COMMENT

ADEQUATE REPRESENTATION, NOTICE AND THE NEW CLASS ACTION RULE: EFFECTUATING REMEDIES PROVIDED BY THE SECURITIES LAWS

INTRODUCTION

Twenty-four million individuals in the United States are reported to own stock in American industry.¹ Companies, exchanges and stockbrokers, through the communications media, constantly encourage the individual to own his share of American business. However, when this same individual is injured by a violation of the federal securities laws, he is often in a helpless position, either unaware of his injury or unable to prosecute his claim.² The securities laws were established for his benefit, yet it is financially impossible for him to take advantage of their remedies. The burdens of prosecuting a suit—the expenses of gathering sufficient facts, of lawyer's fees, and of complicated and protracted litigation—appear overwhelming when compared with the size of his individual claim.

Indeed, the threshold problem is that the average investor has neither the sophistication nor the time to discover possible violations of the securities laws. For example, consider the length and difficult contents of the average prospectus. Will the average investor read the entire document? If he does, is it clear that he will understand the contents? Will he be sufficiently well informed from other independent sources to check the accuracy of the statements or to know whether any significant facts have been omitted? Finally, will he be able to relate the contents of the prospectus to other filings or to later events?

One solution to this disturbing quandary might be to depend upon action by the administrative body charged with the enforcement of the

² The wide diffusion of securities has created a situation where the single and isolated security holder usually is helpless in protecting his own interests or pleading his own cause. The plight of the individual investor is accentuated ... where his investment is so small that it becomes either impossible or imprudent for him to expend the funds necessary to prosecute his claims or defend his position.

securities acts. However, the Securities Exchange Commission has neither the funds nor the personnel to investigate all complaints from individual investors.

Moreover, Congress, in passing the two major acts in the field, determined that a private remedy was essential if enforcement was not to be a haphazard affair. The addition, through judicial interpretation, of private remedies under other sections of these statutes has become an integral part of securities law enforcement. Since these remedies are available, obstacles to their realization by small investors should be minimized. The damages which such investors have suffered may, in the aggregate, total more than the damages inflicted on the rare individual who can afford the costs of a suit. The fact that the potential defendant has spread an injury over a large group of people should not make him any less amenable to a lawsuit. The individual who trades on “inside information” or omits material information from a prospectus, thereby injuring thousands of shareholders, should answer in a court of law.

In principle, the law has been able to handle a representative suit for over two hundred fifty years. The class action traditionally has been available as a means for the individual to prosecute a small claim. It also has been a device whereby one investor could benefit from the vigilance and knowledge of other stockholders; it would appear, therefore, to be the ideal device for enforcement of the federal securities laws. However, as the number of situations in which the class action was appropriate and the number of people involved in mass injuries increased, the law failed to meet the challenge of changed conditions.


6 There are three specific liability provisions in the Securities Act of 1933. Section 11, 15 U.S.C. § 77k (1964), establishes the liability of the issuer of registered securities if the registration statement is materially misleading or defective. Section 12(1), 15 U.S.C. § 77l(1) (1964), gives the purchaser the right to damages or rescission if he is offered or sold a security in violation of the registration requirements of the Act. Finally, § 12(2), 15 U.S.C. § 77l(2) (1964), establishes the same remedies as § 12(1), if a person offers or sells a security through a material misstatement. It is instructive that Professor Loss attributes in part the limited number of suits under these provisions (evidence of only 77 such suits could be found through 1961) to the high costs involved, and that he views the class action as a means of overcoming the reluctance of investors to sue. 3 L. Loss, SECURI

7 See Z. CHAFFEE, SOME PROBLEMS OF EQUITY 200-01 (1950); 3A J. MOORE, FEDERAL PRACTICE ¶ 23.02, at 3411-12 (2d ed. 1964) [hereinafter cited as Moore].

8 Kalven & Rosenfield, supra note 2, at 691.
with an effective class action rule. In the old federal class action, all those who were affected by a question of "common or general interest" could sue or be defended by a representative of the whole. This rule, however, was limited at times to equitable actions and situations where compulsory joinder was appropriate.

A new class action rule was adopted in 1938 and, until recently, has governed class actions under the securities laws. However, it proved to be of limited utility in the situation described above. The rule sought to define three different types of class actions, "true," "hybrid" and "spurious"—classifications based on "jural relations" or the kinds of rights belonging to the members of the class. From the outset, this categorization could not be made by the courts on a consistent basis. In addition, the drafters failed to spell out the res judicata effects of the different categories, because they agreed that, as a matter of substantive law, this would be beyond their authority. However, due to the courts' reliance on Professor Moore's commentary, it generally was held that absentee class members could be bound by the result in a "true" or "hybrid," but not in a "spurious," class action. Thus, the category into which a judge placed a given

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9 Equity R. 38, 226 U.S. 659 (1912).
13 See, e.g., Escott v. Barchris Constr. Co., 340 F.2d 731 (2d Cir. 1965); Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909 (9th Cir. 1964); Oppenheimer v. F. J. Young & Co., 144 F.2d 387 (2d Cir. 1944).
15 In order to understand the gloss placed on the rule by Professor Moore, its chief proponent, his trilogy should be read. See Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Geo. L.J. 551 (1937); Moore & Cohn, Federal Class Actions, 32 Ill. L. Rev. 307 (1937); Moore & Cohn, Federal Class Actions—Jurisdiction and Effect of Judgment, 32 Ill. L. Rev. 555 (1938). For an incisive and humorous "epitaph" for Moore's "accursed" labels, see Kalven & Rosenfield, supra note 2, at 707 n.73.
16 The history of Pennsylvania Co. v. Deckert illustrates the problems the categories caused the courts. The district court said the suit was a class action, but did not label it, 27 F. Supp. 763, 769 (E.D. Pa. 1939); on appeal, the court of appeals termed it a "spurious" class suit, 108 F.2d 51, 53 (3d Cir. 1940); the Supreme Court reversed the case on other grounds, 311 U.S. 282 (1940); the district court termed it a "hybrid" suit on remand, 39 F. Supp. 592, 595 (E.D. Pa. 1941); on a return visit to the Court of Appeals for the Third Circuit, it was determined that the label was unimportant. 123 F.2d 979, 983 (3d Cir. 1941). See Edgerton v. Armour & Co., 94 F. Supp. 549 (S.D. Cal. 1950); Advisory Committee's Note, 39 F.R.D. at 98 (1966).
18 See note 15 supra.
action assumed a greater importance than many felt was necessary, especially in light of the difficulty of distinguishing the different kinds of rights involved.19

The type of action which has been discussed above, the mass injury under the securities laws, was always classified as a "spurious" class action 20 in which the rights of the members of the class were "several, and there [was] a common question of law or fact affecting the several rights and a common relief [was] sought."21 Although placement of this type of action in this category was rarely questioned, the effects of such a categorization were often criticized.22 In effect, this was not a class action—only the original plaintiff and those who took the initiative and intervened prior to decree were bound by the judgment.23 The "spurious" class action appeared to be merely a useful tool for avoiding joinder requirements"24 and for eliminating some of the requirements of diversity jurisdiction for intervention.25

More important, none of the necessary benefits which would facilitate the class action accrued to those who used this device.26 The representative was not allowed to represent, in any meaningful sense, the rights of the absentee, because there was no legal relationship between the representative and the absentee in a situation where there was just a common question of law and fact.27 Thus, claims could be aggregated only if the claimants could be persuaded to intervene. In light of the financial and other difficulties of contacting possible intervenors 28 and the risk of their being liable for a percentage of the costs,

22 See note 14 infra.
26 In addition to the psychological and financial problems involved in representing only those actually before the court, the claims of the members of the class could not be aggregated to reach the necessary jurisdictional amount. See Alfonso v. Hillsborough County Aviation Authority, 305 F.2d 724 (5th Cir. 1962); Sturgeon v. Great Lakes Steel Corp., 143 F.2d 819 (6th Cir.), cert. denied, 323 U.S. 779 (1944). Although this question has not been answered under the new rule, it can reasonably be expected that, since the action is binding on all the absennces, the courts will follow the advice of the commentators and allow aggregation. See Simeone, Procedural Problems of Class Suits, 60 Mich. L. Rev. 905, 936-38 (1962). But see Alvarez v. Pan American Life Ins. Co., 375 F.2d 992 (5th Cir. 1967).
27 In a "true" class action the rights of the members of the class were joint; in a "hybrid" class action the rights of the members were several, but were bound together by specific property or fund. In the "spurious" class action, it was said that the rights were several and the relationship between the members was the common question of law or fact. See 3A MOORE § 23.08-.11, at 3434-72.
28 This could have involved ethical problems for plaintiff's lawyer. See ABA CANONS OF PROFESSIONAL ETHICS No. 27; note 82 infra.
it was entirely unrealistic to assume that a sufficient number would come forward. When individuals did choose to join the action, they often were those who had a larger than average stake in the litigation and probably would have been able to overcome the financial impediments and bring suit themselves.\textsuperscript{29} The new Rule 23 was promulgated on July 1, 1966,\textsuperscript{30} as an answer to the need for a procedural device which would solve a problem peculiar to "our complex modern economic system where a single harmful act may result in damages to a great number of people,"\textsuperscript{31} a need which the "spurious" class action had inadequately fulfilled.

With the adoption of the new Rule 23, the old "spurious" class action was eliminated, and much of the confused precedent which had attempted to cope with it became only a matter of historical interest.\textsuperscript{32} The new rule came to grips with the problem which the drafters of the old rule had felt was beyond their authority: the binding effect of a class action. The new rule supplied an answer: once it has been determined that a class action may be maintained, all absentees will be bound by the result, whether favorable or not.\textsuperscript{33} On first reading, then, one would expect that the problems outlined above\textsuperscript{34} would be eliminated; that a single plaintiff, with a small monetary injury, now could represent an entire class. Because all would be bound by the result, the plaintiff and his attorney could afford to prosecute the case with vigor in the face of complex litigation and mounting expense, since, if successful, the compensation would be a percentage of the entire class' recovery.\textsuperscript{35}

However, this may not actually be the case. There are very few decisions under the new rule, but the results in some of these early cases are disturbing.\textsuperscript{36} One explanation for the undesirable results is that the Advisory Committee's attempt to fulfill the requirements of due process, as the Committee understood them, resulted in extremely stringent procedural requirements. These requirements represent a built-in limitation to any future use of the class action. The other explanation is that the courts are simply misinterpreting the requirements of the rule, and that it is this misinterpretation which is depriving the rule of its potential value.

\textsuperscript{29} See, e.g., Cherner v. Transitron Electronic Corp., 221 F. Supp. 48 (D. Mass. 1963) (four mutual funds were parties).
\textsuperscript{30} Fed. R. Civ. P. 23. The initial publication was in 39 F.R.D. at 95 (1966).
\textsuperscript{31} Escott v. Barchris Const. Corp., 340 F.2d 731, 733 (2d Cir. 1965).
\textsuperscript{32} See BARON & HOLZOFF, supra note 20, § 562.3 (Supp. 1966). See notes 15-16 supra.
\textsuperscript{33} See Fed. R. Civ. P. 23(c) (3).
\textsuperscript{34} See text accompanying notes 14-27 supra.
\textsuperscript{35} See text accompanying note 84 infra.
This Comment is an attempt to explore this problem of interpretation as it relates to several important sections of the rule. Its thesis is that it is within the courts’ discretion and ability to give effect to the class action device, even in the most difficult cases, by giving full effect and sufficient weight to the main themes of the rule: (1) the responsibility and deference accorded the trial judge; and (2) a practical approach to the problems which might confront a court.

**The New Rule**

New Rule 23 establishes, in subdivision (a), four prerequisites to the maintenance of class actions.\(^{37}\) The first prerequisite is that the number of the members of the class must make joinder of all impracticable.\(^{38}\) The second requirement is that there must be questions of law or fact common to the class.\(^{39}\) The third and fourth requirements are closely related, the former stating that the claims or defenses of the representatives must be typical of the claims or defenses of the class, and the representatives will fairly and adequately protect the interests of the class.\(^{40}\)

\(^{37}\) (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.\(^{41}\)

\(^{38}\) Fed. R. Civ. P. 23(a)(1). The old rule permitted a class action if the people constituting the class were "so numerous as to make it impracticable to bring them before the court." Fed. R. Civ. P. 23(a), 28 U.S.C. App. (1964). This language is so similar to that in the new rule, see note 37 supra, that the old precedent should remain a reliable guide to the minimum size of a class suit. E.g., Thaxton v. Vaughan, 321 F.2d 474 (4th Cir. 1963) (seven insufficient); Phillips v. Sherman, 197 F. Supp. 866, 869 (S.D.N.Y. 1961) (twenty-nine insufficient); Citizens Banking Co. v. Monticello State Bank, 143 F.2d 261 (8th Cir. 1944) (forty sufficient). It is doubtful that many of the cases which arise under the federal securities laws would have classes small enough to enter this marginal area.


\(^{40}\) Fed. R. Civ. P. 23(a)(3). This provision replaces a requirement in the old rule that the members of the class seek common relief. Fed. R. Civ. P. 23(a)(3), 28 U.S.C. App. (1964). This could have been a great restriction on class actions in securities cases in which some members of the class desired damages and others rescission. Compare Farmers Co-op Oil Co. v. Socony-Vacuum Oil Co., 133 F.2d 101 (8th Cir. 1942), with Oppenheimer v. F. J. Young & Co., 144 F.2d 387 (2d Cir. 1944). However, with a developing practical approach, the requirement proved not to be a burdensome. See Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909, 915 (9th Cir. 1964). Since the new language is even more liberal than the recent decisions under the old rule, this requirement should not place a severe restriction on the securities law class action.

\(^{41}\) Fed. R. Civ. P. 23(a)(4). For a full discussion of the potential problems inherent in this prerequisite, see text accompanying notes 58-93 infra.
Subdivision (b) of the new rule describes the types of class actions which may be brought. The old concept of jural relations has disappeared; in its place are descriptions of practical situations in which it is appropriate to employ the class action device. Although the contrary has been contended, it seems clear that subdivision (b)(3) describes the only type of class action which can be brought under the federal securities acts. Under (b)(3), the court must find that

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

1. the prosecution of separate actions by or against individual members of the class would create a risk of
   (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
   (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members of the class or substantially impair or impede their ability to protect their interests;

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. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

See Advisory Committee's Note, 39 F.R.D. at 102 (1966).

42 See Memorandum of Plaintiff in Opposition to Defendants' Motion for an Order Determining that this Action Is Not Maintainable as a Class Action 21-26, Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147 (S.D.N.Y. 1966). This argument was rejected by the Second Circuit Court of Appeals. Eisen v. Carlisle & Jacquelin, CCH FED. SEC. L. REP. 92,164, at 96,756 (2d Cir. March 8, 1968).

43 Although the language of subdivisions (b)(1) and (b)(2), see note 42 supra, could be interpreted to include a securities law violation of the type under discussion, it is clear that the rule contemplates this type of action coming only within the ambit of "common questions of law or fact."

Clause (A) of (b)(1) has been described as required

"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."

Advisory Committee's Note, 39 F.R.D. at 100 (1966) (quoting D. Louiseill & G. Hazard, Pleading and Procedure: State and Federal 719 (1962)). The note goes on to describe the following examples, among others: (1) actions by separate individuals against a government body to prevent it from making a particular appropriation might create the risk of inconsistent determinations; (2) many actions respecting an alleged nuisance might create the same risk. See Booth v. General Dynamics Corp., 264 F. Supp. 465 (N.D. Ill. 1967).

Clause (B) is reserved for those situations where other members of the class would be concluded by a judgment in an individual action, not legally, but as a practical matter. For example, if one individual were to bring an action for reorganization of a mutual benefit insurance company, the effects of a judgment could hardly be confined to exclude members other than the one bringing the suit. Another applicable situation would occur when there are numerous potential claimants against a limited fund, insufficient to fulfill all the claims. See Supreme Tribe of Ben-Hur v. Cauble,
common questions of law or fact predominate over questions affecting individual members. There are some recent cases which suggest, notwithstanding a series of misrepresentations by the defendant or the need for each of the members of the class to prove individual reliance, that a typical securities case presents common questions which do predominate.

In addition, the judge must find that the class action is a superior means of prosecuting the case. The only alternatives suggested—consolidated actions, liberal intervention and the test case—are inferior means of insuring vigorous prosecution on behalf of a large group of individuals, each of whose damages are very small. All of these require too much individual initiative and assume a high degree of awareness on the part of the average absentee. Experience with the "spurious" class action strongly suggests that the class action, under the new rules, will be superior.

In reaching a conclusion on the question of the superiority of a class action, the rules advise the court to consider four factors: (1) the interest of the individual members of the class in prosecuting their own action; (2) the extent and nature of the litigation which has already been commenced by or against members of the class; (3) the desirability of concentrating the case in one forum; (4) the difficulty of managing the class action.

As soon as practicable, the court is to determine whether the class action may be maintained. However, this determination is not

255 U.S. 356 (1921); Dann v. Studebaker-Packard Corp., 288 F.2d 201 (6th Cir. 1961); Dickinson v. Burnham, 197 F.2d 973 (2d Cir.), cert. denied, 344 U.S. 875 (1952); Citizens Banking Co. v. Monticello State Bank, 143 F.2d 261 (8th Cir. 1944).

Subdivision (b) (2) "is intended to reach situations where a party has taken action or refused to take action with respect to a class . . . ." It is understood by the Advisory Committee that a (b) (2) action will be employed when injunctive or corresponding declaratory relief is appropriate. "The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." Advisory Committee's Note, 39 F.R.D. at 102 (1966) (emphasis added). It is clear, notwithstanding the Committee's statement to the contrary, that its "primary utility will be in civil rights cases." 2 BARRON & HOLTZOFF, supra note 20, § 562, at 69 (Supp. 1967). See, e.g., Potts v. Flax, 313 F.2d 284 (5th Cir. 1963); Brunson v. Board of Trustees, 311 F.2d 107 (4th Cir. 1962). It is probably correct that (b) (2) should only apply to cases in which the party opposing the class has created it through his own actions, and not apply where the class has defined itself by reacting to the actions of the party opposing the class. See Note, Proposed Rule 23: Class Actions Reclassified, 51 VA. L. REV. 629, 648-49 (1965).

This requirement is closely related to the prerequisite in FED. R. CIV. P. 23(a) (3). See note 42 supra. In deciding this question, the court will have to balance the "value of allowing individual adjudication on each claim and the value of judicial economy, which will be served by allowing the class action." Note, Proposed Rule 23: Class Actions Reclassified, 51 VA. L. REV. 629, 643 (1965).

See note 39 supra.

See FED. R. CIV. P. 23(b) (3).

See Advisory Committee's Note, 39 F.R.D. at 103.

See text accompanying notes 16-28 supra.

FED. R. CIV. P. 23(b) (3) (A)-(D).
necessarily final, and may be amended before decision on the merits. Subdivision (c)(2) contains the notice requirement, which applies only to (b)(3) actions. In addition, subdivision (c)(3) establishes the rule that the judgment in any class action shall bind all absentee members of the class. Finally, the court is instructed that, when appropriate, the class action may be maintained as to less than all the issues (with others remaining for individual adjudication) and that, in the court's discretion, the class may be divided into subclasses.

Subdivision (d) is the final portion of the panoply of discretionary authority which the rule grants the trial judge. Subdivision (b)(3) allows him to decide whether a "common question" class action may be brought; (b)(1) grants authority to the court to decide conditionally whether a class action may be maintained and to amend this determination any time before judgment; (b)(4) permits a decision that the action shall be brought only as to certain issues or to divide the class into subclasses. Finally, subdivision (d), entitled "Orders in Conduct of Actions," gives the judge the power to control the course of litigation. The rule sets out examples of orders which are within his discretion. He may decide how to arrange the proceedings in order to simplify the presentation; he may send notice to

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51 Fed. R. Civ. P. 23(c)(1):
(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

52 Fed. R. Civ. P. 23(c)(2):
(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel. See text accompanying notes 95-162 infra.

53 Fed. R. Civ. P. 23(c)(3):
(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

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

55 Fed. R. Civ. P. 23(d):
(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the
members of the class in order to (1) inform them of a development in the action, (2) tell them of the proposed extent of the judgment, (3) allow them to judge the adequacy of the representation, (4) present either claims or defenses through intervention, or (5) come into the action for any other reason; he may impose conditions on the named plaintiffs or subsequent intervenors, for example to strengthen their representation; he may strike the allegation that the action can be maintained on behalf of absentees. Finally, subdivision (d) includes a catch-all authority allowing the judge to deal with “similar procedural matters.”

It is clear that this authority is the key to the philosophy behind the new rule. The judge is no longer a passive observer, allowing the initiative of the opposing attorneys to control the course of the litigation; he plays an active role. In a very real sense, he is the guardian of the interests of the absentees. Only through his constant vigilance and sense of fairness will the radically altered Rule 23 achieve its full potential. He must not only make the initial decision on maintenance of a class action and constantly ensure that the decision was correct and that the absentees’ interests are being preserved; he must also approve any final settlement of a case which has been maintained as a class action.

In this context, this Comment will analyze the issues which face the class action trial judge in these primary problem areas: (1) the factors which he should consider when judging adequate representation under (a)(3) and (4); (2) the meaning of the mandatory notice requirement for (b)(3) actions; (3) the difficulties of defining a large, amorphous class for the purposes of giving notice and fashioning a judgment; and (4) a final ancillary problem—the point at which an individual should be allowed to appeal from a determination that his action may not be maintained as a class action.

|Fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.|

66 It is not clear whether the *ejusdem generis* rule of statutory construction would prohibit the judge from actually suggesting issues or evidence which the representative of the class might present. In light of the importance of judicial supervision, however, a rule of statutory construction should not preclude the implementation of a sound policy.

67 Fed. R. Civ. P. 23(e):

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.
Adequacy of Representation

It is crucial for the individual plaintiff with limited damages to prove that he can adequately represent the absent members of the class. However, failure of the courts to abandon three past practices in class action litigation would seem to limit the likelihood that such a plaintiff would be found an adequate representative: first, reliance on differences between the interests of the would-be representative and the interests of members of the class which do not go to the issue being litigated; second, undue emphasis on the relative percentage of the representative's interest in the total suit; and third, insufficient faith in the monetary interest of the representative's attorney as a guaranty of adequate representation.

Subdivision (a)(4) of new Rule 23 states, under the general heading "Prerequisites to a Class Action," that one or more members of a class may sue or be sued only if "the representative parties will fairly and adequately protect the interests of the class." Because this language is so similar to that of the old rule, which provided that one or more representatives "as will fairly insure the adequate representation of all" could sue or be sued, it might be argued that the old case law should still be relevant. However, this is not true in all respects. Under the old "spurious" class action, most courts felt that it was unnecessary to analyze the adequacy of the representation. The "spurious" class action was viewed merely as a permissive joinder device, not binding anyone except those parties actually before the court. Therefore, considerations of due process did not require such an examination. However, those few courts which viewed this type of class action as binding on absentees did in fact confront the issue. Since, under new Rule 23, every class action will bind all those who do not ask to be excluded, the courts will be compelled to decide whether the plaintiff adequately represents the interests of these absentees.

There are many factors which enter into any decision on the adequacy of representation. The most important is that, with respect to the litigated issues, the interests of the representative must be

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59 See note 37 supra.
61 See, e.g., York v. Guaranty Trust Co., 143 F.2d 503, 528 n.52 (2d Cir. 1944), reed'd on other grounds, 326 U.S. 99 (1945); Fischer v. Kletz, 41 F.R.D. 377, 383 (S.D.N.Y. 1966). But see Weeks v. Barco Oil Co., 125 F.2d 84 (7th Cir. 1941); Pelas v. Caterpillar Tractor Co., 113 F.2d 626 (7th Cir. 1940).
62 See 3A Moore ¶ 23.07[1], at 3425. This lack of concern did not extend to the situation where the original plaintiff was given control of the action over other intervenors. Id.
64 See 3A Moore ¶ 23.07[1], at 3425.
coextensive with the interests of other members of the class. Care must be taken in the determination of this question in order to avoid a problem which arose in the recent case of Eisen v. Carlisle & Jacquelin. Eisen sought to represent all odd-lot purchasers and sellers on the New York Stock Exchange during the six years prior to the commencement of his suit. He alleged that the two major odd-lot dealers on the New York Stock Exchange had conspired and combined to monopolize odd-lot trading and to charge excessive fees in violation of the Sherman Act. The suit was an attempt to recover the amount of the alleged excess fees paid by the members of the class during the six-year period. The district court, in deciding that Eisen would not adequately represent the interests of the absentees, accepted an argument advanced by the defendants. The defendants pointed out that the class of odd-lot traders included traders, dealers, arbitrageurs and speculators; that the prices of the shares purchased varied from the lowest to the highest priced stocks on the New York Stock Exchange; and that the nature of the transactions—long or short, on margin or for cash, limited or contingent, and for a fixed amount or as part of a long-term investment plan—differed in many respects. These were indeed factors which distinguished Eisen from other members of the class. However, they were distinctions irrelevant to the issue in the case—whether the defendants charged excessive fees. As Eisen argued (and as the Second Circuit agreed), all these investors, regardless of their purposes or of the stock they had purchased, paid excessive commissions when they traded in odd-lots.

Within any class of litigants, there are likely to be substantial differences. The factors on which the courts must focus, to the exclusion of all others, are those which go to the common questions of

65 See Hansberry v. Lee, 311 U.S. 32 (1940); text accompanying notes 115-22 infra.
66 41 F.R.D. 147 (S.D.N.Y. 1966), rev'd and remanded, CCH Fed. Sec. L. Rep. ¶ 92,164 (2d Cir. Mar. 8, 1968). Although the majority opinion speaks to some of the issues raised by Judge Tyler's original decision (see, e.g., CCH Fed. Sec. L. Rep. ¶ 92,164, at 96,754-55, noting that the district court erred in relying on the "quantitative elements" of the nominal plaintiff's interest as a basis for dismissal), even the problems discussed are by no means mooted or solved by this single decision. The vigorous dissent by Judge Lumbard reinforces this point. CCH Fed. Sec. L. Rep. ¶ 92,164, at 96,761-62.
67 Memorandum of Plaintiff in Opposition to Defendants' Motion for an Order Determining that this Action Is Not Maintainable as a Class Action 10, Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147 (S.D.N.Y. 1966).
70 Eisen v. Carlisle & Jacquelin, CCH Fed. Sec. L. Rep. ¶ 92,164, at 96,754 (2d Cir. Mar. 8, 1968). Indeed, if these were relevant distinctions among members of the class, the judge was empowered to divide the class into appropriate subclasses. Fed. R. Civ. P. 23(c)(4)(B).
law or fact for which the named plaintiff seeks to represent the class.  

Thus, one court was correct in stating that two jobbers of gasoline inadequately represented a class of 900 in an antitrust action against 19 oil companies which were alleged to have entered into a price-fixing conspiracy, when the relationships between the various jobbers and the oil companies were governed by different types of contracts with varying terms.  

However, if in this same suit all had been bound by a standard contract, a court would hardly have been justified in dismissing the class action merely because of a difference in termination dates. This would be a "distinction without a difference" and of no relevance to the ability of one to represent many.  

Once a court has passed the threshold question of common interests, it will normally examine the number of plaintiffs and the percentage of their interest in the litigation. This factor was particularly important to the district court in Eisen: "Eisen's inadequacy as a representative of the asserted class is further underscored by the obvious fact that his interest, as sole plaintiff, is miniscule compared to the interests of the class as a whole." Other courts have also been disturbed by a numerical disparity. Such a consideration, however, is contrary to the philosophy of the class action, especially in those cases in which there is a large class, all of whose members have miniscule financial interests in the litigation. What was said twenty years ago may still be true today under the new rule: "The halting quality of the confidence of both the drafters of the Rule and the courts in adequate representation as a safeguard is exposed by their logically unnecessary concern for numbers."  

The first objection to this unnecessary concern is that reliance on numerical representation defeats the basic aim of the class suit. The most important purpose of a class action is to allow one individual with a small claim to represent many others, most of whom may also have  

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74 See Mersay v. First Republic Corp. of America, 43 F.R.D. 465 (S.D.N.Y. 1968); Redmond v. Commerce Trust Co., 144 F.2d 140 (8th Cir.), cert. denied, 323 U.S. 776 (1944) (action to preserve a trust fund, where the court was not misled by the divergent interests of the beneficiaries in the distribution of the trust corpus).  


76 See 2 BARRON & HOLTZOFF, supra note 20, § 567; 3A MOORE ¶ 23.07[2].  

77 See, e.g., Pennsylvania Co. v. Deckert, 123 F.2d 979 (3d Cir. 1941); Pelelas v. Caterpillar Tractor Co., 113 F.2d 629, 632 (7th Cir. 1940).  

small claims. To argue either that the individual's representation is inadequate because he stand alone, or that there obviously is no class because no others have chosen to join him, is to be blind to the normal apathy or ignorance of individuals in the face of what is, to each, a relatively small injury. Few people are likely to know either that they have been wronged or that the law has a procedure which will offer them relief. Furthermore, in many of those cases in which the client's stake in the litigation is large enough to fulfill any meaningful "percentage requirement," the potential representative is likely in a position where he need not tie his action to the claims of the whole class in order to present a claim sufficiently large to warrant vigorous prosecution. While it is probably true that the percentage threshold to proceed as a class representative is lower than the percentage threshold to be in a position to "go it alone," it remains true that a "percentage requirement" will affect those who are most dependent on the class action as a means to press their claims. The rationale behind the class action is to encourage the "little guy" to bring an action; if he is big enough, he doesn't need encouragement.

A second, and especially telling objection to this "numbers game," is that it puts the plaintiff or his attorney in a compromising position. If the client represents a small fraction of the class, in terms of numbers and financial interest, an attorney who would otherwise be glad to prosecute the suit must insist that the potential class representative solicit other individuals similarly situated so that the court will be more willing to allow the suit to proceed as a class action. This act may well be in conflict with the spirit of the canons of ethics. The attorney, through his agent (the client who approached him) is

78 Of lesser, but by no means of little importance, are the goals of protecting the defendant from successive harassment suits, and the judicial process from the great expense and delay involved in providing a forum for such a series of cases.

79 In Eisen, Judge Tyler noted "there is no evidence that any other member has the slightest interest in this litigation. . . ." 41 F.R.D. at 152.


81 See Dolgow v. Anderson, 43 F.R.D. 472, 494 (S.D.N.Y. 1968) ("The realities of the situation here and in the vast majority of class actions suggest that the amount of possible recovery by the class rather than by the individual plaintiffs furnishes the motivating force behind prosecution"); Murphy v. North American Light & Power Co., 33 F. Supp. 567, 570 (S.D.N.Y. 1940) ("these causes looked at in their true light are really voluntary speculations in fees by the attorneys for the complainants").

82 "It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations. . . ." ABA CANONS OF PROFESSIONAL ETHICS No. 27.
soliciting business. In practice, this individual may not know others who have suffered from the same group wrong nor where to discover them. However, the more involved the lawyer becomes, either in helping the client find other class representatives or in soliciting their participation himself, the greater chance he takes of violating the canons of ethics. The alternative, of course, is for the attorney to tell his potential client that although he has a good cause of action and there are others in the same position, the small recovery in the individual action would not warrant the great effort and expense required to prosecute the case to its fullest. Ironically, the same amount of effort and expense would bring all those who are similarly situated a recovery for the group wrong.

Finally, there is no reason to suppose the attorney will prosecute the case with any more vigor if the plaintiff’s share in the eventual recovery is one or twenty-five per cent, or if there are two or a hundred active plaintiffs. If the suit is successful, the attorney will receive a percentage of the gross recovery, not just a percentage of his client’s (or clients’) recovery. This fact makes it feasible for the attorney to bring the class action in the first place. So long as his client’s interest in the proceedings is identical to that of the other members of the class, the client is, in reality, the class itself, and the attorney’s stake in the litigation will rise or fall with the interests of the class.

Furthermore, is it not the attorney who is actually in control of the case? He controls the course of litigation, decides the basis of the suit and interrogates witnesses. Therefore, if the court desires to guarantee adequate representation it should look at the real representative, not the nominal plaintiff, who is no more than a vehicle through whom the attorney is able to perform his role as a private guardian for assuring compliance with the securities laws. However, the courts have been unwilling to place great reliance on this “real representative.”

This reluctance to look at the representative’s attorney as one measure of adequacy of representation may stem from more than a reluctance to break with the old precedent of looking at the number of plaintiffs and the percentage of their interest in the total litigation.

84 In his conduct of the litigation, the class action attorney must be careful to avoid violating ABA CANONS OF PROFESSIONAL ETHICS No. 10 (acquiring interest in litigation), No. 28 (stirring up litigation), or No. 42 (bearing the expenses of litigation). However, there is no reason why the lawyer should feel any more restricted in his conduct than in the normal contingent fee litigation which is specifically authorized by Canon 13 if supervised by the court, a requirement fulfilled by Fed. R. Civ. P. 23(e).
85 The importance of the attorney has been recognized: “Conceivably a single plaintiff with competent counsel may afford better representation to the class than a great number of parties and a multitude of counsel.” 2 BARRON & HOLTZOFF, supra note 20, § 567, at 305.
If the courts are to evaluate attorneys from a vantage point other than their financial stake in the litigation, what factors are they to use? Should the lawyer's reputation be considered? The judge may never have heard of him. One possible alternative is to examine his experience in the area. This approach, however, might well make it impossible for capable young attorneys to enter the field. If this tack is nevertheless taken, one consideration might be an evaluation of the lawyer's success in this type of litigation. But how is this to be judged? Do settlements count as positive factors? An in-depth examination of the types and difficulty of cases the attorney has handled may be required. The entire procedure conjures up visions of placing the character and reputation of the attorney on trial.

It might be embarrassing to the bar if a judge were to dismiss a case because of the inadequacy of plaintiff's counsel. So long as the judge discusses only the positive attributes of counsel, there is no problem. However, once courts start considering ability, the judge who feels that the lawyer is not suitable may well look for any other reason which he might find "safer" to articulate as an excuse for dismissing the suit. The danger of having cases decided on the basis of such sub silentio factors is manifest. There is no doubt that an inquiry into the qualifications of the attorney in order to determine adequate representation would be time-consuming and injudicious.

It may be argued that, if the percentage of the representative's interest is considered irrelevant and the judge is barred from considering the ability of the class representative's lawyer, no independent meaning attaches to the requirement that "the representative parties will fairly and adequately protect the interests of the class." However, there is an objective factor which the court should evaluate and which gives some independent meaning to the adequate representation standard. This is the ability of the attorney to spend a sufficient amount of time and money to discover all the necessary facts, to line up expert witnesses and to handle the other demands imposed by the proper conduct of complex litigation. There would be nothing improper in a judge requesting information about this ability; the requirement of adequate representation would seem to require it. If the judge

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86 Apparently, evidence of this type was offered by Eisen, who pointed out to the court that part of his ability to represent the class adequately was based on his lawyer's experience. The opinion, however, failed to address itself to this contention, merely pointing out that it was one of the arguments raised. Eisen v. Carlisle & Jacquelin, 41 F.R.D. at 150.

87 Although judges do make similar evaluations when they are called upon to designate a lead attorney in class actions and other multiparty cases, this type of decision is distinguishable from that discussed in the text. In the latter situation, a negative decision may mean that counsel is denied any participation in a case; in the former, his role is merely circumscribed.

88 One court put this reluctance in the form of a presumption. "Until the contrary is demonstrated, courts will assume that members of the bar are skilled in their profession." Dolgow v. Anderson, 43 F.R.D. 472, 496 (S.D.N.Y. 1968).
feels that the attorney has failed or, at any time during the trial, does fail to demonstrate the proper economic qualifications, he could use his discretionary authority over the notice requirement to encourage intervention. The intervening parties could help finance the litigation and their attorneys could help guide it. This procedure is authorized by implication in the Advisory Committee's suggestion that the discretionary notice under (d)(2) might be especially appropriate in a (b)(3) action to allow the absentees to object to the adequacy of representation.80

In addition, the fact that a court might find it difficult to evaluate the qualifications of the attorney in terms other than financial commitment does not leave the judge without other ways in which to guarantee adequate representation. The trial judge, as has already been noted,81 is given a much broader role to play under the new rules than in the normal adversary proceeding. He, along with the attorney for the class, is the guardian of the rights of the absentee. The broad discretion accorded the judge in shaping orders under subdivision (d) can be utilized effectively to ensure that the attorney prosecutes the case fully and does not represent the absentees on a pro forma basis.82 The attorney's self-interest and financial resources, coupled with a vigilant judge, should insure adequate representation83 to the members of the class.

NOTICE REQUIREMENT

In the securities regulation field, the notice requirement of Rule 23 presents the greatest impediment to the prosecution of class actions. This notice is intended to give members "an opportunity to secure exclusion from the class."84 Subdivision (c)(2) requires that some notice must be given in all class actions maintained under subdivision (b)(3). The crucial section commands that "the best notice practicable under the circumstances" be given, and that individual notice be

93 39 F.R.D. at 106-07.
94 Advisory Committee's Note, 39 F.R.D. at 107.
given "to all members who can be identified through reasonable effort." The remaining portion of (c)(2) explains: (1) that such notice shall inform the class member that he can exclude himself from the binding effects of the litigation if he requests exclusion by a certain date; (2) that if he does not request exclusion, the judgment will bind him whether favorable or not; and (3) that he may enter an appearance through counsel if he so desires. Subdivision (c)(3) announces the rule that a judgment in a (b)(3) action shall include those to whom (c)(2) notice was directed, who did not request exclusion and whom the judge found to be members of the class.

The Advisory Committee's Note to subdivision (c)(2) is not particularly helpful in defining the meaning of the requirement for mandatory notice. After parroting the language of the subdivision, it refers the reader to the note to subdivision (d)(2) which is more illuminating. Here the purpose of the mandatory notice is stated: to give absentees the opportunity to secure exclusion from the class.

In discussing the discretionary notice under (d)(2), the Advisory Committee noted an inverse relationship between the need for notice and adequate representation. "In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum." Thus, the provision for discretionary notice in addition to the mandatory subdivision (c)(2) notice "is designed to fulfill requirements of due process to which the class action procedure is of course subject." One further comment from the Advisory Committee bears special mention: "Notice to members of the class, whenever employed under amended Rule 23, should be accommodated to the particular purpose but need not comply with the formalities for service of process."

Neither the rule nor the Note explicitly supplies the answers to two important questions connected with the notice problem: (1) who is to compose and send the notice; and (2) who is to bear the cost. The former question is faced twice, and each time, the answer is either ambiguous or would yield different results depending upon the type of class action brought. Subdivision (c)(2) states, "In any class action maintained under subdivision (b)(3), the court shall direct . . . the best notice . . . ."; subdivision (d)(4) states that "the court may make appropriate orders: . . . (2) . . . that notice be given in such a manner . . . ." The difference in language may

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95 Fed. R. Civ. P. 23(c)(2).
96 See text accompanying notes 148-51 infra.
98 Id. at 106-07.
99 Id. at 106.
100 Id. at 107.
101 Id. (emphasis added).
THE NEW CLASS ACTION RULE

imply that in a "common question" class action, the notice should come from the court. This would be compatible with the role established for the court as a guardian of the interests of the absentees.

However, the source of the notice is a much less important issue than its content. Regardless of the source of the notice, it is clear that the court should play an effective role in supervising its content. This will eliminate the risk that the notice will be used by plaintiff's counsel to accomplish champertous ends or to convey the impression that plaintiff's claim is well-founded. If it is known that the court will oversee the contents, there is also less chance that plaintiff or his attorney will be able to use the threat of publicity about an alleged liability to force a potential defendant to settle prior to the commencement of an action. It is unlikely that the type of notice of which a court might approve would be so damaging that potential defendants would be forced to avoid it by an unwarranted settlement. Although there is no answer to the second question—who pays—in the new rule, it is generally acknowledged that the plaintiff must undertake to bear the expense of notifying absentees. It is, of course, this expense which makes the decision on the amount of notice required so crucial to the practicability of maintaining a class action.

Although the rule, when read in conjunction with the Advisory Committee's Note, does not supply the specific guidelines which might be desirable in such a new area, there are clearly certain factors which will aid courts in the development of precedent under (c) (2). Most important is the discretion accorded the judge in determining "the best notice practicable" and the amount of activity which will constitute "reasonable effort" to identify all members of the class. A decision was apparently made by the drafters that the judge presiding over the trial is in the best position to determine, in light of the case before him, exactly what content to give these words. In addition, the judge is instructed that the notice need not comply with the

105 Once a suit is commenced, the possibility of a settlement by force is reduced, since the judge, as well as controlling notice, must approve any dismissal or compromise. Fed. R. Civ. P. 23(e).
rigorous procedure required for service of process.\textsuperscript{107} On the other hand, it is equally clear that some minimal notice requirement is necessary to satisfy due process, and that the judge can demand no less. The entire tone of the provision and of the Advisory Committee's gloss is one of accommodation between the desire to inform the members of the class and the expense and effort involved in providing each individual with personal notice.

In view of this background, it could be expected that decisions determining what will be required in a given case under subdivision (c)(2) will represent a carefully reasoned attempt to balance these competing interests. However, in \textit{Eisen v. Carlisle & Jacquelin}, the first court to confront this problem under the new rule seems to have accepted an individual notice requirement as mandatory, despite the presence of competing interests. Plaintiff, as noted above, was seeking to represent all odd-lot traders on the New York Stock Exchange during the past six years. Eisen estimated that he represented "hundreds of thousands" and the defendant in an affidavit estimated that there had been 3,750,000 odd-lot traders in the last six years.\textsuperscript{108} Notwithstanding the disparity in these estimates, the fact that the class represented by Eisen was extremely large is readily established. It is equally evident that requiring individual notice to each member of the class would present such a burden, both in terms of expense and investigation time, that the class action would never be brought, even if the action were to satisfy all the other requirements of Rule 23. However, Judge Tyler rejected plaintiff's contention that notice by publication would be sufficient, whether through free publicity\textsuperscript{109} or paid advertisements. The opinion simply stated that the rule and the requirements of due process required individual notice to all those who could be identified. With complete disregard for the rule's requirement of "best notice practicable" and the rule's admonition of "reasonable effort," the court went on to hold that, in light of the "financial limitations inherent in the circumstances here presented," the class action could not be maintained.\textsuperscript{110} This holding has particularly disturbing implications;\textsuperscript{111} if the financial ability of complying with the

\textsuperscript{107} "Notice . . . should be accommodated to the particular purpose but need not comply with the formalities for service of process." Advisory Committee's Note, 39 F.R.D. at 107.

\textsuperscript{108} 41 F.R.D. at 151.

\textsuperscript{109} Eisen contended that the publicity the case had received in the press should be considered as partial fulfillment of the notice requirement. Memorandum of Plaintiff in Opposition to Defendants' Motion for an Order Determining this Action is Not Maintainable as a Class Action 32, Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147 (S.D.N.Y. 1966). \textit{See} N.Y. Times, May 3, 1966, at 69, col. 6; Wall St. J., May 4, 1966, at 8, col. 2.

\textsuperscript{110} 41 F.R.D. at 152.

\textsuperscript{111} Despite the discussion in this Comment addressed to the mistakes made by the \textit{Eisen} court in regard to the maintenance of a class action, there is another factor, the presence of which, although not mentioned in the opinion, was sufficient to justify dismissing the suit as to its representative character. Even if the plaintiff were suc-
individual notice requirement is held to be a condition precedent to the maintenance of a class action, the chances of bringing a class action will diminish as the size of the class increases and the dollar amount of any individual’s damage decreases.

However, it would seem that fulfilling the requirements of subdivision (c) (2) might not be as difficult a task as was implied in the Eisen opinion. The language of the rule, i.e., “best notice practicable” and “reasonable effort,” seems to suggest (if not demand) a less rigorous interpretation. Because of the emphasis which Judge Tyler placed on due process, it is most probable that he was either unwilling to exercise, or unaware that he possessed, greater discretion. The opinion states that “it is virtually certain that far better notice than plaintiff apparently contemplates would be necessary here to comply with amended Rule 23(c) (2) and, even more importantly, with due process standards.” This implies that due process in this case required a more rigorous standard of notice than that required by the language of the rule. Such a result, in fact, may have been the understanding of the drafters. Instead of explicitly attempting to state the requirements of due process, the rule may have been drawn broadly in order to leave the courts free to decide this question, which certainly is within their area of competence. An examination of due process requirements as established by the Supreme Court is therefore necessary in order to determine what the minimum notice requirement for a class action should be.

The dissent’s characterization of the majority’s handling of the notice issue seems justified: “Indeed, the question of how to give any notice which would be sufficient to meet constitutional requirements is so impossible of solution that my colleagues choose to ignore it.”

Nevertheless, if the court finds that a considerable number of members of the class can be identified with reasonable effort, financial considerations prevent the plaintiff from furnishing individual notice to these members, there may prove to be no alternative other than the dismissal of the class suit.

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114 41 F.R.D. at 151.
Constitutional Requirements

The most important Supreme Court decision dealing with the due process requirements for binding absentee members of a class is *Hansberry v. Lee* cited in the Advisory Committee Note. In *Hansberry*, the plaintiff sought to enjoin the breach of a restrictive covenant. The defense was that the covenant had never become operative since the requisite ninety-five per cent of the owners had failed to sign it. Although it was proven as a matter of fact that only fifty-four per cent had signed the covenant, the injunction was nevertheless granted and upheld by the Illinois courts on the basis of an earlier suit involving a similar request for injunction, in which the parties had stipulated that ninety-five per cent had signed the covenant. Because this earlier suit was a class action, the stipulation in the earlier suit bound the present defendants as members of the class, even though the specific finding of the earlier court was erroneous. The only way this finding could be set aside, according to the Illinois court, was by a direct attack on the first judgment.

The Supreme Court reversed the judgment. Apparently, the basis for this decision was the divergent interests of the defendants in the present suit, who were resisting the covenant, and their "representatives" in the earlier case. The court stated, "Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires." Although the Court was addressing itself to the process due the absentee, nowhere is there a mention of notice in connection with the necessary protection of absentee interests. Rather, the opinion turns on the identity of interests and the fairness of the prosecution by the class representatives. The presence of both factors is not only necessary but also sufficient to bind the absentees.

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115 311 U.S. 32 (1940).
116 39 F.R.D. at 106-07:
Indeed, under subdivision (c)(2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class. This mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject. See *Hansberry v. Lee* . . . *Mullane v. Central Hanover Bank & Trust Co.* . . . cf. *Dickenson v. Burnham* . . . see also *All American Airways, Inc. v. Elderd* . . . *Gart v. Cole* . . . .
In the course of the decision, the Court noted:

Nor do we find it necessary for the decision of this case to say that, when the only circumstance defining the class is that the determination of the rights of its members turns upon a single issue of fact or law, a state could not constitutionally adopt a procedure whereby some of the members of the class could stand in judgment for all, provided that the procedure were so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue.\footnote{\textsuperscript{121}}

Notwithstanding commentary to the contrary,\footnote{\textsuperscript{122}} it would seem a safe inference from the language above (couched in the form of an invitation to adjudication) that the Court, consistent with due process, might sanction a rule which did not include any notice requirement, as long as it is guaranteed that the interests of the absentees were adequately represented. In any event, it is difficult to understand why the Advisory Committee viewed this case as establishing a due process requirement of notice to absentees in order to enable them to "opt out."

The Advisory Committee Note also cited \textit{Mullane v. Central Hanover Bank & Trust Co.}\footnote{\textsuperscript{123}} for the proposition that due process

\footnote{\textsuperscript{121}}Id. at 43.
\footnote{\textsuperscript{122}}For early attempts to explain the rationale of the case, see 26 \textit{Cornell L.Q.} 317 (1941); 39 \textit{Mich. L. Rev.} 829 (1941); 89 \textit{U. Pa. L. Rev.} 525 (1941). One possible explanation, both advanced and rejected in Note, \textit{Proposed Rule 23: Class Actions Reclassified}, 51 \textit{Va. L. Rev.} 629, 637 (1965), is that there were two classes involved, one which wished to enforce the covenant and another which did not. \textit{See} 3A \textit{Moore} \textsuperscript{\textcopyright} 23.11, at 3471. However, this fact would not require the Court to discuss the issue of adequate representation, a concept which the Court discusses at length. Also, if the Court had felt it was dealing with two distinct classes, there would have been no need to discuss the res judicata effects of the first decision, since the Court had earlier spoken to the issue that one class could not represent another. \textit{See} Smith v. Swormstedt, 57 U.S. (16 How.) 288, 301-03 (1853).

There are other commentators who maintain, notwithstanding the discussion in the text, that the lack of notice to the other members of the class was the \textit{ratio decidendi} of the case. \textit{E.g.}, Keeffe, Levy & Donovan, \textit{Lee Defeats Ben Hur}, 33 \textit{Cornell L.Q.} 327, 337-39 (1948). These commentators may have turned to a lack of notice explanation because of their difficulty in accepting the notion that an absentee could be represented by an individual with whom he had no jural ties. \textit{See} Note, \textit{Proposed Rule 23, supra} at 639. The same Note advances another argument against the lack of notice rationale. "[T]he court to the conflicts of interest which separated them from their supposed representatives. They would not have lost their opportunity to present their case at a time which was convenient to them; certainly, in light of the antagonistic interests, the court would have fashioned a judgment which did not bind those who had received notice and were opposed.

The discussion above, however, does not negate the most obvious reason why notice could not be considered the \textit{ratio decidendi} of the case—the court did not even mention it in connection with class action absentees.

\footnote{\textsuperscript{123}}339 U.S. 306 (1950).
requires actual notice to the members of a (b) (3) class.\textsuperscript{124} However, it is also questionable whether this case is good authority for that proposition. \textit{Mullane} dealt with a New York statute\textsuperscript{125} which permitted banks to commingle the assets of various funds for which it was trustee in a common investment trust. The statute required a triennial accounting which had to be submitted for court approval. Two attorneys, one to represent those interested in the principal of the commingled funds and one to represent those interested in the income, had to be present at the proceeding.\textsuperscript{126} The effect of a decree of approval was severe; "every right which . . . [those interested in the fund] would have against the trust company . . . for improper management of the common trust fund during the period covered by the accounting"\textsuperscript{127} was thereby terminated. The statute properly recognized that those interested in the fund ought to be notified of such an important proceeding and provided that, at a minimum, notice of the hearing had to be published once a week for four consecutive weeks in a newspaper designated by the court. The notice did not have to carry the names of all those interested in the common fund; the only information required was the name of the bank, the date of the fund's inception and a list of all participating estates, trusts or funds.\textsuperscript{128} It was the adequacy of just such minimal notice that was attacked in \textit{Mullane}.

Before considering the Court's decision in \textit{Mullane}, it is essential to distinguish between the interests of the representatives in a class action (either the attorneys or the denominated plaintiffs) and the interests of guardians \textit{ad litem} in a \textit{Mullane} situation. It is much too easy to view the two situations as equivalent, an error which the Advisory Committee may have committed. In the common trust fund example, the guardian \textit{ad litem} acts without the advice or assistance of any client. He probably knows few or none of the individuals he represents. His fee is court-established and is generally independent of the outcome. There is a tremendous temptation either to over- or under-litigate.\textsuperscript{129} He can increase his income by choosing to litigate issues without regard for the probabilities of recovering a

\textsuperscript{124} 39 F.R.D. at 107.
\textsuperscript{125} N.Y. \textit{Banking Law} § 100-c (McKinney 1950).
\textsuperscript{126} \textit{Id}.
\textsuperscript{127} 339 U.S. at 311.
\textsuperscript{128} N.Y. \textit{Banking Law} § 100-c(9) (McKinney 1950).
\textsuperscript{129} "Also, their interests are presumably subject to diminution in the proceeding by allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest." 306 U.S. at 313. It is possible that \textit{Mullane}, itself, was the product of such attorney action, since \textit{Mullane} was the guardian \textit{ad litem} for the income beneficiaries of the common trust fund and it is difficult to understand for what other reason he would challenge his own ability to represent these individuals in their absence.
sufficient sum to make the contest economical; or his natural inclination may be to treat the proceeding on a pro forma basis. Assuming a minimum fee system, the representative's purpose may be to see how little time and effort he can put in and still receive this compensation. In addition, all of the guardian's out-of-pocket expenses are reimbursed; there is always a pool out of which these may be paid. Thus, a situation similar to *Mullane* is probably not unusual: three interested parties at the proceeding, all of whom are interested in having the accounting completed as quickly as possible; or, in the alternative, one or two who want to extend the proceedings, but none whose self-interest guarantees adequate representation of the absentee's interests. The same is not true of an attorney in a class action. Barring the possibility of a fraudulent settlement, his interests are identical with those of his clients. If they win, he shares in their victory; if they lose, he will be uncompensated for many hours of hard work and substantial out-of-pocket expense.\(^{130}\)

These shortcomings of the guardian *ad litem* procedure may have influenced the Court in *Mullane* when it turned to the notice requirement. In this context, the Court probably felt compelled to interpret the due process notice requirement to ensure that some of the beneficiaries were aware of the proceedings. The Court stated that, as to actual beneficiaries whose names and addresses were known and with whom the bank as trustee regularly communicated, there was no reason why notice by mail should not be required.\(^{131}\) It is from this holding—in a case involving a possible conflict of interest, a small number of beneficiaries (only 113 trusts were involved), a mailing list already extant and a notice by publication buried in the back pages of one newspaper (which had failed to prompt any of the beneficiaries to make an appearance)—that the Advisory Committee apparently drew the conclusion that due process required individual notice in a class action to all those who could be identified with reasonable effort.

The Court's treatment of unknown and conjectural beneficiaries is more relevant to the class action situation. The Court felt that the statutory notice was sufficient: although not likely to reach such beneficiaries, it was not likely to be any less efficient than other alternatives.\(^{132}\) The same notice was also held sufficient for those with conjectural or future interests and for those who did not come to the attention of the trustee in the normal course of business.\(^{133}\)


\(^{131}\) 339 U.S. at 318.

\(^{132}\) 339 U.S. at 317.

\(^{133}\) *Id.*
recognized that their names could be discovered through investigation, but it also recognized that such a procedure would require considerable delay and expense. "In view of the character of the proceedings and the nature of the interests involved," the Court held that more notice would be unnecessary.\footnote{\textit{Id.}} This can only be a reference to the ability of the other beneficiaries, those whose names the common trust fund trustee already had in his possession, to represent the interests of those for whom notice was a mere formality. The Court looked at the possible effects of an opposite holding, and realized that the burdens of notice would largely offset the advantages of the common trust fund device. "These are practical matters in which we should be reluctant to disturb the judgment of the state authorities." \footnote{339 U.S. at 318.} The Court took the same practical approach when evaluating its requirement that individual notice be sent to known beneficiaries. "Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to appraise them of its pendency." \footnote{Id.} Even here, the Court specifically excluded such a requirement for actual beneficiaries whose identities could be discovered only through costly investigation. The entire rationale of the opinion rests on notifying some of the interested parties with a minimum of expense and effort; due process was satisfied even though all of the known beneficiaries would not receive notice through the mail.\footnote{Id.} The individual interests of the income beneficiaries, on the one hand, and the principal beneficiaries, on the other, were identical to those of other beneficiaries of the same type. "Therefore notice reasonably certain to reach most of those interested in objecting [to the accounting] is likely to safeguard the interests of all, since any objection sustained would inure to the benefit of all." \footnote{Id.}

Given this analysis of \textit{Mullane}, the Advisory Committee was clearly misguided in interpreting the decision as \textit{requiring} individual notice in a class action.\footnote{339 U.S. at 319.} If anything, the discussion of unknown and conjectural beneficiaries seems to support the opposite conclusion—absentees can be bound without any notice if their interests are adequately represented. The same can be said for the three lower court

\footnote{\textit{Id.}}
cases\textsuperscript{140} which the Advisory Committee cited with a “cf.”\textsuperscript{141} or “see also” signal.

Further doubt is cast on the contention that due process requires such notice by an earlier draft of Rule 23 which was published in 1964.\textsuperscript{142} Although this version of the rule would also have bound absentees in a (b)(3) action, the rule required “that reasonable notice be given to the class, including specific notice to each member known to be engaged in a separate suit on the same subject matter with the party opposed to the class.”\textsuperscript{143} The purpose of this notice was the same as in the present rule: to allow absentees to request exclusion. Thus, at least at one point in the development of the rule, many of the drafters saw no need to require individual notice to every member of the class.

\textit{Other Considerations}

There are three other arguments against requiring actual individual notice. First, such notice was not required in the old “true” and “hybrid” class actions,\textsuperscript{144} which bound all absentees\textsuperscript{145} and is not required in actions brought under subdivisions (b)(1) or (b)(2) of

\begin{itemize}
\item Advisory Committee’s Note, 39 F.R.D. at 107. In Gart v. Cole, 263 F.2d 244 (2d Cir. 1959),\textsuperscript{142} cert. denied, 359 U.S. 978 (1959), the Second Circuit dismissed a suit brought by plaintiffs who were members of a class which had lost an earlier suit in state court. There were four grounds for the decision—there had been ample notice of the earlier suit, there was no antagonism between the interests of the earlier plaintiffs and the interests of the group before the court, the same counsel had prosecuted the earlier suits and the same issue was being litigated. Whether fewer than all of these grounds would have been sufficient for the disposition of the case is not made clear. The court quoted approvingly from \textit{Hansberry} that “the Constitution requires at most only that ‘for any * * * reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter.’ . . . 311 U.S. 32, 43 . . .” 263 F.2d at 248. The court went on to add “Also of paramount relevance is the well-known suggestion . . . that a judgment may be constitutionally based on notice alone.” Id. at 249. Nowhere in the opinion, however, is there any indication that an individual notice requirement is the standard which is required.

In All American Airways, Inc. v. Elderd, 209 F.2d 247 (2d Cir. 1954), the only reference to the notice problem is a citation to earlier dictum by the Second Circuit Court of Appeals in Dickinson v. Burnham, 197 F.2d 973, 979 (2d Cir. 1952), cert. denied, 344 U.S. 875 (1952). In the latter case the court had “noted a query advanced by text writers to the possibilities of extending the scope of \textit{res judicata}, where adequate notice and specific opportunity to come in have been accorded the persons represented . . . .” The \textit{Elderd} court gave no further definition of “adequate” but stated without explanation that “no such compulsive notice as the writers visualize is possible as to the unascertained property owners.” 209 F.2d at 249.

In Dickinson v. Burnham, supra, the third case cited by the Committee, the only reference to notice is the dictum discussed above in relation to the \textit{Elderd} case. 197 F.2d at 979.


\textsuperscript{141} 34 F.R.D. 325, 384-95 (1964).

\textsuperscript{142} Id. at 386.


\textsuperscript{144} See Kalven & Rosenfield, supra note 2, at 697-98.
new Rule 23. Against this, it may be argued that a (b) (3) class action most closely resembles the old "spurious" class action, where absentees could not be bound. Yet the primary rationale for refusing to bind absentee members of a "spurious" class was that the nature of their relationship, involving only a common question of law or fact, was insufficient to guarantee adequacy of representation, which adequacy was recognized under the common law only when all parties were suing in the same formal writ. Now that this common law "writ-bound" thinking has been replaced by an "interest-balancing" analysis, it would seem that the courts' ability to analyze the adequacy of representation should be sufficient refutation of this objection.

The second argument turns on the compromise struck by new Rule 23. Under the old rule, an individual generally had to intervene prior to judgment in order to take advantage of the favorable decree. This view was sharply criticized by Kalven and Rosenfield. They felt that, if the class representative were able to win a favorable decree, the decree should be kept open to allow all to participate, even though these same people would not have been bound if the suit had been unsuccessful. Only if the absentees were allowed to participate in this way, their argument proceeded, could the "social utility inherent in the device . . . be realized—all would be afforded inexpensive, certain, adequate relief." This position was, of course, attacked as not being congruent with the doctrines of res judicata and mutuality and as being fundamentally unfair—the absentees received all the benefits of winning but none of the burdens of losing.

The new rule thus represents a compromise between these two positions. It allows broadened participation, yet it retains the traditional concepts of res judicata and mutuality by binding absentees regardless of the result. Instead of saying that "you are in if you come in" or "you are in if you win," the rule declares that "you are in unless you ask out." Thus, the primary purpose of the notice requirement is to assure the absentee an opportunity to "opt out."

It would be ironic if the price paid for broadened participation—the notice requirement and the right to opt out—became so demanding

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149 Kalven & Rosenfield, supra note 2, at 701.
150 Id. at 711.
that it effectively barred the class action in which participation was to be expanded. The end result of this approach would restrict as many "socially useful" class actions as the old rule's requirement of actual intervention.

Finally, if there is an individual notice requirement in all (b)(3) actions, fulfilling this requirement becomes crucial to the maintenance of the case. Thus, there will be many attempts to have (b)(3) actions reclassified as (b)(1)'s or (b)(2)'s. In light of the difficulty courts had in the past in classifying actions to fit the old categories, and the broad language of the present categories, it would seem that too much significance might attach to a difficult categorization whose rationale is in doubt. This would not be the result if it were known that placing an action into the (b)(3) category would mean a notice requirement which was determined with serious consideration of the practical possibilities.

Statutory Requirements

Notwithstanding the strength of the argument that due process requires no notice to the absentee members of a (b)(3) class, the requirements of Rule 23 must still be fulfilled. However, the minimum notice requirement is no longer defined by the requirements of due process; it is defined by the most reasonable and practical interpretation of the broad language of the rule.

One thing seems clear—the ability to give individual notice to all absentees should not be a condition precedent to the maintenance of a class action. If a suit may be maintained under all the other requirements of the rule, the court should weigh the practicalities of the case before it and order notice accordingly. The desideratum should be to obtain the best notice "practicable" within the bounds of the limitation of "reasonable effort." For example, in an Eisen situation, where none of the other members of the class are known to the plaintiff, where discovering them would involve tremendous effort, and where the expense involved would eliminate any chance of the case being prosecuted, "the best notice practicable" is something short of personal notice to all.

However, the alternative need not be notice by publication. It is clear that "chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper," and that it is unfair to require all absentee members of the

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152 See Advisory Committee's Note, 39 F.R.D. 69, 98 (1966) ("In practice the terms 'joint,' 'common,' etc., which were used as the basis of Rule 23 classification proved obscure and uncertain") ; note 16 supra.
153 See note 42 supra.
154 See text accompanying note 114 supra.
class to "examine all that is published to see if something may be tucked away in it that affects his . . . interests." 158 There are many effective procedures 157 falling between the individual notice by mail, which the Eisen court wanted to require, and the small advertisement, which should be reserved for those situations in which more adequate notice is impossible. 158

In considering the possible alternatives a judge should analyze several factors. Although not an exhaustive list, the following considerations are worth mention. First, the possible expense of any type of notice should be compared with the total amount of recovery sought; second, the nature of the suit should be examined to discover if it is likely that any members of the class have an especially large stake in the litigation; third, and connected to the second consideration, an examination ought to be conducted to see if this is the type of suit in which a great number of people would be likely to opt out; fourth, and closely related to the first three considerations, an evaluation should be made of the likelihood that the cause of action will ever be brought other than as a class action if dismissed now. 159

Depending on the results of these evaluations, the court can then order notice tailored to fit the needs and realistic possibilities of the peculiar fact situation before it. The possibilities include: (1) individual notice to all members of the class; (2) individual notice only to those included in a mailing list available to the defendant or others; (3) individual notice to a random sample of the absentees; 160 (4) individual notice to those whose potential stake in the litigation is above a certain amount; (5) notice by publication. 161 A court order to give notice by publication should regulate the contents of the advertisements, the frequency of their placement and the newspapers and magazines in which they should appear. In addition, the court may order notice by publication in conjunction with (1) through (4), as the needs of the situation might warrant.

This process can be demonstrated through the Eisen situation. In this type of case, the class is numerous and the individual stakes are small. It would be unlikely, therefore, that many members would want to opt out. In addition, the possibilities of the case being brought through any other means are slight. In light of the foregoing, it would seem appropriate to order notice by publication, specifying national media such as the Wall Street Journal 162 or New York Times.

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156 Id. at 315.
159 Dolgow v. Anderson, 43 F.R.D. 472, 485 (S.D.N.Y. 1966) ("if this case does not proceed as a class action, it is unlikely that it would proceed at all").
The alternative to this interest-balancing process is strict construction of the notice requirement and the dismissal of many worthy class actions. This would be a greater injustice to both the class members and society than would be the denial of notice to some of the absentees.

**Problems of Defining the Class**

Under the new rule, if all class members are bound by the result, there may be a problem of defining the class. The issue will arise twice: first, when the court is required to direct notice to the members of the class pursuant to subdivision (c) (2); again when the court, in meeting the requirement of subdivision (c) (3), must describe those who are bound by the result of its judgment. In the normal class action, this task should not prove too difficult. The plaintiff will assert that he represents all stockholders in a certain corporation or all those who bought stock on the representations made in a certain prospectus. Although it may be difficult to compile a list of all members of a class, the definition of the class required by (c) (3) makes it simple to determine if a party is a member of the class.

Thus, in the recent case of *Fischer v. Kletz*, the court answered the defendants' contention that failure to define the exact number of people in the case was fatal by stating that "[t]he class itself, however, has been defined with some precision, i.e., all individuals who bought Yale securities during the period when the allegedly false and misleading financial statements were issued and circulated." However, the definitional problem becomes much more complex when the size of the class depends on a question of fact which cannot be determined until trial. For example, in *Richland v. Cheatham*, the plaintiffs sought to represent all those who bought Georgia-Pacific stock at a price allegedly inflated by churning and by purchases of the stock by both the company and its pension trust. Even if the price of the stock had been manipulated, the difficulties of ascertaining who bought at the manipulated price remained. Thus, the factual question

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165 It may be argued that any liberalization of the requirements for bringing a class action would result in a greater number of "strike suits." However, it would seem that the rule itself plus the acts under which suits might be brought contain sufficient safeguards. The secret and outrageous settlement is barred by Fed. R. Civ. P. 23(c), which requires court approval and notice to other members of the class. The preliminary showing of adequate representation and congruity of interests would seem capable of thwarting many frivolous actions. In securities actions, the court is also empowered to require the plaintiff to post bond to cover defendant's costs and attorney fees. Securities Act of 1933, §11, 15 U.S.C. §77k (1964); Securities Exchange Act of 1934, §§9(e), 18(a), 15 U.S.C. §§78i(e), 78r(a) (1964).

164 There is another, though less desirable alternative—it is not necessary that all members of the class be bound. Subdivision (c) (3) authorizes the court to exclude from the binding effect of the judgment all those who were not or could not be properly notified. Hence the class could be reduced when judgment is given.


of how long these manipulative activities continued to affect the market price of the stock would have to be determined in order to define the class. If it could be proved that the market price continued to reflect the Georgia-Pacific purchases for only two weeks, then the class could be defined. However, it was just as likely that the price continued to be affected for one month. Thus, the court was presented with a complicated question which a short hearing prior to trial could hardly resolve.

There are two solutions which make it possible for a court to permit a class action to go forward while reserving a decision on the question of who is in the class until all the facts are presented. The court could decide all Rule 23 issues except the size of the class, hold a short hearing and tentatively determine that question, reserving the right to change its determination if new facts come to light during the course of the trial. This could be accomplished under the power granted the court in the second sentence of subdivision (c)(1):

"An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." The second alternative is also specifically authorized by the rule. "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." Under this provision, the judge could delay determination under Rule 23 until all evidence which would be relevant to the actual composition of the class had been presented.

The former proposal is clearly preferable. There is no reason for the judge to delay his determination of whether the action can be maintained under Rule 23. All other questions except the exact limits of the class can be determined prior to the commencement of the trial. By delaying this determination and thus delaying such notice as the court may prescribe, a large portion of the trial may be completed before anyone except the named representative is aware an action is proceeding on his behalf. This deprives the attorney of the advice and aid of those other members of the class. It also might force the lawyer, against his better judgment, to fashion his presentation of the evidence so that issues affecting the determination of the class would be presented first. It would be much better, particularly in light of some courts' concern with the relative interest of the nominal representative, to allow some members of the class to know that the action

168 Any judge should approach the decision to change a class action into an individual action with great reluctance and circumspection. The attorney representing the class probably has relied on the earlier determination that the action could be maintained as a class action, and, if reversal comes at a time when the proceedings have progressed quite far, he may have expended more time than the individual claim is worth.

169 For example, the court, under the former alternative, arbitrarily could define the class as the smallest unit which the final determination could possibly yield. It would then be appropriate if the court were to direct notice to at least this group.
is proceeding, and then amend the description of the class some time prior to the final judgment.

Another objection to delaying determination of whether the action can be maintained as a class action is psychological. Armed with a ruling that his is a class action, the attorney for the class will probably proceed with vigor and enthusiasm; if denied such a determination he may refuse to proceed, with consequent loss of benefit to both the small individual plaintiffs the rule is designed to encourage and the general public.

**Appealability**

There is a final area in which a practical and realistic approach to the maintenance of class actions will help to insure effectiveness. A plaintiff will frequently want to appeal a lower court determination that his suit is not properly brought as a class action. However, precedent under the old “spurious” class action rule indicates that the courts would not hear the appeal immediately after the decision by the trial court. For example, in *Lipsett v. United States,* the Court of Appeals for the Second Circuit refused to hear an appeal from an order striking the allegation of class action. Denial of an appeal in this situation was not altogether wrong. The fact that a plaintiff could not maintain his action as a “spurious” class action really did not affect anything. Since the “spurious” class action was merely a permissive joinder device, all those who had intervened could still maintain their cause of action. And Rule 24 still would allow those who wished the right to intervene. The denial of the allegation that the case could be maintained as a class action “merely prettified the pleadings.”

In *All American Airways v. Elderd,* the court, when confronted with the same situation, said that the maintenance of the class action “cannot make the case of the claimed representatives stronger, or give them rights which they would not have of their own strength, or affect legally the rights or obligations of those who do not intervene.”

Under the new rules, however, the issue is considerably different. If the court in an *Eisen* situation chooses to render an order that an action is not maintainable as a class action, the law suit will, for all intents and purposes, end. It is unrealistic to assume that the plaintiff will continue to prosecute his own small claim through a lengthy and

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170 359 F.2d 956 (2d Cir. 1966).
171 Id. at 958.
172 209 F.2d 247 (2d Cir. 1954).
173 The counterclaiming defendants appealed the determination that the action could not be maintained as a class action. They had been hopeful that the court of appeals would declare this an appropriate case in which to bind the absentees. *Id.* at 248-49.
174 *Id.* at 248.
complex litigation, gambling all the while that the trial judge's original determination will be reversed. For this reason, an immediate appeal should be allowed from the class action decision.\(^{176}\) There is ample precedent for such action in closely analogous situations where it would be unfair to ask that "appeal consideration be deferred until the whole case is adjudicated."\(^{176}\) Although the appeals statute states that the "courts of appeals shall have jurisdiction from all final decisions of the district courts . . .,"\(^{177}\) the requirement of finality is to be given "a practical rather than a technical construction."\(^{178}\) The courts of appeals are to balance the undesirability of piecemeal review against the dangers of denying justice through a delay until there is an actual final judgment.

Thus, the government has been allowed to appeal an order of the trial court striking a tax lien from the records and substituting a supersedeas bond because, if the government won the case on the merits, it would be delayed in collecting the disputed taxes.\(^{179}\) The same result was reached in a case involving the vacating of the attachment of a ship. The court held this determination appealable because review of the order dissolving the attachment would be meaningless once the vessel had been released and the possibilities of re-attachment concomitantly dimmed.\(^{180}\) Perhaps the best analogy to appeal of the class action determination is the allowance of an appeal where the plaintiff has been denied a motion to appeal in forma pauperis.\(^{181}\) If such an appeal is not allowed, it is extremely unlikely that the individual would ever have his case heard on the merits. The *Eisen* situation is similar. If appeal is not allowed, there is little hope that a

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\(^{175}\) Perhaps, also, the defendant in a case in which the plaintiff has been granted permission to proceed as a class-representative ought to be forced to take an interlocutory appeal on this decision or waive his right to contest the issue at a later date. This would be consistent with the rationale which attempts to encourage plaintiffs to proceed with complex litigation with full vigor in reliance that, at least if they should win on the merits, they would be rewarded with a large recovery on behalf of the class. As matters stand, it may be to the defendant's advantage to wait, since the greater financial burden may be falling on the plaintiff. The resultant financial uncertainty might lead plaintiff to accept a less favorable settlement than might otherwise result. On the other hand, the idea of forcing a party to appeal (as opposed to allowing a party to do so) smacks of procedural unfairness. Placing the opposing party in the same posture would not restore fairness to the situation. Further, at best, the forced appeal would only include those issues which could be adjudicated prior to trial. There are, of course, many issues plus a specific authorization for redetermination of the class action question, see Fed. R. Civ. P. 23(d)(4), which only can occur during or after trial.


\(^{181}\) Roberts v. United States District Court, 339 U.S. 844 (1950).
lawyer will pursue plaintiff's claim for $70 in the expectation that the class action determination will be reversed on appeal, following adjudication on the merits.\textsuperscript{182}

**Conclusion**

It can be seen that if the new class action rule is to achieve its full potential as a device for prosecuting many socially worthwhile suits, a new and consistent attitude by the judiciary is required. The courts must understand that it is incumbent upon them to facilitate the bringing of these suits by giving the rules a liberal interpretation. Moreover, the courts must assume the additional role of guardian, a role which is required by the liberalization or rejection of some of the outdated "procedural safeguards." If this mandate is followed, the new Rule 23 will become a useful and viable tool.

\textsuperscript{182}This was the approach taken by the Second Circuit Court of Appeals. Eisen v. Carlisle & Jacquelin, 319 F.2d 119, 121 (2d Cir. 1966), cert. denied, 386 U.S. 1035 (1967): "Dismissal of the class action in the present case will irreparably harm Eisen and all others similarly situated, for . . . it will for all practical purposes terminate the litigation."