fed. R. Civ. P. 23(e) requires that the judge approve the terms of the settlement.
literature\(^{15}\) on the class suit that has appeared in the decade since amended rule 23 was promulgated would have begun to create an operational blueprint for class suits under rule 23, in fact the commentary has been strikingly narrow. One topic has received by far the most scrutiny: the risks, rewards, and practical possibilities of implementing class actions aggregating claims otherwise too small to be litigated. This literature has itself been preoccupied with two issues: \(^{16}\) whether individual claims can be aggregated to meet jurisdictional amount in controversy requirements, \(^{17}\) and whether rule 23, or due process, requires that individual notice—which might make class suit financially impossible \(^{18}\)—be given to class members.\(^{19}\) The Supreme Court has now given definitive answers to these questions—respectively, no,\(^{20}\) and yes (but only as a matter of rule interpretation).\(^{21}\) Regardless of the wisdom of the Court’s answers, it seems clear that further consideration of these questions by federal courts is foreclosed.\(^{22}\) Commentators have also been concerned with the ultimate question about consumer class suits—

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\(^{15}\) An indication of the flourishing of this literature can be obtained from entries in the *Index to Legal Periodicals*. In the volume covering September, 1964 to August, 1967, there are a total of only 8 articles on class actions listed under the topics of Civil Procedure and Federal Rules of Civil Procedure. For the one-year period ending in August, 1975, however, there are 80 articles dealing with class actions, now gathered under a separate heading.

\(^{16}\) A third topic, fluid recovery, has also received considerable discussion, see pp. 1516–36 infra and articles cited therein.

\(^{17}\) Of the 80 entries in the *Index to Legal Periodicals* for the period ending August, 1975, see note 15 supra, over 20 are concerned with the jurisdictional amount requirement.


\(^{19}\) Over 15 of the 80 entries in the *Index to Legal Periodicals* for the period ending August, 1975, see note 15 supra, are concerned with due process or notice.

\(^{20}\) See Zahn v. International Paper Co., 414 U.S. 291 (1973) (each member of a class must fulfill any relevant jurisdictional amount requirement).


\(^{22}\) A number of states have adopted class action legislation designed at least in part to implement the concept of the consumer class suit by reducing the costs of notice to the class. See, e.g., CAL. CIV. CODE ANN. § 1781 (West 1973) (publication notice allowed); N.Y. CIV. PRAC. LAW §§ 901–09 (McKinney Supp. 1975–76) (random sample notice; notice cost shifting to class opponent); WIS. STAT. ANN. § 426.110 (West 1974) (state pays costs of notice). At the federal level, there has been some interest in modifying the Federal Trade Commission Act to include a consumer class action device. See *Proposed Federal Consumer Class Action Legislation—II*, 4 CLASS ACTION REP. 342 (1975). Of course, the issue of whether due process requires individual notice must be considered in determining the wisdom and permissibility of amending rule 23 to eliminate the categorical requirement of individual notice established by Eisen. See pp. 1402–16, 1627 infra.
hypothesized as aggregating large numbers of very small claims—whether they constitute an "engine of destruction" and "a form of legalized blackmail" or, instead, "one of the most socially useful remedies in history." This debate has been openly partisan, and has now seemingly reached an impasse, which can only be broken through empirical verification of the assumptions underlying the competing positions. Although inconclusive, this debate has had the undesirable effect of etching in the minds of legal commentators a paradigm of class litigation that is in fact misrepresentative of the bulk of federal class actions.

By far the largest group of class actions on federal court dockets are civil rights cases in which plaintiffs typically seek injunctive relief whether or not they seek damages. Many of the statutes involved in this type of litigation provide for an award of attorneys' fees; as a result, the economic feasibility of litigation does not depend entirely upon proration of costs

29 See p. 1356 infra.
30 Recent statistics for the number of class suits filed and pending by nature of suit are as follows:

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<td>292</td>
<td>299</td>
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<td>207</td>
</tr>
<tr>
<td>Securities Laws</td>
<td>235</td>
<td>305</td>
<td>81</td>
<td>122</td>
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<tr>
<td>Other</td>
<td>338</td>
<td>375</td>
<td>144</td>
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<td>Total Total</td>
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over a number of individual claims. Moreover, many of the remaining actions, chiefly brought under the antitrust and securities laws, involve claims of injury, which, unlike some consumer actions, are of the sort for which the statutes have been traditionally thought to provide remedies, and are also apparently of a magnitude which, if not absolutely large, is large enough to matter to the class members.

\[32\] See note 30 supra.

\[33\] See, e.g., cases cited at p. 1363, note 158 infra. Furthermore, the Supreme Court's decision in Zahn, see note 20 supra, is irrelevant in many federal question cases where the jurisdictional statute imposes no amount requirement.

\[34\] There is little available data concerning the size of individual claims aggregated in damage class actions. Opinions which mention the size of claims offer support only for the proposition that damage class actions aggregate a mix of claims, ranging from the very small to the very large. See, e.g., Windham v. American Brands, Inc., 68 F.R.D. 641, 659 (D.S.C. 1975) (claims ranging from not "sufficient to warrant an independent anti-trust suit of this type" to over $120,000); Republic Nat'l Bank v. Denton & Anderson Co., 68 F.R.D. 208 (W.D. Tex. 1975) (claims of $18,870 and $293,760 included among claims of class members); Boring v. Medusa Portland Cement Co., 63 F.R.D. 78, 80 (M.D. Pa. 1974) (claims of named plaintiffs range from $100 to $34,000); Dolgow v. Anderson, 43 F.R.D. 472, 479 (E.D.N.Y. 1968) (claims of named plaintiffs range from $160 to $14,760). A study undertaken by the Georgetown Law Journal for the Senate Commerce Committee suggests that only a small percentage of the claims aggregated in damage class actions may be nonviable, see p. 1356 infra: of twenty class actions selected from across the nation in which recoveries were awarded, in ten all funds designated for class recovery were distributed to the class; in six additional cases less than five percent of the class recovery was left unclaimed. See Note, The Rule 23(b)(3) Class Action: An Empirical Study, 62 GEO. L.J. 1123, 1163 (1974). Data as to the importance class members attach to injunctive relief appears to be nonexistent.

Although information as to the size of individual claims is lacking, data concerning the size of classes is relatively abundant. To the extent that the economic attractiveness to attorneys of classes aggregating very small claims is a direct function of class size, class size provides an indirect indication of the prevalence of very small claims in class actions. The American College of Trial Lawyers Report assumed that the average damage class action brought in the Southern District of New York aggregated about 300,000 claims. See AMERICAN COLLEGE OF TRIAL LAWYERS, SPECIAL COMM. ON RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE, REPORT AND RECOMMENDATIONS 15 (1972). Even if claims were very small, attorneys might find classes of this size attractive. For example, if each class member had a claim of only two dollars, the recovery fund would be $600,000, and if an attorney's fee were fixed at a flat percentage of 15 percent, but see pp. 1611-15, the fee would amount to $90,000. The Georgetown study, however, found classes to be much smaller in the District of Columbia. "Of the 50 cases for which figures on class size were available, . . . only 14 percent had classes over 100,000 members and 25 percent had classes under 10,000 members." Note, supra at 1134. Moreover, even though skewed in favor of large class actions, see id. at 1128 n.36, the Georgetown study's national survey revealed that "over 75 percent" of the cases examined had smaller classes than the average size of 300,000 suggested by the American College of Trial Lawyers, see id. at 1158. A survey of class action decisions reported in Federal Rules Decisions in 1974 and 1975, also dealing only with damage actions, suggests that classes may
Almost all contemporary class actions are predicated on a statute or the Constitution. As Professor Chayes has developed in his Article, *The Role of the Judge in Public Law Litigation*, lawsuits based on such public laws inevitably affect the rights and interests of individuals not actually represented before the court. This is so regardless of whether a suit is formally brought as a class action, and regardless of whether injunctive or monetary relief is sought. Where one party is a government official, for example, the interpretation given to a public law will have a tendency to shape that official's conduct not only toward his present opponent, but, through the force of bureaucratic standardization, toward others as well. Even where an official is not involved, the presence of a regulatory statute is itself evidence that the activity regulated is one in which numerous people engage who can be expected to conform their behavior to interpretations of the regulation that may emerge in single-party litigation. Because of the impact of a suit on others, the interests of nonparties who may be affected by the injunctive decree frequently sought in public law litigation may in turn affect the form or availability of such equitable relief, even if such a decree is a simple prohibitory injunction. Moreover, complex structural relief is often the only appropriate remedy in public law cases. Such relief is fashioned in its details largely through bargaining and negotiation. Representation of the various interests that will be affected by the decree at the bargaining table therefore becomes a crucial safeguard for absentee rights.

Analysis of the structure of the contemporary docket of the federal courts thus suggests that class actions will characteristic-

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<th>SIZE OF CLASS</th>
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<th>25-100</th>
<th>100-1,000</th>
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<td>6</td>
<td>6</td>
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For a class of 10,000 to generate attorneys' fees of $90,000, on the basis delineated above, the average class member's claim would have to be $60. A $60 claim, although small, is far less likely to be treated as nonviable by the claimant than a $2 claim.

35 See note 30 supra.
36 *89 Harv. L. Rev. 1281* (1976).
37 See *id.* at 1294.
38 See *id.*
39 See *id.* at 1292-93.
40 See *id.* at 1298-302.
41 See *id.* at 1300-01.
ly raise questions which the 1966 rulemakers left to the discretion of trial courts and which subsequent commentators have largely ignored. Even in damage actions, claims severable in form may not be severable in practice; the right to opt out therefore may not be meaningful. Even so, the size of the claims may be sufficiently large that fairness requires that courts be careful to accomodate the interests of all class members. This Note will attempt to work out a general approach to class actions recognizing the public law character of such suits and the consequent need for taking absentee interests into account in class procedures.\textsuperscript{42} It

\textsuperscript{42} This Note will deal expressly only with plaintiff-class actions in the federal courts. This limitation of the subject matter does not, however, limit the generality of the conclusions reached. The problems created by the need to represent absentee interests are, with the important exception of due process, see pp. 1403–08 infra, the same whether a class is conceived of as a plaintiff or a defendant. Indeed, the multiplicity of interests typically present in a plaintiff class in, for example, a Title VII suit seeking complex structural relief makes any bifurcation of the litigants into "plaintiffs" and "defendants" a somewhat meaningless exercise. The restriction of the discussion to federal cases is similarly not a major limitation since state class action law has, to a large extent, emulated federal practice under either original or amended rule 23. See Homburger, \textit{State Class Actions and the Federal Rule}, 71 COLUM. L. REV. 609, 612 (1971). In states that do not have either version of rule 23, or a facsimile thereof, the typical class action rule is that of the Field Code, which usually is drawn in community of interest terms, see Homburger, supra at 612–25, and is anachronistic, see pp. 1343–48 infra. In Field Code states, therefore, federal precedents may often be persuasive. See Homburger, supra at 625. The uses to which class actions are put in the states is less clear than in the federal system. Many recent state class action statutes are drawn specifically with regulatory, often consumer protection, purposes in mind. See, e.g., statutes cited note 22 supra. To the extent that state class actions are used for regulatory purposes, they will present issues substantially similar to those treated here. It does seem clear, however, that some states use the class action in somewhat idiosyncratic ways, see, e.g., MO. ANN. STAT. § 71.015 (Vernon Supp. 1976) (land condemnation), and these uses may present unusual problems. For a specific treatment of defendant-class actions, see, e.g., 7 C. WRIGHT & A. MILLER, \textit{Federal Practice and Procedure} § 1770 (1972); Parsons & Starr, \textit{Environmental Litigation and Defendant Class Actions: The Unrealized Viability of Rule 23, 4 Ecology L.Q. 881, 884–902 (1975); Note, \textit{Federal Rules of Civil Procedure 23: A Defendant Class Action with a Public Official as the Named Representative}, 9 VALPARAISO U.L. REV. 357 (1975). For survey and analysis of state class action law, see, e.g., Homburger, supra; Note, \textit{State Class Action Statutes: A Comparative Analysis}, 60 IOWA L. REV. 93 (1974); Comment, \textit{The Progressive Transformation of Class Actions in California}, 12 SAN DIEGO L. REV. 186 (1974).

This Note, moreover, will not attempt to be a primer on current federal class action law. To a large extent, federal cases will be discussed as illustrative of specific problems that class procedure must take into account. Issues closely related to rule 23 will, however, be discussed in the following sections: Section IV, Part B, due process and notice; Section IV, Part C, timing of certification and structure of pretrial; Section IV, Part D, management of discovery and statutes of limitations; Section V, Part A, common question and typicality requirements (\textit{Fed. R. Civ. P. 23(a)(2), (a)(3)}); Section V, Part B, adequacy of representation requirement (\textit{Fed. R. Civ. P. 23(a)(4)}), subclassing (\textit{Fed. R. Civ. P. 23(c)(4)}), opt-outs (\textit{Fed. R. Civ. P.}...
is postulated that the interests (and interrelationships of interests) of absentees are relevant because courts in deciding cases are under an obligation derived from substantive law to consider and reconcile those interests. This obligation can be seen most clearly in contemporary equitable doctrine, but it is also implicit in efforts by courts to discover — through devices such as the appointment of masters and the recognition of amici — the impact of their decisions on those not before the court. On the other hand, substantive law itself may restrict the procedural mechanisms available for recognizing absentee rights.

The central problem of class action procedure therefore becomes the design of a mechanism for registering absentee interests which will not distort the law that makes those interests relevant.

II. THREE THEORIES OF THE CLASS ACTION

The authors of the 1966 revision of the federal class action rule eschewed “obscure and uncertain” abstractions. Rule 23’s typology of proper class actions emphasizes the practical: the criteria of propriety are drafted to take into account “[t]he difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the

R. Civ. P. 23(c)(2)), and class definition (FED. R. CIV. P. 23(c)(3)); Section V, Part C, predominance of common questions (FED. R. CIV. P. 23(b)(3)); Section VI, supervision of settlements (FED. R. CIV. P. 23(e)).

It is now commonplace that administrative agencies, in implementing their statutory mandates, must give adequate consideration to all affected interests. See, e.g., Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1756-60 (1975). Such explicit recognition of the need for courts to recognize the interests of all affected has seldom been made, although some such conception must underly the expansion of intervention privileges under FED. R. CIV. P. 24 to encompass those who have a practical interest in a pending suit, see, e.g., Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 135 (1967); Advisory Comm. Note, 39 F.R.D. 109 (1966) (“If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene . . .”), and even those whose injury is limited to the stare decisis effect of a decision, see Atlantis Dev. Corp. v. United States, 379 F.2d 818, 826-29 (5th Cir. 1967). The purpose of allowing persons with such injuries to intervene is presumably to consider their claims to affect the status quo, which compete with the similar claims of the original litigants. See id.; Stewart, supra at 1750 (administrative law context). Of course, it is possible as a matter of statutory construction that the interests of some persons who are practically affected will be legally irrelevant and therefore they could be neither class members nor intervenors.

class”; 2 the fact that the party’s action which prompted injunctive or declaratory relief was itself directed “to the class as a whole”; 3 and the “economies of time, effort, and expense,” as well as the “uniformity of decision as to persons similarly situated,” which a class action would achieve.4 Perhaps because of their pragmatism, however, the rulemakers, although purporting to fix “the measures which can be taken to assure the fair conduct of [class] actions,” 5 in fact did not. Almost invariably rule 23 prescribes discretion as the solution to the problems raised by the class action’s use of representative procedures to settle the rights of nonparties.6

The various issues which class actions raise cannot be fully analyzed unless the connections among the issues are explored. Some overarching conceptual framework is a necessary prerequisite to an understanding of these connections. This section of the Note will sketch three general theories of the class suit. Two theories assimilate class actions to ordinary litigation. In these, a unity of interest among class members, whether objectively manifest in a community of interest or subjectively evidenced by the consent of class members to suit on their behalf, transforms the class into an artificial individual, no different, at least in form, from parties to a conventional lawsuit. Neither of the unity theories, however, is ultimately satisfactory. A third theory is therefore discussed, which focuses on the relationship of class action procedures to substantive law, and which provides the analytical framework for much of the rest of this Note.

The development of each of the three theories will proceed by elaborating specific conceptions of the social justification for the use of class suits and of the fairness of representative procedures from the standpoint of class members. The concepts of justification and fairness are obviously not easily separated; indeed, under each of the theories discussed here, justification and fairness will prove to be essentially two sides of the same coin. It is nonetheless helpful to distinguish the two concepts at least provisionally, if only to make clearer the terms of their merger under each theory. The development of the theories will also be loosely historical. The first of the theories, the community of interest theory, is most closely associated with class action law of the nineteenth century. The second theory, the consent theory, is suggested by provisions of the 1938 and 1966 Federal Rules. The

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2 Id. at 100; see FED. R. CIV. P. 23(b)(1); p. 1322, note 8 supra.
3 Advisory Comm. Note, 39 F.R.D. 102 (1966); see FED. R. CIV. P. 23(b)(2); p. 1322, note 8 supra.
4 Advisory Comm. Note, 39 F.R.D. 102-03 (1966); see FED. R. CIV. P. 23(b)(3); p. 1322, note 8 supra.
6 See pp. 1322-23 supra.
third theory, the substantive theory, grows out of problems raised by post-1966 class action practice. The association of particular theories with particular periods of time is not meant to be rigorous. Indeed, one reason for discussion of the community of interest theory, for example, is that its influence continues to be visible in the works of class action commentators\(^7\) even though the theory itself is anachronistic in the contemporary context. Moreover, the three theories are in a sense ideal types. They are suggested by features of class action practice of certain eras, but they are ultimately simplifications of that practice. For this reason, although historically developed, the three theories are chiefly of analytical significance.\(^8\)

\textbf{A. Unity Theories of Class Suit: Community of Interest and Consent}

Traditionally, class action doctrine has started from the proposition that a class, in Langdell’s words, “must, for all the purposes of the suit, constitute a unit.”\(^9\) At least since the middle of the nineteenth century, however, neither courts nor commentators have succeeded in formulating a test of the unity of a class capable of winning general approval. Rival schools of thought can be identified, adherents either of the view that all members of the class must share “one right,”\(^10\) or of the theory that a sufficient unity of interest may exist if all class members have “one and the same case to establish.”\(^11\) This Part begins by sketching the “one right” or community of interest theory in its early nineteenth century version and then the more modern consent theory of justification and fairness, which is associated with the “one case” or common question definition of a class. The polar views thus outlined, discussion turns first to the changes in styles of...


\(^8\) Thus, for example, although the opt-out mechanism set up in the 1966 revision of rule 23, see Fed. R. Civ. P. 23(c)(2), is highly suggestive of the consent theory of class suit, see pp. 1337-43 infra, the Advisory Committee Note indicates that the rulemakers saw the common question class suits in which opting out was permitted to be justified at least in part by the increased access to courts such suits would make possible, see 39 F.R.D. at 104, a justification characteristic of the substantive theory, see pp. 1359-66 infra. See also Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 397-98 (1967); note 39 infra.


\(^10\) Id. at 128.

\(^11\) Id.
legal reasoning which help to account for the decline of the community of interest theory, and second, to the limited capacity of the consent theory to account for the uses to which class actions have been put since 1966.

I. The Community of Interest Theory.—Calvert, in his Parties to Suits in Equity, first published in 1837, described the English case law of his time as establishing a "community of interest" as the fundamental prerequisite for class suit. "[T]his form of suit cannot be adopted," he wrote, unless all the persons, on whose behalf the bill is filed, have "one common interest in all the objects of the suit." Early nineteenth century decisions suggest that the underlying test of community of interest was one of indivisibility of interest: whether individuals asserted to be members of a class would, if they sued separately, each assert the same interest in whatever property or other entitlement was at issue. Characteristically, conclusions as to the existence or non-

12 F. CALVERT, PARTIES TO SUITS IN EQUITY (1837). Citations hereinafter, however, are to the second edition. F. CALVERT, PARTIES TO SUITS IN EQUITY (2d ed. 1847).

13 Id. at 38. Professor Chafee, in his analysis of early nineteenth century class action law, concluded that the chief problems class actions raised at that time had to do with reconciling class suits and joinder requirements. See Z. CHAFEE, SOME PROBLEMS OF EQUITY 203-04, 210 (1950). Calvert's treatise, however, suggests that the tension between joinder requirements and representative actions may not in fact have been a matter of significant concern. Calvert devoted only two somewhat perfunctory pages to discussion of the requirement that classes be too numerous for joinder to be practicable, F. CALVERT, supra note 12, at 42-43, but took nine pages to analyze the community of interest requirement, id. at 34-42. See also note 21 infra.

14 F. CALVERT, supra note 12, at 42.

15 Two cases Calvert treated as central in his treatise are illustrative. Jones v. Garcia del Rio, 37 Eng. Rep. 1113 (Ch. 1823), discussed in F. CALVERT, supra note 12, at 34-35, 41-42, concerned a suit brought by three persons seeking recission on behalf of all holders of shares of a loan which was alleged to have been fraudulently secured by ostensible agents of the Peruvian government. See 37 Eng. Rep. at 1113-14. The fraud was said to lie in the fact that, while the agents claimed to be acting on behalf of the government of Peru, no government of Peru existed, at least as a matter of English law, since Peru had not yet been recognized by the English government as free of Spanish dominion. See id. Defendants, on a motion to dissolve a temporary injunction blocking execution of the loan, argued that the suit could not be brought as a class suit since the plaintiffs were not authorized to sue by the other members of the class and since many if not most of the shareholders were content with the loan and were either ignorant of the suit or disapproved of it. Id. at 1114. Lord Eldon, agreeing that the suit could not go forward as a class action, dissolved the injunction. Id. at 1115. He began by doubting the possibility of a class suit "[w]here some parties are not satisfied, and are disposed to abide by the contract," since "[t]he cases where one party files a bill on behalf of himself and others are cases where the others have a choice between that and nothing . . . ." Id. at 1114. His conclusion, however, ultimately rested more on the theoretical possibility of class member dissent than on its existence in fact. The plaintiffs could not "file one bill" because, "if they had any demand
existence of communities of interest were framed in terms of the distinction between joint and several rights.\(^{16}\)

Under the community of interest theory a class was a distinct entity. Its existence derived not from the discretion of a court, nor the option of class members, but from the nature of the right held by putative class members.\(^{17}\) The fact that a suit took a class

at all," they "had each a demand at law, and each a several demand in equity . . . ." Id. at 1115. See also Weale v. West-Middlesex Waterworks, 37 Eng. Rep. 412, 416–17 (Ch. 1820).

Bromley v. Smith, 57 Eng. Rep. 482 (Ch. 1826), discussed in F. CALVERT, supra at 37–38, like Jones v. Garcia del Rio, involved an attempt to bring a class suit in the face of disagreement within the class. Nine parishioners of a borough brought an action on behalf of all other parishioners against borough officials who had allegedly allocated funds inconsistently with their responsibilities under an Enclosure Act. See 57 Eng. Rep. at 482. The defendants argued that the asserted misappropriation had been ratified by a majority of the parishioners, and thus that a suit challenging the appropriation could not be brought on behalf of the parishioners. See id. at 482–83. The interests of the parishioners in the enclosed land, however, were interests in common. Prior to enclosure, the rights had been in common, see id. at 482, and the Enclosure Act, although altering the content of those rights, evidently did not transform their nature. See also note 16 infra. Sir John Leach, Vice-Chancellor, held that, given the common right, the class suit was proper. "Where a matter is necessarily injurious to the common right, the majority of the persons interested can neither excise the wrong, nor deprive all other parties of their remedy by suit." 57 Eng. Rep. at 483. The right did not run to the class members as an aggregate, but to the class as a whole, and thus the views of class members, a majority or otherwise, were irrelevant.

\(^{16}\) Where the entitlement claimed was statutory, courts tended to focus less on the nature of the entitlement and more on the fact of the indivisibly common benefit which would result from the suit. See, e.g., Gray v. Chaplin, 57 Eng. Rep. 348, 350 (Ch. 1825) ("In order to enable a Plaintiff to sue on behalf of himself and all others who stand in the same relation with him to the subject of the suit, it must appear that the relief sought by him is in its nature beneficial to all those whom he undertakes to represent.") (emphasis added); Attorney-General v. Heelis, 57 Eng. Rep. 270, 274 (Ch. 1824).

The community of interest theory could not account for all early nineteenth century suits taking a class form. In particular, creditor’s bills, actions in which one creditor asserted the rights of all creditors, even though the rights of the creditors were distinct, did not fit the theory. Calvert at one point explained creditor’s bills as cases where a "[c]ourt assumes that a legatee or creditor praying an account against an executor on behalf of himself and of all other legatees or creditors seeks a relief beneficial to them all," F. CALVERT, supra note 12, at 36 (emphasis added), but ultimately concluded that these suits simply could not be accounted for under the community of interest theory: "The simple explanation seems to be, that there is an inconsistency in principle . . . ." Id. at 54. Defendant class suits were also troublesome for the community of interest theory. See note 21 infra.

\(^{17}\) In Leigh v. Thomas, 28 Eng. Rep. 201 (Ch. 1751), for example, Sir John Strange sustained a demurrer against a suit brought on behalf of 64 members of a ship’s crew on the ground that the suit should have been brought on behalf of all 80 members of the crew. And in Baldwin v. Lawrence, 57 Eng. Rep. 251, 254–55 (Ch. 1824), three members of a trading company were not permitted to sue
form, rather than reflecting a choice requiring justification, followed from the structure of the legal relationships figuring in the case. Similarly, once a community of interest was established, the fairness of litigation to absentees was largely not a matter of concern.\textsuperscript{18} Class litigation affected class interests, not individual interests. With respect to class interests, class members were "homogeneous"; \textsuperscript{19} all stood "in the same situation." \textsuperscript{20} The fact that the common interest was asserted by one class member rather than another was beside the point.\textsuperscript{21}

The independent reality of the class under the community of interest theory seems to link class suits with such feudal institutions as the joint tenancy, which also treated individuals "as though they together constituted one person, a fictitious unity." \textsuperscript{22}

alone on the ground that the action could not be brought on behalf of fewer than the whole class.

\textsuperscript{18} See Z. CHAFEE, supra note 13, at 203.

\textsuperscript{19} Newton v. Earl of Egmont, 58 Eng. Rep. 286, 289 (Ch. 1832).

\textsuperscript{20} Small v. Attwood, 159 Eng. Rep. 1051, 1072 (Ex. 1832).

\textsuperscript{21} Calvert's discussion of class suits considered the problem of fairness to absentees only in the context of defendant class suits. See F. CALVERT, supra note 12, at 45-46. Despite contrary language in some cases, e.g., Bouverie v. Prentice, 28 Eng. Rep. 1082, 1083 (Ch. 1783), Calvert treated Mayor of York v. Pilkington, 26 Eng. Rep. 180, 181 (Ch. 1737), as establishing that a defendant class need not be united by a single community of interest. See F. CALVERT, supra. But see Z. CHAFEE, supra note 13, at 165 & n.34 (Pilkington not a class suit). Calvert's analysis of defendant classes nonetheless reflected community of interest thinking. He argued that the interests of absentees would be adequately protected if, among the class members present in court, there were holders of each of the several rights shared by class members. See F. CALVERT, supra at 46. On this view, a defendant class consisted of a complex of communities of interest, to be protected through subclassing; if the rights of defendant class members were entirely distinct, class suit could not go forward, see Dilly v. Doig, 30 Eng. Rep. 738 (Ch. 1794); F. CALVERT, supra at 46-47. Calvert concluded that, as a rule of thumb, "[a] fair test" of whether an individual could be sued as representative of a defendant class was "[w]hether, were he contending for the same right in the position of a plaintiff, he could file his bill on behalf of others as well as of himself." Id. at 47.

The interchangeability of class members, given a community of interest, not only explains the apparent lack of concern for fairness to absentees in the early nineteenth century cases, but also suggests why, \textit{contra} Professor Chafee, joinder was considered relatively unimportant, see note 13 supra. Given a community of interest, the class, not the class member, became the legally relevant actor. Individual class members, therefore, had no interest in the litigation that would trigger a joinder requirement.

\textsuperscript{22} 2 AMERICAN LAW OF PROPERTY § 6.1, at 3 (A.J. Casner ed. 1952). Because the interests of joint tenants were "one and the same," the "entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor . . . ." 2 W. BLACKSTONE, COMMENTARIES *183. A similar principle of survivorship operated under the community of interest theory of class actions. If an individual bringing suit on behalf of a class died, the action did not abate; instead, another class member could step forward and continue the suit. See Boddy v. Kent, 35 Eng. Rep. 707, 708 (Ch. 1816); Leigh v. Thomas, 28 Eng. Rep. 201,
Class actions in early nineteenth century England, however, were not simply historical artifacts; the joint rights enforced in such suits were commonly the rights of members of the unincorporated associations then ubiquitous in English society as a result of the restrictions placed on the use of the corporate form by the South Sea Bubble Act.23 The early nineteenth century class action, as it emerged in England, appears to be best viewed as a transitional form — an attempt to extend a medieval legal concep-

201 (Ch. 1751); F. CALVERT, supra note 12, at 34. See also pp. 1464–66 infra (mootness).

Class actions appear to have had their origins in feudal society, antedating courts of equity. See Marcin, Searching for the Origin of the Class Action, 23 CATH. U.L. REV. 515 (1974). In Cockburn v. Thompson, 33 Eng. Rep. 1005 (Ch. 1809), Lord Eldon referred to a number of cases having a distinctly medieval character in responding to defendants’ challenge to the legitimacy of class suits generally:

There are various other cases: a Bill by the lord of a manor against some of the tenants, or, vice versa, by tenants on behalf of themselves and the others, to establish some right; as a Bill with regard to suit to a mill ... ; a Bill against parishioners for tithes; or by some parishioners to establish a Modus.


I shall give the Judgment with great consideration in this cause; which is of high importance; going in effect, as it is argued for the Defendant, to this; that with regard to all those Institutions, known to subsist in this great metropolis in the nature of partnership, all Assurance Companies, for instance, if they have not a corporate character, no law can be administered in any Court of Justice among the members of such Societies. Another extremely important effect, if this demurrer can be maintained, will be, that with regard to a great number of charitable institutions, ... no law or equity can be administered among the members . . . .

tion in order to give legal structure to contemporary social institutions.  

In the United States, Story, unlike Calvert, attempted to analyze class suits outside the framework of the community of interest theory. His Commentaries on Equity Pleadings assert at the outset of the discussion of class litigation that a representative action may be brought "where the parties are very numerous, and although they have, or may have, separate and distinct interests . . . ." Near the close of the discussion, the Commentaries urge equity courts to give up "too strict an adherence to forms and rules established under very different circumstances," and to allow class suits on behalf of separate and distinct claims not meeting the community of interest test "even to the extent of binding unrepresented interests, after due notice to the parties to appear and represent them . . . ." In the main body of his analysis, however, Story was careful to point out that the practice of courts at that time was indeed to require "a common interest, or a common right, which the Bill seeks to establish and enforce, or a general claim or privilege, which it seeks to establish, or to narrow, or take away." The prevailing view, he noted, was that "all the parties stand, or are supposed to stand, in the same situation . . . ."  

Despite Story's contrary urgings, by the time of the Civil War, class action law in the United States was shaped largely by the community of interest theory. The Supreme Court's class action decisions of that era all took as their doctrinal framework the community of interest theory. Indeed, in Smith v. Sworm-
stedt, the Court expressly rejected Story's suggestion that a class suit could be brought on behalf of individuals with distinct and several rights; a proper class suit, Justice Nelson's opinion concluded, required "a common interest or a common right . . . ." Reported state court decisions also suggest the influence of the community of interest theory. The close connection between class suits and the law of unincorporated associations characteristic of the English case law carried over in the American litigation. The two cases in which the Supreme Court held class suits to be proper, Beatty v. Kurtz and Smith v. Swormstedt , both concerned litigation involving religious associations. Suits by or against shareholders in economic enterprises were prominent among the state cases.

2. The Consent Theory.—A second theory of class suit exists which is in many ways the antithesis of the community of interest theory. This theory takes as its starting point the indi-

Swormstedt, 57 U.S. (16 How.) 288, 302-03 (1854); Beatty v. Kurtz, 27 U.S. (2 Pet.) 566, 584 (1829). Justice Story authored the Supreme Court's opinion in Beatty. There, representatives of an unincorporated Lutheran church sought to quiet title to church property. The defendants challenged the authority of the plaintiffs to sue on behalf of the church members. Justice Story found it unnecessary to inquire into the authority of the plaintiffs as a matter of church government since the suit could properly be regarded as a class action:

. . . we think it one of those cases, in which certain persons, belonging to a voluntary society, and having a common interest, may sue in behalf of themselves and others having the like interest, as part of the same society; for purposes common to all, and beneficial to all.

Id.

33 See id. at 302.
34 Id. Justice Nelson's opinion for the Supreme Court found the requisite common interest in Smith, a suit by ministers of the southern branch of the Methodist Church brought against ministers of the northern branch to recover a share of a pension fund. In Ayres v. Carver, 58 U.S. (17 How.) 591 (1855), however, the Court suggested in dictum that the requisite common interest might be lacking where an individual brought suit against representatives of a class of landholders to establish title to land. Justice Nelson's majority opinion observed "that it is difficult to see any interest or estate in common among these several defendants, that would authorize the rights of the absent parties to be represented in the litigation . . . ." Id. at 594. As a result, he indicated, "without anything in common," the class suit could not "have the effect to make a decree against one binding upon the others, or even require them to join in the defense." Id.

36 27 U.S. (2 Pet.) 566 (1829), discussed in note 31 supra.
37 57 U.S. (16 How.) 288 (1854), discussed in note 34 supra.
38 See, e.g., Louisville & O. Tpk. Rd. Co. v. Ballard, 59 Ky. (2 Metc.) 165 (1859) (shareholders defendant class); Robinson v. Smith, 3 Paige 222 (N.Y. Ch. 1832) (shareholders plaintiff class).
viduality of class member interests. In contrast with the community of interest theory, the class member, not the class, is the fundamental unit. The existence of a class is not a corollary of the character of the substantive right at issue in a case, but a matter of fact contingent upon the consent of class members.

The consent theory was not as much an element of the conscious class action jurisprudence of its time as was the community of interest theory. It received the imprimatur of neither the 1938 nor 1966 federal rulemakers. Nonetheless, a number of commentators have acknowledged that the consent of class members may provide a source of legitimacy for the class suit. Moreover, the Supreme Court's holding in *Eisen v. Carlisle & Jacquelin* — that individualized notice must be given class members in class actions brought under federal rule 23(b)(3) — seems most defensible if it is assumed that to be proper such class actions must be grounded in the consent of individual class members. The best evidence of the "reality" of the consent theory is to be found in the mechanics of the 1938 and 1966 federal class action rules.

Rule 23, as originally adopted in 1938, made provision for class suits similar to the traditional community of interest actions. Under section (a) of the rule, class suits were authorized "when the character of the right sought to be enforced for or against the class is . . . joint or common . . . ." But the 1938 rule also permitted class suits "where the character of the right . . . is . . . several, and there is a common question of law or fact affecting the several rights and a common relief is sought." Thus,

39 The 1938 rulemakers evidently took for granted the consent mechanism used in "spurious" class suits; the focus of attention was upon use of the "spurious" suit as a permissive joinder device. See p. 1339 infra. Although there is some evidence that the 1966 rulemakers saw the opt-out mechanism for (b)(3) classes as a consent mechanism, see Kaplan, supra note 8, at 392, the chief focus of the Advisory Committee Note was upon the economy and uniformity advantages of the (b)(3) suit, see Advisory Comm. Note, 39 F.R.D. 102-03 (1966), with some attention also given to the increased access to courts the (b)(3) suit would make possible, see note 8 supra.


42 Id. at 177.

43 Notice, although an obvious prerequisite to consent, is required neither by due process, see pp. 1402-16 infra, nor by the substantive theory of class suit, see pp. 1439-48 infra.


45 Id.
while making use of the community of interest theory's distinction between joint and several rights, the 1938 federal class action rule allowed class suits even in the absence of a community of interest.

Professor Moore, chief architect of the 1938 class action rule, foresaw only a limited role for common question class suits. In his view, these suits were "spurious" class actions. A judgment rendered in a common question class action bound only parties and privies, not absentees. The usefulness of the "spurious" suit derived chiefly from the interaction of the relaxed permissive joinder standard applied to judge the propriety of motions to intervene made by class members and the intricacies of the law of federal jurisdiction. Intervening class members, Moore argued, could be regarded as ancillary parties, and thus exempt from diversity-of-citizenship and amount-in-controversy requirements. The "spurious" class suit, therefore, provided federal courts with a ready mechanism for overcoming jurisdictional hurdles to bringing all parties to complex litigation into court.

Within three years of the adoption of the 1938 rule, however, a second, more ambitious, use for the common question class suit became apparent. In The Contemporary Function of the Class Suit, Kalven and Rosenfield argued that the common question class suit could be employed to deliver relief to masses of individuals injured by corporate wrongdoing but unable to assume the costs of individual litigation. Following trials favorable to class claims, they suggested, courts could order notice to be sent to

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49 Moore, supra note 46, at 575. At the time Moore was writing, the proposition that only the original parties to a class suit need meet the diversity requirement was already well established. See, e.g., Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 365-66 (1921). The Supreme Court has not subsequently questioned the proposition. See Snyder v. Harris, 394 U.S. 332, 340 (1969). Moore's theory that intervening class members might be regarded as ancillary parties for purposes of jurisdictional amount requirements, however, did not similarly derive from prior case law and has subsequently been rejected by the Supreme Court, albeit in the different context created by revised rule 23. See Zahn v. International Paper Co., 414 U.S. 291 (1973).
50 See Moore, supra note 46, at 575.
51 8 U. CHI. L. REV. 685 (1941).
52 Id. at 684-86, 691.
absent class members inviting them to intervene in advance of entry of judgment, at the cost of only a pro rata share in the expense of the litigation, to obtain judgment on their own claims.\textsuperscript{53} This technique of "one-way intervention," although in fact rarely used by the courts,\textsuperscript{54} came to be associated with the "spurious" class suit. Until the revision of rule 23 in 1966, debate over the propriety of common question class suits focused not so much on the advantages of "spurious" suits for "cleaning up a litigious situation"\textsuperscript{55} as on the fairness of one-way intervention as a means of making common question class actions for damages practical.\textsuperscript{56}

The one-way intervention technique transformed litigation taking a traditional bi-polar form into class litigation by means of a consent mechanism. Individuals became class members only if they affirmatively chose to become class members by intervening to participate in the judgment.\textsuperscript{57} Because consent was not invited until after trial, individuals could decide whether to become class members in a state of close to perfect information. An individual need not estimate the likelihood of adequate representation in the class suit but only judge whether a trial result was favorable enough to justify foregoing a separate suit.\textsuperscript{58} Postponing intervention, however, while it simplified the issue of adequacy of representation for potential class members, increased the burden of the litigative process for class opponents. Class opponents were liable to all individuals who chose to intervene as class members in the event of a trial favorable to the class, but all individuals, except for the class representative, could retain their right to sue class opponents if trial were unfavorable to the class.

Rule 23 was revised in 1966, in part in order to correct the

\textsuperscript{53} Id. at 692–94.


\textsuperscript{55} Moore, supra note 46, at 575.


\textsuperscript{57} See Comment, supra note 7, at 1236–37.

\textsuperscript{58} In addition to estimating the likelihood of a separate suit yielding more favorable relief, an individual might also have to take into account the possibility that a class judgment would be overturned on appeal.
asymmetry produced by one-way intervention. The requirement of class member consent, however, persisted as the defining characteristic of common question damage class actions. The revised rule provided that a judgment order in an action maintained as a common question class action should include all members of the class whether or not the judgment was favorable to the class. Individuals were to be considered members of a class if, after notice of their potential membership in the class, they had not requested exclusion from the class within a designated period of time. Individuals who did not exclude themselves from a class could, if they wished, enter an appearance in a suit through counsel.

The Advisory Committee Note on the 1966 revision of rule 23 suggests that the rulemakers also saw the common question class action at least in part as a means of rationalizing party practice. A single trial of an issue common to many claims would eliminate the need for repeated marshellings of the same proof in multiple trials, and would thus increase the overall efficiency of the trial system. Moreover, especially if separate trials would have been before separate juries, consolidation of issues through class suit

60 Common question suits for injunctive or corresponding declaratory relief may be brought under section (b)(2) of the 1966 rule, and do not involve use of a consent mechanism. See Fed. R. Civ. P. 23(b)(2), (c)(3).
62 Id. 23(c)(2), (c)(3). At least by the time the revised rule was adopted, notice was thought to be best given early in the litigative process “if class members are to have a meaningful opportunity to request exclusion, appear in the action, object to representation, etc.,” Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39, 40-41 (1967).
63 Fed. R. Civ. P. 23(c)(2). At least on one view, the right to enter an appearance is not in form a full-fledged right to intervene; rather, entering an appearance triggers only the limited right to receive copies of papers and to be fully informed of the progress of the litigation. See Kaplan, supra note 8, at 392 n.137. In practice, however, the distinction between an appearance and intervention is limited, given the power of courts under rule 23(d)(5) to condition intervention, see 7A C. Wright & A. Miller, Federal Practice and Procedure § 1799, at 257, (1972), as well as the judiciary’s discretionary power under section (d)(5) to expand participation rights to intervenor status, see 3B J. Moore, Federal Practice ¶ 23.90[2], at 23-1622 to 23-1623 (1974).
64 Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.

would afford the significant advantage of preventing nonuniform disposition of identical claims. These justifications are institutional: desiderata from the perspective of the judicial system as a whole. But because common question class actions may not be brought under rule 23 unless class members consent, such institutional interests are in practice subordinated to individual interests.\footnote{While a court could screen out plainly uneconomical suits, see pp. 1504–16 infra (predomination), given the operation of a consent mechanism, the court would be without power to insure that economical class suits do indeed go forward.} Whether a class suit is brought does not ultimately turn on whether the suit will contribute to trial efficiency and uniformity; rather, the determinative test is whether, for individual class members, the benefits class suit promises warrant the risk of surrendering control of litigation. The chief attractions of the class suit from the individual litigant’s perspective are the opportunities aggregation of claims makes possible for shaving costs and for increasing bargaining power. It may be that individual and institutional interests coincide; wherever trial economy and uniformity could be realized, savings from cost sharing and increases in bargaining power may be sufficiently substantial to persuade individuals to consent to class suit. Such harmony, however, is gratuitous insofar as the workings of the consent mechanism are concerned. If class suit is conditioned upon the consent of class members, the ultimate decisionmakers as to whether class suit is justified become not the rulemakers or the courts but individual class members.

Given a consent requirement, the fairness of class suit is not an institutional concern. A representative suit is brought only on behalf of individuals who have elected to waive the right to bring their own suit. Nonconsenting individuals remain free to litigate their own claim through separate suits if they opt out.\footnote{Class members also possess at least a limited right of intervention. See note 63 supra.} Such a waiver theory of fairness, like the justification for class actions the consent requirement suggests, is radically individualistic. There is no attempt to fix general criteria as to when representation is sufficiently adequate. Rather, it is up to each potential class member to decide whether his interests and the interests of the class representative are in harmony.

The consent theory of class suit thus reverses the approach of the community of interest theory. The class is not a distinct entity, but an aggregate of individuals. The views of individual class members, instead of being beside the point, are decisive. The structure of litigation is determined not by the nature of the cause of action, but by the breadth of the common transaction or
occurrence upon which suit is based, and the choices of the individuals injured.

3. The Inadequacy of the Community of Interest and Consent Theories. — The community of interest and consent theories represent the two traditional responses to the problems of justification and fairness raised by class actions. Unfortunately, neither theory is of use for analysis of developments in class action law since the revision of rule 23 in 1966. The community of interest theory rests upon methodological assumptions foreign to modern legal thought. The consent theory rests upon factual assumptions not in accord with the reality of contemporary class litigation. Unlike the community of interest theory, the consent theory fails to connect substance and procedure, and thus fails to provide courts with a framework for structuring class litigation.

(a) The Community of Interest Theory. — The 1938 federal class action rule, although it recognized class suits the community of interest theory did not, held true to the traditional methodology by grounding its categories in the distinction between joint and several rights.67 As is well-known, however, the rule’s typology of class suits proved to be a failure.68 Commentators mocked it.69 Courts fell into confusion attempting to apply it.70 This failure may be seen to reflect changes in the law, already underway even before the 1938 rule was adopted, which served to separate the community of interest theory from its origins in practice, as well as from usual modes of doctrinal thinking.

By 1938, the distinction between joint and several rights had become an empty abstraction. Joint property was an anomaly. The rules of construction courts employed in interpreting conveyances treated joint tenancies as exceptional and tenancies in common and other forms of severality as the norm.71 The ready availability of the corporate form72 limited the need to conceive of joint stock companies as classes in order to bring the activities of such institutions within the purview of courts. Increased govern-

69 See, e.g., Z. Chafee, supra note 13, at 246, 257; Keeffe, Levy & Donovan, Lee Defeats Ben Hur, 33 CORNELL L.Q. 327, 334 (1948); Kalven & Rosenfield, supra note 51, at 707 n.73.
70 See, e.g., cases cited in Advisory Comm. Note, supra note 68. See also Z. Chafee, supra note 13, at 264-65.
ment regulation of mutual insurance associations,73 and the increased willingness of courts and legislatures to accord entity status to unincorporated associations,74 further reduced the role for class suits of the sort with which community of interest theorists were most familiar.

Moreover, by 1938, the community of interest theory was not only disconnected from its social origins but out of phase with the prevailing style of legal thought as well. A new, more pragmatic, more empirical jurisprudence was emerging.75 Matters previously treated as appropriate for analytical inquiry were coming to be seen as too value-laden or empirical for formal analysis. This development was most visible in academic76 thought and in constitutional law.77 But it was apparent as well in the law of procedure, reflected, for example, in the increasing use of the transaction or occurrence as the usual basis for rules governing joinder of claims.78 The community of interest test, presupposing an analytical categorization of rights rather than some more factual inquiry, plainly was not a part of this new jurisprudence. Indeed, in 1938 a good case could be made for the proposition that the community of interest concept was long since dead, one of the earliest casualties of the reorientation of legal thought.

75 On the philosophical origins and context of this jurisprudence, see M. White, Social Thought in America: The Revolt Against Formalism (2d ed. 1957).
77 The transformation in constitutional law is apparent, for example, from a comparison, on the one hand, of Justice Peckham's indifference to statistical argument in Lochner v. New York, 198 U.S. 45, 59 (1905), Justice Brewer's use of the Brandeis brief in Muller v. Oregon, 208 U.S. 412 (1908), as evidence of traditional beliefs rather than of facts, see id. at 421, and Justice Pitney's refusal to defer to legislative factfinding in Coppage v. Kansas, see 236 U.S. 1, 16 (1915), as well as his willingness to defend constitutional doctrine in terms of ideological ultimates, see, e.g., id. at 17, with, on the other hand, Justice Stone's largely factual argument in dissent in Ribnik v. McBride, 277 U.S. 350, 363-72 (1928), Chief Justice Hughes' emphasis on deference to legislative judgment in West Coast Hotel Co. v. Parrish, 300 U.S. 379, 398-99 (1937), and Justice Frankfurter's contention in concurrence in American Fed. of Labor v. American Sash & Door Co., 335 U.S. 538, 557 (1949), that value judgments are matters for legislatures and not courts.
78 See, e.g., Fed. R. Civ. P. 13(a) (compulsory counterclaims). See generally Millar, Notabilia of American Civil Procedure 1887-1937, 50 Harv. L. Rev. 1017, 1025 (1937). The transformation in civil procedure is also illustrated by the shift in focus of procedure from the cause of action to the factual basis of a claim. See, e.g., Simpson, A Possible Solution to the Pleading Problem, 53 Harv. L. Rev. 169 (1939).
At the outset, the attack on community of interest was pitched not at the level of class action doctrine but of equitable jurisdiction. Pomeroy, in his 1881 *Treatise on Equity Jurisprudence*, asserted that the community of interest requirement, as a test of the jurisdiction of an equity court to consolidate actions at law in order to prevent a multiplicity of suits, found insufficient support in the case law. Equity jurisdiction was proper, he argued, so long as consolidated claims were connected by a common question of fact or law. Pomeroy’s reading of the cases was probably wrong. But his assertion proved a source of profound con-

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79 Citation hereinafter is to the reprint of the first edition incorporated by Pomeroy’s sons in their second edition. See 1 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE v-vi (C. Pomeroy & J. Pomeroy, Jr. eds. 1892).

80 Id. § 269, at 367-70.

81 Id.

82 See Z. CHAFEE, supra note 13, at 173. For example, Pomeroy cited in support of his claim state court decisions allowing numbers of taxpayers, sometimes suing as a class, to challenge levies against their property by municipalities, counties, and other subdivisions of state government. See J. POMEROY, supra note 79, § 260, at 348 n.1. In at least six of the cases Pomeroy cited as suits brought by a number of taxpayers, suit was actually initiated by a single individual acting alone. See Terret v. Town of Sharon, 34 Conn. 105, 108-09 (1867); Webster v. Town of Harwinton, 32 Conn. 131, 131-32 (1864); Scofield v. Eighth School Dist., 27 Conn. 499, 503 (1958); Viele v. Thompson, 44 Ill. 9, 10 (1867); Board of Comm’rs v. Markle, 46 Ind. 96, 105-05 (1874); Ten Eyck v. Mayor of Keokuk, 15 Iowa 486 (1864). Pomeroy argued that courts treated suits by individuals no differently from suits by numbers of individuals, see J. POMEROY, supra at 349 n.1, but such suits plainly offered no independent support for his proposition. Two other cases are also obviously inapposite. See Brodnax v. Groom, 64 N.C. 244, 247 (1870) (suit authorized by statute); Galloway v. Jenkins, 63 N.C. 147, 150 (1869) (defendant consents to class suit). Of the remainder of the cases Pomeroy cited, the overwhelming majority simply allowed suit by numbers of taxpayers without discussion of the standard determining the propriety of the multiplicity jurisdiction. See, e.g., City of New London v. Brainard, 22 Conn. 552 (1853); Drake v. Phillips, 40 Ill. 388 (1866); Butler v. Dunham, 27 Ill. 474 (1861). In the cases in which the issue of the propriety of the multiplicity jurisdiction was faced, most courts dealt with the issue perfunctorily, finding equitable jurisdiction without framing the issue in Pomeroy’s terms as a choice between a community of interest and a common question standard. See Vanover v. Davis, 27 Ga. 354, 358 (1859); Barr v. Deniston, 19 N.H. 170, 180 (1848); Worth v. Commissioners, 1 Winst. Eq. 70, 72-73 (N.C. 1864); cf. Mayor of Baltimore v. Gill, 31 Md. 375, 394 (1869) (suit proper since municipal taxpayers constitute a class distinct from the general public). Only in Bull v. Read, 13 Grat. 78 (Va. Sup. Ct. App. 1855), did a court frame the issue as Pomeroy framed it; there, in a confused opinion, the court allowed the suit by a class of taxpayers since, “although their individual interests might be several and distinct,” there was an “injury of the common right;” id. at 86.

The cases Pomeroy cited do, however, establish that for many courts, in cases of importance, the procedural validity of class suits and other suits brought on behalf of numerous taxpayers was not a matter of question. Many of the cases involved issues of considerable moment. At least thirteen were brought as
fusion. The Mississippi Supreme Court, in *Tribette v. Illinois Central R.R.*, 83 challenged the accuracy of Pomeroy's citations, rejected his conclusion, and reasserted the community of interest requirement. 84 Thereafter, however, the Mississippi Supreme

class suits. Nineteen concerned attempts to enjoin the levy of taxes in support of bonds issued to finance purchases of railroad stock—high stakes litigation in the nineteenth century given the magnitude of the liabilities municipalities and county governments assumed in order to attract railroads into their environs, see, e.g., *Sharpless v. Mayor of Philadelphia*, 21 Pa. 147, 158 (1853) (“This is, beyond all comparison, the most important cause that has ever been in this Court since the formation of the government”). See generally C. Fairman, *Reconstruction and Reunion* 918–1116 (1971). But Pomeroy's portrayal of the state of the law was distorted. While many courts seem to have been prepared to tolerate taxpayer suits sub silentio, where the validity of such suits was expressly drawn in question, courts often resorted to community of interest analysis, and often held equitable jurisdiction to be inappropriate. The evolution of Iowa's law of taxpayer suits is illustrative. Pomeroy cited nine Iowa taxpayer cases as support for his argument. Eight of the cases allowed suits to go forward without comment as to their procedural validity. The ninth, *Zorger v. Township of Rapids*, 36 Iowa 175 (1873), noted the existence of an issue as to whether suits on behalf of classes of taxpayers were proper, but did not address the issue since it was the “sole question in another case now pending,” id. at 180. Pomeroy did not cite the pending case referred to in *Zorger*. In that case, *Fleming v. Mershon*, 36 Iowa 413 (1873), the Iowa Supreme Court held a taxpayer class suit to be improper since “[t]he property of each taxpayer is held in severalty,” id. at 418, noting that it could “find no case holding that one or more tax payers may, for themselves and others chargeable with the same tax, enjoin the collection of the same . . . .” id. at 419.

More generally, the leading cases of the day appear to run directly contrary to Pomeroy's argument. Justice Nelson, on circuit in *Cutting v. Gilbert*, 6 F. Cas. 1079 (No. 3519) (C.C.S.D.N.Y. 1865), refused to hear a suit brought on behalf of a number of taxpayers, on the ground that the requisite “community of interest growing out of the nature and condition of the right in dispute” was lacking inasmuch as “the only matter in common among the plaintiffs, or between them and the defendants, is an interest in the question involved,” id. at 1080. Justice Cooley of Michigan reached a similar conclusion:

> . . . no other complainant has any joint interest with [any other complainant] in resisting this tax. The sum demanded of each is distinct and separate, and it does not concern one of the complainants whether another pays or not. All the joint interest the parties have is a joint interest in a question of law. . . .

*Youngblood v. Sexton*, 32 Mich. 406, 410–11 (1875). Pomeroy was aware of cases like *Cutting* and *Youngblood*, and argued that they rested on a misreading of the law. See J. Pomeroy, *supra* § 266, at 360–64 n.1. More accurately, it might be said that these cases reflected the surface of the law of their time, but that underneath the surface a transformation had begun, a transformation, *contra* Pomeroy, which had not been completed by 1881, and which did not come to the surface until the publication of the *Equity Jurisprudence* itself.

83 70 Miss. 182, 12 So. 32 (1892).

84 See id. at 186–93.
Court overruled Tribette, and then overruled its overruling. The Alabama Supreme Court originally followed Tribette, but switched its allegiance to Pomeroy in another leading case, Southern Steel Co. v. Hopkins, only to switch back to Tribette by the time Hopkins came up for rehearing. The United States Supreme Court, in Hale v. Allinson, attempted a compromise by suggesting that equity jurisdiction should turn on the outcome of a balancing test. The Second Circuit, however, subsequently distinguished Allinson and reasserted Tribette.

The Pomeroy-Tribette controversy itself, of course, was ultimately mooted by the merger of law and equity. The doctrinal uncertainty the dispute revealed, however, was not confined to equity jurisdiction. By 1909, the existence or nonexistence of a community of interest had apparently ceased to be seen as the exclusive test of the propriety of class suit. Street's Federal Equity Practice separated community of interest and common question class suits, through a distinction between "true" class suits, concerning funds or property which could be brought within the control of a court by joining only a few plaintiffs or defendants, and "spurious" class suits, involving issues of personal liability and "involuntary associations." Class action commentary in the 1930's reflected advancing confusion in the case law. Blume labeled the Field Code's equivalent of the community of interest

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86 Cumberland Tel. & Tel. Co. v. Williamson, 101 Miss. 1, 8-9, 57 So. 559, 560-61 (1910). The Williamson court treated the Garrison case as distinguishable from Tribette, see id. at 10; compare note 85 supra, and instead saw Whitlock v. Yazoo & M.V.R.R., 91 Miss. 779, 45 So. 861 (1907), as the "apotheosis" of the "erroneous doctrine of Prof. Pomeroy," 110 Miss. at 14, 57 So. at 562. For a discussion of the continuing impact of Tribette upon Mississippi class action law, see Comment, Federal and State Class Actions: Developments and Opportunities, 46 Miss. L.J. 39, 55-67 (1975).

87 Turner v. City of Mobile, 135 Ala. 73, 114, 33 So. 132, 141 (1902).

88 157 Ala. 175, 190, 47 So. 274, 278 (1908).

89 See Southern Steel Co. v. Hopkins, 174 Ala. 465, 469, 475, 57 So. 11, 12, 14 (1911).

90 188 U.S. 56 (1903).

91 Id. at 77-78; see Fletcher, The Jurisdiction of Equity Relating to Multiplicity of Suits, 24 Yale L.J. 642, 645-46 (1915).

92 See Watson v. Huntington, 215 F. 472, 476-78 (2d Cir. 1914).

93 1 T. STREET, FEDERAL EQUITY PRACTICE (1909).

94 Id. § 547, at 342.

95 Id. § 548, at 342-43. Only "true" class suits, Street argued, had full binding effect, id. § 552, at 345; "spurious" class suits bound only those class members who were made parties in supplemental proceedings, id.
test "more or less arbitrary and unworkable." 96 Wheaton found
the question of what constituted the common or general interest
required for class suit under the Code "[o]ne of the most baffling
problems of code pleading." 97 McLaughlin, in an article entitled
The Mystery of the Representative Suit, felt the need to start
from scratch in examining class suits, and to this end resorted to
dictionaries and linguistic analysis.98 Significantly, all three com-
mentators agreed that the proper test of the propriety of class
suits ought to be the common question standard.99

The anachronism, even in 1938, of community of interest
analysis suggests that the community of interest theory is simply
not an available alternative to the consent theory in analyzing
contemporary class actions. This fact is of more than historical
interest. The consent theory is itself an inadequate guide to post-
1966 class actions, and its inadequacies, at least in part, are ones
which the community of interest theory does not share.

(b) The Consent Theory. — The consent theory, of course,
is more in keeping with the contemporary style of legal thought.
Class action practice, however, as it has developed since 1966,
suggests that the factual assumptions of the consent theory may
be today no less artificial than the processes of reasoning required
by the community of interest theory. Moreover, the consent the-
ory's underlying premise — that responsibility for deciding the
propriety of class suit should rest with class members rather than
the court — of necessity prevents the theory from having any-
thing to say about how courts should go about reconciling class
procedures with substantive law. In effect, the consent theory
leaves to class members not only the issues of justification and
fairness, but questions of statutory policy as well.

For the consent theory to be apposite, the claims of individual
class members must be severable; the individual class member, if
he refuses to participate in a class suit, must be able to preserve
his right of action. The structure of the 1966 rule plainly re-
fects this fact. Class members are afforded no right to opt out
in suits meeting the conditions of section (b)(1) of rule 23, en-
compassing circumstances where the interrelated situations of
class members would prevent the award of severable relief, or sec-
tion (b)(2), covering cases where injunctive or declaratory re-

96 Blume, The "Common Questions" Principle in the Code Provision for Repre-
97 Wheaton, Representative Suits Involving Numerous Litigants, 19 Cornell
L.Q. 399, 407 (1934).
98 See McLaughlin, The Mystery of the Representative Suit, 26 Geo. L.J. 878,
878, 882-83 (1938).
99 See Blume, supra note 96, at 903; McLaughlin, supra note 98, at 890, 893;
Wheaton, supra note 97, at 434.
The limit severability sets on the usefulness of the consent theory substantially reduces the theory's practical relevance. Truly severable claims may be rare. Once the influence of precedent upon litigation of common questions is recognized, the distinctions rule 23 draws between (b)(1) and (b)(3) class suits become tenuous. It may be that individuals invited to consent to class suit are ordinarily not free to decide solely on the basis of a comparison of the expected recoveries from class and individual litigation; because of the impact of the class suit upon any parallel litigation, individuals may be induced to join the class action rather than proceed on their own. Whatever the number of cases in which consent mechanisms may operate unhindered, it is clear that, as a result of the severability constraint, the consent theory has little relevance in a significant proportion of class suits. For example, most civil rights class suits brought since 1966 have been brought as (b)(2) actions. As of 1975, the largest single group — 59.7% — of the class actions pending in federal courts concerned civil rights violations.

For the consent theory to be apposite, the claims of individual

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100 See FED. R. CIV. P. 23(b)(1), (b)(2), (c)(2).

101 See generally Atlantis Dev. Corp. v. United States, 379 F.2d 818, 826–29 (5th Cir. 1967). In Atlantis, the United States Court of Appeals for the Fifth Circuit held that the stare decisis effects of an adjudication upon a third party's claim arising out of the transaction at issue in the litigation justified intervention as of right by the third party under rule 24(a). The court, evidently seeking to limit the application of its holding, repeatedly emphasized that the intervenor's interest in the litigation derived from claims arising out of the same transaction as was at issue in the litigation. See id. at 826, 829. The "same transaction" to which the court referred, however, was in reality but a common question of law and fact — "the right to build structures with or without permission of the Corps of Engineers," id. at 826 — and thus, given the familial relationship of rules 23 and 24, see id. at 824, Atlantis' recognition of stare decisis as a barrier to severability appears fully relevant to class action analysis.

102 See, e.g., McDonnell Douglas Corp. v. United States Dist. Ct., 523 F.2d 1083, 1086 (9th Cir. 1975), cert. denied sub nom. Flanagan v. McDonnell Douglas Corp., 44 U.S.L.W. 3564 (U.S. April 5, 1976) (conceding overlap of (b)(1)(A) and (b)(3) class suits inasmuch as different adjudications of common questions create "different legal rules governing the same conduct" but refusing to read (b)(1)(A) this broadly in order not to render (b)(3) wholly redundant); Technograph Printed Circuits, Ltd. v. Methode Elec., Inc., 285 F. Supp. 714, 722 (N.D. Ill. 1968) (impact of differing adjudications upon class opponent's planning basis for categorization of suit under (b)(1)(A)). See also Benett, Eisen v. Carlisle & Jacquelin: Supreme Court Calls for Revamping of Class Action Strategy, 1974 Wis. L. Rev. 801, 819–23 (overlap of (b)(1)(A) and (b)(3) categories).

103 See, e.g., 1 W. CONNOLLY, A PRACTICAL GUIDE TO EQUAL EMPLOYMENT OPPORTUNITY 511 (1975) ("most Title VII class action suits are brought under Rule 23(b)(2) ").

104 See p. 1325, note 30 supra.
class members must also be claims which the class members would have litigated even were no class action mechanism available. If the claims which class actions aggregate are too small to be individually litigated, the economy and uniformity justifications for class suit, attenuated in any event under the consent theory, disappear entirely. More importantly, the emphasis the consent theory gives to the interests of the individual class members becomes misplaced. Class member consent serves as an adequate mechanism for establishing the appropriateness of class suits only so long as the individuals whose consent is sought would have sued the class opponent themselves but for the prosecution of the class suit. In this situation, the class action threatens the interests of potential class members, who risk loss of control over the presentation of their claims, but not the interests of the class opponent, who would have had to face all of the class members at some point in any event, and who benefits from the reduced litigation costs consolidation of the class claims makes possible. Seeking consent from potential class members, rather than the class opponent, is therefore appropriate. If potential class members would not have sued the class opponent individually, however, it is the class opponent, and not the potential class members, whom the class suit disadvantages. The class action offers potential class members the chance of an otherwise unrealizable gain; the class opponent, however, must reckon with the prospect of a total liability larger than would have been the case in the absence of a class action. The consent of class members in this situation is usually beside the point: the issue is the justification for increasing the burden on the class opponent.

In fact, at least some of the claims aggregated in many of the common question damage actions initiated since the revision of rule 23 have been individually quite small. The individual suing on behalf of six million Philadelphia area bread consumers in *Hackett v. General Host Corp.* sought to recover only about nine dollars. Even if damages were trebled, the forty million hotel guests on whose behalf an antitrust class action was brought in *In re Hotel Telephone Charges* would have recovered, on the average, only about six dollars. Individual claims in these amounts obviously could not be pursued in federal court without recourse to class actions, or other devices, to spread the cost of attorneys’ fees and other litigation expenses.

Short of a rule excluding holders of claims of less than a certain amount from class actions, there appears to be little that

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105 455 F.2d 618 (3d Cir. 1972).
106 See id. at 620.
107 500 F.2d 86 (9th Cir. 1974).
108 See id. at 88.
can be done to make class action practice fit with the assumptions of the consent theory. The Supreme Court’s decision in Eisen v. Carlisle & Jacquelin,\(^{109}\) holding that individualized notice must be given to class members in \((b) (3)\) actions,\(^{110}\) can perhaps be understood not only as a reflection of a consent theory analysis,\(^{111}\) but also as an effort to insure the continued relevance of the consent theory. The cost of notice serves as a screen, denying access to federal courts to the large damage class actions which are most likely to have been brought on behalf of individuals asserting claims too small to be litigated alone. The screen, however, is imperfect. The cost of notice may limit the size of class suits, but it is not clear that the limit that would be set is so low as to make small claimant classes impractical.\(^{112}\)

It is not just that the consent theory’s assumptions fail to square with contemporary practice; on its own terms the theory is conceptually incomplete. The consent theory offers no view of the relationship of class action procedure to substantive law. Class suit, under the consent theory, is simply a mechanism of private convenience, a useful device for individuals to realize litigative economies and to increase bargaining power. The substantive policies underlying the causes of action under which class suits are brought are no more relevant than any other institutional values to the decisions of individuals as to whether to consent to class suit.

The problem of reconciling substance and procedure in class actions first became apparent to courts as they attempted to move beyond the confines of the community of interest theory. If class suit were allowed only where “one right” was at issue, the procedure for trying a class action need differ in no remarkable way from the procedure followed in any other lawsuit. Clearly, the class suit concerned only one set of issues, which could be argued by class representatives and the class opponent, and tried by a court, in the usual manner. Where a substantive cause of action treated rights as several rather than joint, however, courts found consolidated procedures troublesome. Allowing each holder of one of the aggregated claims to try his own case would be un-


\(^{110}\) Id. at 177.

\(^{111}\) See p. 1338 & note 43 supra.

\(^{112}\) Attorney assumption of notice costs, see pp. 1618–23 infra, or other devices, may reduce the burden of giving notice. In any event, the Eisen class, numbering about six million, see 417 U.S. at 166, was considerably larger than a “normal” class, see p. 1326, note 34 supra; the notice costs for even such a giant class could be reduced through subclassing, see 417 U.S. at 179–81 (Douglas, J., dissenting in part). See also id. at 179 n.16; pp. 1498–1504 infra (manageability).
manageable; \(^ {113} \) deciding all claims on the basis of a trial of a representative claim appeared to be inconsistent with the cause of action's recognition of individual rights.\(^ {114} \) The bias against consolidated or class treatment of tort claims, a continuing legacy of the Pomeroy-Tribette controversy, originally reflected precisely these concerns.\(^ {115} \)

Given full scope, the consent theory in effect delegates to class members the responsibility for deciding whether class procedures are consistent with the policies underlying a given cause of action. If the only substantive policies class procedures might distort were policies having to do with protecting the rights of class members, such a delegation — an extension of the consent theory's waiver approach to fairness — could perhaps be justified. In fact, however, class procedures are just as likely to interfere with policies grounded in legislative concern for class opponents or third parties. Where interests other than the interests of class members are at stake, the consent theory's unlimited delegation of responsibility to class members is plainly improper. It is perhaps for this reason that the consent theory is not, in practice, given full rein. Rule 23 conditions authorization of common question damage actions under section (b)(3) upon a judicial finding that common questions "predominate," \(^ {116} \) and thus provides courts with an opportunity to check the fit of class procedures with substantive values.\(^ {117} \) Such judicial intervention, however,

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\(^ {113} \) See, e.g., Southern Steel Co. v. Hopkins, 174 Ala. 465, 479, 57 So. 11, 15 (1911).

\(^ {114} \) See, e.g., Cumberland Tel. & Tel. Co. v. Williamson, 101 Miss. 1, 14-15, 57 So. 559, 562 (1910).

\(^ {115} \) The Advisory Committee Note on revised rule 23 opposed mass tort class actions:

A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.


\(^ {116} \) Fed. R. Civ. P. 23(b)(3).

\(^ {117} \) See pp. 1504-16 infra (predomination).
cannot be explained under the consent theory; to make room for it, a new approach is needed.

B. A Substantive Theory of Class Actions

A third theory of the class suit is suggested by current practice. In outline form the theory can be stated as follows:

Class action procedures assist courts in giving full realization to substantive policies in two ways. First, to the extent that they open courts to claims not ordinarily litigated, class actions enable courts to enforce policies underlying causes of action in circumstances where those policies might not otherwise be effectuated. Second, to the extent that they enable courts to see the full implications of recognizing rights or remedies, class action procedures assist courts in judging precisely what outcomes of litigation would best serve the policies underlying causes of action. Class action procedures are fair because courts are more likely to see both the significance of the claims of a plaintiff and the consequences of imposing liability upon a defendant, and thus are more likely to arrive at a substantively just conclusion. Through class action procedures, moreover, the interests of absentees, who may be affected by the litigation regardless of its class nature, are given representation in the litigative process, and thus are more likely to be given their due.

This substantive theory of class actions has been developed in response to issues of substantive and institutional distortion, largely ignored by defenders of the class action mechanism, which contemporary critics of class actions persistently raise. This Part begins by outlining the attacks made upon the modern class action and the chief responses to them. An analysis of the inappropriateness of the usual defenses of class actions, given the constraints of the Rules Enabling Act,\textsuperscript{118} leads to a discussion of the assistance class actions give to the full realization of substantive policies. This discussion develops an analytic framework in which contemporary class actions and the Rules Enabling Act may be accommodated and concludes with a theory of fairness that complements the full realization justification for class suits.

1. Class Actions and Their Critics: The Problem of Justifying Increased Access to Federal Courts. — One of the most significant functions contemporary class actions serve is to lower barriers to access to federal courts. Class suit generalizes the benefits an individual obtains from legal services by making them

available to others similarly situated. By allowing attorneys' fees to be computed on the aggregate of benefits thus bestowed, the class action can break the connection between access to courts and financial wherewithal. In damage class actions, attorneys' fees are paid not by the named plaintiffs, but by the class as a whole, in the form of a pro rata deduction from the class recovery. Since the fee is contingent upon victory, no class member loses anything from class suit; since the fee is shared, no single class member pays more than a small part of the costs of an attorney. Class suits may not only reduce the cost of attorneys for particular individuals, but may also increase the fees which attorneys recover, thus creating an extra incentive for attorneys to take class suits. In both damage actions and suits for injunctive relief brought under statutes providing for the award of fees, the formal criteria for fee awards may take special account of the class character of the suit; in any event, the magnitude of the benefit a class suit confers may prompt a judge to be particularly generous in fixing an attorney's fee.

Taking as their paradigm damage class actions grouping large numbers of individually small claims, critics have argued that the contemporary class action has performed the access func-

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119 In addition to increasing access to the courts, the class action may also make it more likely that a suit will be fully litigated. Because it is improper for a class representative to settle a suit unless the settlement is fair to the whole class, the representative is unlikely to be able to "sell out" the class, thereby creating the classic strike suit situation. See generally pp. 1536-76 infra. Moreover, with respect to injunctive relief, the effect of the class judgment is to give all members of the class standing to initiate contempt proceedings against the class opponent, see, e.g., Spangler v. Pasadena City Bd. of Educ., 384 F. Supp. 846, 848-49 (C.D. Cal. 1974), aff'd, 519 F.2d 430 (9th Cir.), vacated on other grounds, 96 S. Ct. 2697 (1976), and thus to limit the class opponent's ability, after the conclusion of the litigation, to reach a settlement nullifying the injunction. Finally, the class suit insulates the individual plaintiff from events that would normally moot his particular claim. See Franks v. Bowman Transp. Co., Inc., 96 S. Ct. 1251 (1976); Sosna v. Iowa, 419 U.S. 393 (1975); pp. 1464-66 & notes 53-63 infra.

120 See pp. 1604-18 infra.

121 Even if the fee is not fixed as a percentage of the class recovery, see p. 1612, note 146 infra, reference to an hours-worked standard in fee calculation, see pp. 1611-15 infra, should cause attorneys' fees to be higher in class litigation than in ordinary suits, given the greater efforts of class attorneys.

122 For indirect evidence that class suits may be better rewarded than ordinary litigation, see Evans v. Sheraton Park Hotel, 503 F.2d 177, 188 (D.C. Cir. 1974) (vacating award of nominal attorneys' fees in Title VII case in which class suit was not allowed and suggesting that in sex discrimination suits there is no real distinction between class and non-class litigation).

tion too well. The individual claims aggregated in class actions, critics contend, are typically de minimis; the injuries such class actions compensate would not be regarded by class members as significant, and thus should not serve as a pretext for the expenditure of scarce judicial resources. Moreover, because class opponents must confront the possibility of tremendous aggregate judgments, the likelihood increases that class opponents will choose to settle even apparently frivolous suits rather than risk potentially catastrophic litigation. Only the attorney, critics conclude, benefits from class action litigation.

Defenders of the contemporary class suit respond with two arguments. It is by no means clear, they contend, that the claims class actions aggregate are insignificant. The costs of litigating complicated questions of federal law may be quite high. Since an individual’s claim must exceed the cost of litigation to make individual suit rational, individuals who have suffered inarguably hurtful losses may be left without remedy if forced to act alone. The second argument draws on economic theory. Class actions, it is argued, enable holders of small claims to share the transaction costs of asserting a cause of action; because of the increased access to courts which results, class opponents are forced to con-


128 See, e.g., Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412, 414 (S.D.N.Y. 1972) (parties stipulate to $20,000 as appropriate attorney’s fee for individual Truth in Lending Act action); D. Gould, Staff Report on the Small Claims Courts 16 (National Institute for Consumer Justice, August 15, 1972) (impractical for consumers to press defective product claims below the $5,000 to $10,000 range); Pomerantz & Combe, Dialogue on Class Actions, 29 Bus. Law. 109-10 (1973) ($500 to $1,000 claim costs more than that to prosecute). See also Frankel, Amended Rule 23 From a Judge’s Point of View, 32 Antitrust L.J. 295, 298 (1966).
front the full social cost of their activities. This forced "cost-internalization" is said to promote economic efficiency.

The arguments of class action defenders are strikingly inconclusive. Analytically, it is possible to distinguish three types of individual claims class actions aggregate: the nonviable, the individually nonrecoverable, and the individually recoverable. A claim is nonviable if the expenses an individual would incur in asserting a right to a share of a class judgment would be greater than his expected share of the recovery. A claim is individually nonrecoverable if it would not justify the expense to an individual of independent litigation but would justify the lesser expenditure required to obtain a share of a class judgment. A claim is individually recoverable if it warrants the costs of separate litigation; that is, if an action to recover the claim would be economically rational regardless of the availability of class action procedures. Critics of class actions tend to focus on the presence of nonviable claims, and the absence of individually recoverable claims. Defenders emphasize the opportunity for recovery class action procedures afford holders of individually nonrecoverable claims. Thus, on the question of whether the expenditure of judicial resources in class suits is justified, the dispute is ultimately both factual and normative. Its resolution requires, first, information so far unobtained as to the distribution of benefits from class actions and, second, a judgment as to whether such benefits as are conferred justify the expenditure of judicial resources and the costs of holding the class opponent liable.

The cost-internalization case for class actions rests upon a similarly complex series of judgments. First, it must be determined that placing costs on class opponents will in fact result in a more efficient allocation of social resources than would be produced by placing costs on holders of small claims. Since transactions costs between a class and a class opponent may be sub-

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131 See, e.g., American College of Trial Lawyers, supra note 124, at 22-25; Blechman, supra note 124, at 398-99; Handler, supra note 123, at 9-10; Simon, supra note 123, at 378-79.


133 See p. 1326, note 34 supra.
stantial, allowing costs to fall on holders of small claims may be more efficient if the small claimants have access to a less expensive means of reducing social costs than do defendants.\textsuperscript{134} Second, even if large class actions increase allocational efficiency, distributional considerations must be taken into account. Class opponents required to shoulder huge judgments may not be able to pass on all the costs; if losses rest with class members, however, they will be spread among many people.\textsuperscript{135} Although requiring class opponents to bear costs they cannot share is not necessarily socially inefficient, the dislocation cost-bearing could cause class opponents will be tolerable only if regarded as distributionally proper \textsuperscript{136} or as justified by increases in efficiency. Third, the "chilling effect" upon class opponents of potentially crippling losses must be considered. The combination of huge judgments and high litigation costs may cause class opponents to protect themselves by refraining not only from socially inefficient activity but also from activity which is in fact socially desirable.

The arguments of class action defenders are vulnerable to attack not just because they rest upon unverified factual and normative assumptions but because they assume that federal courts engaged in procedural decisionmaking may independently look to the same criteria Congress employs in legislating. The Rules Enabling Act provides that rules of civil procedure "shall not abridge, enlarge or modify any substantive right . . . ." \textsuperscript{137} Traditionally, federal courts and their rulemaking delegates have attempted to keep within the confines of the Act by sharply distinguishing questions of substance and procedure: \textsuperscript{138} typically, procedural issues are resolved by reference to criteria which are substantively neutral.\textsuperscript{139} Thus, for example, the Rules Advisory

\textsuperscript{134} See generally Coase, The Problem of Social Cost, 3 J. LAW & ECON. 1, 15–16, 18 (1960).


\textsuperscript{136} Cf. Reserve Mining Co. v. EPA, 514 F.2d 492, 535–36 (8th Cir. 1975) (refusing to issue injunction against polluting plant because of social cost to employees who would be put out of work).


\textsuperscript{139} Professor Ely has defined a procedural rule as "one designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes." Ely, The Irrepressible Myth of Erie, 87 HARV. L. REV. 693, 724 (1974.) An emphasis on fairness and efficiency is characteristic of the justifications offered for the 1966 revisions of the Federal Rules of Civil Procedure. For example, amended rule 12(g), concerning consolidation of defenses, was advocated as working "against piecemeal consideration of a case," Advisory Comm. Note, 39 F.R.D. 78 (1966); amended rule 12(h), dealing with the waiver or preservation of certain defenses, was justified as reinforcing the policy of "forbidding successive motions," id., as a means to avoiding delay in bringing certain defenses before the court,
Committee justified the treatment which revised rule 23 accords common question damage class actions in terms of the values of economy and uniformity of treatment. Such neutral values are not apposite in the context of contemporary class actions, which do not so much consolidate claims courts would hear in any event as bring into court claims that would otherwise go unheard.

It has been argued that the irrelevance of traditional rule-making values suggests that contemporary class actions violate the Rules Enabling Act. The Act, however, does not mandate that federal courts ignore substantive considerations in making procedural decisions, but rather requires only that, if courts are to apply substantive criteria, they do so in a way that will not distort the substantive choices Congress has independently made. It is clear, however, that resort to criteria like compensatory

See id. at 79, and a surer way of putting a party "on fair notice of the effect of his actions and omissions," id.

140 See id. at 102-03. See also note 39 supra.

141 See Landers, Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma, 47 S. Cal. L. Rev. 842, 860 (1974). This argument should be distinguished from a second contention of class action critics, that judges must inevitably alter substantive law in order to make class actions manageable, see, e.g., Simon, supra note 123, at 386, which is considered later in this Part, see note 182 infra.

142 The interaction of substantive and procedural analysis which the Rules Enabling Act allows has been obscured by the attention given to the implications of the Act in diversity cases, where under the Erie doctrine federal courts are required to take state substantive law essentially as they find it, and are thus unconstrained only in their consideration of procedural issues. Professor Ely, for example, although arguing contra Sibbach v. Wilson & Co., 312 U.S. 1 (1941), that the Enabling Act requires federal courts not only to determine if federal rules are "procedural" but also to judge whether such rules "supplant" state substantive policies, see Ely, supra note 139, at 722, treats the substantive inquiry, because it arises in the diversity context, in a choice-of-law manner. The analysis involves a search for conflicts between a federal rule and state law; if a conflict is found, it is resolved not by inquiring whether either the federal rule or state law can be adjusted to a point of accommodation, but by categorizing the state law as "procedural," in which event the federal rule prevails, or as "substantive," in which case state law governs.

Such inflexibility is not necessary in the adjudication of federal questions, since all federal law, substantive and procedural, is equally open to judicial shaping. Snyder v. Harris, 394 U.S. 332 (1969), involving a question as to the relationship of rule 23 and the jurisdictional amount requirement Congress has attached to its grant of diversity jurisdiction, see 28 U.S.C. § 1332 (1970), provides a paradigmatic illustration. There, in deciding whether it was proper in (b)(3) suits to aggregate claims in order to establish the requisite amount in controversy, Justice Black's majority opinion, although holding that the issue was to be resolved under the statute rather than under rule 23, see 394 U.S. at 336, recognized the legitimacy, given the 1966 amendment of the rule, of an inquiry into whether the statute ought to be reinterpreted, and, although holding that the statute's interpretation ought not to be changed, see id. at 338-40, noted that the statutory policy would not in any event seriously undermine the functioning of the rule, see id. at 341. More recently,
sation and cost-internalization to defend class actions, without regard to the policies of the causes of action that class actions enforce, is inconsistent with the Act. If contemporary class actions are to be justified, it must be in a way more attentive to the interaction of judicial and legislative policymaking.

2. Class Actions as a Means to Full Realization of Substantive Policies: Increased Access to Courts. — The surest way to guarantee the consistency of class action procedures and substantive policies is to ground the justification for the procedures in the policies themselves. On this view, the increased access to courts that class actions make possible is justified because it allows the policies underlying the claims enforced in a class suit to be given effect in situations in which this would not otherwise be the case.

If class actions are to be substantively justified in this way, the key question becomes whether the policies underlying a cause of action are indeed furthered by class suit. In answering this question, ordinary techniques of statutory interpretation may be of little help. Some statutes, such as the Fair Labor Standards Act and the revised Truth in Lending Act, incorporate provisions regulating the use of class actions. However, Congress usually will not have considered the place of class actions in its statutory scheme. As a result, statutory language and legislative history will not be directly relevant. Judicial analysis must con-

in American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974), the Supreme Court expressly acknowledged the dialectic of substantive and procedural reasoning in Rules Enabling Act analysis in federal question cases. In American Pipe, the Court held that the commencement of a class action tolls the statute of limitations for all individuals who would have been members of the class but for the failure of the class to meet the numerosity requirement of rule 23(a)(1). Id. at 552-53; see pp. 1448-54 infra. A contrary ruling, the unanimous Court reasoned, would disserve the policies underlying federal class action procedure, see id. at 553-54; moreover, tolling of the statute of limitations in this context would not be inconsistent with the values furthered by a time bar, see id. at 554-55. Class opponents argued that the Rules Enabling Act prohibited courts from adopting procedural rules that would extend a congressionally-enacted, “substantive” statute of limitations. See id. at 556. Justice Stewart’s opinion, however, concluded that under the Rules Enabling Act the supposed substantive character of the adjusted statute of limitations was not by itself dispositive: “The proper test is not whether a time limitation is ‘substantive’ or ‘procedural,’ but whether tolling the limitation in a given context is consonant with the legislative scheme.” Id. at 557-58. Since the tolling rule for class actions which American Pipe adopted was consistent with statute of limitations policies, the Rules Enabling Act was not violated. See also Brennan v. Machinists Local 50, 503 F.2d 800 (9th Cir. 1974). 143 29 U.S.C. § 216(b) (1970). See generally Foster, Jurisdiction, Rights, and Remedies for Group Wrongs Under the Fair Labor Standards Act: Special Federal Questions, 1975 Wis. L. Rev. 295. 144 15 U.S.C. § 1640(a) (Supp. IV, 1974).
cern itself chiefly with the policies which may be seen to underlie a given cause of action.\textsuperscript{145}

More specifically, substantive analysis of the appropriateness of class actions requires a precise understanding of the policies shaping the relationship of a cause of action and the statutory directive it enforces. One set of policies may be called remedial and concerns the purposes a cause of action serves: for example, compensation, disgorgement of unjust enrichment, or deterrence of violations in the first place. Were remedial policies the only ones to be considered, class suits, given their effect of increasing access to courts, and thus statutory enforcement, would appear to be almost invariably consistent with substantive policies. There may, however, be a second set of policies expressed in the elements of a cause of action. These policies, which may be called structural, encompass values such as precision or ease of self-application and reflect the impact the elements of a cause of action have upon the operational meaning of a statutory directive.

The substantive propriety of class suit turns on the compatibility of class procedures with both the remedial and the structural policies of a cause of action. For example, it has been argued that courts, seeking to further the perceived remedial purposes of a statute, have redefined elements of liability to remove "uncommon" questions that would limit the usefulness of the class action device.\textsuperscript{146} The compatibility of such a generalization of the circumstances of liability with underlying policies is a matter that can be determined only on a case-by-case basis. It is certainly possible, however, that generalization would conflict with a statute's commitment to precision or individual accountability.\textsuperscript{147} Judgments as to the appropriateness of class suit

\textsuperscript{145} In judging the propriety of class actions, courts ought to adopt essentially the same approach that the Supreme Court has relied upon in deciding whether to imply private rights of action under federal regulatory statutes. Although the Court has at times relied upon statutory language and legislative intent as an initial basis for refusing to imply a cause of action, see, e.g., National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 456-61 (1974), in general the Court has treated statutes not as themselves determinative of the implication question but as the sources of the policies which implication of a private cause of action may be found either to frustrate, see, e.g., SIPC v. Barbour, 421 U.S. 412, 421-23 (1975); National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, supra at 461-64, or further, see, e.g., Allen v. State Bd. of Elections, 393 U.S. 544, 556-57 (1969); J.I. Case Co. v. Borak, 377 U.S. 426, 431-33 (1964). See also Cort v. Ash, 422 U.S. 66, 84 (1975) (refusal to imply private right of action adding nothing to furtherance of statutory purpose). See generally Comment, Private Rights of Action Under Amtrak and Ash: Some Implications for Implication, 123 U. Pa. L. Rev. 1392, 1422-37 (1975).

\textsuperscript{146} See generally Comment, The Impact of Class Actions on Rule 10b-5, 38 U. Chi. L. Rev. 337 (1971).

\textsuperscript{147} See pp. 1504-16 infra. Similarly, use of classwide mechanisms for the distribu-
may require not only recognition of both remedial and structural policies but awareness of the effects of the policies' interaction. For example, a complex mode of proof may make a liability determination quite exact, but to the extent that proof is complex, the unpredictability of the outcome of the suit may increase. Given the large liability class suits may threaten, such uncertainty could give rise to a dynamic encouraging class opponents to settle class suits or simply to forebear from all conduct even arguably prohibited. The ultimate effect, therefore, may be to exaggerate a remedial policy of deterrence to the point that a statute's effective scope is extended beyond its literal reach—in other words, overdeterrence.

Possibly because courts have accepted the class suit under rule 23 as a device that merely creates a more efficient forum for litigation without affecting the substantive law applied in a suit, case law considering the effect of the class device on substantive policies is limited. Because of this, and because this Note is not concerned with specific substantive applications, further analysis of the interaction between remedial and structural policy and the class suit will be limited to illustration. The clearest examples of situations in which courts have apparently sensed a need to reconcile statutory policy and the class suit involve statutory penalty cases brought under the original Truth in Lending Act and the antitrust laws.

Particularly acute problems of distortion are likely to arise where class actions are brought to enforce causes of action imposing a penalty for statutory violations. One reason for including a penalty provision in the elements of a cause of action is to achieve artificially the deterrent effect of a more uniform enforcement of a statutory directive. Class actions also serve to increase the uniformity of a statute's application, by transforming a suit brought by a single individual into a suit brought on behalf of a class of similarly situated individuals. The increased deterrent effect class actions create may intensify the already heightened deterrent effect of a penalty provision, to a point perhaps counterproductive to statutory policies.  

Class actions under the original Truth in Lending Act provide an obvious example. Until recently modified, the Truth in

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148 In this regard, it is interesting that § 901(b) of the recently enacted New York class action law, N.Y. CIV. PRAC. LAW & RULES §§ 901–09 (McKinney Supp. 1975–76), denies class treatment to actions seeking to recover a statutory penalty or a minimum measure of damages unless such a class suit is expressly authorized by statute.

Lending Act made no provision for class actions but did guarantee individuals suing under the Act a minimum recovery of $100 as well as attorneys' fees.\(^\text{150}\) Class suits aggregating the $100 claims of credit card holders threatened mass credit companies with enormous liabilities for even technical violations.\(^\text{151}\) In the leading case of *Ratner v. Chemical Bank New York Trust Co.*,\(^\text{152}\) however, Judge Frankel in effect closed off the Truth in Lending Act to class actions.\(^\text{153}\) Even though Judge Frankel attempted to limit the scope of his decision to the facts of *Ratner*,\(^\text{154}\) at the center of his argument was a conclusion which moved beyond those facts to encompass Truth in Lending class actions generally: class actions were "essentially inconsistent" with the remedy provided by Congress since they would carry the effect of that remedy "to an absurd and stultifying extreme . . . ."\(^\text{155}\)

Court decisions concerning the propriety of class actions under the antitrust laws afford a more complex illustration of the interaction of class actions and the remedial and structural policies underlying statutory causes of action. Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws"


\(^{153}\) Although there may have been a backlash developing at about the time Congress amended the Truth in Lending Act, see, e.g., Haynes v. Logan Furniture Mart, Inc., 503 F.2d 1161, 1164-65 (7th Cir. 1974); Note, Recent Developments in Truth in Lending Class Actions and Proposed Alternatives, 27 STAN. L. REV. 101, 110 n.53 (1974), most courts hearing Truth in Lending Act cases appear to have treated Judge Frankel's *Ratner* opinion as decisive on the question of the propriety of class suits. E.g., Garza v. Chicago Health Clubs, Inc., 56 F.R.D. 548, 549 (N.D. Ill. 1972); see Fisher, From *Ratner* to *Qui Tam*: Truth-in-Lending Class Action Developments, 24 HASTINGS L.J. 813, 833-34 & n.121 (1973); Note, supra note 151, at 1412.

\(^{154}\) See 54 F.R.D. at 413. He noted that the defendant in *Ratner* had already ceased, albeit inadvertently, the conduct in violation of the act, id. at 414, and concurred in the defendant's observation that the sought-for $13 million class recovery would be a particularly "horrendous, possibly annihilating punishment" given "at most a technical and debatable violation of the Truth in Lending Act," id. at 416.

\(^{155}\) Id. at 414. The 1974 amendments to the Truth in Lending Act expressly recognized the possibility of class actions under the Act, see 15 U.S.C. § 1640(a)(2)(B) (Supp. IV, 1974), but declared that the $100 minimum recovery provision, see id. § (2)(A), did not apply in class suits, see id. § (2)(B), and limited the amount of the recovery in class suits to "the lesser of $100,000 or 1 per centum of the net worth of the creditor," id.
may recover treble damages, costs, and attorneys' fees.\textsuperscript{156} Like the Truth in Lending Act, the Clayton Act thus establishes a penalty.\textsuperscript{157} Courts, however, have not banned antitrust class actions altogether. Rather, they have tied the propriety of class suit to the particular cause of action under which suit is brought. The polar cases are set by class suits charging price fixing, which are almost always allowed to go forward,\textsuperscript{158} and class suits claiming monopolization, which are generally disallowed.\textsuperscript{159} The courts themselves have usually distinguished between price-fixing and monopolization suits by focusing on the propriety of classwide modes of proof in the two contexts.\textsuperscript{160} The treble damages provi-


\textsuperscript{157} See Lyons v. Westinghouse Elec. Corp., 222 F.2d 184, 189 (2d Cir.), cert. denied, 350 U.S. 825 (1955) (L. Hand, J.) ("The remedy provided is not solely civil; two thirds of the recovery is not remedial and inevitably presupposes a punitive purpose"). For a more detailed discussion of the policies underlying the treble damages provision, see pp. 1533-35 infra.


\textsuperscript{160} Although price-fixing class actions have been generally allowed, such suits have not been received favorably by the courts where the class alleged a conspiracy on the part of a large number of defendants. Methods of proving conspiracy which do not require individualized investigations of such defendants' acts have been held to be insufficient as a matter of antitrust law; given the need for separate showings as to each defendant, class suit becomes improper. \textit{See}, e.g., Kline v. Coldwell, Banker & Co., 508 F.2d 226, 230-33 (9th Cir. 1974), cert. denied, 421 U.S. 963 (1975); \textit{In re} Hotel Telephone Charges, 500 F.2d 86, 89 (9th Cir. 1974); Ralston v. Volkswagenwerk, A.G., 61 F.R.D. 427, 429-31 (W.D. Mo. 1973). In the monopolization cases, courts have seen the chief issue to be that of impact — the Clayton Act's requirement that individuals seeking to recover treble damages show that they were injured in their "business or property" by violation of the antitrust laws, \textit{see} 15 U.S.C. § 15 (1970). Proof of price-fixing is itself proof of injury, \textit{see} San Antonio Tel. Co. v. American Tel. & Tel. Co., 68 F.R.D. 435, 439 (W.D. Tex. 1975); once price-fixing is established, a plaintiff need only show the amount of damages in order to recover, \textit{see} Philadelphia v. American Oil Co., 53 F.R.D. 45, 67 (D.N.J. 1971). By contrast, proof of monopolization is not itself proof that class members were injured; as a result, individual showings of injury by each class member cannot be dispensed with, and class suit becomes improper. \textit{See}, e.g., Yanai v. Frito Lay, Inc., 61 F.R.D. 349, 351-52 (N.D. Ohio 1973); Shaw v. Mobil Oil Corp., 60 F.R.D. 566, 569 (D.N.J. 1973). For more detailed discussion
sion has not been treated as relevant to the issue of the relative propriety of price-fixing and monopolization class suits, and no attempt has been made to suggest that the concern for over deterrence is of a different intensity in the two contexts.

Significantly, however, the differences courts see in price-fixing and monopolization cases do indeed track important differences in the likelihood and consequences of overdeterrence—differences attributable to structural features of the two causes of action. The possibility that individuals will be overdeterred by the prospect of price-fixing class actions is limited given that the elements of a price-fixing violation are few, and that the acts constituting the violation are initiated by the individual charged. Threatened with a price-fixing class action, an individual may with relative ease determine the likelihood of the suit’s success, and thus reduce the risk of settling a frivolous claim. In con-

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161 Price-fixing in violation of § 1 of the Sherman Act, 15 U.S.C. § 1 (1970), is established by proof of the existence of a contract, combination, or conspiracy for the purpose of fixing prices which in fact did have an effect on price structure. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 219-20 (1940). The first two elements of liability, concerning the existence and purpose of concerted action, obviously turn on the meaning to be attributed to the defendants’ own acts. The third element, having to do with the effect of the defendants’ conduct, on its face appears to concern factual questions as to which defendants are likely to have no better information than anyone else. The Socony-Vacuum decision, however, substantially diminished the significance of the effect requirement by treating effect as relevant only where defendants’ conduct did not involve overt price-fixing, see id. at 219; once price-fixing is established, its impact on the market is irrelevant: “Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces.” Id. at 222; see id. at 224 & n.59. See generally Rahl, Price Competition and the Price Fixing Rule—Preface and Perspective, Symposium on “Price Competition and Antitrust Policy,” 57 Nw. U.L. Rev. 137 (1962).

162 Defendants are not in the position of having to rely only upon protracted and expensive trial procedures to screen out frivolous claims. In antitrust actions, as in other suits, summary judgment is available to short-circuit litigation of clearly nonmeritorious suits. Although it has traditionally been thought that “summary procedures should be used sparingly in complex antitrust litigation,” Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 473 (1962), in recent years courts, while repeating the maxim, have not hesitated to make use of summary judgment to dispose of nonmeritorious antitrust actions, see, e.g., Solomon v. Houston Corrugated Box Co., 526 F.2d 389, 393-94 (5th Cir. 1976); Clark v. United Bank of Denver Nat’l Ass’n, 480 F.2d 235, 240 (10th Cir.), cert. denied, 414 U.S. 1004 (1973), including price-fixing actions, see Scranton Constr. Co. v. Litton Indus. Leasing Corp., 494 F.2d 778, 782-83 (5th Cir. 1974), cert denied, 419 U.S. 1105 (1975). See also P. Areeda, ANTITRUST ANALYSIS § 168, at 92 (2d ed. 1974).
The elements of the monopolization offense are greater in number and less clearly derive from acts within an individual's control. Proof may be retrospective, and liability can turn as much on an assessment of a situation as on identification of particular acts. Uncertainty, therefore, is greater and thus the likelihood increases that an individual wary of monopolization class suits will overreact by avoiding conduct not in fact violative of the antitrust laws and by settling class actions in fact frivolous. The costs of overdeterrence may also be greater in the monopolization context. An individual concerned by the prospect of price-fixing class actions would avoid any possibility of appearing to depart from market pricing, a course of conduct not necessarily socially undesirable. An individual fearful of monopolization class actions, however, might refrain from expansionary practices which are in fact socially beneficial.

The full implications of the substantive mode of analysis necessary to square class actions increasing access to federal courts with the Rules Enabling Act should not go unrecognized. Substantive analysis narrows the frame of reference for debate as to the propriety of class actions: the issue no longer is the merits of the class suit in general, but the acceptability of class actions with respect to a given cause of action. As a result, questions of class action procedure must be seen as more a matter for individualized adjudication than rulemaking. This is not to say that a class ac-

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tion rule is unnecessary if the justification for class suit is grounded in substantive law. A rule would still serve the critical function of providing a point of departure. In effect, a rule could be used by courts as a picture of a "normal" class action, a depiction of the process of class litigation which courts could treat as a benchmark in shaping particular class suits to fit individual causes of action.164 If class suits are to be justified substantively, however, a class action rule cannot be applied mechanically. The trial judge, and not the rulemaker, must bear chief responsibility for the design of class action procedures.165

3. Class Actions as a Means to Full Realization of Substantive Policies: Heuristic Functions. — Class actions do not simply increase the opportunities for federal courts to enforce statutory directives but also assist the courts in determining precisely what the implications of those directives are. A class action calls to the attention of a court the interests of individuals other than the immediate parties which, in common with the interests of one or the other of the named parties, will be affected by decision of the issue before the court. The existence of these absentee interests, whether they reinforce or diverge from the interests of a named party, may be a relevant factor in the court's decision on the merits of a case or award of a remedy. A judge attentive to the considerations underlying statutory directives might consider absentee interests in any event; the class action, however, functions as a heuristic device, reminding the judge that resolution of the dispute between the parties may affect, and correspondingly be affected by, the interests of individuals not before the court.166

(a) The Heuristic Function and Necessity: Class Actions and Limited Funds. — The heuristic function of class actions is most apparent in cases where relief awarded to the immediate parties would obviously affect the interests of absentees or would be obviously affected by the actions of absentees. For example, where a number of individuals claim rights to a share of a fund too small to satisfy in full every individual's claim, courts readily allow a class action to be brought to allocate the fund among the competi-

164 This is essentially the approach taken in California. See Comment, California: A Flexible Scheme, Class Action Symposium, 68 NW. U.L. REV. 1000, 1024 (1974).

165 Because of its largely discretionary structure, rule 23 may in practice effect a significant delegation of power to trial judges. See Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39, 39 (1967).

166 The notion of the heuristic function of the class suit is developed in several opinions of Chief Judge Clark, who made use of the idea as an explanation of the purpose served by the "spurious" class suit under the 1938 version of rule 23. See Nagler v. Admiral Corp., 248 F.2d 319, 327 (2d Cir. 1957); All American Airways v. Elderd, 209 F.2d 247, 248 (2d Cir. 1954). See also 3B J. MOORE, supra note 63, ¶ 23.10 [1], at 23-2609 to 23-2610.
A series of suits by individual competitors might result in a situation where each competitor possessed the right to claim in full against the fund, putting the holder of the fund in the quandary of having to decide which of a number of equally binding judgments to obey. Moreover, since the fund is limited, each competitor would be affected by the outcome of every other competitor's lawsuit. To whatever extent recovery rights are awarded one competitor, the difficulties other competitors would face in recovering would be increased.

It has been suggested that in this situation class suit is somehow a matter of necessity. The class action, however, is not in fact the only solution to the limited fund problem. As a matter of substantive policy, a "first come, first served" rule might be deemed superior. Even if substantive policy is better served by pro rata distribution, class actions are not strictly necessary. If the court hearing the claim of the first competitor took cognizance of the entire situation and applied allocative criteria appropriate for the entire situation to determine the extent of each claimant's share of the fund, application of the principle of stare decisis in cases brought by the other competitors could lead to a situation free of difficulty. It is not clear, therefore, in what sense class suit here may be said to be "necessary." The justification for use of the class action form in this setting is in fact more modest. By setting out before the court hearing the first competitor's claim the relationship among the claimants, the class action calls to the attention of the court its responsibility in deciding the claim to work out a satisfactory solution to the situation.


See generally Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433, 446-48 (1960). Stare decisis, of course, is relevant only where litigation turns on questions of law or mixed questions of law or fact. Presumably, the question of the measure of relief—the central question in the limited fund situation—falls into one or the other of these categories.

The argument for a heuristic rather than a necessity interpretation of the limited fund class action is not merely that class suit is not strictly necessary in the limited fund situation. It may very well be that the res judicata effect a class suit may afford, but see pp. 1395-400 infra, would provide greater certainty than stare decisis, and on this basis ought to be preferred. The focus of the necessity concept, however, obscures the fact that, at least as to relief, class members are in a state of mutual opposition: each benefits from the other's loss. The fact of mutual antagonism was clear to community of interest theorists, see note 16 supra; indeed, the point of Langdell's article on creditor's bills was to show that a class action solution to the limited fund problem could be satisfactorily derived from equitable principles without resort to class action doctrine, see Langdell, supra note
(b) The Relevance of the Heuristic Function to Issues of Both Relief and Liability. — The limited fund class action calls the attention of a court to the context in which individual relief is sought, and thus increases the likelihood that the individual relief the court awards will be meaningful. The heuristic value of the class suit in other contexts may derive from the clarity with which the class action reveals that, even where a right is individual, the appropriate remedy may not be. For example, a single individual has standing to challenge racially discriminatory practices burdening a group of which the individual is a member. Relief from racial discrimination, however, may require court orders restructuring the way the discriminator deals with the group as a whole. Influenced by traditional doctrines limiting the scope of relief to the scope of the right, a court hearing only the claim of a single individual may be reluctant to award such far-reaching relief. The class action, by aggregating the claims of discrimination victims, reestablishes the symmetry of right and remedy. It assists the court in seeing not only the differences in situation of individual class members which may affect the details of structural relief, but also the generality of the challenged discriminatory practice that makes structural relief appropriate in the first place.

Class characteristics may also be relevant to adjudication of the merits of a claim. Class actions, therefore, can serve a heur-

9. From this perspective, the limited fund suit is analogous to school desegregation suits, which under rule 23 would fall into the separate (b) (2) category, see Advisory Comm. Note, 39 F.R.D. 102 (1966), but which may give rise to similar conflicts problems at the relief stage, see, e.g., Calhoun v. Cook, 522 F.2d 717, 718 (5th Cir. 1975).

171 See, e.g., Jenkins v. United Gas Corp., 400 F.2d 28, 33 (5th Cir. 1968); Potts v. Flax, 313 F.2d 284, 289-90 (5th Cir. 1963).

172 See, e.g., Rogers v. International Paper Co., 510 F.2d 1340, 1356-57 (8th Cir.), vacated on grounds not here relevant, 96 S. Ct. 19 (1975); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 243-63 (5th Cir. 1974).


175 Indirect evidence of the usefulness of the class suit in connecting right and remedy is provided by appealability doctrine: a federal district court's refusal to allow a suit for injunctive relief to proceed as a class action is open to interlocutory appeal under 28 U.S.C. § 1292 (a) (1) (1970) as an order "modifying" or "refusing" requested injunctive relief. See, e.g., Price v. Lucky Stores, Inc., 501 F.2d 1177, 1179 (9th Cir. 1974); Yaffe v. Powe, 454 F.2d 1362, 1364-65 (1st Cir. 1972).

176 In some circumstances, the effect of the "case or controversy" requirement of article III may be to make a class suit a more appropriate forum than an individual suit for seeking certain forms of injunctive relief.
istic function even where the relief afforded could be framed to affect only the situation of an individual claimant. The usefulness of the class action form in this context does not depend upon whether a court ultimately decides to allow a class suit to go forward. For example, a court asked to hear a class suit brought under rule 10b-5 on behalf of open market investors claiming injury because of material misrepresentations by the class opponent would have to decide, before it could allow the suit to go forward, whether a showing of material misrepresentation was sufficient to make out a claim under rule 10b-5, or whether the cause of action rather required each injured investor to show actual reliance upon an alleged misrepresentation. In deciding this substantive issue, the court might find relevant the characteristics of the class bringing suit. The size of the class, the loss claimed by individual class members, and the impact of liability upon the class opponent, would give the court a basis for gauging the extent to which adoption of a materiality requirement would, on the one hand, further a policy of compensating the victims of securities fraud or, on the other hand, increase the deterrent effect of rule 10b-5 to the point that the operation of the securities market would be undesirably constrained. Thus, even if the court concluded that the substantive policies shaping the rule 10b-5 cause of action dictated a requirement of actual reliance, and therefore that a class of investors who could show only a material misrepresentation could not bring suit, the class action form would have served a heuristic function.

177 17 C.F.R. § 240.10b-5 (1975).
181 In fact, a showing of reliance probably would not be required in this context. See Blackie v. Barrack, 524 F.2d 891, 905-08 (9th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3518 (U.S. March 5, 1976) (No. 75-1258); Note, supra note 179, at 592.
182 The class suit may thus be seen as a way of calling to the attention of judges the full consequences of their substantive lawmaking which might otherwise be obscured by a case-by-case common law approach. However, if the heuristic function is to be served, and subliminal shifts in substantive law, see Comment, supra note 146, at 347, 345, possibly inconsistent with the Rules Enabling Act, see Note, supra note 174, at 597 n.65, avoided, class action procedures requiring a judge to consider the conformity of class suit with cause of action policies, see pp. 1504-16 infra, must in fact be carried out.
A number of courts have refused to treat challenges to the constitutionality of government action as class suits. In foregoing class action analysis, however, courts hearing constitutional challenges may give up an opportunity to familiarize themselves with the facts of a case which may be relevant to its outcome. Some courts have reasoned that there is no need for a class action challenge to the constitutionality of a government practice since, if the practice were held unconstitutional with respect to one potential class member, government officials would not in any event continue the practice in dealing with other potential class members. Other courts have concluded that apparent differences in the situation of potential class members cause case-by-case adjudication of constitutional claims to be preferred to class litigation. The two positions are inconsistent: If government officials will treat all potential class members identically in any event, case-by-case adjudication is a sham; if differences in the situation of class members justify a case-by-case approach, government officials may not treat all class members identically after all. If class actions were not rejected out of hand in the context of constitutional challenges, but rather their propriety judged in light of the facts of a particular case, courts would be required to determine which of the two positions was the more accurate reflection of the situation in the given case. The merits of a constitutional claim may ultimately turn in part upon the outcome of such a determina-

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184 By so doing, courts also deprive litigants of the protection against mootness the class device affords. See note 119 supra; pp. 1464-66 infra. Refusal to treat a suit challenging the constitutionality of government action as a class suit further deprives litigants of the power which widespread access to the contempt sanction gives, see note 119 supra, to insure that government does not restrict its compliance with a judgment of unconstitutionality to cover only its dealings with the immediate litigants. See generally United States ex rel. Lawrence v. Woods, 432 F.2d 1072, 1075-76 (7th Cir. 1970) (decision of lower federal court does not bind state courts except as to case at hand). The possibility of only selective respect for a judgment of unconstitutionality is by no means hypothetical. See, e.g., Doe v. Poelker, 515 F.2d 541, 547-48 (8th Cir. 1975).


tion. The requirements of procedural due process, for example, are set by a balance of factors including, *inter alia*, the functional appropriateness of particular procedures for resolution of the dispute in question. If government action indeed does not raise issues likely to differ from case to case, procedures useful for the fair decision of sharply individualized claims may not be constitutionally required.

4. Full Realization and Fairness. — Not only the justification for class suits, but the fairness of such procedures as well, may be seen to derive from the contributions class actions make to full realization of substantive policy. It is fair to adjudicate the rights of absentees through a representative process because use of that process increases the likelihood that the absentees will receive what society has decided is their due. It is not that, in the absence of class actions, the rights of the individuals who would have been class members do not exist or are not affected by others' conduct. If conduct occurs which legislation has stipulated ought not to occur, at least in the absence of settlement, the rights of individuals affected by the conduct are nullified de facto if no suit is brought. If suit is brought, although not formally on behalf of members of a class, the rights of the individuals who would have been class members are again affected. The relief awarded may alter the situations of absentees as well as the parties to the litigation; at the least, the litigation will create a precedent which may guide the conduct of the defendant in a lawsuit with the absentees, or influence the outcome of any litigation the absentees subsequently might bring. Class suits, by increasing access to courts and by positioning judges to see better the significance of claims before the courts, increase the likelihood that the rights of individuals which would be affected in any event are accorded the weight to which they are entitled by statute or constitution.

The obligation which this substantive theory of fairness imposes upon judges trying class suits is, not surprisingly, an obligation to ensure that class suits do not infringe the rights of class members. Procedural adjustments may be called for to ensure that the situations and interests of absentees will be able

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188 See also Stewart v. Wohlgemuth, 355 F. Supp. 1212, 1213 (W.D. Pa. 1972) (emphasizing "myriad of differing circumstances" in refusing to allow class treatment of suit challenging alleged conclusive presumption).

189 See p. 1349 & notes 101–02 supra.
to be identified, so that the court will be able to take absentee rights into account in determining the outcome of litigation.\textsuperscript{190} It is also possible, however, that the rights of absentees will themselves be procedural. While the substantive theory of the fairness of the class suit is instrumental, in that it takes as the measure of fairness the degree to which class procedures are a means to protecting the rights of class members, the rights that the substantive theory commits courts to protect may not be. The rights recognized by a given cause of action may include rights of participation or of individual treatment valued for their own sake.\textsuperscript{101} If absentee interests are to be given their due, class procedures may have to be designed to safeguard such procedural rights. Should no class procedure protecting procedural rights be practical, a court, to be fair to absentees, will have to determine whether the totality of the rights a cause of action recognizes, both substantive and procedural, is better served by terminating the lawsuit or by going forward in derogation of some of the rights.\textsuperscript{192}

Two general and related implications of the substantive theory of fairness should be apparent. The judge rather than the litigants is the focus of attention.\textsuperscript{193} The relative homogeneity of a class is immaterial to the fairness of class suit, at least insofar as differences within the class can be accommodated by the judge in deciding the case.\textsuperscript{194} More specific consequences of the substantive theory of fairness, as well as of the full realization justification for class suit from which the theory of fairness derives, are worked out in the next four sections of the Note. The first of these sections considers several general approaches to procedural design useful in analyzing class action issues. The three remaining sections are more concrete, considering the appropriate form for pretrial procedures in class actions, the fundamental requirements for class suits, and the proper procedures for accommodating settlement negotiations within class litigation.

\textsuperscript{190} See pp. 1474–79 infra.

\textsuperscript{191} The right of litigants to control their own lawsuits may also be seen as a more general value pervading the entire legal system and requiring judges to delegate to litigants at least some responsibility for shaping even class suit. See McCoid, supra note 46, at 714; Weinstein, supra note 168, at 438; pp. 1387–90 infra.

\textsuperscript{192} See pp. 1504–16 infra (predomination).

\textsuperscript{193} A judge, therefore, ought to be able to transform a suit into a class action on his own motion. E.g., Wilson v. Zarhadnick, 406 F. Supp. 1195, 1198 (M.D. Ga. 1975); see MANUAL FOR COMPLEX LITIGATION § 1.40, at 17 (1973).

\textsuperscript{194} See pp. 1471–88 infra.
III. DIVISION OF PRIVATE AND PUBLIC CONTROL IN CLASS ACTIONS FURTHERING PUBLIC REGULATORY POLICY

Implicit in the substantive theory of the class suit is a notion that society's interests are served when public regulatory policy is enforced by private lawsuits. And, indeed, the image of the class suit as a manifestation of a private attorney general theory of litigation is corroborated by the overwhelmingly public law basis of the substantive claims litigated in federal class actions. The substantive theory of class actions is paradoxical, for at the same time it consigns vindication of public interests to private parties, it recognizes that the public interest must be protected against the machinations of those very same parties. Within the substantive model, this tension is resolved through judicial control: The court is entrusted with protecting the class from its own champions. So long as the lawsuit is fully litigated, there is at least in theory little danger of private control subverting the public interest. But in practice, few class actions are fully litigated. Most class actions for damages are either dismissed before trial or settled, and injunctive decrees may be negotiated, even

1 See pp. 1353-72 supra.
2 See p. 1325, note 30 supra.
3 See pp. 1371-72 supra.
4 See pp. 1402-16 infra.
5 See Morris v. Burchard, 51 F.R.D. 530, 536 (S.D.N.Y. 1971) ("It is remarkable that cases which have gone through the crucible of a complete trial are not readily to be found, although Rule 23, as amended, has been in existence for about four years."); AMERICAN COLLEGE OF TRIAL LAWYERS, SPECIAL COMM. ON RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE, REPORT AND RECOMMENDATIONS 15-16 (1972) (since 1966, no antitrust or securities class action has proceeded through trial to actual determination of damages); Furth & Burns, The Anatomy of a Seventy Million Dollar Sherman Act Settlement — A Law Professor's Tape-Talk with Plaintiff's Trial Counsel, 23 DEPAUL L. REV. 865, 880 (1974) (practitioner observes that virtually all antitrust class actions are settled); Handler, The Shift from Substantive to Procedural Innovations in Antitrust Suits — The Twenty-Third Annual Antitrust Review, 71 COLUM. L. REV. 1, 8 (1971). But see North Carolina v. Chas. Pfizer & Co., 384 F. Supp. 265 (E.D.N.C. 1974), aff'd, No. 74-2154 (4th Cir., Jan. 12, 1976) (antitrust class suit brought by State of North Carolina, as part of Pfizer litigation, dismissed after trial on merits); Patrick & Cherner, Rule 23 and the Class Action for Damages: A Reply to the Report of the American College of Trial Lawyers, 28 BUS. LAW. 1097, 1108 (1973) (list of tried damage class actions). A statistical study of class actions brought within the District Court for the District of Columbia found that in 63% of the cases the certification issue was never reached and that 55% of the cases were won by the defendant on a preliminary motion, usually a motion for failure to state a claim for which relief could be granted. Of the 21 cases producing any relief, whether equitable or legal, 11 were settled, 6 were won on summary judgment motions, and 4 were won by plaintiffs after a full trial. Note, The Rule 23(b)(3) Class Action: An Empirical Study, 62 GEO. L.J. 1123, 1135-38 (1974).
if liability is adjudicated. This raises two related questions: How much judicial intervention is necessary to ensure fairness? How much private control is consistent with the purposes of the substantive model?

Such questions did not trouble traditional legal thought, which implicitly assumed that the parties would, on the basis of their business judgment and predictions about the likely outcome of trial, reach settlements that implemented underlying policy or at least did not so distort that policy as to require judicial supervision. Federal class action procedure has taken a less sanguine view of settlement, and today requires judicial approval of dismissals or compromises of class and derivative suits, and suits involving unincorporated associations. Implicit in such judicial review is the assumption that the judge will exercise some sort of control — presumably in what he defines as the interest of absentees or of the public generally — over the private arrangements of the named litigants.

How precisely the judge is to impose the “correct” degree of social control is not clear and seems to turn on a great many factors. The rulemakers’ decision to allow settlement is an indication that the parties’ interests are to count for something. The substantive law under which a suit is brought may also indicate a preference for solutions negotiated among the parties. Frequently, substantive law will dictate no more than a general form for relief, and party input and cooperation may be necessary to assure a remedy that fulfills the purposes of substantive law, not in the least because cooperation of the parties will be essential to the implementation of the decree. On the other hand, judicial

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7 Of course, settlements of lawsuits, like other contracts, could be overturned if force, fraud, or duress tainted the agreement. See generally 6A Corbin, Contracts § 1392 (2d ed. 1962). See also Colorado Milling & Elevator Co. v. Howbert, 57 F.2d 769, 771 (10th Cir. 1932) (mistake).
8 See Fed. R. Civ. P. 23(e), 23.1, 23.2.
9 See generally pp. 1536–40, 1565–76 infra.
10 Settlement is a well-recognized means for disposing of litigation, encouraged in many types of federal cases. See Pfizer, Inc. v. Lord, 456 F.2d 532, 53 (8th Cir.), cert. denied, 466 U.S. 976 (1972); Manual for Complex Litigation, pt. 1, § 1.21 (1973). See also Fox, Settlement: Helping the Lawyers to Fulfill Their Responsibility, 53 F. R. D. 129 (1971). Negotiation is also an important element in many recent federal statutes. See note 16 infra.
12 See Chayes, supra note 6, at 1292–96.
13 The judge’s need to enlist the continuing support of the parties — and particularly the defendants who are often the only group in a position to implement...
control over settlement or decree negotiation may be necessary to assure a remedy that fulfills the purposes of substantive law.14 In exercising such control prior to a determination of liability, however, a judge must be careful to avoid prejudging the merits of the dispute.15 And in any case, the judge must avoid the appearance of partiality in order not to undermine the legitimacy of the class action procedure. Some degree of private control, therefore, may be required by considerations of fairness as well as by substantive policy.

A framework for analyzing possible modes of judicial interaction with private ordering can be developed by considering four ideal types of dispute resolution mechanisms identified by legal anthropology and sociology: (1) regulation of private ordering; (2) mediation; (3) privately controlled adjudication; and (4) publicly controlled adjudication. In the first two, public control is minimal. The ultimate disposition of the dispute is shaped by the values and interests of the disputants, although the outcome will depend on their bargaining power, which will reflect at least in part the credibility of the plaintiffs’ substantive claims. In the latter two, the dispute will be resolved in accord with social norms, although in privately controlled litigation there is always the opportunity to remit the dispute to negotiation or mediation at any time the disputants so choose. These four modes are not, however, mutually exclusive: A dispute may be regulated on several levels simultaneously or successively.

A. Regulation of Private Ordering

The oldest form of dispute resolution—one that predates society—is self-help, letting the parties fight it out. Its chief

14 See pp. 1523–76 infra.
15 In Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), the Supreme Court disapproved the practice of the lower court in holding a minihearing in which the likelihood of the plaintiff’s success was determined and the cost of notice apportioned accordingly between the plaintiff and defendant. Among other reasons given by the court for disapproving this practice was the fear that such a preliminary hearing could prejudice the later trial of the case. Id. at 178. A similar problem could be raised by any attempt to determine how a settled case might have come out on the merits since it is always possible that a settlement will fail and trial will, indeed, ensue.
advantage is that it promotes pluralist decisionmaking. The state does not dictate a solution; rather the parties work out a settlement on the basis of their interests, shared expectations, and relative bargaining power. But there are two disadvantages. First, the solution that results may be irreconcilable with collective notions of justice. Second, conflict between the parties can result in violent social disruption. All societies must therefore regulate self-help to some extent. Certain weapons will be restricted or banned to prevent violence. But other non-violent weapons

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16 Pluralist decisionmaking is often chosen as a mode of implementing regulatory statutes. For example, Title VII charges the EEOC to attempt to conciliate a civil rights dispute before allowing it to go to court. See 42 U.S.C. § 2000e-5(a) (1970). See also 29 U.S.C. § 626(d) (1970) (Age Discrimination in Employment Act; Secretary of Labor to "seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion"). Similarly, the Magnuson-Moss Warranty — Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-12 (Supp. IV, 1974), mandates an attempt to reach a negotiated solution in warranty disputes, see id. § 2310, as did early drafts of the consumer class action bill, which would have required class plaintiffs to allow the defendant an opportunity to settle with class members, see Dole, The Settlement of Class Actions for Damages, 71 COLUM. L. REV. 971, 1004-05 (1971). See also Shulman, Reason, Contract, and Law in Labor Relations, 68 HARV. L. REV. 999, 1024 (1955) (arguing that courts should avoid becoming entangled in labor disputes because adjudication was inappropriate for maintaining a regime of industrial self-government).

17 Professor Eisenberg has pointed out that principles, rules, precedents, and reasoned elaboration can play a part in the negotiated resolution of disputes. See Eisenberg, Private Ordering Through Negotiation: Dispute-Settlement and Rule-making, 89 HARV. L. REV. 637 (1976). This suggests that claims of right based on social norms, such as regulatory statutes or the Constitution, could play a role in private ordering even if there was no practical access to a court to obtain a judicial sanction.


19 The absolute proscription of private violence is a fairly recent development. In more primitive times, society was content to regulate violence rather than eliminate it altogether. See P. FITZGERALD, SALMOND ON JURISPRUDENCE 90 & n. (e) (12th ed. 1966). See also Barton, Procedure Among the Ifugao, in LAW AND WARFARE 179-80 (P. Bohannan ed. 1967) (two week truce imposed on disputants in Philippine tribe, after which the "parties may fight out the dispute to suit themselves") [hereinafter cited as BOHANANN]; Pollock, The Transformation of Equity, in ESSAYS IN THE LAW 185 (1922) (lex talionsis belongs "to a much later and more rational stage of ancient law, for it presupposes a long course of bargaining and settlement of feuds . . . "). At an intermediate level, society may ritualize violence, substituting less bloody forms. Dueling may succeed murder, boxing or wrestling may supplant duelings. See 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 39-40, 50-51 (2d ed. 1898) (extrajudicial fighting); Barton, supra, at 168 (wrestling to settle land boundaries).

 Judges and commentators have also recognized that the court may, in some types of cases, be essentially a theater in which the parties may have a ritualized fight. See Ball, The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater, 28 STAN. L. REV. 81, 107 (1975); Wyzanski, A Trial Judge's
will remain available to disputants and may be used without societal authorization as sanctions to coerce settlement.

One mode of societal regulation of private ordering is the structuring of bargaining relationships between groups of potential disputants. Nonviolent negotiation may, for example, be both possible and socially acceptable when the parties are to some degree mutually dependent. Because either party may threaten future non-cooperation, or even withdrawal, each has non-violent bargaining power with which to prevent gross injustice. Private bargaining is ineffective, however, if one side is too disorganized or weak to protect itself, or if one party has no incentive, or need, to bargain with the other. To promote private ordering in these circumstances, society may provide a mechanism through which the aggrieved may organize themselves into bargaining units, and disputants may be required to negotiate in good faith, thereby creating a structure for peaceful resolution of conflict.

Society may also, and routinely does, redefine relationships directly through the enactment of regulatory statutes. To some extent, individuals will conform their behavior to regulatory norms even in the absence of an effective sanction. For society to ensure compliance, however, publicly or privately initiated adjudication is generally required. But, because regulatory statutes may reflect different interests than those shared by either the regulated party or its opponent, or because regulatory statutes may allow a range of outcomes more or less desirable to the parties, both parties may prefer a negotiated to an adjudicated solution.

"A political libel suit is the modern substitute for ordeal by battle . . . . [T]he judge is not the commander but merely the umpire."; cf. Arnold, Trial by Combat and the New Deal, 47 Harv. L. Rev. 913, 931-37 (1934) (criticizing the idea that the judge should be a neutral umpire on the ground that "rugged individualism" view of law, in which that idea made some sense, is not apposite in regulatory contexts).


This may frequently be the case in class suits initiated by groups, such as prisoners or inmates of mental institutions, thought to be in a subordinate role to the defendant. But even here, some possibility of bargaining exists. See Eisenberg, supra note 17, at 672-80.

For example, in the Norwalk, Connecticut school integration case, the parties agreed to a desegregation plan in which only minority students were bused. Other class members objected that the equal protection clause required two-way busing, but they were ultimately unsuccessful. See Norwalk CORE v. Norwalk Bd. of
Rather than using enforcement mechanisms to obtain a judicial resolution of the dispute, therefore, an aggrieved party may use the threat of going to court as a weapon to force its adversary to the bargaining table. To the extent the parties are willing to trade statutory entitlements for benefits for which they have no legal claim, conformity with social norms can also be diluted. The difference in outcome between negotiated and adjudicated outcomes may, in some cases, subvert regulatory policy. On the other hand, it may be perceived as a benefit, giving needed flexibility to a regulatory regime.

Enforcement of statutory norms through class actions simultaneously creates the potential for fuller realization of substantive policy through adjudication and the preconditions for effective bargaining among the named parties. When an aggrieved group holds individually recoverable claims, some private ordering may be possible in the absence of class suits. If, however, aggrieved individuals are disorganized and hold individually non-recoverable claims, the class action creates the structure essential for negotiation. By extending access to the legal system to persons holding individually nonrecoverable claims, the class suit mechanism makes possible a threat of litigation that the class opponent cannot simply ignore. Indeed, a class action may be a much more credible weapon than a threatened invocation of either legislative or administrative action — once a claim is filed, both the court and the defendant must respond. But, for the reasons mentioned


25 For example, in Purcell v. Keane, 54 F.R.D. 455 (1972), disdissent union members sued union officials for restitution of funds improperly spent. In approving a settlement — opposed by five of the six named plaintiffs because it did not require the defendants to admit guilt — the court noted that the primary concern of the plaintiffs in bringing suit had not been restitution, but ousting the defendants from their union offices by discrediting them. Such an ouster went beyond the permissible relief that could be granted by the court under the statute upon which suit was brought, and the court therefore approved the settlement which had no provision for an admission of guilt. See id. at 499.

26 Some administrative procedures may put equivalent pressure on defendants. However, in many procedures the administrative agency will retain discretion to determine whether the defendant must answer a complaint. See, e.g., National Labor Relations Act § 10, 29 U.S.C. § 160 (1970); Labor-Management Reporting and Disclosure Act § 402, 29 U.S.C. § 482 (1970).
above, both the class representative and the class opponent may find it desirable to negotiate, rather than adjudicate, their dispute. As a practical matter, however, it seems likely that a class opponent's incentive to negotiate, or at least the terms of a settlement that a class opponent is willing to accept, will depend on the extent to which the settlement can, as a practical or legal matter, terminate the possibility of future adjudication.\textsuperscript{27} Here, again, the class suit, which allows absentee class members to be bound without their consent,\textsuperscript{28} or which at least puts inertia on the side of settlement by requiring absentees to opt out,\textsuperscript{29} provides a mechanism to facilitate a negotiated outcome.

The cost of class actions provides the chief incentive to settle for both the class and the class opponent. For the plaintiff class, trial is complex and expensive, and class attorneys have much to lose. For the defendant, the risks of suffering a huge judgment, or of being burdened with court-imposed structural relief, may be unacceptable.\textsuperscript{30} Settlement pressures, however, may not always be equal. At the outset of litigation, the plaintiff class can rely upon the defendant's interest in avoiding both the full consequences of an adverse judgment and the rapidly mounting expenses of litigation to provide an incentive for quick agreement.\textsuperscript{31} After a time, though, the defendant's deeper pocket may enable it to win a favorable settlement through a war of attrition, by simply outlasting the plaintiffs.\textsuperscript{32}

Class action procedures also provide the parties means of pressuring their opponents. The power to move a court to rule on

\textsuperscript{27}No case has been found where a settlement was reached prior to judicial definition of the class or where the class definition was not itself the subject of negotiation. In the former case, the class will be legally bound if the settlement is approved by the court; in the latter, the defendant apparently attempts to set class size to preclude any practical possibility of future litigation, see pp. 1555-56 infra. See also Jimenez v. Weinberger, 523 F.2d 689, 700 (7th Cir. 1975) (certification needed to promote certainty in settlement negotiations).

\textsuperscript{28}See pp. 1394-1402 infra (res judicata).

\textsuperscript{29}Where the class definition is negotiated, notice of the class suit, notice of the settlement, and an opportunity to opt out may all be combined into one communication from the court. In this situation, absentees have a clear opportunity to assess the adequacy of the settlement and may, indeed, reject it. The defendant is nonetheless given some assurance that the settlement will have practical binding effect since (1) inertia will be on the side of accepting the settlement; and (2) the defendant may be able to condition his assent to the settlement on a substantial proportion of absentees accepting it. See generally pp. 1555-60 infra.


\textsuperscript{31}See Handler, supra note 5, at 9.

\textsuperscript{32}Cf. Saylor v. Lindsley, 456 F.2d 896, 900-01 (2d Cir. 1972) (lengthy derivative suit may not be worth plaintiff's attorney's time); Reiter v. Universal Marion Corp., 299 F.2d 449, 454 (D.C. Cir. 1962) (lawyer may compromise derivative suit for inadequate amount).
the issue of class certification, for example, provides a class opponent with an important bargaining weapon. Standards of certification such as predominance and adequacy of representation are often indeterminate, and representatives of a class may be unwilling to take the risk of an adverse ruling. Even a favorable ruling on certification may have unfavorable consequences for a class since procedural obligations triggered by certification, such as the responsibility to give notice, may significantly increase the costs of litigation. On the other hand, class action notice gives plaintiffs a means of creating adverse publicity about defendants. Indeed, the very function of notice is to bring the class suit to the attention of absentees who may well be the customers, creditors, or potential shareholders of the defendant company. A defendant may well fear that such publicity will interfere with its day-to-day operations. In Katz v. Carte Blanche Corp., for example, the defendant, fearing that notice of a pending class action would prejudice it with its customers, asked the court to dispense with notice and convert the action into a test case. If the plaintiff won, absentees could benefit; if the plaintiff lost, absentees would not be bound. For Carte Blanche, ridding itself of adverse publicity was worth more than obtaining mutuality of estoppel.

Discovery can also be a bargaining weapon. Because class actions tend to be big cases, covering a complex factual pattern, many more documents and exhibits may be relevant than in a simple lawsuit. Thus relevance may provide little check on the scope of discovery. The class may demand more information than

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33 See pp. 1416–39 infra.
34 See pp. 1471–1516 infra.
35 See pp. 1402–16 infra.
37 496 F.2d at 757–58.
39 See, e.g., Burns v. Thiokol Chemical Corp., 483 F.2d 300, 307 (5th Cir. 1973) (“voluminous employment records”); Cornaglia v. Ricciardi, 63 F.R.D. 416, 421 (E.D. Pa. 1974); Hoffman v. Charnita, Inc., 17 FED. RULES SERV. 2D 1215, 1217 (M.D. Pa. 1973) (“As both suits have been certified as class actions, the extent of discovery has of necessity been broadened.”).
could possibly be sifted at trial in an effort to interrupt corporate activity, probe for embarrassing secrets, or impose costs. On the other hand, the class opponent may use discovery to harass absentees, hoping thereby to cause enough opt-outs to make the case financially infeasible. If discovery of the class is restricted to prevent such abuses, however, the class opponent will be unable to discourage extensive discovery by making counter-demands.

The defendants' bar calls the system of private bargaining made possible by class action procedure "blackmail." This epithet assumes that even meritless strike suits have access to the full range of weapons. But the difference between bargained and adjudicated outcomes may not be so great. Class attorneys, who will receive a fee only if they benefit the class, have economic incentive to screen out meritless cases. Cases are further screened at certification and on summary judgment motions. Also, an innocent defendant could demand a manageable trial on the common issue of liability.

Since the ultimate justification for class actions is the contribution they make to full realization of substantive policies underlying causes of action, the social acceptability of settlements that result from bargaining in the context of threatened class litigation turns at least in part upon the degree to which the strength of the parties' respective legal positions determines the outcome of the negotiations. One means of fostering the congruence of negotiated settlements and substantive policy is through careful design of class action procedures. While such procedures have the primary function of providing a structure for adjudication of class claims, they can be bargaining weapons, and thus their desirability must be evaluated from both the litigating and negotiating perspective.

Due regard for the dynamics of bargaining imposes both constraints and obligations on class action procedure. No procedure should make class litigation so onerous that a party has no alternative but to accede to an opponent's demand. So long as all parties retain a credible threat of withdrawing from negotiations and seeking an official resolution of a dispute, however, the parties'
expectations about the outcome of adjudication will limit the affect of adventitious elements on the negotiated resolution — if one party perceives a demand of the other as more onerous than the expected outcome of adjudication, that party will proceed, or at least threaten to proceed, to adjudication rather than accept a burdensome settlement. From the bargaining standpoint, therefore, notice requirements that impose a prohibitive cost upon plaintiffs, or which lack the flexibility to enable a judge to protect a defendant from debilitating publicity, are suspect. Similarly, discovery rules that leave no leeway for regulation of plaintiff attempts to use class litigation as a private freedom of information act or of defendant attempts to harass and intimidate class members through repeated demands for information may be counterproductive if they undermine the ability of a party to make credible threats of going to adjudication.

Affirmatively, proper class action procedures must include mechanisms by which litigants may obtain official determinations of their substantive claims. In many class suits, trial itself will provide the necessary means. But because trial may sometimes be too drawn-out or expensive to be a practically available alternative, other devices, such as summary judgment procedures or substantive settlement review hearings, may be necessary.

If bargaining in the context of a pending class suit is to be regulated to reduce adventitious elements of bargaining power, the trial judge must assume chief responsibility and must not be bound by inflexible procedures regulating the timing or form of procedural orders. Assumption of this responsibility does not, however, create a particularly activist role for the court. Even in the context of class suits, negotiation is a useful means of dispute resolution, desirable for its own sake, and indeed often recognized as desirable by the statutes under which class suits are brought. Use of class action procedures as bargaining weaponry is therefore ordinarily not objectionable since substantive policy will usually be furthered by any of a range of settlement outcomes. It is only when procedural weaponry becomes so powerful that it makes possible settlements outside the substantively satisfactory range that there is a need for regulation.

The role of the trial judge in ensuring the credibility of the parties’ respective threats to adjudicate is not, however, the only role for the trial judge in monitoring private negotiations. While it is important that adventitious elements be reduced in negotiations, this alone does not ensure that absentees’ interests will be adequately represented in any negotiated resolution of the class suit. To a large extent, protection of absentees requires adjustment of the party structure of the negotiations or review at settle-
ment hearings. Both of these possibilities will be discussed at length later in this Note.48 A third possibility for ensuring that settlements are fair to absentees is to cast the trial judge in the role of the mediator. Whether this is feasible and appropriate in the class action setting will now be considered.

B. Mediation

Mediation is conventionally defined as the intervention of a third party to settle disputes without the use of coercive force.49 It differs from adjudication in that the mediator seeks to further the interests of the parties as they individually perceive them, while the adjudicator stipulates an outcome not necessarily related to the desires of the parties. The paradigmatic act of mediation is the articulation of a compromise mutually acceptable to the disputants. A mediator, however, may also foster agreement in less active ways. The mere presence of a third party is likely to inhibit negotiation in bad faith, since the disputants will generally not want to appear unreasonable.50 In addition, the outsider may be able to facilitate agreement by clarifying issues. Through requests to the parties to state areas of agreement and disagreement, through his own statement of the issues, and through direction of discussion toward the most fruitful areas, an outsider may be able to break deadlocks and secure a compromise agreement.51

Ordinarily the value of mediation is seen to lie simply in the fact that it facilitates agreement. The advantages of mediation are, therefore, the advantages of negotiation. For example, the parties are free to talk out the full range of their grievances unfettered by legal categories or rules of admissibility and relevance.52 At the end of the mediation, there will be a compromise to which each has contributed. There will be no unilateral ascription of blame; all will be partially vindicated and none condemned.53 The common experience of participation in the act of settlement may enhance feelings of solidarity and create a working unit to resolve future disputes.54 At least theoretically, however, media-

48 See pp. 1479–82 infra (subclassing); pp. 1536–76 infra (settlement).
50 See Fuller, supra note 20, at 307–09.
51 See id. at 318.
52 In villages in India, for example, dispute resolution negotiations resemble group therapy sessions. Related disputes are brought up and grievances aired. There is a general talking-out of group problems. See Cohn, Some Notes on Law and Change in North India, in BOHANNAN, supra note 19, at 148.
53 Id. at 156; Felsteiner, supra note 49, at 70–71.
54 See McCray v. Beatty, 64 F.R.D. 107, 109 (D.N.J. 1974); Eisenberg, supra note 17, at 646–49.
tion differs from negotiation in that the mediator has the power to introduce a degree of outside direction into the negotiating process. There may be a number of compromises of a given dispute which, once articulated by a mediator, the parties would find equally acceptable. There may also be a number of solutions that society as a whole would find equally satisfactory. If the two sets of acceptable agreements overlap, a mediator, by articulating a compromise agreement falling within the overlap, may be able to reconcile the interests of the disputants in a way which is consistent with social objectives.

It is unclear, however, whether such theoretical control could be realized in the class action context. The social interests the mediator would be attempting to accommodate with the interests of the disputants should be those identified with the interests of absentee class members. The disputing parties may, therefore, regard the mediator as the representative of a distinct interest group and treat the mediator's proposals not as neutral suggestions, but as the ploys of a fellow bargainer. Thus, explicit use of mediation as a means of social control may nullify mediation's potential for facilitating negotiated settlement.

To capture most fully the cooperative values of mediation, settlements must be reached before blame is ascribed. In the pretrial stage of the class action, however, mediation undertaken by the judge hearing the case raises a number of ethical difficulties. Mediation, to be perceived as fair by the parties, requires the judge to be aware of the merits of the case. If this awareness is achieved through extra-record conferences with the parties—particularly ex parte conferences—subsequent adjudicatory fact-finding by the judge may be open to the criticism that it reflects more than a considered evaluation of the record. In addition, if

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55 If the judge does not mediate with an awareness of absentee interests, then he has no choice but to review the settlement as if no mediation had ever occurred and may be required, as a matter of adjudication, to reject a settlement suggested in mediation.

56 See Fuller, supra note 20, at 312-13.
57 See Eisenberg, supra note 17, at 658-60; Felsteiner, supra note 49, at 70-71.
58 See Fox, supra note 10, at 142-43.
59 See AMERICAN BAR ASS'N, CODE OF JUDICIAL CONDUCT, Canon 3A(4) (1974) (a judge should "neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding"); CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(A)(4), in 69 F.R.D. 273, 275 (1976) (same); cf. Fox, supra note 10, at 143 (limiting his encouragement of an active role in settlement to jury trial cases where "any factual discussions in settlement conferences could jeopardize neither the judge's responsibility at trial nor the integrity of final factual determinations."). See also United States v. Abilene & So. Ry., 265 U.S. 274, 289 (1924) (order void because parties not apprised of the evidence upon
the judge makes a concerted effort to make a fair evaluation of the parties' cases, that evaluation may color his subsequent rulings in the case should it go to trial.60 Equally important, if the case is settled on terms different from those suggested by the judge, or if absentees should attack the fairness of the settlement suggested by the judge, the judge will be required in effect to rule on the adequacy of his own order. Such a posture for the trial judge seems to contravene both the spirit of the federal statute prohibiting a judge from sitting on an appeal from an order he has previously entered,61 and case law prohibiting administrative officials from sitting on cases in which they have prejudged the outcome.62 Such prejudgment is an especially acute problem in the context of settlement approval because, unlike an issue that is ultimately decided as a matter of law, there is no readily available external referent to which a judge can turn to determine the adequacy of a settlement and to minimize the force of his own prejudgment.63

There appears to be no fully satisfactory solution to the problems of prejudgment and bias raised by judicial mediation. These problems may be reduced if a judge does not attempt mediation until after he has heard all the relevant evidence and enunciated the law in an adjudicatory proceeding, or if, in mediating, the judge bases his order even though information came from parties' annual reports). To be sure, it is possible to overstate the effect of extra-record information. To some extent, judges passing on evidentiary issues are routinely exposed to such evidence; however, they are not asked, as they are in mediation, to determine the weight of such evidence in evidentiary hearings.

61 28 U.S.C. § 47 (1970) (“No judge shall hear or determine an appeal from the decision of a case or issues tried by him.”); see CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(C)(1)(e), in 69 F.R.D. 273, 278 (1976) (a judge should disqualify himself when “he has . . . expressed an opinion concerning the merits of the particular case in controversy.”).
63 Prejudgment of issues of law is generally thought to present fewer problems than prejudgment of issues of fact, or of the case as a whole. See Note, Disqualification of Judges for Bias in the Federal Courts, 79 HARV. L. REV. 1435, 1449 (1966). The standard to be applied when judging the adequacy of a settlement is a balancing test, resting on factual information about the case, the course of negotiation, and absentee interests, and legal issues concerning the substantiality of the plaintiff's case. In short, the judge's role is not that of a law applier, but a characterizer of fact. See pp. 1569-76 infra.
judge limits himself to suggesting general compromises or to clarifying issues. The judge might also confine himself to making structural adjustments in an ongoing bargaining process. But, since a judge's rulings of law may not cover every issue which could be mediated and which the judge would have to adjudicate should negotiation and mediation fail, the prudent judge should refrain from making overly specific suggestions, even after an adjudication of liability. Moreover, if active mediation by a judge occurs only after formal rulings of law and findings of fact have been made, at least some of the value of mediation may be lost. Ascription of blame may undermine the consensual base of mediation. Even if formal recognition of the disputants as antagonists does not make mediation entirely impossible, it may still reduce the likelihood of future cooperation after the settlement is put into effect.

Many of the problems raised by mediation in the context of class actions might be avoided if a judge appointed someone else to act as mediator. This would eliminate the problems of prejudgment and bias. Restrictions on the timing of mediation and on the activism of the mediator would be unnecessary. This course is not without expense, however, since such a mediator must be paid. It is unclear what authority the judge would have to tax the costs of mediation against either the plaintiff class or the defendant; mediation could be financed only if the parties consent to it. In any event, it is unclear what authority the judge has to insist on mediation if either party objects to it, or, indeed, what value mediation would have if it is not consensual. If the parties agree to mediate, there seems little reason for the judge to appoint the mediator as an officer of the court, since, if the mediator attempts to perform any part of the judge's role as protector of absentee interests, he, like the judge, may well lose the impartiality needed to mediate. If the mediator plays no role in protecting absentees, however, his presence should have no effect on procedural decisions designed to ensure that absentees are adequately represented. In reviewing a mediated settlement, a judge would have to apply the same standards he would use to review any negotiated settlement.

The problems of prejudgment and bias, and of undermining the force of mediation through advocacy of absentee interests, suggest that a judge ought not to regard his role in the class action process as primarily one of mediation. This is not to say that judges should not sometimes resort to mediation in resolving

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64 See pp. 1558–65 infra.
65 See pp. 1563–64 infra.
66 See pp. 1569–76 infra.
class actions. For example, a judge, faced with drafting a complex structural injunction that affects several distinct interests may naturally turn to a process of negotiation and mediation among the affected parties. Such a course will be particularly appropriate where, as under Title VII, the statute upon which liability is based evinces a policy in favor of conciliation. The choice of negotiation and mediation over some alternative form of decree formulation — for example, reliance on a court-appointed master — will also minimize the intrusiveness of the decree on the interests of the parties. This is desirable since it will generally be to the advantage of both parties and the court to have willing acquiescence in an agreement, rather than grudging compliance with a decree that a party perceives as unfair. Moreover, the settlement of a complex structural case requires a continuing remedy which will itself be so complex that it cannot be easily monitored or rigorously enforced. If the settlement is to be effective, the judge must reconcile the parties to restore a working relationship between them so that they can administer the decree cooperatively. Otherwise disputes will arise over alleged violations which it would be wasteful and institutionally inappropriate for a judge to decide.

C. Privately Controlled Adjudication and Publicly Controlled Adjudication

In private ordering and mediation, society does not impose a solution upon the parties. In privately controlled adjudication, however, society will impose a solution at the instigation of any party who can afford to litigate. Indeed, society may subsidize litigation — through provision of attorneys’ fees — to create

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67 See generally Chayes, supra note 6, at 1058–62.
68 See notes 11, 16 supra.
69 See Eisenberg, supra note 17, at 672–80.
the opportunity to enunciate general principles and exercise social control. To the extent society is successful in encouraging adjudication, the distortion of regulatory statutes caused by private bargaining is eliminated.

In publicly controlled adjudication, society will impose a solution whether or not the parties want it. Public control may be exercised in any of four areas: investigation; initiation; litigation; or settlement. Official investigation and initiation of a lawsuit represents the greatest degree of public intervention in private disputes. There is no room for private bargaining; the victim has no power to forgive the offense. Paradoxically, official control of initiation may also be used to delay private access to the courts in order to promote negotiated solutions between the government and a private party.

Public control of litigation can take two forms. First, an official may prosecute the action, either in the interest of an individual or of society as a whole. Second, the judge may, to various degrees, control the conduct of the lawsuit, overriding litigational choices made by the parties. In the traditional theory of adjudication, private control of the issues presented for adjudication and of facts elicited in proof was conceptualized as absolute. But even in the simple binary lawsuit, there is a good deal of judicial control. This control is exercised for three purposes: (1) to promote efficiency — e.g., compulsory counterclaims, mandatory joinder of claims arising out of the same transaction or occurrence, consolidation and multidistrict litigation; (2) to protect the integrity of the factfinding process — e.g., the best evidence rule, hearsay rules, the character evidence rules; 

73 This may not be true in practice. Victims, by refusing to testify, may be able to forgive an offense.
75 See, e.g., Chayes, supra note 6, at 1283; Pound, Do We Need a Philosophy of Law, 5 COLUM. L. REV. 399, 344-49 (1905).
76 This control may be used to encourage private negotiation. See Fed. R. Civ. P. 16; MANUAL FOR COMPLEX LITIGATION, pt. I, § 1.21 (1973).
81 E.g., Fed. R. Evid. 1002.
82 E.g., id. 802.
83 E.g., id. 404.
(3) to protect absentees — e.g., necessary party rules, intervention rules, rules limiting discovery against non-parties.

In the class action, because of manageability problems, the potential for abuse, and the need to protect absentees, judicial control is both more explicit and more pervasive. The tools of this control are such devices as explicit manageability determination, appointment of masters, experts, or implementation committees, sub-classing, determination of adequacy of representation, and oversight of communications with absentees.

In the simple binary lawsuit, there is no public control of settlement; the parties may, at any time, negotiate rather than adjudicate their dispute. Public control over settlement may be exercised for two purposes: first, to reduce distortion in regulatory policy; second, to protect absentees. Judicial scrutiny of settlements in class actions exemplifies both concerns. Absentees may desire strict application of regulatory policy, while the class representative may prefer negotiation. The defendant may create a conflict of interest by offering a generous settlement to the named plaintiff but not to the class. In such cases the class advocate may favor the interests of the named plaintiff over those of the class. In recognition of this conflict, the court must make some arrangement for providing the absentees with representation.

Strict enforcement achieved through adjudication is not, however, an unalloyed good. Regulatory statutes frequently evince a desire for flexibility and harmony where not inconsistent with broad statutory directives. Moreover, public control of adjudication may itself distort substantive policy. Agencies charged with enforcing the law may be captured by the groups they are supposed to regulate, and shield them from strict enforcement of the law. Judicial control raises serious problems of bias, for the

84 E.g., FED. R. Civ. P. 19.
85 E.g., id. 24.
86 E.g., id. 33 (interrogatories limited to parties); id. 35 (physical or mental examination limited to parties).
87 Id. 23(b)(3) (D). See also pp. 1498-1504 infra.
88 See Chayes, supra note 6, at 1060-61; pp. 1561-65 infra.
89 See pp. 1479-82 infra.
90 See pp. 1540, 1547 infra.
91 See pp. 1540-46 infra.
92 See note 16 supra.
court may be called upon to judge the propriety of its own action.98 Moreover, even an appearance of partiality may undermine the legitimacy of a court’s decision.97 For these reasons, procedural draftsmen should not assume that regulatory policy is best served by increased public control.

D. The Interaction of the Four Modes: Two Illustrations

The seminal paradigms of the substantive theory of class actions — damage suits for individually non-recoverable claims and suits seeking complex structural injunctions — may be characterized by the mixture of the four modes of dispute resolution appropriate to each.

The concern of the court in the damages case is primarily with strict enforcement of the law. There is usually no ongoing complex interrelationship between the parties to protect.98 While damages may be difficult to calculate and distribute,99 there will be no need for continuing enforcement. Once the funds are disbursed, the case is closed. The interest in justice for absentees requires the court to play an active role; settlement negotiations should not be a private bargaining mechanism. The judge should monitor negotiations to enable him to assess the fairness of a proposed settlement and to ensure that the credibility of each party’s threat to withdraw from negotiation and seek adjudication is maintained. Finally, he can appoint a guardian for absentee interests, a sort of public prosecutor, to protect the unrepresented.100

Class actions seeking complex structural relief differ from damage suits in two respects. First, in fashioning a decree, a judge must create a code for future conduct. It would be impossible for him to amass enough experience and expertise during a trial to formulate all the necessary details of the decree. Once liability is established, the court will naturally turn to the parties for assistance in working out the fine points of the injunction.101 It

96 See, e.g., Pfizer, Inc. v. Lord, 456 F.2d 532 (8th Cir.), cert. denied, 406 U.S. 976 (1972); cf. Gibson v Berryhill, 411 U.S. 564, 579 (1973) (due process denied when adjudicative tribunal has pecuniary interest in outcome of litigation).
100 See pp. 1561–65 infra.
is impossible, therefore, for relief in such cases to be framed totally through adjudication. The judge's role is inevitably that of mediator or overseer. Second, the parties are often joined by ongoing complex relationships. The preferred resolution of the conflict ought to reconcile the parties, especially because, without good faith compliance, attempts to enforce a complex decree may fail.

This interest in harmony suggests that a mediated or negotiated resolution will have advantages over adjudication. There may be many sources of conflict among the interrelated parties. A court searching for a single right answer deducible from legal principles may attempt to confine its inquiry to the narrowest controversy.\textsuperscript{102} A better solution might result from allowing the parties to talk out the full range of their differences.

Furthermore, there may be an advantage to having the parties experience the negotiation process itself. The cooperative nature of negotiation may forge a structure for good faith bargaining in the future.\textsuperscript{103} Class members' sense of participation may also add to the legitimacy of the resolution. To facilitate the potential for harmony that may be created by negotiation, negotiators should be genuinely representative, chosen by a process that absentees consider legitimate. This process should foster intraclass dialogue and facilitate input from those affected by the decree.

Nevertheless, because complex injunction cases are often brought to vindicate fundamental rights, the court must supervise the resolution process to ensure justice. In a sense, the case should proceed on two levels: adjudication and negotiation. The danger with such a hybrid process, though, is that the result may seem neither just nor consensual.\textsuperscript{104} The court, therefore, must oversee the bargaining process to ensure its legitimacy. Controlling both trial and negotiation, the court can use the one as an instrument for justice, the other as an instrument for harmony and reconciliation.

IV. STRUCTURING PRETRIAL: PROBLEMS OF INFORMATION AND DUE PROCESS

The elaboration of special pretrial procedures for class actions by court rules is a recent phenomenon. In traditional equity


\textsuperscript{103} Cf. Eisenberg, \textit{supra} note 17, at 669–72 (in rulemaking negotiation, terms already agreed serve as precedents for further elaboration of terms of agreement; initial agreement implies duty of fair dealing in working out additional terms).

practice, objections to class treatment were raised in the same manner as other party questions—by motion directed to the pleadings or at the hearing on the merits.1 Original rule 23, while developing elaborate jural categories intended to determine cases suitable for class treatment, prescribed no pretrial procedures for developing the facts or law that might be required to decide suitability in a particular case and made no express provision for a hearing at which the issue of suitability could be raised.2 Set against this background, the novelty of the pretrial provisions of amended rule 23 is apparent. Judges must determine the propriety of class suit 3]$ as soon as practicable3 and before any adjudication of the merits.4 In some cases, the rule requires a judge certifying a class suit to order that notice be sent to class members, advising them of the suit, their right to participate, and the fact that, if they do not exclude themselves from the suit within a set time, they will be included in the class judgment regardless of the outcome of the suit.5 In all cases, the rule gives a judge discretionary power to order notice, as well as authority to structure the litigation through subclassing or other means in order to assure the fairness of the class action process.6

1 In Smith v. Swormstedt, 57 U.S. (16 How.) 288 (1853), for example, the lack of a proper class was raised on a motion for want of proper parties. Id. at 141. In the 1912 Equity Rules, printed at 226 U.S. 629, such a motion could be made by answer, in which case rule 43 required a hearing to be held within 14 days. In Smith, however, which predated the 1912 rules, the motion appears to have been heard after all facts on the merits were developed. See 57 U.S. at 141. The Equity Rules of 1912 also seem to have contemplated such a procedure since rule 44 makes specific provision for “tardy objections” raised “at the hearing of a cause.” 226 U.S. at 661.

2 Except for provisions requiring judicial supervision of settlements in representative suits, Fed. R. Civ. P. 23(c) (1938), printed at 39 F.R.D. 94–95, the original Federal Rules contained no special provisions for dealing with class suits or protecting absentees. Concern for absentees seems to have been translated into procedural rules only in the early 1950’s. See Advisory Comm. Note to Proposed (but Unadopted) Amendment to Rule 23, in 3B J. Moore, FEDERAL PRACTICE §§ 23.01[5] (2d ed. 1974). Even so, an amendment to Fed. R. Civ. P. 23 (1938), which would have established a pretrial procedure similar to that in current rule 23, failed of adoption in 1955. See id. §§ 23.01[4]–[6]. See also Advisory Comm. Note, 39 F.R.D. 99 (1966) (“original rule [23] did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness. . . .”).

3 FED. R. CIV. P. 23(c)(1).

4 See note 159 infra.

5 FED. R. CIV. P. 23(c)(2).

6 Id. 23(d).
huge body of procedural common law." The development of a common law, however, presumes that courts know the principles or policies to be served by procedures designed to determine, at an early stage of the lawsuit, the suitability of an action for class treatment. Three such general concerns are reflected in the choice of pretrial procedures adopted in 1966: res judicata, notice, and class definition. First, and perhaps most importantly, the draftsmen sought to achieve the broadest possible res judicata binding effect in actions decided against the class. The express certification findings were to insulate the class suit so far as possible from successful collateral attack; the order was to be entered as soon as practicable in order to avoid any nonmutuality of estoppel. Second, as a corollary of this res judicata policy, the draftsmen framed notice provisions meeting assumed due process requirements. In addition, some form of official notice to absentees was required in common question actions to implement the absentee's right to opt out of the lawsuit. Finally, the draftsmen thought it necessary for the court to "define" the action. Precisely what this definition was to achieve — and why it had to precede decision on the merits — is uncertain, although some familiarity with the interests and circumstances of the absentees is necessary if the judge is to discharge his function of overseeing settlements and ensuring adequacy of representation.

This Section of the Note will take up in turn each of the draftsmen's reasons for defining the pretrial procedure of rule 23 as they did. The first Part of this Section will argue that mutual estoppel is neither an obviously valuable, nor practically possible objective for class suits. Only a limited res judicata policy, having few implications for pretrial procedure, is required by the substantive theory of class suits. The second Part considers the constitutional ramifications of giving binding effect to class actions and concludes that notice is required, if at all, not by procedural due process but by principles of equal protection and delegation to the extent to which notice may reasonably be thought to improve adequacy of representation. The third Part develops a pretrial procedure that seeks to facilitate class definition, as well as meaningful participation by class members, through a series of steps.

9 Id. at 106.
10 Id.
11 Id. at 106-07.
12 Id. at 105.
13 Id. at 104.
14 See Fed. R. Civ. P. 23(e); pp. 1537-38, 1565-76 infra (settlement).
15 See pp. 1402-16 infra.
analogous to those by which merits issues are developed for trial, and addresses a series of additional problems created by discovery and statutes of limitations.

A. Res Judicata

One of the central purposes of the draftsmen of the 1966 revision of rule 23 was the elimination of one-way intervention, the practice of holding open a "spurious" class action judgment favorable to the class in order to allow absentees to intervene to enforce their claims against a losing opponent, free of the risk of being bound by an adverse result. This decision to seek to extend the binding effect of an adverse decree to absentee class members, especially in common question suits brought under rule 23(b)(3), seems to explain virtually the complete structure of the pretrial procedure of rule 23. A hearing on the suitability of a case for class treatment had to be held before any hearing on the merits, otherwise there was a danger that a judgment would not be extended to bind a losing class. An early and complete hearing in common question cases was also needed to allow absentees receiving notice an opportunity to appear and argue the merits. Such provision for early notice, apparently intended to imple-


17 See pp. 1339-40 supra.

18 Certification, in the opinion of the Advisory Committee, would make a collateral attack less likely to succeed. See Advisory Comm. Note, 39 F.R.D. 106 (1966). For this reason, the risk of de facto one-way intervention would increase if a decision on the merits were entered prior to any certification decision. Surprisingly, the few cases which have considered the binding effect of the class action judgment have refused to bind absentees even though the trial courts had certified the suits. For a discussion of the cases, see Note, Collateral Attack on the Binding Effect of Class Action Judgments, 87 HARV. L. REV. 589 (1974). In the one case that bound an absentee, In re Four Seasons Securities Laws Litigation, 502 F.2d 834 (10th Cir.), cert. denied, 419 U.S. 1034 (1974), the court rested its decision not on the trial court's findings of adequate representation, but on the fact that the estopped party had had actual notice of the precise terms of the settlement it sought to avoid and had been negligent in failing to seize the opportunity to intervene or opt out. Id. at 843-44. The effect of the amendments to rule 23, in fact, seems to have been to make courts reviewing class action judgments on collateral attack more sensitive to adequacy of representation than in the past and more willing to deny res judicata effect because of trial conduct subsequent to certification. Compare, e.g., Gonzalez v. Cassidy, 474 F.2d 67 (5th Cir. 1973) (holding that failure to appeal decision adverse to the class may constitute failure of representation), and In re Four Seasons Securities Laws Litigation, 59 F.R.D. 607, 606-83 (W.D. Okla. 1973), rev'd on other grounds, 502 F.2d 834 (10th Cir.), cert. denied, 419 U.S. 1034 (1974) (suggesting that failure of typicality destroyed adequacy of representation), with Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921) (adequacy standard but no actual analysis), and Krick v. Klockenbrink, 144 Ind. App. 55, 60-61, 242 N.E. 2d 848, 851 (1969) (adequacy assumed from apparent identity of interests).
ment a perceived due process requirement of notice and an opportunity to be heard, is itself not independent of the res judicata effect the draftsmen sought to create. If class suits had no binding effect in the event the class lost, there would be no need to structure the class suit to ensure due process for absentees; absentees would retain the right to sue individually if they were not satisfied with the outcome of the class suit and would, therefore, have neither their property nor liberty endangered by that suit. Similarly, the draftsmen's choice to allow individuals in common question suits to opt out of the class action would not be needed if the class judgment were not binding—absentees who wished to control their own litigation could do so after the class suit was decided by bringing another suit.

The reasons the rulemakers opposed one-way intervention are not clear. The Advisory Committee Note, although emphatic in its insistence that "one-way intervention is excluded" under rule 23(c)(3), is otherwise silent, except for a reference to disagreement as to the propriety of prior practice. Justice Kaplan's treatment of the matter is similarly cryptic. He took "the essential task" of the rulemakers to be "to redefine the conditions for maintaining the fully effective action," but his summary of the reasons for rejecting one-way intervention included only mention of the views of some critics that the procedure "was distasteful" as "lacking 'mutuality,'" and "a perverse anomaly" inasmuch as "there could be a class action that did not run fully for or against the class."

Defense of the 1966 rule in terms of the principle of mutuality—that it is unfair to bind one party to an adverse judgment if the other party would not also have been bound in the event of defeat—would, of course, be anachronistic. Justice Traynor's 1942 opinion in Bernhard v. Bank of America National Trust & Savings Ass'n established the doctrinal framework which would lead to the demise of the mutuality doctrine, and in 1975 the Restatement (Second) of Judgments abandoned mutu-

20 Id. at 106.
21 Id. at 105.
23 Id. at 385–86.
24 19 Cal. 2d 807, 122 P.2d 892 (1942).
ality altogether, consigning the doctrine to the status of a minority rule. 25 In place of mutuality, the Restatement focuses on the issue of whether the person sought to be estopped has had a full and fair opportunity to litigate the merits of his claim. 26 In general, the class suit would provide the class opponent such a full and fair opportunity to litigate against the claims of both the named plaintiff and the absentees. The class opponent is apprised of the factors traditionally thought critical to giving a judgment binding effect: the nature of substantive claims of others invoking the judgment, the existence of a large number of persons who wish to sue; and the size of potential liability. 27 In having a detailed warning of claims that may be pressed against him, the class opponent is in a better position than other defendants who may be bound by losing a single, individual litigation. The effect of one-way intervention, when compared with the effect which may be given to single-party litigation under the Restatement's rules does not seem especially unfair to the class opponent.

A more modern argument for binding class members to losing litigation might focus on the values of economy and repose. If res judicata effect were not given to class judgments, the resources of the judicial system would be wasted on the relitigation of once-decided claims and class opponents would be denied protection from vexatious and harassing multiple lawsuits. The force of this argument is undercut, however, by the structure of rule 23 — class members in (b)(3) actions are given an opportunity to exclude themselves from a class suit, and thus the protection which a class judgment affords against relitigation is incomplete. Even were no opt-out right recognized, however, the content of res judicata law itself would significantly diminish the extent to which recognition of the binding effect of class action judgments would in fact further the values of economy and repose. The case for claim or issue preclusion is most strong, if a judgment settles the effect on future relations of an isolated, past action governed by relatively well-settled law. 28 In such a case, the effect

25 Restatement (Second) of Judgments § 88 (Tent. Draft No. 2 1975). See also Reporters' Note, id. at 98–99.
26 Id. at 99.
27 See The Evergreens v. Nunan, 141 F.2d 927, 929 (2d Cir. 1944); Restatement (Second) of Judgments §§ 68.1(e)(ii), (iii) (Tent. Draft No. 1 1973); id. § 88, Comments a, b (Tent. Draft No. 2 1975); cf. American Pipe & Const. Co. v. Utah, 414 U.S. 538, 555 (1974) (not unfair to subject defendant to otherwise time-barred claims of absentees when complaint discloses nature of substantive claims and number and generic identity of potential plaintiffs); Haas v. Pittsburgh Nat'l Bank, 526 F.2d 1083, 1097 (3d Cir. 1975) (same).
of an erroneous outcome will generally be confined to the parties,\(^\text{29}\) and, given the need to economize on the use of judicial resources, it is not unfair to cast the effect of an erroneous judgment on the parties who have, after all, controlled the litigation.\(^\text{30}\) On the other hand, the scope of preclusion has always been limited in suits, which include the great majority of class actions,\(^\text{31}\) having the attributes of what Professor Chayes has called "public law" litigation.\(^\text{32}\) Such suits are characterized by a number of factors which require subordination of the efficiency policies that justify preclusion by judgment to the need for a currently accurate legal result. Most importantly, public law litigation concerns itself with regulation, not isolated instances of largely private interactions. By its nature, regulated activity is activity undertaken by many people who are substantially similarly situated. In addition, regulatory statutes deal with behavior which, if not illegal, may commonly be repeated over time.\(^\text{33}\) Finally, the factual inquiry in the public law lawsuit is generally not about what happened on a specific past occasion, but what the legal interpretation of an agreed set of events should be.\(^\text{34}\) Given this set of factors, propagation of an erroneous judgment through res judicata can lead to persons similarly situated being treated differently.


\(^{30}\) See Chayes, supra note 29, at 1287–88.

\(^{31}\) The public law character of federal class suits is apparent from the statutory and constitutional basis of jurisdiction in most such suits. See p. 1325, note 30 supra. The situation in the states is less clear. Missouri, for example, uses class suits for land condemnation. See, e.g., City of Aurora v. Coleman, 490 S.W.2d 668 (Mo. Ct. App. 1973). On the other hand, California, New York, and Wisconsin have enacted new class action legislation intended to assist consumer class litigation. See Cal. Civ. Code Ann. § 1781 (West 1973); N.Y. Civ. Prac. Law & Rules §§ 901–09 (McKinney Supp. 1976); Wis. Stat. Ann § 426.110 (West 1974).

\(^{32}\) See generally Chayes, supra note 29. Professor Chayes notes a development reflecting similar accuracy concerns in the handling of factfinding in public law litigation. Increasingly, judges, recognizing the public nature of the lawsuit and the number of persons potentially affected by a decree, are no longer willing to allow the litigants to be the sole source of information to the court, but are shaping the trial, turning to court-appointed experts where necessary to develop accurate information. Id. at 1297–98, 1300–01.

\(^{33}\) For example, were high school diploma requirements for entry level jobs not generally suspect under Title VII, see, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971), employers would in all likelihood have continued to use them. In this sort of situation, were res judicata applied to block the application of a change of law, employers in all senses similarly situated would face different legal obligations based on the fortuity of when they were sued unless res judicata were relaxed to allow a change of law to affect all equally.

\(^{34}\) See Chayes, supra note 29, at 1296–97.
and can frustrate the ability of the courts uniformly to implement statutory policy as that policy changes over time.\textsuperscript{35}

The tensions thus established between judicial economy, on the one hand, and equality of treatment and proper implementation of statutory policy on the other has long been resolved in favor of the latter policies in the fields of administrative law\textsuperscript{36} and taxation.\textsuperscript{37} In the words of the Supreme Court, collateral estoppel must be limited to \textsuperscript{38}

lawsuits over matters . . . which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities . . . .

The Second Restatement has generalized this concern, largely on the basis of cases dealing with regulation, stating that a rule of law should not be binding "when other litigants are free to urge that the rule should be rejected."\textsuperscript{39} It thus seems unlikely that, given the regulatory purpose, the large element of fact characterization, and the public law subject matter of class suits, res judicata can provide any greater degree of binding effect against a losing class than stare decisis in the majority of cases brought as class suits in the federal courts.\textsuperscript{40}

\textsuperscript{35} See, e.g., Christian v. Jemison, 303 F.2d 52, 55 (5th Cir. 1962) ("It would be senseless absurdity to sanction in Baton Rouge segregated seating under a law patently unconstitutional while everywhere else in the country segregated seating is prohibited."); YMCA v. Sestric, 362 Mo. 551, 567, 242 S.W.2d 497, 507-08 (1951) (en banc); Groner & Stemstein, supra note 28, at 306 ("In order more fully to achieve the Congressional purpose, the private party is denied continued benefits from a former decision, now appreciated as erroneous.").

\textsuperscript{36} See 2 K. Davis, Administrative Law Treatise § 18.03 (1958); Groner & Stemstein, supra note 28.

\textsuperscript{37} For example, Dean Griswold almost forty years ago suggested that res judicata was appropriately applied in tax cases only where the fact situation was truly static, and not where continuing behavior on the part of the taxpayer raised similar questions of tax treatment in each tax year. Griswold, Res Judicata in Federal Tax Cases, 46 Yale L.J. 1320, 1357 (1937). Moreover, he argued that a supervening change in the law, which showed the first interpretation of the tax code to be erroneous, should not be propagated despite unchanged circumstances. See id.

\textsuperscript{38} Commissioner v. Sunnen, 333 U.S. 591, 599 (1948).

\textsuperscript{39} Restatement (Second) of Judgments, Reporter's Notes § 68.1(b) (Tent. Draft No. 1, 1973).

\textsuperscript{40} Neither the Restatement nor the case law differentiates between damage actions and actions for prospective relief, although most of the case law deals with relitigation which would result in an order having only prospective consequences. See, e.g., Christian v. Jemison, 303 F.2d 52 (5th Cir. 1962); Louis Stores, Inc. v. Department of Alcoholic Beverage Control, 57 Cal. 2d 749, 371 P.2d 758, 22 Cal. Rptr. 14 (1968); Floyd County Bd. of Educ. v. Layne, 474 S.W.2d 397 (Ky. Ct. App. 1972). Whether relitigation of an action leading to an award of damages
The decline of mutuality doctrine and the exception to estoppel for judgments heavily based on legal issues suggests that the central concern of the 1966 rulemakers for ensuring res judicata effects was misplaced. To be sure, if representation has been adequate and the legal climate static, little is gained by relitigation. But in such conditions res judicata may not be needed to quiet relitigation. If the legal climate is static, stare decisis will work as a bar, and class attorneys, who are ordinarily compensated only if they win, will be unlikely to bring suit to retest an adverse judgment.

Whatever marginal advantage binding class members to losing actions would achieve seems to be more than outweighed by the costs of treating the achievement of res judicata effects as an important determinant of class action procedure. If class members are to be bound regardless of the outcome of litigation, the propriety of class suit must, at least on the theory of the 1966 rulemakers, be adjudicated prior to adjudication of the merits in order to insulate the class judgment from collateral attack. Adjudication of the merits may come rather quickly after a lawsuit is initiated, on a motion for summary judgment or dismissal for failure to state a claim. Judges are therefore put under pressure to decide on the propriety of class suit as soon as possible. The dangers of this pressure are two-fold: first, judges may decide questions of class procedure before they in fact have enough information properly to do so; second, judges, although not strictly prevented by an early determination from reopening class issues, may be inclined to treat them as settled, and thus neglect their obligation to insure adequacy of representation. A focus on res judicata also raises the risk that a court hearing a class suit will attempt to protect its judgment by deciding class action issues in a way which would provide collateral attack courts with "bright line" evidence of adequate representation.

covering a period which would have been covered in a prior damage suit is appropriate does not seem answerable as a matter of abstract res judicata policy. Instead, the answer must be determined as a matter of the remedial policy of the statute supporting the litigation. Thus, for example, if the statute evinced a policy of eliminating unjust enrichment or of compensation, retroactive effect might be appropriate. A contrary result might, however, be called for if damages were primarily intended as a mechanism for modifying future behavior.

41 See Atlantis Dev. Corp. v. United States, 379 F.2d 818, 829 (5th Cir. 1967) (holding stare decisis to be a sufficient ground for intervention of right because similarity of issues would, as a practical matter, foreclose any other outcome in a subsequent suit by intervenor); Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433, 446–48 (1960).

42 See p. 1615 infra.


44 For further discussion of these problems, see pp. 1416–27 infra.
such as individualized notice, even if such decisions were not in fact necessary. Although res judicata ought not be a central influence in the design of class procedures, this conclusion should not obscure the fact that there are cases in which res judicata may usefully be employed to force the consolidation of the claims of many persons into a class suit. The absence of interested parties raises particular problems in two kinds of situation: the suit for complex structural relief; and the consumer class suit. In each of these, no problem is raised if the class loses — encouragement of participation is important only if the class wins; and for this reason, it makes little difference whether a class is “certified” before or after the decision on the merits.

In the complex structural injunction case, a new suit will complicate implementation of the decree and may lead to confusion ultimately sapping the vitality of the relief given in the first suit. The decree will inevitably be shaped through negotiation and, for negotiations to be successful, the parties must have a fairly certain idea of the constraints within which they are working. For negotiations to be worthwhile, there must be some assurance that the negotiated solution will not be constantly subject to relitigation and modification. In addition, the parties may have established ongoing forms of dispute negotiation — such as biracial or employer-union-employee committees — that are designed to process additional grievances in an orderly manner, making it more likely that the decree can be implemented in a satisfactory manner by the parties themselves. To allow a collateral attack in these circumstances would upset expectations.

45 See N.Y. Times, Oct. 12, 1975, at 29, col. 1 (decision to allow private Title VII suits to go on after government consent decree means “settlement is never going to become effective”). A similar policy is reflected in the National Labor Relations Board’s contract bar rule which, in the interest of stable labor relations, requires that the negotiating structure represented by a consummated collective bargaining agreement bar representation elections for a three year period. See General Cable Corp., 139 N.L.R.B. 1123 (1962).

46 See Chayes, supra note 29, at 1298–301.

47 At the heart of bargaining is making trade-offs. If a bargainer can never be sure that he can get the benefit of a particular compromise, he is unlikely to make it. Although this may not be a problem as to the finer points of the decree, the central concessions that may make a decree work may often be most uncertain. For example, a number of school decrees have been attacked for providing inadequate busing or for adopting desegregation plans that do not achieve sufficiently low minority populations in all schools. See, e.g., Calhoun v. Cook, 522 F.2d 517 (5th Cir. 1975); Hines v. Rapides Parish School Bd., 479 F.2d 762 (5th Cir. 1973).

48 E.g., id. at 764.

that have been formed and which ought to be fostered since negotiation, by generating precedents or at least tacit commitments to further good faith dealing, assists in assuring compliance with the decree.50

Where a decree is still open, therefore, res judicata ought to be available in a limited form. First, parties should be required to intervene in the ongoing suit.51 Even intervention should be denied, however, unless the absentees can show that they have not been adequately represented.52 This modified form of preclusion will have the effect of involving the absentees in the negotiating milieu, but with minimal affect on expectation and agreements that have already been created.53 Finally, since there is always access to the court if negotiations reach an impasse, intervention will allow former absentees to protect their legal rights where representation was in fact inadequate.54

In consumer class suits where individual claims are small, but relief must be delivered to large numbers of individuals at defendant's or class' expense,55 the cost of creating a mechanism for relief delivery may be so great that fairness to the defendant, or to the class, requires that administrative expenses be paid only once. For example, in the Antibiotic Drug Antitrust Litigation,56 delivery of relief to consumers required widespread advertising, media events, persuasion of consumer publications and labor newsletters to run stories, and the employment of a staff of 15 to 25 part and

50 See pp. 1383, 1391 supra.
51 Hines v. Rapides Parish School Bd., 479 F.2d 762, 765 & n.2 (5th Cir. 1973); accord, NEA v. Board of School Comm'rs, 483 F.2d 1022 (5th Cir. 1973); cf. United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 866-68, petition for cert. filed, 44 U.S.L.W. 3429 (U.S. Jan. 15, 1976) (No. 75-1005) (upholding consent decree provisions by which EEOC agreed to suggest that other pending or subsequent litigation be brought into consent mechanism established by decrees).
52 Hines v. Rapides Parish School Bd., 479 F.2d 762, 765 (5th Cir. 1973). If representation is adequate, there seems little need to add new parties to the negotiation since their presence may needlessly upset or delay agreements already reached.
53 In Hines v. Rapides Parish School Bd., 479 F.2d 762, 765 n.2 (5th Cir. 1973), the Fifth Circuit suggested that the most appropriate form of intervention would be to allow the intervenors to participate in the implementation committee since this would “ensure that different points of view would be presented.”
54 See id.
55 Expenses involved with delivering relief may be taxed against the class' recovery, or, where a statute so provides, may be taxed to the defendant. The pending Consumer Class Action bill would tax the costs of distributing relief to the defendant, see H.R. 2078, 94th Cong., 1st Sess. § 14 (1975), the New York class action statute would allow, but not require, the defendant to bear the costs, see N.Y. CIV. PRAC. LAW § 904 (McKinney Supp. 1976).
full-time clerks for a period of a year to process claims. The cost of these efforts amounted to over $230,000. Since the cost of delivering relief will probably not vary much with the total amount of damages to be delivered, fairness seems to require that all claims be brought in one suit and that suit be binding so long as representation has been adequate.

B. Notice and Due Process in Plaintiff-Class Actions

Whether absentee class members, either individually or selectively, must be given notice and an opportunity to be heard in a class suit if that suit is to comport with due process is a question much debated. In this debate, the touchstones have been the cases of *Hansberry v. Lee* and *Mullane v. Central Hanover Bank & Trust Co.* The former is generally thought to stand for the proposition that due process requires only "adequate representation" on the part of the class representative; while the latter suggests that some form of notice to absentees is required to foreclose absentees even if they are represented by a guardian *ad litem.* Complicating this debate is the recent case of *Eisen v. Carlisle & Jacquelin,* which, while inconclusive on the constitutional question, required individual notice in class suits brought under rule 23(b)(3) of the Federal Rules of Civil Procedure.

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58 311 U.S. 32 (1940). Hansberry, a black, acquired property allegedly bound by a racially restrictive covenant. In an earlier suit in which the covenant was upheld, the parties (who did not include Hansberry) had falsely stipulated that the covenant was signed by the requisite number of property owners to satisfy a condition precedent of its validity. The Supreme Court held that Hansberry was not bound by the prior suit on the ground that neither litigant in the suit had adequately represented Hansberry's interest. See Z. Chafee, *Some Problems of Equity* 232-37 (1950); pp. 1472-74 infra.
59 339 U.S. 306 (1950); see p. 1413 infra.
64 417 U.S. at 177. In a more recent case, *Sosna v. Iowa,* 419 U.S. 393 (1975), the Supreme Court appeared to limit *Eisen* to a holding about rule 23(b)(3). See *id.* at 397 n.4. The implication of *Sosna* is, therefore, that notice is not required as a matter of due process. *Sosna,* moreover, appears to overrule cases holding that notice is a constitutional requirement in suits brought under rule 23(b)(1) or (b)(2), such as *Hoston v. United States Gypsum Co.,* 67 F.R.D. 650, 657-58 (E.D. La. 1975); Ostapowicz v. Johnson Bronze Co., 54 F.R.D. 465,
In addition, there is the black letter learning that adjudications, to be "binding," must provide for adequate notice and an opportunity to be heard.65

To date, the debate has proved inconclusive. One court, relying on a theory of estoppel,66 has held that actual notice and an opportunity to be heard are sufficient to foreclose a subsequent suit by a class member even if representation has not been adequate.67 Other courts and commentators have suggested that adequacy of representation without notice is enough.68 The Federal Rules, after Eisen, display a schizophrenic approach—notice is required at apparently any cost to protect the $10 claim of an absentee in common question class suits, but individual notice is not required to adjudicate absentees' constitutional rights.69 The inconclusiveness of this debate seems to stem largely from the narrowness of the universe of cases and doctrines thought relevant to the issues. What will be attempted here, therefore, is to present an argument from a nontraditional perspective that suggests that any notice obligation in plaintiff-class suits is ancillary to a requirement of adequate representation derived from considerations of equal protection and delegation.

It is first necessary to distinguish two meanings of the term "binding effect." In most notice and hearing cases, a person is bound in the sense that he will have to suffer a coercive order entered against him in a court.70 The exercise of such coercion,
which constitutes a deprivation of liberty or property, would usually trigger a due process obligation. This would be the case, for example, where a judgment is entered against a defendant class, although there are cases allowing a defendant class to be bound in a coercive sense without actual notice and an opportunity to be heard. The second meaning of “binding effect” is its res judicata sense—here used to mean denying a person access to a court to relitigate a claim previously tried in a class suit in which that person was a member of the plaintiff class. It is binding effect in this res judicata sense that has been the focus of recent debate. An unrealized right of action—what is lost when res judicata is applied to bar an absentee’s claim—has never been thought itself to be property in the constitutional sense.

guaranteed by the Due Process Clause . . . “). Almost all major notice and hearing cases involving judicial processes concern the right of someone in the position of a defendant or of one being coerced by an ex parte court order. E.g., North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Lynch v. Household Finance Co., 405 U.S. 538 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Grannis v. Ordean, 234 U.S. 385 (1914); Pennoyer v. Neff, 95 U.S. 714 (1877). Although commentators have noted that the plaintiff-defendant distinction is not one that can be consistently maintained for purposes of constitutional analysis, see, e.g., Michelman, The Supreme Court and Litigation Access Fees: The Right to Protect One’s Rights—Part I, 1973 DUKE L.J. 1153, 1177-97, it does seem true that persons in a plaintiff posture have never been thought to have a presumptive right to notice and opportunity to be heard. See note 73 infra.

71 E.g., Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 361 (1921) (no procedure instituted to notify Indiana claimants being enjoined by this suit); Smith v. Swormstedt, 57 U.S. (16 How.) 288 (1853) (no mention of any notice).

72 See, e.g., Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Dam, supra note 63.

73 An individual’s claim of a constitutional right to notice and an opportunity to be heard is an effective defense to an attempt to raise a class judgment as a bar to the individual’s prosecution of his own suit only if attribution of binding effect to the class judgment would deprive the individual of liberty or property. See generally Goss v. Lopez, 419 U.S. 565, 572-76 (1975). The only right the individual loses if a class judgment is given binding effect is the right to bring the action himself, and the remedy afforded by the class action can provide constitutionally sufficient alternative protection of the individual’s underlying substantive claim. See Bernheimer v. Converse, 206 U.S. 516, 532 (1907) (representation by corporation in defendant class action sufficient protection of shareholder’s rights). It has been argued that the right to bring an action ought itself to be regarded as a property right. See Comment, The Heirs of Boddie: Court Access for Indigents After Kras and Ortwein, 8 HARV. CIV. R.-CIV. LIB. L. REV. 571, 587 (1973). Traditionally, however, the Supreme Court has not regarded the extinction of a cause of action as itself sufficient to trigger a constitutional claim. The only rights the Court has treated as infringed by repeal of a statutory cause of action have been the underlying substantive rights; indeed, only where the underlying substantive rights have been held to “vest” has the Court engaged in constitutional scrutiny. See, e.g., Coombes v. Getz, 285
traditional prerequisite for the notice requirement is lacking in the class action context. The constitutional question raised by binding effect in the res judicata sense, therefore, is not whether notice is required, but when, or if, access to a court may be foreclosed to an individual.

The power to deny access to a court by denying a cause of action to all potential litigants indiscriminately is largely unchecked. Even in the heyday of the contracts clause, no one ever supposed that statutes of limitations, which undoubtedly cut off access to a trial on the merits of a plaintiff's claim, raised constitutional questions. With the subordination of retroactivity doctrine to the rationality analysis of modern substantive due pro-


Even were the deprivation of an unrealized cause of action held to provide a basis for claiming due process rights, a right to notice and an opportunity to be heard would not immediately follow. Class actions fix rights in the aggregate, not individually. The matters in issue in class suits primarily have to do with acts of a defendant affecting class members in common, and not acts of the defendant affecting individual class members, or acts by individual class members themselves. In Professor Davis' terminology, see I K. DAVIS, supra note 36, § 7.02, class actions determine legislative facts, not adjudicative facts. See Chayes, supra note 29, at 1307 (arguing that public law litigation is not about factfinding in the usual sense, but about fact characterization and prediction, the stuff of legislation). Under Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441 (1915), therefore, there may be no constitutional obligation to afford a hearing to individuals whose rights are determined by class action proceedings. Cf. FPC v. Texaco, Inc., 377 U.S. 33 (1964) (individual hearing not required under APA as to matters determined in prior rulemaking procedure). Only if a class action judgment were substantively unconstitutional, or representation of absentee interests inadequate, see p. 1410 infra, would an individual class member retain an individual cause of action.

74 In Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827), for example, all seven Justices assumed that, at least as prospectively applied, statutes of limitations were proper under the contracts clause, the relevant constitutional provision, and undertook to show that the insolvency law at issue in the case could (or could not) be distinguished from a statute of limitations. See id. at 261-63 (Washington, J.); id. at 287 (Johnson, J.); id. at 301 (Thompson, J.); id. at 326-27 (Trimble, J.); id. at 348-49 (Marshall, C.J., dissenting). See also McElmoyle v. Cohen, 38 U.S. (13 Pet.) 311, 327-28 (1839) (state does not violate the full faith and credit clause by looking to its own statute of limitations in determining whether to enforce another state's judgment). Chief Justice Marshall suggested in dictum in Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 121 (1819), that the retroactive application of a statute of limitations in a case involving a contract entered into prior to the enactment of the statute would be unconstitutional. See id. at 207. It is not clear, however, that this dictum survives Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 435 (1934). See generally Battaglia v. General Motors Corp., 169 F.2d 254, 259-61 (2d Cir. 1948).
cess, legislative discretion to terminate rights of action is generally assumed. In the Portal-to-Portal Cases, for example, Congress was held to have the power to cut off windfall claims which had arisen under the Fair Labor Standards Act even though some were actually in litigation.

Where access to courts is limited to some but not all holders of a cause of action, however, the constitutionality of the government action is less clear. Differential distribution of access to courts, like differential distribution of any other government service, raises questions of equal protection. The Supreme Court has held, for example, that while no individual need be afforded a right to appeal from a trial judgment, if a right to appeal is granted, unjustified discriminations in the grant of the right are unconstitutional. Selective denials of access to trial courts have been similarly analyzed. For example, in Cohen v. Beneficial Industrial Loan Corp., the Court upheld New York's security for costs requirement in shareholder derivative suits. While recognizing that the statute might discriminate against small claimants — completely foreclosing access to the courts to potentially meritorious claims — the Court found sufficient justification for the requirement in the legislative judgment that a security for cost provision was needed to stop strike suits. More recently, in three cases, Boddie v. Connecticut, United States v. Kras, and Ortwein v. Schwab, the Court dealt with the issue of whether filing fees that excluded low income plaintiffs from court were constitutionally prohibited. Because the filing fees were struck down in Boddie but upheld in Kras and Ortwein, the ult-

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81 337 U.S. 541 (1949).
82 Id. at 551-52.
83 Id. at 552.
84 Id. at 550-53.
87 410 U.S. 656 (1973) (per curiam).
88 See 401 U.S. at 374.
89 See 409 U.S. at 450.
90 See 410 U.S. at 658-60.
mate significance of the cases is not clear. At minimum, however, they stand for the following: a person in the position of a plaintiff has a less well established entitlement to be heard than one who stands in the position of a defendant or in the position of one coerced by extrajudicial action, but the rights of plaintiffs are of sufficient magnitude that selective denials of access require at least some governmental justification.

 Plaintiff class actions also raise the selective access question. Access to court is foreclosed to an individual who was previously an absentee class member although courts are generally open to individuals with the type of claim asserted by the former class member. Analysis of the constitutionality of this discrimination is made difficult by the fact that no consensus has emerged as to the standard of review to be applied in judging selective denials of access. It is clear that, where a plaintiff seeks to vindicate a fundamental right, selective denial of access requires a substantial justification. Some have argued that a plaintiff's right of access to courts is itself fundamental, and that regardless of the character of the claim a plaintiff wishes to assert in court, selective denial of the right of access must always be supported by a compelling reason. The Supreme Court has not gone this far, however. In Cohen, Kras, and Ortwein, where the rights plaintiffs sought to vindicate were not constitutionally fundamental, the Court's review of selective denials of access was couched in

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91 See generally Michelman, supra note 70.
93 The Supreme Court has used both due process and equal protection analysis in analyzing the access issue. Compare Boddie v. Connecticut, 401 U.S. 371, 374-77 (1971) (due process), and United States v. Kras, 409 U.S. 434, 443-46 (1973) (same), with Boddie v. Connecticut, supra at 383-86 (Douglas, J., concurring) (equal protection); id. at 386-89 (Brennan, J., concurring) (same); United States v. Kras, supra at 446-49 (same); id. at 457-58 (Douglas, J., dissenting) (same), and Ortwein v. Schwab, 410 U.S. 656, 660 (1973) (per curiam) (same). A comparison of the due process and equal protection analysis in the majority opinion in Kras shows that due process analysis is the same as equal protection analysis inasmuch as each attempts to differentiate fundamental rights, to be accorded more protection, from other rights that can be foreclosed on a rational basis standard. See also Weinberger v. Salfi, 422 U.S. 749 (1975) (treating due process analysis in the same way, relying on equal protection precedents), noted in The Supreme Court, 1974 Term, 89 Harv. L. Rev. 47, 77-85 (1975). One exception to this overlap may be the analysis suggested by Justice Harlan in Boddie: that if the state requires an individual to undertake some transaction in court, then due process requires an absolute right of access. See 401 U.S. at 376-77.
terms of the rationality standard associated with minimal equal protection scrutiny.96

Because the Supreme Court has apparently adopted a two-tier standard for determining the constitutionality of restrictions on access to courts,97 the binding effect of a class judgment will depend both on the substantive right asserted by the person seeking to avoid the binding effect of the class suit and on the reasons supporting the extension of binding effect to the absentee. Where the substantive right asserted is not fundamental, a desire to shield the defendant from relitigation — a purpose very similar to that asserted to support the security for costs requirement in Cohen98 — would appear to satisfy at least the rational relationship requirement set out in Cohen, Kras, and Ortwein, even though the practice under rule 23 of permitting opt-outs suggests that finality is not a particularly compelling purpose inasmuch as the absence of relitigation will turn on the uncontrolled choices of class members.99 Since, however, the one-way intervention that would result were binding effect denied does not seem particularly unfair when compared to modern res judicata notions,100 it seems doubtful that prevention of relitigation would rise to the level of a compelling interest.101

In some circumstances, the ascription of binding effect to class actions would appear to meet even a demanding standard of justification. The award of class-wide structural injunctive relief, to be fair, must be done in a single proceeding, where all interests practically affected can be taken into account. In this type of case, recognition of a binding effect serves both to goad affected individuals to come forward and to create the repose necessary if implementation of a complex structural decree is not to be made meaningless by repeated alteration of its terms.102 Although not

97 There may also be a middle tier of scrutiny. See Lindsey v. Normet, 405 U.S. 56, 74-79 (1971) (invalidating double-bond requirement on appeal from tenant's action against landlord).
98 See 337 U.S. at 548.
99 See p. 1396 supra.
100 See id.
101 The fact that it may not be possible to bind class members to a losing lawsuit in which constitutional claims are asserted provides one more reason why res judicata concerns ought not to be a central determinant of class action procedure. See generally pp. 1396-99 supra.
102 Attempted relitigation of claims resolved in favor of a class is by no means merely a hypothetical possibility. In United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975), the United States Court of Appeals for the Fifth Circuit affirmed a consent decree negotiated by representatives of EEOC, the Justice Department, and the Department of Labor, on one side, and repre-
often thought to raise similarly complex issues, class actions for damages may require elaborate and expensive mechanisms for delivering relief, operating over a protracted period of time. Where the cost of delivering relief is a substantial proportion of the value of the relief to be delivered, fairness may also require that relitigation be avoided.\textsuperscript{103} In each of the above cases, the justification for extending binding effect to absentees is that such binding effect is necessary to effectuate class relief. Justifications of this sort, framed in terms of the necessities of effectuating governmental functions designed to secure personal rights, are of a form which the Supreme Court has found persuasive in circumstances where ordinarily only the most compelling justifications would be tolerated.\textsuperscript{104}

sentatives of the steel industry and unions, on the other. The decree sought to correct Title VII violations in the steel industry through structural reform of industry hiring and advancement practices and through provision of a fund to cover back pay awards. See \textit{id.} at 834–36. Steel industry employees, who were not parties to the consent decree, were not bound by the decree so long as they did not accept back pay under the decree. See \textit{id.} at 837–38. Since approval of the decree, a number of class actions, pending at the time the decree was negotiated, and brought by employees seeking both structural and back pay relief, have resumed. See, \textit{e.g.}, United States v. United States Steel Corp., 520 F.2d 1043 (5th Cir. 1975); Rodgers v. United States Steel Corp., 69 F.R.D. 382 (W.D. Pa. 1975). At least one observer has suggested that the failure of the steel industry consent decree to put an end to litigation may mean "that the industry wide settlement is never going to become effective." N.Y. Times, Oct. 12, 1975, at 29, col. 1. See also pp. 1400-01 supra.

\textsuperscript{103} See pp. 1401-02 supra.

\textsuperscript{104} The Supreme Court has indicated that restrictions on access to government services which are justifiable as corollaries to provision of the services in the first place will survive constitutional scrutiny in contexts where the Court ordinarily requires a compelling justification. Thus, in Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973), the Supreme Court upheld a refusal by the FCC to require a federally licensed broadcaster to carry editorial advertising, although content-based discrimination of the sort the FCC tolerated is ordinarily forbidden under the first amendment, \textit{see, e.g.}, Police Dept. v. Mosley, 408 U.S. 92 (1972). The Court reaffirmed the constitutionality of the FCC's Fairness Doctrine, \textit{see} 412 U.S. at 120-32, itself a form of content regulation, as a means of realizing first amendment values in the broadcasting context, and held that, absent government intervention seemingly inconsistent with first amendment norms, \textit{see id.} at 126-27, opening broadcast media to editorial advertising might distort the broadcast "marketplace of ideas," \textit{see id.} at 123-24, and therefore need not be constitutionally required.

Similarly, in Sosna v. Iowa, 419 U.S. 393 (1975), the Court upheld Iowa's requirement that an individual reside in the state for one year before seeking a divorce under its law, although the Court had previously struck down durational residency requirements in other contexts as unconstitutional penalties on the exercise of the fundamental right to travel, \textit{see} Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (free nonemergency medical care for indigents); Dunn v. Blumstein, 405 U.S. 330 (1972) (voting); Shapiro v. Thompson, 394 U.S. 618 (1969) (welfare benefits). Justice Rehnquist's majority opinion in
The access cases are a strong indication that one cannot, as did the Supreme Court in *Mullane* and *Eisen*, move from precedents dealing with coercive binding effects to a conclusion about the constitutional requirements for res judicata without explaining why the former is applicable to the latter situation. Instead, the access cases suggest that curtailment of access to the courts presents a fairly standard problem of equal protection analysis. Under this analysis, access can be cut off if such curtailment of a legal remedy furthers sufficiently important governmental interests, even though the courts are generally open to redress the grievance complained of.

Unlike the selective limitations of access which the Supreme Court considered in *Boddie*, *Kras*, and *Ortwein*, however, the foreclosure of access effected by class suits results from a judicial rather than a legislative decision. This difference does not diminish the relevance of the access cases since a court hearing a class action is acting pursuant to legislative grants of power embodied in, for example, the statute governing the court's jurisdiction and the Rules Enabling Act. But the fact of delegation is significant because it creates the constitutional requirement of adequacy of representation in class suits. A delegate cannot be free to act arbitrarily. He is constitutionally mandated to further the purpose for which authority has been delegated to him. The purpose of the pertinent delegations in the class action context is the adequate determination of a point of law or issue of common fact, or the implementation of a decree that adequately considers the interests of all affected. If a prior class suit is to foreclose an individual who would otherwise have access to courts, therefore, the class suit must have been adjudicated through a process ensuring that the interests of absentees would in fact be given their due in the litiga-

*Sosna*, in canvassing the state's justifications for its residency requirement, emphasized the state's interest "in minimizing the susceptibility of its own divorce decrees to collateral attack," 419 U.S. at 407, and the usefulness of a bright-line test like the durational residency requirement in furthering that interest, *see id.* at 407–08 & n.21. *But see id.* at 426–27 (Marshall, J., dissenting); *The Supreme Court, 1974 Term*, 89 Harv. L. Rev. 47, 94 n.48 (1975). Justice Rehnquist also noted Iowa's interest "in avoiding officious intermeddling in matters in which another State has a paramount interest," 419 U.S. at 407, and the interests of possibly absent spouses and children in the divorce proceedings, *see id.* at 406–07, concerns which suggest a second justification for the durational residency requirement framed in terms of the usefulness of a jurisdictional limit as a means of allocating divorces to the states in the best position to reach substantively correct determinations, *see The Supreme Court, 1974 Term, supra* at 94–95.


tion. This requirement, of course, is the requirement of adequate representation which Chief Justice Stone set out in *Hansberry v. Lee.*

Although the requirement of adequate representation is often associated with a duty the class representative must discharge, it is in fact not a duty of a single individual, but a requirement that must be met by the process of class adjudication taken as a whole. Even under rule 23, which makes the adequacy of the class representative an express requirement of class suit, responsibility for ensuring adequacy is mainly that of the judge who can cause the class to be divided into subclasses, issue orders to protect absentees, or send notice inviting intervention to improve representation. As will be developed more fully in the discussion in Section V below, the responsibility for ensuring adequacy devolves in the first instance on the trial judge since he is the only person in a position independently to scrutinize the "fit" between the interests of the class representative and the class. Nonetheless, fulfillment of the requirement of adequate representation also has important implications for the conduct of class counsel, who are, after all, generally entrusted with initiating the procedural steps through which representation problems are identified and cured. These elements of the professional responsibility of class counsel will be fully developed in Section VII of this Note.

The conclusion that the adequacy of representation requirement derives from the delegation doctrine is reinforced by consideration of the origins of the duty of fair representation developed in labor law. The power of an exclusive bargaining repre-

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108 See pp. 1472–74 infra.
110 Id. 23(c)(4), 23(d).
111 See pp. 1454–1556 infra.
112 See pp. 1577–1623 infra.
113 The analogy to labor law drawn here is not intended to suggest that the duty of the union representative in negotiating and enforcing collective bargaining agreements should be defined by the same standard as the duty of adequate representation in class suits. The situations are quite different, most importantly in that it may be possible to disaggregate a class, or redefine a class, to enhance the uniformity of interest in the represented group. See pp. 1479–82 infra (subcassing). Such redefinition will usually not be possible in the labor field where appropriate bargaining units are defined without regard to employee interests on specific job-related issues. Consequently, if collective agreements are to be made at all, the union must have a wide scope to compromise conflicting points of view. The heuristic functions of the class suit, on the other hand, require that such conflicting interests, rather than being compromised outside of the courtroom by class counsel, be brought to the judge's attention, and perhaps be represented by an advocate, see pp. 1479–82 infra.

The conclusion of the foregoing analysis—that a union representative may be an inadequate class representative in circumstances in which he would meet
sentative to compromise individual rights or interests is strikingly analogous to the power of a judge, through adjudication of a class suit, to foreclose the access rights of absentees. In the seminal case of *Steele v. Louisville & Nashville R.R.*, the Supreme Court, construing the grant of exclusive representative status in the Railway Labor Act to avoid constitutional infirmity, said:

> [T]he exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf . . . . [T]he statutory representative [has] at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislatates.

This does not mean that the statutory representative . . . is barred from making contracts which may have unfavorable effects on some of the members of the craft represented. Variations . . . based on differences relevant to the authorized purposes of the contract . . . are within the scope of . . . representation . . .

The duty of fair representation developed in *Steele* has subsequently been carried over to define the duty of the union when settling the contractual claims of its members. Thus, in *Vaca v. Sipes*, the Court held that union members could be denied access to court to contest contract claims under a collective bargaining agreement unless they could show that the union had violated its duty of fair representation. Moreover, *Vaca* explicitly reconciles the congressional purpose to have labor disputes informally settled with the employee’s right to seek redress in court by requiring union representation to be adequate.

his obligations under the duty of fair representation — is supported by the one case that has specifically discussed the relationship of the two doctrines. In *Air Line Stewards Local 550 v. American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974), the Seventh Circuit held that the union, all of whose current members had interests potentially antagonistic to former union members included in the class, did not adequately represent the latter group in reaching a settlement in which the interests of the former members were subordinated to those of the present members. *See id.* at 640–42.

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114 323 U.S. 192 (1944).
116 323 U.S. at 202–03; *see id.* at 198–204.
117 386 U.S. 171 (1967).
118 Id. at 186.
119 Id. at 182–83 ("[T]he duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law"); *accord*, Hines v. Anchor
And the recent case of *Hines v. Anchor Motor Freight, Inc.*\(^{120}\) holds that an employer cannot bind an employee to the results of an arbitration in which the union inadequately represented the employee.\(^{121}\)

The foregoing excursus into the access cases and labor law thus seems to confirm Hansberry's pronouncement that adequacy of representation is the central concern of constitutional analysis of binding effect in the res judicata sense. The relationship of adequacy of representation to a possible notice requirement in class actions may be illuminated by reconsidering *Mullane v. Central Hanover Bank & Trust Co.*\(^{122}\) from the theoretical perspective of the access cases. *Mullane* was not technically a class suit, but involved a New York procedure by which a trustee of a common trust fund could petition the courts for acceptance of an accounting.\(^{123}\) Upon acceptance, the trustee was freed from any subsequent liability for improper management of the common fund.\(^{124}\) As part of the procedure, guardians *ad litem* for income and corpus beneficiaries were appointed and perfunctory publication notice was accorded the absentee beneficiaries.\(^{125}\) The Supreme Court held that due process required better notice and specifically that the trustee had to notify individually by mail all those beneficiaries with whom it was in regular correspondence.\(^{126}\)

On its face, *Mullane* seems squarely inconsistent with the access cases since it appears to accord full due process rights to a procedure the result of which was merely the termination of access to redress inchoate claims against the trustee for breach of fiduciary duty. But the force of this inconsistency is undercut by two considerations. First, the complaining parties were in the position of defendants and the case therefore "looked like" the coercive defendant cases which provided the totality of the precedential support for the opinion.\(^{127}\) Second, as the Court specifically noted, the fees of the guardians *ad litem* would be charged against the trust, thus depriving the beneficiaries of

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\(^{120}\) 96 S. Ct. 1048 (1976).

\(^{121}\) Id. at 1060.


\(^{123}\) See id. at 309.

\(^{124}\) See id. at 309, 311.

\(^{125}\) See id. at 310.

\(^{126}\) See id. at 315–19.

\(^{127}\) See id. at 310.
tangible property as well as claims against the trustee. For this reason, there was a true coercive element in the suit.

There is, however, even a more fundamental objection to the procedure used in Mullane. To understand this objection, it is necessary to construct two models of how a judge might act to ensure adequate representation of absentee interests. The first — private control — model places independent value on an individual’s mastery of his own claim — so much so that a class member has a presumptive right to intervene or opt out even though either action may be dysfunctional from the standpoint of efficiency. The value attached to private control reflects the traditional assumption of the adversary process: each individual is the best judge of his own interests, even on matters such as the litigation strategy to be employed in the suit. This approach is skeptical of the ability of any third party, including a judge, to identify and evaluate absentee interests. The numerosity of the parties makes it impossible to join all who are interested, but the aim of the judge and the procedural system is to get actual intervention of a sufficient number of class members to ensure a reasonable likelihood that each absentee’s interest is represented before the court by someone sharing the same interest, and at the same time to afford an opportunity to escape the suit to any absentee who doubts the likelihood of anyone else being able to protect his interests. Early and extensive notice is obviously a requirement of such a scheme, not only to allow absentees the opportunity to act, but also to take advantage of the traditional notion that a person with notice who does not intervene can fairly be estopped from complaining of the result of litigation.

In the second — judicial control — model no special significance is given to private control. Instead, representation of class interests is adequate if those interests are brought to the attention of the court, but each distinct interest need not be represented

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128 Id. at 313.
129 Use of trust funds to pay attorneys’ fees is distinguishable from use of a class recovery as a common fund to pay litigation expenses since the beneficiaries’ rights in trust, in contrast to class members’ interests in a fund, pre-existed the litigation.
130 Cf. Chayes, supra note 29, at 1282-88 (traditional view of lawsuit).
131 These objectives may be inconsistent to the extent that affording class members an opportunity to opt out has the effect of removing from the lawsuit the individuals who would have otherwise been most likely to intervene. See pp. 1483-84, 1487-89 infra.
133 See, e.g., Greenfield v. Villager Indus., Inc., 483 F.2d 824, 832 (3d Cir. 1973). Much of the commentary on class actions stresses the special role of the judge. See Weinstein, Revision of Procedure: Some Problems in Class Actions,
by an advocate. Indeed, intervention is suspect since intervenors will represent only that segment of the class able to obtain an attorney. A portion of the class will lack practical access to the court and, as to these class members, there is no reason to assume either adequate representation or voluntary waiver of their interests in the suit. Instead of intervention, devices such as subclassing, the appointment of amici or special representatives, or surveys of the class must take the place of multiplicity and the adversary system in informing the judge of the range of interests with which he must deal in reaching judgment. Because access to the legal system can best be provided to the group as a whole, an individual's claim to control the advocacy of his cause must be subordinated when necessary to allow group rights to be vindicated. Although our traditions dictate minimizing such subordination, the judicial control paradigm recognizes that giving full sway to private control can be self-defeating since individual litigation may not in fact be possible and yet insistence on individual rights could make class suit financially or practically infeasible. Notice may or may not play a part in apprising the court of the multiplicity of interests held by absentees; in any event, since notice is designed chiefly to generate information, and not necessarily to spur intervention, notice need not be extensive.

The fundamental flaw in the procedure at issue in Mullane is that if it fits neither model and thus failed to ensure adequate representation. As far as can be ascertained from the opinion, the Supreme Court doubted whether there was any practical supervision of the adequacy of the court-appointed representatives either by the court or by absentees. Moreover, the Court seemed to assume that this was a case in which actual intervention was contemplated by the statutory procedure, since the Court ascribed no role to the trial judge in overseeing adequacy of representation

9 BUFFALO L. REV. 433, 460 (1960); Note, supra note 18, at 603; Comment, Adequate Representation, Notice and the New Class Action Rule: Effectuating Remedies Provided by the Securities Laws, 116 U. PA. L. REV. 889, 905 (1968). Professor Crafee likened the class action to the receivership of an insolvent corporation — the judge must oversee the interests of the numerous absentee — the judge must oversee the interests of the numerous absentee involved. Z. CHAFEE, supra note 58, at 289.

134 See pp. 1479-82 infra.


136 See pp. 1441-44 infra.

137 Of course, if an absentee should intervene, that is all to the good.

or even the reasonableness of the fees paid the guardians. In this view, Mullane stands for the rather limited proposition that, if multiplicity of intervention — the private control approach — is to be relied upon to achieve adequate representation, then notice must be reasonably likely to come to the attention of those who might intervene — potentially everybody in the class.

C. Definition of the Action: The Structure of Pretrial Procedure

"In order to give clear definition to the action," rule 23(c)(1) mandates that "[a]s 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." Why such definition by order is needed, especially near the outset of litigation, remains one of the most puzzling questions about rule 23. The rule itself would seem to require definition, even in the limited sense of being able to state the generic identities of class members, at only three times: (1) after entry of a judgment, to be able to state who is bound by the action; (2) before a hearing confirming a dismissal or settlement, to be able to give notice; and (3) under rule 23(b)(3), before a hearing on the merits, in order to enhance binding effect, implement opt-out rights, and give such notice as may be required by due process. Only on the third occasion is early definition of the class arguably necessary. Although even here, since the ultimate judgment will not run to those to whom notice is not directed, some more convenient definition of the class, such as that in the complaint, would seem to serve the function of giving notice to absentees of their participation rights. Moreover, even if it is conceded that protection

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139 See 339 U.S. at 313 (guardians "may conduct a fruitless or uncompensatory contest").

140 Although the notice Mullane requires may be extensive, its constitutional standard of "reasonable" notice, see id. at 314, should not be confused with the more rigorous rule of individual notice which the Supreme Court found required by rule 23 in Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 175 (1974). See Dam, supra note 63, at 106-09; Note, Managing the Large Class Action, supra note 60, at 435-41.


142 See FED. R. CIV. P. 23(c)(3).

143 See id. 23(e).

144 See id. 23(c)(2), discussed, pp. 1392-95 supra.

145 See FED. R. CIV. P. 23(c)(3) ("The judgment . . . shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed . . .").

146 Sending notice prior to the development of more than fragmentary information about the class would, to some extent, handicap the effort of the trial judge to secure participation by absentees. Because such notice would disclose very
of absentees requires some information about class members, it would seem that such information could be gathered through discovery devices that are readily available in the Federal Rules, and that certification vel non adds nothing to the information before the court, although a certification hearing may provide a convenient forum for argument about the meaning of information that has been collected. Indeed, a spate of recent appellate decisions commenting negatively on trials in which certification was delayed (or ignored altogether) until after a decision on the merits seems to confirm that federal courts have found early definition in the rule's sense unnecessary to successful adjudication of at least some class suits.

This Part of the Note will consider whether certification ought in fact to be considered a procedure of little practical significance which, at least in the absence of rule 23(c)(1), can be safely ignored. The present structure of the pretrial procedure that has been built around rule 23 will first be described and then critically analyzed to determine whether this procedure does in fact serve a useful defining function. Second, because the conclusion is reached that present procedure focuses on incorrect goals, an alternative procedure derived from the substantive theory of the class suit is presented. The pretrial procedure which is developed is directed primarily toward generating information about the class in much the same way pretrial procedure in individual suits develops information about the merits of a dispute. Problems of information——

little about the action, absentees might not be able to judge what course the action ought to take to be consistent with their interests without engaging in expensive and time-consuming factfinding of their own. Reluctant to undertake such an investigation, and equally reluctant to take perhaps unnecessary and certainly costly steps to intervene in the class action, absentees might conclude that the best response to incomplete notice is to opt out. Under current early certification practice, however, notice based on the pleadings may offer little less information than notice based on information elicited at the certification hearing. See pp. 1422–24 infra. Offsetting any disadvantage created with respect to intervention might be the salutary effect of limiting any tendency on the part of class representatives to overstate the size of the class to get settlement leverage: since the plaintiff must pay the costs of individual notice in rule 23(b)(3) suits, see Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177–79 (1974), his cost of suit would increase in tandem with any settlement leverage.

147 Thus a hearing on class information for the purposes of clarifying what is known about the class could usefully serve a function parallel to that of the rule 16 conference, which is intended to focus the trial on issues that remain unresolved. See Fed. R. Civ. P. 16; pp. 1427–38 infra.

148 See cases discussed at note 159 infra. See also Rodriguez v. East Texas Motor Freight, 505 F.2d 40, 51 (5th Cir. 1974) (no formal certification until after decision on the merits, class suit allowed), cert. granted, 44 U.S.L.W. 3670 (U.S. May 25, 1976) (No. 75-718); Bing v. Roadway Express, Inc., 485 F.2d 441, 446–47 (5th Cir. 1973) (same).
gathering from class members are, therefore, next considered. A final section analyzes constraints statutes of limitations may place on the timing of a determination of the suitability of an action for class treatment.

1. A Critique of Practice Under Rule 23. — One of the most difficult tasks in analyzing the pretrial structure of rule 23 is that the rule itself mandates very little and, as a consequence, courts have taken divergent views both on the timing of certification relative to various motions going to the merits and on the scope of the investigation that is needed to justify certification. On the timing question, the law seems to be in a state of flux. In *Dolgow v. Anderson*,149 one of the first cases to address this question, Judge Weinstein held that a class suit could not be certified unless the class representatives were able to show a "substantial possibility" of prevailing on the merits.150 Such a preliminary inquiry was required, he thought, to avoid unfair pressure on the defendant to settle.151 Although the *Dolgow* procedure has been urged by those worried about the abusiveness of class suits,152 it has received mixed reviews153 and the Supreme Court's decision in *Eisen v. Carlisle & Jacquelin*,154 which held that a preliminary

149 43 F.R.D. 472 (E.D.N.Y. 1968), rev'd and remanded for entry of findings of fact and conclusions of law, 438 F.2d 825 (2d Cir. 1970).
150 43 F.R.D. at 501.
151 See id. at 501-02. Judge Weinstein implied that notice, especially carrying the imprimatur of a federal court, could depress the class opponent's stock prices, thereby apparently giving the class undue bargaining leverage by disrupting the opponent's ordinary business relationships. See also pp. 1437-38 infra.
152 See, e.g., AMERICAN COLLEGE OF TRIAL LAWYERS, SPECIAL COMM. ON RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE, REPORT AND RECOMMENDATIONS 25-28 (1972). Other procedures intended to reduce the bargaining leverage of class representatives have also been adopted. See, e.g., Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir.), cert. denied, 419 U.S. 885 (1974) (use of non-class test case procedure to avoid harmful publicity that would arise from notice), discussed, pp. 1437-38 infra.
hearing on the merits for the purpose of apportioning the cost of notice was improper under rule 23,\(^{155}\) appears to rule out Dolgow hearings as well.\(^{156}\)

_Eisen_ did not, however, dispose of the issue of whether traditional preliminary motions directed to the merits, such as summary judgment motions, could precede certification.\(^{157}\) This issue has received a great deal of attention in the last year and the law now seems relatively clear. Focusing on the need to avoid procedures having the effect of one-way intervention, the United States Courts of Appeals for the Seventh and District of Columbia Circuits have held that certification of rule 23(b)(3) class suits, with its attendant notice,\(^{158}\) must be made prior to the determination of summary judgment motions, whether the disposition of the motion is for or against the class.\(^{159}\) In suits brought under

\(^{155}\) _Id._ at 178-79.

\(^{156}\) The Supreme Court cited approvingly Judge Wisdom's opinion in _Miller v. Mackey International_, 452 F.2d 424 (5th Cir. 1974), in which the Fifth Circuit, construing rule 23, had held a Dolgow hearing improper:

_In determining the propriety of a class action, the question is not whether the plaintiff [has] stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met._

417 U.S. at 178, _quoting_ 452 F.2d at 427. The Court also noted that preliminary hearings, "not accompanied by the traditional rules and procedures applicable to civil trials," 417 U.S. at 178, could result in substantial prejudice to the class opponent. _See also_ pp. 1383-87 _supra_.

\(^{157}\) The Supreme Court relied upon two factors in disapproving the preliminary hearing in _Eisen_: lack of authorization by, and apparent incompatibility with, rule 23, and the possibility of prejudice to the class opponent due to a lack of normal procedural safeguards. _See note_ 156 _supra_. _See also_ Guarantee Ins. Agency Co. v. Mid-Continental Realty Corp., 57 F.R.D. 555, 564 (N.D. Ill. 1972) (questioning whether preliminary hearing violated seventh amendment jury trial right). Neither of these problems is raised by hearings on rule 12 or 56 motions prior to certification. Such motions are obviously both contemplated and specifically authorized by the Federal Rules, and are clearly not thought to be prejudicial to any party. _But see_ Peritz v. Liberty Loan Corp., 523 F.2d 349 (7th Cir. 1975), _discussed_, note 159 _infra_.

\(^{158}\) _See_ FED. R. CIV. P. 23(c)(2).

\(^{159}\) This line of analysis begins with the Seventh Circuit's decision in _Sprogis v. United Airlines, Inc._, 444 F.2d 1194, 1201-02 (7th Cir.), _cert. denied_, 404 U.S. 901 (1971), in which the court of appeals held that § 706(g) of Title VII, 42 U.S.C. § 2000e-5(g) (1970), authorized a trial court to extend a judgment in favor of a single plaintiff to the class of similarly situated airline stewardesses. Judge, now Justice, Stevens dissented, arguing that a procedure in which an action was given class status after a judgment was "strikingly unfair" because such a judgment was not mutually binding. In 1975, the Seventh Circuit had occasion to reconsider its _Sprogis_ holding in _Peritz v. Liberty Loan Corp._, 523 F.2d 349 (7th Cir. 1975). In _Peritz_, the trial court had severed the liability issue in a Truth in Lending Act suit from other issues and tried it to a jury before ruling on certification. After a special verdict was entered for the plaintiff, the trial court certified the class and the defendant appealed. _Id._ at 350-51. Chief Judge Swygert, relying heavily on the Supreme Court's discussion of one-way interven-
rule 23(b)(1) or (b)(2), these same courts have allowed certification to be made contemporaneously with a determination of the merits, although even here such late certification contravenes the command of rule 23(c)(1) and may be impermissible if the defendant is prejudiced by the delay. Thus, the emphasis of pretrial procedural design seems to have shifted its focus from protection of the defendant from the *in terrorem* effect of the class suit to the protection of the defendant from the supposed unfairness of one-way intervention.

In the following case of Jimenez v. Weinberger, 523 F.2d 689 (7th Cir. 1975), *cert. denied sub nom.* Jimenez v. Mathews, 44 U.S.L.W. 3754 (U.S. June 29, 1976) (No. 75-1114), Judge Stevens, this time writing for the majority, discussed the whole problem of the timing of certification and motions leading to a disposition on the merits. In suits brought under rule 23(b)(3), he wrote, the requirements for notice and opt-out set out in rule 23(c)(2) and the need to avoid one-way intervention require that certification precede summary judgment. *See id.* at 698. In suits brought under rule 23(b)(1) or (b)(2), however, the absence of an opt-out right and, apparently, lack of concern over one-way intervention, make it permissible to enter an order on the merits and on certification at the same time. *See id.* Nonetheless, delay in certification contravenes the express language of rule 23(c)(1), *id.* at 699, and delayed certification may be improper if prejudice to the class opponent would thereby result, *id.* But cf. American Pipe & Const. Co. v. Utah, *supra*, at 544-55 (not unfair to class opponent to allow alleged class members to intervene after denial of certification because of adequate notice of nature of class claims). Jimenez involved a case in which summary judgment was won by the class on appeal in the Supreme Court, *see 523 F.2d at 693*, but the Seventh Circuit has made clear in a subsequent case, Roberts v. American Airlines, Inc., 526 F.2d 757 (7th Cir. 1975), that the no-certification-after-a-hearing-on-the-merits rule is equally applicable to cases won by the class opponent. *See id.* at 763. The District of Columbia Circuit, in Larionoff v. United States, 533 F.2d 1167, 1182-83 (D.C. Cir. 1976), has concurred with the *Jimenez* court in all particulars.

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160 See note 159 *supra*.


163 Whether a vacating of the certification order after a hearing on the merits...
The rationale of these recent cases, if carried to its logical extreme, would require certification to precede even motions made under rule 12(b)(6); even though such a motion could not bind a defendant — denial of the motion leads only to continued trial, not judgment — the class representative would get the benefit in settlement negotiations of alleging a class without any attendant res judicata detriment. There is reason to think that such an extension will not occur, however; or if it does, that it will have little practical impact. The Senate Commerce Committee class action study, for example, reports that 55 percent of the class action cases studied were disposed of in favor of the defendant on preliminary motions. Plaintiffs’ attorneys who were interviewed in the study further reported that they thought it essential to present a strong case on the merits in order to get certification, regardless of whether a certification order was actually entered before formal consideration of the merits. So without vacating the decision on the merits as well is effective in removing one-way intervention is doubtful. Where a summary judgment is decided in favor of the plaintiffs, the court in Jimenez v. Weinberger, 523 F.2d 689 (7th Cir. 1975), cert. denied sub nom. Jimenez v. Mathews, 44 U.S.L.W. 3754 (U.S. June 29, 1976) (No. 75-1114), realized that, under modern theories of res judicata, see pp. 1395-99 supra, it was very unlikely that a class opponent would be able to relitigate the summary judgment issue against any subsequent opponent, whether or not that opponent was a member of the class as alleged. See id. at 701; accord, Elliott v. Weinberger, No. 74-1611, at 15 (9th Cir., Oct. 1, 1975) (noting that the overturning of certification because of alleged defects in notice would be fruitless since the class had won and legal services attorneys would doubtless be able to bring individual suits invoking the stare decisis and res judicata effects of the summary judgment even if the notice was defective), vacated and remanded on other grounds sub nom. Mathews v. Elliott, 44 U.S.L.W. 3699 (U.S. May 25, 1976) (No. 75-1234). See also Katz v. Carte Blanche Corp., 496 F.2d 747, 758-62 (3d Cir.), cert. denied, 419 U.S. 855 (1974). As a result of stare decisis and res judicata, one-way intervention cannot be avoided unless the decision on the merits, rather than the certification order, is vacated. Such an outcome would, however, seem unfair to the named parties.

164 FED. R. CIV. P. 12(b)(6) provides for motions against the complaint for failure to state a claim upon which relief may be granted.

165 Cf. Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324, 328 (E.D. Pa. 1967) (arguing that it was impermissible for class representative to “enhance his own bargaining power by . . . alleging that he is acting for a class of litigants” unless class can in fact be bound).


167 Id. at 1136. See also id. at 1144 (sample cases tend to show concurrent consideration of certification and merits issues).

168 Id. at 1144.
long as the "penalty" for disposing of merits motions before certification is not a reversal of the ruling on the motion, but merely a vacating of certification, defendants may well continue their attempts to defeat the class suit on the merits before turning to the class allegations, especially since the actual benefit to be expected from res judicata is not substantially greater than that afforded by stare decisis in any event. Yet, despite what may be a gap between theory and practice, it does seem clear that there is growing pressure at the appellate level to make "as soon as practicable" mean "very quickly," a pressure that is reinforced by local rules of court that require a party to move for certification within 30 to 90 days after filing of the complaint on pain of having the complaint stripped of its class allegations.

The earlier in the course of an action a court enters a certification order, however, the less likely is it that definition in the sense of digging below the pleadings will be possible. Instead, courts will have to decide issues raised at the certification hearing on the basis of the pleadings or on a limited amount of discovered

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169 See Peritz v. Liberty Loan Corp., 523 F.2d 349, 355 (7th Cir. 1975).
170 See id. (plaintiff attorneys thought that a decision on the merits against a class would effectively preclude further suit regardless of timing of certification). See also pp. 1395-99 supra.

Moreover, a number of cases indicate that the defendant may "waive" early certification and elect to proceed directly to the merits. See Roberts v. American Airlines, Inc., 526 F.2d 757, 762-63 (7th Cir. 1975); Katz v. Carte Blanche Corp., 496 F.2d 747, 762 (3d Cir.), cert. denied, 419 U.S. 885 (1974); Haas v. Pittsburgh Nat'l Bank, 381 F. Supp. 801, 805-06 (W.D. Pa. 1974), aff'd in part, remanded in part, on grounds not here relevant, 526 F.2d 1083 (3d Cir. 1975).

171 See generally pp. 1394-1402 supra.
172 FED. R. CIV. P. 23(c)(1).

Even if no motion is made, the court has an independent duty to decide whether to certify the class. See, e.g., Garrett v. City of Hamtramck, 503 F.2d 1236, 1243 (6th Cir. 1974); 3B J. MOORE, supra note 2, ¶ 23.50.
175 In a number of cases, e.g., Dickerson v. United States Steel Corp., 64 F.R.D. 353, 354 (E.D. Pa. 1974); G & B Invest. Club v. Kleintere's Inc., 62 F.R.D. 140, 145-46 (E.D. Pa. 1974); Berman v. Narragansett Racing Assoc', 48 F.R.D. 337 (D.R.I. 1969); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 457 (E.D. Pa. 1968), some or all of the requirements of rule 23(a) were decided on the basis of the complaint or the apparently unverified statements of counsel at oral argument. It seems clear that a decision on the basis of the pleadings is proper. See Huff v. N.D. Cass Co., 485 F.2d 710, 713 (5th Cir. 1973); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1785, at 131 (1972). Moreover, a number of cases seem to sanction a decision on the pleadings by, in effect, requiring the defendant to show why the action cannot be maintained as a
The procedural posture of the certification hearing has sometimes caused courts to decide certification issues on the basis of presumptions—historically with a bias in favor of class treatment. Such a cursory definition of the action need not be final, of course. Rule 23(c)(1) itself provides that certification orders are provisional and "may be altered or amended before the decision on the merits." Reconsideration of a certification order, however, is discretionary; rule 23 does not itself structure pretrial procedure in a way which would occasion reconsideration. In fact, by mandating that all of the inquiries required by rules 23(a) and 23(b) be undertaken at once, the rule could encourage courts to see the certification hearing as a cataclysmic, all-or-nothing event. In any case, certification on the basis of a record that does not get beyond the pleadings scarcely seems to provide a defining function; and even if further definition of the action in fact takes place throughout the course
of the action, rule 23(c) is immaterial to the development of that definition.

The foregoing description may in fact caricature the present order of battle in class actions; nonetheless, it does seem clear that policy pressures are driving the certification hearing toward the beginning of the suit, especially in suits brought under rule 23(b)(3). The primary effect of this movement is to limit the potential of the certification hearing as a device for assessing information about the class and for determining what else it might be useful to know about the class before adjudicating its rights. There are, however, two other adverse consequences of this movement. First, early certification on the basis of presumptions creates the potential for unfairness to the defendant. Second, an improper class determination at the outset can make control of settlement difficult.

The point of the preliminary hearing on the merits instituted in Dolgow v. Anderson was to ensure the court that an action had some merit before notice, with its attendant adverse publicity, was sent to class members. Once such notice was sent, Judge Weinstein feared that the class opponent would be put under severe pressure to settle the action because the opponent's stock prices would fall, apparently interfering with the opponent's ongoing, but terminable, business relationships. As rule 23(b)(3) procedure is currently being structured — to stress avoidance of one-way intervention — there is, at least in theory, no way for the class opponent to escape settlement pressure arising from such adverse publicity. The certification hearing ought to be early in the action, certification may ensue unless the class allegations are grossly deficient, and, especially after the Supreme Court's

181 For example, no case has been found that states that rule 23(c) does not allow a wave of discovery and an evidentiary hearing on class issues. Indeed, even Larionoff v. United States, 533 F.2d 1167 (D.C. Cir. 1976), which holds that certification hearings should generally be held early in the action, see note 159 supra, recognizes that factual development may be necessary to make a proper ruling. See 533 F.2d at 1183 n.40. Nonetheless, a reading of trial court cases leaves the distinct impression that most certification issues are decided on little more than the pleadings and, perhaps, oral argument. This conclusion, however, is weakened by the fact that many opinions certifying class suits are ambiguous as to the factual basis for certification and to the legal issues the court thought the case raised. See also Note, supra note 166, at 1143 (opinions on certification often unclear, generally did not state facts or reasons for opinion).

182 43 F.R.D. 472 (E.D.N.Y. 1968), rev'd and remanded for entry of findings of fact and conclusions of law, 438 F.2d 825 (2d Cir. 1970).

183 43 F.R.D. at 501-02.

184 See id.

185 Cf. Peritz v. Liberty Loan Corp., 523 F.2d 349 (7th Cir. 1975), discussed, p. 1425 infra.

186 See cases cited at notes 175, 177 supra.
decision in *Eisen*, notice must be sent to all persons individually identifiable. Faced with this problem, the United States Court of Appeals for the Third Circuit, in the leading case of *Katz v. Carte Blanche Corp.*, found in the threat of adverse publicity sufficient reason for abandoning class suit altogether—at least with the consent of the class opponent—and substituting instead a test case procedure whereby the named plaintiff's claim is first litigated. If the class opponent wins that case, it is left with only stare decisis protection against the class; on the other hand, if the class opponent loses, persons found to be in the class as originally alleged would be allowed to take advantage of the judgment.

Whether the procedure adopted in *Katz*, which was decided before the Supreme Court's opinion in *Eisen*, survives that decision is uncertain. The United States Court of Appeals for the Seventh Circuit, in *Peritz v. Liberty Loan Corp.*, has already disapproved, as creating a potential for one-way intervention, a procedure similar to that used in *Katz*, whereby the trial

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188 See id. at 175-77.
190 See 496 F.2d at 762. It is not clear why the consent of the defendant is needed. Unless the test case, if won by the plaintiff class, is followed by certification of the class, collection of fees from those benefited by the judgment may be difficult because subsequent litigation using the judgment won in the test case could occur in many courts and there will be no fund easily available to charge with costs. This eventuality might make a test case financially infeasible, a result clearly unfair to the plaintiff. This problem could perhaps be overcome if the defendant would also agree to pay attorneys' fees. Nonetheless, it must be questioned whether litigants have the power to modify the mandates of the Federal Rules of Civil Procedure by consent.
191 See 496 F.2d at 762.
192 See 88 HARV. L. REV. at 831.
193 523 F.2d 349 (7th Cir. 1975), discussed, note 159 supra. It is interesting to note that the *Peritz* procedure, like that in *Katz*, did not prejudice the defendant's case in the way that the *Eisen* preliminary merits hearing did, see note 156 supra, suggesting that *Eisen* is being interpreted as a case about one-way intervention. If this is the case, then it is difficult to distinguish a partial trial as in *Peritz* from a full trial before certification as in *Katz*.
court severed a liability issue and tried it to the jury prior to certification.\textsuperscript{194} On the other hand, the Katz procedure does not necessarily require that absentees seeking to use a judgment against the class opponent do so in a class suit.\textsuperscript{195} To the extent that subsequent class suit is avoided, the Katz procedure could, perhaps, be justified as an execution of the mandate in rule 23(b)(3) to consider, and presumably implement if superior, procedures alternative to the class suit.\textsuperscript{196} Whatever the outcome of this debate, it is clear that the Katz procedure, which at least as a formal matter ignores the claims of absentees, is not capable of implementing any defining function as envisioned in rule 23(c)(1).

A more pervasive problem with early certification based largely on the pleadings is that such certification can be counterproductive to effective control of settlement. Once an order defining the class is entered, the parties will be relieved of any obligation to present further argument on an appropriate class definition, and the dynamics of the post-settlement situation make it unlikely that either party will spontaneously challenge an order already entered. Neither party will want to upset the settlement and the judge will, therefore, be deprived of adversarial presentation of class issues. Moreover, the judge may be hesitant on his own motion to upset or delay a settlement once reached—especially if gathering information about the class will itself be a complicated process.\textsuperscript{197} As a result, a class definition once tentative becomes final without reevaluation.

If it were reasonably likely that the class definition as alleged would be correct, the failure to have adversary presentation would present few problems. The trial judge could accept the class definition presented by the plaintiff or by the parties and assess the adequacy of the settlement by the interests of that class as he understands them. The alleged class definition is unlikely to be correct, however. The named plaintiff, when drawing the complaint, will seldom know much about the actual situation of absentees. The conscientious representative, to be sure of tolling the statute of limitations for all whom discovery will show to be actual class members\textsuperscript{198} and to minimize the costs charged against

\textsuperscript{194} See note 159 supra.

\textsuperscript{195} But cf. note 190 supra.

\textsuperscript{196} Rule 23(b)(3) provides "the court [must find] that . . . a class action is superior to other available methods for the fair and efficient adjudication of the controversy."


\textsuperscript{198} See pp. 1449-54 infra.
individual recoveries, will specify the class as broadly as his initial understanding of the common issues will allow. Moreover, the class attorney's own interest in ensuring an adequate fund from which to collect his fee will provide additional incentive for a broad class definition. The class opponent may acquiesce in the alleged class definition to avoid the expense of litigating this issue and, perhaps, to achieve the widest possible res judicata effect. Alternatively, the named parties, seeking to reach a quick agreement, may adopt an improperly small class definition in order to avoid a challenge to the settlement by persons who should be in the class, but whose interests are being disregarded by the named parties. Thus, a procedure which allows the actual entry of an order defining the class before class facts are developed shifts inertia to the side of misspecification, relieving settling parties of the burden of demonstrating the adequacy of the class definition contained in the complaint or negotiated among themselves.

2. Using the Defining Function to Structure Pretrial Procedure. — The foregoing description may misrepresent actual practice under rule 23 to some extent. Nonetheless, trial courts attempting to follow appellate guidelines may well structure pretrial primarily to avoid one-way intervention and to afford individual class members some opportunity to exercise control over the litigation of their claims. Yet neither of these issues seems to be an appropriate focus of class action pretrial. As discussed above, the search for mutuality will be somewhat fruitless. Attempts to introduce individual control should be delayed until the court decides that such control is desirable. Instead, class action pretrial procedures should concentrate on defining the range of interests presented by the class.

Pretrial procedures designed to serve this defining function will include two major components. First, they will provide for a series of hearings at which the judge can determine whether the party structure of the litigation assures that all relevant interests of absentees will be considered before the lawsuit is resolved. Second, pretrial procedures will include formal occasions for modifying the party structure by adding spokesmen for theretofore unrepresented interests if the hearings show that to be necessary. In short, pretrial procedures should serve as the means of implementing the constitutional requirement of adequate representation. As such, class action pretrial procedures should be designed to generate information about absentees. Such information cannot be gathered by examining the pleadings, for class allegations, like

other allegations in the complaint, suffer from all the defects of self-serving statements and lack of information that have caused pleadings to be given a very limited office in the structure of the Federal Rules of Civil Procedure as a whole.

In the unity theories of the class suit, such a defining function is not needed. The interests of absentees under the community of interest theory are simply not relevant to just adjudication of the class suit; if absentee interests are a matter of legal concern, this concern is taken into account at the moment of determining the suitability of the action for class treatment, and class status is denied.200 In the consent theory, it is not the role of the judge to determine adequacy of representation; instead, the focus of procedure is on alerting absentees to the pendency of the suit and letting them decide whether to opt out of, or intervene or acquiesce in, the representative suit.201 Under the substantive theory of the class suit, however, the judge has primary responsibility for ensuring the fairness to absentees of either an adjudicated or negotiated conclusion of the action. Although the issue of the fairness of a settlement is ultimately adjudicated, the judge's participation in the structuring of settlement can be at the level both of negotiation and of adjudication and for this reason, it is useful to consider the defining function from the perspective of each mode of dispute resolution.

In adjudication, the defining function can most usefully be thought of as a requirement for a series of iterative steps — some involving the gathering and assessment of information about the class and others adjusting the party structure so that future information obtained from the representative parties about the interests and situations of absentees can be assumed to be true, or will at least be subject to verification through some form of adversarial presentation.202 Divided in this way, the defining function can be seen to combine elements of both judicial and private control.

Since the pleadings are by their very nature documents within

200 See pp. 1332-34 & note 15 supra.
201 See p. 1342 supra. The consent theory may, however, require that the judge make some inquiry into the facts underlying the complaint so that he can transmit enough information to absentees through the notice sent them to allow an informed choice about what course to take with regard to the litigation. See note 146 supra; cf. p. 1403, note 66 supra (due process may require some form of knowing waiver).
202 This form of adversarial presentation need not be actual intervention by absentees. Instead, it may be sufficient that absentees may monitor the suit and make motions to intervene when they think their interests are being compromised, see pp. 1482-85 infra. Such motions would indicate to the judge a need to re-open the definition question.
the private control of the parties, the first task of the judge in adjudicating a class action must be to subject the pleadings to a verification process that will ensure correspondence between the class allegations and the actual situations of absentees. Because, at the time of filing of the complaint, neither the class representative nor the class opponent may have actual knowledge about the absentees, some sort of discovery will generally be necessary at the beginning of the verification process. Further, the parties' interests at the outset of litigation may not be adverse, or may be mutually adverse to the interests of absentees; the judge will, therefore, have to take the initiative in scheduling and directing information gathering. Once the judge has assured himself that he can safely assume that the positions of the class representative faithfully mirror those of the class as a whole, or has established a party structure through subclassing, intervention, or monitoring by absentees that will provide an adversarial presentation of information about the class to the court, further control of the action can be remitted largely to private control with the judge exercising control only if new information shows this to be necessary. Of course, if the information gathered about the class shows that a representative suit cannot be fairly concluded without distorting substantive policies, the defining function will end with an order dismissing class allegations.

The defining function required to achieve a fair negotiated resolution of the class suit is somewhat different. If settlement is understood to reflect a substantive choice to facilitate consensual and autonomous ordering in society, as well as a convenient method of clearing dockets, then it is clear that extensive judicial involvement in structuring the outcome reached in negotiation is counterproductive. Nonetheless, only the judge is in a position to force the parties before the court to take absentee interests into account. Factoring such interests into the outcome of the action is, however, a much different process than in adjudication,

203 See Note, supra note 166, at 1141.
205 See pp. 1479–82 infra.
206 See pp. 1482–85 infra.
207 See pp. 1566–68 infra.
208 See generally pp. 1375–76 supra.
209 Because a range of substantive outcomes will often be consistent with a statutory mandate, the parties actually negotiating a settlement may adopt an outcome furthering their private interests over absentee interests if such a course is both consistent with the statute and more desirable than an outcome that would be required to accommodate absentee concerns. See sources cited note 204 supra; pp. 1561–62 infra.
where it is sufficient to bring the relevant interests to the attention of the court. As discussed in an earlier Section, participation by the judge in negotiations as an advocate of absentee interests poses grave problems of fairness. Moreover, the goal of creating autonomous resolutions of disputes suffers if the interests of absentees are filtered through the judge. Thus, for negotiations to be fair and to further consensual goals, the defining function must be concerned not only with identifying the interests of absentees, but with modifying the party structure of negotiations through such techniques as inviting intervention so that the resolution of the suit itself reflects the range of interests that will be affected by the settlement.

The purpose of the defining function—preparing the class action for fair disposition by either adjudication or negotiation—determines the timing of procedures which implement that function as well. The judge ought to have at least begun to define the action, and put the party structure in place, before he is asked to rule on the merits or approve a settlement or dismissal. These occasions, however, mark only the last points by which definition must have occurred. In fact, considerations of the dynamics of settlement suggest that definition must begin at the outset of the litigation, immediately after the filing of the complaint.

The filing of the complaint is, as a practical matter, the first opportunity for a court to exercise control over a class dispute, but it should not be understood to indicate an irrevocable decision

210 See pp. 1383–87 supra.

211 The judge may have other alternatives than asking parties to intervene. He may appoint an absentee advocate, see pp. 1561–65 infra, or he may invite amici whose institutional concerns closely match those of absentees to enter the negotiations, see Chayes, supra note 29, at 1300–01. In either case, the actual participation of a person sharing the views of absentees is essential. Moreover, since the judge must defer in reviewing the settlement to an analysis of whether a negotiated decree is fair given the interests of the parties, as well as the strength of the parties' cases on the merits, the judge will be handicapped in finding a yardstick to measure the judgment. In this situation, perhaps the best that the judge can do is make reasonably sure that each point of view has been at the bargaining table.

212 Although not a part of the defining function as developed in the text, the judge must play a role in controlling bargaining weapons. See generally pp. 1375–83 supra. It is the judge who controls the procedures that will be adopted in adjudicating the lawsuit and, therefore, the judge is the only one in the position to ensure that procedures do not themselves become bargaining weapons so powerful that they either defeat access (where access through the class device is consistent with substantive policies) or force the class opponent to settle for an outcome falling outside limits set by the strength on the merits of the class' claim. In performing this function, however, the judge is not handicapped by the fact that he must find out about unfair bargaining pressure from a representative of those pressured—here it is the parties themselves who stand to be pressured, and they can be expected to bring their interests to the attention of the court.
by the parties to adjudicate their dispute. Instead, it is merely one step in ongoing negotiations between the class and its opponent, and these negotiations may terminate in a proposed settlement at any time and without regard to either the interests of absentees or the readiness of the action to proceed to any stage of adjudication. If the action is not defined by the time the parties move for a hearing on dismissal or compromise, it will be more difficult to terminate the suit in a fair way. The judge will not have the benefit of adversarial presentation on class issues that he might have had before the settlement was reached, and his opportunity to inject absentee representatives into the bargaining process will have been missed. Although the settlement could be disapproved and new negotiations mandated with the appropriate party structure, this course is not as satisfactory as putting the party structure in place while the situation is still fluid and the absentee representatives do not have to contend with a preexisting agreement.213

Considerations other than the possible need to pass on the fairness of a settlement also dictate that the defining function start immediately after the filing of the complaint. Indeed, initiation of bargaining that can lead to an acceptable settlement may be hampered until there is at least a tentative indication that the class representative will in fact be allowed to speak for the class he purports to represent.214 Similarly, at least in damage actions, implementation of the access function requires that class attorneys be given some assurance reasonably early in the lawsuit that the fund upon which they expect to draw for their fees will exist if the suit is won on the merits. Finally, motions under rule 12 or for summary judgment can be made at any time after filing of the complaint and in disposing of these motions the judge should be aware of any relevant interests held by potential class members, or he should at least be clear that the motion can appropriately be resolved without reference to outsiders’ concerns.215

To say that the court must take control of the defining function at the outset does not, however, make it so. Courts usually do not move unless litigants request them to do so, and it cannot
realistically be expected that trial judges will scan their new docket entries for class suits. For this reason, a rule that would require a class attorney to file a motion for an initial hearing on class issues seems essential.\(^{216}\) Such an initial hearing would not be the certification hearing envisioned by present local rules of court.\(^{217}\) Instead, the function of this hearing would be limited. First, it would provide the trial judge with an opportunity to determine whether settlement negotiations were already underway and, if so, to bring those negotiations under judicial supervision. Second, the hearing would give the class opponent a chance to protect himself from any undue bargaining power which the filing of the complaint had given the class by providing an occasion for the judge to consider a motion to dismiss class allegations as improper on the face of the complaint. The test of such a motion ought to be the same as that currently employed under rule 12(b)(6).\(^{218}\) Thus if the allegations of the complaint taken as true cannot support a class action—for example, because the representative is not a member of the class alleged,\(^{219}\) or because the theory of liability is inconsistent with class relief as a matter of law\(^{220}\) —the class allegations should be stricken. Finally, the hearing would provide the trial judge an opportunity to begin the iterative process of developing information about the class. For this purpose, the judge could take the occasion to issue an order establishing a discovery schedule and fixing a time for a hearing to consider the discovered information.\(^{221}\)

After an initial round of information-gathering, the trial judge should be in a position to enter a number of orders determining the future course of the suit. For purposes of exposition, these orders will be described as entered after a single hearing. It must be kept in mind, however, that there is no need to have a single climactic moment at which the future of the action is determined. To the contrary, both the heuristic function of class litigation and


\(^{217}\) See, e.g., rules cited note 173 *supra*.

\(^{218}\) In ruling on a motion to dismiss for failure to state a cause of action, all well-pleaded allegations of the complaint must be accepted as true, as well as all reasonable inferences therefrom. See, e.g., Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208, 1212 n.3 (8th Cir. 1972).

\(^{219}\) See pp. 1458–63 *infra*.

\(^{220}\) See pp. 1359–66 *supra*.

\(^{221}\) One such program of hearings and discovery was outlined by Judge Fullam in *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452 (E.D. Pa. 1967). There the parties exchanged statements of contentions on class issues and then briefed the contested issues. Rebuttal briefs followed. Discovery was to follow on disputed points, although in the actual case it was not needed. Finally, the court was prepared to hear oral argument on certification issues. See *Newberg*, *supra* note 177, at 105 n.17.
the constitutional requirement that the interests of absentees be adequately represented mandate that orders redefining party structure, sending notice or directing additional discovery be entered as the judge thinks required fully to develop relevant information about the class. Moreover, even after the generic identity of the class is set and an initial party structure is in place, the judge must be willing to respond to unfolding events by reopening class and party questions.

At the second hearing, the class opponent would be able to move that the class allegations be struck if class facts showed that there existed an irremediable conflict within the class,\(^{222}\) a want of numerosity, or some other ground for the conclusion that a representative action should not proceed. The facts developed at this hearing should further put the trial judge in possession of at least a tentative picture both of the situations of class members and of the party structure for the litigation which will be required to represent absentees adequately. At the close of this hearing, therefore, the judge would for the first time be in a position to take whatever procedural steps are necessary to deal with differences within the class which would not justify termination of the class aspects of the litigation, but which would require recognition if adequate representation were to be ensured. Such steps might include the creation of subclasses, encouragement of intervention, redefinition of the class to exclude dissenting groups, or extension to class members of the right to opt out.

At the close of the second hearing, the trial judge will also be in a position to decide whether notice of the class action should be given to class members and what form that notice should take. The judge's other procedural decisions may make notice to at least some class members useful or even necessary. For example, an order that notice be given to the relevant class members would seem to follow as a matter of course from a judge's decision to create subclasses, encourage intervention among particular segments of the class, or extend an opt-out right to part of the class. In each of these cases, it should be recognized that the sole function of notice is to allow absentees to respond to the pendency of the lawsuit, in the first two cases by joining actively in it, in the last case by leaving it. If it is not reasonably likely that class members can be found who can indeed afford to intervene in, or at least monitor, the litigation, then notice in the first two cases is of no practical value. Similarly, if absentees do not hold individually recoverable claims, there seems little practical value in notifying them of a right to opt out of the suit; they have no other way to recover and, if they choose not to recover, they can simply refuse

\(^{222}\) See pp. 1489–98 infra.
to file a claim against whatever fund the lawsuit may eventually create.

Although notice itself is not constitutionally required, a procedural step such as subclassing may be. If notice is necessary to implement such a procedural step, then some thought must be given to the form that notice should take, since the cost of at least some forms of notice may be so great as to make class suit impossible.223 In this regard, it seems clear that individual notice would

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223 Since the Supreme Court's decision in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), which held that plaintiffs in rule 23(b)(3) class suits must bear the cost of notice, id. at 177–79, there has been much concern that notice costs would make class suits financially infeasible. Whether this fear is exaggerated is not clear. In Eisen itself, the estimated cost of notice was $315,000, see id. at 167 n.4; however, Eisen involved an unusually large class, see p. 1326 n.34 supra. The Senate Commerce Committee Study, supra note 166, suggests that notice costs may not be any more of a barrier to class suits than attorneys' or experts' fees which have so far been thought not to create serious obstacles to class suit. The Study found that, of 23 class actions in a nationwide survey, only four involved notice costs greater than $25,000, and only 8 involved a cost of more than $5,000. Regardless of the magnitude of the problem, the trend in legislation appears to be to overrule Eisen, with a number of state statutes providing for allocation of the cost of notice between the parties. See, e.g., CAL. CIV. CODE ANN. § 1781 (West 1973); N.J. CIV. PRAC. R. ANN. 4:32–2(b) (S. Pressler ed. 1975); N.Y. CIV. PRAC. LAW § 904 (McKinney Supp. 1975–76); cf. WIS. STAT. ANN. § 426.110 (1974) (state Commissioner of Banking bears the cost of notice in consumer suits). At the federal level, there have been a number of consumer class action proposals which have provided for dividing the cost of notice. See, e.g., Proposed Federal Consumer Class Action—II, 4 CLASS ACTION REP. 342, 346 (1975) (discussing Consumer Class Action Act of 1976).

A court, faced with the prospect of expensive notice, has a number of alternatives available to it for financing notice other than placing the cost on the class opponent. First, the court can allow the class attorney to put up the money in the first instance, see pp. 1618–23 infra, subject to reimbursement as part of the cost of suit taxed against the class recovery or the class opponent, see, e.g., Katz v. Carte Blanche Corp., 53 F.R.D. 539, 546 (W.D. Pa. 1971), rev'd on other grounds, 496 F.2d 747 (3d Cir.), cert. denied, 419 U.S. 885 (1974). Second, the court may be able to redefine a subclass small enough to make the cost of notice manageable. See, e.g., Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 183–85 (1974) (Douglas, J., dissenting). But cf. pp. 1456–58 infra (underinclusive class definition may create problems of fairness). Third, the court can factor the cost of notice into the form of notice that it will require in the first place. Thus, if individual notice were prohibitive, the court could adopt a form of publication or media notice, see notes 225–27 infra, that would allow suit to go on while providing at least a limited opportunity for class members to make their views known. See Watson v. Branch County Bank, 380 F. Supp. 945, 959–60 (W.D. Mich. 1974); Booth v. General Dynamics Corp., 264 F. Supp. 465, 472 (N.D. Ill. 1967) (“Given the necessity for preserving the viability of the taxpayer action device, notice by publication would seem sufficient to satisfy due process requirements.”); cf. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318–19 (1950) (personal service on contingent remaindermen not needed because of prohibitive cost of maintaining records of addresses; similarly, not necessary that
seldom be required to implement the participation or monitoring functions sought to be implemented by subclassing or intervention. Indeed, under current class action doctrine, intervention of right is limited to those not already adequately represented in the suit so that an attempt to intervene by each and every class member individually notified would be rebuffed. What is needed instead is some assurance that a cross-section of absentees is taking sufficient part in the suit to provide a check on the veracity of assertions made about the class by its representatives. For this purpose, the normal publicity generated in, for example, a plant against whose owner a Title VII suit is pending, or in a city in which a school integration suit is pending, may be sufficient notice by itself if supplemented by a publicized procedure by which the public may make its views known to the court. Alternatively, notice could be sent to a random sample of the class, or, more traditional publication notice could be used, but only if a medium could be found that was likely to be read by class members.

all who could be notified receive notice, expense may be limited so long as some who share interest of absentees are notified). Finally, the court might tax notice costs to the class opponent, but make the class representative post a bond. See, e.g., Lamb v. United Sec. Life Co., 59 F.R.D. 25, 39 (S.D. Iowa) (dictum). Were this course to be widely adopted, it is possible that the costs of notice in class suits could be reduced generally, since wide use would allow a bondsman to set his price on an actuarial basis, in effect creating an insurance fund to be tapped by losing class representatives.

Innovative use of publicity and other forms of publication has been made in a number of cases. In Elliott v. Weinberger, No. 74-I6II, at 9 (9th Cir., Oct. 1, 1975), which involved a class of claimants under the old age provisions of the Social Security Act, the court ordered posters placed in every local Social Security office, advertisements of a non-legal nature in two papers of general circulation, and a mention of the suit in every communication from the Social Security Administration to class members. See also Lopez v. Wyman, 329 F. Supp. 483 (W.D.N.Y. 1971), aff'd, 404 U.S. 1055 (1972) (news media coverage); Danforth v. Christian, 351 F. Supp. 287 (W.D. Mo. 1972) (press releases); Fujishima v. Board of Educ., 460 F.2d 1355 (7th Cir. 1972) (notice given to class of high school students by posting and intercom announcements).


Where notice is used to distribute damages to individual class members, a form of notice reasonably likely to come to the attention of class members seems essential. This does not, however, mean that notice by mail is required. Indeed, in the Antibiotic Drug Antitrust Litigation, many of the claims were those of...
Even where modification of the party structure of the class suit is not mandated, notice may nonetheless be desirable to implement individual control objectives. The tradition of private control of litigation — of the individual day in court — is deeply ingrained and should probably be recognized as a matter of course. The value of private control should, however, be kept in perspective. Both notice and participation in class actions are by no means cost-free.228 Absent statutory provisions to the contrary, the cost of court-ordered notice must be borne by either the class attorney or the named plaintiffs, at least pending the outcome of the suit.229 Moreover, to intervene in a class action, a class member will generally have to find an attorney. Whether the fees for such an attorney could be taxed against the class recovery, or, under a statute, against the class opponent, is a complex question, depending on such imponderables as whether the absentee will be allowed to intervene at all, rather than just monitor the lawsuit, and, if intervention is allowed, whether the absentee’s attorney will benefit the class as a whole, or contribute significantly to the furtherance of statutory objectives by his presence.230 These fac-

individual consumers of drugs about whom the class opponents could not have been expected to have records containing addresses.

228 See Watson v. Branch County Bank, 380 F. Supp. 945, 959–60 (W.D. Mich. 1974) (refusing to order notice because of its expense and because it was not needed to elucidate the issues through intervention).

229 See pp. 1618–23 infra.

230 There seems little doubt that an intervenor in an action can, in appropriate circumstances, be reimbursed for his attorneys’ fees out of either the fund created by the lawsuit or under a statute that authorizes fee-shifting. See Wilderness Soc’y v. Morton, 495 F.2d 1026 (D.C. Cir. 1974), rev’d sub nom. Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240 (1975). In brief, those circumstances are the following: (1) where the opposing party has acted in bad faith in contesting the litigation or some part thereof; (2) where the intervenor has conferred a benefit on an identifiable group of people and taxing the fees against the fund created by the lawsuit is an equitable method of distributing costs to all benefitted; and (3) where the intervenor acts “in the public interest.” See 495 F.2d at 1029–31. See generally Dawson, Lawyers and Involuntary Clients in Public Interest Litigation, 88 HARV. L. REV. 849 (1975). The first condition might be true in any class suit, but it is clearly not a matter under the control of the intervenor. It is conceivable that the intervenor, like the class representative, might confer benefits on the class as a whole. But, since only intervention that is not mandated for a fair adjudication of the class dispute is now being considered, it cannot be assumed that the intervenor will in fact confer such a benefit — the purpose of allowing intervention is to vindicate the private interest in litigation control, not the class interest. In any event, to be in a position to confer benefit on the class, an intervenor would have to achieve full participation status, and admission to such status is a matter of the court’s discretion, see pp. 1482–85 infra.

Similarly, the “public interest” that justifies a fee award is the bringing of a suit enforcing public policy that could not be brought unless fees were shifted. In Alyeska Pipeline, supra, the Supreme Court held that fees could not be shifted
tors will always be in doubt at the outset, and for this reason, attorneys may not be willing to undertake intervention on a contingent fee basis. Thus, the most probable intervenors would be those with such a stake in the outcome that they would be willing to pay attorneys' fees. Unless, therefore, the information developed about the class makes it likely that at least some persons hold large claims, or have access to a form of subsidized legal service, the quest to implement private control may have little effect except to make litigation more expensive for the class representative.

Beyond considerations of the functional possibility of private control, fairness to the defendant may require that notice be limited. For the class opponent, notice is a form of adverse publicity, particularly dangerous if class members treat the fact of suit as conclusive of the class opponent's culpability and modify their behavior accordingly. As was discussed above,\(^\text{231}\) the concern for unfair bargaining leverage which the class representative may obtain through widespread notice caused the Third Circuit in *Katz v. Carte Blanche Corp.*\(^\text{232}\) to abandon the class suit altogether in favor of a test case procedure. Although such a procedure is probably the only response to the problems created by the style of individualized notice mandated by the Supreme Court in *Eisen v. Carlisle & Jacquelin*,\(^\text{233}\) it is an unsatisfactory alternative because, in protecting the defendant, it dispenses with concern for absentee interests even though the very fact that class suit would be appropriate testifies to the importance of taking those interests into account. A better procedure, but one admittedly barred under rule 23(c)(2) as presently interpreted, would be to adopt a form of notice that would not be likely to disrupt business relationships between the class opponent and more than a random sample of the class. Such a limited form of

under this theory without statutory authorization. But even assuming such authorization, it is not clear that the intervenor here is intervening in the "public interest" since the access function is fulfilled by the class representative's suit, and unless intervention is required for the fair adjudication of that suit, no "additional" vindication of public rights is being carried out. Indeed, it could be argued that the imposition of multiple intervenors' fees on the class opponent would deter conduct not in fact prohibited and would, therefore, be contrary to public policy. See pp. 1353-66 supra.

Where intervention or subclassing is needed for the suit fairly to adjudicate the rights of absentees, it would seem that intervenors' counsel or the subclass' counsel should be able to collect fees under either the second or third theories above. In this case, intervention or subclassing is presumptively beneficial to the class as a whole since the class suit could not go forward without it.

\(^{231}\) See p. 1425 supra.


notice would, in general, fulfill the heuristic function of the class suit. In addition, were notice limited to those likely to obtain the legal counsel necessary to intervene, the potential for misunderstanding would be reduced.234

234 The appealability of orders entered under rule 23(c)(1) is a matter much mooted. See, e.g., J. Moore, supra note 2, ¶ 23.97; C. Wright & A. Miller, supra note 175, ¶ 1802; Note, Interlocutory Appeal from Orders Striking Class Action Allegations, 70 Colum. L. Rev. 1292 (1970); Note, Class Action Certification Orders: An Argument for the Defendant's Right to Appeal, 42 Geo. Wash. L. Rev. 621 (1974); Note, Interlocutory Appeals in the Federal Courts under 28 U.S.C. § 1292(b), 88 Harv. L. Rev. 607, 630-31 n.97 (1975). At present, the Second Circuit is willing to review orders denying class status under the aegis of 28 U.S.C. § 1291 (1970), if such a denial as a practical matter ends the lawsuit. See, e.g., Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035 (1967); accord, e.g., General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974); Kohn v. Royall, Koegel & Wells, 496 F.2d 1094 (2d Cir. 1974). This doctrine has, however, been rejected by the Third, Fifth, Seventh, and Ninth Circuits. See Hackett v. General Host Corp., 455 F.2d 618 (3d Cir.), cert. denied, 407 U.S. 925 (1972); Graci v. United States, 472 F.2d 124 (5th Cir.), cert. denied, 412 U.S. 928 (1973); Anschul v. Sitmar Cruises, Inc., No. 74-1908 (7th Cir. May 17, 1976); Falk v. Dempsey-Tegeler & Co., 472 F.2d 142 (9th Cir. 1972). Although some have urged that the interlocutory appeal provisions of 28 U.S.C. § 1292(b) (1970) should provide a basis for appeal, see, e.g., Kaplan, supra note 22, at 350 n.31, this use of § 1292(b) appears generally inconsistent with the legislative purpose in passing the section. See Note, Interlocutory Appeals in the Federal Courts, supra.

Under the procedure proposed here, the appeal question is further clouded because there need be no order defining class status until a determination of the merits and such an order is a prerequisite to appeal under any theory. On the other hand, if the judge does dismiss class allegations prior to concluding the action in the district court, an appeal would seem proper where (1) the trial court has determined that the access function performed by class suits is consistent with statutory policy and (2) access would be frustrated by the denial because the action would, as a practical matter, be terminated as financially infeasible. Such a rule would seem to meet the requirements of the collateral order doctrine under § 1291, see id. at 608 n.7 and sources cited therein, since there would be no occasion for appellate review of the order. Nonetheless, the second prong of this "death knell" rule, Eisen v. Carlisle & Jacquelin, supra, at 121, has caused courts difficulty because it is not always easy to determine when a litigation is practically terminated. See, e.g., Kohn v. Royall, Koegel & Wells, supra, at 1099-1100. Because of this, it would seem better to adopt a per se rule that allows appeal from denials of class action status. Although such a rule is overbroad, it does ensure that an erroneous denial of class status does not work as a stare decisis bar to future litigants seeking access to court through a similar class suit. It further ensures that party structure alignments needed for just adjudication should the class allegations be reinstated on appeal can be made in a timely manner — even if the suit could go forward individually, reversal of the denial of class status on final appeal might be impractical because a retrial with a correct party structure might be required.

On the other hand, appeal from orders affirming class status should not be appealable except when they would otherwise create the conditions of appealability required by § 1292(b). See Note, Interlocutory Appeals in the Federal Courts, supra, at 930-31 n.97. There are two reasons for this. First, even though the class opponent may feel more settlement pressure once the action is allowed to go for-
3. Information Gathering from Absentee Class Members. — In traditional single party litigation, the parties structure discovery to ferret out information relevant to the substantive issues in the case. The judge remains passive unless he is requested to intervene.\textsuperscript{235} The threat of retaliation by the opposing party and the protection provided by rule 26\textsuperscript{236} are generally sufficient to contain any exploitation by one party of the liberal federal discovery provisions to the detriment of other parties.\textsuperscript{237} The class action, however, both expands the range of discoverable issues to include those relevant to questions of class procedure\textsuperscript{238} and heightens the potential for abuse of the discovery devices because of the presence of absentees who may be subjected to discovery but who do not themselves engage in it.\textsuperscript{239}

(a) Discovery and Class Procedure. — At its outset, every class suit must be governed by the judicial control paradigm.\textsuperscript{240} In this paradigm, assurance of adequacy of representation requires that the judge obtain information about the class. In addition, the judge must have access to facts about the class if he is to assess properly the suitability of the case for class treatment. The most straightforward method for developing class information is through ordinary discovery devices directed to absentees, and this warfare as a class suit, this is not likely to lead to unfair outcomes so long as the class opponent can threaten an adjudication on the merits, \textit{see} pp. 1375–83 \textit{supra}, and there is no reason to think that this will not generally be the case. As a result, the class opponent who adjudicates the action will get an opportunity to raise class action issues on appeal from judgment and the settling opponent is not unfairly prejudiced. Second, a decision to allow an action to go forward as a class suit will often involve discretionary factors such as the ability of the court to deal adequately with class conflict. Because of this discretion, such orders are not likely to be reversed, \textit{see} \textit{Note, Interlocutory Appeals in the Federal Courts, supra}, at 618 n.57, and, therefore, an appeal will probably not be worthwhile given the delay and expense involved.

\textsuperscript{235} \textit{See} 4 J. Moore, \textit{supra} note 2, \textsection 26.02(5) (2d ed. 1975).
\textsuperscript{236} "Upon motion by a party or by the person from whom discovery is sought and for good cause shown," a district court may restrict or prohibit discovery. Fed. R. Civ. P. 26(c).
\textsuperscript{239} Absentees are not ordinarily expected to make discovery of the class adversary or to seek protective orders. \textit{See}, e.g., Brennan \textit{v. Midwestern United Life Ins. Co.}, 450 F.2d 999, 1005 (7th Cir. 1971), \textit{cert. denied}, 405 U.S. 921 (1972) (allowing discovery from absentees only if justice requires); \textit{cf. American Pipe \& Constr. Co. v. Utah}, 414 U.S. 538, 552 (1974) (prior to certification, absentees are expected to be passive beneficiaries of action brought on their behalf).
\textsuperscript{240} \textit{See} pp. 1414–15 \textit{supra}.
course has been either adopted or advocated by courts and commentators.\textsuperscript{241}

Reliance on the parties to develop information about the class—class facts—is nonetheless hazardous. Because one of the purposes of discovery is to bring to light facts that would cause the court to dismiss the class allegations for inadequacy of representation,\textsuperscript{242} or to divide the class into subclasses, the named plaintiff’s interests in the suit may run counter to the purposes of the court and may cause the named plaintiff to shade or conceal adverse information.\textsuperscript{243} Normally, the equal availability of discovery to the defendant would check any such concealment by the plaintiff. In the class context, however, defendant discovery of absentees may itself have to be limited to prevent abuse. There is danger that defendants will use discovery to intimidate absentees with burdensome discovery requests in the hope that absentees will opt out of the lawsuit, making it financially infeasible, or that absentees will fall victim to sanctions of exclusion or dismissal for failure to comply with discovery.\textsuperscript{244} Alternatively, the defendant may point to a low response rate from absentees as an indication that their sense of harm is slight and that class relief ought, therefore, to be limited, an argument that may be misleading if the discovery requests are burdensome.

A simple solution to both problems would be to limit discovery to class facts in records in the possession of the defendant.\textsuperscript{245} Such information might well establish, for example, whether the claims of the class and the named plaintiffs are likely to be similar. Limiting discovery intended to generate data about absentees to the defendant’s files removes any chance of abuse by the defendant and also limits the potential for plaintiff distortion since the defendant can be relied upon to bring any such distortions to light.


\textsuperscript{242} Dismissal of class allegations will often make suit financially impossible and thus is clearly contrary to the named plaintiff’s interest. Moreover, the named plaintiffs may have an interest in controlling the form of relief sought in the suit, and such control is threatened by the intervention of additional parties.

\textsuperscript{243} See also pp. 1597–1604 infra.

\textsuperscript{244} See, e.g., Wainright v. Kraftco Corp., 54 F.R.D. 532, 534 (N.D. Ga. 1972); Southern Cal. Edison Co. v. Superior Court, 7 Cal. 3d 832, 843, 500 P.2d 621, 627, 103 Cal. Rptr. 709, 715 (1972); C. WRIGHT & A. MILLER, supra note 175, § 1792 n.96; cf. Carlson v. Superior Court, 33 Cal. App. 3d 640, 109 Cal. Rptr. 240 (1973) (abuse of discretion for trial court to require absentees to submit to deposition or waive claim).

\textsuperscript{245} See Burns v. Thiokol Chemical Corp., 483 F.2d 300, 305–07 (5th Cir. 1973); Yaffe v. Powers, 454 F.2d 1362, 1367 (1st Cir. 1972).
Allowing the named plaintiff to discover class facts from the defendant nonetheless gives the plaintiff a potent bargaining weapon since discovery can be used to disrupt the defendant's normal business operations.\(^246\) For this reason, defendants have resisted the plaintiff's discovery request by challenging plaintiff's "standing" to seek information about absentees.\(^247\) or by trying to convince the court that the plaintiff is actually seeking to find a class rather than to verify the existence of a class of which the plaintiff has some extrinsic knowledge.\(^248\) Although the court may not be able to remove the potential for abuse entirely, a number of ways of minimizing it do seem to be readily available. First, the court can require the plaintiff to compile the requested class data, or to pay for its compilation.\(^249\) Second, the court can force the plaintiff to make a showing analogous to probable cause to demonstrate that discovery is not merely a fishing expedition for a class that may not exist.\(^250\) Finally, the court could limit discovery to contested certification issues.\(^251\) This course, however, should be a last resort since the court could never assure itself that it had properly defined a class if the defendant controlled access to information through the issues it sought to put in controversy.

To the extent that information about the class is not available from defendant records, some sort of discovery of absentees will be required to generate the information necessary to ensure adequacy of representation and suitability of the case for class treatment. Because private control of discovery may be inadequate to provide the required information, the judge must actively oversee the information collection process. The ability of the plaintiff to obscure or slant class facts can be limited if the court assigns the plaintiff specific discovery tasks. The potential for harassment in defendant discovery requests can be similarly reduced if the court approves proffered interrogatories, document requests, and requests for admissions.\(^252\) Alternatively, the court might

\(^{246}\) There is also a danger that wide-ranging discovery could invade the privacy of class members or others employed by, or doing business with, the defendant.


\(^{249}\) See Burns v. Thiokol Chemical Corp., 483 F.2d 300, 307 (5th Cir. 1973).


\(^{252}\) The constitutionality of such prior restraint on communications cannot be assumed. See pp. 1600–01 & note 95 infra.
on its own initiative conduct a preliminary survey of the class prior to certification. The form of this survey could be that of a simple questionnaire and could be addressed either to the class as a whole or to a random sample. In order to ensure that the results of such a survey were correctly interpreted, the judge could allow the parties to participate in the drafting of the form and to present adversary argument on the meaning of the responses.

The current practice of sending proof of claim forms to absentees in damage actions often performs the same function as

253 In Knight v. Board of Educ., 48 F.R.D. 108, 112-14 (E.D.N.Y. 1969), Judge Weinstein used an interrogatory to determine how many class members sought to return to a school from which they were expelled in order to assess the need for preliminary relief. See also In re Antibiotic Antitrust Actions, 333 F. Supp. 278, 288 (S.D.N.Y. 1971) (court supervised sampling of class members superior to formal discovery), aff'd sub nom. Pfizer, Inc. v. Lord, 449 F.2d 119 (2d Cir. 1971) (per curiam).

254 See N.Y. CIV. PRAC. LAW & RULES § 904 (McKinney Supp. 1975-76) (providing for random sampling in class suits).

The propriety of court contact with class members prior to certification was recently questioned in Pan American World Airways, Inc. v. United States District Court, 523 F.2d 1073 (9th Cir. 1975), noted in 44 FORD. L. REV. 421 (1975). There, the Ninth Circuit granted mandamus to restrain a district judge's effort to notify potential damage claimants of their opportunity to participate in an uncertified mass tort class action. The court of appeals felt that such notice might stir up litigation in derogation of the traditional ban on solicitation, id. at 1077 & n.3, 1078-79, and that it was not authorized by the Federal Rules of Civil Procedure.

The decision in Pan American seems justified since notice designed to bring potential class members into an uncertified class action, and not to elicit information from them, does not seem to further any purpose of rule 23. The claims at issue in Pan American — individually recoverable damage claims arising from a single air crash — are those which the draftsmen of rule 23 found particularly inappropriate for class action treatment. See Advisory Comm. Note, 39 F.R.D. 103 (1966). Consequently, the effect of the district judge's action would have been to use the putative applicability of rule 23 to bring into court individual claims which would not have been suitable for aggregation in a class suit. Pan American's narrow reading of the district judge's authority under rules 23(d) and 83 cannot, however, be the general rule, since it interferes too greatly with the main task of the trial judge in class litigation — ensuring adequacy of representation. Indeed, the Pan American court itself noted that pre-certification notice intended to determine whether the action should proceed as a class suit would present a different case. 523 F.2d at 1078-79.


The proof of claim forms analyzed here are usually sent with class notice or otherwise near the outset of the litigation to help the court determine the extent and nature of absentee claims. Proof of claim forms are also sent to class members after adjudication of the common questions — usually concerning defendant's liability — in order to distribute the class recovery.
court-class communication designed to elicit class facts. Such forms request absentees to state the size of their claim and their intention to assert it if the class is victorious. Frequently, courts relying on the proof of claim device condition further participation in the action on the return of the form by the absentee. This practice, which has been criticized by courts, commentators and the bar, highlights the general question of the appropriateness of punitive sanctions for failure to respond to pre-certificaton discovery requests. If failure to respond bars the claim, the class action effectively shortens the limitations period for absentees. If a refusal to respond eliminates the absentee from the class without depriving him of his individual cause of action, then effectively the absentee must opt in to the class suit.


261 Id. at 94.


262 See, e.g., Minnesota v. United States Steel Corp., 44 F.R.D. 559, 577-78 (D. Minn. 1968). In cases in which the defendant has some implicit leverage over class members — such as an employer would have over employee class members in a Title VII action — requiring the absentee to opt in can effectively decimate the class. A study commissioned by the Senate Commerce Committee found that use of an opt-out procedure generally resulted in a 10% or less reduction in the class.
The 1966 revision of the Federal Rules of Civil Procedure, however, deliberately avoided imposing this requirement in common question litigation. Since discovery requests focusing on certification criteria are designed to provide the court with an understanding of absentee interests through communication with some or all absentees, the application of sanctions should be sparing and dictated by the exigencies of information gathering rather than by any sense of adversarial symmetry.

(b) Discovery and the Merits. — To argue the merits of their case, litigants in class actions need the traditional discovery tools available in single party suits. However, like discovery of class facts, defendant discovery of information about the merits of a class’ case can be used as a tactical weapon to reduce the size of potential liability. But, unlike discovery of class facts, develop-

while the use of an opt-in procedure resulted in reductions of 39% to 73% in class membership. Note, supra note 166, at 1150.


A compromise solution that preserves the use of a sanction to facilitate response to proof of claim forms and yet disarms its tactical force was used in West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), aff’d, 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971). Class members who failed to file proof of claims in response to notice of a proposed settlement were barred from the recovery. However the court ruled that such a failure to file “will constitute an authorization to the Attorney General . . . to utilize whatever money he may recover as your representative for the benefit of the citizens of your state in such manner as the Court may direct.” Id. at 725.


The discovery rules themselves refer specifically to “parties” and other “persons,” but make no specific allowance for absentee class members. See id. Moreover, there is no explicit authorization of discovery in rule 23. A court might find authority in the open-ended language of rule 23(d): “In the conduct of actions to which this rule applies, the court may make appropriate orders . . . (5) dealing with similar procedural matters.” See Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1004–05 (7th Cir. 1971), cert. denied, 405 U.S. 921 (1972). But see Note, Requests for Information in Class Actions, 83 Yale L.J. 602, 604 (1974). The revised version of rule 23 proposed in American College of Trial Lawyers, Report and Recommendations of the Special Comm. on Rule 23 of the Federal Rules of Civil Procedure (1972), provides for discovery of absentees by the class adversary. Id. at 3.
ing facts about absentees which are necessary to prove his case creates no apparent conflict of interest for the plaintiff. Thus, to the extent that clas facts and information about the merits do not overlap, no judicial control of plaintiff discovery is required.

The potential exploitation of discovery to the detriment of absent class members can be controlled through increased judicial control over the timing 266 and content 267 of discovery requests, the range of absentees properly subjected to various forms of discovery, and the types of sanctions imposed for noncompliance with discovery requests. As a basic principle, discovery of absentees should be discouraged because of the potential for abuse.268 The defendant should be required first to seek the necessary information from the class representative.269 In many cases, the class representative will be able to meet defendant’s needs for information concerning common questions; discovery of information relating to individual claims can be deferred until the core question of liability is settled.270

In those cases in which the defendant establishes to the satis-

266 See note 270 infra.
267 See Gardner v. Awards Marketing Corp., 55 F.R.D. 460, 466 (D. Utah 1972) (permission to send interrogatories to class members denied after inspection of proposed questions). To blunt the oppressive effect of absentee discovery, information requests might be routed through the court so that the judge can strike any portions deemed prejudicial or oppressive. See pp. 1601-04 infra; cf. MANUAL FOR COMPLEX LITIGATION, pt. I, § 3.21 (West 1973) (appointment of master or magistrate recommended to supervise discovery in complex cases).
268 “The usefulness of Rule 23 would end if class members could be subjected to Rule 33 and forced to spend time, and perhaps engage legal counsel, to answer detailed interrogatories.” Wainwright v. Kraftco Corp., 54 F.R.D. 532, 534 (N.D. Ga. 1972). The proposition that absentees ordinarily are not subject to discovery appears to be accepted even by those courts willing to allow some discovery of absentees. See, e.g., Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1005 (7th Cir. 1971), cert. denied, 405 U.S. 921 (1972).
269 See, e.g., Wainwright v. Kraftco Corp., 54 F.R.D. 532 (N.D. Ga. 1972) (permitting full discovery against two class representatives including discovery of “work product” material); Bucalo v. General Leisure Prods. Corp., 15 Fed. Rules Serv. 2D 564 (S.D.N.Y. 1971) (by implication). A court might also deny the use of discovery against absentees when the necessary information can be obtained by other means, such as a market survey. See Gardner v. Awards Marketing Corp., 55 F.R.D. 460, 466 (D. Utah 1972). Finally, it has been suggested that problems of gathering information from the plaintiff class might be handled without extension of discovery to class members by expanding the range of discovery against named parties and requiring absentees with access to crucial information to intervene as named parties subject to discovery. See Note, supra note 265, at 602, 616-18.
faction of the court that discovery of absentees is essential for the prosecution of his case, the court could authorize limited discovery of absentees.\(^{271}\) Normal party-discovery devices might be used against absentees who participate in the suit as intervenors or amici, or who are actively monitoring the suit. Active participation reflects a financial or emotional stake in the outcome of the litigation of the same magnitude as that of the named parties. It is, therefore, not unfair to require active participants to protect their own interests through motions under rule 26 or through counter-discovery motions. Those who have chosen to remain passive beneficiaries of the representative suit merit more protection. This does not mean that passive absentees should be immunized from discovery, but only that the sort of discovery to which any person with relevant information can be subjected — non-party depositions and subpoenas\(^{272}\) — should be used.

The ability and incentive of defendants to reduce class size through discovery can also be limited by adjusting sanctions for noncompliance with discovery requests rather than by imposing limitations on the discovery process itself. Under the Federal Rules, the district judge has discretion to modify penalties meted

\(^{271}\) In Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999 (7th Cir. 1971), cert. denied, 405 U.S. 921 (1972), the court held that, in order for the defendant to obtain discovery of absentees, the information sought must be needed for trial, the defendant must not take unfair advantage of the class members, and the class members must be fully informed of the consequences of not complying with discovery. *Id.* at 1006. The court did not indicate what showing of "need" would be required. Commentators have attempted to define what sort of need supports class discovery. *See* Comment, *supra* note 259, at 810–11 (situations of necessity are those in which the "requested information is critical to the issue of liability and is unavailable from any other source."); *Note*, *supra* note 270, at 1080–82 (same); *Note*, *supra* note 265, at 619 (suggests a standard similar to that required to obtain work product discovery of an attorney). Subsequent cases in the Seventh Circuit, while applying the *Brennan* test, have denied class discovery. *See* Clark v. Universal Builders, Inc., 501 F.2d 324, 340–41 (7th Cir.), *cert. denied*, 410 U.S. 1070 (1974); Bisgeier v. Fotomat Corp., 62 F.R.D. 118, 120–21 (N.D. Ill. 1973).


\(^{272}\) *See* Fed. R. Civ. P. 30, 31, 45; Gardner v. Awards Marketing Corp., 55 F.R.D. 460, 463–64 (D. Utah 1972); Wainwright v. Kraftco Corp., 54 F.R.D. 532, 535 (N.D. Ga. 1972); Minnesota v. United States Steel Corp., 44 F.R.D. 559, 582 (D. Minn. 1968). *See also* Southern Cal. Edison Co. v. Superior Court, 7 Cal. 3d 832, 500 P.2d 621, 103 Cal. Rptr. 709 (1972). Non-party depositions and subpoenas are considerably more expensive than party interrogatories, requests for admissions or document requests. With a class of any size, these devices would be an impracticable means of reaching a large number of absentees and thus a deterrent to the use of discovery to intimidate.
out to litigants for failure to respond to discovery. Instead of dismissing with prejudice the claim of an absentee who does not respond, the judge might simply exclude him from the class or perhaps impose no sanction at all. The opportunity to use discovery for tactical purposes would be further reduced if the absentees subjected to discovery were restricted to those thought especially likely to have pertinent information. Such a limitation respects the defendant's legitimate claim to have information necessary to defend the suit while recognizing that even the reduction of sanctions may not prevent absentees from opting out of a lawsuit rather than taking the time to answer discovery requests.

In determining the efficacy and fairness of sanctions in particular circumstances, a key consideration is the substantiality of the class member's claim. Those with individually recoverable claims would be subject to discovery if they brought separate actions; there is thus little prejudice in permitting such discovery


274 See Robertson v. National Basketball Ass'n, 67 F.R.D. 691, 700-1 (S.D.N.Y. 1975) (no sanction); Wainwright v. Kraftco Corp., 54 F.R.D. 532, 534 (N.D. Ga. 1972) (same); Note, supra note 265, at 618; pp. 1443-44 & notes 261-63 supra. But see Brennan v. Midwestern United Life Ins. Co., 456 F.2d 999 (7th Cir. 1971), cert. denied, 405 U.S. 991 (1972). In Brennan, the court affirmed dismissal with prejudice of claims of identifiable absentees who failed to respond to discovery when the defendant had made sufficient showing of need and lack of intent to intimidate class members. The Robertson court distinguished Brennan by noting that if discovery sanctions were imposed against absentees in a (b)(1) action, class members would have to choose between dismissal or compliance. In a (b)(3) action such as Brennan, class members are able to opt out. Such self-exclusion gives a choice only to class members with individually recoverable claims, however.

275 The practice of sampling discovery has been adopted by several courts. See, e.g., Robertson v. National Basketball Ass'n, 67 F.R.D. 691, 700-1 (S.D.N.Y. 1975); Southern Cal. Edison Co. v. Superior Court, 7 Cal. 3d 832, 836, 500 P.2d 621, 622, 103 Cal. Rptr. 709, 710 (1972); cf. In re Antibiotic Antitrust Actions, 333 F. Supp. 278, 288 (S.D.N.Y. 1971) (while rejecting the general requirement of proof of claims before judgment for a consumer class, the court suggested a “sampling” of claims within a representative state or subdivision). Such sampling discovery can be directed to class members on a random basis or to those thought best able to satisfy defendant's informational needs. See Note, supra note 265, at 613. See also Note, supra note 270, at 1077-78.

A sampling scheme is open to criticism in that it imposes unequal burdens on class members, especially if sanctions are imposed for noncompliance with discovery. Gardner v. Awards Marketing Corp., 55 F.R.D. 460, 464-65 (D. Utah 1972).

276 Such a discriminating application of sanctions depends on precise knowledge of the class and its claims, information that may be obtainable itself only through some form of discovery — perhaps through court controlled information-gathering.
with attendant sanctions in the collective suit. Sanctions are likely to be similarly effective in ensuring compliance with discovery requests by those asserting moderate claims, although the fairness of imposing such penalties is not as clear. For some small claimants, however, the potential recovery would not justify the expense of retaining counsel to answer information requests.277 For such class members a threat of dismissal would be ineffective.

(4) Delay of Certification and Statutes of Limitations. — Both rule 23278 and the defining function described above envision that a final determination of the appropriateness of an action for class treatment may be delayed for some time. Any scaling down of the class or denial of class status, however, creates a potential for unfairness to absentees excluded from the class suit. Relevant statutes of limitations may have run, leaving the excluded parties without legal redress.279 If, therefore, statutes of limitations were not tolled by the filing of the class suit as to all those who might reasonably assume that their claims were being pressed by the class representative, protection of absentees would counsel a final determination of class status and membership prior to the running of statutes of limitations whenever such a course was open.280

The potential for harm to absentees from redefinition of the class membership or denial of class status has, however, been greatly reduced by the Supreme Court’s decision in American Pipe & Construction Co. v. Utah.281 There, the named plaintiff brought an antitrust class action eleven days before the running of the statute of limitations.282 The class allegations were dismissed

277 See Wainwright v. Kraftco Corp., 54 F.R.D. 532, 534 (N.D. Ga. 1972). The advice of an attorney would be invaluable, if not essential, to a perplexed absentee confronted with requests for information. For example, rule 33 appears to assume that counsel will assist a party; objections to rule 33 interrogatories must be signed “by the attorney making them.” Fed. R. Civ. P. 33(a). See also Note, supra note 270, at 1076; Note, supra note 265, at 615.

278 Fed. R. Civ. P. 23(c)(1) (a certification order “may be conditional, and may be altered or amended before the decision on the merits.”).

279 In Board of School Comm’rs v. Jacobs, 420 U.S. 128 (1975), the Supreme Court indicated that a class suit must be certified if mootness of the named plaintiffs’ claims is not to make the whole action moot. Whether this developing doctrine dictates an early final decision on the appropriateness of an action for class treatment will be discussed below, in conjunction with the Supreme Court’s recent mootness cases. See pp. 1463–66 & note 57 infra.

280 It is possible that the filing of a class complaint shortly before the running of the statute of limitations would make any class determination practically impossible. This was probably the case in American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974), discussed at pp. 1448–50 infra, in which suit was filed 11 days before the statute of limitations would have run, id. at 541.


282 Id. at 541.
some months later for failure to meet the numerosity requirement of rule 23(a)(1) in an opinion in which the trial court noted that the other requirements of rule 23(a) had been met. The trial court subsequently denied as time-barred motions to intervene made by groups that would have been absentee class members had the case been allowed to proceed as a class suit. The Supreme Court reversed, holding that the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status.

The American Pipe holding is itself narrow, limited to situations in which class status is denied for lack of numerosity and in which the persons claiming the benefit of tolling seek to intervene in the suit. Neither of these limitations seems required by the reasoning of the Court, however. First, the Court concluded that the purpose of the statute of limitations would be met because the class allegations in American Pipe had given the defendants notice of "the substantive claims being brought against them, [and also] the number and generic identities of the potential plaintiffs who may participate in the judgment." Second, the Court concluded that it was not desirable to limit the tolling benefit to persons who could demonstrate reliance on the filing of the class suit. Such a limitation was not necessary to protect the interests of the defendant and a contrary rule would be inconsistent with the purposes of rule 23. Absentees uncertain of their ability to

283 Suit was filed on May 13, 1969, and class status was denied on December 4, 1969. Id. at 541, 543. Former class members sought to intervene 8 days after denial of class status. Id. at 543.

284 Id.

285 Id. at 544.

286 Id. at 553.

287 See id.

288 The American Pipe decision has subsequently been relied on by the Third Circuit in an opinion in which class tolling was allowed. There, the named plaintiff had no standing as to one defendant and intervention by a party with standing was opposed on the ground that the statute of limitations had run. The court held that the named plaintiff's complaint tolled the relevant statute of limitations. See Haas v. Pittsburgh Nat'l Bank, 526 F.2d 1083, 1095-96 (3d Cir. 1975).

289 414 U.S. at 555.

290 The Court apparently reasoned that the defendant would have notice of all the purported class claims whether or not there had been reliance by any individual claimant, and therefore the imposition of a time bar to non-relying claimants would serve no purpose of the statute of limitations. Id. at 554-55. In a footnote, the Court implied that, should an intervenor attempt to raise a claim of which the defendant would not have notice, the trial court could appropriately condition intervention on the intervenor's dropping that claim. See id. at 555 n.25.
show reliance might file protective complaints or motions to intervene in the class suit, a result undermining the efficiency justification of rule 23. In addition, the Court concluded that rule 23 evinces a desire to allow absentees to remain the "passive beneficiaries" of the representative suit unless expressly called upon by order of the court to take some action, and that a rule requiring active participation to protect against the running of statutes of limitations would be inconsistent with such a theory of the absentees' role.

Even though it is arguable that judicial efficiency would be little harmed by a rule contrary to that of American Pipe — because few potential plaintiffs would actually rely on the class suit to vindicate their rights — a broad tolling rule nonetheless seems justified whenever the class complaint as a practical matter puts the defendant on notice of the possible claims pending against it. Since the class allegation in such a case would

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291 Id. at 553-54. The Court's emphasis on the possibility that absentees would attempt to intervene or would file protective suits, which would lead to duplicative proceedings contrary to the efficiency rationale of rule 23, has been challenged by one commentator on the ground that few persons would have knowledge of the suit in any event and, therefore, that there would be little reliance and few protective filings. See Wheeler, Predismissal Notice and Statutes of Limitations in Federal Class Actions After American Pipe & Construction Co. v. Utah, 48 S. CAL. L. REV. 771, 778-79 (1975). This argument has force if it is assumed that the appropriate focus is on reliance by class members. If, instead, one focuses on reliance by class attorneys, the argument is less persuasive. Especially in consumer class action litigation for damages, in which very few class members will typically hold individually recoverable claims, the class attorney is deeply involved in organizing the suit. See pp. 1577-78 infra. Class attorneys may realistically be expected to refrain from filing overlapping suits. Cf. p. 1611, note 144 infra (the filing of overlapping class suits might constitute unethical competition for fees). But see COPPAR v. Rizzo, 357 F. Supp. 1289, 1290-91 (E.D. Pa. 1973), aff'd sub nom. Goode v. Rizzo, 506 F.2d 542 (3d Cir. 1975), rev'd, 96 S. Ct. 598 (1976) (three suits filed in the Eastern District of Pennsylvania all purporting to represent the same class in a civil rights action against police force). Moreover, given the low cost to an attorney of filing a complaint or motion to intervene, class attorneys fearful of the running of the statute of limitations as to claims they might represent could well make protective filings. More importantly, where the majority of absentees hold individually nonrecoverable claims, they can be protected only by the American Pipe tolling rule. As a practical matter, such absentees can neither file individually — because of the cost of legal assistance — nor demonstrate detrimental reliance since they would not have been able to sue individually even if no suit had been brought. Thus, protection of absentee access rights seems to require that, if a proper class suit is brought after an improper one is dismissed, such a suit should not be time-barred so long as the defendant received the proper notice.

292 414 U.S. at 552.

293 See note 291 supra.

294 The central importance of notice in determining whether statutes of limitations should be tolled for persons who would have been members of a class
give the defendant the same information he would have if each party individually filed a complaint, prejudice to the defendant would result only in an unusual case. Similarly, a defendant faced with information about a potential liability to a class cannot be said to have reached a state of repose that should be protected. If the *American Pipe* tolling rule is restricted to those situations in which the purposes of the statute of limitations are met by the class complaint for all persons described as class members, then the fact that some who have inexcusably slept on their rights are aided is beside the point — there is no practical prejudice to the defendant. Moreover, the importance attached to vindicating public policy under the substantive theory of the class suit counsels hesitance in foreclosing individual suits that arguably further compliance with statutory policy if such foreclosure is not needed to protect defendant interests.

The *American Pipe* Court defined the notice that the defendant must have as twofold: The defendant must have fair warning of both the subject matter and the size of the purported class member’s claim. Precisely what constitutes notice of the subject matter of the prospective litigation is not clear, however. *American Pipe* itself involved antitrust litigation in which the actual proof offered at least as to damages was unlikely to be identical for all the plaintiffs, suggesting that identity of the facts to be proved in the cases of the named plaintiff and those seeking class tolling is not required. A clearer definition of what is required for notice of the subject matter of prospective litigation can be derived by considering doctrine developed in the closely analogous area of the relation back of pleading amendments under rule 15(c).

had one been certified was recently recognized by the Third Circuit in Haas v. Pittsburgh Nat’l Bank, 526 F.2d 1083 (3d Cir. 1975). There, the named plaintiff had no standing to assert a Truth in Lending Act claim against one defendant. The district court allowed another consumer who had standing with respect to that defendant to enter the suit even though the latter consumer could not be represented by the original named plaintiffs and though the statute of limitations had run as to the intervenor in the absence of class tolling. *Id.* at 1095–96. The Third Circuit affirmed, noting that the purpose of the statute of limitations was fulfilled when the defendant had notice of the claim that might be asserted against him and the number and generic identity of potential plaintiffs. *Id.* at 1097.

295 See Note, Developments in the Law — Statutes of Limitations, 63 HARV. L. REV. 1177, 1185 (1950) (only reasonable expectations “that the slate has been wiped clean” are protected).

296 (c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received
Rule 15(c) itself provides that an amendment will relate back "[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Both rule 8,297 which defines the requirements for a complaint, and rule 15(c) envision that all relevant statutes of limitations are tolled once the defendant is aware of the event upon which liability is predicated.298 Thus, amendments which state the plaintiff's legal theory with greater clarity, or which allege specific facts of which the defendant might have become aware in the course of a reasonable investigation of the event alleged in the original complaint, relate back.299 Such results seem inevitable in a system that triggers tolling on the filing of a complaint, but which assigns a very limited office to pleadings. Pleadings do not carry the burden of defining issues for trial; this is left for devices such as discovery or pre-trial conferences.300 As a result, the typical federal defendant will have very limited knowledge of the nature such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake . . . , the action would have been brought against him.

FED. R. CIV. P. 15(c) [parts not relevant omitted].

297FED. R. CIV. P. 8 states, in relevant part, "[a] pleading which sets forth a claim for relief . . . shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." A perusal of the suggested forms for the complaint, FED. R. CIV. P. APP. FORMS 3–17, quickly reveals that the defendant will not get specific knowledge of the facts upon which the plaintiff will rely or of plaintiff's legal theory. Nonetheless, such general notice as the form complaints give is apparently sufficient to toll the statute of limitations for the named plaintiff. It would seem inconsistent with the structure of the Federal Rules to require more exacting notice of the claims of absentee class members, which are, after all, common to that of the named plaintiff.

298See, e.g., Tiller v. Atlantic Coast Line R.R., 323 U.S. 574, 581 (1945) (relation back allowed even though amendment invoked additional statute and required proof of additional facts; notice "that petitioner was trying to enforce a claim against it because of the events leading up to the death of the deceased in respondent's [railroad] yard" was sufficient); 3 J. MOORE, supra note 2, ¶ 15.15[3]; 6 C. WRIGHT & A. MILLER, supra note 175, § 1497, at 495–99 (1971).

299See id. ¶ 1498, at 510–11.

300See generally 5 C. WRIGHT & A. MILLER, supra note 175, § 1202 (1969). See also Conley v. Gibson, 335 U.S. 41, 45–46 (1957). The limited function of the pleadings would suggest that the defendant carries the burden of collecting and preserving evidence sufficient to rebut a wide range of contentions that may develop through discovery and trial. Cf. Barthel v. Stamm, 145 F.2d 487, 491 (1944), cert. denied, 324 U.S. 878 (1945) ("When a suit is filed, . . . the defendant knows that the whole transaction described in [the complaint] will be fully sifted, by amendment if need be . . . "). For this reason, variations between the case to be proved by purported class members and the case of the named plaintiff should seldom be prejudicial to the defendant.
of the claim against him at the time the statute of limitations is tolled.301

Where the amendment of the complaint adds an additional party plaintiff to the lawsuit, the rulemakers intended the 1966 amendments to rule 15(c), relating to the addition of defendant parties, to apply by analogy.302 The relevant sections of amended rule 15(c) would appear to be that which requires a single transaction or occurrence and that which, read by analogy, would require that the opposing party "has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits . . . ." Because there is no apparent reason to require better notice for the class action defendant than for the defendant in an ordinary lawsuit, the transaction or occurrence and defendant prejudice provisions of rule 15(c) ought to determine the protection given the class defendant resisting claims of purported class members. In the class suit context, of course, the transaction or occurrence sued on by former absentees may not be identical to that referenced in the named plaintiff's complaint. Nonetheless, because the issues presented must be common for the defendant to have the required notice of the absentees' "substantive claims," there seems little difference between American Pipe and rule 15(c) on this requirement.303

In the specific context of the class suit, therefore, the relevant rule for establishing adequacy of notice to the defendant would seem to have two steps. First, tolling should be allowed if the substantive provisions of the intervenor's complaint, treated as an amendment of a complaint identical to the named plaintiff's complaint, would be allowed to relate back under rule 15(c) (assuming no practical prejudice to the defendant) and if the intervenor is described by the class allegations in the named plaintiff's complaint. Second, even if the first condition were met, tolling should be disallowed if differences in the case to be made by the named plaintiff and the intervenor are so great that the defendant would be prejudiced because discovery of the named plaintiff would be insufficient to prepare its defense to the intervenor's case and because delay in instituting discovery against the intervenor created the sort of stale claims problems statutes of limitations seek to avoid.304 The burden of showing that delay caused

301 See note 297 supra.
303 Moreover, the Court implied in American Pipe that tolling would not be extended to claims so distinct from those raised in the named plaintiff's complaint that the defendant would not have notice of them. See 414 U.S. at 555 n.25.
304 See Note, Federal Rule of Civil Procedure 15(c): Relation Back of Amendments, 57 MINN. L. REV. 83, 115 (1972) (urging same test for prejudice in
prejudice should ordinarily be on the defendant for three reasons: first, such prejudice is unlikely when the first conditions are met; second, the Federal Rules of Civil Procedure are generally to be construed in such a way that a court will decide a case on its merits rather than on a technical objection if no clear unfairness would arise from the former course; third, the objectives of the substantive theory of the class suit would generally be served by proceeding to the merits whenever this is not clearly violative of the policies embodied in statutes of limitations.

V. FUNDAMENTAL REQUIREMENTS FOR CLASS SUIT

Representative procedures ought not to be used unless necessary; perhaps the most fundamental requirement for a class suit, therefore, is the existence of a class too numerous for joinder to be practical. Traditionally, "too numerous" has been a concept given content on a case-by-case basis; the numerosity requirement is simply not susceptible of doctrinal analysis.1 Numerosity, therefore, will not be discussed here. Instead, this Section will explore other prerequisites of class suit, attempting to determine what constraints fairness and substantive law impose on the availability of class procedure.

A. Common Questions, Typicality, and Case or Controversy

1. Common Questions.—Although a class action may not be brought under rule 23 unless there exists a common question of fact or law,2 neither the rule nor the Advisory Committee Note3 attempts to define what a common question is, and the federal courts, when they have not ruled on the requirement without making their criteria explicit,4 have encountered difficulty in defining case where new defendant is brought into action by amendment); cf. Craig v. United States, 413 F.2d 854, 858 (9th Cir. 1969), cert. denied, 396 U.S. 987 (1969) (finding prejudice where party sought to be added as a defendant had notice of accident which was basis for amended complaint, but had no reason to investigate facts respecting defenses that could be asserted against the amending party).

2See, e.g., F. Calvert, Parties to Suits in Equity 42 (2d ed. 1847).
4See, e.g., Tober v. Charnita, Inc., 58 F.R.D. 74, 79 (M.D. Pa. 1973) ("It is clear that there are common questions which will affect every class member"); Lewis v Bogen, 33 F. Supp. 331, 339-40 (S.D.N.Y. 1972) ("There can be no dispute that the questions of law and fact ... are common to ... the class ... "); Iowa v Union Asphalt & Roadoils, Inc., 281 F. Supp. 391, 401 (S.D. Iowa 1968) (questions of law and fact "[u]ndoubtedly" common), aff'd, 409 F.2d 1239 (8th Cir. 1969).
it.\(^5\) Content can be given to the requirement, however, if it is recognized to be the first step in the process through which the court identifies the situation it must deal with in adjudicating the class action. The inquiry mandated can be understood to be an effort to determine the persons whose claims would be resolved, or whose interests would be affected, if the class representatives were indeed to marshal the legal arguments and elements of proof needed to establish the class claim as alleged and as further developed through initial rounds of discovery. A common question is properly raised, then if the question states an element of the claim and if the group that will be affected by adjudication of the complaint is in fact described by the class allegations in the complaint. Judicial enforcement of this requirement is necessary because the class attorneys, in framing the complaint, may not know enough about the situation out of which the claim arises to state an accurate definition.\(^6\) In undertaking common question analysis, therefore, the trial judge performs both the traditional judicial function of moving beyond the pleadings to define the actual problems of concern in the lawsuit, and the more peculiarly class-action-oriented function of asserting judicial control over the party structure of the suit.

Obviously the class definition as presented could be either overinclusive or underinclusive. Much commentary has focused on the practical problems created when proof of the named plaintiffs' claims will not prove each and every element of every class member's claim.\(^7\) This, however, is not the kind of overinclusiveness to which common question analysis is addressed. The common question requirement by itself does not mandate complete uniformity among the class members. Instead, considerations going beyond common question analysis, concerning the available techniques for structuring the lawsuit,\(^8\) as well as the fairness of severing individuals with somewhat distinct claims,\(^9\) will determine the full extent to which class redefinition is necessary and possible


\(^7\) These discussions have generally focused on the question of whether "fluid recovery," in which class claims are proved in the aggregate, is proper, or whether there must be individual trials of damages. For an analysis of this issue and citations to the literature, see pp. 1516-36 infra.

\(^8\) See pp. 1471-98 infra.

\(^9\) If individuals with somewhat distinct claims will, as a practical matter, be affected by the outcome of the lawsuit, it may be better to retain them in the suit if available techniques for representing diverse interests within the class would be sufficient to safeguard their claims even though the use of such techniques might complicate the trial.
in such situations of partial overlap. The only overinclusiveness which common questions analysis will itself eliminate will arise in situations in which the claims of class members raise such distinct questions of law or fact that they are clearly severable in practice.10

Common question analysis of underinclusiveness raises issues similar to those raised by traditional necessary and indispensable party practice.11 The similarity is clearly apparent from consideration of problems confronted by the district court and court of appeals in Castro v. Beecher.12 Castro involved a suit brought on behalf of black and Spanish-surnamed persons allegedly injured by the discriminatory recruiting and hiring practices of Massachusetts state and municipal police departments.13 Judge Wyzanski’s district court opinion, upon analysis of the named plaintiffs’ claims, concluded that the cause of action those claims made out was one having to do with discrimination against all “non-mainstream whites,” not just black and Spanish-surnamed persons.14 The named plaintiffs had apparently refused to represent this larger class,15 and Judge Wyzanski refused to certify the class as alleged.16 Although the opinion does not make it express, the justification for this ruling seems to be that, as a matter of equitable doctrine, it was not possible to grant relief to one group of individuals when the effect would be to prefer that group over other persons similarly affected by the class opponent’s wrongful conduct.17 By denying class treatment, Judge Wyzanski was in effect asserting that class litigation was improper unless the class encompassed the totality of the group affected by the litigation.

On appeal, however, the First Circuit reversed. Judge Coffin’s opinion concluded that the named plaintiffs’ claims did indeed make out the elements of a cause of action shared by black and Spanish-surnamed victims of the class opponent’s discrimination.18 Although the court of appeals ultimately held that the class was

10 See, e.g., Samuel v. University of Pittsburgh, 56 F.R.D. 435, 439–40 (W.D. Pa. 1972) (dividing a class where some members had been affected by an administrative rule and others had been injured by a common law rule even though the injury — having to pay out-of-state tuition fees — was common to all class members; the court treated this ruling as a typicality rather than a common question ruling).
13 334 F. Supp. at 934.
14 Id. at 943, 947–48.
15 Id. at 948.
16 Id.
17 Id.
18 459 F.2d at 729–31.
improper for other reasons, its opinion suggests that the appropriate inquiry under the “common question” requirement is whether the named parties had the same case to prove as other class members. If, however, Judge Coffin did not also mean to assert that equitable doctrine did not constrain the district court’s ability to grant preferential relief only to blacks and Spanish-surnamed persons, then his focus on common proof ignores the effect of relief on parties who would have an equal claim to modify the status quo, thereby creating rather than resolving differences within the class.

Judge Wyzanski’s disposition of the case highlights a fundamental problem with class suits that are intended to resolve the totality of a situation of overlapping claims. Class representatives, in filing a complaint, can obviously be put under no obligation to define a class as broadly as the situation may in fact warrant. When the underinclusiveness of the class becomes apparent, moreover, the class representatives may refuse to bring suit on behalf of the class the court thinks to be most appropriate. A court under rule 23 could apparently condition continuation of the suit as a class action upon the named plaintiffs’ agreement to represent the class as the court defines it. Such an approach, however, obviously raises problems of adequacy of representation. Regardless of judicial control, class representatives must largely be relied upon to bring differences within a class to the attention of the court, and if class representatives have already refused to take such actions it is doubtful that the court’s formal appointment will indeed do much to change the realities of the situation. Alternatively, the court might treat the class the named plaintiffs wish to represent as a subclass, and either appoint representatives for other subclasses of the class as a whole, or order notice to be sent to other class members inviting intervention.

19 The court of appeals found that, with regard to hiring practices, the plaintiffs had failed to make out a prima facie case of racially discriminatory impact. Id. at 732. With regard to the challenge to bias in recruitment, the court concluded that, since the named plaintiffs had been aware of police employment opportunities and had taken the entrance examination, they could not bring a class suit challenging the dissemination of recruitment information. Id.

20 Until the complaint is filed, there can be no judicial control of the lawsuit. Moreover, class attorneys may not be able to define the class with precision until initial discovery is completed. See Note, supra note 6, at 1141.

21 See Fed. R. Civ. P. 23 (c) (1). Indeed, a federal court may require a litigant seeking to bring an individual action to convert his suit to a class action. See, e.g., Wilson v. Zarhadnick, 406 F. Supp. 1195, 1198 (M.D. Ga. 1975).

22 See p. 1593 infra (ethical responsibilities).

23 One court has ruled that it is improper for a court to contact persons not class members for the purpose of soliciting intervention. See Pan American World Airways, Inc. v. United States District Court, 523 F.2d 1073 (9th Cir. 1975). In Pan American, however, the class claim, which arose out of an air crash disaster,
Faced with class representatives unwilling to represent a full class, a court could also consider alternatives beyond those suggested by class action procedure itself. For example, a court might invite amici to represent the interests of those members whom class representatives refuse to represent. As Professor Chayes has indicated,24 such virtual representation through amici appears to be an increasingly common technique for reconciling the claims of parties with others not before the court, and there seems no practical obstacle to shaping relief to take into account so far as possible the interests of those virtually represented.25 The party structure that would result from the participation of amici would be similar to that created by subclassing, but would appear to be subject to the same limitations as intervention, namely that it may be difficult to be sure that the amici is indeed representing the interests of any constituency larger than itself.26 A court could also analyze the situation in rule 19 terms — balancing the harm to nonparties of going forward to judgment against the harm to the present parties of refusing to adjudicate after considering alternative forms of judgment that might lessen the impact on outsiders.27 Judge Wyzanski’s decision in Castro can be read to reflect such a balancing — if equity would not allow blacks and Spanish-surnamed persons to be advanced as a class over their fellow victims of discrimination, then the harm to such victims was clearly lessened by granting only individual preferences, and, as compared with allowing no individual relief at all, such individual relief adequately balanced the claims of the competing groups of individuals.

2. Typicality. — Some courts, attempting to apply the language of rule 23(a)(3) that “the claims or defenses of the repre-
sentative parties are typical of the claims or defenses of the class," have imposed a distinct requirement of typicality in addition to the common question requirement. In the leading case of LaMar v. H & B Novelty & Loan Co., for example, the United States Court of Appeals for the Ninth Circuit treated the typicality requirement as a significant constraint on class definition. In LaMar, the named plaintiff brought suits against the class of all pawnbrokers licensed to do business in Oregon on behalf of the class of the pawnbrokers' customers, to recover damages for alleged violations of the Truth in Lending Act. LaMar, the named plaintiff, had dealt with only one of the defendants, and for this reason, the Ninth Circuit held that the suit could not be validly certified as a class action. Although the court conceded that a common question was raised as to the legality of the various transactions members of the defendant class entered into with members of the plaintiff class, it found that the claim of the named plaintiff was not "typical" of the claims of other members of the plaintiff class. "[T]ypicality is lacking where the representative plaintiff's cause of action is against a defendant unrelated to the defendants against whom the cause of action of the members of the class lies." The LaMar court justified its reading of the typicality requirement in terms of the institutional necessity for courts to confine themselves to adjudication of "discrete complaints of injury by one or a very small number of alleged wrongdoers." This concern is similar to those underlying article III, and, indeed, a number of courts, in applying the typicality requirement, have

28 See, e.g., Green v. Cauthen, 379 F. Supp. 316, 372 (D.S.C. 1974) ("It is only common sense that 'typicality' would not be established as a separate prerequisite in Rule 23(a)(3) if it was not intended to have an independent meaning.").
29 489 F.2d 461 (9th Cir. 1973).
30 Id. at 462.
31 Id.
32 Id.
33 Id. at 465.
34 Id. The LaMar court also found that class suit was improper because the named parties could not fulfill the adequate representation requirement of rule 23(a)(4), and because class suit was not superior to other methods of adjudicating the claim, see Fed. R. Civ. P. 23(b)(3). Id. at 468.
35 Id. at 465. The LaMar opinion attempts to interpret the provisions of rule 23 according to a theory of the "judicial process." The opinion is prefaced by a philosophical disquisition on what the court perceived to be two distinctly different methods of dispute-settlement — the judicial process and the administrative process — and the subsequent analysis of the requirements of rule 23 suggests that the class action is antithetical to the former and must therefore be read restrictively to reduce the number and size of class actions that may be brought. See id. at 461-64, 468.
treated it as a standing rule.\textsuperscript{37} It is not clear, however, what article III policies the LaMar court might have thought its definition of typicality would serve, although it may have been concerned that LaMar was in some sense raising injuries to others that he did not share since he had not dealt with some of the class opponents. Traditionally, federal courts have not allowed plaintiffs so to raise the claims of third parties.\textsuperscript{38} More particularly, the court may have been concerned over whether consideration of the named plaintiff's claims would properly align a court's perspective in dealing with the claims of other class members. Despite the existence of a common question, it could be argued, there may be differences in situation as between a named plaintiff and other members of a class. A court which judges the acceptability of a class suit solely in terms of the common question requirement, and looks chiefly to the named plaintiff's situation as a sample of those of other class members, may overlook these differences and may consequently skew its adjudication of a case.\textsuperscript{39} The typicality requirement, on this view, functions as a prophylactic, screening out those class suits in which differences in situation are likely — suits in which the named plaintiff lacks claims against all of the defendants allegedly liable to the class.

Class actions may be categorized in terms of four plaintiff-defendant relationships. In order to assess the need for a prophylactic party alignment rule, it is helpful to make use of these categories to assess the risk of distorting adjudicated outcomes raised by class actions that fail to satisfy the typicality requirement. In the first category, the issues litigated in the class suit have to do with a single act by the class opponent simultaneously affecting the interests of all class members. Mass accident cases\textsuperscript{40} and


\textsuperscript{38} Although LaMar assumed that the plaintiffs had standing to maintain their action in order to be able to reach the typicality question, the court implied that plaintiffs' standing might successfully be challenged, and it discussed the standing question in language similar to that subsequently used in the typicality portion of the opinion. Compare 489 F.2d at 464 with id. at 465-66.

\textsuperscript{39} Cf. Stewart, The Reformation of American Administrative Law, 88 HARV. L. REV. 1667, 1732 (1975) (criticizing the "zone of interests" test for standing because, in obscuring the basis for standing, the test may cause the court not to focus on the legally relevant considerations).

cases concerning the constitutionality of state statutes illustrate this type.41 Class suits falling into the second category concern a series of acts by a class opponent (or opponents) which, if taken together, give rise to a liability running to the class as a whole. Rizzo v. Goode 42 is one illustration of this type; antitrust conspiracy cases,43 and securities cases in which scienter is inferred from the repeated acts of the class opponent 44 are others. The third category consists of cases where a single class opponent has committed a series of separate but fungible acts, each act giving rise to liability to a member or members of the class. Illustrations of this category include class litigation of the materiality of separate but similar representations alleged to be violative of the securities laws,45 as well as class suits under Title VII grouping a number of equivalent but individually culpable acts of discrimination.46 Finally, the fourth category is made up of class suits


42 96 S.Ct. 598 (1976), discussed, pp. 1468-70 infra.


where the common issues are raised by the separate acts of several class opponents, and each act individually gives rise to liability to some members of the class. *LaMar*, of course, falls into this category, as do suits like *Richardson v. Ramirez*, challenging the legality of acts performed by each of a class of local government officials.

Use of the named plaintiffs' interests and situations as a sample raises few problems of distortion in the first two categories of class suits. In the first category, since the act of the class opponent that affects the interests of the named plaintiff is the same act which affects the interests of all other class members, a court

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47 418 U.S. 24 (1974). In *Richardson*, the plaintiff class of ex-felons in California challenged the constitutionality of the state constitutional and statutory provisions that barred plaintiffs from voting by bringing a suit for declaratory and injunctive relief against the class of county clerks and voter registrars. See *id.* at 32–33. During the course of the suit, the three county officials named as representative defendants decided not to contest the action and agreed to register the ex-felons, including the named plaintiffs to vote. *Id.* at 34, 36. Noting that the suit was a class action, and finding with regard to the absentee plaintiffs and defendants that the controversy remained live, the Supreme Court held that the case was not moot and proceeded to the merits. See *id.* at 36–40. Although the Court implied that as a result of *Bailey v. Patterson*, 369 U.S. 31, 32–33 (1962), see pp. 1466–67 infra, the class action might not have been permitted to go forward since the mootness of the named plaintiff's claim removed the named plaintiff from the class. See 418 U.S. at 39. The Court did not imply, however, that the action would have been improper absent the mootness of the named plaintiff's claim.


In *Samuel*, the defendant class of state and state-related colleges and universities in Pennsylvania was sued by the class of married female graduate students attending the defendants' schools. The plaintiffs sought damages and declaratory and injunctive relief against the use of an administrative regulation and a "similar common law rule" which classified the plaintiffs as out-of-state residents for tuition payment purposes. See 56 F.R.D. at 437–38. The named plaintiffs were all students at the University of Pittsburgh, see *id.*, and, therefore, as in *LaMar*, had no personal claim against the other defendants. Finding the constitutionality of the administrative regulation to be a question common to the plaintiff and defendant classes, see *id.* at 439–40, the court permitted the suit to go forward. The court limited the class action to the administrative rule, however, excluding those defendants employing, and those plaintiffs affected by, the common law rule since that rule was found to present a different question than the administrative regulation. See *id.* at 440. Plaintiffs were thus considered to have standing to sue on behalf of all those for whom the administrative rule presented a common question, notwithstanding that the named plaintiffs had personal claims against only one of the defendants. Similarly, in *Wilson*, * supra*, *Washington*, * supra*, and *Gibbs, supra*, class plaintiffs were allowed to sue a class of defendant state officials even though, in each case, the named parties had come in contact with no more than a handful of the defendant class.
looking to the situations of the named plaintiffs will see essentially all there is to be seen, at least with respect to the characteristics of the class opponent's act. In the second category, adjudication of liability requires a court to look to the situations of class members other than the named plaintiffs, and thus any tendency on the part of a court simply to assume that the situations of class members are interchangeable with that of the named plaintiff is externally checked. Class suits falling into the third and fourth categories, however, do create a risk of distortion. In all these suits, a court is required to adjudicate the liability of a series of separate acts, by either one or more class opponents. Unreflective treatment of the named plaintiffs' situation as representative of the situations of other class members accordingly creates a risk of leaving unseen differences in the situations of class members which may affect adjudication of liability or design of relief.

The foregoing analysis suggests that if a prophylactic typicality rule is in fact justified by concerns for distortion of adjudicated outcomes, then it should function as a constraint in a wide variety of cases. Such a sweeping conclusion is itself suspect, however, since suits falling into the third category are routinely treated as class actions. Suits in the fourth category have also been allowed to go forward. Thus, if LaMar is accepted, a significant number of suits routinely given class status would have to be treated as individual suits.

The novel sweep of accepting the necessity of a typicality constraint if outcomes in class suits are not to be distorted indicates a need for further consideration of the premises supporting that constraint. In the next Part, limitations placed on class representation by article III will be examined to determine whether the Constitution mandates either a restrictive standing limit or a prophylactic rule to remove distortion. In the following Part, procedural steps for disaggregating the class in a manner that reduces any potential for distortion inhering in representative advocacy will be considered as alternatives to dismissing the claims of some or all class members. The conclusion reached in these parts is, in summary, that the type of limitation envisioned by the LaMar court cannot be justified by reference to article III, and that a range of procedural options are open to a court, which make dismissal an unnecessarily harsh remedy for any distortion that is inherent in representative advocacy.

3. Class Actions and Article III in the Supreme Court: The Emerging Doctrine. — The Supreme Court has only recently begun to consider the implications of the case or controversy requirement for class actions. Nonetheless, it is already possible to

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49 See, e.g., cases discussed in note 48 supra.
discern two distinct approaches underlying the Court's decisions. An initial series of cases attempted to assimilate class actions to ordinary litigation by treating the named plaintiffs as the focus of the case or controversy inquiry. More recent decisions, however, suggest that the class is the relevant actor, and that the case or controversy requirement is to be analyzed in terms of the status of the legal issues in dispute between the class and the class opponent.

The evolution in the Supreme Court's approach to class actions is most apparent in the Court's mootness decisions. In Hall v. Beals 50 and Indiana Employment Security Division v. Burney,51 the Court, without directly confronting the mootness issue, implied that the satisfaction of a named plaintiff's claim would render a class action nonjusticiable.52 In Sosna v. Iowa 53 and Franks v. Bowman Transportation Co.,54 however, the need for a continuing dispute between an identified plaintiff and defendant ceased to be axiomatic in the Supreme Court's analysis.55

Sosna held that, where a durational residency requirement continued to frustrate the efforts of class members to obtain divorces, the fact that the named plaintiff had satisfied the residency requirement by the time the case reached the Supreme Court did not deprive the Court of jurisdiction to review the requirement's constitutionality.56 Justice Rehnquist's majority opinion, without attempting to identify any particular individuals disputing the validity of the residency requirement, concluded that the case "remains very much alive for the class of persons" that the named plaintiff was "certified to represent."57 Sosna, although shifting

51 409 U.S. 540 (1973) (per curiam).
52 See id. at 541-42; 396 U.S. at 49.
53 419 U.S. 393 (1975).
54 46 S. Ct. 1251 (1976).
55 Richardson v. Ramirez, 418 U.S. 24 (1974), may be a transitional case. There, the Supreme Court, although holding that a class claim was not moot simply because the claims of the named plaintiffs had been satisfied, nonetheless appeared to analyze the case in a manner consistent with the emphasis in Hall and Burney on the existence of a continuing dispute between identified litigants. Justice Rehnquist's majority opinion found subsumed within the formal structure of the class litigation a distinct, continuing controversy between one of the representatives of the defendant class and an identified member of the plaintiff class, and emphasized the existence of this dispute in holding the class action not to be moot. See id. at 37-40. See also Note, The Mootness Doctrine in the Supreme Court, 88 HARV. L. REV. 373, 390-92 (1974); The Supreme Court, 1973 Term, 88 HARV. L. REV. 41, 106-07 (1974).
56 See 419 U.S. at 397-403.
57 419 U.S. at 401. The Supreme Court suggested in Sosna that, where a class had not yet been certified at the time the named plaintiff's claim became moot, the effect of the mooting "may depend upon the circumstances of the particular
the emphasis in mootness analysis from individual litigants to the class, limited the reach of its holding to cases raising issues "capable of repetition, yet evading review." In *Franks*, however, the Court abandoned this limitation, ruling that a class action is not mooted by satisfaction of a named plaintiff's claim whenever a dispute continues between a class opponent and other members of the class.59

Dissenting in *Sosna*, Justice White criticized the Supreme Court's approach to mootness in class actions as substituting a "legal fiction" for a "live case or controversy." But treating the class rather than the named plaintiff as the party in dispute with a class opponent neither nullifies article III's prohibition of federal trial of moot cases nor removes the obligation article III ordinarily imposes upon federal judges to ground their decision-making in the concrete circumstances of a particular case. Even after *Sosna* and *Franks*, a class suit may become moot if the issue in dispute ceases to affect the interests of every member of the class.62 If the claim of a named plaintiff becomes moot, therefore,
a federal court must inform itself of the situations of other class
members, and confirm the existence of a continuing controversy
between class members and the class opponent, before it may
retain jurisdiction over the action. Thus, the effect of the two
decisions is not so much to diminish the relevance of the case or
controversy requirement in class actions as to redirect the focus
of a court's inquiry away from identification of proper party re-
lationships per se and towards direct verification of the existence
of an actual controversy.

Similar movement is apparent in the Supreme Court's interpre-
tation of the injury in fact requirement for standing mandated by
article III. "Injury in fact" may be given two meanings in the
class action context. One approach would condition class suit
upon the named plaintiff's personal satisfaction of the require-
ment. A named plaintiff would not be permitted to sue on behalf
of a class unless he could have brought suit on his own consistent
with the constraints of article III. A second approach would not
separate the named plaintiff from the class. Rather, the named
plaintiff would be permitted to assert an injury suffered in com-
mon by the class, provided that such an injury met the require-
ments of article III, even though the named plaintiff's own injury
taken in isolation would not have afforded him standing to raise
the claim he raises on behalf of the class. This second approach
would treat the situation of the class as a whole as the concern of
the lawsuit, and would thus permit the litigation of grievances
no single individual would have standing to assert.

On at least three occasions, the Supreme Court has been pre-
sented with an opportunity to choose between these two interpre-
tations of the injury in fact requirement. Bailey v. Patterson involved a suit on behalf of a class of blacks threatened with
prosecution under Mississippi's breach of the peace statutes for

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\[Id. \text{ at 515.} \] Subsequent to the lower court's decision Berbling was replaced in of-
office by Spomer. \[Id. \text{ at 519–20.} \] The Supreme Court held that the suit against
Berbling was moot since the conduct charged was personal to Berbling and not
the policy of the office. \[Id. \text{ at 521.} \] The suit was thus moot for all members
of the class. See also Hall v. Beals, 396 U.S. 45, 48 (1969) (per curiam) (chall-
egged statute amended); Bledsoe, supra note 61, at 436–37.

\[63 \text{ Thus, in Franks v. Bowman Transp. Co., 96 S. Ct. 1251 (1976), Justice}
Brennan's majority opinion, after finding the suit not to be moot even though
the named plaintiff no longer had a claim, because it had been certified as a class
action, see id. at 1259–60, proceeded to examine the facts of the case for the pur-
pose of showing that a "live" and sufficiently specific dispute remained, see id.
at 1260.}


\[65 \text{ See Comment, Continuation and Representation of Class Actions Follow-
ing Dismissal of the Class Representative, 1974 DUKE L.J. 573, 578–79.}

\[66 \text{ 369 U.S. 31 (1962) (per curiam).} \]
violating allegedly unconstitutional state and local segregation laws.\textsuperscript{67} The named plaintiffs had not themselves violated the segregation laws and had not been personally threatened with prosecution.\textsuperscript{68} They argued, however, that criminal proceedings brought against other members of the class who had violated the laws, as well as other acts by state and local officials, constituted a generalized threat to all members of the class, including the named plaintiffs, that was sufficiently immediate to permit the named plaintiffs to represent all members of the class, whether individually threatened with arrest or not.\textsuperscript{69} The Supreme Court, however, rejected the named plaintiffs' argument, finding that the only individuals entitled to bring suit were those who had been arrested or personally threatened with arrest. Since the named plaintiffs did not fall into this category, they lacked the injury in fact necessary to permit them to sue on behalf of the class of those who did.\textsuperscript{70}

It is not clear from the Court's brief discussion which of the two approaches to injury in fact in class actions it adopted. On the one hand, Bailey may be read as holding that the only individuals who had standing to sue were those who had been arrested or personally threatened, and that the named plaintiffs, because they could not satisfy this standard, could not bring suit, either individually or on behalf of a class. Alternatively, the Court's decision may be understood as recognizing that the status of the injury to a class as a whole was the measure of injury in fact, but at the same time holding that the arrest or threatened arrest of specific individuals did not pose a sufficiently immediate threat to the larger class of which the named plaintiffs were members to create a justiciable controversy between that class as a whole and the defendants.

\textit{O'Shea v. Littleton} \textsuperscript{71} is also ambiguous. \textit{O'Shea} held to be

\textsuperscript{67} Id. at 32.


\textsuperscript{69} Appellants' Reply to Appellee's Motion to Dismiss or to Affirm at 8–10, Bailey v. Patterson, 369 U.S. 31 (1962). Although the class included individuals who had been arrested, and whose prosecutions were pending in Mississippi state courts, named plaintiff status was given only to others apparently as part of an attempt to avoid bringing the case within the rule that a federal court will ordinarily not hear a request for equitable relief from an individual who is a defendant in an on-going state criminal prosecution. \textit{See} Douglas v. City of Jeannette, 319 U.S. 157 (1943). \textit{See generally} P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, \textit{Hart & Wechsler's The Federal Courts and the Federal System} 1009–50 (2d ed. 1973); \textit{The Supreme Court, 1974 Term}, 89 Harv. L. Rev. 47, 151–69 (1975).

\textsuperscript{70} 369 U.S. at 32–33.

\textsuperscript{71} 414 U.S. 488 (1974).
nonjusticiable a class suit for injunctive relief instituted on behalf of residents of Cairo, Illinois, allegedly victimized by the discriminatory practices of a county judge and magistrate in setting bail and fixing sentences in criminal cases. Looking to the claims of the named plaintiffs, Justice White's majority opinion found that, since any future injury necessary to justify the issuance of an injunction was contingent on the named plaintiffs' violating the law, but that the named plaintiffs "naturally do not suggest that any one of them expects to violate valid criminal laws," the issues the named plaintiffs sought to raise were too hypothetical to be capable of judicial resolution. O'Shea thus seems to take the approach of determining standing to sue through analysis of the claims of the class representatives examined in isolation.

The circumstances of the case, however, diminish its significance. The objections the O'Shea majority raised as to the immediacy of the named plaintiffs' claims would have been equally applicable had the Court examined the situation of the class as a whole. As the Court interpreted it, the wrong the named plaintiffs asserted was not a wrong committed against the class as a whole, in the way the Bailey plaintiffs argued that the coercive acts at issue there were, but a series of individual wrongs. The likelihood that any one class member would be arrested and come before the class opponents was independent of the likelihood of similar incidents involving other class members. The situations the named plaintiffs asserted to be representative of the situations of class members generally, therefore, would have appeared no less hypothetical had the Supreme Court expanded the scope of its inquiry.

Recently, in Rizzo v. Goode, the Court appears to have had to make a choice between standards for determining injury in fact in class actions that it failed to make in Bailey and O'Shea. Rizzo involved a class suit by Philadelphia residents against the Mayor and Police Commissioner claiming that the defendants had failed to take the necessary steps to curb allegedly pervasive police misconduct and seeking an injunction ordering an overhaul of disciplinary procedures. The Supreme Court initially analyzed

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72 See id. at 490–93.
73 See, e.g., id. at 495, 496.
74 Id. at 498.
75 See id.
76 See id. at 496–97. But see id. at 509 (Douglas, J., dissenting).
77 Justice White also noted that the class which the named plaintiffs purported to represent had never been certified. See id. at 494–95 n.3.
78 96 S. Ct. 598 (1976).
79 Id. at 601–02.
Rizzo in much the same way as it had proceeded in O'Shea, by looking to the claims of the named plaintiffs in isolation.\textsuperscript{80} The representative plaintiffs’ claim for relief, according to Justice Rehnquist's majority opinion, rested on the argument that “a small, unnamed minority of policemen”\textsuperscript{81} believed, because of the failure to act on the part of the defendant Mayor and Police Commissioner, that the police department was tolerant of misconduct, and that such policemen were therefore likely to mistreat the named plaintiffs in the future.\textsuperscript{82} If the Court had been faced only with the claims of the individual plaintiffs, such a theory of causality would clearly have presented too hypothetical a claim of injury to be justiciable.\textsuperscript{88}

The Rizzo Court, however, apparently adopted an alternative theory of case or controversy. The district court and court of appeals had allowed injunctive relief against the police department on the theory that a series of incidents of police misconduct involving some of the named plaintiffs and other members of the class showed an “unacceptably high” level of police abuse inconsistent with supervisory officials' fulfillment of an obligation to act to prevent such misconduct.\textsuperscript{84} On this theory, the relevant injury would not be a threat to any specific individual, but the threat directed to all class members that some of their number would be abused in the future. Justice Rehnquist, after seeming to distinguish O'Shea on the ground that it was not a class suit,\textsuperscript{85} moved directly to an analysis of the correctness of the lower courts’ theory of liability,\textsuperscript{86} thereby implying that the class injury as defined by the lower courts was of a kind sufficient to meet article III’s injury in fact requirement and allow a decision on the merits.\textsuperscript{87}

After Rizzo, a named plaintiff can apparently make either of two showings in order to establish the requisite case or controversy. He may show that the impact upon his own interests of the class opponent’s conduct constitutes an injury in fact. Alternatively, he may show that the class opponent’s conduct, because of its impact upon the various class members, gives rise to a statutory cause of action or claim of constitutional violation on

\textsuperscript{80} See id. at 604-05.
\textsuperscript{81} Id. at 605.
\textsuperscript{82} Id.
\textsuperscript{83} See id.
\textsuperscript{85} See 96 S. Ct. at 605.
\textsuperscript{86} See id. On the merits, the Supreme Court reversed the lower courts’ finding of liability. See id. at 607.
\textsuperscript{87} The Supreme Court's silent resolution of the injury in fact issue, of course, means that the Court's precise holding is ultimately ambiguous.
behalf of the class as a whole, even if the threat to any specific class member, taken in isolation, would be too hypothetical to confer standing.88

The case or controversy doctrine which has emerged in recent opinions thus exhibits a willingness to consider constitutional limitations on justiciability at the level of the class as a whole as well as at the level of the individual situation of the named plaintiff suggested to be appropriate by early suits. Although the extent to which the class will be allowed to replace the individual as a relevant actor for article III purposes is still not clear, courts do

88 Given Rizzo, it appears that the Supreme Court's subsequent dictum in Simon v. Eastern Ky. Welfare Rights Org., 96 S. Ct. 1917 (1976), to the effect that the fact of a class action "adds nothing to the question of standing," id. at 1925 n.20, is overbroad. Rizzo, however, does not remove the need for a standing inquiry in class actions: while evaluation of the sufficiency of the quantum of injury asserted may be affected by the fact of a class action, the fundamental requirement that class representatives assert some injury, whether strictly individual or classwide, remains, see id.; Warth v. Seldin, 422 U.S. 490, 502 (1975); Bailey v. Patterson, 369 U.S. 31, 32-33 (1962) (per curiam).

The Supreme Court seems not to have addressed the question of whether an individual who has shown the requisite injury in fact may assert the rights of a third-party class under the doctrine of constitutional jus tertii. Where the plaintiff is a voluntary association seeking to represent the class of its members, however, courts have examined plaintiff's standing to sue by reference to jus tertii doctrines without determining whether the fact that the suit is a class action affects the analysis. See, e.g., Arkansas Educ. Ass'n v. Board of Educ., 446 F.2d 763, 766 (8th Cir. 1971); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 937 (2d Cir. 1968) (dictum); Smith v. Board of Educ., 365 F.2d 770, 777 (8th Cir. 1966); Undergraduate Student Ass'n v. Peltason, 359 F. Supp. 320, 323 (N.D. Ill. 1973). An organization's assertion of the rights of its members, however, is a long established instance of standing to assert constitutional jus tertii. See generally Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L.J. 599, 644-45 (1962). Moreover, to the extent that a court, in examining the facts surrounding an organization's claim, is likely to learn of the situations of other class members and determine the size of the class and the scope of the action, fair litigation of the class claim may not be hampered by the fact that the claim is waived by a third party. Whether a nonorganizational plaintiff may be permitted to assert the rights of a class to which he does not belong in cases where failure to allow jus tertii would result in the dilution of the rights of class members is an open question. It has been argued that it "would be absurd to hold" that a litigant has a "standing in the constitutional sense"—that is, falls within the traditional jus tertii exception to the standing rules—"but is barred by the technical requirements of Rule 23." Undergraduate Student Ass'n v. Peltason, supra, at 333. On the other hand, where the plaintiff does not belong to the class it will ordinarily be difficult for a court to make the inquiry into the facts surrounding the claims raised and the identities and situations of the absentees necessary for the fair litigation of the class action, as well as into whether failure to grant plaintiff standing in the case would in fact result in dilution of the absentees' constitutional rights—the essential prerequisite for the assertion of jus tertii. See generally Note, Standing to Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423 (1974).
appear to have some flexibility in substituting in place of party alignment analysis a direct inquiry into the justiciability of a particular issue. The jurisprudence of article III, therefore, is inconsistent with the rigid party alignment approach of the LaMar typicality requirement.89 Indeed, the case or controversy requirement, to the extent that it obliges federal courts to look beyond the named plaintiff to the situations of other class members as well, complements a court's duty to insure adequacy of representation in rendering the typicality requirement unnecessary.

B. Adequacy of Representation

The requirement that class representatives "fairly and adequately protect the interests of the class" 90 is both a prerequisite to class suit under rule 23(a)(4) and a constitutional mandate as well. Although the concept of adequacy of representation might thus appear to be central to class action jurisprudence, commentators have devoted surprisingly little attention to the subject.91 Moreover, although federal courts have had to confront the question of adequacy of representation on a regular basis, the doctrine which has developed under rule 23 92 hardly extends beyond an often empty requirement that class attorneys be competent.93

89 See p. 1459 supra.
90 FED. R. CIV. P. 23(a)(4).
92 The doctrine has been stated as follows:
Adequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class.
93 Judicial inquiry into the qualifications of the class attorney is almost always pro forma. See, e.g., Quinault Allottee Ass'n v. United States, 453 F.2d 1272, 1276
and an unfocused hostility to classes whose members are in disagreement or in different situations.\textsuperscript{94} This Part, after discussing the open-textured character of the constitutional obligation to insure adequacy of representation, will consider from the perspective of the substantive theory of class actions the various techniques available to courts for dealing with problems of adequacy of representation and the paradigmatic situations in which such techniques may or may not apply.

1. General Considerations: Constitutional Constraints and The Substantive Theory. — Any analysis of the adequacy of representation requirement in class actions must begin with the Supreme Court's decision in \textit{Hansberry v. Lee}.\textsuperscript{95} \textit{Hansberry} involved a suit brought to enforce a racially restrictive covenant.\textsuperscript{96}

Over defendants' objections that the agreement was invalid for...
want of the requisite number of signers, the Illinois Supreme Court upheld enforcement of the covenant on a theory of res judicata. In the earlier suit, *Burke v. Kleiman*, an action to enforce the covenant, plaintiffs and defendants had stipulated that sufficient signatures had been obtained to bring the covenant into effect. *Burke* had been brought as a class suit on behalf of all owners of property governed by the covenant. The state supreme court concluded that, because the *Hansberry* defendants had been members of this plaintiff class, they were therefore bound by the stipulation. The United States Supreme Court reversed. Chief Justice Stone's majority opinion held that the stipulation in the first suit did not bar the *Hansberry* defendants from challenging the validity of the covenant. "In seeking to enforce the agreement the plaintiffs in [the first] suit were not representing the [Hansberry defendants] whose substantial interest is in resisting performance [of the covenant]." A number of commentators have attempted to tie the Supreme Court's conclusion in *Hansberry* to some specific rule, such as a requirement of notice of or a cohesive or unified class. Contemporary comment on *Hansberry* was confused. One view was that the stipulated facts in *Burke* were fraudulent and collusive, rendering the judgment therein ineffective. See 89 U. Pa. L. Rev. 525, 527 (1941). The Illinois Supreme Court, however, had specifically found that there had been no such collusion, see *Lee v. Hansberry*, 372 Ill. at 374, 24 N.E.2d at 39, and, although Chief Justice Stone hinted at the possible presence of fraud in *Burke*, he did not specifically rebut the finding in *Lee* or purport to rest his holding on that ground. See 311 U.S. at 45-46. It was also argued that the *Hansberry* holding rested on the fact that no notice had been given to the absentees in *Burke*. See, e.g., Keeffe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 Corn. L.Q. 329, 338-39 (1948) ("[T]he fundamental reason why the Supreme Court of Illinois was reversed in the *Hansberry* case . . . was . . . the lack of notice to all members of the class in *Burke v. Kleiman* . . . ."); 89 U. Pa. L. Rev., supra, at 526 n.7 (1941) ("The Court . . . relied heavily on the fact that notice was never given to the present defendants of the previous suit."); 26 Corn. L.Q. 317, 318 n.2 (1941). See also 49 Yale L.J. 1125, 1130 (1940) (analyzing the *Lee* decision and criticizing it for the lack of notice). Unfortunately for this attempted explanation, the Supreme Court did not discuss the question of notice in its *Hansberry* opinion.

Another analyst embraced a "community of interest" explanation, finding that the class suit in *Burke* was improper because the interests of the landowners in the enforcement of the restrictive covenant were "several" instead of "joint" or common. See 39 Mich. L. Rev. 829, 830-31 (1941). One recent commentator...
Justice Stone's opinion, however, sought to leave class action procedure free from rigid constitutional structuring. "[T]he Fourteenth Amendment does not compel state courts or legislatures to adopt any particular rule for establishing the conclusiveness of judgments in class suits." ¹⁰⁵ Due process, Stone indicated, did not require adoption of class action rules based on federal rule 23;¹⁰⁶ nor did it mandate the choice of any particular theory of class suit such as the community of interest theory.¹⁰⁷ Due process would be served so long as the class action procedure adopted "fairly insures the protection of the interests of absent parties who are to be bound by it."¹⁰⁸ In *Hansberry* itself, the Illinois Supreme Court had defended the preclusive effect given to the *Burke* judgment by reference to the community of interest theory.¹⁰⁹ Chief Justice Stone applied this theory to the facts of the case, found that since the obligations created by the covenant were "several," no community of interests existed, and ruled that "without more" in the way of procedural safeguards of absentee interests *Burke* could not be treated as binding.¹¹⁰

As it emerges from *Hansberry*, the due process requirement of adequacy of representation assumes the form of an obligation placed upon procedural rulemakers and judges administering class actions to take whatever steps are necessary "to insure the full and fair consideration of the common issue[s]." ¹¹¹ This duty is to a large degree open-ended. Situations threatening "full and fair consideration" not only vary with the facts of particular cases, has also advanced the "community of interest" hypothesis, arguing that because of the conflict among the landowners there were in effect two classes involved in the *Burke* litigation — one group of owners wishing to enforce the covenant and a second group opposing them — and that the decision won by the former could not bind the *Hansberry* defendants since they were not in the same class. *See* Note, *The Importance of Being Adequate*, supra note 91, at 1224–29.

¹⁰⁵ 311 U.S. at 42.
¹⁰⁶ See id.
¹⁰⁷ See id. at 43.
¹⁰⁹ See 372 Ill. at 373, 24 N.E.2d at 39.
¹¹⁰ See 311 U.S. at 44. The Supreme Court briefly considered the theory that the interests of the class members opposing enforcement of the restrictive covenant — the defendant-petitioners in *Hansberry* — had been represented by the defendants in *Burke*. Suggesting, however, that *Burke* may have been a collusive suit in which "it [did] not appear that the [Burke defendants'] interest in defeating the contract outweighed their interest in establishing its validity," the Court dismissed that possibility. Id. at 46. Whether the interests of dissenting absentees may be adequately represented by the class opponent is considered further at pp. 1481–82 infra.
¹¹¹ 311 U.S. at 43. For a full discussion of the doctrinal origins of the constitutional obligation to insure adequacy of representation, see pages 1402–13 infra.
but are also inevitably contingent upon the strategic choices available to a judge or the judicial system. The fairness of class procedures depends upon their capacity to put before the court all legally relevant interests. The ultimate measure of due process, therefore, is the extent to which procedures that are available to overcome any biases in the advocacy of the representative parties are in fact used by the court.

A contemporary approach to adequacy of representation must be particularly sensitive to three factors. First, the primary justification for class actions derives from the increased realization of substantive policies which such suits make possible. A program for insuring adequate representation which unnecessarily narrowed the range of permissible class actions would not be congruent with this justification. Second, a chief function of the class action is heuristic. By making explicit for the trial judge the range and magnitude of the interests affected by litigation, the class action form increases the likelihood that the judge's decision on the merits of a suit and award of relief will be informed by consideration of these interests. The class action device, therefore, may have a great capacity for fairly accommodating even extremely heterogeneous classes. Third, class action procedures reflect a mix of judicial and party control. At various points during the course of a suit, responsibility for taking the measure of the interests of class members may either be given to the trial judge or, as is customary in nonclass litigation, delegated to the litigants. The distribution of such responsibility turns both on the assessment of the relative competence of the judge and the litigants, and on any extrinsic values, such as disinterestedness or private ordering, which may be thought to be furthered by judicial or party control. At the most practical level, fulfillment of the obligation to insure adequacy of representation will involve a series of judgments as to the proper combination of judicial and private control.

2. Differences Within the Class: Accommodation or Exclusion. — Unless the trial judge possesses at least some information about the characteristics of the class, there will be no way for him to act to ensure that absentee interests are fully and fairly represented during the course of the suit. Judicial knowledge of the circumstances of class members, however, may not alone be a sufficient guarantee of adequate representation of class member interests. Given the constraints of time and the judicial role, a judge may not on his own be able to develop full information as

112 See generally pp. 1353–71 supra.
113 See pp. 1366–71 supra.
114 See p. 1414 supra.
to the interests of absentees, and thus may not by himself be able to ensure that those interests are given full weight in the lawsuit, either in its litigated or negotiated phases. Inevitably, therefore, the trial judge will depend upon the representatives of the class to identify and assert absentee interests. In order for such private control to be successful, however, the judge must ensure that the constituency of each representative is sufficiently uniform and congruent with the interests of the representative that the position of the advocate can safely be taken as a statement of the position of the class as a whole. In order to ensure such uniformity, various techniques of class division or of adding advocates are available to the trial judge. The employment of these techniques presupposes that the judge has some source of information about the class which circumvents the class representative himself, since it will seldom be in the interest of the representative to admit that a position he is advocating is not that of his constituency. Thus, the discussion of available techniques for aligning advocates with class points of view should be understood to be incomplete, depending on other techniques for checking the adequacy of class representatives, some of which have already been suggested in the discussion of the development of class facts,115 and others of which will be developed in the discussion of professional responsibility.116

The discussion of the individual techniques which follows is shaped by the conclusion that, so long as the judge is in a position to obtain information about divergent points of view held by the class, divergent class interests can in general be handled through the class device. This point of view is different from that of some federal courts, which have attempted to avoid having to take into account divergent class interests. In some cases, these courts have refused to certify class suits where the interests of members of a proposed class differed.117 On other occasions, courts have redefined classes in order to exclude from the lawsuit class members with interests not in accord with the majority of a class.118 In damage actions brought under rule 23(b)(3), moreover, class

115 See pp. 1439-44 supra.
116 See pp. 1577-1623 infra.
members are permitted to opt out, and this opportunity to exit has probably served to siphon off dissent. A policy of excluding divergent interests from class litigation is, however, potentially inconsistent with both the access and heuristic functions of the class suit recognized by the substantive theory. Where the full panoply of class interests could be represented by a manageable number of advocates, or by a combination of advocates and intervenors, a refusal to allow a class action to go forward is inconsistent with a policy of increasing access to courts, at least where the necessary expansion in the number of advocates could have been financially supported by the suit. Similarly, from the standpoint of the judicial system as a whole, the outcome of adjudication is “better” if that outcome reflects the totality of legally relevant views, rather than only those of persons sharing the point of view of the named plaintiffs. Thus, exclusion ought to be regarded as a technique of last resort.

(a) The Requirement of a Determinate Class as a Prerequisite to Protection of Absentee Interests.—Before a court can ascertain differences of interest within a class, and take steps to accommodate those differences, it must be able to identify the members of the class. The courts’ duty to protect absentee interests, therefore, requires courts to impose a corollary obligation on class representatives to define with some concreteness the class upon whose behalf they are suing. A vague definition of a class is not necessarily invalid: a class need be defined with only that degree of specificity that can suggest to the court the inquiries it should make in order to determine whether any differences exist among the class.

For example, the class of “Indo-Hispano, also called Mexican-American and Spanish-American” individuals, which was held to be too imprecise in Lopez Tijerina v. Henry, would pass muster. As the opinion in Tijerina itself reveals, the indicia of membership in this class, such as possession of a Spanish surname, Mexican, Indian, or Spanish ancestry, or use of Spanish as a pri-

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119 See FED. R. CIV. P. 23 (c)(2)(A).
120 A certain degree of specificity may also be required of a class definition in order for a court to ensure that the proposed class complies with the other requirements, such as the existence of common questions of law or fact, see pp. 1454–58 supra, and the predominance of such common components over individual questions, see pp. 1504–16 infra. To the extent that the predominance inquiry reflects a concern for whether liability may be determined and relief delivered on a class basis, the class definition standard may be more restrictive than adequacy of representation would alone require. See pp. 1504–16 infra. See also Comment, Defining a Rule 23(b)(2) Class: An Expository Analysis, 12 SAN DIEGO L. REV. 150 (1974).
mary or material language,\textsuperscript{122} while perhaps overinclusive or underinclusive,\textsuperscript{123} would nonetheless have afforded a court means of identifying particular individuals whose interests could be compared with those of other individuals also apparently members of the class.\textsuperscript{124} On the other hand, a precisely stated class definition may provide a court with no useful point of departure for an adequacy inquiry. Thus, as the court recognized in \textit{Rappaport v. Katz},\textsuperscript{125} a class defined to include “all persons imminently seeking to be married by defendant or his agents who also object to the dress and ring rules he has promulgated”\textsuperscript{126} would be “incapable of ascertainment”\textsuperscript{127} since to identify members of the class a court would have to inquire “into the state of mind of each particular individual” proposed as a class member.\textsuperscript{128}

At least insofar as constraints on class definition derive from the need for the judiciary to protect the interests of absentees, the fact that the membership of a class changes during the course of a lawsuit ought not in itself trigger rejection of the class.\textsuperscript{129} So

\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} Dissenting from the dismissal of the appeal in \textit{Lopez Tijerina}, Justice Douglas found that in the context of the claims alleged and the relief sought, the class definition was not impermissibly vague. “There can be no dispute that in many parts of the Southwestern United States persons of Indian and Mexican or Spanish descent are, as a class, subject to various forms of discrimination.” 398 U.S. 922, 924 (Douglas, J., dissenting). Other courts have permitted class suits to be brought on behalf of similarly-defined classes of Hispanic-Americans. See, e.g., \textit{Aspira of New York, Inc. v. Board of Educ.}, 58 F.R.D. 62, 63 (S.D.N.Y. 1973) (public school children “for whom Spanish is their predominant or only language”); \textit{Serna v. Portales Mun. Schools}, 351 F. Supp. 1279, 1280 (D.N.M. 1972), aff’d, 499 F.2d 1147, 1152 (10th Cir. 1974) (“minors of Spanish-surnamed heritage”).

\textsuperscript{125} 62 F.R.D. 512 (S.D.N.Y. 1974).
\textsuperscript{126} Id. at 515.
\textsuperscript{127} Id.
\textsuperscript{128} Id. Although classes defined solely according to the “state of mind” of their members may properly be considered insufficiently precise to permit class suits, courts have sometimes used the “state of mind” rubric too loosely and have rejected class suits where the class members could be identified by some action or other objective manifestation. Thus, in \textit{DeBremaecker v. Short}, 433 F.2d 733 (5th Cir. 1970), an action on behalf of persons active in the “peace movement” complaining of police harassment was held to be nonmaintainable even though both plaintiffs’ and defendants’ conduct provided objective characteristics by which class membership could be ascertained. Similarly, in the leading case of \textit{Chaffee v. Johnson}, 229 F. Supp. 445 (S.D. Miss. 1964), \textit{aff’d on other grounds}, 352 F.2d 514 (5th Cir. 1965), \textit{cert. denied}, 384 U.S. 956 (1966), the class of “all persons who are workers for the end of discrimination . . . in Mississippi” was held “vague and indefinite” since “the purported class depends upon the state of mind of a particular individual,” id. at 448, although the class definition was in fact couched in terms of the actions and not the beliefs of the plaintiffs.\textsuperscript{129} See, e.g., \textit{Wallace v. McDonald}, 369 F. Supp. 180, 188 (E.D.N.Y. 1973);
long as individuals who are members of a class at any one point in time can be identified, that the membership of the class does indeed change should not interfere with a court’s efforts to insure fairness to absentees. Thus, classes defined, for example, to include all individuals seeking divorces who are burdened by a state’s durational residency requirement or all unmarried individuals barred by a state statute from obtaining contraceptives would be sufficiently definite even though the membership of the classes would be constantly changing.

(b) Subclassing as a Means of Structuring Heterogeneous Classes. — Subclassing provides the trial judge with a means of increasing the reliability of party representation of absentee interests by, in effect, adding additional parties to the lawsuit who more accurately reflect in their own interests the interests of discrete groups of absentees. Absent subclassing, class representatives are likely to have to rank the interests of class members as a precondition to advocacy. The possibility emerges, therefore, that the interests of some class members will either never be represented, because regularly given low priority, or only be sporadically asserted, because of changes in the representative’s priorities during the course of litigation. By dividing a class, a judge may be able to redefine the responsibilities of class attorneys and named plaintiffs in terms of the interests of distinct and relatively unified portions of a class. The necessity for the ranking of class interests by the parties may therefore diminish, and the likelihood that diverse absentee interests will be presented to the court increase.

If subclassing is to be fully used to protect against failures of advocacy, courts must be sensitive to the representational problems created for a single advocate even in circumstances in which the differences in the situations of class members do not express themselves as contradictory positions concerning the course of the litigation. In *Northern Natural Gas Co. v. Grounds*, an interpleader class action involving a dispute over rights to helium extracted in the course of natural gas pumping operations, the

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133 See p. 1595 infra.


135 Id. at 624. Six interpleader actions were brought to determine who was entitled to the money paid by the United States for a helium-gas mixture which it had bought from helium extraction companies and their parent pipeline com-
court may have erred in refusing to subclass the suit to reflect the fact that the litigation was proceeding on alternative theories of liability.\textsuperscript{136} A group of landowners, seeking recovery for helium taken from their property, argued both that helium was not “gas” within the terms of relevant lease arrangements,\textsuperscript{137} and that even if it were “gas,” recovery would nonetheless be justified on unjust enrichment grounds.\textsuperscript{138} The court held that subclassing to reflect the alternative theories was not required because the two theories were “mutually exclusive” \textsuperscript{139} and thus there was no “antagonism or conflict of interest among the subclasses. . . .” \textsuperscript{140} This latter conclusion is open to question. The court noted that the subclass arguing the theory that helium was “gas” but that recovery was justified on unjust enrichment principles would also recover were helium shown not to be “gas.” \textsuperscript{141} The subclass holding to the theory that helium was not a “gas,” however, would not necessarily have had any interest in arguing the unjust enrichment theory with equal force, and therefore, if there was no subclassing, class members who saw their interests as best furthered by the unjust enrichment approach would be at the mercy of the class attorney’s litigative priorities.

To be most effective, of course, subclassing should occur before absentees’ interests have been placed in jeopardy. In many cases, therefore, a court may wish to organize subclasses at the outset of litigation. Such preventive subclassing is made difficult, however, by the fact that representatives of the proposed subclass may not yet be parties to the litigation. If there is to be early subclassing, therefore, a court may have to resort to notice in an attempt to persuade members of the relevant subclasses to become parties to the litigation,\textsuperscript{142} order the class attorney, perhaps as a condition of approving class suit, to find members of the proposed subclasses willing to join in the suit,\textsuperscript{143} or appoint counsel itself to represent the subclasses.\textsuperscript{144}

panies. The court grouped the rival claimants into three classes: the owners of the lands from which the helium-bearing natural gas was produced, the “lessee-producers” who actually extracted helium from the natural gas, and the pipeline companies who processed and transported the gas for resale. See id. at 624–25.

\textsuperscript{136} See id. at 634.
\textsuperscript{137} See id.
\textsuperscript{138} See id.
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} See id.
\textsuperscript{142} See pp. 1434–35 supra.
\textsuperscript{143} Once the class attorney finds such individuals it would be incumbent upon the court to advise them to secure separate counsel. See MANUAL FOR COMPLEX LITIGATION § 1.42 (3d ed. 1975); p. 1593 & note 67 infra.
\textsuperscript{144} See Amos v. Board of School Directors, 408 F. Supp. 765, 773–76 (E.D. Wis. 1976).
A court may be able to reduce the administrative complexity of subclassing by making use of the class opponent as the subclass representative. Reliance upon the class opponent to protect absentee interests, however, is a technique of limited usefulness. The court must be in a position to predict the coincidence of the interests of absentees and the class opponent. Such a prediction will be possible only where the issue to which class differences are relevant is one which can be resolved in a small number of ways, and where there is one and only one resolution which furthers the class opponent's interest. Even if the number of resolutions of a given issue is limited, if the class opponent is in the position of a stakeholder, with no interest in any one particular resolution of the lawsuit, reliance upon the class opponent to protect absentee interests would not be warranted.

_Dierks v. Thompson_ presents the rare case in which a court could use the class opponent to protect the interests of absentee class members. In _Dierks_ former employees of a corporation brought a class suit against the trustees of the corporation's pension fund challenging the formula the trustees had used to calculate employees' interests. The suit turned on whether under the terms of the pension plan the employees were entitled to a fixed amount upon maturity of their rights or rather would be owed a percentage interest in the fund. The class representatives sought the percentage return but a substantial number of absentees disagreed. The trial court nonetheless proceeded with the suit. On appeal, the First Circuit held that despite the dissension the class suit was proper. The pension plan was capable of only one of two interpretations, and the defendants had "from the

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145 If the issues at stake may be resolved in a variety of ways, then the class members' interests may shift during the course of the litigation so that while the opponent may have been an adequate guardian of absentee interests at the outset, he might not be so later in the suit.

146 Even if the class opponent had just two or three optimal alternative resolutions for the dispute, one of which corresponds to that sought by absentee class members, the opponent may order his priorities so that the result desired by the absentees — while still something the opponent favored — will be ranked last.

147 The class opponent could not be regarded as the representative of absentee interests in a "pure" or "strict" interpleader case, for example, since in such a situation the opponent would be but a stakeholder, without an interest in the result, and unwilling to advocate the absentees' interests. See 7 C. Wright & A. Miller, supra note 91, § 1701, at 352–53.

148 414 F.2d 453 (1st Cir. 1969).

149 See id. at 455.

150 See id. at 455.

151 See id. at 456 & n.5.

152 See id. at 454.

153 See id. at 457.

154 See id. at 455. Although the court initially stated that plaintiffs sought
outset . . . actively supported the position" of the dissident absentee. 155

(c) Intervention as a Supplement to Subclassing. — Subclassing is possible only if differing class members coalesce into discrete, identifiable groups. Not all differences among class members, however, will divide along such clear lines. State of mind differences provide an obvious example. Class members may disagree, for example, over the relief that should be sought, 156 or even over whether suit should be brought at all. 157 But while this disagreement may be quite real, it may not be possible for a court to associate it with any particular subset of the class membership. Even if class cleavages may be described in a way which connects differing interests or situations with specific class members, it may not be possible to define subclasses with sufficient clarity to provide a homogeneous constituency for subclass representatives. 158

"one or the other of two alternative constructions of the plan," apparently both of plaintiffs' interpretations would have resulted in a percentage return under the terms of the pension plan. See id.

155 Id. at 457. Dierks has been criticized as "jarring and illogical," Note, The Importance of Being Adequate, supra note 91, at 1254, on three grounds: (1) the absentee may have sought a third interpretation of the pension plan different from either of those espoused by the representative plaintiff and the defendant; (2) the defendant might have supported the absentee's position less vigorously than a representative of the absentees would have; and (3) Dierks is barred by Hansberry v. Lee. While the first two criticisms are undoubtedly valid in most cases where the class opponent arguably represents absentee interests, they do not seem correct in Dierks. The court of appeals determined that the issue in the case was susceptible of only one of two results — percentage interest or a fixed interest in the fund — and that there was no third interpretation. The court also determined that the defendants had "actively supported" their position. Defendants' "vigor" is further indicated by the fact that they appealed from their defeat in the district court and won on appeal, thus fully vindicating the interests of the absentees. Cf. Gonzales v. Cassidy, 474 F.2d 67, 75 (5th Cir. 1973) (representative's failure to appeal decision adverse to most class members evidence of inadequacy).

The suggestion that class opponent representation of absentees' interests is categorically barred by Hansberry is also unfounded. Although the Hansberry Court briefly raised the possibility that the interests of property owners opposing enforcement of the restrictive covenant had been represented by the defendant in Burke, the Court found that such representation had not in fact occurred in that latter case. The Court, however, did not consider whether such representation, where actually provided, could ever be considered adequate. See 311 U.S. at 46; note 110 supra.


158 See, e.g., Henry v. Lopez Tijerina, 48 F.R.D. 274 (D.N.M. 1969), appeal...
Provision for intervention by individual class members, therefore, may be necessary if the full range of absentee interests is to be effectively represented in class litigation. Through exercise of its power to invite, accept, or reject motions to intervene, a court may act to fit into the lawsuit representatives of class interests not susceptible of subclassing, while at the same time screening out individuals who would assert points of view already integrated into the party structure. Although the intervention mechanism thus gives courts a useful tool for defining the shape of class litigation, intervention is also an important means whereby class members themselves may assert a measure of control over litigation brought on their behalf. Indeed, it is the opportunity for class member initiative afforded by intervention which makes the device such an effective complement to subclassing. Not only are class members whose interests a court recognizes but cannot group provided with a means for participating in the lawsuit, but also class members whose differences with their fellows have not been spotted by the court are given a way of calling attention to their situation.

Although an effective complement, intervention is not a substitute for subclassing. An intervenor asserts only his own interest. The point of view he presents may change during the course of a lawsuit, and therefore may cease to correspond to the perspective of the absentees the court may have originally thought the intervenor represented. Moreover, an intervenor, especially if not invited by the court, may have unique interests. His views may be shared by few other class members, and positioning him as an

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59 The discussion here concerns itself exclusively with intervention by class members. Individuals other than class members may also have to be recognized as intervenors in order to complete the party structure of a class suit. The conditions under which such individuals may participate are defined (to the extent that such a distinction may be drawn) by the law of intervention, see, e.g., Fed. R. Civ. P. 24, and not by the law of class actions, and are therefore not discussed in this Note.

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160 Since intervention, like subclassing, is prospective, and requires the identification of possibly antagonistic or unrepresented interests at a point perhaps prior to any awareness by absentees that these interests may be in danger of impairment, a court may encounter difficulty in attempting to identify and induce particular absentees to come into the lawsuit. See p. 1480 supra.

equal with representatives of the views of significant numbers of class members may distort the picture of the class presented to the court.\textsuperscript{162} If subclassing is possible, therefore, it should be preferred to recognition of intervenors.

As the federal rules are presently interpreted, the questions of the circumstances under which intervention by class members will be allowed and the participatory rights to be accorded intervenors are matters for the discretion of the trial court.\textsuperscript{163} The trial judge decides whether the interests of absentees will be adequately represented if a class member's motion to intervene is denied; the trial judge also decides whether the intervening class member will be granted the status of a full party, or rather will be limited to an ancillary role. Because the implications of a judge's duty to insure adequacy of representation derive from the circumstances of each particular case, proper intervention policy in class actions probably cannot be reduced to rules. But while from the perspective of the judicial system as a whole discretion as to the circumstances and form of class member intervention may be inevitable, it does not follow that trial judges themselves ought to regard all questions of intervention procedure as equally discretionary. Class member intervention is a useful complement to subclassing in part because it affords a means for absentees to act on their own judgments concerning the adequacy with which their interests are being represented, and thus provides a means for supplementing the trial judge's superintendency of the litigation. If in passing on motions to intervene trial judges simply rely on their own views as to the completeness of the party structure, much of the value of the intervention mechanism as a device for obtaining fresh insight into the fairness of class suit will be lost. Courts

\textsuperscript{162} This problem might be corrected by limiting the extent of the intervenor's participation. \textit{See} Shapiro, \textit{supra} note 161, at 752–56.

\textsuperscript{163} The extent of judicial discretion in permitting and conditioning intervention by class members was initially a matter of some debate among the commentators, and was related to the general question of the interaction of rules 23 and 24. Rule 24 provides that where an applicant proves that he has an interest threatened with impairment in a pending suit, and that he is inadequately represented by the existing parties, he is entitled to intervene "of right." \textit{Fed. R. Civ. P. 24(a)(2)}. When an absentee class member is the applicant he invariably satisfies the interest and impairment requirements, and thus, under a rule 24 analysis, an absentee ought to be considered as entitled to intervene as a full party on a showing of a lack of adequate representation. Rule 23, however, vests discretion in the trial courts to invite intervention where such intervention would, in the opinion of the court, facilitate adequate representation, and also empowers judges to impose conditions on such intervenors. \textit{Fed. R. Civ. P. 23(d)(2)} and (3). The dispute has been resolved by permitting courts to limit and condition intervention by absentees even where in a non-class suit such intervention would be of right. \textit{See, e.g., 3B J. Moore, supra note 91, }\textit{\textsuperscript{2} 23.90[2], 7A C. Wright & A. Miller, supra note 91, § 1799.}
therefore should at least begin their analysis of the need for intervention with a presumption in favor of the intervenor’s motion. Of course, one consequence of a liberal intervention policy will be an increased complication in the party structure, and thus a reduction in the manageability of the class suit. This adverse effect, however, may be minimized if courts reverse the presumption with respect to the participatory rights of intervenors. Ordinarily, intervening class members should be given the right merely to witness class proceedings and to receive all briefs and other official filings submitted by any of the full parties during the course of the suit. Additional participation rights should be recognized only upon a showing that such rights are necessary if absentee interests are to be adequately protected.

(d) Elimination of Differences Through Class Redefinition and Self-Exclusion by Class Members. — Differences within a class may be reduced, rather than accommodated, in either of two ways. The boundaries of a class may be redrawn to exclude class members whose interests or situations differ from those of the class representatives. Alternatively, class members may be granted a right to exclude themselves from the lawsuit, and thus an opportunity to act on their own conclusions as to whether their interests coincide with the interests furthered by class litigation. Under rule 23, class redefinition is a matter left largely within the discretion of the trial judge. Rule 23 has been interpreted by the federal courts to itself resolve the issue of the availability of opt-out rights. Section (c)(2) of the rule grants class members an opportunity for self-exclusion if a class suit is brought as a common question action under section (b)(3). Rule 23, however, makes no explicit provision for opt-outs in suits brought under sections (b)(1) or (b)(2), and the federal courts have refused to exercise their discretionary power under section (d) to extend a self-exclusion right to cover these suits.


165 See, e.g., 7A C. WRIGHT & A. MILLER, supra note 91; Note, supra note 164, at 1175.

166 See, e.g., McBroom v. Western Elec. Co., 18 FED. RULES SERV. 2D 1200, 1203 (M.D.N.C. 1974). This right of the absentees to attend proceedings and receive documents sufficient to enable them to scrutinize the litigation would appear to be the irreducible minimum component of FED. R. CIV. P. 23(c)(2)(C) intervention. See Kaplan, supra note 91, at 392 n.137.

167 See generally Fed. R. CIV. P. 23(c)(1).


Because class redefinition turns on factors unique to the case at hand, rule 23's treatment of this technique as discretionary seems appropriate. In exercising their discretion, however, courts should be attentive to the practical limits on the usefulness of the technique. If exclusion is truly to protect the interests of class members who differ with the remainder of a class, the excluded group must first of all be capable of definition in a manner which allows for the identification of the specific class members excluded. Some differences within a class, just as they may be beyond the reach of subclassing,170 may also be too diffuse to be remedied through class redefinition. Moreover, even if a dissident group can be defined with the requisite particularity, exclusion of the group may not protect the group's interests if the practical effect of the class judgment would extend beyond the perimeters of the redefined class. Failure to take this consideration into account may explain the court's redefinition of the class in Insley v. Joyce.171 In that case, suit had been brought on behalf of all union members denied credit under a pension plan, who would have been covered by the plan but for the fact that they had temporarily left their jobs.172 The court held this class to be improper since "some of the members of the class so described might still qualify for pensions in the future notwithstanding their loss of credit,"173 and therefore these class members would have an interest in denying relief to already retired class members in order to reduce depletion of the pension fund.174 The court subsequently redefined the class to consist only of the retired members of the union who had been denied credit.175 This redefinition, however, failed to protect the interests the court attributed to the excluded class members: if the redefined class prevailed, the pension fund would still be depleted, and the former class members would be no better off for having been left out of the lawsuit.

Judicial use of the redefinition technique to purge a class of dissident elements should be checked by an awareness of the inconsistency of the technique with the functions of class suit. To the extent that a class is narrowed, enforcement of substantive policy is constrained. Moreover, redefinition of a class to screen out class differences deprives the court of exposure to those dif-

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170 See p. 1484 & notes 156–158 supra.
172 Id. at 1230–31.
173 Id. at 1234.
174 See id. at 1234–35.
175 See id. at 1235.
ferences during the course of the litigation, and thus may have the effect of limiting the heuristic function of the class device. In Swarb v. Lennox,\textsuperscript{176} for example, the court redefined a class suing to challenge the constitutionality of Pennsylvania’s confession of judgment procedures to include only individuals who had agreed to the inclusion of confession of judgment clauses in contractual agreements and who had incomes of less than $10,000 per year.\textsuperscript{177} This redefinition seems to have been prompted at least in part by the court’s apparent conclusion that individuals with incomes above the cut-off level would be more likely to object to the adverse impact invalidation of confession judgments would have upon the credit market.\textsuperscript{178} If this division of interest in fact existed, the court’s redefinition had the effect of excluding from the litigation a disagreement within the class directly relevant to the merits of the suit. The confession of judgment procedure had been challenged as inconsistent with the requirements of procedural due process.\textsuperscript{179} One factor pertinent to a court’s determination of what procedure a legislature is required to afford in establishing a regulatory framework for commercial transactions is the extent of the burden alternative procedures would impose on debtors and creditors.\textsuperscript{180}

Like class redefinition, the grant of opt-out rights makes sense only if the individuals removed from the class can truly be insulated from the effect of the class judgment. Thus, the distinction rule 23 draws between (b)(1) and (b)(2) classes, whose members have no right to exclude themselves, and (b)(3) classes, whose members may opt out, has at least some practical justification.\textsuperscript{181} Most (b)(1) and (b)(2) classes are suing for relief which cannot be readily limited to only some class members. For example, all individuals who seek to claim from a common fund are affected by a court’s allocation of the fund regardless of whether they have excluded themselves from the suit.\textsuperscript{182} Similarly, all individuals burdened by an unconstitutional statute are affected, even if they have opted out of class litigation, if the statute is

\textsuperscript{177} See id. at 1098–99.
\textsuperscript{178} See id.
\textsuperscript{179} See id. at 1095.
\textsuperscript{181} But see pp. 1348–49 supra.
invalidated. Rule 23(b)(3) class suits, by contrast, are generally brought to recover money damages, relief which may be awarded in a manner which distinguishes among individual class members, and which therefore may be shaped to respect the rights of individuals who have excluded themselves from a lawsuit. The fact that relief is severable may be of limited significance for class members offered the opportunity to exclude themselves who, despite their disagreement with class representatives, nonetheless do wish to pursue their claims: cut off from the class, individual class members may not be able to afford the cost of litigation; moreover, the stare decisis effects of the class judgment may frustrate existing class members’ attempt to litigate independently in any event. But at least for those class members whose disagreement with class representatives manifests itself in a desire not to sue, the right to leave the lawsuit may be of value.

At a more fundamental level, however, provision of any opt-out right whatsoever is difficult to defend. Affording class members an opportunity to exclude themselves from a lawsuit is not a reliable means of reducing difference within a class since there can be no guarantee that all class members whose interests diverge from the interests asserted by class representatives will indeed remove themselves. Moreover, the grant of an opt-out right may in fact be counterproductive from the perspective of the class action court. Class members who would take the initiative to exclude themselves from a suit may be the individuals who would be most likely to participate actively in the suit, in order to protect their divergent interests, were no opt-outs allowed. Departure of these individuals from the litigation would deprive the court of an important source of information about the class, and may therefore handicap the court’s efforts to protect absentees. Because they sap participation, grants of opt-out rights should be infrequent. In general, invitations to opt out should not be ex-
tended to an entire class. Rather, this technique would seem to be best used as a supplement to class redefinition. If there is uncertainty as to whether the interests of a segment of a class are so out of phase with the interests of the rest of the class that class redefinition is warranted, that segment of the class could be afforded an opportunity to exit from the suit, and thus to judge the divergence of their interests themselves.

3. Differences Within the Class: Characteristic Problems.—In view of the array of techniques available to courts for structuring class litigation to accommodate differences within the class, there is room to wonder why a court would ever terminate a class suit for fear that the interests of class members would not be adequately represented. Nonetheless, practice under rule 23 reveals that federal courts frequently do cite intra-class differences as a reason for refusing to certify a class action. The courts, however, have not reached a consensus on the kinds of class differences which justify refusals to hear a class suit. If there is to be a vision of rule 23, Where an action can be maintained under sections (b)(1) and/or (b)(2), and also under section (b)(3), courts have almost invariably ruled that the suit should be brought under (b)(1) and/or (b)(2). See, e.g., Robertson v. National Basketball Ass’n, 389 F. Supp. 867, 903 (S.D.N.Y. 1975); Van Gemert v. Boeing Co., 259 F. Supp. 125, 130 (S.D.N.Y. 1966). Moreover, in a number of cases where the issue was whether absentees had moved to opt out within the time set by the court, or, where pleading lack of notice or excusable neglect, the absentees filed motions for exclusion after the expiration of the opt-out period, courts have placed the burden of proof on the absentees, and have regularly ruled against them. See, e.g., In re National Student Marketing Litigation v. Barnes Plaintiffs, 530 F.2d 1012, 1014-15 (D.C. Cir. 1975); Sanders v. John Nuveen & Co., 524 F.2d 1064, 1074-75 (7th Cir. 1975), cert. denied, 96 S. Ct. 1659 (1976); Manhattan-Ward, Inc. v. Grinnell Corp., 490 F.2d 1183, 1185 (2d Cir. 1974).


190 For example, while it has been held that disagreements among a class concerning the relief sought prevents a class action from going forward, see, e.g., Guttmann v. Braemer, 51 F.R.D. 537, 539 (S.D.N.Y. 1970), other courts have disagreed, see, e.g., Rodriguez v. East Texas Motor Freight, 505 F.2d 40, 51 (5th Cir. 1974), cert. granted, 44 U.S.L.W. 3670 (U.S. May 24, 1976) (No. 75-718). Similarly, although some courts have ruled that opposition to suit by some class members bars class suit, see, e.g., Schy v. Susquehanna Corp., 419 F.2d 1112, 1116-17 (7th Cir. 1970), other courts have allowed class actions to go forward despite such opposition, see, e.g., Knuth v. Erie-Crawford Dairy Cooperative Ass’n, 395 F.2d 420, 428 (3d Cir. 1968); Gates v. Dalton, 67 F.R.D. 621, 630-31 (E.D.N.Y. 1975). In securities fraud class actions, some courts have said that named plaintiffs cannot represent shareholders who purchased stock after they did, see, e.g., Elkoff v. Liggett & Myers, Inc., 66 F.R.D. 36, 42 (S.D.N.Y. 1975), but other courts have disagreed, see, e.g., Tucker v. Arthur Anderson & Co., 67 F.R.D. 468, 482 (S.D.N.Y. 1975). A similar pattern manifests itself in...
hierarchy of class conflicts, therefore, it cannot be divined from current practice, but must instead find its origins in the theory of adequacy of representation itself.

(a) Adequacy of Representation and the Accommodation of Dissent Within the Class Concerning Liability or Relief. — The fundamental assumption underlying the theory of adequacy of representation which has been advanced in this section is that judicial awareness of differences within a class is a sufficient protection of absentee interests. If the differing situations of class members are known to the trial judge, the judge will be able to assess the significance of these differences in light of the substantive law governing the suit, and give the various interests of class members their due in reaching conclusions as to liability, relief, or the fairness of settlement. It is the end of judicial awareness which the techniques discussed above are designed to further. Practical and institutional constraints limit the ability of the trial judge, without assistance, to discover differences in the situations of class members. As a result, the structure of class litigation must be adjusted so that the trial judge can safely rely upon the class representatives for an accurate picture of the class. If there are any intra-class differences which justify a court’s refusal to hear a class action, therefore, those differences must either derive from the fact that some class members have interests for which judicial awareness provides no protection, or which undermine so irreparably the integrity of class representatives that no adjustment of the litigation structure of the class suit can enable the trial judge to obtain a clear view of the class. Differences which do not raise questions as to the very legitimacy of the class action process, however, but which merely reflect variances in view as to the proper outcome of a suit, do not provide reason for a court to refuse to hear a class suit. Such differences can be taken into account, and absentee interests thus fairly protected, in the course of the class action itself.

Most differences in situation or interest among class members, therefore, should not bar class suit. If the factual circumstances underlying class members’ claims differ,191 or if class members

Title VII class actions: some courts hold that a plaintiff employee cannot represent persons never employed by the defendant company, see, e.g., Freeman v. Motor Convoy, Inc., 68 F.R.D. 196, 199 (N.D. Ga. 1975), while other courts do not find the difference in situation to be important, see, e.g., Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515, 520 (S.D.N.Y. 1973), appeal dismissed, 496 F.2d 1094 (2d Cir. 1974).

191 For example, the problems arising out of differences among the fact situations of the claims of particular plaintiff class members have become especially significant in securities fraud class actions with the growth of the “common scheme” or “common course of conduct” doctrine. Under the common scheme
disagree as to the proper theory of liability, the trial judge, through use of techniques like subclassing or intervention, may incorporate the class differences into the litigative process, and give all class members their due in deciding what is the proper outcome of the litigation. Even if differences among class members are more fundamental, having to do with the type of relief which should be sought or indeed with whether the class opponent ought approach, plaintiffs who have purchased securities over a long period of time or in response to a number of prospectuses or financial statements may pool their claims in one large class action. See Note, The Impact of Class Actions on Rule 23—5, 38 U. CHI. L. REV. 337, 360 (1971). In such a securities action, a representative plaintiff who purchased at the very early stages of defendant's alleged deception would have an interest in proving that the defendant's duty to disclose arose at the outset and might sacrifice the interests of some absentees by passing up a settlement in which the defendant would have admitted a breach of his duty to disclose, but would have placed that duty later on. See Stull v. Baker, [1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,227 (S.D.N.Y. 1973); See also Elkind v. Liggett & Myers, Inc., 66 F.R.D. 36, 41—42 (S.D.N.Y. 1975); Bisgeier v. Fotomat Corp., 62 F.R.D. 113, 117 (N.D. Ill. 1972). On the other hand, a late purchaser might too readily accept such a settlement offer and not fully protect the interests of early buyers.

Similar potential conflicts might also affect the amount of damages particular plaintiffs could recover, as well as whether they could recover at all. Thus, where the plaintiff claims that defendants' misrepresentations inflated the price of stock traded on the open market, some class members might desire to maximize the inflation existing at a given date while others would desire to minimize it. An early purchaser who has already sold his stock might seek to maximize the deflation due to an intervening corrective disclosure in order to maximize his losses, but in so doing he would put himself in conflict with a late purchaser interested in maximizing the inflation in the price which he paid. See Blackie v. Barrack, 524 F.2d 891, 908 (9th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3614 (U.S. March 5, 1976) (No. 75—1258). See also B&B Investment Club v. Kleinert's Inc., 62 F.R.D. 140, 144 (E.D. Pa. 1974).


193 See Note, Defining The Typical and Representative Plaintiff, supra note 91, at 422—24. Such differences commonly arise in suits on behalf of a class of franchisees or land purchasers in a real estate development alleging antitrust violations or fraud in the franchise or sales agreement, since some plaintiffs may be seeking rescission of the contract and a restitution of their payments under it while others would prefer to maintain their business relationship with the defendant and would settle for an award of damages. See, e.g., Lukenas v. Bryce's Mt. Resort, Inc., 66 F.R.D. 69, 71—72 (W.D. Va. 1975); Seligson v. The Plum Tree, Inc., 61 F.R.D. 343, 345—46 (E.D. Pa. 1973); Tober v. Charnita, Inc., 58 F.R.D. 74, 80 (M.D. Pa. 1973).

Although this type of conflict may occur among class members who are otherwise similarly situated, often it is symptomatic of an antagonism between class members who continue to have ties to the defendant and those whose ties have been severed. Thus, in an employment discrimination suit brought on behalf of the class of past and present employees who allege that a practice followed by
to be held liable at all, judicial accommodation appears to provide a sufficient mechanism for the protection of absentee interests. So long as a dispute concerns the outcome of litigation, the trial judge is in a position to isolate the differing positions, judge their validity in light of the substantive law governing the case, and shape the outcome of the suit to give the various class interests the weight to which the law entitles them.

The ability of the trial judge to accommodate dissent within a class would appear to be most severely tested when members of the class align themselves with the class opponent and claim that their interests would be better served were the class opponent not held liable. Disagreement of this sort split the class allegedly represented by the suit at issue in *Hansberry v. Lee.* Federal courts acting under rule 23 have frequently found objections by class members to the value of holding class opponents liable to be a bar to class suit. Analysis of the bases for absentees' claims of unfairness in this context, however, reveals no objection which cannot be dealt with through the class action process itself.

One argument dissenters might make is that their interests have been disadvantaged by the increased access to courts class actions make possible. But for the availability of the class device, class members seeking to hold the class opponent liable would not have been able to act on their views. This objection is not one peculiar to absentee members of a divided class. It could be as easily raised by a class opponent facing a united class. The inquiry the objection suggests is into the compatibility of class

the defendant is unlawful, former employees who were discharged by the defendant pursuant to the allegedly discriminatory practice may demand nothing less than reinstatement and an award of back pay while the present employees may be satisfied with declaratory relief and an injunction against further discrimination. See *Airline Stewards & Stewardesses Local 550 v. American Airlines, Inc., 490 F.2d 636, 640 (7th Cir. 1973), cert. denied, 416 U.S. 993 (1974).* See also *Robertson v. National Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975); Chrapliwy v. Uniroyal, Inc., 18 Fed. Rules Serv. 2d 517 (N.D. Ind. 1974).*


195 See, e.g., *Bailey v. Ryan Stevedoring Co., Inc., 528 F.2d 551, 553-54 (5th Cir. 1976); Schy v. Susquehanna Corp., 419 F.2d 1112, 1116-17 (7th Cir. 1970); Shulman v. Ritzenberg, 47 F.R.D. 202, 207 (D.D.C. 1969).*

196 See *Note, Defining the Typical and Representative Plaintiff, supra note 91, at 429.*
actions and a given cause of action, an inquiry obviously a part of the class action process itself. A second argument would hold that class suit may significantly impair any right class members have to forgive a statutory violation. Formally, the right remains: even if individual class members have no right to opt out, they may still refuse to claim the relief to which they are entitled. Practically, though, once classwide liability is found, the right to forgive may not be of much significance. Each class member, fearful that other class members will claim their recovery, may conclude that forgiving the class opponent will have little practical effect, and take the "second best" course of seeking relief. It is not necessary, however, to ban class actions where some class members would absolve the class opponent in order to afford such members a meaningful opportunity for forgiveness. Class members could be informed that if the number of class members who file for recovery is above a threshold level, class members who refrained from filing, perhaps because they felt the class opponent should not be held liable, would be given a second chance to file, in order to be able to benefit from the suit if they conclude that too few class members have abstained for forgiveness to have any practical effect. Under this scheme, class members who think the class opponent should not be held liable would be free to vote their convictions by not filing a claim on the first round, since, should their action prove ineffectual, they would have an opportunity on the second round to protect themselves.

(b) Judicially Irreconcilable Class Differences: Objection to the Fact of Class Suit Itself. — Objection to the very fact of class suit itself, rather than to its result, is perhaps the most obvious example of the kind of class member dissent which cannot readily be judicially accommodated. For the trial judge to be able to protect the interests of dissident class members, those interests must be capable of being furthered by an adjustment in the outcome of the litigation. If class member interests are adversely affected by the very process of litigation itself, the trial judge, who can act only through that process, can be of no assistance.

199 Such a right cannot be said to exist in any meaningful sense, of course, unless the claims of class members are severable.
200 The opportunity that would be afforded dissenting class members by this procedure would not be an opportunity to terminate the lawsuit, but rather a chance to reduce significantly the impact of the suit upon the class opponent. It would be necessary for the court to set a threshold level of nonforgiveness as a precondition for a second round of filing since, given an unconditioned second round, dissenting class members, uncertain of the extent of forgiveness which their fellows would regard as meaningful, might find it prudent to file a claim even if each dissenter personally found the results of the first round satisfactory.
Class members are most likely to regard class litigation, whatever its outcome, as inimical to their interests if they have joined with the class opponent in a continuing business relationship. The litigative process, by itself, could be destructive of that relationship. The costs of litigation might burden the class opponent to the point that his business activities were impaired. The risk of classwide liability, as well as the public charges of malfeasance, might hamper the class opponent's efforts to attract investment capital or to obtain or retain continuing relationships with customers or other individuals with whom the class opponent's business requires him to deal. The constraints on communication class litigation imposes might impede class members and the class opponent in their efforts to coordinate business activities.

Claims that the very fact of class litigation threatens to injure some class members raise the possibility of a radical conflict of interest within a class. If the existence of absentee interests which would be injured without regard to the outcome of litigation bars class suit, the interests of other class members, which would have been furthered by the increased bargaining power and litigative economies class suit promises, will be frustrated. But from the perspective of absentees who object to the fact of class suit itself, continuation of the class suit would be unfair. These absentees, included within the class without their consent, would increase the bargaining power of the class through their forced inclusion, but would be without means to shape the process of class litigation in order to protect their own interests.

201 See, e.g., Free World Foreign Cars, Inc. v. Alfa Romeo, 55 F.R.D. 26 (S.D.N.Y. 1970). In Free World, a former franchisee of the defendant automobile distributor brought an antitrust action on behalf of the class of present and former franchisees. The court found that the interests of the present and former franchisees were adverse since the current Alfa Romeo franchisees wanted the defendant to remain in business in order to assure their supply of automobiles, while the named plaintiff's only interest was in obtaining damages. Id. at 29. Judge Weinfeld, noting that "the defendant has a minimum share" of the American automobile market, concluded that the defendant might prefer to terminate all existing dealerships rather than incur the expenses of defending the action or risk the threat of a substantial judgment. Id. See also Class Action Symposium, supra note 91, at 1142.

202 See p. 1355 supra.


204 The maintenance of the class suit may similarly harm absentee class members since litigation challenging the legality of a franchise agreement, automobile dealership, or land sales contract may lower the market value of the franchise of property or make it more difficult for an absentee plaintiff to sell.

In a given case, close analysis may reveal that there is in fact no conflict. The injury to absentee interests alleged to result from class suit may be too conjectural or too insignificant to warrant judicial solicitude. The absentee who object to the fact of class suit may comprise a discrete group within the class, and therefore may be able to be excluded from the class without jeopardizing the continuance of litigation. Class members who are not injured by the fact of suit itself may all hold individually recoverable claims, and may therefore not be significantly injured if the class action is not allowed. The first responses of a court faced with allegations that class suit itself injures absentees, therefore, should be to obtain information about the situation of class members, and then to consider the usefulness of available judicial action less draconian than termination of the class suit.

If a conflict is not false, the court, in order to decide whether to allow a class suit to go forward or to terminate it, must come to a conclusion as to the relative importance of the conflicting interests of class members. The source of the court's hierarchy must be the substantive policies the court understands to be reflected in the cause of action under which the class suit was brought. The balance between regulatory needs and the need not to discourage unduly the conduct regulated is one which is central to any statutory scheme. To ignore such a balance would be to cut off the class suit from its justification as a means to fuller realization of substantive policy.

(c) Judicially Irreconcilable Class Differences: Radical Individualism as a Threat to the Integrity of Class Representation. — If the judge hearing a class suit is to protect absentee interests, the interests of each absentee cannot be antagonistic to the interests of

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206 Thus, in Free World Foreign Cars, Inc. v. Alfa Romeo, 55 F.R.D. 26 (S.D.N.Y. 1972), discussed in note 201 supra, the court took steps to verify the claim that the fact of suit itself would indeed injure the interests of plaintiff class members. See id. at 29.

207 Such a focused opt-out would be preferable to a redefinition of the class to exclude dissident absentees since self-exclusion would permit the absentees themselves to decide whether or not to participate in the suit and the possible recovery.


209 A general extension of a right to opt out would not be a satisfactory means of dealing with the problem of objection to the fact of suit itself since class members other than those with the particular objection which prompted the offer of the exit right may take the opportunity to leave. See also p. 1488 supra.

210 See generally pp. 1360-61 supra.

211 See generally pp. 1353-71 supra.
every other absentee. Such all-pervasive antagonism would deprive class representatives of any function: no member of the class could confidently speak for any member of the class but himself. Moreover, there would be too many possible permutations of interests for the trial judge to accommodate without assistance. Radically individualist classes could arise in either of two ways. Mutual antagonism might be the natural state of class members. Outside the context of litigation, the situation of class members may be such that each benefits from the others’ losses. For such class members, class litigation may present itself as an opportunity to carry on ordinary competition by other means. Alternatively, the war of all against all may be occasioned by the litigation itself. The legal consequences of the events giving rise to class suit may be such that class members not only have claims against the class opponent but also against each other.212

Such Hobbesian classes are occasionally encountered in practice. Class members in antitrust actions are often competitors outside the context of litigation.213 Usually, enforcement of the antitrust laws is of common benefit to class members, and thus the fact that class members are competitors does not threaten the integrity of the class procedure.214 Particular antitrust causes of action, however, may make class litigation a theater for competition, and thus ultimately inappropriate. For example, in Albertson’s Inc. v. Amalgamated Sugar Co.215 purchasers of beet sugar, who competed with each other in the sale of sugar-based products, brought suit against their suppliers, charging illegal price fixing, monopolization, tying, and price discrimination.216 The trial judge held that class suit was proper in connection with the price fixing and monopolization claims, but refused to certify class litigation of the tying and price discrimination issues.217 The United States Court of Appeals for the Tenth Circuit affirmed.218 If the class prevailed on the tying and price discrimination charges, Judge McWilliams reasoned, “the defendants would necessarily be en-

212 Such a situation should not be confused with a so-called “limited fund” situation, in which class members are in competition with each other for shares of a limited recovery, see, e.g., Berman v. Narragansett Racing Ass’n, 414 F.2d 311 (1st Cir. 1969), cert. denied, 396 U.S. 1037 (1970). In the limited fund situation, the claims of the class members, while in competition with each other, are made against the class opponent, and not other class members.
215 503 F.2d 459 (10th Cir. 1974).
216 Id. at 460–61.
218 503 F.2d at 465.
joined from pricing their beet sugar on the base point pricing method" presently in use. A new price structure would have to be substituted, "which would be disruptive" of the established "competitive position of the various members of the class . . . ." Class members' mutually antagonistic interests as competitors would thus be affected by the lawsuit, rendering the class procedure improper. By contrast, the Albertson's court found, litigation of the price fixing and monopolization claims would not affect "the defendant's system of pricing." As to these issues, therefore, class suit would be in order.

Courts have chiefly had to deal with only a weak form of mutual antagonism among class members deriving from the litigation itself. Not all class members are potentially liable to each other: instead, it is only the class representative who must seek recovery from the class opponent while at the same time protecting himself from other class members. Class representatives in securities actions, if previously in the position of "insiders," have been particularly apt to draw charges that they are themselves liable to the class they purport to represent. Suit by a union on behalf of its members under Title VII to challenge discriminatory provisions of a pension plan has been similarly attacked: the union helped draw up the plan and was therefore itself at least arguably liable to its members for the discrimination. It does not follow from the fact that a particular named plaintiff is potentially liable to a class that no reliable class representatives may be found. Courts, therefore, have been rightly reluctant to treat claims of a class representative's liability to a class as bars to class litigation. Indeed, courts have gone so far as to hold, at least where only one of a number of named plaintiffs is implicated, that denial of class certification would not even be considered if a named plaintiff's liability is not clear and no claims have been filed against the

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219 Id. at 463.
220 Id. But see 1974 UTAH L. REV. 842, 849 (arguing that in fact there may have been no competition).
221 Id. at 464.
225 In a class suit where there are several representative plaintiffs, antagonism between some of the named parties and some group of absentees may be remedied and the class suit permitted to go forward if the other named plaintiffs can adequately represent those absentees' interests. See, e.g., Lamb v. United Security Life Co., 59 F.R.D. 25, 29-30 (S.D. Iowa 1972).
class representative, or if the named plaintiff's liability traces from a theory other than the theory under which suit is brought against the class opponent. Rather than halt a class action, one court simply removed a named plaintiff potentially liable to the class, and ordered the remaining class representatives to obtain a new attorney.

C. Manageability and Predomination: An Overview

Previous Parts of this Section have analyzed class action procedure from the perspective of the class members, considering the inquiries a court must make, and the actions it must take, in order to become sufficiently informed of the situations of class members to be able to insure adequate representation of their interests. This Part and the next Part adopt a different point of view, in effect looking at class action procedure from the vantage point of the causes of action under which class actions are brought in order to determine whether the results of class actions will be consistent with the policies which the causes of action reflect. This Part briefly sketches an outline of manageability and predomination analysis. The next Part illustrates the analysis through an extended discussion of the problem of damage distribution.

1. Manageability as a Threshold Inquiry. — Rule 23 treats "the difficulties likely to be encountered in the management of a class action" as simply one of a number of factors which federal courts should take into account in judging the propriety of class actions brought under rule 23(b)(3). A number of federal

229 FED. R. CIV. P. 23(b)(3).
230 See id. 23(b)(3). Under the rule, manageability is one consideration which courts are supposed to take into account in deciding whether common questions predominate and whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. See id. Predomination analysis, however, has come to involve an independent inquiry. See pp. 1504-16 infra. The concept of superiority has not acquired a distinct content. The language of the Rule suggests that a determination that a class action is superior requires consideration of the efficacy of available alternatives to class suit, see FED. R. CIV. P. 23(b)(3) ("a class action is superior to other available methods for the fair and efficient adjudication of the controversy"), but federal courts appear to have been reluctant to involve themselves in serious comparative analysis. Compare Amalgamated Workers Union v. Hess Oil Virgin Islands Corp., 478 F.2d 540, 542-43 (3d Cir. 1973) (superiority analysis does not involve inquiry into efficacy of administrative alternatives), with Kamm v. California City Develop. Co., 509 F.2d 206, 211-13 (9th Cir. 1975) (administrative alternatives should be considered).
courts, however, have appeared to treat "manageability" as a self-contained criterion for evaluating class actions, and have placed primary reliance upon the conclusion that a class action was unmanageable in holding that class litigation should not go forward.231 Although it is apparent that the manageability inquiry ultimately involves a judgment concerning the usefulness of the expenditure of judicial resources entailed in the litigation of a class action, the courts have not attempted to develop a general doctrine of manageability, but rather have limited their analysis to the identification of the "unmanageable" features of particular class suits.232 Two key questions, therefore, remain.

See generally 7A C. WRIGHT & A. MILLER, supra note 91, § 1779. Often the analysis which courts undertake under the superiority rubric may be more accurately characterized as predomination analysis, compare, e.g., Doe v. Wohlgemuth, 376 F. Supp. 173, 182 (W.D. Pa. 1974), modified on other grounds sub nom. Doe v. Beal, 523 F.2d 611 (3d Cir. 1975), and 3B J. MOORE, supra note 91, ¶ 23.45[3], with pp. 1504-16 infra, or as an investigation of manageability, compare, e.g., In re Hotel Telephone Charges, 500 F.2d 86, 90-92 (9th Cir. 1974), and Shaffner v. Chemical Bank, 339 F. Supp. 329, 335-37 (S.D.N.Y. 1972), with pp. 1500-04 infra.


open: What is the standard by which manageability is measured? How do courts derive their conception of the "normal" procedural structure for class litigation whose manageability in the particular context is judged? Consideration of those questions suggests that manageability is not indeed an independent inquiry, but rather one aspect of a broader substantive analysis.

A conclusion that a class action is manageable or unmanageable, it could be argued, is the result of a cost-benefit analysis. To determine if a class action is manageable, a court weighs the costs to it in terms of the expenditure of judicial resources against the benefits which would accrue to the class members should their action prove successful. This formulation, however, is unsatisfactory. Class actions may not require courts to "expend" judicial resources in any straightforward sense. As Professor Dam has noted, a court's backlog of cases can serve a rationing function. Individuals may decide that certain suits simply are not worth the wait. In refusing to expend its resources hearing a class action, a court gains the opportunity to hear other cases instead: it does not, however, ultimately relieve its backlog, and thus realize a true saving of resources, since the temporary shortening of the delay in getting into court will make litigation attractive to otherwise discouraged claims holders who, in bringing suit, will return the backlog to its original state. A court may be said to "expend" judicial resources in allowing a class suit to go forward only if it can be concluded that the claims which would be filed in response to a shortening of the backlog resulting from a refusal to hear the class action are in some sense "more important" than the claims aggregated in the class action. Such an evaluation of the relative significance of claims brought in different suits, however, is a suspect enterprise. It will almost invariably require judicial ranking of statutes in terms of their importance, a practice traditionally thought to be improper in the absence of legislative guidance and only recently criticized by the Supreme Court in Alyeska Pipeline Serv. Co. v. Wilderness Soc'y.

The manageability requirement can be interpreted more narrowly in order to avoid weighing the importance of claims. On this view, class action procedures would be unmanageable if...

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litigation of a class suit in accord with those procedures would in the end confer no benefit on class members.\(^{236}\) No assessment of the relative importance of various claims is required in order to conclude that judicial resources would be wasted if an action conferring no benefits were litigated in place of suits which would result in at least some relief, no matter how important or unimportant. This interpretation appears to conform closely to the results of the cases in which courts have undertaken manageability analysis under rule 23. Class actions have been held to be unmanageable, for example, where the size of the class was so large that the amount of information which could be expected to be generated in the course of the litigation would overburden the litigation process to the point of collapse,\(^{237}\) where attorneys' fees and other administrative costs would so deplete a recovery fund that no worthwhile relief would be delivered by the action,\(^{238}\) where the cost of necessary notice was so high, given the size of the class, that the action would never be able to proceed beyond preliminary stages,\(^{239}\) or where class members could not be identified with sufficient accuracy to make delivery of relief possible.\(^{240}\)

At first glance, a conclusion as to whether class members would or would not benefit from a class action might appear to presuppose no more than familiarity with the characteristics of a given class action and a practical sense of the dynamics of class litigation. In other words, a court's decision concerning man-


ageability could be seen as essentially pragmatic and ad hoc. In fact, however, this manageability inquiry is by no means so straightforward. Class actions may confer multiple benefits. Even if administrative costs were to absorb all except an insignificant portion of a class damage recovery, for example, the class action might still benefit class members inasmuch as the class opponent would be forced to disgorge ill-gotten gains, thus setting an example to deter future violations of statutory directives. To determine if a class action is manageable, therefore, a court must identify the benefits which might conceivably accrue from its litigation. If judicial analysis is to be consistent with the Rules Enabling Act, such a process of identification cannot be trusted simply as a matter of discretion. The range of benefits a class action may be said to confer must be seen to depend upon the content of the policies reflected in the cause of action to which the class action gives force.

The connection between manageability analysis and the relationship of class action procedures to substantive law is also visible in the process by which courts define the particular sort of class action procedures whose manageability they judge. Some courts seem to treat the class action as it is described in the complaint as the subject of manageability analysis. This approach ignores the discretion which rule 23 grants courts, through such techniques as subclassing and conditional orders, to reshape a class, and thus, for example, to bring the size of a class within manageable bounds. The more sophisticated practice, however, has been to judge the manageability of a class action only after

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242 Thus, for example, in In re Hotel Telephone Charges, 500 F.2d 86 (9th Cir. 1974), the conclusion that a class action was unmanageable was not treated as following immediately from the fact that the claims of class members were so small that the suit would serve little if any compensatory purpose, see id. at 91, but rather was held to require an antecedent conclusion that a private action which only served “to ‘punish’ and ‘deter’ antitrust violations,” id. at 92, would be inconsistent with the policies underlying the antitrust cause of action, see id. at 91–92.
244 See Fed. R. Civ. P. 23(c)(1), (c)(4).
first determining which of the range of class procedures will be able to be used in the litigation.\textsuperscript{246} In some cases, notably those in which the cost of notice creates the barrier to going forward, the rigidities of rule 23 have been held to preclude resort to procedures which would have rendered the action manageable.\textsuperscript{247} But in other cases, a more fundamental reason — the constraints imposed by the cause of action under which suit was brought — has been invoked to explain why certain procedures, classwide calculation of damages and fluid distribution, for example, cannot be taken into account in judging manageability.\textsuperscript{248}

The fact that the manageability inquiry ultimately converges with the question of the congruence of class action procedures and substantive law suggests that use of manageability as though it were an independent criterion of the propriety of class actions may be misleading. A focus on the question of whether a court will waste its time if it allows a class action to go forward could distract attention from the more fundamental question of the limits of the compatibility of class procedures and a given cause of action, a question to which the manageability inquiry itself requires an answer.\textsuperscript{249} Manageability, therefore, is best treated as a threshold matter. Instead of first determining which class


action procedures are appropriate under a given cause of action, and only then determining whether a class action making use of the available procedures would be manageable, a court should first identify what combination of procedures would make possible the most expeditious litigation of a class suit, and then consider whether the procedures fit with the cause of action, and what the consequences are if they do not. Such a reorientation not only clearly separates the concern for conservation of judicial resources from the need to conform class action procedures with substantive values, but also redefines the manageability concern per se in affirmative terms as an obligation imposed upon courts always to look for the least cumbersome class procedures, and this increases the likelihood that judicial resources will be conserved even in actions which would not raise problems of unmanageability.

2. A Substantive Approach to the Predomination Inquiry.— The question of whether the modes of procedure required for litigation of a class action are compatible with the values reflected in the cause of action under which the class suit is brought is of course a central one given the substantive theory of class actions. It is not only through this inquiry that a judge decides whether class litigation would indeed contribute to the full realization of substantive policy, and thus be consistent with the Rules Enabling Act, but it is also through this inquiry, at least in part, that the judge becomes aware of the implications of the situations of class members for the outcome of the litigation, and thus acquires the information needed not only to decide the question of compatibility, but also to protect the interests of absentees should the class suit go forward. In judging the congruence of class procedures and substantive policy, a judge will have to consider whether aspects of a given cause of action render class suit inappropriate regardless of the precise form of class

150 See p. 1353 supra.
152 See pp. 1366–71 supra.
153 Although this section separates the questions of the fairness and substantive compatibility of class actions, the two issues are of course interrelated. The interests of absentees are ultimately adequately represented if they are given what the cause of action provides as their due; protection of absentee interests therefore presumes judicial familiarity with the values reflected in a cause of action and the adjustment of class procedures to fit those values. On the other hand, a judgment concerning the substantive compatibility of class action procedures cannot be made unless the situations of class members and the procedural implications of those situations are known; the inquiry into substantive congruence thus presupposes the inquiry into adequacy of representation.
Ordinarily, however, if it is to be answered fully, the question of compatibility will also require consideration of the specific forms which substantive values dictate that class procedures should take, as well as evaluation of the consequences for those substantive values if class litigation does proceed through the mandated forms. The analysis required to resolve these latter two inquiries — the subject of interest here — will henceforth be called "predomination" analysis: it is under the predomination rubric that federal courts applying rule 23 have engaged in the kinds of investigations which give content to the substantive theory’s requirement of congruence.

The importance of predomination analysis, and its relevance to the substantive theory of class actions, is not immediately apparent from the surface of class action doctrine as it has developed under rule 23. Under the rule, a court is expressly required to determine whether "questions of law or fact common to the members of the class predominate over any questions affecting only individual members" only in cases where class representatives attempt to justify a class action under section (b)(3). The Advisory Committee Note suggests that the chief purpose of the predomination inquiry is not to measure the compatibility of class action procedures with substantive law but to determine whether a class action will in fact realize any litigation economies.

Given the increased access to courts which class actions make possible, in most cases the goal of litigation economy is probably chimerical. But courts attempting to articulate a test of predomination which would provide a way of measuring the economies a class action might make possible have also discovered that a useful standard of economy is quite difficult to formulate. The most straightforward test, which would hold that common questions predominate whenever the time spent litigating both the issues which all class members may try in common and the issues

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254 For an illustration of this kind of analysis, see pp. 1361–65 supra.
255 FED. R. CIV. P. 23(b)(3).
256 See Advisory Committee Note, 39 F.R.D. 103 (1966). See also Kaplan, supra note 91, at 390.
257 See pp. 1353–55 supra. The subversion which the access function of class action works upon the idea of litigative economy should be distinguished from Professor Dam’s critique of the concept, see p. 1500 & note 234 supra. The fact that a court’s backlog operates as a rationing device suggests nothing about whether it would be desirable to try more cases within a given period of time: it is possible to acknowledge backlog rationing and still value litigative economy. The backlog becomes relevant only when the issue is whether there is any point to a class action going forward at all. It is the substitution effect resulting from the fact of the backlog which causes manageability analysis be ultimately substantive. See pp. 1501–03 supra.
which class members must try separately would be less than the
total time spent if all class members separately litigate all ques-
tions, would be satisfied so long as there was one issue which
could be tried in common, and therefore in essence renders the
predomination requirement nugatory. Instead of gauging econ-
omy, therefore, courts have looked for standards for weighing the
relative importance of issues which must be tried in common or
rather must be judged separately. It has been suggested that
common questions predominate only where the total amount of
time which would be spent on proof of the common issues in a
class action would be greater than the time which would be de-
voted to trial of issues individual to each class member in the same
action. This standard has been rejected, however, chiefly
because its use would block most class actions from going for-
ward inasmuch as only the most complex of common questions
would require more time for trial than the repeated adjudication
of issues which must be evaluated separately with respect to each
class member. Increasingly, courts have asserted as their formal
test of predomination an essentially empty standard of signifi-
cance, finding common questions to predominate whenever a
class action would resolve a "goodly proportion of what appears
to be the overall dispute." If the content of predomination doctrine as it has developed
under rule 23 thus does not explicitly reveal the kind of approach
which a substantive theory of class actions would suggest, practice
under rule 23 nonetheless conforms rather closely to the substan-
tive model. Before a court can judge whether common questions
are more "significant" than individual questions, it must first
determine which elements of a cause may in fact be litigated in
common and which elements will require separate showings by
each class member. This preliminary inquiry is unabashedly sub-
stantive: a court must come to a conclusion concerning what
modes of proof are permissible under a given cause of action.

259 See Minnesota v. United States Steel Corp., 44 F.R.D. 559, 569 (D. Minn.
1968); Landers, Of Legalized Blackmail and Legalized Theft: Consumer Class Ac-
260 See 7A C. WRIGHT & A. MILLER, supra note 91, § 1778, at 52; Note, Rule
261 See Minnesota v. United States Steel Corp., 44 F.R.D. 559, 569 (D. Minn.
1968). See also 7A C. WRIGHT & A. MILLER, supra note 91, § 1778, at 52-53.
A. MILLER, supra note 91, at 53, 55. But see id. at 54; 3B J. MOORE, supra note 91,
§ 23.45[2], at 23-755.
263 Landers, supra note 259, at 862.
The question of whether proof of securities fraud is made out merely by showing the materiality of a class opponent's misrepresentations — a showing which can be made without regard to the situations of individual class members and is thus "common" — or rather whether securities fraud is shown only if there is a demonstration that each individual allegedly injured actually relied upon the asserted misrepresentations provides perhaps the best known illustration of the kind of substantive issue which federal courts have had to resolve prior to determining whether common questions predominate.264 However, consideration of a second example — the question of what kinds of proof are proper for showing "tying" in violation of the antitrust laws — affords a more complete view of the range of choices which a court may be required to make.

Under the antitrust laws, a showing of illegal tying is made out by proof of: (1) "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product"; 265 (2) "sufficient economic power" on the part of the seller "with respect to the tying product to appreciably restrain free competition in the market for the tied product"; 266 and (3) "a 'not insubstantial' " effect on interstate commerce.


commerce as a result of the agreement. Most tying class actions brought since 1966 have concerned the practice of franchising. Franchisees have claimed that as a precondition to obtaining rights to a franchisor's trademarks and processes of doing business, they have had to agree to acquire such things as equipment, supplies, and building leases from the franchisor as well.

The first important franchisee class action, Siegel v. Chicken Delight, Inc., did not raise substantial questions as to the propriety of classwide proof. In that case, the standard franchise agreement entered into by the franchisor with each of the franchisee class members expressly conditioned the franchisees' rights to trademarks and business methods upon the purchase from the franchisor of various supplies. The chief matters at issue in the litigation concerned whether, as a matter of law, the standard agreement did indeed constitute a "tie," and whether, as a matter of fact, no alternative to the tie existed for purposes of insuring quality control, thus justifying the arrangement. Resolution of neither matter required separate consideration of the circumstances of each class member. The district court found for the class on the first issue and a jury returned a special verdict for the class on the second. The court of appeals affirmed the judgment except with respect to the question of the measure of damages.

In the wake of Chicken Delight, many franchisors modified their standard agreements to remove any express ties. Franchisees, however, have continued to bring class actions, alleging that tying practices continue sub silentio. These second gen-

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269 See generally id. 1090–92.

270 448 F.2d 43 (9th Cir. 1971), cert. denied, 405 U.S. 955 (1972); 271 F. Supp. 722 (N.D. Cal. 1967), modified sub nom. Chicken Delight, Inc v. Harris, 412 F.2d 830 (9th Cir. 1969).


272 See 448 F.2d at 46.

273 See id. at 47–49.

274 See id. at 50–52.

275 See id. at 52, 53.


eration suits raise serious problems concerning the compatibility of class procedures and the requirements of the antitrust laws. To determine if a tying arrangement exists despite the absence of an express agreement, it may be necessary to examine the details of a franchisor's business relationships with franchisees in order to see whether the franchisor in practice demands that franchisees, as a condition of retaining their franchise rights, make purchases from the franchisor or designated third parties. Such an examination would require separate consideration of the franchisor's dealings with each franchisee; as a result, common litigation of the matter would become impossible. Most federal courts have indeed concluded that in the absence of express, standardized tying arrangements, individualized analysis of franchisor-franchisee relationships is necessary. Recently, however, in Ungar v. Dunkin' Donuts, Inc., one district court, criticizing the prevailing view, held that generalized modes of proof, and thus class actions, may be proper even in second generation franchisee suits. The district court's opinion, taken together with the court of appeals' response, provides a clear picture of the kind of analysis characteristic at this stage under the substantive theory.


The courts have referred to the showing necessary to establish a tie in the absence of an express agreement as a showing of "coercion." See, e.g., Abercrombie v. Lum's Inc., supra, at 391. "Coercion" in this context, however, should be regarded as a term of art. As commentators have noted, it is difficult to speak of voluntary economic arrangements as coercive without challenging the legitimacy of all agreements, not just tying agreements, in which the parties are of unequal bargaining power. See, e.g., Pearson, supra note 265, at 632-34. The term "coercion" may perhaps be best understood here not as a description of the subjective experience of the bargaining process but as a measure of a court's confidence that the evidence before it does indeed establish that a defendant connected the sale of two products—in purchasing the tied product the plaintiff acted so automatically it was if he were coerced.


See id. at 116, 141-43.

Two features of the district court’s approach in Dunkin’ Donuts are noteworthy. First, the court attempted to connect its conclusion concerning appropriate modes of proof to what it took to be the fundamental policy underlying the statutory cause of action. Although much of the Dunkin’ Donuts opinion is devoted to a discussion of precedent, that discussion is shaped by the judgment, reached at the outset of the opinion, that the harm of tying lies not so much in the restrictions it places upon the franchisees as in the injury to society as a whole resulting from the restraint on competition, and therefore that a precise focus on the details of franchisees’ dealings with the franchisor is not among the requirements of the cause of action. Second, the generalized modes of proof which the court held to be appropriate derive their persuasiveness at least in part from the class-wide character of the tying allegations. In addition to direct investigation of the franchisor’s dealings with individual franchisees, the court identified two alternative showings, each of which would support the inference of a tie: “proof of a resolutely enforced company policy to persuade or influence franchisees to buy only from the franchisor or its designated sources” or “proof that large numbers of franchisees have accepted a burdensome or uneconomic tie.” The first showing, which requires an inference to be drawn about the likely effects of the franchisor’s acts, is analogous to the materiality showing permitted by securities fraud causes of action, while the second showing, which requires an inference to be drawn from the effects of the franchisor’s acts about the character of those acts, is similar to the discriminatory impact showing permitted in Title VII class actions. The fact of class suit is relevant to both showings in that the reliability of both showings is statistical: the greater the number of instances in which the relevant act or effect occurs, the greater the likelihood that the suggested inference is correct, and

282 See 68 F.R.D. at 84-111.
283 See id. at 88.
284 Id. at 116.
285 Id.
286 See Note, supra note 264, at 593 ("proof that the deception was material — that it would influence a reasonable investor — is persuasive circumstantial evidence that a sufficient number of traders in the market did indeed rely").
287 E.g., Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited"); see Note, Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal, 89 Harv. L. Rev. 387, 391 (1975) ("under Griggs, the inequality itself raises an inference that a specific discriminatory process is functioning to cause the observed disparity").
thus the greater the reliability of a conclusion that a tie has occurred.

Although the court of appeals reversed the decision of the district court, it disagreed only with the district court's conclusion and not with its substantive approach. Like the district court opinion, the court of appeals decision in *Dunkin' Donuts* concerns itself largely with a discussion of precedent. Analysis of the cases here, however, is structured by a distinctly different view of the precision of proof required by the policies underlying the tying cause of action: the objectionableness of tying is not general but derives from the injury it causes those bringing suit. As a result, the precise character of the injury asserted is a matter of concern, and the tolerance of inexact modes of proof is therefore low. The injury to a franchisee from franchisor tying is unclear in any event since a franchisor's "package deal" may appear either reassuring or constraining at various points in the franchise relationship depending upon the degree of confidence a franchisee has in his own operations. Against this background, the indeterminacy of the inferences required by the modes of proof which the district court approved becomes unacceptable. Because the injury to the franchisee is itself unclear, the franchisor cannot properly be held liable unless conditioning of franchise rights upon agreement to purchase other goods can be clearly seen.

The substantive approach to identifying common and individual issues which the tying cases illustrate could easily be extended to govern treatment of the predomination question itself. The predomination inquiry, which ideally should come after a preliminary identification of the modes of procedure which would make possible the most expeditious litigation of a class action, as well as an analysis of the compatibility of the most manageable procedures with the values reflected in the pertinent cause of action, would concern itself with the consequences for the progress of the lawsuit if some elements of a cause of action can be established only by modes of proof which require separate inquiries into the situations of each class member. This analysis would confront the kind of problems many courts have addressed under the manageability rubric. The administrative costs of individual proceedings, for example, might be greater than the claims with

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288 531 F.2d at 1226-27.
289 See id. at 1218-22.
290 See id. at 1220-21 & n.7a.
291 See id. at 1223. See also P. Areeda, Antitrust Analysis, ¶ 554, at 617 (2d ed. 1974).
292 See 531 F.2d at 1224-25.
293 See pp. 1503-04 supra.
which the proceedings would be concerned, and thus in all like-
lihood class members would choose not to come forward.  

Even if it were rational for class members to come forward, the
time it would take for a court to conduct all of the necessary
hearings could be so long that the lawsuit would seem to be im-
practical.  

Substantive predominance analysis would deal with
such propositions, however, not simply by attempting to determine
their validity, but also by undertaking to ascertain the effect such
propositions would have, if true, upon the substantive fairness
of the outcome of the litigation.

If litigation of certain issues in a class action is rendered im-
practical given that trial of such issues would require a separate
inquiry into the situations of each class member, the lawsuit’s
settlement dynamic may be altered. Despite suffering defeats in
the litigation of common questions, class opponents may refuse
to settle, knowing that class members have no practical means
of proceeding with the trial process, unless the class agrees to
only token relief.  

Alternatively, it may be the class opponent
who will settle at a loss: even a small possibility of having to
incur the expense of repeated litigation of the separate issues may
prompt the class opponent to offer the class a premium in order
to end the lawsuit.  

Given these possibilities, the task of sub-
stantive predominance analysis is to determine whether the
absence of the adjudicative check which is ordinarily an important
means of guaranteeing the fairness of the settlement process in-
deed so increases the likelihood of a settlement outside the bounds
of substantive fairness that the class action ought not to be al-
lowed to get underway.  

Such a substantive predominance
analysis may be resolved in favor of letting a class action go
forward for any of three reasons.

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294 See, e.g., Cotchett v. Avis Rent A Car Sys., Inc., 56 F.R.D. 549, 553
(S.D.N.Y. 1972). See also note 252 supra (manageability case breakdown).

295 See, e.g., In re Hotel Telephone Charges, 500 F.2d 86, 89 (9th Cir. 1974)
(“In a class of forty million, assuming only ten percent of these unknown mem-
bers come forward with claims, and assuming the proof of each claim required
only ten minutes, approximately one hundred years would yet be required to
adjudicate the claims”).

296 See Landers, supra note 259, at 881.

297 See Handler, The Shift From Substantive to Procedural Innovations in Anti-

298 On this view, predominance analysis may be seen as a prospective form
of settlement scrutiny, see pp. 1569–76 infra. Arguably, this interpretation of the
predomination requirement is constitutional in origin: its purpose is to determine
whether the litigation process, in the absence of an adjudicative check, will re-
liably produce judgments falling within the constraints set by the cause of action
upon the legislative delegation of authority to the courts. See generally pp. 1373–91
supra.
First, it may not in fact be the case that no adjudicative check exists to restrain settlement negotiations. If separate trials are required to adjudicate counterclaims, for example, settlement of the counterclaims is likely not to be unconstrained, even if the separate trials would be impractical in the class action context, since the class opponent retains the threat of withdrawing the subject of the counterclaims from the negotiations and initiating actions on the counterclaims against at least a sample of the class.\textsuperscript{299} Class procedure itself might provide an adjudicative check in the form of settlement review, at least with regard to issues which, although required to be individually tried, are nonetheless susceptible of mechanical resolution.\textsuperscript{300} Damages issues involving only mechanical questions concerning the application of the measure of damages,\textsuperscript{301} and not more complex questions of whether the injury alleged does indeed constitute an injury under the governing statute,\textsuperscript{302} provide perhaps the paradigm illustra-

\textsuperscript{299} Practice under rule 23 conforms to the result suggested by this argument. Although the existence of counterclaims has been cited as one of the various factors which in combination prevent common questions from predominating, see, e.g., Rodriguez v. Family Publications Serv., Inc., 57 F.R.D. 189, 193 (C.D. Cal. 1972); Cotchett v. Avis Rent A Car Sys., Inc., 56 F.R.D. 549, 552 (S.D.N.Y. 1972); Lah v. Shell Oil Co., 50 F.R.D. 198, 199 (S.D. Ohio 1970), courts have generally ruled that counterclaims alone do not prevent a class action from going forward, but rather may be held for separate trials after common issues have been resolved, see, e.g., Weit v. Continental Ill. Nat'l Bank, 60 F.R.D. 5, 8 (N.D. Ill. 1973); Donson Stores, Inc. v. American Bakeries, Inc., 58 F.R.D. 485, 489-90 (S.D.N.Y. 1973), noted in 87 HARV. L. REV. 470 (1973). Courts, however, have also concluded that class members are not parties for purposes of rule 13, see, e.g., Wainwright v. Kraftco Corp., 54 F.R.D. 532, 534 (N.D. Ga. 1974), and therefore have preserved class opponents' option to raise counterclaims separately by creating an exception to ordinary compulsory counterclaim practice.

\textsuperscript{300} See pp. 1569-70 infra.

\textsuperscript{301} Price-fixing class actions brought under § 1 of the Sherman Act, 15 U.S.C. § 1 (1970), provide a paradigmatic example. Proof that class opponents fixed prices is necessarily also proof that the class opponents' customers were injured; as a result, if price-fixing may be shown by modes of proof which do not require separate inquiries into the situations of each class member, the showing of injury or standing required by § 4 of the Clayton Act, 15 U.S.C. § 15 (1970), will also be made in common. The only element of the cause of action which may require individualized inquiries, therefore, is the relatively straightforward issue of the measure of damages, an issue whose individual character, courts have said, does not block a class action from going forward. See, e.g., City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 67-68 (D.N.J. 1971); Illinois v. Harper & Row Publ., Inc., 301 F. Supp. 484, 489 (N.D. Ill. 1969); Iowa v. Union Asphalt & Roadolls, Inc., 281 F. Supp. 391, 402 (S.D. Iowa 1968).

\textsuperscript{302} In contrast with proof of price-fixing, see note 301 supra, proof of the existence of a monopoly violative of § 2 of the Sherman Act, 15 U.S.C. § 2 (1970), does not also establish the identity of those who were injured by contravention of the antitrust laws. Courts hearing monopolization class actions, therefore, have had to consider separately the questions of whether injury may be
tion of individual issues whose settlement might be subject to effective subsequent review. Indeed, where damages issues are of this simplicity, courts have generally not regarded their individual character as a barrier to allowing class actions to go forward.303

Second, it may be possible to conclude that the values associated with the elements of a cause of action which must be tried individually are of such little weight relative to the values associated with other elements of the cause of action that, even if such values were not given their due in the course of litigation, the outcome of the suit could not be said to be unfair. Such a judgment appears at least in part to underlie the holding of courts hearing class actions charging racial discrimination in violation of Title VII that all class members need not file complaints with the EEOC prior to the class action despite the apparently contrary thrust of section 706 of the statute.304 As the United States Court of Appeals for the Fifth Circuit noted in the leading case of Oatis v. Crown Zellerbach Corp.,305 not only would additional filings appear to contribute little to realization of the value of conciliation underlying the filing requirement once the EEOC had failed to secure a voluntary resolution of a first complaint,306 but also insistence upon full compliance with the filing requirement should, in order not "to frustrate our system of justice and order," be subordinated to "'the highest priority'" policy of remedying racial discrimination.307 It is important to recognize that such weighing is not absolute, but rather is a relative process which must be undertaken independently under every cause of action. Thus, although the pertinent language is identical to that in Title VII, courts hearing cases under the Age Discrimination

established through proofs which do not require separate inquiries into the situations of each class member and of whether class suit may go forward if individualized proof is required. Courts have generally answered "no" to both questions, see, e.g., Shumate & Co. v. National Ass'n of Securities Dealers, Inc., 509 F.2d 147, 151-52 (5th Cir.), cert. denied, 96 S. Ct. 131 (1975); San Antonio Tel. Co. v. American Tel. & Tel. Co., 68 F.R.D. 435, 443 (W.D. Tex. 1975); Kinzler v. New York Stock Exch., 62 F.R.D. 196, 200-01 (S.D.N.Y. 1974); City of Detroit v. Grinnell Corp., 356 F. Supp. 1380, 1388 (S.D.N.Y. 1972), modified on other grounds, 495 F.2d 448 (2d Cir. 1974), a not surprising response in view of the complex considerations involved in defining the injury caused by a monopoly.

303 See, e.g., Blackie v. Barrack, 524 F.2d 891, 902 (9th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3518 (U.S. March 5, 1976) (No. 75-1258) (securities class action); Arkansas Educ. Ass'n v. Board of Educ., 446 F.2d 763, 768 (8th Cir. 1971) (employment discrimination backpay suit).

304 See id. at 498.

307 Id. at 499.
in Employment Act,\(^\text{308}\) which places great weight on conciliatory resolution of complaints,\(^\text{309}\) have been reluctant to allow such suits to go forward unless all class members have complied with the filing requirement.\(^\text{310}\) Moreover, in *Weinberger v. Salfi*,\(^\text{311}\) the Supreme Court, noting the need to prevent "premature interference with agency processes,"\(^\text{312}\) ruled that class actions challenging certain Social Security regulations could not go forward unless all class members had first exhausted administrative remedies.\(^\text{313}\)

Third, it may be the case that the class action can be structured so that issues whose litigation requires separate consideration of the situations of each class member are either eliminated or rendered practically amenable to adjudication. If it is only certain class members whose claims give rise to issues inappropriate for common adjudication, the class may be redefined to exclude such class members from the lawsuit.\(^\text{314}\) If a class appears to be so large that individual litigation of damage issues, for example, would be impracticable, a court could perhaps require class members to file proof-of-claim forms at the outset of the suit as a precondition to benefiting from any judgment,\(^\text{315}\) and thus, since presumably only a relatively small number of class members would comply,\(^\text{316}\) reduce the number of individual proceedings required. Obviously, such draconian techniques should be used only as a last resort, and only after it is determined that use of the techniques is not itself unfair. In many cases, it may not be possible to insulate excluded class members from the practical


\(^{309}\) See 29 U.S.C. § 626(b) (1975).


\(^{311}\) 422 U.S. 749 (1975).

\(^{312}\) Id. at 765.

\(^{313}\) Id. at 764.


\(^{316}\) See pp. 1443-44 & note 262 *supra*.
effects of a class judgment. Moreover, such exclusion is not only inconsistent with the access function of the class suit, but because it artificially homogenizes the class, is inconsistent with the heuristic function as well.

D. Calculation and Distribution of Damages

Class actions for damages pose special problems for judicial administration since conventional mechanisms for calculating and distributing damages may not be practicable in the context of a suit brought on behalf of many small claimants. If all or even a substantial portion of the class members seek individual damage trials, the court may be intolerably burdened. Moreover, class members may not come forward if the burden of proving damages outweighs any potential benefit of doing so. Finally, in some actions, it may be impossible to identify class members so that, if relief is to be distributed at all, it must be through some indirect process. These problems often merge: claims which are too small to justify any sort of individualized proof may often arise out of transactions of which no records are kept and may also be so numerous that they would take a great deal of time to process through individual trials.

317 See, e.g., Lawson v. Brown, 349 F. Supp. 203, 209 (W.D. Pa. 1972). The strongest justification for use of proof of claim forms, a practice otherwise properly criticized, see p. 1444 & note 263 supra, may arise in cases where a class is too large for separate trials of individuals issues to be within the realm of practicality, the individual issues are too critical to the cause of action to be ignored in settlement negotiations unconstrained by an adjudicative check, and the situations of class members are too interrelated to allow for a narrowing redefinition of the class. The proof-of-claim requirement in this context may be the best of a set of bad alternatives: although class members who do not file the forms will have their interests affected in any event, a sample of the original class may still be part of the action, increasing the possibility of adequate representation of the interests of excluded absentees, and the action will be able to go forward, providing at least some vindication of substantive policy.


321 For example, the claims of Philadelphia area consumers pressed in Hackett v. General Host Corp., 1972 Trade Cas. ¶ 73,879 (E.D. Pa. 1970), appeal dismissed, 455 F.2d 618 (3d Cir.), cert. denied, 407 U.S. 925 (1972), would fall into this category. Buyers of bread, the members of the plaintiff
A range of techniques, including reference to masters, streamlined summary judgment procedures, shifts in burdens of proof, class-wide calculation of damages, administrative processing of individual claims, and the so-called fluid class recovery—in which damages are calculated in the aggregate and distributed through a proof-of-claim procedure with any residue being distributed for the benefit of class members—have been proposed as means for making delivery of relief feasible in class actions involving individually nonrecoverable or nonviable claims. Some of these innovations have been attacked on the ground that they alter substantive law, and several have even been labelled unconstitutional. This Part of the Note will first describe the spectrum of possible damage calculation and distribution mechanisms in terms of the extent to which they can deliver relief to small claimants and the resulting degree to which policies of precise compensation—by which is meant compensating only those who are actually hurt and who feel hurt to the degree that they are willing to come forward and claim damages—deterrence, and disgorgement of unjust enrichment are served. After arguing that all of these mechanisms are constitutionally permissible and are not foreclosed by rule 23, the discussion will conclude with an analysis of whether particular techniques are compatible with statutory policy in selected areas of the law.

I. The Spectrum of Damage Calculation and Distribution Mechanisms.—Schemes for calculating and distributing damages can be grouped in four broad categories, arranged by degree of individualization in proof and distribution, as follows:

First, damages can be claimed through the traditional device of a full evidentiary hearing with each class member having a separate day in court, complete with such procedures as a right to jury trial. These individual trials could follow either "decerti-
"compensation" of the class after resolution of liability issues or notice to all class members informing them of the opportunity to intervene in the class suit. Under this approach, the goal of precise compensation would be meticulously served since damages would be awarded only to class members whose claims could survive a trial procedure. Policies of deterrence and disgorgement of unjust enrichment, on the other hand, would be served only to the extent consistent with such precise compensation.

Although common trial on liability issues might reduce the expense of trying individual claims, making possible delivery of relief to some class members with otherwise individually non-recoverable claims, individual damage trials would usually be sufficiently burdensome to foreclose compensation of smaller claims. For example, in Samuel v. University of Pittsburgh, a case in which the court decertified the class after invalidating certain residency requirements for married students' tuition rates, only four class members attempted to gain restitution of previous overcharges, none of them successfully. Alternatively, the anticipated burden on judicial resources of a multitude of individual trials could be so great that a court might be unwilling to let an action go forward as a class suit from the outset because the impracticality of relief would make trial of common liability issues a sterile exercise.

Second, in some cases it may be possible to adopt innovative summary judgment procedures to ease the burden of individualized proof of damages on class members as well as the court—thereby allowing greater compensation, deterrence and dis-


Individual damage trials might create a heavy burden on the defendant as well. See Twenty-Third Review, supra note 323, at 8-9.


328 Id. at 1281.


gorgement — without abandoning the individual trial requirement or significantly increasing the danger that unharmed individuals will recover. One commentator has suggested, for example, that in an antitrust case where it could be shown that each consumer had paid a uniform overcharge, the representative should move that any absent class member who furnished an affidavit and some documentation of his purchases would be entitled to a grant of summary judgment on his individual claim, with recovery based on the demonstrated surcharge, unless the defendant filed a counter-affidavit which raised a material issue of fact.330 Alternatively, if some risk of paying unharmed individuals would be acceptable in order to achieve broader compensation of those who were injured, burdens of proof could be lightened for plaintiffs at the individual trials.331 Either of these procedures might still be so burdensome, however, that many class members would be dissuaded from prosecuting their claims.332

Third, to compensate small claimants and deter activities imposing significant but diffuse harm, as well as to disgorge profits resulting from such behavior, it may be necessary to replace individual damage trials with calculation of damages on a class-wide basis, before a jury if the defendant wishes.333 In cases such as Eisen v. Carlisle & Jacquelin,334 in which defendants were accused of fixing the odd lot price differential charged to purchasers and sellers of securities, the aggregate damages suffered by the class could easily have been calculated by multiplying the number of transactions, as revealed in defendant’s records, by the uniform overcharge.335 One commentator has suggested that

333 Where damages are to be distributed to the class “as a whole” through a fluid recovery mechanism, see pp. 1520-23 & notes 339-40, 346-54 infra, the total damages inflicted upon the class must be calculated. In other circumstances, class-wide calculation may involve derivation of a formula for determining approximate damages to individual class members, based on some sort of averaging process across the entire class or some fraction thereof. See, e.g., Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 261-63 (5th Cir. 1974) (use in Title VII suits of class-wide formulas to calculate damages due to individual class members), discussed, p. 1528 & note 377 infra; Ralston v. Volkswagenwerk, A.G., 61 F.R.D. 427, 431-33 (W.D. Mo. 1973).
335 Id. at 262, 265.
such straightforward cases will be relatively rare, however, at least in the price-fixing context, and that class-wide calculation of damages will not be possible in other circumstances.\textsuperscript{336} Nonetheless, in many cases a reasonable estimate of the damages inflicted by a defendant might be acceptable.\textsuperscript{337} Even in complicated cases it may be possible to use sampling, averaging, or other statistical techniques to generate close approximations of class damages.\textsuperscript{338}

Unlike the individual damage trials procedure, in which the type of distribution follows ineluctably from the method of calculation, class-wide calculation can be accompanied by distribution to individual class members or by some sort of distribution to the class "as a whole."\textsuperscript{339} To be worthwhile, of course, the method of damage distribution must be less burdensome on class members than individual proof at trial. Worthwhile reductions in cost might be achieved by establishing a quasi-administrative claim processing procedure\textsuperscript{340} possibly under the control of masters or a committee of counsel,\textsuperscript{341} that would distribute damages upon some showing of individual proof. Fairly rigorous procedures could be used where class members are likely to have kept, or have access to, records of transactions needed to prove claims.\textsuperscript{342} In such circumstances, absentee could be required to submit affidavits stating the claimed loss, with copies of appropriate supporting documents. The court might also order

\begin{itemize}
\item \textsuperscript{336} Malina, \textit{Fluid Class Recovery as a Consumer Remedy in Antitrust Cases}, 47 N.Y.U.L. Rev. 477, 482–92 (1972). See also Comment, supra note 332, at 364.
\item \textsuperscript{338} See, e.g., Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 263 & n. 154 (5th Cir. 1974); Shapiro, \textit{Processing the Consumer's Claim}, 41 ANTITRUST L.J. 257, 270–73 (1972). See also Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., 1973 CCH Trade Cas. ¶ 74,593 (2d Cir. 1973) (formula used to distribute settlement fund).
\item \textsuperscript{341} See Shapiro & Springer, \textit{Management of Consumer Class Actions After Eisen: Notice and Determination of Damages}, 26 MERCER L. Rev. 851, 867 (1975); Shapiro, supra note 338, at 264–65. The judge would make final approval of the claims. See Shapiro, supra at 266.
\end{itemize}
verification procedures, such as a rigorous auditing of a sample of the claims submitted, to control the danger of fraud. If complete records are not available, distribution of damages will be possible, only at the risk of paying individuals who were not in fact harmed. For instance, in a case brought to recover illegal overcharges on name-brand gasoline, each motorist could be required merely to submit a sworn affidavit stating that he had purchased gasoline from a name-brand station during the relevant time period, supported by evidence that he had operated an automobile.

So long as the total amount of damages to be distributed is set by an accurate calculation, some degree of inaccuracy in setting individual claims can be tolerated. It can be expected that at least some class members will fail to file claims and that the resulting residue can cover spurious or overstated claims. Nonetheless, if the purpose of transferring funds from the class opponent to the class is solely to compensate for actual damage done, it is clear that this limited compensation objective is less well served to the extent that each individual's claim is not subject to verification. Thus, as imprecision in proof increases to accommodate smaller and smaller claims, precise compensation goals are submerged in goals of deterrence and disgorgement of unjust enrichment. To offset this emphasis on deterrence and disgorgement, therefore, any residue not claimed can be returned to the defendant, thereby making the ultimate amount of funds transferred to the class more equivalent to the amount that might have been distributed if only those who were hurt had submitted claims.

Fourth, a procedure similar to the third procedure could be used, but with the residue used for the benefit of the class, where deterrence and disgorgement are dominant goals. The fluid settlement of the Pfizer litigation, see West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), aff'd, 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971), suggests a possible claim verification procedure which preserves a compensatory focus. A committee of counsel verified all claims over $1,000 by mail or phone when the class member fully documented his claims, and by personal interview when claims were less completely supported. Smaller claims were examined by lawyers looking for obvious errors. See Shapiro, supra note 338, at 265-66. If a judge wanted to add another check to this procedure, he might require in-depth verification of a sample of smaller claims.


Of course, where class-wide calculation consists of deriving a formula for computing individual class members' damages, rather than an assessment of the aggregate damage inflicted upon the class, see note 333 supra, there will never be a residue following individual distribution.

An alternative method of obtaining fuller deterrence and disgorgement without use of fluid recovery, as such, would be to distribute any residue to class mem-
recovery scheme is a response not only to deterrent and disgorgement policies, but is also useful where persons actually hurt are likely not to be able to come forward and prove that fact because, for example, they will not be in a position to be given notice of the action, or because they will not keep records that would allow proof of damages with any acceptable degree of accuracy. The theory of fluid recovery resembles that of the cy pres doctrine in testamentary interpretation: where funds cannot be delivered precisely to those with primary legal claims, the money should if possible be put to the "next best" use.347 There are two commonly discussed versions of fluid recovery. In one, the residue of the class damages fund is distributed through the market, usually in the form of a reduced charge for an item the defendant previously overpriced.348 In the other, the money is given to the state to use on a project likely to be of interest to class members or, if that is not possible, for general purposes.349

Such procedures will not always be appropriate, however, since they achieve their broad coverage only by sacrificing a considerable amount of precision in matching those injured with those paid. Class members who successfully comply with the individual proof-of-claim procedure will be compensated twice, and individuals who begin trading in the affected market after the violation,350 or who live in the relevant state but never dealt with the defendant, will be compensated even though they were never harmed.351 As a result, fluid recovery in some cases may fit more


350 The decreased market price resulting from fluid distribution may attract new customers, increasing the number of individuals who will share in the recovery though never injured. See Cy Pres Remedy, supra note 347, at 461-62.

351 Of course, class members who have moved to a different state or who have changed their activity will still not be compensated, even indirectly.
easily into a deterrence or disgorgement rationale. Indeed, if the entire class damage fund, minus attorneys’ fees, reverts to the state, the action becomes similar to a *qui tam* suit, in which a private party is authorized to bring an action for a civil penalty on behalf of the government and, as an incentive, is allowed to retain part of the recovery.\(^{352}\) To be sure, some forms of fluid distribution will be more likely to compensate injured individuals than others, as when the state can sponsor a project of direct and exclusive interest to class members or when the market used to distribute the fund is largely and repeatedly used by class members.\(^{353}\) But even in these situations there will clearly be imprecise compensation; moreover, it may be difficult to find such ideal projects and markets.\(^{354}\)

2. Tailoring Damage Calculation and Distribution to Fulfill Statutory Policy. — Some have asserted that class-wide damage assessment violates due process or deprives defendants of their seventh amendment right to a jury trial.\(^{355}\) In one of the appellate reincarnations of *Eisen v. Carlisle & Jacquelin* (*Eisen III*),\(^{356}\) for example, the United States Court of Appeals for the Second Circuit, without explaining its reasoning, held that fluid recovery violates due process.\(^{357}\) Although the Supreme

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353 In contrast, perhaps the least compensatory version of fluid distribution would be to add the residue of the class damages fund to the state’s general treasury.

354 See Malina, supra note 336, at 482–92. Fluid distribution through the market may raise additional problems in some circumstances. Supervision of the defendant’s pricing policies may require an unacceptable amount of court time unless a regulatory agency is available to administer the remedy. Comment, supra note 332, at 370, 373. See also Note, *Mass Compensatory Relief: The Inadequacy of the Class Action and the Need for Procedural Alternatives*, 24 SYRACUSE L. REV. 1341, 1359 (1973). On the other hand, if such a regulatory agency does exist, use of fluid distribution may constitute an intrusion into its jurisdiction. See *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1010–11 (2d Cir. 1973), vacated and remanded on other grounds, 417 U.S. 156 (1974).


357 Id. at 1018. The opinion does not make clear whether the panel felt that class-wide calculation of damages without a fluid distribution mechanism would violate due process. Indeed, the Second Circuit earlier passed up an opportunity to reverse an opinion in the antibiotics antitrust litigation which indicated that class-wide calculation would be employed. See Pfizer v. Lord, 449 F.2d 119 (2d
Court has not ruled on constitutional challenges to class-wide damage assessment and fluid recovery, the arguments do not appear compelling. The defendant's seventh amendment right would appear to be satisfied by the opportunity to adjudicate the class-wide damage assessment before a jury. Thus, in a case brought under the 1938 version of rule 23, the Second Circuit held that defendants do not have the right to separate jury trials on each claim when class members are given the chance to intervene and share in a judgment fund after liability has been found and class-wide damages have been determined.

The nature of the due process argument is not clear. Because of the constraints of substantive law, class-wide calculation of damages would be inappropriate where the class opponent has defenses that he could assert against class members on an individual basis. In the absence of such necessarily individualized inquiries, however, the class opponent hardly seems prejudiced.


The only constitutional objection that appears possible is that defendant's seventh amendment right to jury trial may be infringed if issues of liability and damages are closely intertwined, yet are decided by separate juries. See United Airlines v. Wiener, 286 F.2d 302, 306 (9th Cir.), cert. denied, 366 U.S. 924 (1961) (propriety of exemplary damages in negligence actions closely related to degree of culpability, and thus separate juries impermissible). However, no case was found where this objection was raised in a class action context; moreover, satisfaction of the predominance requirement, see pp. 1504-16 supra, should ensure that individual damage issues are sufficiently distinct from common liability issues that separate jury trials would not be unfair.

Dickinson v. Burnham, 197 F.2d 973 (2d Cir. 1952).

Cases holding that defendants are not entitled to a separate jury trial on each claim in an ordinary multiple joinder case also lend support by analogy to the constitutionality of class-wide damage assessment. See Kalven & Rosenfield, supra note 359.

by being restricted to only one hearing on common issues. Even though the calculation of damages might involve issues on which a hearing would ordinarily be required by due process, it has never been thought that due process required multiple hearings where there was one full and fair adjudication of the merits. Indeed, if this were not so, then the doctrine of collateral estoppel, which allows parties losing one action to be stopped on common issues in subsequent suits either for or against nonparties, would be constitutionally suspect. Such a novel result would seem to require much more support than adherents to the view that class-wide proof violates due process have so far mustered. Indeed, even if the estoppel situation is technically distinguishable from that of the class suit — in that the estopped party does indeed get a second hearing, but only on the issue of the fairness of the hearing received in the first lawsuit — the resulting anomaly that a defendant could be bound by a judgment favorable to all those similarly situated to an individual plaintiff in subsequent suits if the first of a series of litigations was fair, but would not be "bound" when such individuals had in fact been parties to a fairly adjudicated class suit, casts great doubt on the validity of the due process argument.

In the absence of any constitutional obstacles, it might be argued that the availability of particular damage calculation and distribution mechanisms should turn on an interpretation of rule 23. Thus, the Second Circuit in Eisen III treated the permissibility of fluid recovery as a question of whether it was appropriate to read such a procedure into the rule. The court concluded that fluid recovery was improper, reasoning that the Rules Enabling Act forbids procedural rules which "modify, abridge, or enlarge" substantive rights and that reading fluid recovery into rule 23 would alter the substantive standards under section 4 of the Clayton Act, the statute pursuant to which the action was brought. While the court’s interpretation of the Clayton Act may be questioned, its general approach of examining the substantive law to determine the appropriateness of a damage mechanism is clearly correct.


367 See 479 F.2d at 1014, 1018.

368 See pp. 1532-34 & notes 400-14 infra.

369 See generally pp. 1360-65 supra. Treating damage remedies in class actions as a question of rule 23 interpretation may be affirmatively misleading to
Where the relevant statute expressly authorizes class-wide calculation of damages, flexible proof-of-claim procedures, or fluid distribution, such devices are clearly permissible. For example, the proposed Consumer Class Action Act would make available a five-step fluid recovery mechanism for class actions brought to enforce § 5 of the Federal Trade Commission Act. On the other hand, a statute may on its face prohibit particular damage calculation and distribution mechanisms, or establish requirements for class actions which preclude the possibility of some or all class-wide remedies. Fluid distribution of damages, for instance, would appear to be inconsistent with the requirement of the Fair Labor Standards Act that class members affirmatively opt in at the outset of class litigation, since the opt-in requirement evinces an objective to compensate only those who feel hurt and are therefore willing to come forward and make a claim.

Where the statute is less explicit, courts must engage in a more complex analysis if statutory directives are to be carried out accurately. Although courts have an obligation to develop remedies which effectuate statutory policies, the potential for the extent that the unit of analysis becomes class actions in general rather than the set of policies underlying the particular statute being enforced. Untenable distinctions between class actions and non-class actions may be encouraged while real distinctions among statutory causes of action may be ignored. See note infra.


See id. at 344-45 (§ 8 of proposed Act). After calculation of the aggregate damage inflicted upon the class and distribution to individual class members, any remainder of the damages fund would be distributed under a cy pres principle for the benefit of the class; any further remainder would be contributed to a Class Action Defense Costs Fund, the unused balance of which would be credited to the federal courts' operating budget at the close of each fiscal year. The proposed Act would apparently make this fluid recovery mechanism available in all class actions brought in the federal courts pursuant to 28 U.S.C. § 1337 (1970) (jurisdictional authorization for actions arising under legislation regulating commerce), as well as those brought under the Act. See id. at 344 (§ 8(b)).


Some commentators have argued that class-wide damage mechanisms are foreclosed by Snyder v. Harris, 394 U.S. 332 (1969), which held that individual claims of class members could not be aggregated to meet the $10,000 jurisdictional minimum required in diversity actions by 28 U.S.C. § 1332 (1970). See, e.g., Twenty-Fourth Review, supra note 355, at 39-40. The Eisen III court used this
greater deterrence, compensation, or disgorgement of unjust enrichment is not sufficient in and of itself to justify judicial creation of expansive systems for delivering damages. In the presence of a relevant statute courts are not free to attach whatever weights they choose to enforcement policies, but must tailor class action remedies to fit the matrix of policies they have attributed to the statute in interpreting its substantive provisions. Thus, the process of determining appropriate methods for delivering damages in class actions should proceed by analyzing whether the policies served by particular mechanisms for calculating and distributing damages match statutory policies.

This approach, while relatively easy to describe, will often be difficult to apply. In order to determine how far along the spectrum of damage mechanisms the statute extends, the court will have to assess the strength and scope of the statute's concern for deterrence, disgorgement, and compensation. For example, the polar extreme of class-wide calculation of damages with a fluid distribution in which the bulk of the fund escheats to the state could only be justified if the statute displayed a deep concern for deterrence and disgorgement regardless of the possibility of windfall recoveries for third parties or some class members. This policy mix would be likely only where the danger of over-deterrence or excessive punishment through private enforcement is low: for example, where the substantive law is quite clear, where deterrence of borderline conduct would not cause any serious consequences, or where good-faith violations are exempt from

argument to support its denial of fluid recovery in an antitrust class action, citing Snyder for the proposition that "the claims of many may not be treated collectively." Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1014 (2d Cir. 1973), vacated and remanded on other grounds, 417 U.S. 156 (1974); see pp. 1531-32 & notes 397-405 infra. Such a broad reading of Snyder is clearly unwarranted. The Supreme Court's recent decisions addressing the issue of mootness in class actions, Franks v. Bowman Transp. Co., 96 S. Ct. 1251, 1258-60 (1976); Sosna v. Iowa, 419 U.S. 393, 397-403 (1975), indicate that at least for article III purposes the claims of class members may indeed be treated collectively. See pp. 1464-66 supra. More importantly, Snyder merely involved interpretation of a particular jurisdictional statute, whose purposes and policies do not necessarily coincide with the purposes and policies underlying the various causes of action enforced through class suits. Indeed, the Snyder Court expressly noted, 394 U.S. at 341, that its holding would not affect the availability of the multitude of federal question class actions which can be brought without regard to jurisdictional amount, see, e.g., 28 U.S.C. § 1337 (1970) (antitrust actions and suits under legislation regulating commerce). See also Eisen Note, supra note 359, at 450 (explaining Snyder Court's reasons for reading jurisdictional statute narrowly). Certainly, courts fashioning class-wide damage remedies in Title VII suits, for example, see pp. 1528-29 & notes 376-80 infra, have not felt constrained by Snyder's interpretation of the diversity jurisdiction statute.

374 See pp. 1368-71 & note 182 supra.
coverage.\textsuperscript{375} Distribution of damages through a flexible proof-of-claim procedure, with the remainder of any class-wide damages fund returned to the defendant, may be appropriate in some circumstances where fluid distribution would not. Since distribution to individual class members serves a compensatory function more precisely than distribution to the class "as a whole," this procedure may be available even under statutes which do not recognize deterrence or disgorgement as legitimate goals for private enforcement, except to the extent that they are byproducts of compensatory relief. Where a defendant has caused moderately small amounts of injury to a number of similarly situated individuals, the proof-of-claim technique may be the most accurate approach practically available for making injured parties whole. Of course, to the degree that the statute embodies independent deterrence and disgorgement values, the case for class-wide calculation of damages coupled with individualized distribution is strengthened. On the other hand, the proof-of-claim mechanism, although less dangerous than fluid distribution, may be unacceptable if there is still a strong possibility that overdeterrence or unfair penalties would result. Where the statute evinces concern for protecting borderline conduct, where crippling liability is threatened, or where diffuse injury is not objectionable, adherence to a fully individualized approach would be proper.

Despite the complexity of the underlying considerations, courts have read some statutes to permit class-wide damage remedies even though no provisions expressly authorized such mechanisms. In \textit{Pettway v. American Cast Iron Pipe Co.},\textsuperscript{376} the Fifth Circuit sanctioned a variety of techniques for class-wide calculation of back pay awards in Title VII suits, with distribution of relief to individual class members through a proof-of-claim procedure.\textsuperscript{377} To reach this result, the court followed the basic ap-

\textsuperscript{375} See generally pp. 1360-66 supra.
\textsuperscript{376} 494 F.2d 211 (5th Cir. 1974).
\textsuperscript{377} Id. at 260-63 & nn.151, 154. Methods endorsed by the court included generation of a formula for individual class members' damages through averaging of pay rates across the different pay groups in question, \textit{id.} at 262; see Stamps v. Detroit Edison Co., 365 F. Supp. 87, 121-22 (E.D. Mich. 1973), rev'd on other grounds sub nom. EEOC v. Detroit Edison Co., 515 F.2d 301, 315 (6th Cir. 1975), or across a comparable group of employees who were not the victims of discrimination, see 494 F.2d at 261-63 & n.151; United States v. Wood, Wire & Metal Lathers Union, Local 46, 328 F. Supp. 429, 443-45 (S.D.N.Y. 1971), motion for stay pending appeal denied, 341 F. Supp. 694 (S.D.N.Y. 1972), aff'd, 471 F.2d 408 (2d Cir. 1973). The latter approach, characterized by the court as a "formula of comparability or representative employee earnings formula," 494 F.2d at 262, apparently would also be permissible if utilized to calculate the aggregate damages inflicted upon the class as a whole, which would then be distributed in pro rata shares to similarly situated class members. \textit{See id.} at 262-63 & n.154; \textit{cf.} F.W.
proach of analyzing the policies underlying the statutory back-pay provisions and then tailoring the relief mechanisms to fulfill these policies. The court determined that the purpose of back-pay awards is to compensate victims of discrimination for economic loss and rejected a defense based on the defendant's good faith.378 The court then noted that some imprecision in calculating backpay awards must be tolerated: to effectuate the statutory purpose of making injured parties whole, unrealistic accuracy in assessing damages should not be required, and uncertainties should be resolved against the discriminating employer.379 When class size or the nature of defendant's conduct makes individualized damage determinations impracticable, a class-wide approach is necessary and appropriate, the court concluded.380

The more radical remedy of fluid distribution was found by the District of Columbia Circuit, in Bebchick v. Public Utilities Commission,381 to be similarly authorized under a statute governing ratemaking by the local public utilities commission.382 Plaintiffs challenged a commission order authorizing an increase in tran-

Woolworth Co. v. NLRB, 121 F.2d 658, 662–63 (2d Cir. 1941) (pro rata distribution of back pay award by NLRB).

378 See 494 F.2d at 251–53.
379 Id. at 260–61.
380 See id. at 261–63. Fluid distribution schemes, however, may not be proper under Title VII. Language in the recent case of Franks v. Bowman Transp. Co., 96 S. Ct. 1251, 1268 n.32 (1976), appears to suggest that the defendant must be granted some sort of opportunity to challenge individual class members' claims. In any event, fluid distribution is unlikely to be necessary in the Title VII context, since claims will usually not be so small as to be nonviable. See note 322 supra.

As is the case under Title VII, class-wide calculation of damages with distribution through a proof-of-claim procedure should be permissible in class actions under the Magnuson-Moss Consumer Product Warranty Act, see 15 U.S.C. §§ 2310(d)(3), (e) (Supp. IV, 1974). While fluid distribution appears to be incompatible with the Act's amount-in-controversy requirement, see note 372 supra, class-wide calculation may be necessary in order to deliver compensation to injured consumers with moderately small claims. Moreover, § 110(e) of the Act, 15 U.S.C. § 2310(e) (Supp. IV, 1974), provides strong protection against any danger of overdeterrence or undue penalty: a class action may not be brought unless the defendant has been afforded a reasonable opportunity to cure the alleged violation. See also Magnuson-Moss Consumer Product Warranty Act, § 110(a), 15 U.S.C. § 2310(a) (informal dispute settlement procedures).

382 See id. at 190 (discussing § 4 of Franchise Act); id. at 203-04 (supplemental opinion authorizing fluid distribution).

The Eisen III court attempted to distinguish Bebchick on the ground that it was not a class action. See Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1012 (2d Cir. 1973), vacated and remanded on other grounds, 417 U.S. 156 (1974). However, since the source of authority for fluid distribution lies not in rule 23 but in the courts' power to effectuate statutory policies, see pp. 1525-26 & notes 369, 373 supra, this distinction seems irrelevant.
sit fares from twenty to twenty-five cents.\textsuperscript{383} The appellate court invalidated the order\textsuperscript{384} and required that a special account or fund equal in amount to the total of the overcharges be established by the transit company.\textsuperscript{385} The court left the disposition of this fund to the discretion of the utilities commission, but ordered that the money be applied for the benefit of transit users — for example, to decrease the fares which otherwise would prevail.\textsuperscript{386} Although the court did not discuss the underlying statutory policies in detail, it appears to have been motivated by a desire to compensate individuals who paid overcharges, as well as to prevent the unjust enrichment of the transit company.\textsuperscript{387} If many of the overcharged transit customers would use the company's facilities in the future, thereby benefiting from the decreased fares resulting from application of the fund, fluid distribution would indeed serve a substantial compensatory function in this context. Moreover, where fluid distribution is used to compensate a class of individuals charged an amount greater than a rate fixed pursuant to statute, there is little danger that the regulated entity will be unduly penalized or deterred from engaging in socially beneficial conduct, inasmuch as the entity is merely required to refund revenues in excess of a proper rate computed according to statutory criteria.\textsuperscript{388}

Although the courts have not yet had the opportunity to address the issue, the 1974 Amendments to the Truth in Lending Act\textsuperscript{389} in effect direct the courts to undertake the type of purposive analysis advocated in this Note. Prior to the 1974 Amendments, courts generally construed the Act to bar damage class actions entirely, on the ground that the $100 statutory minimum recovery for each individual would have imposed crippling liability on defendants if aggregated through class suits.\textsuperscript{390} The 1974 Amendments make the $100 minimum inapplicable to class

\textsuperscript{383} 318 F.2d at 189.
\textsuperscript{384} Id. at 196.
\textsuperscript{385} Id. at 203–04 (supplemental opinion).
\textsuperscript{386} See id. at 204.
\textsuperscript{387} See id. at 203–04.
\textsuperscript{388} See Appleton Electric Co. v. Advance-United Expressways, 494 F.2d 126, 135 (7th Cir. 1974) (danger of "legalized blackmail" feared by Eisen III court not present in class action for refund of excess rate charge). Indeed, the prospect of a fluid recovery might be necessary to deter regulated companies from trying to charge more than the rate fixed by a regulatory commission. See id. at 133; Daar v. Yellow Cab Co., 67 Cal. 2d 695, 715 n.15, 433 P.2d 732, 746 n.15, 63 Cal. Rptr. 724, 738 n.15 (1967), subsequent settlement discussed in Comment, supra note 332, at 366 n.186.
actions and impose a ceiling on the total recovery available in class suits — the lesser of $100,000 or one percent of the net worth of the defendant.\(^{391}\) So long as the ceiling is not exceeded, the court may exercise its discretion in computing the amount of damages awarded; however, the court is directed to consider the amount of actual damages, the frequency and persistence of statutory violations by the defendant, the defendant's resources, the number of injured persons, and the extent to which the defendant's failure to comply with the Act was intentional, as well as any other relevant factors.\(^{392}\) Class-wide calculation of damages, with or without fluid distribution, is not expressly authorized. Even so, given the list of factors which Congress considered relevant to damages calculation, and the clear deterrent purpose of the Act,\(^{393}\) the full range of class action damage mechanisms would appear to be available. The danger of crippling liability potentially raised by fluid distribution or flexible proof-of-claim procedures is virtually eliminated by the ceiling on total recovery,\(^{394}\) and by the court's power to reduce the award to reflect the amount of defendant's resources. Overdeterrence should not be a problem if remedies are adjusted to take into account the extent to which defendant's failure to comply with the Act was intentional: where defendant acted in good faith, class-wide remedies could be withheld; where defendant's conduct was persistent and willful, even the version of fluid distribution in which the damages fund escheats to the state might be proper.\(^{396}\)

Unlike the amended Truth in Lending Act, the antitrust laws do not have any special provisions for computing damages in class actions. As a result, courts have little choice but to apply the treble damages remedy created by § 4 of the Clayton Act\(^{397}\) to class as well as individual suits.\(^{398}\) Since treble damages were


\(^{393}\) See Comment, supra note 392, at 1291. The $100 minimum recovery in individual suits is clear evidence of a deterrent purpose independent of the degree to which compensation is served.

\(^{394}\) See Boggs v. Alto Trailer Sales, Inc., 511 F.2d 114, 117-18 (5th Cir. 1975).


\(^{396}\) Of course, the larger the amount of actual damages suffered by the class, the larger the compensation interest at stake will be. Thus, where actual damages are substantial, some class-wide remedies could perhaps be justified as a means of delivering compensation, even if the creditor-defendant's conduct was not willful. In such cases, however, punitive damages ordinarily would not be appropriate.


\(^{398}\) See Kline v. Coldwell, Banker & Co., 508 F.2d 226, 235 (9th Cir. 1974),
designed at least in part to encourage private enforcement of the antitrust laws, \textsuperscript{399} simultaneous use of class-wide damage mechanisms which themselves significantly increase access to courts arguably could result in overdeterrence or imposition of undue penalties. Courts must therefore consider whether the treble damages mechanism should be deemed to “pre-empt” other remedies.

In \textit{Eisen III} \textsuperscript{400} and \textit{In re Hotel Telephone Charges}, \textsuperscript{401} the Second and Ninth Circuits respectively rejected fluid recovery in antitrust class actions on grounds independent of the potential unfairness of trebling damages awarded to the class “as a whole.” \textsuperscript{402} However, neither court’s reasoning appears fully to justify the conclusion it reached. Aside from unconvincing arguments based on the Constitution \textsuperscript{403} and on \textit{Snyder v. Harris}, \textsuperscript{404} the \textit{Eisen III} court appeared to rely on the danger that class actions seeking huge amounts of damages might subject defendants to strong pressure to settle regardless of the merits of the class’ claim. \textsuperscript{405} But given summary judgment procedures \textsuperscript{406} and hours-


\textsuperscript{400} Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), vacated and remanded on other grounds, 417 U.S. 156 (1974).

\textsuperscript{401} 500 F.2d 86 (9th Cir. 1974).

\textsuperscript{402} The Supreme Court vacated and remanded the \textit{Eisen III} decision without reaching the fluid recovery issue. 417 U.S. 156 (1974).

Prior to \textit{Eisen III} and the \textit{Hotel Telephone Charges} case, fluid recovery mechanisms had been utilized in settlements of several antitrust class actions. See Colson v. Hilton Hotels Corp., 59 F.R.D. 324, 326 (N.D. Ill. 1972); West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710, 733–34 (S.D.N.Y. 1970), aff’d, 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971). By agreeing to these settlements, however, defendants presumably waived any objection that this form of relief was not authorized by the Clayton Act.

\textsuperscript{403} See pp. 1523–25 & notes 355–63 supra.

\textsuperscript{404} See note 373 supra. The court also cited Hawaii v. Standard Oil Co., 405 U.S. 251 (1972), but that case does not appear to be dispositive. See \textit{Eisen Note}, supra note 359, at 450–51; p. 1533 & notes 409–10 infra.

\textsuperscript{405} See 479 F.2d at 1018–19.

\textsuperscript{406} Although summary judgment is not generally favored in antitrust actions, see, e.g., Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962), recent cases suggest that defendants may gain such relief when plaintiffs’ claims clearly lack a factual or legal basis. See, e.g., Gordon v. New York Stock Exchange, Inc., 422 U.S. 659, 686–87 (1975) (class action); First Nat’l Bank v. Cities Service Co., 391 U.S. 253, 274–90 (1968); Solomon v. Houston Corrugated Box Co., 526 F.2d 389, 393–96 (5th Cir. 1975); ALW, Inc. v. United Air Lines,
worked standards for computing attorneys’ fees, this danger of “legalized blackmail” would not appear to be significant enough to warrant denying relief to small claimants. The Ninth Circuit endorsed Eisen III’s analysis and advanced the additional rationale that the Clayton Act only authorizes private suits in which a compensatory function is served. Although this reading of the Clayton Act is probably justified, it only eliminates the version of fluid distribution in which the residue of the class damages fund reverts to the state treasury. Where fluid distribution is made through a market in which most future participants are likely to be class members, a substantial compensatory function is served. Thus, unless there was insufficient evidence in the Hotel Telephone Charges case that the market for defendants’ services met this condition, the Ninth Circuit appears to have underrated the efficiency of fluid distribution as a means of compensating class members injured by the defendants’ alleged price fixing.

Although the reasoning of the Eisen and Hotel Telephone Charges cases thus does not provide a convincing basis for rejecting all forms of fluid distribution in antitrust class actions, the fact that damages are trebled in antitrust actions suggests that judicial reluctance to allow fluid distribution may not be without foundation. A chief purpose of the treble damages penalty is to increase enforcement of the antitrust laws through private litigation by increasing the attractiveness of litigating otherwise uncertain claims. There is inevitably a risk in creating incentives for the litigation of borderline claims: fearful of the prospect of being sued, individuals may refrain from conduct not in fact proscribed. This risk of overdeterrence, it could be argued, should not be run unnecessarily. Treble damages actions should be allowed only where the individuals who benefit from the penalty

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407 See pp. 1611–15 infra (hours-worked standard reduces likelihood class attorney will negotiate a “strike” settlement).

408 500 F.2d at 90, 92.

409 See id. at 91–92, citing Hawaii v. Standard Oil Co., 405 U.S. 251 (1972). The court also appeared to be concerned with the expenditure of judicial resources which litigation of the case would require. See id. at 91. But see pp. 1505–06 & notes 256–65 supra (rejecting this argument as basis for disallowance of class suit).


411 The treble damages provision also serves two other purposes: to ensure that individuals receive full compensation notwithstanding the imprecision of jury determinations; and to punish and deter wrongdoers. See Note, supra note 399, at 1566–67. See also P. Areeda, supra note 399.
provision were plainly injured by the antitrust violation. On this view, fluid distribution mechanisms, because they extend relief to individuals who may not in fact have been injured or who would not have otherwise sought redress for their injury, may be inappropriate.

The existence of the treble damages provision, however, need not be seen as a bar to use of fluid distribution mechanisms in all antitrust class actions. Concern for overdeterrence is inapposite in cases where the misconduct alleged would, if proven, constitute a clear violation of the antitrust laws. In such cases, therefore, fluid distribution schemes could perhaps coexist with the award of treble damages. This analysis would not change the result in Eisen. There, while the defendants were accused of the archetypal antitrust offense of price-fixing, they had a strong claim of immunity from the antitrust laws.412 On the other hand, the class in Hotel Telephone Charges appeared to allege a "hardcore" violation of section one of the Sherman Act413—an express agreement to fix prices without any claim to immunity.414 Hence, denial of fluid distribution in that case may not have been justified.

Both Eisen III and the Hotel Telephone Charges cases deal with situations in which most class members' claims were too


413 See In re Hotel Telephone Charges, 500 F.2d 86, 88 (9th Cir. 1970); In re Hotel Telephone Charge Antitrust Litigation, 341 F. Supp. 771, 772-73 & n.4 (J.P.M.D.L. 1972). It is difficult to discern plaintiff's theory from the text of the opinions. If the plaintiffs were, for example, merely alleging "conscious parallelism" rather than an express agreement, the defendants' conduct would not constitute a clear violation of the Sherman Act. See generally Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 HARV. L. REV. 655, 655-84 (1962). In that case, Hotel Telephone Charges should be analyzed in the same manner as Eisen III.

414 See, e.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223-24 (1940) (per se rule applied to price-fixing). As the Eisen case demonstrates, allegation of a per se violation would not be sufficient as such to satisfy this "clear violation" standard. The per se rule must clearly apply to the facts alleged. See also note 413 supra (Hotel Telephone Charges may not have involved clear violation).
The Eisen III panel directed its discussion primarily at the fluid distribution aspect of fluid recovery, and did not make clear whether class-wide calculation of damages and distribution to individual class members through a proof-of-claim procedure, with the residue of any fund returned to the defendant, would be permissible under appropriate circumstances. Indeed, in an earlier case, the Second Circuit had declined an opportunity to reverse a class certification granted on the assumption that class-wide calculation could be utilized if necessary. On the other hand, the Ninth Circuit appeared to read Eisen III to foreclose all approaches involving class-wide calculation of damages; moreover, the Ninth Circuit's own analysis implied that all of the parts of the fluid recovery procedure were unacceptable. Purposive analysis of the Clayton Act indicates, however, that class-wide calculation of damages without fluid distribution should not be foreclosed, and Eisen III and the Hotel Telephone Charges case should therefore be read narrowly on this issue.

The principles governing damages assessment in antitrust actions are quite similar to those which the Fifth Circuit called upon in Pettway to justify classwide calculation in a Title VII case. In Bigelow v. RKO Radio Pictures, Inc., the Supreme Court held that "the jury may make a just and reasonable estimate of the damage based on relevant data," and noted that "the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." Where a wrongdoer has caused a substantial amount of harm to a class, but the relatively small amount of injury imposed on each class member makes individual damage trials impracticable, class-wide calculation of damages with distribution through a proof-of-claim procedure would appear to be the most precise method available for compensating injured individuals. Although this procedure might lead to overcompensation, the average treble damages claim was $6.00 in Hotel Telephone Charges, see 500 F.2d at 88, and $3.90 in Eisen, 479 F.2d at 1010.

415 The average treble damages claim was $6.00 in Hotel Telephone Charges, see 500 F.2d at 88, and $3.90 in Eisen, 479 F.2d at 1010.
416 See 479 F.2d at 1014, 1016–18.
418 See In re Antibiotic Antitrust Actions, 333 F. Supp. 278, 281–82 (S.D.N.Y.), mandamus denied sub nom. Pfizer, Inc. v. Lord, 449 F.2d 119 (2d Cir. 1971). The Eisen III court attempted to distinguish this case on the basis that it arose at an early stage in the litigation. See 479 F.2d at 1012.
419 See 500 F.2d at 90.
420 See id. at 89–90.
422 327 U.S. 251 (1946).
423 Id. at 264–65.
424 Utilization of statistical techniques should therefore be permissible unless...
sation of some persons, utilization of appropriate safeguards in the proof-of-claim stage should preclude the substantial windfalls to non-class members which are possible with a fluid distribution mechanism. Given the strong deterrent and disgorgement policies of the Clayton Act, the degree of compensation achieved by a proof-of-claim process should satisfy the Act's requirement that private suits carry out a compensatory function. Finally, in contrast to fluid distribution, the purpose of the Act's treble damages provision is served by the proof-of-claim mechanism. Since individuals are required to come forward and file claims, trebling the claimants' actual damages affords necessary encouragement for private enforcement of the antitrust laws. Thus, regardless of whether treble damages are considered to preempt fluid distribution, the proof-of-claim procedure does not appear to be preempted.

VI. SUPERVISING SETTLEMENTS

Most class actions for damages brought under rule 23 have been settled or dismissed before trial. Formal settlements in suits seeking injunctive relief have also been common. Moreover, in formally litigated actions for complex structural injunctions, judges have often relied on a process of negotiation between the parties to aid in shaping the final decree. Because of the pervasiveness of negotiation in the resolution of class suits, a class action procedure that does not take settlement into account is incomplete.

Negotiation presents a serious threat to the attainment of a major purpose of class litigation — full realization of substantive policies — unless privately controlled decisions are harmonized

1 See p. 1373 n.5 supra.
3 See Chayes, The Role of the Judge in Public Law Litigation, supra at 1298-99.
4 See p. 1353 supra.
with public interests. Even when negotiations are completely in good faith, the outcome may not reflect the range of substantive concerns underlying the regulatory statute pursuant to which suit has been brought, because the parties may not share such a broad range of interests. In addition, the parties may be willing to trade statutory entitlements for benefits to which they have no legal claim. Consistency between adjudicated and negotiated resolutions of the class suit can thus be maintained only if the parties are required to obtain permission from the judge before settling. Indeed, especially if the settlement produces a decree which will modify the behavior of the class members, the concern that all affected interests be heard in the shaping of relief implicates essentially the same role for the judge as when he supervises negotiation of a decree after liability has been found at trial. Moreover, judicial supervision of the settlement may be essential for creating a constitutionally binding judgment, and such binding effect is both desirable from the standpoint of efficiency and necessary to allow the class representative to bargain in the name of the class as a whole.

Private negotiations of class action issues raise a particularly great danger of inadequate representation because the attorney negotiating on behalf of the class must ordinarily forego some relief beneficial to some or all class members in order to avoid the need for trial and must therefore rank possible outcomes in order of preference. During bargaining the class attorney may be forced to rely more heavily than usual upon the named plaintiff to determine class desires. A plaintiff and his attorney may erroneously conclude that the representative party’s views mirror those of the class, leading them to make concessions which are disproportionately costly from the perspective of absentees. Moreover, the danger will exist that a plaintiff and his attorney will deliberately shift the burden of a compromise to parties not before the court. In its crudest form, this sort of compromise involves a sell-out by the named plaintiff and the class attorney, in which they agree to discontinue the class suit in return for personal reward.

Before approving a settlement, therefore, the judge must assure himself that the class has been adequately represented during

5 See pp. 1373–75 supra.
8 See generally Chayes, supra note 3, at 1294.
9 See pp. 1411, 1414–15 supra.
10 See p. 1379 supra.
11 See p. 1593 infra.
12 See pp. 1540–46 infra.
settlement talks,\textsuperscript{13} a conclusion which will not follow automatically from a finding of adequacy for litigation purposes. Indeed, the judge may not even have an opportunity to evaluate the sufficiency of the named plaintiff and his counsel before they propose a compromise or seek to dismiss the actions. Settlement may come at any time in the litigation, including the period before certification. Even the propriety of class treatment and the definition of the class may be among the issues the parties attempt to decide for themselves.\textsuperscript{14} The judge who delays inquiry into the special problems of private negotiations in class actions may be faced with an impossible task once the parties have settled. At that time, all of the active litigants will have an interest in obtaining court approval for their settlement, and may be unwilling — or unable — to engage in adversary proceedings which could expose deficiencies in the agreement and the process which produced it.\textsuperscript{15} The judge will also have missed the opportunity to introduce into the bargaining process additional participants whose presence might have been necessary to produce a fair result.\textsuperscript{16} Although such parties could be asked to participate in hearings on the adequacy of the settlement, or could be added into another, court-ordered round of negotiation, their impact would be diminished in the first situation by a comparative lack of knowledge of the background of the case, and in the second, by having to work to upset an agreement already formulated.

The Federal Rules recognize that settlement in class suits presents exceptional problems not present in traditional binary litigation where settlement is not only freely allowed, but actually encouraged as a method of managing complex cases.\textsuperscript{17} Thus, rule 23(e) provides that:\textsuperscript{18}


\textsuperscript{14} See pp. 1540-46, 1555-60 infra.

\textsuperscript{15} See Chayes, supra note 3, at 1300.

\textsuperscript{16} See pp. 1560-65 infra.

\textsuperscript{17} See \textit{Manual for Complex Litigation}, pt. i § 1.21 (West ed. 1973) [hereinafter cited as \textit{Manual}].

\textsuperscript{18} \textit{Fed. R. Civ. P.} 23(e).

Rule 23.1, which governs derivative actions by shareholders, includes a virtually identical notice and approval provision. The most important distinction between class and derivative suits rests in the fact that a corporation has but one indivisible claim from which shareholders can derive a cause of action. Thus, once a shareholder accepts a dismissal of the claim with prejudice,
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.

The threat presented by dismissal or compromise should not, however, be overstated. These devices are still important methods for disposing of suits which prove to be meritless or which can be resolved in an entirely acceptable manner without trial. The challenge is to create procedures that will foster settlements which adequately protect absentees' interests, or at least serve to identify unfair outcomes when they are presented to the court. This further litigation is foreclosed. See 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1840 (1972) [hereinafter cited as WRIGHT & MILLER]. In contrast, if the named plaintiff in a class action seeks a dismissal with prejudice to himself only, other members of the class remain legally free to litigate their causes of action on an individual or group basis. As a result, extreme care must be exercised when using derivative suits as precedents for analyzing pre-certification dismissals of class actions; only derivative suits dismissed without prejudice may be relied upon legitimately in that context. Nevertheless, many of the standards developed in derivative suits for evaluating a compromise apply equally well to class actions settled on behalf of the entire class. Indeed, when reviewing such settlements courts often cite the two types of cases interchangeably. See, e.g., City of Detroit v. Grinnell Corp., 493 F.2d 448, 462 (2d Cir. 1974) (class action); Newman v. Stein, 464 F.2d 689, 692 (2d Cir.), cert. denied, 409 U.S. 1039 (1972) (derivative suit).

Similarly, the court approval requirement in original rule 23(c) resembles the one in rule 23(e), although the notice provisions differ. Therefore, much pre-1986 precedent continues to have validity. WRIGHT & MILLER, supra, § 1797 at 226.

Rule 23(e) can also serve as a limited aid to defendants. First, defendants benefit to the extent that notice and court approval ensure that the class will be bound to the settlement. See Panel on Class Actions, 28 BUS. LAW. 133, 154 (March 1973) (remarks of Ruder); pp. 1378-79 supra; p. 1559 & note 126 infra (discussing defendants' willingness to pay costs of rule 23(e) notice). Second, the incidence of strike suits in which the plaintiff brings a non-meritorious class claim in order to coerce settlement of his individual claim may decline: inasmuch as rule 23(e) requires that other class members be given notice and an opportunity to intervene and pursue class or individual claims, see pp. 1540-46 & notes 20-54 infra, defendants may be put in a position where it would be irrational to enter into an individual settlement with the strike suiter. See, e.g., Rothman v. Gould, 52 F.R.D. 494, 497 (S.D.N.Y. 1971) (Frankel, J.). See also T. SCHELLING, THE STRATEGY OF CONFLICT 22-28 (1963). Knowing that it will be difficult to obtain individual settlements, plaintiffs may choose not to bring a suit at all.

On the other hand, to the extent that plaintiffs are encouraged to pursue non-meritorious claims on behalf of the entire class, in the hope that defendants will settle the class claim rather than risking enormous damages liability, see pp. 1361-65, 1381-82 supra (discussing "legalized blackmail"), defendants might actually be made worse off by the requirement of rule 23(e). The source of protection against such "legalized blackmail" would appear to lie instead in summary judgment, see pp. 1419-20 supra, predomination requirements, see pp. 1504-16 supra, hours-worked standards for calculating class attorneys' fees, see pp. 1611-15 supra.
section of the Note, although working largely within the framework of rule 23, will attempt to sketch a general approach to settlement procedure.

A. Pre-Certification Dismissals and Settlements: Problems with Relief Offered to Class Members as Individual Litigants

1. Settlements of the Named Plaintiffs’ Claims. — In the pre-certification context, the settlement problem will often arise in the form of a motion to dismiss class allegations or to dismiss the action altogether. Either of these motions may follow a legitimate decision that a claim is atypical or meritless, but they may also be the culmination of a process in which the representative plaintiff increases his bargaining leverage by filing a class suit and then attempts to abandon the class when his personal objectives have been met. Such a use of the class action may properly be called an abuse because none of the policies underlying the creation of the device are advanced. These tactics will seldom succeed when class members’ claims could support individual suits since the defendant would not be able to avoid subsequent litigation by buying off the plaintiff in the filed action. However, when claims are small, the defendant might feel that settlement of the named plaintiff’s claim would, as a practical matter, foreclose the possibility of further litigation.

Whether or not the named plaintiff has been bought off by the defendant, dismissal of a class allegation may upset justified reliance created by the filing of the class suit. Class members with individually recoverable claims may have relied upon informal publicity about the existence of the class suit and abstained from filing individual or class claims, and class attorneys may have refrained from initiating additional class actions on behalf of small claimants. Although the statute of limitations is tolled when a

infra, and, if deemed necessary, expanded use of preliminary hearings, see pp. 1424-26 supra, or fee awards to prevailing defendants, see p. 1632, note 41 infra.


22 This would be true in a situation where the named plaintiff or a settling class attorney has unique financial or other resources to carry on the litigation or where it is unlikely that another class member would be willing to shoulder the burden of being a class representative. See Comment, Continuation and Representation of Class Actions Following Dismissal of the Class Representative, 1974 Duke L.J. 573, 587 n.60.

23 The terminology utilized in this Note for describing class members’ claims according to the feasibility of individual recovery is set forth at p. 1356 supra.

class suit is filed, it begins to run again if the case is dismissed. If a class member learned that a suit had been filed, but not that it had been terminated, he might lose his claim. Even if the class member learned of the dismissal in time to overcome the statute of limitations, the intervening delay might make the gathering of evidence and preparation of a case more difficult. Moreover, judicial failure to protect pre-certification reliance would disserve the policy of increasing access to courts, as well as judicial economy, since putative class members might be compelled to file overlapping class or individual suits in order to protect themselves.

Thus, while pre-certification dismissal does not legally bind absent class members, notice may be appropriate under some circumstances to afford absentees an opportunity to intervene and take over the class suit, or to file individual claims. The F.R.D. 396, 398 (N.D. Ohio 1973). Informal publicity would be particularly likely to reach members of the plaintiffs' bar, who might then counsel class members not to file additional class suits, see Greenfield v. Villager Indus., Inc., 483 F.2d 824, 832 n.9 (3d Cir. 1973). For instance, Class Action Reports, a newsletter directed largely to lawyers who bring class actions, lists newly filed cases even when no official notice has been given. See, e.g., Developments, 4 CLASS ACTION REP. 2, 76, 92 (1975). Of course, attorneys for class members with individually recoverable claims may also rely on this information and advise their clients not to file individual suits.

Failure to consider the role which attorneys play in determining whether suit is brought has led at least one commentator to underestimate the potential for reliance. Wheeler, Predismissal Notice and Statute of Limitations in Federal Class Actions After American Pipe & Construction Co. v. Utah, 48 S. CAL. L. REV. 771, 804-06 (1975).

26 See id. at 561 (dictum).
30 See, e.g., Washington v. Wyman, 54 F.R.D. 266, 270 (S.D.N.Y. 1971); Rothman v. Gould, 52 F.R.D. 494, 498 (S.D.N.Y. 1971); Comment, Involuntary Dismissals of Class Actions, 40 U. CHI. L. REV. 783, 801 (1973); cf. LaReau v. Manson, 383 F. Supp. 214, 218 (D. Conn. 1974) (contacting legal clinic to handle further prosecution). The court should withhold approval of any dismissal of the class claim pending notice to the class. If no suitable substitute for the original plaintiff comes forward, the judge will be forced to dismiss the claim, albeit without prejudice to absentees. See Rothman v. Gould, supra at 498; Comment, supra at 803-04.
judge's authority to order notice in the pre-certification situation is clear; the only question is when he should do so. Requiring a named plaintiff or the class attorney to pay the cost of notice before a class allegation can be dismissed could discourage the initiation of class actions. This problem can be controlled to

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If the judge relies upon rule 23(e), the rule's language might appear to leave him no option but to send notice whenever a class suit is dismissed. The mandatory aspect of the rule, however, has been interpreted to apply to the approval requirement only, leaving the court free to omit notice that would not further class interests. See 1B J. MOORE, FEDERAL PRACTICE ¶ 23.80 [2-1] (2d ed. 1975). But see Wheeler, supra note 24, at 810 (reading rule 23(e) to require notice in all cases to which it applies). If a court believes that rule 23(e) makes notice mandatory, it could utilize the analysis of this Note by rejecting application of rule 23(e) to pre-certification dismissals and operating instead under rule 23(d)(2) see id. at 809-11. However, because the flexible interpretation of rule 23(e) avoids such a formalistic approach, it seems more compatible with the functional orientation of the 1966 amendments. 33 Cf. Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 269 (S.D.N.Y. 1971), rev'd on other grounds, 479 F.2d 1005 (2d Cir. 1973), vacated and remanded, 417 U.S. 156 (1974) (Eisen IV) (certification notice). This problem would, of course, be mitigated if the defendant were required to pay for notice. Eisen IV appears to leave open the possibility of charging a defendant when his own activities in the litigation produce the need to contact the class. See 417 U.S. at 178-79; notes 61, 75, 79 infra.

Measures designed to protect the interests of class members from sellouts by the class attorney and named plaintiffs may have the undesirable side effect of encouraging attorneys to attempt to negotiate individual settlements before filing a complaint. Prefiling bargaining is particularly open to abuse: an attorney may threaten to file a class suit unless the claim of a particular individual is settled. This practice is inconsistent with full realization of substantive policy — the justification for providing class procedures — since substantive policy simply does not factor into the settlement process. Potential recovery in a class suit may be so much greater than the individual claim sought to be settled that the person threatened with class suit may satisfy the individual claim regardless of the merits of either the individual or the class claim.

The existence of summary judgment procedures, *see* pp. 1419-20 *supra*, may reduce the likelihood that a person threatened with a class suit will indeed agree to settle if he believes the class claim to be frivolous. Moreover, because the attorney raising the specter of class suit cannot guarantee that a representative suit will not be brought by another attorney should the individual claim be settled, the defendant may conclude that settling the individual claim would be pointless. *Cf.*
a large extent, however, by ordering relatively inexpensive forms of notice.34 Some courts and commentators have asserted that notice should follow a voluntary dismissal, but ordinarily may be omitted after an involuntary dismissal.35 Although this distinction may serve as a rough guide, analysis in terms of the substantive policies implicated by pre-certification dismissal shows that notice may be unnecessary after some voluntary terminations,36 and provides criteria for identifying cases where notice should be ordered even though the dismissal is involuntary.37

Several courts have ordered notice to absentees when the named plaintiff has moved for dismissal of a class allegation following satisfaction of his claim.38 Other courts, after first finding that the class would not have been certified even in the absence of an individual agreement, have dispensed with notice in such circumstances on the grounds that a proper class action did not exist.39 The latter approach would seem to be unwise. Given the lack of adversary proceedings where both parties support dis-


37 Under such a functional approach, the fact that an unopposed dismissal granted pursuant to a defense motion is formally "involuntary" would not have any significance in and of itself. Nor would it be necessary for the parties to act out an involuntary dismissal to avoid notice costs.


the judge cannot be confident that all factors which might bear on the propriety of certification will be brought to his attention. Where payment has passed, the probability that the class device has been abused is very great, and reliance interests may be at stake as well. Payment to the plaintiff strongly suggests that absentees' claims have merit, and a good faith representative would not be unduly deterred from initiating class suit by a requirement that he either pay notice costs or wait until the class claim has been resolved before compromising his own claim. Therefore, a prophylactic rule requiring notice in all cases where the parties fail to satisfy the judge that payment has not passed — whether voluntary or involuntary dismissal is sought — appears to be appropriate.


41 When individual class claims are large enough to support separate lawsuits, the likelihood that the defendant settled with the named plaintiff largely to eliminate the sole suitable representative for the class is reduced. On the other hand, the possibility is greater that class members who would have filed their own suits refrained from doing so because of informal publicity about the class complaint.

42 Indeed, if potential liability for notice costs deters bad faith representative plaintiffs from filing class suits, substantive policy will be served. However, since the possibility that defendant might agree to pay notice costs as part of the individual settlement could mitigate this deterrent effect, courts might consider exercising their ancillary powers, see Wolf v. Barkes, 348 F.2d 994, 998 (2d Cir.), cert. denied, 382 U.S. 941 (1965) (derivative suit); Webster Eisenlohr, Inc. v. Kalodner, 145 F.2d 316, 324 (3d Cir. 1944), cert. denied, 325 U.S. 867 (1945) (dissenting opinion); Stavrides v. Mellon Nat'l Bank & Trust Co., 60 F.R.D. 634, 637 & n.6 (W.D. Pa. 1973), to block consummation of an individual "sell out" agreement reached before or after certification, or to order the putative representative plaintiff to return any payment he has received. See Dole, The Settlement of Class Actions for Damages, 71 COLUM. L. REV. 971, 980-81 (1971). Such court control would appear more feasible than the alternative of allowing class members to sue an unfaithful named plaintiff or class attorney for breach of fiduciary duty, since the costs of bringing such a suit might be prohibitively high and the defendant might be judgment-proof.

43 See Dolgow v. Anderson, 53 F.R.D. 664, 690 (E.D.N.Y. 1971), aff'd, 464 F.2d 437 (2d Cir. 1972). Involuntary dismissals must be scrutinized because the plaintiff may have covertly agreed not to prosecute the action, or not to oppose a defense motion for summary judgment, to dismiss the claim, or to deny class certification. See Dole, supra note 42, at 982; Haudek I, supra note 35, at 776-79; Comment, supra note 30, at 791-92.

44 If the defendant withdraws his offer of an individual settlement when the court indicates it will order notice, the named plaintiff may decide he wishes to continue the class suit. However, a plaintiff who has attempted to obtain an individual compromise which ignores absentee interests ordinarily should not be certified as an adequate representative. Rothman v. Gould, 52 F.R.D. 494, 501 (S.D.N.Y. 1971); see Comment, supra note 30, at 799-801.
Some cases, and the American College of Trial Lawyers, have suggested that this prophylactic rule identifies all cases in which notice is necessary. However, given the possibility that a payment may be hidden successfully from the judge, as well as the potential for reliance independent of the presence of a payment, notice may be appropriate in other circumstances as well. Thus, where a representative plaintiff contends that discovery or further study has indicated that his claim is untenable, notice probably should be ordered unless the claim is patently non-meritorious. While neither fairness nor any other substantive policy requires that notice be sent if absentees' claims are groundless, a searching inquiry into the merits, or a requirement that reliance be demonstrated, would seem to be impracticable in a non-adversary context.

Moreover, if the plaintiff seeks to drop his class allegation on the basis of a failure to qualify under rules 23(a) or (b), or if a motion to deny certification is granted, the need for notice would appear to turn upon the composition of the class and the specific reason the named party's class allegation fails. If some absentees have individually recoverable claims, notice should


46 See SPECIAL COMMITTEE ON RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE, AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS 35–37 (1972) [hereinafter cited as AMERICAN COLLEGE OF TRIAL LAWYERS].

47 The Rules Advisory Committee is reported to be considering addition of a new rule 23(f) which would require a report to the court of any payment to a party or an attorney made as part of a pre-certification dismissal. See 4 CLASS ACTION REP. 290–91 (1975). Such a policing mechanism could mitigate the problem of uncovering covert settlements, since attorneys might hesitate to ignore the rule from fear of stiff sanctions if their noncompliance were discovered. Nevertheless, even with such a rule notice might still be required in the absence of payment in order to protect absentee reliance interests.

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49 See Laurenzano v. Texaco, Inc., 14 FED. RULES SERV. 2D 1262, 1262 (S.D.N.Y. 1971). Of course, under this approach, if the court dismisses an action for failure to state a claim or actually grants a motion for summary judgment against the named plaintiff or the class, notice need not be ordered.

49 See Laurenzano v. Texaco, Inc., 14 FED. RULES SERV. 2D 1262, 1263 (S.D.N.Y. 1971); AMERICAN COLLEGE OF TRIAL LAWYERS, supra note 46, at 36–37; Dole, supra note 42, at 982 & n.71. But see Comment, supra note 30, at 804 (merit of claim irrelevant to need for notice).
be ordered as a matter of course to protect their reliance interests.\textsuperscript{50} Assuming, however, that no class members have claims which would justify individual suits, notice would be pointless if class suit would fail because of a flaw, such as lack of predominance or numerosity, which could not be cured by any substitute plaintiff.\textsuperscript{51} Although the judge will not always have the advantage of an adversary proceeding, notice probably is not necessary when he is convinced that such a flaw exists: if the finding is correct there is no possibility of meaningful reliance. As a result, in the absence of any indication of abuse, the balance would appear to shift in favor of protecting good faith representatives from the burden of sending notice. On the other hand, where dismissal is based on a problem of inadequacy of representation which a different plaintiff might be able to correct, notice should normally be ordered to protect possible reliance. For example, where dismissal of a class allegation is sought because the plaintiff cannot afford ordinary rule 23(c)(2) notice costs, the court should order some kind of notice\textsuperscript{52} to class members so that they may intervene as representative plaintiffs.\textsuperscript{53} However, to avoid undue deterrence of plaintiffs acting in good faith, an exception might be made if the representative could not reasonably have anticipated his shortcoming.\textsuperscript{54}

2. Settlements Offered Individual Class Members. — Rather than settling with the representative plaintiff alone prior to certification,\textsuperscript{55} a defendant might contact a portion, or all, of the putative class members with individual offers of settlement.\textsuperscript{56} Indi-
vidual claim satisfaction may be an efficient means of accelerating settlement when a defendant anticipates losing the class suit or fears adverse publicity from extended litigation.\textsuperscript{57} In other circumstances, however, claim satisfaction may be used to prevent the full realization of substantive policies. Although class members whose claims have not been satisfied are not legally bound, their interests may be practically impaired. Premium settlements might be offered to selected members of the class, including named plaintiffs, whose resources or claims are necessary for the class suit. Even if offers are made to all class members,\textsuperscript{58} acceptance by only a fraction of the class might prevent the class suit from going forward, either because numerosity would be destroyed, or because the damages or settlement fund that the remaining claims could produce would not cover litigation costs.\textsuperscript{59} If a putative class member fears he will be left without a remedy, he may be coerced into accepting a settlement he considers inadequate. In addition, F.R.D. 572, 574 (D. Md. 1974) (Title VII); Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558, 562 (S.D. Fla. 1974), aff'd, 507 F.2d 1278 (5th Cir. 1975) (negligence), or mootness of the alleged wrong by purchasing the property which gives the individual legal standing to assert the claim, see, e.g., Berley v. Dreyfus & Co., 43 F.R.D. 397, 398 (S.D.N.Y. 1967) (securities); Webster Eisenlohr, Inc. v. Kalodner, 145 F.2d 316, 318 (3d Cir. 1944), cert. denied, 325 U.S. 867 (1945) (same). Although only the first form involves a formal release of the legal claim, the practical effect is the same, and courts should analyze both types of offers in the same manner. See Dole, supra note 42, at 999.


Plaintiffs' attorneys might hesitate to bring class suits if the defendant could deprive them of a fee by making a successful claim satisfaction offer. See Dole, supra note 42, at 994 & n.163. It seems clear, however, that if the offer comes in response to a filed or threatened class suit the class attorney is entitled to a fee. Kahan v. Rosenstiel, 424 F.2d 161, 166-67, 174 (3d Cir.), cert. denied, 398 U.S. 950 (1970); Blau v. Rayette-Faberge, Inc., 389 F.2d 469, 474-75 (2d Cir. 1968) (attorney entitled to fee if corporation makes settlement in response to threat of derivative suit); see Dawson, Lawyers and Involuntary Clients in Public Interest Litigation, 88 Harv. L. Rev. 849, 891-93 & n.167 (1975) (Title VII cases). If possible, the defendant should channel claim satisfaction through the court in order that a pro rata share of a proper fee, see pp. 1666-18 infra, may be deducted from each class member's recovery. If the defendant makes such a deduction impossible, for instance by sending checks directly to class members, then he should be required to pay the fee himself, see Kahan v. Rosentiel, supra at 166, on remand, 315 F. Supp. 1391, 1392 (D. Del. 1970). This system of fee awards should prevent undesirable deterrence of class action filings. See Dole, supra note 42, at 1000. Even so, it does not give any incentive for further litigation on behalf of non-accepting class members since it provides no basis for charging settling individuals with the legal costs of those who wish to pursue their claims further.
the defendant might induce class members to accept inadequate settlements by making fraudulent or misleading statements. Class members who have little legal sophistication or who are in an ongoing relationship with the defendant may be particularly subject to manipulation.60

The potential for abuse of process creates a central issue in pre-certification claim satisfaction — the degree to which the court should control the terms of the defendant’s offers. If claim satisfaction leads to a motion to dismiss the class allegation, the court has the power to exercise supervision pursuant to rule 23(e).61 Prior to that time, control may be asserted under rule 23(d),62 local court rules governing communications with class members,63 or the equitable power of a court to enter orders ancillary to the matters before it.64 Of course, one possibility would be to prohibit pre-certification individual claim satisfaction altogether. However, statutes should not be interpreted as prescribing so heavy a bias in favor of class action unless such a policy is clearly stated.65 As a matter of litigational efficiency, absentees should presumptively be given the opportunity to settle their disputes individually without being forced to become active participants in, or opt-outs from, a class suit.66

60 For example, such problems are likely to arise in Title VII cases, see, e.g., American Finance System, Inc. v. Harlow, 65 F.R.D. 572, 576 (D. Md. 1974) (class members may be ignorant of rights); Mack v. General Elec. Co., 329 F. Supp. 72, 76 (E.D. Pa. 1971) (former employee better plaintiff than current employee because free from “possible coercive influence” of employer), and in antitrust franchise litigation, see, e.g., Weight Watchers of Phila., Inc. v. Weight Watchers Int’l, Inc., 53 F.R.D. 647, 650, 653 (E.D.N.Y. 1971) (allegation of threats by franchisor to franchise operators).

61 See American Finance System, Inc. v. Harlow, 65 F.R.D. 572, 576 (D. Md. 1974); Dole, supra note 42, at 987. A presumption that the class allegation is proper will be necessary for rule 23(e) to apply if claim satisfaction precedes certification. See note 32 supra. Because the defendant’s activity creates the need for informing the non-accepting individual class members that they must prosecute a separate suit to protect their interests, he should pay the cost of notice. See Dole, supra note 42, at 992; note 33 supra.


63 See pp. 1597–98 & note 81 infra.

64 See note 42 supra.


66 In contrast, individual claim satisfaction following certification and notice but prior to resolution of the class claim generally should not be permitted. Once the court has determined that class action is appropriate and, in b(3) actions, given class members the opportunity to opt-out, the defendant should not be allowed to fragment the class through individual settlement offers. See generally In re International House of Pancakes Franchise Litigation, 1972 Trade Cas. ¶ 73,864 (W.D. Mo. 1972). In the unlikely event that a representative plaintiff
When all class members have individually recoverable claims, minimal judicial control will normally suffice. Any class member who does not receive, or who rejects, the settlement offer will be able to bring his own suit. In addition, putative class members are likely to have the assistance of an attorney, thus decreasing the possibility of fraud or coercion. If fraud is subsequently discovered, collateral attack will usually be financially feasible.

If the class is composed of a mix of individually recoverable and non-recoverable claims, or solely of individually non-recoverable claims, a more active judicial role is necessary. Class members with non-recoverable claims often will not be able to afford a personal attorney to evaluate the fairness of the offer and check for fraud or inaccuracy, and collateral attack probably will be infeasible even if fraud is uncovered. The court should therefore ensure that defendant's statements are clear, accurate, and complete through supervision either immediately prior or subsequent to the communications. However, such oversight may not

or class attorney unreasonably rejects a settlement offer which is quite favorable to the class, the court should treat the issue as one of adequacy of representation. See generally note 178 infra (discussing objection by named plaintiff).


70 In theory, small individual claims could be consolidated into another class action. However, the total incremental recovery if fraud were shown might be insufficient to support expensive class litigation.

71 See pp. 1507-1604 infra.

To be complete, the communications should contain an explanation of all of the options available to a class member—including the possibility of refusing the offer and remaining in a litigating class. The notice should also point out, however,
sufficiently protect absentee interests where class members are not legally sophisticated.\textsuperscript{72} In such cases, the class attorney should be permitted to enclose a rebuttal statement in the defendant’s communication.\textsuperscript{73} Although less effective, supervision of defendant communications would be possible as late as the rule 23(e) hearing which should follow a motion to dismiss the class allegation after a claim satisfaction. Finally, even if settlement offers are not fraudulent or misleading, the court should ensure that the type of relief offered does not contravene constitutional or statutory policy.\textsuperscript{74}

The court could minimize the coercion arising from the interdependency of class members’ individual settlement decisions by requiring a defendant to leave open his original offer for a reasonable period of time following dismissal of a class allegation as a result of claim satisfaction.\textsuperscript{75} Under this system, class members could make their initial choices without fear that a decision not to settle might result in no recovery at all. Additional judicial scrutiny is required when the defendant limits his offer to part of the class. Given the substantial danger that the defendant’s sole objective is impairment of the class suit,\textsuperscript{76} the court should permit claim satisfaction to be offered exclusively to a segment of the class only when the court first approves that segment as a legitimate subclass.\textsuperscript{77}

that further litigation may not be possible if enough class members accept to destroy numerosity or to make the suit financially infeasible.

\textsuperscript{72} See p. 1548 & note 60 supra.


In the event the class attorney supports the claim satisfaction offer, see, e.g., Webster Eisenlohr, Inc. v. Kalodner, 145 F.2d 316, 321 (3d Cir. 1944) (dissenting opinion), cert. denied, 325 U.S. 867 (1945), the court might appoint another lawyer to prepare an opposing recommendation, see p. 1561 infra (creation of subclasses); pp. 1561–65 infra (absentee advocate), or possibly even prepare a list of opposing reasons itself, cf. Feder v. Harrington, 58 F.R.D. 171, 177 (S.D.N.Y. 1972) (proposed settlement of entire class claim).

\textsuperscript{74} For instance, the steel industry consent decree approved in United States v. Allegheny-Ludlum Indus., Inc., 63 F.R.D. 1 (N.D. Ala. 1974), aff’d, 517 F.2d 826 (5th Cir. 1975), cert. denied, 96 S. Ct. 1684 (1976), allowed the defendants to offer each class member a back pay settlement in return for release of his Title VII claims. On appeal, the Fifth Circuit interpreted these releases to apply only to past incidents of discrimination, noting that prospective waivers would violate statutory policy. 517 F.2d at 853–55. If such supervision is necessary and valid for a government-negotiated consent decree, it would also appear to be appropriate for private settlements.

\textsuperscript{75} If additional notice is necessary to inform class members of this opportunity, the defendant should be responsible for it. See note 33 supra.

\textsuperscript{76} See Banks v. Lockheed-Georgia Co., 46 F.R.D. 442, 443 (N.D. Ga. 1968) (semble); Dole, supra note 42, at 990–91.

\textsuperscript{77} See pp. 1479–81 supra.
Even if the defendant does not improperly limit the scope of his offer, however, enough class members may initially accept the defendant's offer so that, without judicial intervention, numerosity would be destroyed or further class suit would be made financially impracticable.78 One commentator has suggested that for purposes of numerosity all original members of the class should be counted, and that class members who have accepted the offer should continue in the suit as a separate subclass interested in the possibility that further litigation will uncover fraud in the satisfaction process.79 While providing a possible solution to the numerosity issue, this proposal does not expressly deal with the more difficult question of the extent to which the costs of further class litigation may fairly be imposed on those class members who have accepted defendant's offer.

A better approach would be to analyze acceptances by a portion of the class as a disagreement over whether suit should be brought.80 Class members who accept claim satisfaction should be viewed as equivalent to absentees in suits not involving claim satisfaction who opt-out or, where opt-outs are not permitted, oppose class suit. Thus, if opt-outs would be permitted to defeat numerosity or practically foreclose class litigation, partial acceptance of a class-wide claim satisfaction offer should also be allowed to do so. If a class certification would be refused upon a showing that a given percentage of the class opposed the suit, then certification should also be denied where the same percentage accepts claim satisfaction.81

On the other hand, where an equivalent number of opt-outs or absentees opposed to the filing of suit would not be sufficient to defeat class certification, claim satisfaction should not bar class suit. In such situations, class members who accept a claim satisfaction offer should normally be treated as full members of the class both for numerosity purposes and for sharing of the total litigation costs of the suit.82 The amount accepted as a claim satis-

78 See p. 1547 & note 59 supra.
79 See Dole, supra note 42, at 991-92. The court in American Finance System, Inc. v. Harlow, 65 F.R.D. 572 (D. Md. 1974), cited Dole's suggestion with approval. Id. at 576. However, rather than adopting the subclass concept, the Harlow court indicated that it would apply a lenient standard for numerosity when ruling on a certification motion after a claim satisfaction offer had been made. Id.
80 See pp. 1493-95 supra.
81 However, when individual class claims would justify litigation, the defendant should provide notice to absentees informing them of their option to file a separate suit. See p. 1542 & note 33 supra.
82 Additional fees could be collected from any incremental recovery produced by further litigation or by requiring the defendant to withhold actual payment of claims until it is determined whether those who accept the offer will bear litigation
faction should be set off against the final recovery of these class members.  

B. Settlements Negotiated On Behalf of the Entire Class

There are three major sources of antagonism that may undermine adequacy of representation in the context of a settlement negotiated on behalf of the entire class: conflict between the attorney and the class; conflict between the representative plaintiff and the rest of the class; and conflict among competing interests within the class. Greatest attention has centered on attorney-class conflict. In damage suits, the attorney may be tempted to accept a settlement inadequate from the class’s perspective if the terms of the agreement guarantee him a large attorney’s fee. Similarly, especially in class actions seeking structural injunctions, the attorney may attempt to pursue his own ideological goals without regard to the desires of class members. Although such behavior would appear to violate the attorney’s obligation to the class, it is probably not realistic to expect voluntary compliance with this duty in all cases.

costs. If the defendant prevents such assessment he should become responsible for the plaintiffs’ attorneys’ fees. See note 59 supra.

Of course, this approach may cause defendants to condition their claim satisfaction offers upon dismissal of the class litigation, in which case the set-off issue will never arise.

These categories are not intended to cover every conceivable situation in which a class action settlement should be disapproved, but to provide a structured analysis for many of the more difficult issues facing a reviewing court. The problems that do not easily fit within one or more of the conflicts—such as a grossly inadequate settlement negotiated in good faith by an incompetent attorney—can be considered under a more generalized notion of “fairness” in the context of evaluating the strength of the plaintiff’s case. See pp. 1573–74 infra.

See pp. 1592–1604 infra. This problem can be controlled to some extent by requiring fees to be set by the court, see Jamison v. Butcher & Sherrerd, 68 F.R.D. 454, 470–71 (S.D.N.Y. 1975); Manual, supra note 17, pt. 1, § 146, at 45–46; pp. 1604–18 infra, on the basis of a formula focusing on the number of hours worked rather than the amount of the class recovery, see pp. 1611–15 infra. Control of fees will not, however, remove the conflict entirely since the lawyer must still recover something for the class to get any fee and may therefore be tempted to settle a difficult case.


See pp. 1592–97 infra.

To the extent that formally litigated actions for structural relief involve substantial elements of negotiation between the parties, see Chayes, supra note 3, the ideological conflict of interest can be expected to arise at trial as well as at settlement.
Conflicts of interests between the representative plaintiff and the rest of the class perhaps arise most frequently in the context of settlement agreements binding only on the representative and the defendant. However, such conflicts may also occur in settlements negotiated on behalf of the entire class, when the representative plaintiff designs an allocation plan that gives him a disproportionate share in the class relief. For example, when a state is acting as the representative plaintiff in a consumer class action, it might attempt to increase its own final recovery by agreeing to a distribution scheme in which consumers must file a claim within an extremely short time limit if they wish to prevent their shares from being forfeited to the state.

When the position advocated by the named plaintiff is shared by some class members but opposed by others, the antagonism should be analyzed as a conflict between competing interests within the class. Although some intra-class conflicts can be anticipated and dealt with early in the litigation, many will not surface until the resolution stage. In structural injunction actions, whether formally settled or litigated, class members who agree that the defendant has violated their constitutional or statutory rights may disagree as to the proper institutional change which the court should order. In *Calhoun v. Cook*, for instance, different as-
sociations claiming to speak for Atlanta's black parents agreed on the need to correct past school segregation, but split dramatically over the proper remedy. Some insisted upon busing to integrate the classrooms while others contended that increasing the number of black school administrators would be more productive.

In damage actions, identically situated class members may disagree as to what constitutes a fair settlement of their claims. More fundamentally, objective differences within the class may become the source of conflict when the class representative bargains for a settlement which does or should include different amounts of relief for different groups of class members. For example, in *West Virginia v. Chas. Pfizer & Co.* the defendants in an antitrust case offered plaintiffs, including consumers, retail-wholesalers, and governmental agencies, $100 million to be allocated among them. Disagreement over the proper division of the fund produced the only real controversy over the adequacy of the settlement.

The problems can multiply when the available remedies include a mixture of structural change and compensatory relief, and the settlement involves trading off one form of relief against the other. Thus, in *Air Line Stewards & Stewardesses Association, Local 550 v. American Airlines, Inc.* former employees who had been fired due to a no-pregnancy regulation which violated Title VII preferred immediate reinstatement with full seniority for the period between dismissal and rehiring, while current employees, though pleased to see the regulation eliminated, wished to preserve their own seniority advantages. Moreover, within the subclass of former employees, some preferred immediate reinstatement,

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98 The organizations included the national NAACP, the Atlanta chapter of the NAACP, and CORE. Calhoun v. Cook, 362 F. Supp. 1249, 1250 & n.2 (N.D. Ga.), aff'd, 522 F.2d 717 (5th Cir. 1975).
102 490 F.2d 636 (7th Cir. 1973), cert. denied, 416 U.S. 993 (1974).
103 See id. at 640.
while others were willing to accept some delay to obtain back pay.\textsuperscript{104}

\textbf{1. Structuring the Settlement Process to Promote Adequacy of Representation.} — Two procedural strategies are available to the judge to minimize the potential for conflicts of interest or to identify and correct them when they occur. First, the judge can supervise the party structure of negotiations to facilitate the likelihood of a fair settlement. Second, the judge can create procedures that will channel information to him during negotiation so that he can better evaluate the fairness of any final proposal. These strategies, while analytically distinct, reinforce each other. To the extent that oversight is made effective, the parties, in seeking to avoid reversal, are more likely to reach an adequate settlement on their own; similarly, to the extent that the parties can be trusted to reach a fair settlement on their own, the burden on the court is lessened.

\textit{(a) The Problem of the Tentative Settlement Class.} — The most elaborate settlement mechanism developed for class actions is the tentative settlement class, in which the parties negotiate the definition of the class as well as the content of the relief.\textsuperscript{105} After agreement is reached the judge is asked to give preliminary approval and to authorize notice to class members,\textsuperscript{106} informing them of the terms of the settlement and, in effect, giving them four options: to opt-out;\textsuperscript{107} to accept the settlement and file a claim; to file a claim and remain in the class but to protest the settlement at a final approval hearing; or to do nothing, in which case they are bound without the chance to share in the recovery. The judge then holds a final hearing and rules on the appropriateness

\textsuperscript{104} Id.


\textsuperscript{107} If formation of a tentative settlement class comes after the court has already certified and sent out notice for a smaller class, see pp. 1559-60 infra, only the "new" class members should be given an opportunity to opt out.
of the class definition and the adequacy of the settlement. If the judge rejects the proposal, or if an unexpectedly large number of class members opt out, the defendant may renounce his class stipulation and either oppose class treatment altogether or argue for a narrower definition.\(^\text{108}\)

Characteristically, parties using the tentative settlement class device have succeeded in minimizing judicial involvement pending completion of the settlement package.\(^\text{109}\) Apparently assuming that this absence of early supervision is an inherent part of the tentative settlement class process, the *Manual for Complex Litigation* concludes that tentative settlement classes "should never be formed."\(^\text{110}\) The *Manual* 's basic arguments appear to be that this procedure fails to provide adequate representation of absentees' interests and, as a result, dilutes their bargaining power; de-

\(^{108}\) A somewhat analogous procedure was adopted in *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), aff'd, 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971). Facing over 60 class actions brought by government entities, wholesale druggists, and retail drug stores, the Pfizer defendants attempted to satisfy all of them at once with a $100,000,000 offer. To administer the settlement, the court created a "temporary national class action," id. at 723, and sent a notice to governmental entities acting as representative plaintiffs, inquiring whether they wished to participate in the "global" settlement, either as members of the temporary class or independently, id. The judge also consolidated all class actions brought by wholesale druggists and retail drug stores.

After all but seven of the state class representatives accepted the settlement offer, id. at 724, the judge certified the classes, id., and ordered rule 23(c)(2) notice to be given to class members. The defendants, however, reserved the right to adjust their offer to reflect the number opting out after either of these notices, or to withdraw it completely if the number participating in the settlement diminished significantly. Id. at 723. When the defendants elected to continue, with a reduction in the settlement fund attributable to the seven self-excluded states, the accepting plaintiffs were given an opportunity to devise an allocation system, id., but since they could not agree among themselves, the defendants finally selected one, id. at 731. At that point the judge ordered 23(e) notice, id. at 723, 732, and, subsequently, approved the settlement, id. at 744.

The Pfizer approach differs from a tentative settlement class procedure inasmuch as the class actions were actually certified before the settlement was approved and separate notice was sent for certification and settlement approval. If the judge had rejected the compromise, the defendants might have been forced to accept these classes for litigation. See Note, supra note 105, at 1466–67 n.32. However, the Pfizer parties clearly expected the settlements to win approval and understood that the defendants acquiesced in the formation of a class including all claimants only for settlement purposes. Moreover, the defendants' option to withdraw or revise their offer after the results of the opt-out notice were known resembles the mechanics of a tentative settlement class. Pfizer, therefore, provides much relevant insight into the issues posed by a finely tuned tentative settlement class procedure.


\(^{110}\) *Manual*, supra note 17, pt. 1, § 1.46, at 43.
lays the opportunity for class members to pursue individual litigation; and does not generate the information necessary for class members and the judge to evaluate intelligently the settlement proposal. Proponents of the tentative settlement class respond to criticisms by contending that the mechanism is actually helpful to absentees, since it allows them to opt out with knowledge of the specific benefits of remaining in the class. Proponents also contend that settlements of large consumer class actions would not be possible without tentative settlement classes, and that problems of representation in a tentative settlement class are no worse than in any class settlement.

When all class members have individually recoverable claims, a tentative settlement class may be acceptable. In that situation, class members have a genuine option to opt out of the settlement and can benefit from specific knowledge of the amount of recovery they can expect from remaining in the class. Moreover, since a class member with a recoverable claim is likely to have his own attorney and an incentive to investigate his claim, he may be able to make an effective evaluation of the settlement despite the lack of information supplied by the negotiating parties. To the extent that absentees are able to exercise supervision over the settlement, the weak posture of the judge becomes less troubling. On the other hand, large claimants might be able to gather even more detailed information about the actual negotiations if there

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111 Id. at 43–44. The Manual also condemns tentative settlement classes as unauthorized by rule 23. Id. at 43. However, a tentative class would appear to be a form of conditional certification, sanctioned by rule 23(c)(1), see, e.g., Esplin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968), cert. denied, 394 U.S. 928 (1969) (class definition may be revised); Dolgow v. Anderson, 53 F.R.D. 664, 667–68 (E.D. N.Y. 1971), aff'd, 454 F.2d 437 (2d Cir. 1972) (same); pp. 1418–27 infra, and its acceptability should therefore be analyzed in terms of the purposes of class actions. As to the propriety of delaying certification while settlement talks progress, see pp. 1558–60 & notes 122–128 infra; pp. 1426–27 supra.

112 In re Four Seasons Sec. Laws Litigation, 58 F.R.D. 19, 31 (W.D. Okla. 1972); see, e.g., Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 323 F. Supp. 364, 374 (E.D. Pa. 1970) (approving tentative settlement class), 322 F. Supp. 834 (E.D. Pa.) (approving settlement), modified on other grounds sub nom. Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30 (3d Cir. 1971) (affirming settlement and tentative settlement class procedure). Under the procedure utilized in the Pfizer case, see note 108 supra, the consequences of class membership were not fully established prior to the deadline for opting out, since the allocation plan had not been formulated.

113 See, e.g., City of Detroit v. Grinnell Corp., 495 F.2d 448, 466 (2d Cir. 1974); Panel Discussion, Antitrust Class Actions, 41 Antitrust L.J. 321, 347 (1972) (remarks of Clark concerning Pfizer litigation).

114 See Note, supra note 105, at 1468.

is early certification with the opportunity to intervene. In addition, an absentee might have his own suit delayed if all similar cases are consolidated for pre-trial proceedings and the judge refuses to allow any discovery until the tentative class settlement has been negotiated. On balance, however, these costs would appear to be offset by the advantage of being able to opt out with knowledge of the benefits of remaining in the class.

In contrast, when a significant number of class members' claims are non-recoverable or nonviable, the Manual's concerns about inadequate representation appear well-founded. Defendants may exploit the possibility of attorney-class conflict by shopping among attorneys who claim to represent the class until they find one with "reasonable" demands. Intra-class conflicts are also likely since both the class attorney and the defendant will often have incentive to stipulate to an overly broad class. The class attorney may want to increase the size of the class in order to maximize his fee. If subsequent class or individual suits are probable, the defendant may want to save litigation costs by quieting all claims with a single payment.

When individual claims are small, absentees probably will be unable to protect themselves against inadequate representation. Small claimants will seldom be able to hire a lawyer to help them evaluate the offer. Opting out will often be an illusory choice, since the individual cannot afford to bring his own suit and will probably not wish to gamble that a sufficient number of other absentees will opt out to form a new class. Thus, effective judicial supervision becomes vital. The judge's lack of information, however, may prevent him from fulfilling his guardian role.

These problems can be overcome, however, if the judge exercises early supervision of the settlement process. The judge


118 This danger will be present even if the court calculates fees on the basis of an hours-worked standard: one of the factors usually taken into account is quality of performance, which might be measured at least in part by the size of the settlement. See pp. 1611-15 & note 146 infra. Moreover, the class attorney may not resist a defendant's desire for a large class if the procedure includes some mechanism for easing the financial burden of notice costs.


120 Since individual suits are unfeasible in this situation, the Manual's objection that use of a tentative settlement class unfairly delays litigation of the claim, Manual, supra note 17, pt. 1, § 1.46, at 44, is inapplicable.

should prevent plaintiff-shopping and similar abuses by designating one attorney as the official class negotiator.\textsuperscript{122} The court might initiate some discussion of proper class size among the parties so it can benefit from adversary proceedings on the issue before both sides find it advantageous to argue for a large class. Where appropriate, the judge should form subclasses to ensure that all viewpoints are represented in subsequent negotiations.\textsuperscript{123}

In many cases, the judge need not actually certify the class and order notice, but may rely upon more informal control.\textsuperscript{124} In fact, if \textit{Eisen}-type notice that would strain the named plaintiff's financial resources is required,\textsuperscript{125} class interests may be advanced by delaying notice until a settlement is imminent and the defendant may be willing to pay the costs.\textsuperscript{126} On the other hand, if the case raises complicated intra-class conflicts, the judge might order sampling notice to help him decide whether subclassing is necessary.\textsuperscript{127}

Given effective early supervision,\textsuperscript{128} expansion of class size solely for the purpose of settlement may be unobjectionable. Such expansion would appear to be appropriate when the defendant makes the enlargement possible by waiving a right, such as an individual hearing on each class member's damages, that might have made full litigation of the class claim unmanageable.\textsuperscript{129} For ex-

\textsuperscript{122} See Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30, 33 (3d Cir. 1971).

\textsuperscript{123} See pp. 1560–61 & notes 136–137 infra.

\textsuperscript{124} See pp. 1441–44 supra.

\textsuperscript{125} See p. 1403 supra.

\textsuperscript{126} See City of Detroit v. Grinnell Corp., 495 F.2d 448, 454 (2d Cir. 1974). See also Panel on Class Actions, 28 Bus. Lawyer 133, 154 (Mar. 1973) (Ruder remarks discussing defendant concern over protecting settlement from collateral attack).


\textsuperscript{128} The court's insistence that it establish early control over the case might encourage the parties to negotiate a settlement before the complaint is filed. In order to bind absentees, however, the parties will need to file suit and obtain court approval. Although the parties might attempt to disguise a prefiling agreement by acting out a series of talks, the judge should be suspicious when the parties settle a complicated case with unusual speed. Participation by an absentee advocate, see pp. 1561–64 & notes 138–152 infra, would make this strategy particularly difficult to implement. Moreover, the judge could require counsel from both sides to submit affidavits stating whether any prefiling discussions had taken place, see McGough & Lerach, supra note 32, at 467, which would make perjury charges and other stiff sanctions possible if the lawyers were caught concealing early discussions.

ample, in *Wells v. Bank of America* a sex discrimination case, the judge exercised significant control over the litigation, through conferences with all of the parties, while settlement talks took place. Although the court initially determined that problems of proving individualized harm and measuring damages would make a class encompassing more than a single department of the bank’s headquarters unmanageable, after the parties reached an agreement the judge certified a bank-wide class for settlement purposes only and approved their compromise. An expanded settlement class would also appear to be appropriate when the defendant agrees to pay notice costs which otherwise would have forced the representative plaintiff and his attorney to define the class more narrowly.

Nevertheless, a tentative settlement class should not be permitted when the judge would have created subclasses for the settlement negotiations had the larger class been involved originally, or if the expanded class includes unresolvable conflicts which would have prevented the class suit from going forward. Assuming that additional class or individual suits are possible, confining the benefits of the initial class action to a smaller number of individuals is preferable to approving a settlement made possible only by undermining absentees’ right to adequate representation.

(b) Participants in the Settlement Negotiations. — Adoption of an active role in settlement negotiations gives the judge greater insight into the fairness of any final compromise and tends to encourage the parties to weigh absentee interests more carefully. However, the judge in a class suit must take care that any attempt to mediate the dispute does not prejudice his final assessment of a settlement under rule 23(e), nor lead him to favor one side over the other if the case goes to trial. In addition, mediation designed to protect absentees’ interests as well as to bring about an


134 See pp. 1493-98 *supra*.


136 See p. 1385 *supra*. 
agreement might consume an unreasonable amount of the judge's time. Therefore, the judge should attempt to identify intra-class conflicts at the outset of negotiations and should introduce a spokesman for each interest through the creation of subclasses.\textsuperscript{137} Even so, initial subclassing will not always be an effective judicial response to the conflicts threatening adequacy of representation. Intra-class conflicts may not emerge until negotiations are in progress, at which point they might be overlooked by the judge and ignored by the bargaining parties. Moreover, when subclassing is inappropriate because there are no intra-class conflicts, attorney-class or representative plaintiff-class conflicts may still occur.

Thus, in some cases it may be useful to create a new court officer — an "absentee advocate" — whose task would be to monitor the negotiations on behalf of absent class members. This official would be appointed when the court determined that settlement negotiations were imminent.\textsuperscript{138} The absentee advocate would


Each subclass representative presumably would have some form of veto power over a proposed settlement. In class actions for damages, the subclass representative could refuse to include his group in the compromise, but the defendant would be free to settle with the rest of the class. See West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710, 723–24 (S.D.N.Y. 1970), aff'd, 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971) (seven states acting as class representatives opted out of compromise). In a suit seeking a structural injunction, where a subclass could not effectively remove itself from the impact of the settlement, failure to satisfy a subclass spokesman ordinarily should force the entire case to trial. See Calhoun v. Cook, 487 F.2d 680, 682–83 (5th Cir. 1973) (trial court not allowed to treat case as settled when several plaintiff attorneys repudiated proposed compromise).

Regardless of the form of relief, however, the subclass representative's veto could be overridden upon a showing that the veto constitutes inadequate representation.\textsuperscript{138} To enforce this requirement, the judge could refuse to consider any compromise negotiated before the parties gave him a chance to appoint an absentee advocate. See also note 128 supra (means for regulating prefiling negotiations).

In contrast, when the court desires assistance in drafting a formal decree after a litigated finding of liability, appointment of a master, see generally Kaufman, Masters in The Federal Courts: Rule 53, 58 COLUM. L. REV. 452 (1958); Note, Masters and Magistrates in the Federal Courts, 88 HARV. L. REV. 779 (1975), might be more appropriate since the judge would be delegating traditional judicial duties.
familiarize himself with the case \footnote{See, e.g., Draft Recommendations of the Special Masters, Morgan v. Kerrigan, Civil No. 72-911-G (D. Mass., Mar. 21, 1974). See generally Fed. R. Civ. P. 53.} and attempt to identify conflicts threatening adequacy of representation. The advocate's participation in negotiations would give him access to information about the actual bargaining — including the options considered and rejected, the topics discussed, the defendant's reaction to various proposals, and the amount of compromise necessary to obtain a settlement — that the judge needs to evaluate effectively any final proposal.\footnote{See pp. 1565-76 infra (final settlement hearing). See also Chayes, supra note 3, at 1300-01 & nn. 86-91.} Moreover, if the absentee advocate identified a new intra-class conflict during the course of the negotiations, he would have the duty to inform the judge that further subclassing might be necessary.\footnote{Of course, even if no absentee advocate were appointed, the judge presiding over a class action should remain alert to the possibility that intra-class conflicts will emerge during settlement discussions, and should create new subclasses when appropriate.} If the advocate determined that the class attorney was ready to accept too little for the class or that a plaintiff was exploiting his representative status for his own ends, he could caution the parties and, if his warning were unheeded, bring the problem to the judge's attention.\footnote{Unlike subclass representatives, see note 137 supra, the absentee advocate would have no direct veto power over a proposed settlement since he would not be the primary representative of the class or any portion thereof.} Finally, the absentee advocate might have the time and background to mediate the dispute to a limited extent and help the parties reach an acceptable compromise.\footnote{There is some question, however, concerning the degree to which an advocate can function as an effective mediator. See p. 1386 supra. Moreover, if the judge wishes to refer pretrial controversies to a judicially created officer, see Kaufman, supra note 138, at 465, he should appoint a master, rather than giving such responsibilities to an absentee advocate who could not rule on these disputes impartially. See also note 138 supra.}

The concept of a special participant to protect absent interests in a lawsuit is not new. Although an absentee advocate as such does not appear to have been used in a class action, staff members of government agencies have occasionally participated in private settlement negotiations. For instance, in Wells v. Bank of America,\footnote{Civil No. 71-409 CBR (N.D. Cal., May 30, 1974).} the EEOC intervened to protect absentee interests when a lack of resources led the named plaintiff to consider accepting a settlement that the agency deemed inadequate.\footnote{See Consent Decree in Full Settlement of Civil Action, Wells v. Bank of America, Civil No. 71-409, at 2-3 (N.D. Cal., May 30, 1974). See also Pettway v. American Cast Iron & Pipe Co., 494 F.2d 211, 258 (5th Cir. 1974). But see}
any event, courts appear to have the power to create an absentee advocate pursuant to rule 23(d) or, more generally, the courts’ inherent power to provide “appropriate instruments” for carrying out judicial work.\footnote{See Ex parte Peterson, 253 U.S. 300, 312–13 (1920). While the functions of an absentee advocate may not fit squarely within those enumerated for masters in \textit{Fed. R. Civ. P.} 53, that rule has never been interpreted to be the exclusive source of power for creating judicial assistants. \textit{Harris, The Title VII Administrator: A Case in Judicial Flexibility}, 60 \textit{Cornell L. Rev.} 53, 57 (1974); see \textit{Mathews v. Weber}, 96 S. Ct. 549, 555–56 (1976) (magistrates).}

Absentee interests may be sufficiently protected and an absentee advocate as such may therefore be unnecessary when a government agency with expertise in the appropriate body of law chooses to intervene in a class action.\footnote{See \textit{Jamison v. Butcher & Sherrerd}, 68 F.R.D. 479, 483 (E.D. Pa. 1975). \textit{See generally} \textit{Stewart, supra} note 87, at 1685–86 (agency capture by regulated entities).} However, before depending upon agency attorneys to guard class rights, the judge should satisfy himself that the agency viewpoint does not significantly diverge from class concerns.\footnote{Informal intervention might suffice: an agency might allow a staff member to participate even though it is unwilling to make the resource commitment required for formal intervention, see p. 1571 & note 201 infra.} In doing so, the judge should consider the likelihood that class members would accept some risk of agency bias in return for government protection which is supplied free of charge.

In the absence of an acceptable government intervenor,\footnote{\textit{Cf. Eisen v. Carlisle & Jacquelin}, 52 F.D.R. 253, 262 (S.D.N.Y. 1971), \textit{rev'd on other grounds}, 479 F.2d 1005 (2d Cir. 1973), \textit{vacated and remanded}, 417 U.S. 156 (1974) (use of master to calculate damages might be prohibitively expensive).} the judge might conclude that an absentee advocate should be appointed to help ensure adequacy of representation. Among those he might consider appointing would be attorneys donating their time as part of a pro bono project, other attorneys, and retired judges. An absentee advocate from either of the last two groups presumably would charge a fee for his services, so the source of compensation and the method of computing it must be considered in determining whether use of an absentee advocate would be appropriate.\footnote{See generally \textit{Stewart, supra} note 87, at 1685–86 (agency capture by regulated entities).}

Because the absentee advocate’s function would be to protect the interests of class members, his compensation should be sub-
tracted from any settlement or damages fund.\textsuperscript{151} However, while the litigation progressed, or if no damages were recovered, the representative plaintiff or his attorney would be responsible for the advocate's fee,\textsuperscript{152} unless the defendant agreed otherwise.\textsuperscript{153} In order to avoid pressure on the absentee advocate to accept an inadequate settlement, his fee should be computed on an hourly basis and should not be contingent upon recovery by the class. The representative plaintiff, therefore, should be required to post security at the time the advocate is appointed by the judge.\textsuperscript{155} Although placing this financial burden on the class might appear to have the undesirable effect of increasing the class attorney's incentive to accept an early settlement inadequate from the class' perspective, the advocate's presence would itself provide a check against this danger. On the other hand, the financial burden might in some cases prevent the class suit from going forward.\textsuperscript{156}

Even if an attorney is willing to fill the position on a pro bono basis, creation of an absentee advocate would not be costless. Injection of an additional participant into settlement negotiations may hinder the bargaining process and discourage continuation of class suit.\textsuperscript{157} An absentee advocate should, therefore, be appointed only in those cases in which a significant number of class members are likely to receive a net benefit from his activities after all relevant costs are considered. To determine the potential benefit of an absentee advocate, the judge must evaluate the prob-

\textsuperscript{151} If the governing statute allows the plaintiff to recover attorneys' fees, he should be able to collect the absentee advocate's fee as well. Without a statutory fee award, use of an absentee advocate might become an intolerable financial burden on plaintiffs in injunction cases that do not generate a damages fund.

\textsuperscript{152} This arrangement is analogous to that for notice and other litigation costs. See pp. 1618–23 infra.

\textsuperscript{153} Cf. Stipulation Re Class Actions, Masterson v. Union Oil Co., Civil No. 69–331–ALS (C.D. Cal., filed Dec. 16, 1969) (agreement by defendant to pay for three special masters).

\textsuperscript{154} There is little danger that the absentee advocate would purposely delay negotiations to increase his fee; once the parties believe that their agreement is fair they can present it to the judge and argue against the advocate's reasons for disapproving it. See note 142 supra (absentee advocate cannot veto settlement).

\textsuperscript{155} Cf. 5A J. Moore, supra note 32, \textsection 53.04[1], at 2928 (masters).


\textsuperscript{157} On the other hand, the absentee advocate's role as a mediator might advance agreement. See McCray v. Beatty, 64 F.R.D. 107, 109 (D.N.J. 1974); p. 1562 & note 143 supra.
ability that conflicts threatening adequacy of representation will arise, and the availability of alternative means for controlling them.

If each class member's claim is individually recoverable, if there has already been subclassing, or if the judge has an unusual amount of information about the case, there will usually be sufficient checks against any intra-class, representative plaintiff-class, or attorney-class conflicts that might arise. On the other hand, in cases where an enlargement of the class for settlement purposes is likely, an absentee advocate might prevent over-expansion that would cause intra-class conflicts. Similarly, an advocate might be useful in a very complicated case in which the judge might not be able to identify all appropriate subclasses until bargaining is in progress or might have difficulty evaluating the fairness of a settlement without specific information on the negotiations. For example, in a class suit seeking a structural injunction, an absentee advocate might be warranted when the case excites strong intra-class or attorney-class conflict over the proper remedy for defendant's violation of class members' rights. In a damage action, such special supervision might be necessary when the class is composed of a large number of individuals holding small claims, since the probability of an attorney-class conflict is high, and the dispute over the allocation of a settlement fund may not surface until very late in the negotiations.

2. Review of the Settlement Proposal. — When the negotiating parties reach agreement and propose a settlement of the class claim, the notice and court approval requirements of rule 23(e) must be met. Normally, the judge makes a preliminary evaluation of the proposal and, if the proposal is not rejected on its face,
orders notice to the class members informing them of the settlement’s terms and of their right to appear at a formal approval hearing in which the proponents of the plan have the burden of demonstrating its adequacy. Since the parties who negotiated the settlement are not likely to expose its weaknesses, the court usually must rely upon objecting class members, discovery materials, outside experts, an absentee advocate if there is one, and its own efforts to uncover deficiencies in the settlement.

(a) Notice and the Role of Objectors. — In class actions seeking structural injunctions, sampling or publication notice will usually suffice, since its major purpose is to encourage class members to come forward to help the judge identify conflicts over the proper form of relief. Similarly, when the judge is assuming primary responsibility for ensuring adequacy of representation in a damage action, informing the class through the sampling or publication method should be acceptable. On the other hand, if class members in an action involving monetary relief are heavily relied upon to determine the adequacy of the settlement, or if the notice includes a proof-of-claim form or instructions about making a claim, “best practicable” notice would appear to be required by due process and, in any event, will be necessary if


164 Manual, supra note 17, pt. 1, § 1.46, at 40. Unless class members have not previously been given an opportunity to exclude themselves from the class, see pp. 1559–60 & notes 129–133 supra (discussing tentative settlement class), they should not be given a chance to opt out at this stage of the litigation. Defendants might be discouraged from settling if class members were given a second opportunity to opt out. See p. 1379 supra.


166 See pp. 1441–44 supra.

167 See p. 1568 & notes 177–178 infra.


171 See Greenfield v. Villager Indus., Inc, 483 F.2d 824, 833–34 (3d Cir. 1973); If the settlement notice includes a proof-of-claim form, there will be an obvious need to contact directly as many class members as possible so they can share in the distribution of the fund, particularly if the relevant statute mandates maximum or exclusive use of individualized damage distribution mechanisms. See pp. 1525–
benefits are to be distributed to the proper individuals.\textsuperscript{172} In this situation, the cost of best practicable notice should not deter meritorious suits. The plaintiff or his attorney \textsuperscript{173} can advance the costs knowing that if the proposal is approved he will quickly be reimbursed from the settlement fund. In addition, defendants may often be willing to pay for notice to protect the binding effect of the settlement against any subsequent collateral attack.\textsuperscript{174} Thus, in damage cases, many courts have ordered individual notice of the settlement hearing without giving the issue any elaborate consideration.\textsuperscript{175}

If each class member has a large interest at stake, the judge can legitimately rely upon absentees to respond to notice and appear before the court if they have any significant objections to the settlement. If no objectors appear, there should be a strong presumption that the agreement is fair.\textsuperscript{176} But in actions in which

\textsuperscript{27} supra. Even if the communication with the class does not include a proof-of-claim form, extensive notice will normally be necessary for the judge to insure that representation of absentee interests has been adequate enough to meet constitutional requirements. But cf. pp. 1402–16 supra. See also Grunin v. International House of Pancakes, 513 F.2d 114, 120–22 (8th Cir.), cert. denied, 96 S. Ct. 124 (1975). Best practicable notice will usually mean individual contact with all readily identifiable class members. However, where class members cannot be readily identified, or cost of individual notice would consume any recovery, publication notice should be used. See generally Manual, supra note 17, pt. 1, §§ 1.45–46, at 38–40.

\textsuperscript{172} An adequate settlement notice should summarize the terms of the settlement, explain the consequences of an approval, make clear what participation and opt-out rights a class member has, anticipate major questions class members will want answered, and, unless a subsequent notice is to be sent, indicate what steps a class member must take if he wishes to make a claim. See, e.g., Grunin v. International House of Pancakes, 513 F.2d 114, 122–23 (8th Cir.), cert. denied, 96 S. Ct. 124 (1975); United Founders Life Ins. Co. v. Consumers Nat'l Life Ins. Co., 447 F.2d 647, 654 (7th Cir. 1971); Manual, supra note 17, pt. 1, § 1.46, at 40; Shapiro, supra note 92, at 263 n.15. Moreover, where class members are not likely to have the assistance of counsel, notice should be presented in a manner intelligible to class members. See Shapiro, supra note 92, at 267 n.21 (misunderstanding of Pfizer notice). For instance, in Blankenship v. UMW Welfare \\ Retirement Fund, Civil No. 2186–69 (D.D.C., Jan. 2, 1973), at least one round of notice distributed to class members was written in layman's English. But see Milstein v. Werner, 57 F.R.D. 515, 518 (S.D.N.Y. 1972) (objection that notice not in layman's English overruled).

\textsuperscript{173} See pp. 1618–23 infra.

\textsuperscript{174} See note 126 supra.


If some class members come forward in a suit in which all class members have
many class members have a relatively small interest at stake, the judge cannot depend solely upon absentees to expose deficiencies in the settlement. The cost of appearing at the settlement hearing may exceed the likely benefits to the individual class member, particularly if he anticipates a hostile reaction to his efforts. Thus, even if no objections are made the judge must undertake an independent evaluation of the fairness of the settlement proposal. Of course, if objectors do appear, their argument should be considered by the judge; the fact that only a few class members come forward should not be taken as evidence that their positions are weak or that no other class members share their concerns.

Although objectors have the clear right to present evidence at the settlement approval hearing, they may encounter difficulties in convincing the court to grant discovery time. In deciding whether to allow discovery by an objector, the court should bal-


178 Indeed, some courts have indicated that an absence of objectors heightens the responsibility of the trial judge. E.g., Heddendorf v. Goldfine, 167 F. Supp. 915, 926 (D. Mass. 1958) (derivative suit).

179 See generally Manual, supra note 17, pt. 1, § 1.46, at 42. The judge should remember that these objectors will be confronting opponents who enjoy the advantage of disproportionate familiarity with the litigation.

The named plaintiff himself may object to the settlement, see, e.g., Finn v. FMC Corp., 528 F.2d 1169, 1175-76 (4th Cir. 1975), cert. denied, 44 U.S.L.W. (Mar. 22, 1976); Air Line Stewards & Stewardesses Ass'n, Local 550 v. American Airlines, Inc., 490 F.2d 636, 637 (7th Cir. 1973), cert. denied, 418 U.S. 993 (1974); Saylor v. Lindsley, 456 F.2d 896, 898 (2d Cir. 1972) (derivative suit); Purcell v. Keane, 54 F.R.D. 455, 459 (E.D. Pa. 1972), but courts should not give the named plaintiff an absolute veto over a compromise since his views may not fairly represent those of the class. See Finn v. FMC Corp., supra at 1174 & n.19; Saylor v. Lindsley, supra at 899-900 (dictum).

180 E.g., City of Detroit v. Grinnell Corp., 495 F.2d 448, 462 (2d Cir. 1974); Greenfield v. Villager Industries, Inc., 483 F.2d 824, 833 (3d Cir. 1973); Cohen v. Young, 127 F.2d 721, 725 (6th Cir. 1942) (derivative suit).

ance the objector's need for additional information against the
cost of delay to the settling parties and the danger that an objector
will abuse the process by simply blocking approval until he is
bought off. If an objector has not made use of material or time
already available to him, if his objection does not involve factual
issues which could fruitfully be developed through discovery,
or if discovery would impose unreasonable costs on the propon-
ents of a settlement, the objector's request should be denied. On
the other hand, if the settling parties have undertaken little dis-
covery, leaving class members and the judge with little information
to evaluate the proposal, or if the judge intends to rely heavily
upon objectors, discovery time should normally be granted.

(b) Review by the Trial Court. — Although rule 23 (e) requires
the trial judge to review any proposed settlement of a class action,
it gives no indication of the proper scope of review, the standards
to be used, or the rigor with which those standards should be
applied. Even so, it is clear that the court should insist that any pro-
cedures designed to promote adequacy of representation have been
followed. Thus, reported settlement proceedings have required the
proponents to demonstrate that the proper parties were allowed to
participate in the discussions and decisionmaking, that sufficient
notice was given, and that the plaintiffs' attorney undertook
sufficient trial preparation to represent the class effectively in the
bargaining sessions.

Such procedure-oriented review, however, will not be enough

\[182\] See McGough & Lerach, supra note 32, at 464 & n.78 (danger of abuse).
\[183\] E.g., City of Detroit v. Grinnell Corp., 356 F. Supp. 1380, 1387 (S.D.N.Y.
1972), rev'd on other grounds, 495 F.2d 448 (2d Cir. 1974); Zerkle v. Cleveland-
\[185\] See, e.g., Girsh v. Jepson, 521 F.2d 153, 155 (3d Cir. 1975); Weiss v. Chalker,
1006, 1008 (S.D.N.Y.), aff'd mem., 120 F.2d 328 (2d Cir. 1941) (derivative suit).
\[186\] E.g., Saylor v. Lindsley, 456 F.2d 896, 900 (2d Cir. 1972) (derivative suit);
Pittson Co. v. Reeves, 263 F.2d 328, 329 (7th Cir. 1959) (same); Masterson v.
Pergament, 203 F.2d 315, 321-22 (6th Cir.) (dissenting opinion), cert. denied,
346 U.S. 832 (1953) (same).
\[187\] See, e.g., Greenfield v. Villager Indus., Inc., 483 F.2d 824, 832 (3d Cir. 1973);
Sertic v. United Bhd. of Carpenters, Dist. Council, 459 F.2d 579, 581 (6th Cir.
1972).
\[188\] See, e.g., In re National Student Marketing Litigation, 68 F.R.D. 151, 155
(D.D.C. 1974); Sunrise Toyota, Ltd. v. Toyota Motor Co., 17 FED. RULES SERV.
2d 132, 136 (S.D.N.Y. 1973); Feder v. Harrington, 58 F.R.D. 171, 175 (S.D.N.Y.
1972); Note, supra note 68, at 1149-50. Thus, an unusually quick settlement of a
complicated class action should raise suspicions not only because it may indicate
 collusion, see p. 1575 & note 225 infra, but also because it is unlikely that the at-
torney had time to prepare his case properly.
to protect absentee interests and fulfill statutory policy. Conflicts of interest between the attorney and the class and the representative plaintiff and the class may not be evident without examining the terms of the proposed settlement. Moreover, even good faith bargainers may fail to identify and accommodate all class concerns. Therefore, as most courts have recognized, an inquiry into the substantive fairness of the agreement is necessary.\(^{189}\)

The effectiveness of such substantive review may be proportional to the judge's familiarity with the legal and factual issues of the case. Some information can be gathered from the proponents' presentation at the approval hearing; however, its value must be discounted to account for the parties' natural tendency to omit factors that would undermine the compromise they have just negotiated.\(^{190}\) More reliable background may come from the absentee advocate, if there is one,\(^{191}\) and from the judge's own observations of the progress of the litigation. Indeed, if the judge has properly exercised early supervision over the suit,\(^{192}\) he should be relatively familiar with the issues by the time of the approval hearing. Of course, if objectors come forward, they may also provide insight into the fairness of the settlement.\(^{193}\)

Although discovery materials can be a useful source of information,\(^{194}\) they may be inadequate as a basis for court approval\(^ {195}\) in many class actions — particularly those in which one of the defendant's reasons for settling is to avoid extensive exam-


\(^{190}\) See Haudek, The Settlement and Dismissal of Stockholders' Action — Part II: The Settlement, 23 Sw. L.J. 765, 793 (1969) [hereinafter cited as Haudek II]. See also Note, supra note 68, at 1154.

\(^{191}\) See p. 1562 supra.

\(^{192}\) See pp. 1558–59 supra. See also Pfizer, Inc. v. Lord, 456 F.2d 532, 543 (8th Cir.), cert. denied, 406 U.S. 976 (1971).


\(^{194}\) See McGough & Lerach, supra note 32, at 459.

ination of its operations.196 The judge can postpone his decision until the parties assemble more information,197 but unless an effective objector 198 or an absentee advocate participates in the process, such post-settlement discovery will be non-adversary and may be slanted to favor the settlement.199

In a complicated suit, the judge may wish to call upon outside experts to help him analyze the agreement.200 Government agencies may be willing to assist in the review of a settlement, and perhaps to provide some of the technical data the judge needs to evaluate the proposed compromise. For instance, the SEC regularly comments on settlements, either by appearing at the approval hearing or by submitting an amicus brief.201 Private associations with expertise in the area in question may also be willing to contribute.202 Finally, if the case is very complex and the judge cannot obtain voluntary assistance, he may wish to appoint his own expert.203

196 See p. 1381 supra.
199 At the other extreme, discovery may be too extensive and the judge may be confronted with an unmanageably large and largely incomprehensible amount of data. See Haudek II, supra note 190, at 794.

The EEOC also has participated in settlement approval proceedings. See, e.g., Bryan v. Pittsburgh Plate Glass Co. (PPG Indus., Inc.), 494 F.2d 799, 803 (3rd Cir. 1974), cert. denied, 419 U.S. 900 (1975) (amicus).

202 Cf. Wyatt v. Aderholt, 503 F.2d 1305, 1308 n.3 (5th Cir. 1974) (litigated structural injunction).
203 See Manual, supra note 17, pt. 1, § 3.40. The Manual strongly urges the
At the same time, since settlements have the welcome effect of saving court and private party resources, and of ending litigation on a more amicable basis, the judge should not convert the approval hearing into a full trial on the merits and should not reject settlement proposals unnecessarily. Unless the earlier court finding that the class attorney and the named plaintiff adequately represent the class is meaningless, some degree of deference to the parties would appear to be justified. Thus, some courts have suggested that in evaluating a settlement proposal the "business judgment" of the parties and the recommendations of counsel should be respected. This suggestion is sound if it means that the participants' preferences should be honored if they fall within a range of acceptable compromises defined by the judge to obtain economic information before evaluating an antitrust settlement and mentions the possibility of the court's hiring an expert to provide this data. Id. pt. 1, § 1.46, at 41-42. However, the judge may wish to solicit help from government or private volunteers before spending limited court funds on his own experts.


See Pfizer, Inc. v. Lord, 456 F.2d 532, 542 (8th Cir.), cert. denied, 466 U.S. 976 (1972); p. 1391 supra.


It should be remembered, however, that a settlement disapproval often will not result in full litigation; the parties may instead return to the bargaining table and reach an acceptable compromise. See, e.g., Grunin v. International House of Pancakes, 513 F.2d 114, 119-120 (8th Cir.), cert. denied, 96 S. Ct. 124 (1975) (discussing renegotiation and approval after first settlement rejected); Percondi v. Riker-Maxson Corp., [1970-71 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 93,153 (S.D.N.Y. 1971) (approving settlement negotiated after first proposal rejected).

See pp. 1471-72, 1474-77 supra.


Of course, any agreement including terms void as against public policy should not be approved, regardless of whether absent class members are benefited, harmed, or left unaffected by such terms. Thus, the court in *Grunin v. International House of Pancakes* indicated that it could not sanction a settlement that would perpetuate contracts including per se violations of the antitrust laws. This outer constraint will not suffice in most cases, however, since a compromise that does not directly contravene the law still may not be in the best interests of absentees. Although some opinions appear to imply that the range of acceptable compromises should be very broad, and that a settlement should not be rejected unless it is clearly unfair on its face, trial courts more frequently, and more appropriately, attempt to subject the settlement proposal to a more searching analysis.

Reviewing judges usually try to define the zone of acceptability by first comparing the terms of the settlement to the likely benefits of further litigation. Under the standard outlined by the Supreme Court in *Protective Committee v. Anderson*, a bankruptcy approval case that is frequently quoted in class action decisions, the court must consider factors such as the strength of

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213 513 F.2d 114, 123–24 (8th Cir.), cert. denied, 96 S. Ct. 124 (1975). The court went on to find, however, that the agreement before it included no such per se violations. *Id.* at 124.


215 Even courts using the "unfair on its face" terminology may actually give a more thorough evaluation. See, e.g., Glicken v. Bradford, 35 F.R.D. 144 (S.D.N.Y. 1964) (derivative suit).

216 390 US. 414 (1968).

the plaintiff's case, the availability of affirmative defenses, the complexity, expense, and likely duration of further litigation, and the ability of the defendant to pay a judgment larger than that provided for by the proposed settlement.\textsuperscript{218} The range of acceptable settlements can be narrowed when the judge has greater confidence in his evaluation because the legal issues are clear\textsuperscript{219} or because he has unusual familiarity with the facts of the case.\textsuperscript{220}

The \textit{Protective Committee} standard should identify situations where the class attorney has settled too quickly in order to guarantee his fee, and guide the court's judgment in cases in which the only issue is the sufficiency of the total amount of relief offered to the class.\textsuperscript{221} In other circumstances, however, comparing the terms of the settlement to the likely benefits of further litigation will not provide sufficient protection for absentee interests unless the court carefully scrutinizes the trade-offs which the class attorney and the representative plaintiff have made among available forms of relief, and is sensitive to the possibility of conflicts undermining adequacy of representation.\textsuperscript{222}


\textsuperscript{218} \textit{Protective Comm. v. Anderson}, 390 U.S. 414, 424-25 (1968). \textit{See also} \textit{City of Detroit v. Grinnell Corp.}, 495 F.2d 448, 455 (2d Cir. 1975) (outlining similar test); \textit{Note, supra} note 68.

\textsuperscript{219} \textit{See, e.g.,} \textit{Lewis v. Wells,} 325 F. Supp. 382 (S.D.N.Y. 1971) (derivative suit brought under section 16(b) of \textit{Securities and Exchange Act of 1934}).


\textsuperscript{222} If representation has been inadequate, approval of the settlement would both damage absentee interests and thwart the effectuation of substantive policy. Thus, where the benefits of a settlement proposal deviate significantly from the obvious benefits of going to trial, some courts might refuse approval on the ground that the settlement does not produce the consequences envisioned by the statute in a given fact situation, and thus violates statutory policy. \textit{See, e.g.,} \textit{Lewis v. Wells,} 325 F. Supp. 382, 386 (S.D.N.Y. 1971) (clear violation of section 16(b) of \textit{Securities and Exchange Act of 1934}). Such an analysis should be distinguished from one in which the proposed relief on its face violates public policy. \textit{See} p. 1573 & notes 212-213 \textit{supra.}
Thus, the court should usually reject or revise settlements which include questionable fee arrangements between the class attorney and the defendant and agreements negotiated by a lawyer who turns out to have a serious ideological or other conflict of interest with the class. And, while the class lawyer will be expected to take a less enthusiastic stance on his case once he becomes a settlement proponent, a sharp reversal of position without any apparent basis in discovery or new case law should be suspect as evidence of a possible sell-out. Similarly, the court should refuse approval of settlements in which the named plaintiff or a segment of the class would receive a disproportionate allocation of damages or other relief, as well as proposals in which the form of relief is tailored to carry out an ideological position held by the representative plaintiff but not by the rest of the class.

The judge has a more difficult task in cases in which the class is seeking a structural injunction as well as damages. In this situation, the defendant may be willing to offer additional structural reform or additional damages, but not both, and class members may disagree on the most desirable mix. Moreover, even when class members agree that only injunctive relief is needed, they may disagree on its proper content. In these circumstances, a court passing on a settlement must both formulate and apply its standard of review in the context of the particular case. The source of the standard, of course, will be the policies underlying the

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statute pursuant to which the cause of action has been brought. In some cases, statutory policies might suggest a clear hierarchy of relief, and the fairness of a settlement may be readily judged in terms of that hierarchy. In many cases, however, the hierarchy of values a court can articulate may be more indeterminate. Within this range of indeterminacy, the best a court may be able to do is ask whether there is any reason, such as a failure of the procedural requisites of fairness, that the bargain should be upset.

An example of the common law of remedies being suggested here is the "rightful place" theory of Title VII relief. See, e.g., Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 243 (5th Cir. 1974); Note, Title VII, Seniority Discrimination, and the Incumbent Negro, 80 Harv. L. Rev. 1260 (1967). Even this theory may not provide a determinate choice between two settlement proposals both of which restore "rightful place" but in different ways. Cf., e.g., Air Line Stewards & Stewardesses Ass'n, Local 550 v. American Airlines, Inc., 490 F.2d 636 (7th Cir. 1973), cert. denied, 416 U.S. 993 (1974) (remanding for renegotiation among the parties and recommending subclassing).

Private control may itself be a value recognized by statute and may, in any event, be important to effectuating any remedy. See p. 1374 supra.

Effective appellate review is necessary not only to catch settlements that should have been rejected below but also to encourage trial judges to be more careful in their initial oversight. Trial court approval or disapproval of a class action settlement will be subject to review by a higher court if a dissatisfied named plaintiff continues to reject the compromise, see, e.g., Finn v. FMC Corp., 528 F.2d 1169 (4th Cir. 1975), cert. denied, 44 U.S.L.W. 3531 (U.S., Mar. 22, 1976), or if an objecting class member exercises his right to intervene and appeal, see, e.g., Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30 (3d Cir. 1971); Research Corp. v. Asgrov Seed Co., 425 F.2d 1059 (7th Cir. 1970) (also suggesting that appeal be limited to issues raised at settlement approval hearing). Disapproval of a settlement has been held to be an appealable order. Norman v. Mc Kee, 431 F.2d 769, 774 (9th Cir. 1970), cert. denied 401 U.S. 912 (1971). See also In re International House of Pancakes Franchise Litigation, 487 F.2d 303 (8th Cir. 1973) (deciding appeal of disapproval without comment on appealability issue). Of course, before effective appellate review is possible, the court must know the basis of the decision below. If the opinion and record do not sufficiently reveal the basis of the trial judge's action, the appellate court should immediately remand for clarification. See Girsh v. Jepson, 521 F.2d 153, 159 (3d Cir. 1975); Grunin v. International House of Pancakes, 513 F.2d 114, 125 n.9 (8th Cir.), cert. denied, 96 S. Ct. 124 (1975); Bryan v. Pittsburgh Plate Glass Co. (PPG Indus., Inc.), 494 F.2d 799, 804 (3d Cir.), cert. denied, 419 U.S. 900 (1974) (reasoning found sufficient). Assuming the opinion and record are adequate, the appellate court can ordinarily determine whether proper procedures were followed in the negotiation and approval of a settlement, and therefore should insist upon procedural regularity. See Newman v. Stein, 464 F.2d 689, 692-93 (2d Cir.), cert. denied, 409 U.S. 1039 (1972) (derivative suit). Settlement approvals should be reversed when the court acts without knowledge of possibly important facts concerning the claim, see Grunin v. International House of Pancakes, supra, at 125 (noting requirement but finding it satisfied); City of Detroit v. Grinnell Corp., 495 F.2d 448, 464 (2d Cir. 1974) (same); Newman v. Stein, supra, at 692-93 (derivative suit) (same), when discovery by the parties is insufficient, see Saylor v. Lindsley, 456 F.2d 896, 904 (2d Cir. 1972) (derivative suit) (alternative holding), when objects are not granted...
VII. CLASS ACTIONS AND PROFESSIONAL RESPONSIBILITY

The American Bar Association's *Code of Professional Responsibility* reflects the traditional understanding of the role of the lawyer in individual-plaintiff litigation. The lawyer is sought out by a person with a recoverable claim; through conferences with his client, the lawyer develops a view of his client's interest; the lawyer single-mindedly advocates this interest within the rather sufficient participation rights, see Girsh v. Jepson, *supra*, at 157; Cohen v. Young, 127 F.2d 721, 725-26 (6th Cir. 1942), when notice is inadequate, see, e.g., Greenfield v. Villager Indus., Inc., 483 F.2d 824 (3d Cir. 1973); Sertic v. United Bhd. of Carpenters, Dist. Council, 459 F.2d 579 (6th Cir. 1972); Pittson v. Reeves, 263 F.2d 328, 329 (7th Cir. 1959), or when the class attorney is guilty of improper behavior, see, e.g., Saylor v. Lindley, *supra*, at 900-01. Similarly, appellate judges should feel free to reverse when the trial judge has based his approval on an erroneous understanding of the legal issues of the case, see, e.g., Zints v. LaMorte, 459 F.2d 628, 630 (2d Cir. 1972); Upson v. Otis, 155 F.2d 606 (2d Cir. 1946) (derivative suit), or when a settlement contravenes public policy, see p. 1573 & notes 212-213 *supra*.

The appellate court shares with the trial court the responsibility for scrutinizing the substantive fairness of the compromise and uncovering any conflicts which indicate inadequate representation of absentee interests. Although most appellate courts have purported to use an "abuse of discretion" criterion, see, e.g., Grunin v. International House of Pancakes, *supra*; City of Detroit v. Grinnell Corp., *supra*; Bryan v. Pittsburgh Plate Glass Co. (PPG Indus., Inc.), *supra*, when evaluating the lower court's conclusion, the leniency implied by this standard seems inappropriate for class actions. Judge Friendly suggests that the prevalence of this standard may follow from the general policy favoring settlements, the feeling that one judicial examination of a settlement should suffice, and from an analogy to bankruptcy proceedings in which the trustee's recommendations are rarely disturbed on appeal if the trial court has approved them. See Newman v. Stein, *supra*, at 692-93 & n.7. As he also notes, however, none of these reasons is compelling in the class action context. The importance of protecting absentees tempers the usual pro-settlement policy of traditional litigation, see *Manual, supra* note 17, pt. 1, § 1.21, and counterbalances the argument that one review is enough. Moreover, the differences between a bankruptcy trustee and a representative plaintiff are significant enough to require more stringent review of the latter, especially since a bankruptcy plan before a court of appeals may already have been evaluated by a referee as well as a trial judge. See Newman v. Stein, *supra*, at 692 n.7. On the other hand, an appellate court should be wary of venturing too deeply into factual issues, lest it inadvertently harm the interests of class members. For example, in Upson v. Otis, *supra*, at 611-12, the Second Circuit reversed approval of a derivative suit settlement because it felt the facts showed a strong case for the plaintiff based on a theory for which damages would be considerably higher than the compromise. On remand, the plaintiff prevailed as predicted, but on a different theory. When damages were calculated under this second theory, the recovery turned out to be less than the amount which had been offered in the settlement. See Marcus v. Otis, 168 F.2d 649 (2d Cir.), reaff'd, 169 F.2d 148 (2d Cir. 1948).

1 See generally *American Bar Ass'n, Code of Professional Responsibility*, Canon 2 (1975) [hereinafter cited as *ABA Code*].

2 See id. EC 4-1, EC 7-7.
commodious limits necessitated by the lawyer's alternative role as
an officer of the court; if the lawyer wins the case, he is paid ac-
cording to an individually bargained contract between lawyer and
client; if not, the client may pay the lawyer nothing, but, in any
event, the client is ultimately liable for the expenses of the litiga-
tion.3

In the class suit, especially one aggregating nonrecoverable
claims, these traditional assumptions are inapposite. The holder
of a nonrecoverable claim will not have a financial incentive to
underwrite the costs of litigation, and may have no incentive even
to spend the time necessary to select a lawyer. If he should find
an attorney interested in his problem, that attorney will nonethe-
less be unwilling to go to court unless a class can be formed — an
adequate fee may come only from the fund that litigation might
create. The lawyer's fee will generally not be set by a bargain
between "client" and attorney, but by a court if the attorney wins
or settles; there will be no fee if the attorney is unsuccessful. Nor
can the named plaintiff demand that single-minded allegiance of
his attorney envisioned by the traditional model. The attorney is
the representative for the class and it is improper for him to ignore
the interests of absentees. On the other hand, no very clear idea
of precisely what is meant by a duty to represent a class has
emerged, especially where the class is organized only for the pur-
pose of trying a common legal question.

The disparities between the theory and practice of professional
ethics in the class setting have not gone unnoticed, and, indeed,
have grown into one of the more controversial aspects of class
litigation. This Section of the Note analyzes three areas of special
concern: the interaction of the attorney's role as organizer of
class litigation and traditional bans on advertising and solicita-
tion; the nature of the lawyer-client relationship when the lawyer
is a representative of the class; and, finally, the problem of court
supervision of attorneys' fees and the relationship of fees to tra-
ditional prohibitions on maintenance.

A. Initiating the Class Action:
The Propriety of Advertising and Solicitation

In the individual-plaintiff model, the only proper way for a
lawyer to obtain a client is to do nothing.6 The client, it is as-
sumed, will recognize his legal problems and his need for the

3 See id. Canon 7.
4 See id. EC 2–19.
5 See id. DR 5–103 (B).
6 See B. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS 128–29
services of a lawyer, and will, after canvassing the reputations of local attorneys, approach the one best qualified to serve him. Despite recent modifications, the Code of Professional Responsibility even now restricts advertising to a great degree, and direct attorney solicitation of clients is still forbidden. Some observers have charged, however, that class action attorneys unethically

7 See ABA Code, supra note 1, DR 2-101, 2-102, 2-103, 2-104 (1975). The Disciplinary Rules prohibit advertising by private attorneys, with exceptions for the publishing of certain limited information in professional cards, law lists, and telephone directories. The ABA House of Delegates on February 17, 1976, adopted amendments to the ABA Code somewhat expanding the information permitted in telephone directories to include certain biographical facts, and expanding the information permitted both in telephone directories and reputable law lists or directories to include information concerning the acceptance of credit cards, fees for initial consultations, the availability upon request of a written schedule or estimate of fees for specific services, and specialization if permitted by local rules. The proposal of the ABA's Standing Committee on Ethics and Professional Responsibility to expand further the allowable information and to include "directories published by a bona fide consumers' organization" in the category of permitted informational media was rejected by the House of Delegates. See 44 U.S.L.W. 2390 (Feb. 24, 1976); 62 A.B.A.J. 309-10 (1976).

Solicitation by private attorneys is forbidden by ABA Code, supra note 1, DR 2-103 (A)-(B) and DR 2-104(A). The general rule is relaxed, however, in the case of a "close friend, relative, former client . . . or one whom the lawyer reasonably believes to be a client." ABA Code, supra note 1, DR 2-104(A)(1).

A special exception to the rules on advertising and solicitation is provided for qualified legal assistance organizations including legal aid offices and certain other "bona fide organizations" providing legal services without profit to themselves and not designed to procure "legal work or financial benefit for any lawyer as a private practitioner." ABA Code, supra note 1, DR 2-103(D). The Committee on Legal Ethics of the District of Columbia Bar Association has published an opinion approving radio and newspaper advertising by a public interest law firm. See Ethical Considerations in the Practice of Public Interest Law, 41 J.B. Ass'n D.C. 91, 102-09 (1974). But see Note, Legal Ethics—Advertising and Solicitation by Public Interest Law Firms, 51 Texas L. Rev. 169, 176-79 (1973) (interpretive problems in reading DR 2-103(D) to permit advertising and solicitation by lawyers in public interest firms). Because advertising and solicitation by public interest groups is thus already proper, this Note will focus on the issues associated with lawyer-initiated client contact undertaken by private attorneys.

About two months before the ABA House of Delegates' February, 1976, meeting, the Standing Committee on Ethics and Professional Responsibility published a tentative draft of proposed amendments "to remove all restrictions against advertising, except any public communication containing a 'false, fraudulent, misleading, deceptive or unfair statement or claim.'" ABA Press Release, at 1 (Dec. 6, 1975). The proposed amendments, however, were not meant to "affect the Code's prohibitions against lawyers soliciting business on a one-to-one basis." Id. Comments from lawyers and bar associations induced the Committee to delay any such broad proposals until the House of Delegates' August, 1976, meeting. See Special Report of the Standing Committee on Ethics and Professional Responsibility Recommending Amendments to and Continued Study of Canon 2 of the Code of Professional Responsibility 2 (undated).
solicit their clients.8 Because this charge is not implausible, courts have allowed class opponents to attempt to discover from named plaintiffs whether class attorneys have solicited their participation.9 And at least one federal judge has cited solicitation of class representatives as justification for refusal to certify a class.10

Whatever the accuracy of this charge, it is by no means apparent that concepts of solicitation developed in individual litigation are appropriately applied in the class action context.12 A better analysis starts from the proposition that ethical precepts are not immutable, but will be acceptable only if consonant with the goals society wishes the adjudicative process to serve. These precepts must be construed both to prevent abuse of that process and to avoid conflict with the policies implicit in society's

12 The ABA Code, supra note 1, makes one concession to class attorneys in DR 2–104(A)(5). This provision provides that “[i]f success in asserting rights of a client in class suit is ‘dependent upon the joinder of others,’ the attorney ‘may accept, but shall not seek, employment’ from others contacted to obtain their joinder. This concession is a relatively minor one since the special treatment is granted only to attorneys who already have obtained a named plaintiff for suit. The December 6, 1975, tentative draft of the Standing Committee on Ethics would have made a rather ambiguous modification of the rule, allowing attorneys to ‘accept employment from those he is permitted under applicable law to contact for the purpose of obtaining their joinder.’ ABA Press Release, at 10, Dec. 6, 1975.
13 An alternative argument often advanced in defense of the prohibition on lawyer-initiated contacts is that there would cause commercialization of the legal profession. See, e.g., H. DRINKER, supra note 6, at 211; Note, Advertising, Solicitation and Legal Ethics, 7 VAND. L. REV. 677, 678 n.9 (1954). Treating the fear of commercialization as the basis for the advertising ban affords an explanation for
choice to have class suits. Whether these policies militate for or against the adoption of traditional rules regarding lawyer-initiated client contacts is the subject of Part 1 below. The next Section considers the propriety in class litigation of two specific types of lawyer-initiated contacts, advertising and solicitation. The final Section examines the impact of antitrust and constitutional considerations upon regulation of advertising and solicitation by class action attorneys.

1. Lawyer-Initiated Contact with Class Litigants: General Considerations. — In all likelihood, lawyer-initiated contact would increase the number of class actions, thereby apparently contributing to the greater realization of substantive policies, which is the justification for allowing class suits in the first place. Individuals may not be fully aware of how to vindicate their legal rights, and in particular, may be unaware of the availability of the class action as a means for vindicating rights at a cost lower than that of ordinary litigation. The consistency in gross between policies sought to be furthered by class actions and lawyer-initiated contact exceeding the bounds of the Code of Professional Responsibility may, however, be misleading. The large fees that class actions can generate may create a conflict of interest between the attorney and the named plaintiff and can provide an incentive

the exception made for nonprofit organizations, see note 7 supra. But if the danger commercialization ostensibly threatens is that the public will lose confidence in the legal profession, it is by no means clear that allowing advertising and solicitation would indeed have such an effect. The public is more likely to be impressed by the quality of services rendered by the bar than by the bar's non-commercial tradition. See B. Christensen, supra note 6, at 152. Moreover, the suggestion that the noncommercial tradition is essential to preserving a "professional milieu" fostering adherence to ethical norms, see id. at 154-57, loses much of its significance given the many extant commercial aspects of the profession. Not only does the private practice of law involve the furnishing of services for a fee, but many lawyers, especially the more successful ones, do in fact solicit business in unobtrusive ways falling within exceptions to the solicitation ban. See M. Freedman, Lawyers' Ethics in an Adversary System 116-17 (1975). Critics of the advertising ban suggest that the true basis of the commercialization argument is a desire on the part of established lawyers to preserve existing patterns of competition. See Shuchman, Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code, 37 Geo. Wash. L. Rev. 244, 256-60 (1968). Competition between established firms and younger or less successful firms is particularly relevant in the class action context, where the plaintiffs' bar consists largely of small firms, viewed as "impudent, upstart outsiders." See Andrews, The Class Action Bar: It's All Cat and Mouse, Juris Doctor, Jan. 1974, at 18. This reason for the advertising ban is, of course, plainly indefensible, especially in view of the antitrust laws.

14 See p. 1353 supra.
15 See B. Christensen, supra note 6, at 129-35.
16 The potential for a conflict of interest between the lawyer and his client is not unique to the class action, but may arise more generally in situations where
to abuse the class action process by bringing suits of questionable legal merit.

The very unfamiliarity of potential clients with their legal rights, which makes lawyer-initiated contact a potentially valuable adjunct to the full realization of substantive policies, may make those contacted vulnerable to misrepresentations of the benefits and burdens of participation in class litigation. Thus potential class members may be unaware of possibilities for individual settlement, or they may not understand the substantial commitment they will have to make to the class suit in terms of personal involvement and delay in settling their own claims. Moreover, the attorney may not adequately advise potential class plaintiffs because it is against his personal interest to do so. Finally, the very fact that the class representatives are recruited may be to the disadvantage of the class as a whole. The recruited class representative may have less interest in the litigation than would a volunteer, and so prove less likely to provide information for the attorney as to the identity and interests of the class and may less enthusiastically oversee the attorney’s loyalty to the class. Lawyer-initiated contact may also be unfair from the perspective of the class opponent. It is possible that the incidence of frivolous claims, at least some of which class opponents would lawyers play an active role in initiating litigation. For example, one commentator has noted the potential conflict of interest between the ideological positions of the NAACP Legal Defense Fund and the interests of the plaintiffs it represents. See Bell, Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 Yale L.J. 470 (1976). This conflict became actual in the Atlanta school desegregation case where members of the plaintiff class reached an settlement unacceptable to the national NAACP, see id. at 485-88, and appealed from the district court’s affirmance of the settlement. See Calhoun v. Cook, 522 F.2d 717 (5th Cir. 1975), aff’g 362 F. Supp. 1249 (N.D. Ga. 1973). See also Sierra Club v. Morton, 405 U.S. 727 (1972) (public interest lawyers refused to amend pleadings to show injury in fact; case dismissed for lack of standing).

17 See Franks, Rule 23 — Don Quixote Has a Field Day: Some Ethical Ramifications of Securities Fraud Class Actions, 46 Chin.-Kent L. Rev. 1, 3-4 (1969). Franks discusses the danger that an attorney, approached by an individual with a claim, may seek to escalate the suit into a class action, even when the individual’s interests are not best served thereby. The litigation, he notes, may become more protracted than necessary, and a class action may deplete the defendant’s assets so the defendant cannot fully satisfy proven claims. Id. at 3-4.

18 For example, the named plaintiff might be called upon to respond to detailed discovery requests by the defendant, as well as to factual inquiries made by the class attorney. See p. 1445 supra.


20 Some commentators have suggested that solicitation or advertising outside the class action context increases the incidence of fraudulent or frivolous claims. See Note, Legal Ethics — Ambulance Chasing, 30 N.Y.U. L. Rev. 182, 187-88 (1955); Comment, Settlement of Personal Injury Cases in the Chicago Area, 47 Nw. U. L. Rev. 895, 898 (1953). Christensen, however, argues that courts are able
would increase disproportionately were class attorneys allowed to recruit.

Allowing lawyer-initiated client contact may increase the chilling effect of class actions to the point of deterring potential class opponents from engaging in conduct not in fact statutorily proscribed. The possibility of such contact would be a matter of indifference to persons contemplating action likely to impose substantial injuries on particular individuals, because the injured individuals will have sufficient incentive to retain counsel on their own initiative. To an individual considering action injurious to a class, however, it may matter that advertising or solicitation is permitted. Although injury to a class as a whole may be substantial, injury to individual class members may not reach the point where they would seek legal assistance on their own. Permitting class attorneys to contact potential plaintiffs, because it increases the likelihood that class suits will be brought even where the injury to individual class members is small, may cause individuals to take into account the prospect of a substantial liability to a class.

Up to a point, this would not be unfair to the potential class opponent. Increased deterrent effect may simply increase the likelihood that an individual will comply with statutory directives. In some circumstances, however, the deterrent effect of class actions, even unenhanced by relaxed client contact rules, may distort rather than further statutory policies, as individuals refrain from conduct that a statute was not intended to prohibit.22 Allowing lawyer-initiated contact may increase the situations in which such distortion occurs.

Relaxed contact rules may also have distributional consequences unfair to class opponents. Suits aggregating claims held by individuals who had not previously sought out an attorney are those most likely to increase. If failure to seek out an attorney reflects the potential client’s feeling that he has not been hurt, then it seems questionable to impose substantial burdens on the class opponent since no benefit of apparent importance to anyone, except the attorney, would be produced.23 On the other hand, if

to weed out frivolous or fraudulent claims, see B. CHRISTENSEN, supra note 6, at 145–46, and also maintains that the “remedy, if one is needed, should be directed to the fraudulent and frivolous claims themselves and not to legitimate ones,” id. at 146.


22 See pp. 1353–66 supra.

the failure to contact an attorney reflects an unawareness that one
has suffered a legally cognizable injury, or simply the high cost of
finding a competent attorney when there is no easy way of deter-
mining which attorneys litigate the type of suit the client would
like to bring, then advertising that reduces this information bar-
rier to litigating a felt harm cannot be said to have unfair distri-
butional consequences. Thus, the risk of unfair distributional
consequences can be reduced if permissible lawyer-client contacts
require the potential client to take independent steps to initiate
litigation.

2. Advertising and Solicitation by Class Attorneys: A Com-
parative Analysis. — A comparison of advertising and solicitation
indicates that a rule banning solicitation but allowing advertising
would screen out the worst aspects of lawyer-initiated client con-
tact without significantly impairing realization of substantive
policies this contact makes possible. At the outset, it is important
to distinguish the two forms of contact. Advertising encompasses
all communications initiated by lawyers with potential clients in
circumstances not involving personal contact. Personal contact is
the key element in solicitation: 24 The lawyer approaches a poten-
tial client directly, recommending his own employment and hoping
to secure the potential client's immediate consent to the arrange-
ment.25

Solicitation presents greater opportunities for abuse than
advertising. There exists a greater danger of misrepresentation
by the attorney, since solicitation, unlike advertising, is not readily
subject to scrutiny by the legally informed. A soliciting attorney
may be able to pressure an individual into an immediate decision
to bring class suit, before the individual is able to give the matter
adequate thought.26 An individual approached through advertis-
ing, on the other hand, can decide to contact an attorney alone,
in a less coercive atmosphere.27

Individuals who agree to become class representatives after
responding to an advertisement have demonstrated at least some
interest in pressing a claim. Solicited class representatives, by
contrast, may be individuals who were required to take little initi-

24 See Note, supra note 11, at 1181 n.4.
25 The classic example of solicitation, ambulance chasing, involves a lawyer
approaching an accident victim at the scene or at his hospital bed to secure
immediate agreement to the lawyer’s pursuing the victim's claim.
26 See Note, supra note 11, at 1199 (proposing that solicitation as well as ad-
vertising be allowed but recommending a specific prohibition against such “over-
reaching” in solicitation).
27 Obviously, advertising can also be abused; however, the more serious forms
of misrepresentation and deception are amenable to regulation. See generally
Developments in the Law—Deceptive Advertising, 80 Harv. L. Rev. 1005, 1063–
1163 (1967).
ative beyond simply assenting to a lawyer’s proposal, and thus are less likely to have actual interest in the progress of the litigation. Indeed, it is possible that a solicited class representative’s consent was prompted solely by friendship with the soliciting attorney,\(^{28}\) rather than by any concern for redressing injury. Solicited class representatives, therefore, are more likely to take a passive role, insufficiently checking any tendency of the class attorney towards prosecution of frivolous claims. Moreover, advertising is unlikely to persuade an individual who stands to gain no significant benefit from class suit, or who himself feels no injury, to seek out an attorney. The effect of solicitation may not be similarly limited. Therefore, objections to lawyer-initiated client contact based on the risk of overdeterrence and concern for distributive justice count more heavily against solicitation than advertising.\(^{29}\)

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\(^{28}\) In *Carlisle v. LTV Electrosystems, Inc.*, 54 F.R.D. 237 (N.D. Tex. 1972), one of three named plaintiffs solicited by the class attorney was a personal friend. *Id.* at 239-40. ABA CODE, supra note 1, DR 2-104(A)(1) provides an exception from the solicitation ban if the solicited client is a close friend of the attorney. The court failed to note this exception in citing the attorney’s solicitation of named plaintiffs as one ground for refusing certification, see 54 F.R.D. at 240, but the fact that two out of three named plaintiffs were not friends may have rendered the exception inapplicable. In addition, the court may have felt that the peculiar dangers of solicitation in the class action context mitigated against the application of this exception.

\(^{29}\) The problem of the passive class representative becomes especially obvious when the attorney obtains the participation of his law partner or spouse as named plaintiff, or when the attorney designates himself as named plaintiff. Nevertheless, at least two courts have tolerated such practices. See, e.g., Kramer v. Scientific Control Corp., 67 F.R.D. 98 (E.D. Pa. 1975) (interim order); Lamb v. United Sec. Life Co., 59 F.R.D. 25, 30-31 (S.D. Iowa 1972). Most courts, however, have refused to recognize class attorneys, their spouses, or business associates, as named plaintiffs. See, e.g., Bogus v. American Speech & Hearing Ass’n, 20 Fed. Rules Serv. 2d 859 (E.D. Pa. 1975); Stull v. Pool, 18 Fed. Rules Serv. 2d 1000 (S.D.N.Y. 1974); Graybeal v. American Sav. & Loan Ass’n, 59 F.R.D. 7, 13-14 (D.D.C. 1973); Eovaldi v. First Nat’l Bank, 57 F.R.D. 545, 546 (N.D. Ill. 1972); Cotchett v. Avis Rent A Car Sys., Inc., 56 F.R.D. 549, 554 (S.D.N.Y. 1972); Kriger v. European Health Spa, Inc., 56 F.R.D. 104 (E.D. Wis. 1972); Shields v. First Nat’l Bank, 56 F.R.D. 442, 444 (D. Ariz. 1972). One reason often cited by the courts for rejecting such a dual role for the class attorney is the conflict of interest thereby created. The attorney’s interest as class attorney in the fees accruing as a result of a class recovery is likely to outweigh by far the attorney’s interest as a class member in the recovery per se, at least where the individual claims of class members are small. As a result, the attorney may recommend a settlement relatively unfavorable to the class which a vigilant named plaintiff might have vetoed. See Graybeal v. American Sav. & Loan Ass’n, 59 F.R.D. 7, 13-14 (D.D.C. 1973); Eovaldi v. First Nat’l Bank, 57 F.R.D. 545, 546 (N.D. Ill. 1972). But see Umbriac v. American Snacks, Inc., [1974-1975 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 94,963, at 97,312 (E.D. Pa. 1975) (conflict of interest neutralized by fact that any settlement would be accompanied by notice to class and court approval). One court also thought that the lack of an independent named plaintiff raised doubts as to whether the suit would produce any significant benefits of interest to class members. See Cotchett v. Avis Rent A
Advertising may be just as effective as solicitation in furthering class action objectives. Obviously, it is possible through advertising to inform potential class litigants of their rights, of the efficacy of the class action device, and of the availability of a willing class attorney. The chief advantage of solicitation over advertising is not communication of information but persuasion. It is this very persuasive force, however, which is the source of solicitation’s dangers.30

3. Antitrust and Constitutional Restrictions Upon Regulation of Advertising and Solicitation by Class Attorneys. — In general, restraints on advertising are a per se violation of the Sherman Act.31 The Supreme Court, in Goldfarb v. Virginia State Bar,32 has held that the legal profession is not exempt from restrictions


30 A rule banning solicitation by class attorneys should not, however, be enforced in the class action forum, but rather in separate disciplinary proceedings. Cf. Fisher Studio, Inc., v. Loew’s Inc., 232 F.2d 199, 204 (2d Cir.), cert. denied, 352 U.S. 836 (1956) (non-class suit where judge refused to disqualify attorney who solicited plaintiffs). Disqualification of the class attorney opens the way to delaying tactics and harassment by defendants at the suit’s inception, see Hausmann, supra note 9, at 3–6, and also may be unfair to the solicited named plaintiffs or other class members who have relied upon the attorney’s assistance. See also Lefrak v. Arabian Am. Oil Co., No. 75–7234 (2d Cir., Dec. 12, 1975) (non-class suit).

31 See United States v. Gasoline Retailers Ass’n, 285 F.2d 688, 691 (7th Cir. 1961) (prohibiting agreement to restrain advertising among retail gasoline dealers); United States v. House of Seagram, Inc., 1965 Trade Cas. ¶ 71,517, at 81,269 (S.D. Fla. 1965) (prohibiting similar agreement between liquor producer and liquor retailers). See also Louisiana Petroleum Retail Dealers, Inc. v. Texas Co., 1956 Trade Cas. ¶ 68,566, at 72,267 (W.D. La. 1956) (given agreement prohibiting advertising among retail gasoline dealers, Clayton Act injunction denied because of plaintiff’s “unclean hands”).

The Justice Department has filed suit against pharmacists challenging the prohibition upon advertising of retail prices of prescription drugs in the pharmacists’ code of ethics. See United States v. American Pharmaceutical Ass’n, Civil No. G75–558 (W.D. Mich., filed Nov. 24, 1975), reprinted in 5 CCH TRADE REG. REP. ¶ 45,075, at 53,631. The FTC has issued a similar complaint against the American Medical Association, charging that the prohibition on advertising and solicitation in the AMA Principles of Medical Ethics violates section 5 of the Federal Trade Commission Act. See In re American Medical Ass’n, Complaint Dkt. No. 9064 (FTC Dec. 19, 1975), reprinted in 3 CCH TRADE REG. REP. ¶ 21,068, at 20,939.

upon anticompetitive conduct, and many commentators, in the wake of Goldfarb, have suggested that rules restricting legal advertising fall within the Sherman Act's prohibition. Indeed, the American Bar Association has indicated that it regards present limits on legal advertising as vulnerable to antitrust attack.

The applicability of antitrust analysis to advertising and solicitation by class attorneys, however, is not immediately clear. The per se rule against advertising restraints was developed by courts as a response to attempts to limit price advertising. At first glance, price advertising might appear to be of little relevance in the class action context, since the fees class attorneys charge...
are often fixed by courts at the conclusion of litigation.37 Class attorneys might nonetheless be able to engage in price competition, and thus find price advertising useful. For example, class attorneys could advertise their willingness to accept only the lesser of the court-awarded fee or some specified amount. Moreover, the utility of service advertising is unaffected by judicial control over attorneys' fees. Restraints on advertising, therefore, may have as significant an anticompetitive effect in the class action milieu as in other areas of legal service.

Whatever the potential for enhanced competition in the provision of legal services, there is little reason to exempt prohibitions on legal advertising from the present per se antitrust rule since most of the benefits of an advertising ban can be realized in ways more consistent with competition. As to the prohibition of solicitation, however, the case is quite different. Solicitation can have, at best, only a marginal competitive effect given the existence of advertising, and its potential for abuse in the legal context seems clear. Furthermore, the possibilities for deception and misrepresentation are a traditional concern of the Federal Trade Commission, the only plaintiff under present law that can challenge prohibitions on legal advertising on a nationwide basis.38 The FTC, if it finds the policies supporting solicitation bans persuasive, even if not strictly cognizable in antitrust terms,39 may in its discretion take no action. Thus it seems likely that current prohibitions on solicitation will not be affected by the antitrust laws, while prohibitions on advertising will be found to contravene antitrust policy.

37 See p. 1608 infra.

38 The Supreme Court, in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), did not reject the state action exemption from the Sherman Act enunciated in Parker v. Brown, 317 U.S. 341 (1943). It merely held that the exemption did not cover minimum fee schedules, since the only state involvement, a general grant of rulemaking authority, did not constitute a decision of the state to implement minimum fee schedules, at least for purposes of the Parker doctrine. See 421 U.S. at 788-92. Parker's state action test, however, is likely to be met with respect to restraints on advertising and solicitation by lawyers. The Code's prohibitions have "acquired the force of law in at least thirty-three states," either through statutory enactment or through adoption as rules of court by state supreme courts. Comment, Solicitation by the Second Oldest Profession: Attorneys and Advertising, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 77, 78 n.8 (1973); see Note, supra note 34, at 716 n.7. Parker's requirement that anticompetitive conduct be compelled, rather than merely permitted, by state law thus appears to be met. Therefore restraints on advertising or solicitation could not, at least in a majority of states, be attacked directly under the Sherman Act. The Parker doctrine probably does not limit action taken by the Federal Trade Commission. See id. at 731-34. The FTC, therefore, is in a position not only to take action against advertising restraints but also to decide whether to challenge solicitation bans.

The conclusion that current rules against lawyers' advertising cannot stand is further buttressed by constitutional considerations. In *Bigelow v. Virginia*, the Supreme Court extended constitutional protection to advertisements concerning matters not illegal and within the "public interest." Advertising by class action attorneys plainly falls within the compass of the *Bigelow* rule. Like the abortion referral service advertisement at issue in *Bigelow*, an advertisement informing potential class members of a possible violation of their statutory or constitutional rights and of the existence of an inexpensive means of redress would not "simply propose a commercial transaction" but would contain "factual material . . . of potential interest and value to a diverse audience." If the subject matter of class action advertisements is thus constitutionally protected under *Bigelow*, attorneys, under traditional first amendment analysis, have a right to engage in such advertising, and members of their potential audience have a right to receive it, in the absence of a compelling justification for restrictions. Although the *Bigelow* Court styled its analysis simply as "balancing," Justice Blackmun's majority opinion in fact closely

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41 See id. at 821-26.
42 Id. at 811-12.
43 Id. at 822.
44 In *Bigelow*, a newspaper editor's right to publish an abortion referral service advertisement was at issue. He was contesting a conviction under a Virginia criminal statute prohibiting such advertising. *Id.* at 811-15. See also Virginia Citizens Consumer Council, Inc. v. State Bd. of Pharmacy, 373 F. Supp. 683, 687 (E.D. Va. 1974) (overturning Virginia statute banning advertising of prescription drugs in an opinion emphasizing the consumers' "right-to-know"), aff'd, 96 S. Ct. 1817 (1976).

A right to receive information was first recognized in *Martin v. Struthers*, 319 U.S. 141 (1943), where the Supreme Court, in overturning the conviction of a Jehovah's Witness under a municipal ordinance prohibiting personal delivery of leaflets door-to-door, emphasized the rights both of "those desiring to distribute literature and those desiring to receive it." *Id.* at 149. This reference in *Martin* to the right to receive information is notable in that there was no specific evidence that any of the local homeowners had expressed a desire to receive the information. See also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389-90 (1969). A number of subsequent first amendment cases, a right to receive information has been recognized by the Court upon the urging of the potential recipients. See, e.g., *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (postal delivery of communist propaganda from abroad); *Thomas v. Collins*, 323 U.S. 516 (1945) (labor organizer soliciting union membership by a speech in a mass meeting). But cf. *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (rejecting argument that right to receive information means that alien has right to deliver a speech in United States).

46 See 421 U.S. at 826.
scrutinized the asserted government interests, rejecting as insubstantial a justification previously held legitimate in a case without first amendment overtones, distinguishing the prohibition at issue from less restrictive alternatives, and noting the absence of any conflicting rights.

It is unlikely that a prohibition of advertising by class action attorneys could withstand similarly exacting scrutiny. The concerns for fairness to class members and class opponents which might prompt an across-the-board prohibition of advertising by class action attorneys either may be met by less restrictive alternatives or seem too insubstantial to warrant the infringement of first amendment rights. Problems of misrepresentation might be solved through an independent prohibition that, because of the public nature of advertising, could be readily policed. The problem of weak class representatives is attenuated in the advertising context since potential class representatives must still make the effort to contact an attorney. In any event, the problem could be dealt with on a case-by-case basis through appropriate judicial inquiries during early stages of class action litigation.

47 Compare id. at 827–28 (Virginia’s interest in protecting its citizens from information about abortions “entitled to little, if any weight, under the circumstances”) with Head v. New Mexico Bd. of Examiners, 374 U.S. 424 (1963) (upholding the power of one state to prohibit within its borders commercial advertising of optometric services in another state). See also The Supreme Court, 1974 Term, 89 HARV. L. REV. 47, 118–20 & n.51 (1975).

48 See 421 U.S. at 824. The Court mentioned that Virginia could have protected the health of its citizens by disseminating further information to help them “make better informed decisions.” Id.

49 Id. at 828.

50 Constitutional attacks upon state regulation of professional activity outside the first amendment context have previously been rejected by the Supreme Court. See North Dakota Board of Pharmacy v. Snyder’s Drug Stores, Inc., 414 U.S. 156 (1973); Head v. New Mexico Board of Examiners, 374 U.S. 424 (1963); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Barsky v. Board of Regents, 347 U.S. 442 (1954); Semler v. Oregon Board of Dental Examiners, 294 U.S. 608 (1935). The Bigelow Court stated that these “Fourteenth Amendment cases that concern the regulation of professional activity” are not inconsistent with its decision. 421 U.S. at 825 n.10.

51 See B. CHRISTENSEN, supra note 6, at 141. See also note 7 supra.

52 See, e.g., In re Goldchip Funding Co., 61 F.R.D. 592 (M.D. Pa. 1974). In Goldchip, the plaintiff’s affidavit stated that he and his mother, the other named plaintiff, had little business experience or knowledge of the facts and that they were relying on the attorneys to investigate the facts and to advise them on the proper course of action. See id. at 593. The court denied a motion to certify, until the plaintiffs might produce sufficient facts to demonstrate the adequacy of their representation. The court noted that “[e]ven unknowledgeable and inexperienced Plaintiffs” might meet its test, however, by “demonstrating a keen interest in the progress and outcome of the litigation.” Id. at 595.
numbers of class suits advertising may elicit can only be assessed from the perspective of the specific causes of action under which class suits might be brought, and thus provides no justification for an across-the-board prohibition.\(^{53}\)

Once the ban on advertising by class attorneys is lifted, first amendment considerations which might otherwise militate against similar solicitation bans diminish. The Supreme Court has indicated in several recent decisions that first amendment values may be given less weight where alternative means of communicating exist.\(^{54}\) In any event, if advertising is permitted, a prohibition of solicitation can be regarded as a form of time, place, or manner regulation, screening out the worst abuses of lawyer-initiated client contact\(^ {55}\) without prohibiting that contact entirely.\(^ {56}\) Since time, place, or manner regulations are traditionally subject only to a rationality inquiry,\(^ {57}\) solicitation bans may escape the strict scrutiny advertising prohibitions invite.\(^ {58}\)

\(^{53}\) See pp. 1353-66 supra.

\(^{54}\) See Pell v. Procunier, 417 U.S. 817, 823-28 (1974); Lloyd Corp. v. Tanner, 407 U.S. 551, 566-67 (1972). But cf. Kleindienst v. Mandel, 408 U.S. 753, 765 (1972). In Kleindienst, where American citizens asserted a first amendment right to debate in person with an alien denied entry into the United States, the Court rejected the government's argument that the first amendment was inapplicable because of the Americans' access to the alien's ideas by books and speeches. That argument, the Court explained, "overlooks what may be particular qualities inherent in sustained, face-to-face debate. . . ." Id. But the Court noted that "alternative means of access to Mandel's ideas might be a relevant factor" if the case had called for a balancing analysis. Id.

\(^{55}\) See p. 1584 supra.

\(^{56}\) But see Martin v. Struthers, 319 U.S. 141 (1943). In Martin, the Supreme Court struck down an ordinance prohibiting personal delivery of handbills door-to-door. This personal method of communication, said the Court, was "essential to the poorly financed causes of little people." Id. at 146. In the case of client contact initiated by class attorneys, on the other hand, it is much less clear that solicitation is a less expensive means than advertising to reach potential named plaintiffs. See also Breard v. City of Alexandria, 341 U.S. 622 (1951).


\(^{58}\) But compare the conclusion in Note, supra note 11, at 1158-92, that the Constitution protects both advertising and solicitation so long as there is no deception or overreaching.

The Code's apparent exception from the solicitation ban for non-profit organizations such as the NAACP or public interest law firms, see note 7 supra, seems to have been established in deference to the Supreme Court's decisions in NAACP v. Button, 371 U.S. 415 (1963), and its progeny, United Transp. Union v. State Bar, 401 U.S. 576 (1971); District 12, UMv. v. State Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of Railroad Trainmen v. Virginia ex rel. State Bar, 377 U.S. 1 (1964). In these cases, the Supreme Court enunciated a first amendment right to engage in collective activity to obtain effective access to courts. The Supreme Court in Button and the later cases, however, was not called upon to make any comparison of solicitation and advertising. It appears possible, therefore, that if advertising
B. The Attorney-Client Relationship in Class Actions

1. The Class as the Attorney’s Client.— The Code of Professional Responsibility envisions the role of the attorney to be that of an advocate of the interests of his client, the person who has sought out the attorney and entered a contractual relationship with him. Although the lawyer has some freedom to make tactical choices during litigation without consulting his client, the lawyer must, on larger matters such as the terms of a settlement, defer to the wishes of the client. An attorney can and should inform the client of options the legal system may afford him, but ultimately the definition of the “interest” to be asserted is determined by the client.

It is clearly inappropriate to import this understanding of the attorney-client relationship into the class action context by simply were freely permitted, a rule banning solicitation might withstand constitutional attack even when applied to non-profit organizations.

59 ABA CODE, supra note 1, EC 7-1 states that an attorney’s duty is “to represent his client zealously within the bounds of the law,” in conformity with disciplinary rules and professional regulations. Critics of the legal profession generally do not question that an attorney’s first duty is to the client, but instead argue that the attorney’s professional responsibility encompasses additional duties which may limit the attorney’s pursuit of a client’s interests. Judge Frankel, for example, has suggested that the “adversary ideal” should be “modified” so that the “paramount commitment of counsel concerning matters of fact should be to the discovery of truth rather than to the advancement of the client’s interest.” Frankel, The Search for Truth: An Umpireal View, 123 U. Pa. L. Rev. 1031, 1052-59 (1975). For responses to Judge Frankel’s views, see Freedman, Judge Frankel’s Search For Truth, 123 U. Pa. L. Rev. 1060 (1975); Uviller, The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel’s Idea, 123 U. Pa. L. Rev. 1067 (1975). The SEC, Ralph Nader, and others have urged that the lawyer’s duty to a client should be subordinate to certain responsibilities to the public. See M. Freedman, supra note 13, at 9-11; Sommer, The Emerging Responsibilities of the Securities Lawyer, [1973-1974 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 79,631, at 83,689; 30 Bus. Law. (March, 1975) (special issue devoted to discussion of new duties to investors which SEC has sought to impose on securities lawyers). For contrary views, see Krash, Professional Responsibility to Clients and the Public Interest: Is There a Conflict?, 15 Law Office Econ. & Management 418 (1974).

60 See generally ABA CODE, supra note 1, Canon 2.

61 See ABA CODE, supra note 1, EC 7-7, EC 7-9. See also ABA STANDARDS, THE DEFENCE FUNCTION § 5.2 (1971) (Three decisions are to be made by the accused “after full consultation with counsel”: “(i) what plea to enter; (ii) whether to waive jury trial; (iii) whether to testify in his own behalf.” “[A]ll other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client.”).

62 See ABA CODE, supra note 1, EC 7-8.

63 See D. ROSENTHAL, LAWYER AND CLIENT: WHO’S IN CHARGE 114-15 (1975) (ABA CODE seems to envision client definition of interest, but in practice attorneys are usurping control of major decisions).
substituting the words "named plaintiff" for "client." A chief function of the class action device is to bring to the attention of the court a complete view of the situation an adjudication will resolve. This function would be disserved were the class attorney to treat the named plaintiff as the exclusive client. The interests of the named plaintiff and other members of the class may diverge at various points during the litigation. If at such points an attorney's duty required advocacy of solely the named plaintiff's interests, the interests of other class members would be left effectively unrepresented. Treating both the named plaintiff and the class, or each member of the class separately, as the attorney's clients would not be much more satisfactory. At points where interests diverged, the class attorney would face a conflict of interest.

Under the Code, an attorney faced with a conflict of interest among his clients would be forced to withdraw from the employment of one of the clients. This solution — disaggregation of a multi-person party into its constituent interest groups in order to give the separate interests separate representation — is to some extent recognized in the sub-classing provisions of rule 23 of the Federal Rules of Civil Procedure. But, because of the numerosity of interested persons that makes class suit necessary in the first place, sub-classing will never disaggregate the class into

64 See pp. 1366-71 supra.
65 See pp. 1475-98 supra. See generally Bell, supra note 16.
66 It appears likely that in practice the attorney will choose to assert the interests of the named plaintiff over those of other class members when a conflict arises. Cf., e.g., Gonzales v. Cassidy, 474 F.2d 67, 69-71, 76 (5th Cir. 1973) (failure of class attorney to appeal award of retrospective relief only to named plaintiff basis for refusal of court to give class judgment binding effect). The attorney may have undertaken the case on the prompting of the named plaintiff and may have personal contact throughout the litigation with few other class members. Occasionally, the attorney may hope to obtain legal business from the named plaintiff in the future. The tendency of the class attorney to favor the named plaintiff might be analogized to the apparent tendency of corporate counsel "subconsciously to consider management alone" as his client, because of personal contact with management and dependence on management for continued employment. See Panel Discussion, Responsibility of Lawyers Advising Management, 30 Bus. Law., March, 1975, at 13, 15 (remarks of Van Dusen).
67 ABA Code, supra note 1, DR 5-105 (A)-(C) provides that an attorney should not accept or continue multiple employment if such a course of conduct is likely to involve him in representing differing interests, unless it is obvious that he can adequately represent the interest of each and each consents to the representation after full disclosure of the possible effect on the attorney's loyalty. In the class action context, the possibility of obtaining informed consent from all individual class members is remote, and the idea of obtaining informed consent from the class as a whole is without meaning. The Code, then, seems to require the attorney to withdraw from the litigation. See also ABA Code, supra, EC 5-15, 5-16.
68 See pp. 1479-81 supra.
single-person sub-classes. Thus, conflict of interest among individuals represented by one attorney appears inevitable and, if the class suit is to proceed at all, an understanding of the lawyer-client relationship must be developed that does not depend on the individualized representation of the interests of class members.

In a few cases, such a definition is relatively straightforward. If the class is an association that has procedures for governing itself, then the members of the association have within their control a means of deciding the interests of the association as a whole and are able to communicate these interests to an attorney.69 Because there is a mechanism for aggregating interests other than choice by the attorney himself, it makes sense to cast the attorney in his traditional role of counsellor and advocate with the association as his client, and the interest developed through the association's normal political channels as the interest to be advocated.70

69 See, e.g., Robertson v. National Basketball Ass'n, 67 F.R.D. 691 (S.D.N.Y. 1975); 389 F. Supp. 867 (S.D.N.Y. 1975). In Robertson, the class consisted of all players in the NBA and ABA active at the time the suit was commenced in 1970 or at any time before judgment. 389 F. Supp. at 873, 903. The named plaintiffs were "elected player representative[s]" of the 14 teams in the NBA when the suit commenced. Id. at 873. Every active player at the time the suit was commenced authorized the institution of the suit. Id. at 902. In Halverson v. Convenient Food Mart, Inc., 458 F.2d 927 (7th Cir. 1972), 75 of the 80 Convenient Food Mart franchisees in the Chicago area formed an association; the attorney who became class counsel was invited by an officer to attend a meeting to discuss the possibility of bringing an antitrust action against the franchisor; after the attorney left, all the members present voted in favor of the suit; the association agreed to assume the costs. See id. at 929-30.

Class actions brought by associations are infrequent in part because associations themselves ordinarily have standing to sue on behalf of their members. This standing is usually statutorily conferred. Section 301(b) of the Taft-Hartley Act, for example, provides that a labor union "may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States." 29 U.S.C. § 185(b) (1970). See generally G. Webster, The Law of Associations ¶ 17.09 (1975). Rule 23.2 provides that, even without statutory standing, an unincorporated association may sue or be sued as a class. See Fed. R. Civ. P. 23.2.

70 For example, the duty of loyalty owed by an attorney hired by a corporation runs to the entity and not to its shareholders, directors, or employees. See ABA Code, supra note 1, EC 5-18. But since management of a corporation's affairs is usually entrusted to its board of directors, elected by the shareholders, it is thought that an attorney may "ordinarily assume" that, in "rendering legal advice to management," he is "serving the interests of the corporate entity." Panel Discussion, supra note 66, at 15 (remarks of Van Dusen). Equating the corporation with management simplifies the attorney's task of identifying the client's objectives.

The assumption that an attorney representing a corporate entity will be looking primarily to management for information as to the corporation's situation and interests is reflected in the "control group" standard courts use to define those communications between an attorney and corporate employees protected by the attorney-client privilege. See, e.g., Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962); Golminas v. Fred Teitelbaum Const. Co., 112
Ordinarily, however, a class is not an association. Class members may have nothing in common except the common treatment afforded them by the class opponent. They have neither a mechanism for resolving differences in their interests, nor a way of articulating common goals to the attorney who represents them.

An understanding of the attorney's duty to the class can, nonetheless, be drawn from consideration of the purposes implicit in society's decision to have class suits and in the role assigned the judge in class litigation. The function of the class action is to create a procedure in which the interests of the numerous persons who have been affected by action of the class opponent, or who may be affected by the relief sought in the class suit, can be made visible to the court. The existence of absentee interests, either because they reinforce or because they diverge from the interests of the parties, is a relevant factor in the court's decision of the merits of a case or the award of a remedy. The class procedure thus seeks to facilitate consideration by the court of the greatest number of interests that will be affected by the outcome of the litigation. To achieve this purpose, the judge is charged with guarding the interests of absentees. He can use procedural devices such as sub-classing to force a more representative party structure, and other procedures such as sampling notice and the absentee advocate can free him to some extent from relying on the parties to bring forward information about relevant affected interests.

The lawyer's duty in representing the class must be consistent with this theme. The first obligation of the class attorney, therefore, should be to discover the range of interests held by class members. He ought also to report conflicts of interest among class members to the judge so that he can consider whether disaggregation of the class is necessary for adequate representation.

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71 See pp. 1366-71 supra.
72 See pp. 1479-81 supra.
73 See pp. 1441-42 supra.
74 See pp. 1561-65 supra.
This obligation is analogous to lawyers' traditional duty to withdraw from the representation of clients with differing interests unless each client consents to joint representation after full disclosure. Here, there is no possibility of obtaining such individual consent, so the judge must decide the propriety of joint representation.

Disaggregation of the class will not always be feasible, and if the suit is to proceed, the lawyer will inevitably have to subordinate interests of some class members to those of others; otherwise advocacy of any interest would be impossible. This decision cannot, however, be kept secret from the court because its practical effect is to foreclose actual representation of a potentially relevant interest. Thus, the third obligation of the class attorney should be to disclose to the court that he has chosen to advocate a position not shared by all those whom he putatively represents and to identify the groups that he has been forced to ignore. With this information, the judge is put in a position to take whatever steps may be required to ensure the fairness of the litigation — for example, the judge may require further disaggregation of the class, may allow intervenors a more active role, or may appoint masters, experts, or amici.

An attorney's duty to represent a class may be usefully analogized to a legislator's duty to represent his constituency. A constituency need not share any overriding common interest. Constituents may be affected differently by actions which concern all of them, and thus may have different points of view as to what action is in the best interests of the whole. To represent a constituency, a legislator must first discover the various interests of the constituents. In some circumstances, discovery of the diverse interests may be all that is required of the legislator: at least at preliminary stages of the legislative process, the very fact that proposed action has a differing impact on various elements of a constituency may be what is relevant. At other points a legislator will be required to choose among alternatives each of which will benefit or disadvantage various groups of constituents.

The legislator's choices are, of course, subject to a retrospective check through the electoral system. No similar check on the class representative appears feasible. This does not mean that no review of the choices made by the class attorney is possible. If the attorney is lax in carrying out his obligation to discover the diversity of the class, the court may order sampling notice and

75 See note 67 supra.
tax the costs to the attorney.\textsuperscript{78} Moreover, the court has a range of responses to an attorney's decision to advocate a particular position. At the punitive end of the spectrum, the court may remove an attorney as class representative if it thinks his choice of position displays a gross insensitivity to the range of interests the attorney is supposed to represent.\textsuperscript{79} At the other end of the spectrum, the court may "redefine the client" by sub-classing or inviting the participation of amici or intervenors to represent subordinated interests. Finally, the court, which ultimately must set the attorney's fee,\textsuperscript{80} can use the fee award as an incentive to proper representation of the class.

2. Attorney-Client Relationships in Practice: Communications with Class Members by the Class Attorney and Class Opponent. — The attorney-class relationship outlined above will prove unworkable if courts continue their present practice of restricting communications between the attorney and the class he represents.\textsuperscript{81} Indeed, the practice of restricting communications with

\textsuperscript{78} Cf. FED. R. CIV. P. 37(a)(4), 37(b)(2), 37(d) (all allowing fees and expenses to be taxed against an attorney who advises his client to ignore legitimate discovery requests of opponent).

\textsuperscript{79} See pp. 1489–98 supra.

\textsuperscript{80} See p. 1607 infra.

\textsuperscript{81} A gag rule may simply prohibit all communications by parties or counsel to class members "until such time as an order may be entered by the Court approving such communications." W.D. PA. R. 34(d), ruled invalid at least prior to certification, Rodgers v. U.S. Steel Corp., 508 F.2d 152, 163–64 (3d Cir. 1975), cert. denied, 423 U.S. 832 (1975). More commonly, such rules, following § 1.61 of the 1970 edition of the Manual for Complex and Multidistrict Litigation, 49 F.R.D. 217, 229, contain a general ban on all unapproved communications supplemented by a list of four types of specifically forbidden communications: (1) solicitation of legal representation of class members; (2) solicitation of fees and expenses or agreements to pay them; (3) solicitation of requests to opt out; and (4) misleading or misrepresentative communications. See S.D. FLA. R. 19B; N.D. GA. R. 221.2 & 221.3; N.D. ILL. (Civ.) R. 22; S.D. OHIO R. 3:94; S.D. TEX. R. 6; W.D. WASH. (Civ.) R. 23(g). See also Md. R. 20 (exhaustive list of forbidden communications). The 1973 edition of the Manual exempts from the requirement of prior approval "communications protected by a constitutional right," but requires that such communications be filed with the court within five days. MANUAL FOR COMPLEX LITIGATION, pt. II, § 1.41 (1973). See also Md. R. 20.

the class is encouraged by the *Manual for Complex Litigation*, although the Third Circuit recently found that such gag orders were inconsistent with rule 23 of the Federal Rules of Civil Procedure and raised grave constitutional questions. This section of the Note will consider whether any restrictions on communications with the class are warranted, and if so, how access to the class can be structured to comport with the Constitution and with the needs of the class action procedure.

Gag orders reverse the rule in ordinary litigation that communications between attorney and client are freely permitted and, indeed, encouraged. The apparent rationale for this reversal is the court's fear that the class attorney may abuse communications with the class. He may, for example, solicit fee arrangements or misrepresent the benefits of participation in the class suit in order to prevent opt-outs. Another rationale, arising from the attorney's need to subordinate some class interests to others, is that the advice the attorney offers the class and the inquiries he makes of it may be skewed. These dangers are sufficiently serious to warrant some sort of check on the attorney's communications with the class. Any checks adopted, however, must be narrowly drawn to avoid restricting the flow of information from or counselling to the class.

One obvious check on misrepresentations concerning the prospects of the lawsuit would be to allow the class opponent's attorney to communicate his views of the suit to the class directly. The interests of the class, and ultimately the interests of the judge, whose decisions during the course of litigation turn at least in part

neutral notice, "either party may furnish the class . . . any information with respect" to lawsuit provided they do not "urge or solicit any action on the part of class members").


84 Such communications are intended to be fostered by the attorney-client privilege, see 8 J. WIGMORE, EVIDENCE § 2291, at 545-549 (McNaughton rev. ed. 1961), and by the ethical principle that the lawyer should preserve the confidences of a client, see ABA Code, supra note 1, EC 4-1. See also id., EC 7-8 ("lawyer should exert his best efforts to insure that decisions of his client are made only after client has been informed of relevant considerations"). Traditionally, in class actions the relevance of the attorney-client privilege is analyzed in terms of the relationship of the class attorney and the named plaintiff, see, e.g., *Magida ex rel. Vulcan Detinning Co. v. Continental Can Co.*, 12 F.R.D. 74 (S.D.N.Y. 1951).

85 See *Kronenberg v. Hotel Governor Clinton*, Inc., 281 F. Supp. 622, 625 (S.D.N.Y. 1968) (finding communication with class by class attorney improper since there were "inferences which might easily be drawn from it which do not reflect accurately the legal position" of class members); see *Manual for Complex Litigation*, pt. I, § 1.41 (1973).
upon information as to the situation of class members, may be best served if information about the litigation communicated to the court and information about the class communicated to the court is not within the exclusive control of the class attorney. A class opponent may wish to communicate with class members directly in order to obtain information that would show the court that the situation of the class is not what the class attorney portrays it to be.86 The opponent might also hope to persuade the class, or at least some of its members, that the tactics of the class attorney are questionable,87 or that an individual settlement would be more desirable than continued litigation. Moreover, the class and the class opponent may be involved in an ongoing business relationship.88 Were routine business communications unconnected with the course of litigation required to be channeled through the class attorney, these communications might be distorted or delayed, whether advertently or not. Direct communication with the class might also be desirable from the perspective of the class opponent, given an ongoing business relationship, in order to counteract the undermining of goodwill by communications from the class attorney to the class and by the fact of litigation itself.89

A rule allowing direct class-opponent communication with the class may, however, contravene the traditional rule that counsel may communicate with the opposing litigant only through the litigant’s attorney.90 This rule reflects a concern that an un-

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87 See, e.g., Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int’l, Inc., 435 F.2d 770, 772 (2d Cir. 1972) (defendant franchisor wrote letter to franchisee class members to persuade them that suit would create publicity harmful to franchise business); American Fin. Sys., Inc. v. Pickrel, 18 Fed. Rules Serv. 2d 292, 294 (D. Md. 1974) (defendant sought court permission to offer compromises to individual employees in Title VII suit after compromise rejected by class representative on behalf of class). See pp. 1546–52 supra.
88 See, e.g., Local 734 Bakery Drivers Pension Fund Trust v. Continental Ill. Nat’l Bank & Trust Co., 57 F.R.D. 1, 2 (N.D. Ill. 1972) (communications between bank and class members who were trust or agency account clients).
89 See, e.g., id. (unsuccessful attempt by defendant bank to obtain order allowing it to respond to inquiries by trustees, beneficiaries, and other interested persons about class suit concerning certain trust accounts without prior court approval); cf. Katz v. Carte Blanche Corp., 496 F.2d 747, 757–58 (3d Cir. 1974), cert. denied, 419 U.S. 885 (1974) (notice source of adverse publicity).
90 ABA Code, supra note 1, DR 7-104 (lawyer must not communicate with opposing party represented by counsel without that lawyer’s consent); See In re Schwabe, 242 Ore. 169, 174-75, 408 P.2d 922, 924 (1965) (per curiam); Carpenter v. State Bar, 210 Cal. 520, 292 P. 450 (1930) (per curiam); H. DRINKER, supra note 6, at 201-03. But Drinker states that where the opposing counsel refuses to convey a settlement offer to his client, because of his “arrangement for a contingent fee” or because he has outstanding a bill for legal services which has not been paid, “the other lawyer should be permitted at least to bring the facts before the court, or
sophisticated litigant will be unduly influenced by representations of opposing counsel, a concern that seems equally troubling in the case of a class opponent, or his attorney, who is likely to be more sophisticated than the members of the class. And if the class and the class opponent are involved in an ongoing business relationship, communications from the class opponent to the class may be coercive. There is the further danger that the class opponent is likely to have greater financial resources than the class attorney, and will engage in repeated communications with class members, thereby intimidating class members or undermining their confidence in the class attorney's representation. The class attorney's responses may come too late to prevent class members from withdrawing from the litigation by opt-out or settlement. In any event, the cost to the class attorney of responding to repeated communications may be prohibitive.

The present practice in some federal courts of prohibiting communications with the class by both the class attorney and the class opponent in the absence of prior court approval, although responsive to concerns of abuse, seems overbroad and potentially dysfunctional. Class attorneys and class opponents may limit their communications with a class in order to avoid the time consuming process of obtaining prior judicial clearance and limit the risk of antagonizing the judge. As a result, class attorneys may be handicapped in their efforts to obtain a picture of the different situations of class members, information-gathering and necessary business communications by class opponents may be impaired, class members may be denied legal advice, and the court itself may be deprived of information potentially relevant to its litigation decisions. Moreover, use of a prior restraint even to take it up or allow his client to take it up direct with the other party, at a time and place of which the declining lawyer is advised." Id. at 203.

91 H. DRINKER, supra note 6, at 202. Drinker also emphasizes the duty not to interfere with opposing counsel's fees. Id. n.45.

92 See American Fin. Sys., Inc. v. Pickrel, 18 FED. RULES SERV. 2D 292, 295 (D. Md. 1974) (court limited defendant to "neutrally worded notice of settlement" due to concern that a Title VII class suit would be "eviscerated by violators of the Civil Rights Act who are able to convince legally unsophisticated class members that their claims are unlikely to succeed").

93 Apart from the risk of misrepresentation, which may be protected against by other means, the hazards which prompt the Manual's prior approval requirement are difficult to fathom. In the period after the filing of a class suit, it is not clear what abuse the term "solicitation" encompasses. Communications to class members do not stir up litigation. So long as a single named plaintiff has filed suit, a class suit may proceed. See Halverson v. Convenient Food Mart, Inc., 458 F.2d 927, 930 n.4 (7th Cir. 1972). Subject to court certification, the litigation is thus already stirred up. If the concern is that the class attorney will seek to obtain contracts of employment including fee agreements from class members, a more direct solution is for the court to specifically prohibit solicitation of fee
to control communications to a class by the class attorney or class opponent may be unconstitutional under the first amendment.\textsuperscript{94} Supreme Court decisions suggest that, although courts do possess authority to limit communications connected with litigation in order to protect the integrity of the judicial process, those communications are protected by the first amendment.\textsuperscript{95} Prior restraints, whether administrative or judicial, are traditionally disfavored in first amendment jurisprudence, and should be permitted only where compellingly justified.\textsuperscript{96} A requirement that communications with a class by the class attorney and the class opponent be cleared in advance with the trial judge, therefore, could withstand constitutional scrutiny, if at all, only if no less restrictive alternative existed.\textsuperscript{97}

One alternative that would minimize the degree of prior restraint is suggested by provisions regulating tender offers added in 1968 to the Securities Exchange Act of 1934.\textsuperscript{98} Section 14(d) (1) of the Act requires certain individuals offering to purchase shares of a given corporation to file their tender offers with the SEC and inform the corporation by the time the offers are made.\textsuperscript{99} Section 14(e) prohibits false or misleading statements or omissions made in connection with tender offers or responses to tender offers.\textsuperscript{100} A similar procedural framework could be adopted to contracts, as well as make the exclusive calculation of fees paid the class attorney, ignoring any fee contracts entered into with class members. See pp. 1606–18 infra.


\textsuperscript{95} The Supreme Court initially held first amendment protection of free speech to impose limits on judicial regulation of adjudicative processes in a series of cases overturning contempt convictions for out-of-court statements about trial processes. See Wood v. Georgia, 370 U.S. 375 (1962); Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941). More recently, the Court has refused to distinguish in-court and out-of-court statements. Thus, in Eaton v. City of Tulsa, 415 U.S. 697 (1974) (per curiam), and In re Little, 404 U.S. 553 (1972) (per curiam), the Court cited Craig v. Harney, supra, and appeared to apply the first amendment clear and present danger test developed in the out-of-court cases, in overturning contempt convictions for use of offensive language in court. See also Holt v. Virginia, 381 U.S. 131 (1965) (due process analysis).


regulate communications with a class by a class attorney or class opponent. Categories of forbidden communications could be established. A class attorney or class opponent would be required to file a copy of any communication with the court before disseminating the communication to the class and to furnish the adversary with a copy by the time of dissemination. Courts screening filings would limit their inspection to a search for blatantly abusive communications likely to cause irreparable injury unless restrained in advance of dissemination. The court would rely on the party opposing the communicator to bring to its attention all other communications apparently in violation of restrictions. If, after a hearing, a violation was established, the court, in addition to taking any other appropriate disciplinary measures, could order the offender to distribute corrective notice to the class.

Within this framework, specific steps could be taken to deal with the hazards presented by class attorney and class opponent communications with a class. Misleading or coercive statements, for example, could be included among the catalog of forbidden communications. An administrable test for identifying impermissible coercion could be developed by analogy to federal labor law standards governing employer communications with organizing employees. In communicating to the class the conse-

101 The court might also require that decisions by class members to opt out or to settle individually with the class opponent be subject to revocation for a period sufficient to allow the class attorney to make competing communications with the class. Cf. 15 U.S.C. § 78n(d)(5) (securities deposited pursuant to tender invitations may be withdrawn within specified time periods).

102 See, e.g., Halverson v. Convenient Food Mart, Inc., 458 F.2d 927, 932 (7th Cir. 1972) (remedial notice considered by the court where attorney's letter soliciting named plaintiffs contained misstatement). See also Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc., 455 F.2d 770, 772 (2d Cir. 1972) (plaintiff's request that defendant be required to send a retraction of letter warning against participation in class suit denied).

If misrepresentations are made with the participation of attorneys on either side, the traditional sanctions for unethical attorney conduct, including suspension, disbarment, and contempt could be applied. See 88 Harv. L. Rev. 1911, 1921 & n.66 (1975). The court should not, however, use the sanctions of disqualifying counsel or dismissing class allegations, which are unnecessarily harmful to class interests. See Halverson v. Convenient Food Mart, Inc., supra at 932 (dismissed); Kronenberg v. Hotel Governor Clinton, Inc., 281 F. Supp. 622 (S.D.N.Y. 1968) (same). But see Taub v. Glickman, 14 Fed. Rules Serv. 2d 847 (S.D.N.Y. 1970) (certification denied for inadequate representation; delay, defaults in calendar calls, attorney's conduct in Kronenberg all mentioned).


quences of allowing the class suit to go forward, a class opponent might be permitted to refer only "to demonstrably probable consequences beyond his control . . . ." 105 Use of communications with the class as a weapon in a war of attrition could be discouraged by adopting a variation on the SEC's proxy rules.106 After a given number of communications with a class, a class attorney or class opponent could communicate further with the class only if he agreed to include the adversary's reply along with the communication.107

(employer's expression of views containing no threat of reprisal or promise of benefit does not constitute evidence of unfair labor practice); NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969) (employer has first amendment right to communicate views on unionization to employees so long as he makes no threats of reprisal).

105 NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969). For a communication by a class opponent apparently meeting this standard, see Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc., 455 F.2d 770, 772 (2d Cir. 1972) (prediction by franchisor that class suit would have a dire effect on franchisees' public relations with customers). Such a prediction of extrinsic events would be distinguishable from an employer's threat not to promote an employee or a franchisor's threat not to renew a franchise, unless an invitation to opt out were accepted. The Court in Gissel noted, as a second factor for identifying coercion, the existence of a relationship of "economic dependence" making the recipient of the communication more susceptible to intimidation by the threatening implications of the statement. 395 U.S. at 617.

106 17 C.F.R. § 240.14a-7(b), (c) (1975) (management of issuer that has or plans to solicit proxies is required on request of security holder and on receipt of material, envelopes, and postage, to mail proxy statements to security holders, or in alternative to furnish a reasonably current list of addresses of security holders); 17 C.F.R. § 240.14a-8 (a), (b) (1975) (management must include in its proxy statement a proposal for action at shareholders meeting submitted by shareholder to management within specified period in advance of meeting; in case management opposes proposal, it shall also include in its proxy statement a 200-word statement by the security holder in support of the proposal).

107 In instances where the class attorney or the class opponent indicates a need to speak with class members in person so that the safeguard of filing communications is no longer feasible, other safeguards may be employed. In one class litigation, where it was desired to interview class members in order to obtain information as to whether the suit was appropriate for class treatment, the court approved a letter to be sent to class members by either party, inviting the recipient to meet with the party to provide the necessary information, but emphasizing that acceptance was purely voluntary. Bottino v. McDonald's Corp., 1973-2 Trade Cas. ¶ 74,810, at 95,619 (S.D. Fla. 1973). In another suit, the franchisor class opponent was allowed to discuss the subject matter of the suit "in connection with contract negotiations requested in each instance" by a franchisee class member. Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc., 455 F.2d 770, 772 (2d Cir. 1972), aff'd 55 F.R.D. 50, (E.D.N.Y. 1971). To protect against abuse, however, the court required that the franchisees' personal attorney be present at each negotiating session, that the class attorney be given five days notice of each session as well as be afforded full opportunity to express his views, and that the final session be held at a location convenient for the class attorney to attend. See id.
An approach like the one just set out would not be as constitutionally troublesome as the broad prior restraints courts presently employ. So long as certain procedures are followed, judicial orders temporarily prohibiting activity arguably protected by the first amendment are valid, at least in extraordinary circumstances, even though the restrained party was not afforded a hearing prior to the court’s decision. And coercive and misleading statements have been held to fall outside the scope of first amendment protection so that their ultimate restraint would be permitted.

C. Litigation Costs in Class Actions: Attorneys’ Fees and Other Expenses

At least until recently, the fees which attorneys received for class representation were sometimes spectacularly large, especially in comparison with the sums recovered for class members. In the Doughboy-Hoffert portion of the antibiotics antitrust class action settlement, for example, class members recovered on the average about $364, while class attorneys shared approximately $10 million in fees. Critics of class actions have suggested that a pattern of “minuscule recoveries” and “a golden harvest of fees” is characteristic at least of damages class actions. Judge Lumbard stated an often-voiced conclusion in 1968: “Obviously

108 Cf. Carroll v. President & Comm’rs, 393 U.S. 175, 180 (1968) (ex parte order invalid when no attempt made to notify other party).


110 A court may wish to prohibit communications, such as proposals for fee contracts, see pp. 1609-11 infra, which do not fall within the traditional categories of speech excluded from first amendment protection. But see Valentine v. Chrestenson, 316 U.S. 52 (1942). Such prohibitions may be justified, if allowing the communications would risk significant distortion of the litigative process. See Columbia Broadcasting Syst., Inc. v. Democratic Nat’l Comm., 412 U.S. 94 (1973), discussed, p. 1409, note 104 supra.


113 Free World Foreign Cars, Inc. v. Alfa Romeo, 55 F.R.D. 26, 30 (S.D.N.Y. 1972); see Haas, supra note 8, at 1280; Handler, supra note 23, at 9-10; Simon, supra note 8, at 378, 393-94. See also Note, supra note 21, at 1154-55.
the only persons to gain from a class suit are not the potential plaintiffs, but the attorneys who will represent them."\textsuperscript{114} Moreover, the fact that an attorney will obtain a significant fee from class litigation only if the class triumphs or the case is settled may be the source of a conflict of interest between the attorney and the class. An attorney may be willing to settle a class action, without due regard for the best interests of class members, in order to avoid the risk of defeat at trial.\textsuperscript{115} This potential conflict is exacerbated by a wide gap between the size of fee awards and the judgments won for individual class members: no class member may have a sufficient interest in the course of litigation to impose any check on the strongly interested attorney's dealings.\textsuperscript{116}

The apparently great disparity between attorneys' fees and the benefits class actions confer upon individual class members has also led some critics to suggest that class actions are in fact "lawyer's lawsuits,"\textsuperscript{117} financed solely by class attorneys without any "realistic expectation" of client reimbursement for litigation expenses in the event of defeat.\textsuperscript{118} Although contingent arrangements for attorneys' fees are not generally proscribed,\textsuperscript{119} speculation by an attorney with respect to other expenses constitutes maintenance, a violation of the Code of Professional Responsibility.\textsuperscript{120} Courts suspecting maintenance have in some cases allowed class opponents to attempt to discover whether a named plaintiff has agreed to assume responsibility for litigation costs,\textsuperscript{121} and have narrowed the size of a class so that costs of notice would be within a named plaintiff's resources.\textsuperscript{122}

This Section begins by examining the increasing efforts of courts to control fee awards in class actions. These efforts focus on the hours an attorney has worked, and therefore tend to reduce

\textsuperscript{114} Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 571 (2d Cir. 1968) (Lumbard, C.J., dissenting).
\textsuperscript{115} See Dam, Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest, 4 J. LEGAL STUD. 47, 56-60 (1975). See also Saylor v. Lindsley, 456 F.2d 896, 900-01 (2d Cir. 1972); Wolfram, supra note 112, at 358-59.
\textsuperscript{116} See Dam, supra note 115, at 58-59.
\textsuperscript{117} Andrews, supra note 13, at 18-19.
\textsuperscript{118} SPECIAL COMMITTEE ON RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE, AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS 20-21 (1972); see Simon, supra note 8, at 392.
\textsuperscript{119} See ABA CODE, supra note 1, DR 5-103(A)(2).
\textsuperscript{120} Id. DR 5-103(B).
the size of fee awards. Regulation of attorneys’ fees also creates opportunities for courts to structure the incentives of class attorneys. The Section concludes with an analysis of maintenance, suggesting that despite its dangers, toleration of the practice may be justified in light of the purposes served by class suit.

I. Attorneys’ Fees. — Typically attorneys’ fees are fixed by a contract between the attorney and client.123 Fee contracts between a class attorney and all members of a class are rare, however, due to the large number of class members. Nevertheless, a class attorney may attempt to arrange for fees through contract with the named plaintiff or other class members,124 or with the class opponent as part of a settlement.125 Alternatively, the basis for fee recovery in class actions may be noncontractual. A statutory provision may authorize courts to order unsuccessful litigants to pay the fees of their victorious counterparts; 126 this is the usual source of fees in class suits for injunctive or declaratory relief.127 A


126 Provisions for payment of attorneys’ fees are included, for example, in both Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a–3b, 2000e–5k (1970), as well as in Section 718 of the Emergency School Aid Act of 1972, 20 U.S.C. § 1617 (Supp. III, 1973). In interpreting the fee award provisions of these statutes, the courts have held that attorneys’ fees should ordinarily be granted to successful plaintiffs absent special circumstances rendering the award unjust. See, e.g., Northcross v. Board of Educ., 412 U.S. 427, 428 (1973) (per curiam) (Emergency School Aid Act); Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968) (per curiam) (Title II); Lea v. Cone Mills Corp., 438 F.2d 86, 88 (4th Cir. 1971) (per curiam) (Newman Title II rule equally applicable to Title VII).

Under some statutes, fee awards may be tied to the type of relief obtained. For example, Clayton Act § 4, 15 U.S.C. § 15 (1970), authorizes an award of attorneys’ fees only in cases where the plaintiff has obtained a treble damage judgment. See, e.g., Wall Prods. Co. v. National Gypsum Co., 367 F. Supp. 972 (N.D. Cal. 1973). No award may be made if the plaintiff receives only injunctive relief, see Byram Concretanks, Inc. v. Warren Concrete Prods. Co., 374 F.2d 649, 650–51 (3d Cir. 1967); Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888, 899–900 (S.D.N.Y. 1948), or if the litigation is resolved through settlement, see City of Detroit v. Grinnell Corp., 495 F.2d 448, 459–60 (2d Cir. 1974); Clabaugh v. Southern Wholesale Grocers’ Ass’n, 181 F. 706, 707–08 (5th Cir. 1910).

For a list of statutes providing for award of attorneys’ fees, see Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240, 260–61 n.33 (1975).

127 The private attorney general theory, which had provided a nonstatutory
judgment or settlement in damage litigation creates a “common fund” from which attorneys’ fees may be drawn under an unjust enrichment theory.128 Occasionally, a class opponent’s bad faith may justify assessing him for the class attorney’s fees.129

Where the only basis for a fee award is noncontractual, the court’s authority to determine the amount of the award to the class attorney is clear. Even where there is a fee contract, courts have the general power to override it, and set the amount of the fee.130 In a number of recent cases, courts have articulated circumstances in which this power should be exercised.

basis for fee awards in class actions seeking injunctive relief, see, e.g., Fairley v. Patterson, 493 F.2d 598, 604–06 (5th Cir. 1974) (alternative holding); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971), was repudiated by the Supreme Court in Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240 (1975), noted in The Supreme Court, 1974 Term, 89 HARV. L. REV. 47, 170 (1975), which held that in the absence of a statutory or contractual provision, federal courts can only award fees in common benefit or bad faith situations. See notes 128 & 129 infra.

128 See, e.g., City of Detroit v. Grinnell Corp., 495 F.2d 448, 469 (2d Cir. 1974); Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 165–66 (3d Cir. 1973). See generally Dawson, Lawyers and Involuntary Clients in Public Interest Litigation, 88 HARV. L. REV. 849, 915–29 (1975) [hereinafter cited as Dawson II]. Under the common fund principle, an attorney may assess a pro rata share of his fee from each individual who receives a portion of a monetary fund resulting from litigation by the attorney. See generally Dawson, Lawyers and Involuntary Clients: Attorney Fees From Funds, 87 HARV. L. REV. 1597 (1974). In some circumstances, an attorney may be able to recover fees even if the litigation confers only nonmonetary benefits. See, e.g., Hall v. Cole, 412 U.S. 1, 4–9 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 393–97 (1970); Kiser v. Miller, 364 F. Supp. 1311, 1320–21 (D.D.C. 1973), aff’d in part and remanded in part on other grounds sub nom. Pete v. UMW Welfare & Retirement Fund of 1950, 517 F.2d 1275, 1289–93 (D.C. Cir. 1975) (en banc) (class action). The Supreme Court’s decision in Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240 (1975), however, limited the applicability of this broader “common benefit” doctrine to cases where “the classes of beneficiaries were small in number and easily identifiable . . . . [,] [t]he benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefiting,” id. at 265 n.39.

129 See, e.g., Fairley v. Patterson, 493 F.2d 598, 605–06 (5th Cir. 1974) (alternative holding); Bell v. School Bd., 321 F.2d 494, 500 (4th Cir. 1963); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala.) (alternative holding), aff’d mem., 409 U.S. 942 (1972). In Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240 (1975), the Supreme Court reaffirmed the federal courts’ equitable power to award fees upon a showing of bad faith. See id. at 258–60, 270–71 n.46.

130 See Spilker v. Hankin, 188 F.2d 35 (D.C. Cir. 1951). In Spilker, an attorney whose fee contract for a divorce suit took the form of seven notes was awarded judgment on the second note, and later sued on the last five notes. The court held that notwithstanding the usual principles of res judicata, the attorney’s judgment on the earlier note did not preclude the client from presenting legal or equitable defenses in the second suit. The court stated that attorneys’ fees contracts are “of special interest and concern to the courts” and are “not to be enforced upon the same basis as ordinary contracts.” Id. at 39. The principle
In order to reduce the temptation which settlement negotiations pose for the class attorney to sacrifice class interests to self-interest, courts generally have not allowed the class attorney and the class opponent to fix the amount of the class attorney’s fee as part of a settlement agreement. However, courts have allowed settlements to include provision for judicial award of “reasonable fees,” or to mandate a “reasonable fee” not to exceed an agreed-upon ceiling, at the class opponent’s expense. At least in the context of class suits involving damage claims, tolerance of negotiations between the class attorney and class opponent over “reasonable fee” provisions and fee limits is not inconsistent with a desire to minimize the conflict of interest the class attorney faces in settlement negotiations. The settlement fund will provide an alternative source of fees for the class attorney under a common fund theory. Thus, the decision to award a fee in addition to the class relief rather than to leave the fee to be extracted by the court from the fund only affects whether the amount of the class recovery, or instead the absolute limit to the opponent’s liability, is left uncertain pending the court’s determination of the class attorney’s fee.

that a contract entered into between attorney and client should be scrutinized closely by the court is of long standing. See, e.g., Ridge v. Healy, 251 F. 798, 804 (8th Cir. 1918); Stiers v. Hall, 170 Va. 569, 197 S.E. 450 (1938); Thomas v. Turner’s Adm’r, 87 Va. 1, 12 S.E. 149 (1890). See also Gross v. Russo, 76 Misc. 2d 441, 441-42, 351 N.Y.S.2d 355, 356-57 (Sup. Ct. 1974) (contract between attorney and client not to be viewed in same way as commercial contract).

settlement agreement providing for attorneys’ fees to be fixed by the court; Grunin v. International House of Pancakes, 513 F.2d 114, 120 (8th Cir.), cert. denied, 423 U.S. 864 (1975), (settlement agreement providing for payment of up to $1.25 million in attorneys’ fees at court’s direction).

Indeed, so long as the fee is set by the court, payment by the defendant rather than from the fund may actually ameliorate the conflict of interest between the attorney and the class. When the fee is paid out of the fund, the defendant will have little incentive to argue in favor of a lower fee award; unless there is an absentee advocate, see pp. 1561-65 supra, the court may not have very much assistance in setting a fee which adequately compensates the class attorney and yet does not unfairly diminish class members’ recoveries. On the other hand, if the defendant is liable for the class attorney’s fee, the judge is likely to obtain the benefit of an adversary presentation prior to fixing the amount of the award. See Wolfram, supra note 112, at 359-60; Note, supra note 111, at 1155. Anticipating this adversary process, the defendant may exact, as the price for a fee agreement, a smaller reduction in the class recovery than the unopposed class attorney would inflict through a direct assessment against the settlement fund.

In suits for injunctive relief, however, bargaining by the class attorney for an agreement from the class opponent to pay fees may give rise to a conflict of interest. A settlement resulting only in a consent decree will give rise to no common fund from which fees can be drawn. Statutory fee provisions may have been interpreted not to extend to fee awards in the event of settlement. See note 116 supra. As a result, if a suit for injunctive relief is settled, the class attorney’s fee
Courts have also acted to limit the effect of contingent fee contracts entered into by class attorneys and class members. Attorneys who have obtained the consent of a fraction of a class to contracts fixing fees in terms of a percentage of each class member's recovery have argued that courts should rely upon such agreements as the measure of the fees to which an attorney is entitled, not only from class members consenting to the contracts, but also from nonconsenting class members whose obligation to the attorney is based on the common fund principle. This argument prevailed in Philadelphia Electric Co. v. Anaconda American Brass Co.\textsuperscript{133} Attorneys had obtained the consent of 1380 of 1481 class members to a contingent fee arrangement. The court, finding no reason to differentiate, took the percentage used in the agreement as the measure of fees for nonsigners as well as signers, and awarded the attorneys over $5 million.\textsuperscript{134} In more recent cases, however, courts have refused to extend percentage fee arrangements to cover nonsigning class members, and have even expressed a willingness to disregard such arrangements in fixing the signers' fee obligations. Class attorneys in Illinois v. Harper & Row Publishers, Inc.\textsuperscript{135} failed to persuade the court to measure fees due from the class by reference to percentage fee agreements reached with a "number of specific plaintiffs."\textsuperscript{136} Instead, the court developed its own criteria and, in applying these standards, gave no indication that the fee obligations of class members who may depend upon the agreement of the class opponent, and the class attorney may be tempted to trade off class relief in order to secure compensation. To some degree, the adverse consequences of this conflict of interest can be reduced through judicial review of settlements. See pp. 1573–75 supra. The most effective solution, however, would be reinterpretation of statutory fee provisions to allow for fee awards in the event of settlement.

\textsuperscript{133} 47 F.R.D. 557 (E.D. Pa. 1969).
\textsuperscript{134} Id. at 559–60. In support of its decision the court noted that the 25% fee had been agreed to by "virtually all" of the claimants, who were "responsible government entities and substantial enterprises, for the most part represented by their own counsel," and that there was "no persuasive reason for permitting discrimination in favor of" the noncontracting class members. Id. at 559. One class member, however, the City of New York, which had sought to appear in the litigation by its own counsel and argued that it did not owe any fee to class counsel, was accorded a reduced fee of 15% of its recovery. Id. at 560. For criticism of the decision, see Dawson II, supra note 128, at 923 & n.305.
\textsuperscript{135} 55 F.R.D. 221 (N.D. Ill. 1972).
\textsuperscript{136} Id. at 223. The court acknowledged that in some class suits percentage fee contracts had been "automatically extended" to nonsigning class members. It concluded, however, that such a procedure was not fair to "class members who were unrepresented when the fee contracts were made." Id. at 223. The court noted that the fee contracts, providing for fees of 20% of each class member's recovery, were entered into before the performance of any services, and that it was more sensible for the court to value the services after their performance. Id. at 223–24.
had consented to the percentage arrangement were any different from the obligations of the other class members.137 A year later, in Kiser v. Miller,138 a court expressly refused to enforce a percentage fee plan against either signing or nonsigning class members, on the ground that the plan was "null and void as against public policy."139 The Kiser court, concerned by the inequality in bargaining power between class attorneys and class members,140 found the percentage fees unreasonably large given the amount of effort expended by attorneys on the case and the relative simplicity of the issues the case presented.141

Judicial hostility to percentage fee contracts in class actions is generally appropriate. If such contracts are used only as the measure of the fee charged signing class members, and if the fee such contracts set is significantly larger than the fee a court would award using more neutral criteria,142 a possibility of conflict of interest arises. An attorney may not regard all members of the class as equally his clients but instead, in situations where litigation choices have a differential impact upon signing and nonsigning class members, may give extra weight to the interests of the class members who have contracted for his services. For example, if the majority of the class members who enter into the fee agreement have individually recoverable claims, and if the total number of class members who sign the agreement is not large, there is a risk that an attorney will attempt to treat the signing class members as individual clients, settle their claims, and terminate the class suit.143

Courts could adopt a rule providing that percentage fee contracts would fix the measure of the fees owed an attorney by every member of a class if more than a designated proportion of the class signed the contracts, but that the contracts would bind no one, including the signers, if the threshold proportion were not reached. So long as the required proportion is known with cer-

137 See id. at 224–26. See also Bakery & Confectionery Workers Union v. Ratner, 335 F.2d 691 (D.C. Cir. 1964) (attorneys' fees in suit which started as class action, but in which union ultimately was substituted as plaintiff, should be determined on quantum meruit basis and not by terms of retainer agreement signed by named plaintiffs).


139 Id. at 1319.

140 Class members were retired coal miners, whom the court found to be as a group "impoverished" and likely to lack "sophistication" in dealing with lawyers. Id. at 1318–19.

141 Id.

142 See pp. 1611–15 infra (discussing hours-worked standard).

143 See also pp. 1546–52 supra.
tainty by attorneys in advance of litigation, such a rule would seem to resolve the conflict of interest problem. This is not a satisfactory approach, however, at least from the perspective of the nonsigning class members, since the terms of individual contracts usually will not accurately reflect the value of a class attorney's services. Even class members with individually recoverable claims often will not be in a position to solicit competitive "bids" from other attorneys: once other lawyers learn that a fellow attorney is planning to pursue a class suit they may not be willing to compete for the right to represent the class, since failure would result in an uncompensated expenditure of time.\textsuperscript{144} Moreover, toleration of percentage fee contracts may be plausibly justified only on the ground that such contracts offer attorneys a necessary incentive to initiate class suit.\textsuperscript{145} Through use of appropriate criteria in setting the amount of fee awards, however, courts can create an adequate incentive for attorneys to bring class suits without surrendering control over the amount of the fee.

Whether acting under statutory grants of authority or common fund principles, or in response to bad faith, courts should design fee-setting criteria so as not to discourage attorneys from bringing class suits. Otherwise, the usefulness of the class action as a means to full realization of substantive policy would be jeopardized. In setting fees, courts should be aware of the possibility of using the fee award to create incentives for attorneys adequately to represent class interests. On the other hand, courts should not award fees larger than the amounts which are required to fulfill this purpose. If attorneys collect more than the "reasonable value" of the services which have produced a benefit for class members, the reputation of the profession might suffer and the parties against whom fees ultimately are assessed — either the class members or the class opponent — might be unfairly burdened.

The approach courts currently take in setting the fees awarded class action attorneys is generally consistent with these considerations. Most courts now take as their point of departure the number of hours a class attorney has worked on a case, multi-

\textsuperscript{144} In any event, attorneys may regard such competition as unethical. Canon 7 of the ABA's original Canons of Professional Ethics, \textit{reprinted in} H. Drinker, \textit{supra} note 6, at 311, prohibited "[e]fforts, direct or indirect, in any way to encroach upon the professional employment of another lawyer . . ." The current Code provides that "[i]f a lawyer knows a client has previously obtained counsel, he should not accept employment in the matter unless the other counsel approves or withdraws, or the client terminates the prior employment." ABA Code, \textit{supra} note 1, EC 2–30.

\textsuperscript{145} See generally Hornstein, \textit{Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards}, 69 Harv. L. Rev. 658, 663 (1956).
plying hours worked by an appropriate hourly rate, and then adjusting the total award to reflect risk and the quality of representation. Judges fixing fees in damage class actions, sensitive to charges that percentage fees create windfall gains for class attorneys, may see a standard based on hours worked as a means both of reducing the size of fee awards and of demonstrating the compensatory character of the fees awarded. Use of an hours-worked standard similarly guarantees a degree of rationality in fee calculations conducted pursuant to statutory authority; here, however, the danger may not be that fees would otherwise be too large, but that attorneys suing under such controversial statutes as Title VII may be improperly penalized by courts for engaging in unpopular litigation.

146 Until recently, many courts awarding fees in damage class actions fixed the fees as a percentage of the recovery or settlement fund. See, e.g., Brown Co. Securities Litigation, 355 F. Supp. 574, 592–93 (S.D.N.Y. 1973) (25% of settlement fund); Feder v. Harrington, 58 F.R.D. 171, 177 (S.D.N.Y. 1972) (24% of settlement fund). In Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973), the Third Circuit developed a formula for fee calculation requiring a court to consider only four variables: hours worked, the attorney's hourly rate of compensation, the risk borne by the attorney, and the quality of the attorney's work. See id. at 167–69. The Lindy formula not only identified the relevant variables, but also provided courts with a structured process for calculation: first calculate the number of hours worked, then multiply by the hourly rate to determine a base fee; only after the base fee is fixed, consider such intangibles as risk and quality. See id. The Lindy approach appears to be in the process of replacing the percentage fee method as the principal basis for fee calculations in common fund situations. See, e.g., National Treasury Employees Union v. Nixon, 521 F.2d 317, 322 (D.C. Cir. 1975); Grunin v. International House of Pancakes, 513 F.2d 114, 127–28 (8th Cir.), cert. denied, 423 U.S. 864 (1975); City of Detroit v. Grinnell Corp., 495 F.2d 448, 470–71 (2d Cir. 1974).

With respect to statutory fee awards, the leading case, Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), set forth a framework of analysis requiring a court to consider twelve interrelated variables. See id. at 717–19. Since the Lindy formula essentially captures the factors the Fifth Circuit listed at greater length in Johnson, compare 487 F.2d at 167–69 with 488 F.2d at 717–19, the discussion here will treat Lindy as stating the prevailing rule for both damages and injunction cases. See generally Note, Computing Attorney's Fees in Class Actions: Recent Judicial Guidelines, 16 B.C. IND. & COM. L. REV. 650 (1975).


149 In Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), it is noteworthy that it was the class attorneys who appealed the trial court's apparent failure to adhere closely to the hourly rate approach. The trial court had without explanation excluded between 239.5 and 299.5 of the 659.5 hours claimed by the attorneys. See id. at 717. The total fee of $13,500 represented an hourly rate of only $20 if computed in terms of the 660 hours claimed by the attorneys.
As the basis for an hourly rate of compensation, courts often look to "the hourly amount to which attorneys of like skill in the area would typically be entitled for a given type of work . . . ." Since the typical hourly rate is determined by reference to the fees set through the legal services market for suits by individuals, fee awards to class attorneys under this standard would reflect the social value of the attorneys' services, at least as measured by market pricing. In some circumstances, however, a reference group of attorneys whose fee arrangements are set through the market may not exist. For example, potential plaintiffs under various civil rights acts may be unable to finance litigation themselves. Attorneys' fees, whether for class litigation or individual suits, will ordinarily be set by courts acting pursuant to statutory authorization, rather than by attorney-client bargaining.

In the absence of a clearly relevant market, courts must exercise special care to insure that fee awards are not unduly influenced by judgments as to the relative social importance of various statutory causes of action. Such judicial ranking of statutes . . . .

The fee of $30,145 requested by the attorneys represented an hourly rate of about $45.

150 City of Detroit v. Grinnell Corp., 495 F.2d 448, 471 (2d Cir. 1974); accord, Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 718 (5th Cir. 1974) ("customary fee for similar work in the community"); Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d Cir. 1973) (hourly rate to be calculated by looking to "attorney's legal reputation and status," also taking into account fact that "the reasonable rate of compensation differs for different activities"); In re Gypsum Cases, 1974-2 Trade Cas. ¶ 75,272 (N.D. Cal. 1974) (hourly rate based on "community standards").

151 See note 126 supra.

152 Special care is particularly warranted in light of the differential which has developed between fees awarded in civil rights class actions and fees awarded in securities and antitrust suits. Compare, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 66 F.R.D. 483, 486 (W.D.N.C. 1975) (school desegregation suit; fees come to approximately $65 per hour); Barth v. Bayou Candy Co., 379 F. Supp. 1201 (E.D. La. 1974) (Title VII suit; fees set at $50 per hour for principal attorneys); Wade v. Mississippi Coop. Extension Serv., 378 F. Supp. 1251 (N.D. Miss. 1974) (Title VII suit; fees set at $35 per hour), with, e.g., Blank v. Talley Indus., Inc., 390 F. Supp. 1 (S.D.N.Y. 1975) (securities fraud suit; fees set at $100 per hour for partners, with a 50% bonus); Arenson v. Board of Trade, 372 F. Supp. 1349 (N.D. Ill. 1974) (antitrust suit; fees set at four times normal hourly rate, yielding an average hourly rate of $358); Colton v. Hilton Hotels Corp., 59 F.R.D. 324, 329 (N.D. Ill. 1972) (antitrust suit; fees set at $152.29 per hour).

The apparent difference in the size of fee awards in civil rights and commercial class actions may be the result of a number of factors. Courts are generally more reluctant to award large fees where the fees are paid by the class opponent, the usual situation in civil rights suits, than where the fees come out of the common fund of class benefits, as is typically the case in commercial class actions. See, e.g., Rios v. Steamfitters Local 638, 20 Fair Empl. Prac. Cas. 1282 (S.D.N.Y. 1975) (fees set at rate of approximately $20 per hour in Title VII suit in order not to unduly burden defendant). Solicitude for class opponents, however, may be carried...
would appear to be inconsistent with the Supreme Court's reasoning in *Alyeska Pipeline Service Co. v. Wilderness Society.* In order to maintain the neutrality required by *Alyeska Pipeline*, courts could take either of two courses where no direct market comparison is possible. First, courts might use the fees paid attorneys litigating other statutory causes of action as a basis for calculation. There seems to be no reason to believe that the litigation skills required to bring civil rights class actions, for instance, differ in any significant way from the skills demanded of attorneys involved in, for example, antitrust suits. Second, courts could regard the attorneys representing class opponents as the reference group. In most cases, the fees the attorney for the class opponent obtains will have been negotiated with the client, and thus will be a product of the legal services market. Moreover, the fees of the class opponent's attorney should reflect the

to the point of unfairness to class members, and inconsistency with substantive law, if it results in fees set so low as to thwart the congressional policy of relying, at least in part, upon private attorneys general for enforcement of the civil rights laws, *see, e.g.*, Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968) (per curiam). If attorneys representing the class in a civil rights suit are employed by a nonprofit organization, courts may feel there is no harm in awarding a lower fee inasmuch as the organization might not be motivated by economic considerations in bringing suit. This view, however, overlooks the possibility that the nonprofit organization may rely upon fees to cover its expenses; given such reliance, civil rights suits, at least in the aggregate, may be discouraged by low fee awards even if civil rights attorneys are public-minded. Finally, geographic factors may explain differences in fee rates. Hourly rates may be generally lower in the areas in which many civil rights suits are brought than they are in major commercial centers. It may be, however, that the relevant market for attorneys in civil rights actions is not strictly regional. In the recent steel industry Title VII suits, for example, although litigation centered in Alabama, many of the attorneys in the cases, representing both plaintiffs and defendants, had their home offices in New York. *See, e.g.*, United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 833 (5th Cir. 1975), cert. denied, 44 U.S.L.W. 3593 (U.S. April 19, 1976). Regional variations in attorneys' fees, therefore, also do not provide courts with a ready excuse for avoiding consideration of whether fees awarded in civil rights class actions are improperly lower than the fees awarded in commercial suits.

153 421 U.S. 240 (1975). In *Alyeska Pipeline*, the Court held that in deciding whether to grant fees in the first place, courts could not, "without legislative guidance," judge "some statutes important and others unimportant ... ." *Id.* at 263-64. The *Alyeska Pipeline* principle appears to apply equally to the situation where courts might consider weighing statutory policies, or fail to take steps to avoid de facto weighing, in determining the size of fee awards.

154 In Swann v. Charlotte-Mecklenburg Bd. of Educ., 66 F.R.D. 483 (W.D.N.C. 1975), the court awarded class attorneys a total fee of $175,000—a relatively large fee compared with other fees obtained for civil rights litigation. Judge McMillan noted that defendant's counsel had charged more than the court's award for "similar though unsuccessful services." *Id.* at 486. Yet even though the *Swann* court deemed the request of class counsel for $205,000 to be "reasonable" it reduced the fee to $175,000 since it preferred "to err on the conservative side" rather than "contribute unnecessarily to the overpricing of litigation." *Id.*
complexity of the issues under litigation, as well as the caliber of the opposition a class attorney confronted, and thus should provide a fair measure of the services the class attorney rendered the class.

The practice of increasing a fee award to reflect the risks of litigation is plainly justified. A class attorney's fee is ordinarily contingent upon some sort of recovery by the class, either through settlement or litigation. As a result, attorneys will generally be unwilling to initiate class suits unless fee awards are adjusted to compensate the attorneys for assuming the risk of unsuccessful litigation. Where a fee is taken out of a common fund, award of a risk premium raises no problem of unfairness, since the premium is simply part of the compensation class members pay for the benefit class suit has afforded them. Where a fee is paid by the class opponent under a statutory provision, however, a seeming paradox arises: the greater the class opponent's chances of victory, the greater the fee award the class opponent will have to pay in the event of loss. Nonetheless, award of a risk premium under a statutory fee provision is not, to any significant degree, unfair to the class opponent. The marginal increase in the fee award is unlikely to affect the class opponent's litigation strategy since the burden of the relief, rather than the amount of the fee, will usually be his chief concern. Moreover, the class opponent only has to pay if he has lost the litigation; the risk premium is not extracted from an innocent third party.

155 At least under some statutes, reference to the fees of attorneys for class opponents may be a required part of the process of fixing fees for the class attorney. Cf. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 719 (5th Cir. 1974) (purpose of Title VII's fee provision is in part to "enable litigants to obtain competent counsel worthy of a contest with the caliber of counsel available to their opposition").

156 Such a bonus is typically calculated as a percentage of the hourly compensation, see, e.g., National Ass'n of Regional Medical Programs, Inc. v. Weinberger, 396 F. Supp. 842, 850–51 (D.D.C. 1975), or as a multiple of the basic fee, see, e.g., In re Gypsum Cases, 1974–2 Trade Cas. ¶ 75,272, at 97,774–90 (N.D. Cal. 1974).

157 If a risk premium is included by a judge as part of a fee award to which the class opponent has agreed under a "reasonable" attorneys' fees provision, any potential for unfairness to the class opponent is mitigated by the class opponent's consent, at least so long as the class opponent had knowledge at the time the fee agreement was reached that a risk premium might be awarded.

158 Ordinarily, if the defendant's probability of success at trial is high, the expected savings in terms of the cost of relief would outweigh any increase in the cost of attorneys' fees in the event of defeat. However, should the potential amount of the fees be substantial in comparison with the relief at stake, a risk-averse defendant might actually feel more compelled to settle when there is a more favorable outlook on the merits.

159 In addition, any claim of unfairness must be premised on the assumption that, for a class opponent, a greater chance of victory implies a lesser degree of
The chief difficulty created by the award of a risk premium is one of calculation. In theory, a judge might consider the class attorney’s attitude towards risk — the degree to which the attorney is or is not risk-averse — as well as the attorney’s initial assessment of the probability of success. Reliable information as to an attorney’s subjective judgments is not readily available, however, and thus the judge is left only with his own assessment of the likelihood of the class’ victory. Because it is largely a reflection of the judge’s own experience, this probability judgment cannot be reduced to formula. However, the question of what weight the judge should give to the probability assessment, once it is made, is susceptible of general analysis. The weight given the risk factor in fee calculations may have a significant effect on the allocation of attorneys’ resources between relatively safe and unsafe lawsuits. For example, a court could encourage attorneys to be indifferent between suits certain to win and those with only an even chance of success by doubling fee awards for suits in the latter category. Since borderline violations of a statute are more likely to be risky targets for suit, such equalization of at-

culpability. It is not necessarily the case, however, that the likelihood of successful litigation does indeed correlate inversely with culpability: some account must be taken of adventitious factors, such as the availability of evidence, which may determine the outcome of a lawsuit. Moreover, culpability may not be capable of cardinal measure. Once liability is found, it may be possible to speak only of culpability and nonculpability, and draw no further distinctions. The trial process is a means of coming to a conclusion concerning liability. Once liability is adjudged, an uncertainty as to the class opponent’s liability disappears, and to treat the class opponent as though this were not the case would be to deny the whole purpose of the trial.

Appellate courts discussing the award of risk premiums have attempted to formulate only very general standards. In Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 168 (3d Cir. 1973), the court stated that “the district court should consider any information that may help to establish the probability of success,” but did note that “[t]he most important such information in a civil antitrust suit may be the progress of any criminal action brought against the defendants.” The court in City of Detroit v. Grinnell Corp., 495 F.2d 448, 471 (2d Cir. 1974), found a number of questions relevant in fixing a risk premium:

... has a relevant government action been instituted or, perhaps, even successfully concluded against the defendant; have related civil actions already been instituted by others; and, are the issues novel and complex or straightforward and well worn?

The award of risk premiums is unlikely to cause attorneys to become fully indifferent between lawsuits less certain and more certain of success. Attorneys may be risk-averse, and a court’s equalization of incentives, made from a perspective of risk neutrality, may not correspond to an attorney’s subjective evaluation of the benefits and burdens of particular lawsuits. Any tendency to risk-aversion on the part of attorneys is likely to be increased if maintenance is allowed, see pp. 1618–23 infra, since the attorneys will be assuming the costs of litigation both during the course of a suit and in the event of its failure.
Attorneys' incentives may be tantamount to inviting more challenges to conduct on the fringes of legality. In deciding what weight to give to the probability of a suit's success, therefore, courts must take into account the degree to which substantive policy exhibits a preference for deterring borderline conduct, or focuses instead on the elimination of more narrowly defined, egregious violations.

In addition to influencing class attorneys' choices among lawsuits, the risk premium may also have an effect on class attorneys' conduct during the course of a suit. The prospect of a risk premium may increase a class attorney's willingness to reject an easy settlement and adopt a litigation strategy that involves more uncertainty but is more beneficial to the class. The incentive structure the risk premium creates with respect to the conduct of litigation may be reinforced by the impact of an hours-worked basis for fee calculation. If the size of the fee which an attorney receives is a function of the amount of time he puts into a case, the attorney is to some degree discouraged from entering into quick settlements simply to secure a fee. Of course, one effect of an hours-worked standard may be to tempt class attorneys to spend more time than is necessary in conducting class litigation.

Courts setting fees have therefore required class attorneys to specify the activities to which they devoted time, and have refused to credit attorneys for superfluous hours. Notwithstanding the incentives created by the risk premium and the hours-worked standard, direct adjustment of fee awards to promote adequate representation of class interests may be necessary. Award of an additional "quality premium" may be justified, for example, to encourage attorneys whose fees are not otherwise connected to the size of a damage recovery to seek the

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162 Use of an hours-worked standard in conjunction with a risk premium may also reduce the likelihood that the risk premium will tempt attorneys to bring frivolous suits. An attorney bringing a suit which he considers frivolous will often attempt to obtain a quick settlement from the class opponent rather than expose his claim to prolonged scrutiny. Under the hourly rate approach, the basic fee in such a case will be quite small, and the risk premium therefore also of little value. See City of Detroit v. Grinnell Corp., 495 F.2d 448, 471 (2d Cir. 1974); Pomerantz, Class Action Controversies: Legal Fees, in CURRENT PROBLEMS IN FEDERAL CIVIL PRACTICE 367, 377-78 (B. Garfinkel ed. 1975).

best settlement possible in dealing with a class opponent.\(^{165}\) In considering an award of a quality premium, or conversely a reduction in a fee award on account of poor quality representation, a court should be sensitive to the full range of opportunities which introduction of the quality factor creates for structuring the incentives of class attorneys.\(^{166}\) The court should make clear to class attorneys at the outset of the suit that the size of their fees will be affected by the quality of their performance, as well as indicate in some detail what activities will be rewarded or punished. In identifying the factors relevant to determining the quality of representation, the court should not take too narrow a focus: along with attorneys' efforts going to the merits of a claim the court should consider activities an attorney might undertake that are unique to class representation.\(^{167}\) Thus, a court might award a quality premium for an attorney's efforts to discover, and reveal to the court, relevant differences in the situations of class members.\(^{168}\) The court might also want to encourage activities designed to inform class members of the progress of the class suit — for example, dissemination of a newsletter. Finally, the court might reduce fees to penalize an attorney who concludes a settlement subsequently rejected by the court as inadequate, even though the attorney eventually concludes a settlement winning court approval.

2. Maintenance. — Like attorneys' fees, other costs of litigation are ordinarily recoverable only at the close of a class suit, and only if the suit ends favorably for the class. If a common fund

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\(^{165}\) Use of the hours-worked standard, unless supplemented by a quality premium, deprives an attorney of the financial stake in the size of the class recovery that exists when the attorney's fee is fixed as a percentage of the class recovery. See City of Detroit v. Grinnell Corp., 495 F.2d 448, 471 (2d Cir. 1974).

\(^{166}\) A problem of double-counting arises if courts use explicit bonuses for high-quality performance, or penalties for poor performance. An attorney's skills, or more precisely the skills of his peers, are likely to be one factor affecting the typical hourly rate a quality award is supposed to supplement. But the problem of double-counting disappears if a court is careful to reward an attorney for an outstanding performance, or penalize for a poor performance, only if the performance is one which would not be expected from an attorney paid at the typical hourly rate appropriate for the class attorney. See Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 168 (3d Cir. 1973).

\(^{167}\) Many courts have focused their attention on the class attorney's efforts in litigating the merits of a class claim without seeming to take into account any unusual effort the attorney might have expended on activities peculiar to class representation. See, e.g., Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 168 (3d Cir. 1973); Blank v. Talley Indus., Inc., 390 F. Supp. 1, 6-7 (S.D.N.Y. 1975); In re Gypsum Cases, 1974-2 Trade Cas. ¶ 75,272 (N.D. Cal. 1974).

is created, the expenses incurred in bringing suit can be deducted from the recovery. Even if no common fund results, it is possible that the class opponent will agree, as part of the terms of a settlement, to pay litigation expenses as well as attorneys' fees. Under at least some statutes, if a class should obtain a judgment a court may charge litigation expenses, including the cost of notice, against the class opponent. Following the analogy of attorneys' fees, it might be expected that the class attorney would assume the other costs of litigation, both during the course of suit and in the event of defeat. However, the Code of Professional Responsibility, while it permits attorneys to enter into contingent fee arrangements, does not allow attorneys to advance or guarantee the other costs of litigation unless the "client remains ultimately liable for such expenses."

This ban on maintenance, were it enforced effectively, would be an important obstacle to class suit, since the alternatives to maintenance in the class action context are often either impractical or unfair. The Code would permit the class attorney, as well as


170 Such expenses may go beyond the traditional taxable costs such as docket, court clerk, witness and reporter fees provided for under 28 U.S.C. § 1920 (1970). See generally Note, Awarding Attorney and Expert Witness Fees in Environmental Litigation, 58 CORNELL L. REV. 1222, 1222-23 & nn.1-3 (1973) Under Title VII, for example, courts have awarded the costs of expert witnesses and statistical evidence, see, e.g., Rios v. Steamfitters Local 638, 400 F. Supp. 993, 997 (S.D.N.Y. 1975); Davis v. County of Los Angeles, 8 CCH EMPL. PRAC. DEC. ¶ 9444 (C.D. Cal. 1974), and more generally, all "reasonable expenditures incurred by plaintiff's attorneys," Peters v. Missouri Pac. R.R., 3 Fair Empl. Prac. Cas. 792, 794 (E.D. Tex. 1971), aff'd, 483 F.2d 490 (5th Cir.), cert. denied, 414 U.S. 1002 (1973); accord, Gregory v. Litton Syst., Inc., 316 F. Supp. 401, 404 (C.D. Cal. 1970), modified on other grounds, 472 F.2d 631 (9th Cir. 1972). See also Swann v. Charlotte-Mecklenburg Bd. of Educ., 66 F.R.D. 483 (W.D.N.C. 1975) (award of "actual expenses" in school desegregation case). It seems probable that the costs of notice in a Title VII class action could similarly be taxed against the class opponent. See generally Zugschwerdt, Remedies Granted in Employment Discrimination Cases, in EQUAL EMPLOYMENT OPPORTUNITY—RESPONSIBILITIES, RIGHTS, REMEDIES 239, 333 (J. Pemberton ed. 1975). Not all statutes which provide for attorneys' fee awards also provide for the award of litigation expenses, however. Statutory fee awards under the Clayton Act, for example, do not encompass any expenses other than the traditional taxable costs. See Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 224 (9th Cir.), cert. denied, 379 U.S. 880 (1964).

171 ABA CODE, supra note 1, DR 5-103(A)(2).

172 Id. DR 5-103(B); see id. EC 5-8.
the named plaintiff, to seek to obtain cash or agreements to pay expenses from class members. Such solicitation is likely not to be completely successful, however, if only because of "free-rider" effects, unless a class is given coherence by some preexisting organizational form, and is therefore capable of making decisions as an entity. Imposing the terms of expense agreements reached with some class members upon nonconsenting class members would be unfair, at least where the class has recovered nothing, since the nonconsenting individuals would have received no benefit from which an obligation to pay expenses could be derived. Expense arrangements binding only some members of a class, although apparently consistent with the Code, are equally objectionable since, if only some class members bear the costs of unsuccessful litigation, the class attorney may face a conflict of interest between his duty to the class as a whole and his felt obligation to the financing class members. Finally, redefinition

173 ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 1326 (1975) states that it is ethically proper for an attorney to solicit funds to be used for expenses in connection with preparation for litigation of a class suit, or for the expense of mailing notice, but that it is not proper for an attorney to solicit funds for his own compensation from class members. The attorney is allowed, however, to receive funds solicited by one class member from others for the express purpose of compensating the attorney. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 1280 (1973) endorsed a scheme whereby the original individual client of a class attorney, in order to make pursuit of his claim financially feasible, could conduct at his own expense a mail solicitation of potential class members for immediate funds and for authorization to retain the attorney's services at a 35% contingent fee and to assign himself a 12% contingent fee from the recovery. See also Ralston v. Volkswagenwerk, A.G., 61 F.R.D. 427, 433-34 (W.D. Mo. 1973) (the court denied certification in part because the named plaintiff lacked adequate financial resources, but suggested that class members might seek to "coalesce their finances" prior to filing suit).

174 See Halverson v. Convenient Food Mart, Inc., 458 F.2d 927, 930-31 (7th Cir. 1972) (preexisting association of most of the franchisees in class agreed to pay expenses of class suit). But see Craig, Financing the Employment Discrimination Lawsuit, in HANDLING THE EMPLOYMENT DISCRIMINATION CASE 23, 35 (G. Holmes & Q. Story eds. 1975) (suggesting the usefulness of forming an association for the purpose of Title VII class litigation, and having the association assess dues against its members).

175 The ABA and the courts have permitted the named plaintiff to assume the costs of litigation. See ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 1326 (1975); ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 1283 (1973); Stavrides v. Mellon Nat'l Bank & Trust Co., 60 F.R.D. 634, 637-38 (W.D. Pa. 1973). A joint financing effort by a number of class members would appear to be proper under the Code so long as each of the participants was aware of and had consented to the joint effort. See ABA CODE EC 5-15, EC 5-16, DR 5-105(C), DR 5-106.

176 The conflict may be most pronounced where the sole financing class member is the named plaintiff. Reliance upon the named plaintiff to finance class suit may not only be unfair but also impractical. Although the named plaintiff may have an individually recoverable damage claim, the added costs of bringing a class suit may well exceed the amount of his expected recovery. In many damage class
of a class to include only those individuals consenting to expense arrangements, even if it were practical, would also give rise to problems of fairness. The court would be denied an opportunity to see the full range of individuals commonly affected by a question of law or fact, and thus might reach an incorrect conclusion as to the proper outcome of the litigation.\footnote{177}

Since class actions may in some circumstances be impractical or improper absent maintenance, the justifications for banning the practice must be measured against the justification for class actions, no class members will have individually recoverable claims, and in fact the combined recoveries of even ten or twelve named plaintiffs may be far less than the expected class costs. In a class suit for injunctive relief, it is similarly unlikely that a named plaintiff would have the resources or the desire unilaterally to guarantee class costs for the benefit of a class from whom those costs could not subsequently be recovered should the suit fail.

Perhaps because of the frequent impracticability of named-plaintiff financing of class suits, courts have not always taken assertions that the named plaintiff is financing litigation at face value. Two courts have allowed class opponents to conduct discovery as to the named plaintiff's understanding of his responsibility to reimburse the attorney for class costs. See Sayre v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 65 F.R.D. 379, 385-86 (E.D. Pa. 1974), amended, 69 F.R.D. 117 (E.D. Pa. 1975); Stavrides v. Mellon Nat'l Bank & Trust Co., 66 F.R.D. 634, 637-38 (W.D. Pa. 1975). The Sayre court did not, however, allow discovery as to the named plaintiff's financial status; the court concluded that without more "compelling evidence of maintenance," the issue should be left to any subsequent disciplinary proceedings. 65 F.R.D. at 386. But see MacLean v. Honeywell Inf. Sys., Inc., 20 FED. RULES SERV. 2D 1015, 1016 (D. Mass. 1975) (defendant can inquire into named plaintiff's ability to finance notice costs although defendant's questioning of class counsel as to ability to advance such funds not yet relevant). The Southern District of New York in two recent cases held that the named plaintiff's financial ability to pay litigation costs is relevant to the issue of adequacy of representation but also concluded that the issue should be examined through plaintiff's submission of affidavits to the court in camera and not through discovery by the defendant. See Waldman v. Electrospace Corp., 68 F.R.D. 281, 286-87 (S.D.N.Y. 1975); Dennis v. Saks & Co., 20 FED. RULES SERV. 2D 994-98 (S.D.N.Y. 1975). But see Sanderson v. Winner, 507 F.2d 477 (10th Cir. 1974), cert. denied, 421 U.S. 914 (1975) (defendant could not seek to discover named plaintiff's financial status or any agreements as to the financing of costs since disciplinary proceedings would be the proper forum for such an inquiry).

Courts have also taken the financial constraints on the named plaintiff into account in ruling on issues of class action procedure. See, e.g., P.D.Q. Inc. v. Nissan Motor Corp., 61 F.R.D. 372, 381 (S.D. Fla. 1973) (court limited size of class so that notice costs would be within plaintiff's resources); Ralston v. Volkswagenwerk, A.G., 61 F.R.D. 427 (W.D. Mo. 1973) (class allegations dismissed in part because named plaintiff lacked funds; no offer by attorney to advance costs).


\footnote{177 See pp. 1366-71 supra.}
in general — full realization of substantive policy.\textsuperscript{178} Indeed, it is precisely at this level that the first of the two major arguments traditionally made in support of the maintenance ban is pitched. If an attorney is permitted to assume the costs of litigation, it is argued, a greater number of vexatious or frivolous suits — suits without justification in substantive policy — may result.\textsuperscript{179} Whether class members are willing at the outset of litigation to assume the indeterminate costs of an unsuccessful lawsuit, however, does not seem to be a particularly accurate test of a lawsuit's justification in substantive policy. Given the existence of other safeguards, such as summary judgment,\textsuperscript{180} concern over frivolous suits does not appear to be a sufficient reason for the maintenance ban.

The second of the chief justifications for prohibiting maintenance focuses on the fairness of the practice to class members. The "financial interest in the outcome of litigation" which an attorney develops because of maintenance arguably raises a danger that the attorney's "proprietary interest" will adversely affect his exercise of judgment on behalf of the client.\textsuperscript{181} For example, in order to escape the burden of assuming the costs of litigation, an attorney may prematurely agree to settlement. The force of this argument diminishes in the class action context, however, since the contingent character of fee awards will almost invariably mean that a class attorney has a financial stake in the outcome of litigation in any event. Moreover, in class actions alternative remedies exist: risk premiums may be used to increase an at-

\textsuperscript{178} A number of the justifications traditionally offered for the maintenance ban do not seem to be particularly apposite in the class action context. Because it lessens the client's interest in litigation, and thus increases the attorney's freedom to maneuver, it may be argued that maintenance increases the likelihood of fraudulent claims. See Radin, \textit{Maintenance by Champerty}, 24 \textit{Calif. L. Rev.} 48, 72 (1935). But given the burdens of discovery, and other aspects of participation in class litigation, it seems unlikely that a named plaintiff, even if relieved of the perhaps awesome task of financing class litigation, would lose interest in the progress of the suit and as a result fail to provide whatever supervision of attorney conduct clients ordinarily supply. Moreover, the prospect of the attorney using a promise of maintenance as a lure to trap unwary clients into unfair fee agreements, see \textit{id.} at 72–75, diminishes substantially in the class action context given judicial control over attorneys' fees. Finally, the objection to maintenance as a professionally degrading form of speculation, see \textit{id.} at 69–70, 72, loses much of its force given that contingent fee contracts, to which the argument seems equally applicable, are generally allowed, see ABA Code, supra note 1, EC 2–20.

\textsuperscript{179} See Radin, \textit{supra} note 178, at 72.

\textsuperscript{180} The contingent nature of class attorneys' fees also works to inhibit frivolous claims; an attorney who will not be paid unless he obtains relief for the class through either settlement or litigation is likely to be reluctant to bring suits with only a small chance of success. Frivolous claims are also discouraged if a court makes use of an hours-worked standard in awarding fees. See p. 1620 \textit{supra}.

\textsuperscript{181} See ABA Code, \textit{supra} note 1, EC 5–7. See generally id. EC 5–1.
torney's willingness to pursue risky litigation strategies, and judicial review of settlements provides courts with an opportunity to protect class members from a class attorney's conflict of interest. Thus, like the risk of frivolous suits maintenance may create, the danger of unfairness to class members does not seem sufficiently grave to warrant enforcement of the ban against maintenance if the ban would prove an effective obstacle to class suit.

VIII. Conclusion: Reform of Rule 23 or Legislative Action?

Original rule 23, although criticized from the start, survived intact for close to thirty years. Revised rule 23, however, just entering upon its second decade, is apparently already under scrutiny by the Rules Advisory Committee and certain proposed reforms, allegedly under consideration by the Committee, have leaked out into public print. Attention to the issue of reform of rule 23 is likely to increase as a result of New York's recent adoption of a class action rule strikingly different from the federal model. The avowed purpose of this Note has not been

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182 See pp. 1615–18 supra.
183 See pp. 1552, 1569, 1574–75 supra.
1 See p. 1343 supra.
2 ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1974 ANN. REP. 36.
4 The New York rule, adopted after over a decade of controversy, see Homburger, The 1975 New York Judicial Conference Package: Class Actions and Comparative Negligence, 25 BUFFALO L. REV. 415, 418–19 n.6 (1976), reads as follows:

§ 901. Prerequisites to a class action
a. One or more members of a class may sue or be sued as representative parties on behalf of all if:
   i. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
   ii. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
   iii. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
   iv. the representative parties will fairly and adequately protect the interest of the class; and
   v. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

b. Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.

§ 902. Order allowing class action
Within sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained. An order under this section may be conditional, and may be altered or amended before the decision on the merits on the court's own motion or on motion of the parties. The action may be maintained as a class action only if the court finds that the prerequisites under section 901 have
been satisfied. Among the matters which the court shall consider in determining whether the action may proceed as a class action are:

1. the interest of members of the class in individually controlling the prosecution or defense of separate actions;
2. the impracticability or inefficiency of prosecuting or defending separate actions;
3. the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
4. the desirability or undesirability of concentrating the litigation of the claim in the particular forum;
5. the difficulties likely to be encountered in the management of a class action.

§ 903. Description of class

The order permitting a class action shall describe the class. When appropriate the court may limit the class to those members who do not request exclusion from the class within a specified time after notice.

§ 904. Notice of class action

(a) In class actions brought primarily for injunctive or declaratory relief, notice of the pendency of the action need not be given to the class unless the court finds that notice is necessary to protect the interests of the represented parties and that the cost of notice will not prevent the action from going forward.

(b) In all other class actions, reasonable notice of the commencement of a class action shall be given to the class in such manner as the court directs.

(c) The content of the notice shall be subject to court approval. In determining the method by which notice is to be given, the court shall consider

I. the cost of giving notice by each method considered
II. the resources of the parties and
III. the stake of each represented member of the class, and the likelihood that significant numbers of represented members would desire to exclude themselves from the class or to appear individually, which may be determined, in the court's discretion, by sending notice to a random sample of the class.

(d) I. Preliminary determination of expenses of notification. Unless the court orders otherwise, the plaintiff shall bear the expense of notification. The court may, if justice requires, require that the defendant bear the expense of notification, or may require each of them to bear a part of the expense in proportion to the likelihood that each will prevail upon the merits. The court may hold a preliminary hearing to determine how the costs of notice should be apportioned.

II. Final determination. Upon termination of the action by order or judgment, the court may, but shall not be required to, allow to the prevailing party the expenses of notification as taxable disbursements under article eighty-three of the civil practice law and rules.

§ 905. Judgment

The judgment in an action maintained as 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.

§ 906. Actions conducted partially as class actions

When appropriate,

1. an action may be brought or maintained as a class action with respect to particular issues, or
2. a class may be divided into subclasses and each subclass treated as a class.

The provisions of this article shall then be construed and applied accordingly.

Rule 907. Orders in conduct of class actions

In the conduct of class actions 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 repre-
to survey the law of rule 23 but rather to consider several general questions of class action doctrine. Given the current interest in modifying the rule, however, it is fair to ask: what are the implications of the arguments developed in this Note for reform of rule 23?

There are two answers to this question. The first takes the form of a list of the specific revisions of rule 23 which are suggested by the arguments of this Note: 5

First, the typicality requirement of rule 23(a) (3) should be removed. The strict party alignment interpretation which the Ninth Circuit gave to typicality in the LaMar decision is not necessary given the inquiries courts must undertake in furtherance of their obligation to insure adequacy of representation.6 The alternative construction of the typicality requirement, which treats it in tandem with the adequacy of representation requirement of rule 23(a)(4) as a limit on the degree of heterogeneity permitted in a class,7 is also unnecessary in view of the great capacity of the class action process to accommodate differences within a class.8

5 Comparisons with the New York rule will be drawn in the accompanying footnotes.
7 See pp. 1472, note 94 supra.
8 See pp. 1472-98 supra.
Second, the requirement that common questions predominate, which presently must be satisfied only in class actions brought under rule 23(b)(3), should be made an express prerequisite to class suit in all cases, and thus should be included among the provisions of rule 23(a). It is chiefly through analysis of the predominance question, as redefined under the substantive theory of class actions, that a court verifies that class procedures indeed will not distort the policies reflected in the causes of action under which suit is brought. The dictates of the Rules Enabling Act, therefore, would seem to suggest that federal courts' responsibility to undertake predominance analysis be made clear in the rule.

Third, the distinctions rule 23(b) attempts to draw among the situations in which class actions may be appropriate serve little function, and therefore could be abandoned. Once stare decisis impacts are acknowledged, almost any class action can be seen to possess characteristics resembling those set out in rule 23(b)(1). Moreover, a great many class actions brought for monetary relief also seek injunctive or declaratory remedies, and thus rule 23(b)(2) also has the potential for encompassing most class suits. Since the categories which rule 23(b) sets out are thus not intrinsically distinct, whatever reason exists for their retention must be found in their ancillary function of separating out that group of cases, defined by rule 23(b)(3), in which individualized notice and extension to class members of a right to opt out may be most desirable. In fact, however, individualized notice is neither required nor necessarily improper in any identifiable subset of class actions, and extension of the right to opt out ought to be generally disfavored. Not even this ancillary justification, therefore, argues persuasively for the retention of the rule 23(b) distinctions.

Fourth, the superiority and manageability requirements of rule 23(b)(3) should neither be generalized to all class actions
nor retained even if the rule 23(b) distinctions are kept. To the extent that these requirements may be given content, it is as aspects of substantive predomination analysis. Separate statement of the superiority and manageability inquiries obscures the connection with predomination, and gives rise to the possibility that courts will undertake the inquiries without recognizing the need to consider substantive factors in their analysis.

Fifth, rule 23(c)(1) should be amended to make clear that, although a judge's involvement in a class action should begin as early as possible, a final order authorizing a class action, if it ever need be given, need not issue prior to any ruling on rule 12, rule 50, or other merits motions. Moreover, a provision should be added requiring erstwhile class representatives to move for an initial hearing on class action issues within a designated time after the filing of a complaint. Rule 23(d) should be amended to give trial judges discretionary authority to establish procedures for screening communications with class members by both class representatives and the class opponent. These changes would open the way for courts to adopt an iterative mode of pretrial class action procedure capable of generating the full range of information and the opportunities for adjusting party structures needed for fair litigation of a class suit.

Sixth, rule 23(c)(2) should be eliminated. As an a priori matter, individualized notice is not constitutionally mandated in class actions. Such notice may provide a useful means of insuring adequacy of representation, but such a judgment can only be made on a case-by-case basis, and rule 23(d)(2) provides courts with sufficient authority to order notice in particular cases.

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18 See pp. 1498-1504 supra.
19 See pp. 1501-04 & note 253 supra.
22 See pp. 1597-1604 supra. The New York rule does not address this question.
23 See pp. 1427-38 supra.
24 See pp. 1402-16 supra.
25 The New York rule treats notice as a discretionary matter, see N.Y. Civ. Prac. Law & Rules § 904 (McKinney Supp. 1976), but seeks to provide guidance for courts by distinguishing between class actions brought for injunctive or declaratory relief and other class suits, see id. §§ 902(a), (b). The rule considers in detail the question of the cost of notice, see id. §§ 902(c), (d), authorizing, inter alia, preliminary hearings on the merits to apportion notice costs, see id. § (d) (I). But see pp. 1418-19 supra.
The right to opt out is likewise not constitutionally required.\textsuperscript{26} Unlike giving notice, extending to class members an invitation to opt out cannot even be said to be an ordinarily helpful means of guaranteeing the fairness of class suit.\textsuperscript{27} In a few cases, however, recognition of an exit right may be useful.\textsuperscript{28} Courts, therefore, should have discretionary authority to confer such a right, and rule 23(d) should perhaps be amended to make this clear.\textsuperscript{29} The same amendment might also grant courts discretion to require class members to file proof of claim forms as a precondition to participation in a class judgment. Because such a requirement could greatly restrict the reach of a class judgment, it ought not to be imposed as a matter of course, but only after a substantive predomination analysis has revealed no other way through which a class action could be litigated in a manner consistent with the values reflected in a cause of action.\textsuperscript{30}

\textit{Seventh}, if the above modifications are made, all of rule 23(c)(3) should be deleted except for the first sentence; within that sentence, the reference to subsections (1) and (2) of rule 23(b) should be removed.

\textit{Eighth}, rule 23(e) might be amended to make it clear that trial judges have discretion in fixing notice requirements in the event of settlement.\textsuperscript{31}

The second answer to the question of reform of rule 23 is less concerned with the details of such reform than with its significance. If there has been a central point to this Note, it is this: The design of class action procedure requires sensitivity both to the substantive values reflected in the causes of action under which suit is brought and to the differing situations of class members; such sensitivity presupposes reconsideration of class action procedures with each new case, and thus the trial judge must bear chief responsibility for the shape of class litigation. Given this conception of class action procedure, a rule serves only a very limited function. It calls the attention of the trial judge to his various responsibilities, and grants him sufficient authority to carry out his tasks, but in no sense can the rule be said to resolve issues of class procedure. The effect of the revision

\textsuperscript{26} See generally pp. 1407-09 supra.
\textsuperscript{27} See pp. 1487-89 supra.
\textsuperscript{28} See pp. 1487-88 & notes 183-84 supra.
\textsuperscript{29} The New York rule grants such discretionary authority. See N.Y. CIV. PRAC. LAW & RULES § 903 (McKinney Supp. 1976).
\textsuperscript{30} See pp. 1504-16 supra. The New York rule does not address the question of an opt-in requirement.
of rule 23 in 1966 was to grant great discretion to trial judges; the effect of the amendments proposed here would be to expand that discretion further by eliminating several of the obligatory procedures that the 1966 rulemakers did impose. Reform of rule 23, on this view, is not the medium through which the central questions of class procedure are addressed. At most, rule reform simply clears the way for attention to those questions.

There are, however, two contexts other than rulemaking in which the central questions can be faced. The first is provided by doctrinal analysis, the discussion of the general approaches which might structure courts’ resolution of the issues raised by particular class actions. Such a doctrinal analysis has been the primary focus of this Note. The second context is legislative. On a number of occasions in recent years, Congress, in authorizing or amending private rights of action has specifically addressed the question of propriety of class suits under the cause of action, and has answered the question through detailed regulations of class litigation. Such legislative action should be encouraged, given a substantive theory of class actions, since it takes away the need for courts to engage in complex study of the fit of class procedures with substantive values.

Perhaps because analysis of congressional enactments has traditionally been thought to be somewhat superfluous given the ultimately political character of legislative action, recent commentary on legislative efforts to incorporate class actions within specific regulatory frameworks has largely confined itself to description. Ad hoc, political judgments concerning the wisdom of the underlying cause of action will of necessity play an important role in congressional decisions concerning the extent to which class actions should be permitted. Congressional decisions, however, may also be influenced by more general considerations, reflecting the relative usefulness, both singly and in combination, of the various means for enforcing statutory directives, and may manifest themselves in certain recurring forms. Analysis of these considerations and forms serves the function not only of providing a language for legislative debate but also

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34 See generally pp. 1360-66 supra.
of affording courts means for interpreting legislative actions. The remainder of this Conclusion attempts to sketch a framework for such an analysis. This sketch should be taken as provisional rather than definitive; the aim is to provide a preliminary view rather than a complete account.

At the most general level, a legislative decision concerning the role of class actions in a given regulatory scheme involves a judgment as to the emphasis to be given public and private mechanisms for the enforcement of statutory directives. Assuming that both mechanisms ultimately involve resort to courts in order to force compliance with a statute,\textsuperscript{36} such an evaluation will take the form of an assessment of the advantages and disadvantages of administrative and private decisionmaking with respect to the initiation of judicial action. At least in broad outline, the results of this inquiry are not likely to be surprising. The vices and virtues of administrative and private action are familiar ones, capable of summary in two pairs of contrasting propositions: \textsuperscript{37}

First, administrative decision of the question of whether judicial action should be initiated will confer the benefits of a political and bureaucratic process: respect for competing interests, recognition of resource limitations and thus of the need to screen out unimportant claims, a continuing existence and thus the capability for planning and coordinating a number of separate actions. But administrative decision suffers from the defects of political and bureaucratic decisionmaking as well: a tendency to take into account only familiar interests and indeed to be solicitous of familiar interests to the point of "capture," budgetary limitations so severe that underenforcement results instead of merely a restraint on the initiation of frivolous actions, routinization of activity and thus a resistance to responding to changing conditions.

Second, the benefits of private decision of the question of whether judicial action should be initiated are the benefits of individuality, of entrepreneurial decisionmaking: the possibility of iconoclastic challenges to the conventional hierarchy of com-

\textsuperscript{36} Administrative agencies, of course, may make decisions which are not subject to judicial review, see, e.g., Hahn v. Gottlieb, 430 F.2d 1243 (1st Cir. 1970), or which are given only deferential judicial scrutiny, see, e.g., Universal Camera Corp. v. NLRB, 340 U.S. 560 (1951). See also Dunlop v. Bachowski, 421 U.S. 560 (1975). The discussion here, however, will treat administrative agencies and private litigants as equals with respect to the deference accorded their positions by courts.

\textsuperscript{37} The characteristics of agency decisionmaking were recently subjected to exhaustive consideration in Stewart, The Reformation of American Administrative Law, 88 Harvard L. Rev. 1667 (1975). The essential features of privately-initiated litigation are sketched from the perspective of the judge in Chayes, The Role of the Judge in Public Law Litigation, 89 Harvard L. Rev. 1281, 1310-13 (1976).
peting interests, resource constraints which are a function not of extrinsic factors but of the prospects of a particular case and thus likely to impose a discipline which mirrors a statute's own judgment of the merits of a case, and a capacity for innovation. But the defects of individuality are present also: the risk of intolerance manifest in actions brought to vindicate specific interests without regard for the need to accommodate other interests, a cognate risk that evaluation of the desirability of a case which looks only to the governing statute will ignore the perhaps constraining values of other statutes, a tendency towards disorganized or uneven enforcement practices.

The class action, because of the activist role it requires of the trial judge, to a degree combines the advantages of administrative and private decisionmaking. The increased access to courts which class actions make possible opens the way for spokesman for ordinarily unrepresented interests to make use of litigation to claim the benefit of statutory directives for those in their situation. However, the heuristic effect of the class suit, a function largely of the trial judge's performance of the twin obligations to insure representation of all affected interests and to protect statutory values from distortion, provides a check against litigation blind to competing interests and values. And yet the mediation is incomplete: it occurs only in the context of a particular case. In the aggregate, the hazards of individuality remain and the advantages of political decisionmaking are unrealized. Legislative decisionmakers, therefore, are unlikely to see the class action as itself a resolution of the question of whether to choose public or private litigation.

In certain circumstances, the weight which legislators will attach to the advantages or disadvantages of one or the other mode of initiation will be so significant that the legislative decision will be to lodge exclusive responsibility for initiating judicial action with either public or private decisionmakers. More commonly, however, legislation will reflect the fact that both modes possess vices and virtues by conferring initiation rights upon both public and private actors. The emphasis on government or private action, though, varies from statute to statute. In some circumstances, Congress may give equal weight to both private and government enforcement. The proposed Consumer Class Action Bill, for example, would establish a private right of action against all unfair or deceptive trade practices, enforceable through expansive class action provisions. Not only would jurisdictional

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39 Proposed Federal Consumer Class Action Legislation — II, 4 CLASS ACTION
barriers to bringing class suits be eliminated, but the bill would also provide for collective calculation of damages and a four-step distribution scheme, as well as liberal notice provisions designed to make small-claimant class actions feasible. As a result, private class actions would be able to obtain the full measure of relief available to the FTC under the Federal Trade Commission Improvement Act. More often, however, the form which Congress gives to the two rights of action will reveal an emphasis in favor of one or the other. Such an emphasis may manifest itself in the imposition of either of two kinds of limits placed on government or private action: categorical limits restraining all actions of a given type regardless of whether actions of the other type are brought; or priority rules restraining an action of one type in the event—and to the extent—that an action of the other type is underway. Alternatively, procedural devices such as intervention might be relied upon in order to realize at least partially in actions of one type the advantages of the other type as well.

There are two kinds of categorical limits. Jurisdictional constraints entirely deny private or government actors the opportunity to obtain a given mode of relief, and thus allocate exclusive responsibility for the initiation of such relief to one or the other actors. Under Title VII of the Civil Rights Act of 1964, for example, both private parties and the government have been vested with broad enforcement authority to seek compensatory and injunctive remedies. Yet while private parties may bring class suits for broad structural relief, only the government is

Reports 342, 344 (1975) (§§ 5–7 of proposed Act). The Act specifically provides that while courts are to give weight to the interpretations of the FTC, they are not required to await any administrative action or interpretation by the FTC before applying federal law to the facts and that the failure of the FTC to institute proceedings against similar acts or practices should create no presumption as to their validity. Id. § 6.

Id. § 5. While the Act imposes a jurisdictional amount requirement of $25,000, it allows class members to aggregate their claims in order to meet this requirement.

Id. at 345 (§ 8(d) of proposed Act). Section 8(d) (3) of this proposed Act provides that the residue of a class recovery may be made part of a fund to pay the litigation costs of successful defendants, see also id. at 347 (§ 10(c) of proposed Act), thus establishing a mechanism which would help to counteract problems of overdeterrence without simultaneously unduly discouraging litigation.

Id. at 346 (§ 9(c) of proposed Act). The Act requires the court to consider the cost of notice, the resources of the parties, the individual stakes of absentees, and the likelihood of their participating or opting-out, and then to choose between publication, sampling and individual notice.

See p. 1634 infra.


45 Id. § 2000e–5(f)
statutorily empowered to bring suit against a "pattern or practice" of discrimination and thereby achieve industry-wide relief. While as a practical matter private parties could achieve such relief through a series of class suits, the "pattern or practice" limitation may reflect a congressional preference for greater government input where broad and intricate decrees are likely to result from litigation.

Remedial handicaps, by contrast, do not fully remove the power of a government or private actor to obtain a given form of relief, but they do condition the award of such relief upon the satisfaction of certain obligations or limit the extent to which the relief may be given. Under the Fair Labor Standards Act, for example, both the Secretary of Labor and private litigants may obtain recovery of the full amount of unpaid minimum wages and overtime compensation owed by an employer under the Act, as well as an equal amount in liquidated damages and, where appropriate, injunctive relief. Special provisions govern private class actions, however, which require class members affirmatively to opt into the action, and thus make such suits quite difficult to

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46 Id. § 2000e-6.
47 See United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 843 (5th Cir. 1975) ("It was unquestionably the design of Congress in the enactment of § 707 to provide the government with a swift and effective weapon to vindicate the public interest in eliminating unlawful practices, at a level which may or may not address the grievances of particular individuals.") (denying private intervention of right in government "pattern or practice" action). Originally, the "pattern or practice" authorization reflected a decision to limit government initiation authority to cases of multiple violations. Under the 1972 amendments to Title VII, however, the "pattern or practice" authority was shifted from the Attorney General to the EEOC, and the later was empowered for the first time to bring actions for all violations of the Act. See Act of March 24, 1972, Pub. L. No. 92-261, § 5, 86 Stat. 107.
49 Id. §§ 216(c), 217. Prior to 1974, the Secretary's authority to bring an action for damages under § 16(c) of the Act was limited to cases of settled law in which he had received a written request from an employee claiming unpaid minimum wages or overtime compensation. See 29 U.S.C. § 216(c) (1970). Moreover, while liquidated damages were available in private actions, such recovery was not allowed in actions brought by the Secretary. The 1974 amendments lifted these restrictions, and the Secretary's action for damages under § 16 now parallels his injunctive right of action under § 17. Pub. L. No. 93-259, § 26, 88 Stat. 73 (1974). In neither proceeding is the prior consent of the employee required; a proceeding at law will provide for the recovery of liquidated damages equal to the total unpaid wages and a § 17 action provides for an injunction against any such future failures. See generally Foster, supra note 35, at 337-38.
50 29 U.S.C. § 216(b) (Supp. IV, 1974) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.")
maintain. A similar structure is incorporated in recently enacted revisions of the Federal Trade Commission Act. In addition to its authority to issue cease and desist orders, the FTC is empowered under section 206 of the new Magnuson-Moss Warranty-Federal Trade Commission Improvement Act to seek damages and other legal and equitable relief for consumers injured by unlawful trade practices. This provision appears to authorize calculation of damages on a class-wide basis as well as distribution of unclaimed funds through a fluid recovery mechanism. While the Act creates a private right of action for unlawful trade practices relating to consumer product warranties, private class suits under this provision are subject to restrictive statutory prerequisites. No action is cognizable in federal court unless each individual's claim is greater than twenty-five dollars and the aggregate value of all claims presented exceeds $50,000; moreover, in order to bring a class action, there must be at least one hundred named plaintiffs. Private enforcement of the Federal Trade Commission Act's prohibition of fraudulent credit practices is also limited: while the Truth in Lending Act - which confers the private right of action — contains no minimum recovery provisions, it does establish a ceiling on the recovery available in class actions, and also vests in the judge a large measure of discretion in calculating damages.

See LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286 (5th Cir. 1975); Montalvo v. Tower Life Bldg., 426 F.2d 1135 (5th Cir. 1970).

This is so largely because of an employee's hesitancy to incur his employer's displeasure by affirmatively joining in an action against him. See Foster, supra note 35, at 324-25 & n.105, 341.


See H.R. CONF. REP. No. 1606, 93d Cong., 2d Sess. 40-42 (1974); S. CONF. REP. No. 1408, 93d Cong., 2d Sess. 41 (1974) ("While this section enumerates several types of relief which may be granted, the nature of the relief authorized is limited only by the nature of the injury done and the remedial powers of the court . . . . The Section is not, however, intended to authorize punitive or exemplary damages.")

15 U.S.C. § 2310(d)(1) (Supp. IV, 1974). The Act provides for the recovery of costs and attorneys' fees by successful plaintiffs, unless the court determines that such an award would be inappropriate. Id. § 2310(d)(2).

Id. § 2310(d)(3)(A).

Id. § 2310(d)(3)(B).

Id. § 2310(d)(3)(C).


Id. §§ 1601-1665.

Id. § 1640 (Supp. IV, 1974).

Id. § 1640(a)(2)(b) (Supp. IV, 1974). The ceiling established by the Act is the lesser of $100,000 or 1% of the defendant's net worth. Id. See generally
Of the two kinds of categorical limits, jurisdictional constraints are plainly the more risky, since such constraints restrict the right to obtain a given kind of relief to only one of the possible actors; should obstacles emerge which limit the ability of that actor to obtain relief, substantial underenforcement of a statutory directive may result. Accordingly, both as a matter of legislative practice and of judicial construction, a jurisdictional constraint should not be utilized unless it is determined that less rigorous remedial handicaps will not sufficiently reduce the hazards of either government or private action. Moreover, use of jurisdictional constraints should only follow close analysis of the practicality of government or private action in a given context.

The present situation with respect to enforcement of the antitrust laws provides a clear illustration both of the risks involved in the use of jurisdictional constraints and of the equally effective alternative which remedial handicaps may afford. Under the current antitrust laws, the government is empowered to bring actions for injunctive relief and civil and criminal penalties, while private actions for treble damages serve as the sole means for securing compensation. In an important class of cases, the private action for damages has failed to provide an effective remedy. Price-fixing class actions brought by consumers may not be able to go forward unless fluid recovery mechanisms are available, since it may be impossible to identify specific class members, and in any event the claims of class members may be so small that a significant proportion of a class may not claim compensation. Federal courts have held, however, that fluid recovery is not an available remedy under the present antitrust laws and thus have generally refused to allow consumer class actions. At present, there-


66 See pp. 1531-32 supra.
67 See House Comm. on the Judiciary, Report on Antitrust Parens Patriae Act, H.R. Rep. No. 499, 94th Cong., 1st Sess. 6-8 (1975) (discussing problems of cost and manageability of consumer class actions under the antitrust laws and concluding that "adequate enforcement mechanisms simply do not exist" when violations injure consumers); Handler & Blechman, Antitrust and the Consumer
fore, trade restraints such as price-fixing which injure large numbers of consumers are in practice policed only by government injunctive and penalty actions. Not only is no compensation thus afforded to injured consumers, but this dependence upon government actions creates a more general problem of underenforcement given the weaknesses to which government actions are prone.

The defects of the current scheme have led both Congress and the commentators to recognize the need for provisions creating new rights of action: the question has been one of how the proper public-private balance should be struck. One alternative would be simply to authorize the federal government to initiate actions for damages. This scheme, however, while it would perhaps yield greater compensation than is presently realized as well as the advantages of administrative screening, would be vulnerable to underenforcement. A second approach would be to enact legislation facilitating private class actions for damages through authorization of fluid recovery mechanisms. Substantial reliance on private initiation in this context, however, may impose significant costs. The advantages of administrative screening would be largely foregone, and the risk that defendants fearful of large liabilities might settle nonmeritorious actions, though minimized by summary judgment procedures and other safeguards, must nevertheless be faced. Moreover, the more attenuated the compensatory function becomes as a result of fluid recovery, and the more a monetary recovery resembles a civil penalty than a dam-


See H.R. Rep. No. 499, supra note 67, at 4–6 (emphasizing failure of current federal scheme to compensate injured consumers, resulting in unjust enrichment and “undermin[ing] the deterrent effect of the treble damage provision”); Hearings on H.R. 12528 and H.R. 12921 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 93d Cong., 2d Sess. 27 (1974) (testimony of Assistant Attorney General for Antitrust Thomas Kauper) (“the [treble damages] remedy has been less effective in circumstances involving multiple transactions of relatively small size . . . . there is a need for the availability of a method by which damages can be recovered where antitrust violations have caused small individual damages to large numbers of citizen-consumers”); Hearings on Antitrust Parens Patriae Amendments Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 34 (1975) (remarks of Rep. Rodino).

See Handler & Blechman, supra note 67, at 675–76. The advantages of government initiation, at least with respect to the damage distribution scheme which Handler and Blechman propose, might be gained in any case through the use of quasi-administrative mechanisms to distribute damages in private suits. See pp. 1520–21 supra.

See generally pp. 1520–36 supra.

See pp. 1532–34 supra.
age fund, the less willing society may be to tolerate the risk of overenforcement which attends private actions. Finally, regardless of whether fluid recovery and class-wide damages calculation are deemed appropriate, private enforcement might still be insufficient in areas where private attorneys are unable to finance litigation costs.

Congress in fact has chosen a third alternative. The Parens Patriae Act would authorize state attorneys general to recover damages on behalf of consumers within their respective states injured by violations of the antitrust laws. The idea behind this use of state officials to enforce federal laws may be that state officials will be more disciplined in their decisions as to whether to initiate antitrust damage actions, as well as better able to assume the costs of litigation, than private actors, but less likely to be over-constrained in their enforcement practices than federal officials. This happy synthesis of the advantages of private and government action is by no means certain, however: on the one hand, elected state officials may initiate seemingly unneeded suits in order to gain favorable publicity; on the other hand, such officials, like federal officials, may have only limited resources and face political constraints.

Responding to the concern that state officials may not be sufficiently restrained, Congress has imposed a number of remedial handicaps on parens patriae actions. As recently amended by the House and the Senate, the Act would allow collective calculation of treble damages and fluid distribution only in price-fixing cases brought by state officials, and only where the defendant’s conduct has been determined to be in willful violation of the law. Where the defendant’s conduct is not willful, or a cause of action other than price-fixing is alleged, collective calculation and fluid distribution are not permitted. As a result, recovery in price-fixing cases probably will not be feasible absent a showing of willfulness, and state attorneys general will probably leave other causes of action to private enforcement. This approach serves to protect defendants from heavy damages liability in situations in which the antitrust laws are not clear and administrative screening is most appropriate, while ensuring full deterrence and disgorgement of unjust enrichment, as well as compensation of aggrieved consumers, where violations are clear.

If these remedial handicaps are necessary to make parens patriae actions proper, the question arises as to why state officials

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need be relied upon at all. The same handicaps could be placed upon private class actions, restricting such suits to cases in which summary judgment is most likely to be available to screen out nonmeritorious actions, and in which overenforcement is not likely to be of major concern. Moreover, private class actions unlike parens patriae suits, would not be constrained by political considerations.74 Under the antitrust laws as under the Truth in Lending Act,75 careful structuring of remedial handicaps, rather than resort to jurisdictional constraints, may be the key to striking the appropriate balance on the spectrum of private and government initiation.

Priority rules concern themselves with problems of ordering the relationship of government and private actions in circumstances where categorical limits are inappropriate, or where whatever remedial handicaps which may have been imposed are not so severe as to sharply distinguish government and private action. Questions of ordering are likely not to be a matter of concern under statutory schemes making use of jurisdictional constraints; indeed, a statutory scheme may encourage initiation of litigation concerning the same apparent statutory violation by both an empowered agency and an aggrieved class in order that the full range of a statute's remedial policies may be realized. Under the antitrust laws, for example, litigated findings of liability in government proceedings may be used as prima facie evidence in subsequent private treble damage actions.76 Where government and private remedies overlap, however, parallel actions may not be encouraged. The underlying concern will occasionally reflect the policies associated with res judicata doctrine: hostility to double exaction, conservation of judicial resources, the value of repose. Ordinarily, however, res judicata values will be realized through stare decisis, the reluctance of courts to overturn complicated decrees or to issue conflicting injunctions, or alternatively the potential second litigant's satisfaction with the results of the first action.77 More commonly, priority rules will derive from a con-

74 To the extent that litigation costs impede antitrust actions, they would appear to do so equally in class actions and parens patriae actions.
77 See Rodgers v. United States Steel Corp., 508 F.2d 152, 162 (3d Cir. 1975) (lower court stayed proceedings for six months in part to protect the operation of consent decree entered in earlier government suit); Atlantis Devel. Corp. v. United States, 379 F.2d 818 (5th Cir. 1967) (intervention of right granted because the stare decisis effect of a judgment would have precluded the applicant from reopening in a later suit any of the issues upon which it relied); Shapiro, Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators, 81 HARV. L.
progressional preference for government or private initiation of a cause of action. So long as Congress is neutral as between agency and private initiation, unordered dual schemes may serve as an effective means to encourage the full prosecution of statutory violations. In some cases, however, the substantive goals of the statutory scheme, as well as more general considerations, may suggest that action by government agencies and private parties should not be equally preferred. Where this is true, it is not necessary to forego the greater potential for fuller enforcement implicit in dual schemes; rather, the preference for either private class or government representatives may be expressed within the dual scheme by reserving to one the exclusive right to bring suit in the first instance or by otherwise structuring enforcement procedures.

For example, under Title IV of the Civil Rights Act of 1964, the Attorney General of the United States is empowered to seek injunctive relief against discrimination in education. Since private parties enjoy their own constitutional right of action and thus may seek the same degree of structural relief as the government, both private class and administrative actions are an effective means of securing a full measure of redress. However, suit by the Attorney General is conditioned upon receipt of a written request from an aggrieved party and certification that such party is unable, for either financial or political reasons, to undertake his own action. This provision, in practice serves not only to conserve scarce government resources wherever private parties are capable of instituting their own enforcement proceedings but also to maximize local control over educational policies. In contrast, Title VII of the same Act, while providing both private parties and the government with broad enforcement authority to seek relief from employment discrimination, requires private parties to file with the Equal Employment Opportunity Commission a statement of intent to sue under the Act, and prohibits initiation of private action for a prescribed period of time in order to provide the Commission with an opportunity to seek conciliation and settlement of the claim with the defendant. This preference scheme — though more limited than that established by Title IV

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79 See id. § 1983.
83 Id. § 2000e–5(f).
84 Id. § 2000e–5(b). Title VII also requires recourse to available state agencies prior to private suit. Id. § 2000e–5(c).
— allows the government prior to the initiation of any private suits, to determine whether it is possible to secure voluntary compliance with statutory requirements.

The Fair Labor Standards Act states that the government's decision to initiate suit deprives private parties of access to the courts and binds them to the decision in the government's action. While it has been suggested that this cut-off provision does not apply to private suits which have already been commenced, it seems clear that even if this interpretation is not correct, the statutory scheme comports with constitutional requirements. Under the analysis developed earlier in this Note, the differential distribution of access which results from the attribution of binding effect to the government action need only rationally further a legitimate government object, since the statutory right to minimum wage and overtime compensation is in no sense a "fundamental" one. In fact, the desire to shield the defendant from relitigation — a goal which appears in itself to satisfy the rationality requirement — takes on particular significance through the operation of the FLSA scheme. Under the Act, the Secretary of Labor may obtain recovery of the full amount of unpaid minimum wages and overtime compensation owed by an employer, as well as liquidated damages. After administrative distribution of recovered sums to aggrieved individuals who can be identified, any remainder of the damage fund escheats to the United States. As a result of these provisions, the allowance of subsequent claims by private parties in their own suit would in

85 Id. § 2000e-5(f)(1).
88 See generally Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 438 (1934); p. 1406 & notes 76–78 supra.
89 See pp. 1406–16 & notes 80–140 supra.
90 See pp. 1407–08 supra.
91 29 U.S.C. § 216(c) (Supp. IV, 1974).
92 Id. § 216(c) (1970).
most cases effectively impose double liability on the defendant for a single violation.

Still, the FLSA scheme's use of binding effect to establish a priority rule is not without constitutional consequences. Here, as in a private class action, the decision to restrict access does not result from a legislative decision; rather, it results from the Secretary of Labor's determination, pursuant to a statutory delegation of authority, to initiate suit. The fact of delegation gives rise to a requirement that the interests of the individuals whose claims are foreclosed be adequately represented in the government suit.93 This adequacy standard, however, may properly be less restrictive as a constitutional matter than that imposed on class representatives. The justifications supporting the delegation to the Secretary in the first instance — the values of administrative screening, interest-balancing and decisionmaking — relate both to the decision to initiate action and to the actual conduct of the litigation. As a result, so long as the Secretary's decisions as to initiation and litigation are not arbitrary or capricious or made in bad faith,94 it would seem appropriate to uphold his representation as adequate.

The fact that the Constitution does not impose substantial barriers to the use of binding effect as a priority rule in statutory schemes does not, however, mean that such use of binding effect would necessarily be justified on policy grounds. In most cases, of course, litigation of a single action will as a practical matter eliminate the incentive for a subsequent suit.95 Where substantial incentive does remain, however, this may signal the existence of serious problems in the initial suit: agency capture or the inability of private parties to reflect the broad public interests, for example, may manifest themselves not only in initiation decisions but also in the conduct of litigation and in relief negotiations. To foreclose a subsequent suit in these circumstances might well jeopardize the underlying goals of the statutory scheme. Rather, it would seem to be wiser policy to further the objectives of binding effect by taking steps to insure that all affected are satisfied with the conduct of litigation96 — through liberal grants of intervention rights and through statutory requirements of adequate representation97 — while leaving open the opportunity, rarely exercised in practice, to bring a subsequent suit.98

95 See pp. 1638-39 & note 77 supra.
96 See pp. 1408-09 & notes 102-103 supra.
97 See, e.g., statutes cited in note 86 supra.
98 Such a policy might not seem to be appropriate in those areas in which any
A legislative judgment as to the relative merits of government and private action need not manifest itself solely through categorical limits and priority rules. The optimal combination of the advantages of government and private action may be achieved not only by separating and ordering the two types of action but by synthesizing the two. For example, a number of procedural devices may be utilized to "open up" government actions in order to achieve through these suits some of the benefits of private litigation as well. Provision for sampling notice,\(^99\) in conjunction with liberal intervention rights for private parties significantly affected by the relief sought,\(^100\) might be effective as a means of informing both the government and the court of the interests at stake in a given case.\(^101\) In addition, more rigorous judicial scrutiny of the adequacy of the government's representation — even if government action is not strictly binding upon private litigants — might better serve the interests sought to be protected by statutory enforcement schemes. Even where it may be appropriate to impose a less stringent adequacy standard on government than on private representatives, procedures analogous to the notice and court approval provisions of rule 23(e) might profitably be applied to settlements of government-initiated as well as privately initiated suits.\(^102\)

decision as to relief is likely to stimulate controversy and to give rise to subsequent suits, and in which the relief itself is likely to be complex and ongoing. See pp. 1400–01 supra. Decisions in Title VII suits, for example, may well fit into this category, as the history of the Allegheny-Ludlum litigation would seem to suggest, see pp. 1408–09, note 102 supra.

\(^99\) Under the Parens Patriae Act, for example, actions brought by state attorneys general, though not binding on private parties, must nevertheless be accompanied by publication or other notice as the court directs to be the best practicable notice under the circumstances. See H.R. 8532, 94th Cong., 2d Sess. § 4C(c) (1975).

\(^100\) See generally Note, supra note 77.

\(^101\) Of course, mechanisms which encourage private input and decrease judicial deference to administrative judgments may not be appropriate where the very reason for supporting government initiation is to vest administrative agencies with substantial control over the form of relief granted as well as the power to decide whether to initiate suit. Moreover, notice requirements might increase the cost of suit, thus reducing the number of cases which could be litigated under a given agency budget. Even so, where the disadvantages of administrative action appear to be significant, establishment of private and judicial checks on the quality of government representation would appear to be warranted. Furthermore, to the extent that the information generated by private participation is paid for out of private resources, the costs to the government of notice and a more cumbersome bargaining situation might be partially offset by savings in investigative costs.

\(^102\) Courts have generally been reluctant to allow private parties to seek review of government settlements. See, e.g., United States v. Automobile Manufacturers Ass'n, 307 F. Supp. 617, 619 (C.D. Cal. 1969) aff'd per curiam sub nom. City of
Such mechanisms, however, may not be able to correct under-enforcement of statutory directives by administrative agencies attributable to limited agency resources or political constraints. Private intervenors, for example, may not be able to raise claims independent of those presented by the government. Courts, however, have displayed a willingness to exercise some degree of review over an agency's decision not to bring an action. In *Dunlop v. Bachowski*, the Supreme Court held that the Secretary of Labor must articulate the reasons for a refusal to undertake enforcement proceedings under the LMRDA. The Court ruled, however, that once articulated, these reasons need survive only an abuse of discretion standard. Regardless of that standard of review, it would appear that judicial oversight of agency initiation is appropriate only for fine-tuning government enforcement policy, since agency enforcement will still be limited by resource constraints.

The primary cost of allowing private initiation — the loss of agency screening and interest-balancing capacities — can be mitigated by giving the government a role in private actions. The participation of government agencies in private class actions may help to guide courts in shaping intricate relief and supervising the fairness of settlements and, in addition, may supply private representatives with resources necessary to initiate and sustain complex litigation. In class actions seeking injunctive or monetary relief affecting a wide range of interests, agencies with relevant expertise may be able, through *amicus* briefs or formal intervention, to broaden the court's perspective and thereby assist the court in evaluating settlements and formulating relief. In complicated suits, it may be desirable for agency personnel to participate as guardians of absentee interests during the settlement negotiations themselves. Furthermore, government agencies may supplement private litigation resources by, *inter alia*, subsidizing notice


See Note, supra note 77, at 1195.

*421* U.S. 560 (1975).

*Id.* at 571.

*Id.* at 574.

*Id.* at 572–74.

*See* Shapiro, supra note 77, at 734–36.

*See pp. 1562–63 supra.*
costs or supplying government attorneys to aid in negotiations against well-financed defendants.\textsuperscript{110} Thus, government participation in private class suits might provide a means for utilizing public enforcement resources and agencies' interest-balancing capabilities, without requiring the large expenditure of tax revenues necessary to finance government-initiated litigation. Given this possibility some of the shortcomings of private initiation can perhaps be mitigated.

\textsuperscript{110} See, e.g., Van Bronkhurst v. Safeco Corp., 529 F.2d 943, 944–45 (9th Cir. 1976).