NOTICE AND DUE PROCESS IN FEDERAL CLASS ACTIONS: A REQUIEM FOR REVISED RULE 23?

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Civil rights attorneys and leading authorities on federal procedure regard as virtually axiomatic the proposition that notice to potential class members is not required in a class suit brought in federal court which seeks predominantly injunctive relief.[1] Yet recent decisions of the United States circuit courts of appeal hold directly to the contrary.[2] These decisions demonstrate that revised Federal Rule 23, like its predecessor, has failed to fulfill modern judicial needs.

This note undertakes to explain why the present federal class action device set forth in Rule 23 has been found inadequate to meet constitutional due process requirements, and to suggest revisions appropriate for the purposes the device was intended to accomplish. The note first reviews recent circuit court decisions involving Rule 23 and identifies deficiencies which have been detected in the Rule. The note then indicates how these deficiencies will prevent courts from granting effective relief to victims of pervasive societal harms. The historical development of the federal class suit is examined, and it is shown that the legal fiction which was the traditional basis for holding a class judgment binding with respect to the claims and defenses of absent members can no longer be applied. An analysis is made of the binding effect which can be given to the class judgment through application of doctrines of res judicata and collateral estoppel, and it is concluded that further revision of Rule 23 is necessary before it can be a satisfactory vehicle for redressing group wrongs and avoiding repetitious litigation. Changes to the Rule are suggested which would permit achievement of these ends.

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* Member, third year class.

1. "The Rule does not demand notice in the (b)(1) and (b)(2) actions . . . ." 3B MOORE'S FEDERAL PRACTICE ¶ 23.55, at 23-1152 (2d ed. 1974) [hereinafter cited as MOORE'S]. "[N]otice need not automatically be sent to absent members when the action is instituted under Rule 23(b)(1) or Rule 23(b)(2) . . . ." 7A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1785, at 139 (1972).

2. *See* notes 65-70 and accompanying text *infra*.

The Circuit Court Decisions

Class actions in federal courts are currently governed by Rule 23 of the Federal Rules of Civil Procedure, as amended in 1966. Subdivision (a) of Rule 23 states four prerequisites to the maintenance of a class action: (1) the class is so numerous that joinder of all members is impractical, (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 party will fairly and adequately protect the interests of the class. These prerequisites must each be satisfied before a class action can be brought.[3]

Subdivision (b) describes additional elements which must be present. Subsection (b)(1) provides for maintenance of a class action where the prosecution of separate actions would create a risk of inconsistent or varying adjudications imposing incompatible standards of conduct for the party opposing the class, or a risk that adjudications with respect to individual members of the class would be dispositive of or impair the interests of other members of the class. Subsection (b)(2) provides for maintenance of a class action where a party has taken action or refused to take action with respect to a class and final relief of an injunctive nature, settling the dispute with respect to the class as a whole, is appropriate. Subsection (b)(3) provides for maintenance of a class action where questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated.[4] The criteria set out in subdivision (b) are alternative rather than cumulative; once the four requirements of subdivision (a) are met, only one of the three subsections of subdivision (b) need be satisfied for the class action to proceed.[5]

Subdivision (c) sets forth certain procedural directions to the trial court. Subsection (c)(2) make special provision for class actions maintained under subsection (b)(3), where common questions of law or fact predominate. The trial court is required to direct individual no-

3. *See Advisory Committee's Note, Proposed Rules of Civil Procedure*, 39 F.R.D. 69, 100 (1966) [hereinafter cited as *Advisory Comm. Note*]. *See, e.g.*, Poindexter v. Teubert, 462 F.2d 1096 (4th Cir. 1972) (class action dismissed for failure to show claims or defenses typical of the class); Am. Fed'n of Teachers Local 1600 v. Byrd, 456 F.2d 882 (7th Cir. 1972) (failure to show that the representative party would fairly and accurately represent the interests of the class); Gordon v. Aetna Life Ins. Co., 467 F.2d 717 (D.C. Cir. 1971) (failure to show common questions of law or fact); Demarco v. Edens, 390 F.2d 836 (2d Cir. 1968) (failure to show joinder is impractical).

4. *Advisory Comm. Note, supra* note 3, at 102-03.

5. Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972).

tice to all class members who can be identified through reasonable effort, stating that each member has a right to be excluded from the judgment upon request, or to enter an appearance in the action through counsel. The notice requirement set forth in subsection (c)(2) for class actions maintained under subsection (b)(3) was thought by the Advisory Committee on Civil Rules to be necessary to satisfy constitutional requirements of due process.[6]

The Advisory Committee did not intend that the mandatory notice provision of subsection (c)(2) should extend to actions maintained under subsections (b)(1) and (b)(2) of Rule 23,[7] and the Rule has been interpreted to that effect.[8] To fulfill constitutional requirements of due process in (b)(1) and (b)(2) actions, a discretionary notice provision was included in subdivision (d) of the Rule.[9] Subsection (d)(2) grants the trial court authority in the conduct of all actions under Rule 23 to require notice to some or all of the members of the class whenever necessary for the protection of the class or otherwise for the fair conduct of the action. This notice may convey information of any step in the action, of the proposed extent of the judgment, of the opportunity for members to signify whether they consider the representation fair and adequate, or of the opportunity to intervene and present claims and defenses or otherwise come into the action.[10]

Subsection (c)(3) directs the trial court to include and describe in its judgment the persons embraced thereby. In actions maintained under subsections (b)(1) and (b)(2), subsection (c)(3) provides that the persons to be included and described in the judgment shall be all persons whom the court finds to be members of the class. In actions maintained under subsection (b)(3), subsection (c)(3) provides that the persons to be included and described in the judgment shall be all members of the class to whom notice was directed pursuant to subsection (c)(2) and who did not request exclusion from the judg-

6. *Advisory Comm. Note, supra* note 3, at 106-07. *See* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 392-93 (1967) [hereinafter cited as Kaplan]. Professor Kaplan was reporter to the Advisory Committee from 1960 to 1966.

7. The Committee stated that subsection (b)(2) was intended to include "various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." *Advisory Comm. Note, supra* note 3, at 102. If the individuals in the class cannot be specifically enumerated, it follows that they cannot be given the individual notice contemplated by subsection (c)(2).

8. *See, e.g.*, Hammond v. Powell, 462 F.2d 1053, 1055 (4th Cir. 1972); Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969).

9. *Advisory Comm. Note, supra* note 3, at 106-07.

10. FED. R. CIV. P. 23(d)(2).

ment.[11] The rule does not expressly state that all persons included and described in the judgment will be bound by it, for the binding effect of the judgment was considered by the Advisory Committee to be a question of substantive law that could not be prescribed by a Rule strictly procedural in nature.[12] The Committee clearly believed, however, that a judgment rendered in accordance with the Rule, whether favorable to the class or not, would be res judicata and binding as to all the class members included and described in the judgment.[13]

Thus, inherent in the 1966 amendments to Rule 23 is the notion that due process does not permit the members of a class maintained under subsection (b)(3) to be bound by the class judgment unless they have been given notice and an opportunity to be heard. However, no similar protection is demanded for members of a class maintained under subsections (b)(1) or (b)(2). This disparity invited attention by the courts.

The Eisen Case

The issue of whether due process requires notice and an opportunity to be heard in *all* class action suits maintained under Rule 23 first arose in the celebrated stock exchange case brought in federal district court in 1966 by Morton Eisen.[14] The complaint alleged violations of federal antitrust and securities laws, and described the affected class as all traders on the New York Stock Exchange who purchased or sold stock in odd-lots.[15] The size of this class was approximately 6 million members located throughout the world.[16] The potential amount of class damages was at least $22 million.[17]

11. *Advisory Comm. Note, supra* note 3, at 105.

12. *Id.* at 106. "Subdivision (c)(2) makes clear that the judgment in any class action maintained as such extends to the class (excluding opters-out in (b)(3) cases), whether or not favorable to the class. This is a statement of how the judgment shall read, not an attempted prescription of its subsequent res judicata effect, although looking ahead with hope to that effect." Kaplan, *supra* note 6, at 393.

13. The Committee stated that subsection (c)(3) would exclude situations where class members could wait until after a decision on the merits and then secure the benefits of the decision for themselves if it was favorable, or elect not to be bound by it if it was not, and that under the subsection questions as to the res judicata effects of the judgment would be "more satisfactorily answered." *Advisory Comm. Note, supra* note 3, at 105-06.

14. For a more complete history of the case than that presented here *see* McCall, *Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance—Class Action Issues*, 25 HASTINGS L.J. 1351, 1357-62 (1974) [hereinafter cited as McCall]; Casenote, *Class Actions—Federal Rules of Civil Procedure—Rule 23(b)(3) Class Action Requires Personal Notice to All Identifiable Members of the Class*, 2 FLA. ST. U.L. REV. 366, 366-70 (1974).

15. Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147, 148 (S.D.N.Y. 1966).

16. Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 257-58 (S.D.N.Y. 1971).

17. *Id.* at 265.

The district court dismissed Eisen's suit as a class action, in part on the basis that the class representative did not appear able to provide the notice to class members required both by subsection (c)(2) of Rule 23 and by the general requirement of due process.[18] In a decision popularly known as *Eisen I*,[19] the United States Court of Appeals for the Second Circuit adopted the "death knell" doctrine and held that dismissal of the class allegations of the suit was immediately appealable.[20] For all practicable purposes dismissal of the action as a class suit was a final judgment; the class representative's individual stake in the damage award was only $70, and no competent attorney would undertake a complex antitrust action to recover so inconsequential an amount.[21]

In *Eisen II*[22] the Second Circuit decided the merits of the appeal. The order dismissing the suit as a class action was reversed, and the case was remanded with directions to the district court to give Rule 23 a liberal rather than a restrictive interpretation.[23]

One of Eisen's arguments on appeal was that notice to the class was not required because his class action qualified under subsections (b)(1) and (b)(2) of Rule 23.[24] The Second Circuit rejected the contention that either subsection (b)(1) or subsection (b)(2) was applicable to the factual situation in the case,[25] but decided to address the argument as to notice anyway. The court said, "we hold that notice is required as a matter of due process in all representative actions, and 23(c)(2) merely requires a particular form of notice in 23(b)(3) actions."[26] As authority for its assertion the court cited the Advisory Committee's Note to revised Rule 23[27] and *Mullane v. Central Hanover Bank & Trust Co.*,[28] one of the cases cited by the Advisory Committee for the proposition that notice to the class is required by due process for actions maintained under subsection (b)(3) of Rule 23.[29]

18. 41 F.R.D. at 151-52. Other reasons given by the court for dismissing the suit as a class action were that there was no assurance that the representative party could adequately protect the interests of absent members of the class, *id.* at 150-51, and that questions common to the class did not predominate over questions affecting individual members. *Id.* at 152.

19. Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967).

20. The order was appealable in the same manner as a final judgment because as a practical matter it was a "death knell" for the litigation. *Id.* at 120-21.

21. *Id.*

22. Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968).

23. *Id.* at 563.

24. *Id.* at 564.

25. *Id.*

26. *Id.* at 564-65.

27. *Id.* at 565, *citing Advisory Comm. Note, supra* note 3, at 107.

28. 339 U.S. 306 (1950).

29. *See Advisory Comm. Note, supra* note 3, at 107.

On remand the district court held that the notice required by subsection (c)(2) could be met through a combination of personal notice to certain selected class members and publication,[30] and that the cost of notice could be allocated to, or at least shared by, the defendants if the plaintiff was able to make a strong showing at a preliminary hearing of a likelihood of success at trial on the merits.[31] After that hearing was held the district court allocated 90 percent of the costs of notice to the defendants.[32]

Another appeal followed. In *Eisen III*[33] the Second Circuit again reversed the district court, and held that subsection (c)(2) of Rule 23 and due process require individual notice to all identifiable class members, not just a selected few, and that the entire expense of notice must be borne by the representative plaintiff.[34]

The United States Supreme Court affirmed the conclusion of the Second Circuit with respect to the notice which must be provided to absent class members,[35] but was more circumspect in its holding. Whereas the Second Circuit had said in *Eisen II* that individual notice was required in all class actions maintained under Rule 23,[36] the Supreme Court limited its consideration just to actions maintained under subsection (b)(3). And whereas the Second Circuit had said that its decision was based in part on constitutional guarantees of due process,[37] the Supreme Court affirmed solely on the basis of statutory construction. The Court noted that the Advisory Committee had stated that mandatory notice was required by subsection (c)(2) in order to fulfill the requirements of due process, but held that it was unnecessary to reach that issue in order to decide the case.[38] The Court said that the language of subsection (c)(2) was "unmistakable,"[39] and that it was the clear intention of the Advisory Committee that the notice required by subsection (c)(2) was to be "not merely discretionary" but "mandatory."[40] The question of whether individual notice is required by due process as well as by the language of the statute in class actions maintained under Rule 23 was left for another day.

30. Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 267-68 (S.D.N.Y. 1971).

31. *Id.* at 271.

32. Eisen v. Carlisle & Jacquelin, 54 F.R.D. 565, 573 (S.D.N.Y. 1972).

33. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), *aff'd in part, rev'd in part on other grounds*, 417 U.S. 156 (1974).

34. *Id.* at 1015-16.

35. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (vacating and remanding with instructions to dismiss the class action as defined in plaintiff's original complaint).

36. *See* note 26 and accompanying text *supra*.

37. *Id.*

38. 417 U.S. at 176-77.

39. *Id.* at 173.

40. *Id., quoting Advisory Comm. Note, supra* note 3, at 106-07.

On the question of whether the class representative must bear the entire costs of notice, the Supreme Court held that Rule 23 gave the district court no authority to impose notice costs on the defendant after determining from a preliminary hearing that the class representative was likely to prevail on his claims.[41] Such a procedure contravened the Rule by allowing the representative to secure the benefits of a class action without first satisfying the Rule's requirements, and contained the potential for substantial prejudice to the defendant by coloring the subsequent proceedings with tentative findings made in the absence of established procedural safeguards.[42]

The Progeny of Gregory v. Hershey

By the time *Eisen* reached the Supreme Court, two more United States circuit courts of appeal had been confronted with the issue of whether due process requires notice to the class in all suits maintained under Rule 23.[43] The two cases presenting this issue were spawned by the unrenowned but momentous case of *Gregory v. Hershey*.[44]

In *Gregory*, several selective service registrants sought a declaratory judgment that under the Selective Service Act of 1967 they were entitled to and had been unlawfully denied fatherhood deferments from the draft for the Vietnam War.[45] They brought their suit as a class action under Rule 23, purporting to represent all selective service registrants throughout the United States who were fathers and who had received graduate student deferments but who had never received undergraduate deferments.[46] The district court held the suit was appropriate as a class action under either subsection (b)(1) or subsection (b)(2) of Rule 23, and notification to the members of the class was impractical because of the number of members and the absence of any reasonable way of identifying them.[47] The relief sought was granted to the named plaintiffs and to the class they represented.[48]

The national director of selective service refused to comply with the district court's order, except with respect to the named class representatives. As a result similarly situated registrants in several different states filed suit seeking to assert the class action judgment and obtain injunctive relief against threatened induction into the armed services

41. *Id.* at 177.
42. *Id.* at 177-78.
43. *See* notes 66-71 and accompanying text *infra.*
44. 311 F. Supp. 1 (E.D. Mich. 1969), *rev'd sub nom.*, Gregory v. Tarr 436 F.2d 513 (6th Cir.), *cert. denied*, 403 U.S. 922 (1971).
45. *Id.* at 2.
46. *Id.*
47. Gregory v. Hershey, 51 F.R.D. 188, 189 (E.D. Mich. 1970).
48. *Id.* at 190.

by their local draft boards. In *Pasquier v. Tarr*[49] a district court in Louisiana adopted the dictum from *Eisen II* that notice to the class is required as a matter of due process in all actions maintained under Rule 23, and held that since the class representatives in *Gregory* had not provided notice to a class member (who was, of course, perfectly happy with the *Gregory* decision), the member was not entitled to assert that judgment as res judicata in his suit seeking a deferment.[50] The court said that had *Gregory* been decided the other way the plaintiff could have challenged its binding effect on the due process ground of inadequacy of representation because the class representatives had failed to provide notice.[51] Therefore it would be unfair to hold the defendant bound.[52] To do so, the court said, "gives absent members of the class two bites at the apple at the expense of the defendant."[53]

Other district courts reached the opposite result.[54] In *Schrader v. Selective Service System*,[55] a district court for the Western District of Wisconsin held that the validity of the class action had been litigated in *Gregory*, and that decision was res judicata as to the binding effect of the class judgment.[56] The court rejected the government's argument that it was unfair to bind the defendant by a class action judgment when the plaintiff might not be similarly bound, stating:

> A judgment in favor of the defendant against the class may not be binding upon the members of the class who later sue defendant and argue that they were not adequately represented in the class action. But the rationale for this view is that every man must be guaranteed his day in court. This rationale has no application to the converse situation in which defendants have had the opportunity fully to litigate the issues in a previous case.[57]

At this point the Sixth Circuit overturned the district court decision in *Gregory*, and held that the named representatives and others similarly situated were not entitled to fatherhood deferments.[58] No appeal

49. 318 F. Supp. 1350 (E.D. La. 1970), *aff'd per curiam*, 444 F.2d 116 (5th Cir. 1971); *followed*, McCarthy v. Director of Selective Serv. Sys., 322 F. Supp. 1032 (E.D. Wis. 1970), *aff'd per curiam*, 460 F.2d 1089 (7th Cir. 1972).

50. 318 F. Supp. at 1354.

51. *Id.* at 1353-54, *citing* Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619, 636 (D. Kan. 1968), and 3B MOORE'S, *supra* note 1, ¶ 23.72, at 23-1421-23-1422.

52. *Id.* at 1354.

53. *Id.*

54. Whitmore v. Tarr, 318 F. Supp. 1279 (D. Neb. 1970), *vacated*, 443 F.2d 1370 (8th Cir.), *cert. denied*, 403 U.S. 922 (1971); Germonprez v. Director of Selective Serv., 318 F. Supp. 829 (D.D.C. 1970).

55. 329 F. Supp. 966 (W.D. Wis. 1971), *rev'd*, 470 F.2d 73 (7th Cir.), *cert. denied*, 409 U.S. 1085 (1972).

56. *Id.* at 967.

57. *Id.*

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

had been taken by the government, however, of the finding by the district court that the case was properly brought as a class action.[59] Apparently aware of the nationwide repercussions of the district court's decision, the Sixth Circuit indicated doubt in a footnote that the class judgment should have been given binding effect with respect to absent class members.[60] Three reasons were stated. First, the notice required by Rule 23 was not given to the members.[61] Second, allowing selective service registrants to bring a class action and enjoin not only their own induction but the induction of others similarly situated throughout the nation could have a far-reaching and disruptive effect on the operation of the selective service system.[62] And third, if the district court had decided the case the other way, its decision might not have been binding upon the absent members of the class.[63]

The plaintiff in *Schrader* refused to admit defeat, even though the class action judgment he had previously asserted had now been reversed. He argued that the judgment was binding with respect to his claim to a deferment until it was overturned on appeal, so that the national director of selective service had acted lawlessly by failing to comply with the judgment and ordering his induction.[64] The district court agreed, and held that the actions of the director were lawless and void, that the plaintiff's draft classification must be reopened, and that before being inducted he must be afforded the right of administrative appeal which follows such reopening.[65]

The two *Schrader* district court decisions giving binding effect to the *Gregory* class judgment were reversed by the Seventh Circuit,

59. *Id.* at 514 n.2.

60. *See id.*

61. *Id.*

62. *Id.*

63. *Id.* Following the reversal of *Gregory* by the Sixth Circuit, the Fifth Circuit affirmed the denial of injunctive relief by the Louisiana federal district court in *Pasquier,* holding that whatever res judicata effects the appellant might otherwise have claimed from the district court decision in *Gregory* collapsed when that decision was overturned. Pasquier v. Tarr, 444 F.2d 116, 117 (5th Cir. 1971). In Sandler v. Tarr, 463 F.2d 1096 (4th Cir. 1972), *aff'g* 345 F. Supp. 612 (D. Md. 1971), the Fourth Circuit also adopted the view that whatever effect was to be given the *Gregory* class judgment collapsed when it was reversed on appeal.

64. Schrader v. Selective Serv. Sys., 328 F. Supp. 891, 891-92 (W.D. Wis. 1971), *rev'd,* 470 F.2d 73 (7th Cir.), *cert. denied,* 409 U.S. 1085 (1972); *followed,* Whitmore v. Tarr, 331 F. Supp. 1369 (D. Neb. 1971), on remand after an earlier decision giving the *Gregory* class judgment binding effect was vacated by the Eighth Circuit and remanded for reconsideration in light of the reversal of *Gregory* by the Sixth Circuit. Whitmore v. Tarr, 443 F.2d 1370 (8th Cir.), *vacating* 318 F. Supp. 1279 (D. Neb. 1970), *cert denied,* 403 U.S. 922 (1971).

65. Schrader v. Selective Serv. Sys., 328 F. Supp. 891, 892-93 (W.D. Wis. 1971), *rev'd,* 470 F.2d 73 (7th Cir.), *cert. denied,* 409 U.S. 1085 (1972).

which held that "the absolute failure to give any indicia of notice to absent members renders the purported class action in *Gregory* futile."[66] The court stated that the Second Circuit's decision in *Eisen II* was the only appellate ruling on the requirement of notice when proceeding under subsections (b)(1) and (b)(2) of Rule 23, and that the Second Circuit's interpretation was correct.[67] The court also cited the district court decision in *Pasquier*,[68] which had denied injunctive relief to prospective draftees on the basis that it would be unfair to hold the government bound by the *Gregory* class judgment when absent class members would not have been similarly bound had the case been decided the other way.[69]

In *Zeilstra v. Tarr*[70] the Sixth Circuit adopted the view expressed by the Seventh Circuit in *Schrader,* and held "that *Gregory* was not a valid class action since no notice was ever given to the members of the class."[71]

The *Zeilstra* and *Schrader* decisions thus extended the erosion of Rule 23 that was begun by the Second Circuit in *Eisen II*. The Second Circuit, in holding that notice is required in all actions brought under Rule 23, had overturned subsection (c)(2) of the Rule, which states that notice is mandatory only in actions brought pursuant to subsection (b)(3). The Sixth and Seventh Circuits, in holding that a judgment rendered without notice is void with respect to the claims of absent class members, overturned subsection (c)(3) of the Rule, which indicates that judgments in (b)(1) and (b)(2) actions are to be binding upon all members of the class, whether they were given notice of the proceeding or not.

Class Remedies Denied

Nullification of subsections (c)(2) and (c)(3) of Rule 23 on the ground that these subsections fail to comport with the constitutional demands of due process raises important questions regarding the future use of class actions as a means of correcting pervasive societal violations of civil and constitutional rights. Must a court, before it may enjoin intentional countywide racial segregation in public schools, order that notice be provided at the expense of the class representatives to all

66. Schrader v. Selective Serv. Sys., 470 F.2d 73, 75 (7th Cir.), *cert. denied*, 409 U.S. 1085 (1972).

67. *Id.*

68. 318 F. Supp. 1350 (E.D. La. 1970).

69. *See* text accompanying notes 49-53 *supra.*

70. 466 F.2d 111 (6th Cir. 1972).

71. *Id.* at 113.

black school-age children living within the county?[72] And, if no notice is given and a judgment is rendered requiring the school authorities to correct racial imbalances, is that judgment enforceable only by the named class representatives, and invalid as to all other black children adversely affected by the illegal discriminatory practices which were the subject of the action?

According to the Advisory Committee, among the suits subsection (b)(2) of Rule 23 was intended to reach were "actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration."[73] But where the members of a class are incapable of specific enumeration, it follows that they cannot be identified and provided with individual notice of an action filed on their behalf. If individual notice is required by due process, then due process cannot be satisfied. From this reasoning some courts have held that civil-rights actions cannot be maintained under Rule 23 when the membership of the affected class is such that individual notice cannot be provided,[74] notwithstanding the fact that this conclusion is directly contrary to one of the clearly articulated purposes of the Rule.

Limiting the membership of the class to persons who can be identified and provided with individual notice of the action produces the corollary result of limiting the relief that can be granted. In many instances courts will be powerless to prevent future illegal conduct. Examples are cases alleging illegal discriminatory practices in employment. These actions often include within the affected class all black persons who have been dissuaded in the past from applying for a job with a particular employer by that employer's reputation for discriminatory hiring policies,[75] or all black persons who may apply for employment in the future with a particular employer.[76] These persons would be injured by future discriminatory practices in hiring on the part of the employer, and they must be parties to the suit in order to claim the benefits of a judgment restraining the employer from continuing to engage in such conduct. But these persons are necessarily unknown at the time of the suit, and consequently cannot be provided with individual notice that a suit has been filed on their behalf. If the members

72. *See* Vaughns v. Board of Educ., 355 F. Supp. 1034, 1035 n.1 (D. Md. 1972) (holding notice not required in such an action).

73. *Advisory Comm. Note, supra* note 3, at 102.

74. Allen v. Pipefitters Local 208, 56 F.R.D. 473 (D. Colo. 1972); Deyle v. Davis, 16 F.R. Serv. 2d 862 (D. Vt. 1972); Inmates of Milwaukee County Jail v. Peterson, 51 F.R.D. 540 (E.D. Wis. 1971); *contra,* Poe v. Menghini, 339 F. Supp. 986 (D. Kan. 1972); Johnson v. City of Baton Rouge, 50 F.R.D. 295 (E.D. La. 1970).

75. *E.g.,* Arnold v. Ballard, 6 E.P.D. ¶ 8838 (N.D. Ohio 1973).

76. *E.g.,* Pennsylvania v. Glickman, 7 E.P.D. ¶ 9125 (W.D. Pa. 1974).

of a class must receive notice of a suit brought on their behalf in order to claim the benefits of a judgment rendered against the opposing party, it follows that future applicants and employees will be unable to force an employer to implement and maintain court-ordered affirmative action programs in recruiting and hiring.

Doubts are also raised as to the future of class actions by aggrieved consumers and other groups of persons who individually suffer only minimal monetary damages, but who collectively can assert very substantial losses due to widespread illegal practices by the defendant. The Supreme Court's holding in *Eisen* that individual notice must be provided to the absent class members at the expense of the named representatives in actions brought under subsection (b)(3) of Rule 23 was based only upon statutory interpretation,[77] so that the way is left open for legislative change. A reaffirmation of that holding on constitutional grounds might forever preclude effective private consumer remedies for mass wrongs. In *Eisen,* for example, the cost of mailing individual notice to the two million identifiable class members was estimated to exceed $200,000.[78] Few litigants would be willing to advance such a large amount in order to vindicate a claim insignificant by comparison.

A Critical Re-evaluation

The increasingly strict notice requirements being imposed by the courts in Rule 23 class actions have been said to "frustrate the purpose of the statute,"[79] to be "not sound"[80] and "too inflexible,"[81] and to result in "a denial of judicial relief which cannot be justified."[82] The remainder of this note examines the reasons why difficulties have arisen in accomodating class actions to constitutional due process requirements, and suggests revisions to the Rule which would permit these difficulties to be overcome through application of the principles of res judicata and collateral estoppel.

Purpose and Historical Development of Rule 23

The concept of the class action developed in equity as an exception to the general rule of compulsory joinder that all the interested parties to a dispute must be before the court in order for a suit to be

77. *See* notes 38-40 and accompanying text *supra.*
78. 52 F.R.D. at 263.
79. McCall, *supra* note 14, at 1394.
80. 3B MOORE'S, *supra* note 1, ¶ 23.55, at 23-1152.
81. *Id.*
82. Note, *Eisen v. Carlisle & Jacquelin—Fluid Recovery, Minihearings and Notice in Class Actions,* 54 B.U.L. REV. 111, 154 (1974).

maintained.[83] Where there was a common interest or a common right which the suit sought to establish or enforce, a representative action could be brought when:

> the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing.[84]

The decree of the court of equity in such an action bound all of the absent parties in the same manner as if they had been brought before the court.[85]

A typical class suit in equity was an action against an insurance company by a few policy holders on behalf of all others contending that assessments being levied by the company were excessive,[86] or an action against a fraternal association by a few of its members contending that an increase in dues was beyond the authority of the association's governing body.[87] It is said that the judgments in such actions were binding on the absent class members because of the employment of a legal fiction that absent members had consented to have the class representatives act as their agents in bringing the suit:

> These cases suggest that when an individual voluntarily enters into a relationship in which others will enjoy the same rights stemming from a common source, he impliedly "consents" that questions of law and fact, arising out of the common subject of the relationship, will be litigated without his actual knowledge but with assurances that his "common" interests will be adequately represented.[88]

This concept was established in the federal courts in 1912 when Federal Equity Rule 38 was adopted. That rule provided that absent class members would be bound by the judgment rendered by a federal court of equity in cases involving a question of common or general in-

83. *See* Smith v. Swormstedt, 57 U.S. 288, 302-03 (1853).

84. *Id.* at 303.

85. *Id.*

86. *See, e.g.*, Hartford Life Ins. Co. v. Ibs, 237 U.S. 662 (1915).

87. *See, e.g.*, Supreme Council of the Royal Arcanum v. Green, 237 U.S. 531 (1915).

88. Maraist & Sharp, *Federal Procedure's Troubled Marriage: Due Process and the Class Action*, 49 TEXAS L. REV. 1, 4 (1970) [hereinafter cited as Maraist & Sharp]. *See* McLaughlin, *The Mystery of the Representative Suit*, 26 GEO. L.J. 878 (1938) [hereinafter cited as McLaughlin]. "Equity takes jurisdiction to avoid multiplicity, and all persons affected become necessary parties. The same situation which affords the basis of jurisdiction renders it impracticable to bring them all into court. The court is in a dilemma. It cannot proceed without the presence of necessary parties and they are too numerous to bring in. The Gordian knot is cut by a conclusive presumption on the court's part that the absent class members have delegated the actual plaintiff to 'represent' them in court. This, of course, is errant fiction." *Id.* at 890-91 (footnotes omitted).

terest.[89] The former rule governing class suits had stated that the judgment in a representative action brought in the federal courts would be without prejudice to the rights and claims of absent parties.[90]

In 1937 original Rule 23 was adopted. It expanded the equitable concept of class actions to include not only cases of compulsory joinder, but also cases of permissive joinder.[91] Three categories of class suits were set forth, "true," "hybrid," and "spurious."[92]

"True" and "hybrid" class suits under original Rule 23 were merely continuations of the traditional equity concept of a class action. The "true" class suit involved a class in which the right sought to be enforced by or against the class was "joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it."[93] The right sued upon was of a nondivisable nature,[94] as in an action brought by or against representatives of an unincorporated association, or to enforce rights held in common by the policyholders against a corporate issuer of insurance policies.[95] The "hybrid" class suit involved a class in which the rights sought to be enforced by or against the class were several, and the object of the action was the adjudication of claims affecting specific property,[96] as in an action by a creditor for liquidation or reorganization of a corporation.[97] The "true" and "hybrid" class suits were thus actions requiring compulsory joinder, involving a voluntary relationship with shared rights springing from a common source. A legal fiction that an agency relationship existed between the class representatives and the absent class members could therefore be employed, and judgments in these actions were to be binding upon the absent class members.[98]

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89. *See* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 363-67 (1921); *see generally* Lesar, *Class Suits and the Federal Rules*, 22 MINN. L. REV. 34, 34-39 (1937).

90. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 364 (1921).

91. Moore & Cohn, *Federal Class Actions*, 32 ILL. L. REV. 307, 308-09 (1937) [hereinafter cited as Moore & Cohn]. Professor Moore was research assistant to the reporter for the Advisory Committee on Rules for Civil Procedure at the time original Rule 23 was drafted.

92. *Id.* at 314-21.

93. FED. R. CIV. P. 23(a)(1), 308 U.S. 689 (1937), *as amended*, 383 U.S. 1047 (1966).

94. *See* 3B MOORE'S, *supra* note 1, ¶ 23.30, at 23-502.

95. *See Advisory Committee's Note, Original Rule 23*, 28 U.S.C. 7763 (1970).

96. 3B MOORE'S, *supra* note 1, ¶ 23.30, at 23-502.

97. *See Advisory Committee's Note, Original Rule 23*, 28 U.S.C. 7763 (1970).

98. *See* McLaughlin, *supra* note 88, at 893 n.124; 3B MOORE'S, *supra* note 1, ¶ 23.30, at 23-501-23-502. *But see* Note, *Class Actions and Interpleader: California Procedure and the Federal Rules*, 6 STAN. L. REV. 120, 137-41 (1953) [hereinafter cited as *Class Actions and Interpleader*].

The "spurious" class suit was an innovation for the federal courts,[99] and was a permissive joinder device to be employed when there were numerous persons with severable rights, but with interests in a common question of law or fact.[100] Precedent for this kind of class suit was found in a number of state court decisions,[101] and perhaps in the equitable bill of peace where, to avoid a multiplicity of suits, the chancellor could require parallel suits involving common questions of law or fact to be tried together.[102]

A "spurious" class suit could be brought by the class representatives on behalf of themselves and all others similarly situated.[103] Class members were free to join the action or not,[104] and did not have to show an independent basis of federal jurisdiction in order to intervene.[105] The judgment was to be binding only as to those class members who actually came before the court;[106] class members who did not join the action were not bound by its outcome, whether favorable or unfavorable to the class.[107]

Since the rights of the class members in a "spurious" class suit

99. It was sometimes argued that a "spurious" class suit could be brought under Federal Equity Rule 38, which was in force prior to the adoption of original Rule 23. Suits on behalf of a group of taxpayers to enjoin the collection of an illegal tax were permitted under Equity Rule 38, and these suits were said to establish the proposition that a common interest in a controlling question of law was all that was necessary to maintain an action as a class action under that Rule. Casenote, *Federal Practice—Class Suits—Community of Interest Under Federal Equity Rule 38*, 30 MICH. L. REV. 624, 625 (1932). Except for the fact that a taxpayer's relationship with the government may not be a voluntary one, there is little difference between a suit to enjoin a tax, and suits to enjoin assessments by an insurance company or suits to enjoin dues increases by a fraternal association. The fact that a judgment in an individual action holding a tax statute valid or invalid would operate upon all taxpayers similarly situated makes those persons "indispensable parties" to the suit in the sense that their rights and liabilities will necessarily be determined by its outcome, and thus distinguishes that kind of suit from the "spurious" class suit, which was characterized by permissive rather than compulsory joinder.

100. *See* Moore & Cohn, *supra* note 91, at 318.

101. *See id.* at 319.

102. *See* Z. CHAFEE, SOME PROBLEMS OF EQUITY 200-13 (1950) [hereinafter cited as CHAFEE]; Marcin, *Searching for the Origin of the Class Action*, 23 CATH. U.L. REV. 515, 518-19 (1974); *see generally* Chafee, *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297 (1932).

103. Moore & Cohn, *supra* note 91, at 318.

104. 3B MOORE'S, *supra* note 1, ¶ 23.30, at 23-502.

105. *Advisory Comm. Note, supra* note 3, at 99.

106. Moore & Cohn, *Federal Class Actions—Jurisdiction and Effect of Judgment*, 32 ILL. L. REV. 555, 561 (1938) [hereinafter cited as Moore & Cohn, *Jurisdiction*].

107. 3B MOORE'S, *supra* note 1, ¶ 23.30, at 23-502. It has been argued, however, that the Advisory Committee actually intended that "spurious" class judgments, as well as "true" and "hybrid" class judgments, were to be binding upon absent class members. *See Class Actions and Interpleader, supra* note 98, at 139-40.

were separate and independent, any class member could choose to sue individually on his claim. Joinder was permissive, not compulsory, and it was believed that the spurious class suit should not be allowed to prejudice the rights of the very persons it was invented to aid by precluding them from suing in their own right if they desired to do so.[108] Furthermore, to bind absent class members by the judgment might violate their rights of due process:

> It can be said that it is hard on the defendants to be made to defend another action which has for its object the same purpose, but that is not so harsh as it would be to deprive the plaintiff of its day in court.[109]

In 1966 revised Rule 23 was adopted. According to the Advisory Committee the original Rule had proven to be deficient in three ways. First, the courts had difficulty in deciding whether a suit was to be defined as "true," "hybrid," or "spurious" because of confusion over the concepts of "joint," "common," and "several" rights which were the basis for those classifications.[110] Second, the Rule did not provide an adequate guide to the proper extent of judgments, and the courts were prone to indicate that a judgment would bind the class in cases where it should not, and to indicate that a judgment would not bind the class in cases where it should.[111] And third, the Rule did not provide adequate guidance to the courts in assuring procedural fairness.[112] The revised Rule was also said to exclude "one-way intervention," a much-criticised practice whereby some courts had allowed class members in "spurious" class suits to intervene after a decision on the merits favorable to their interests and thereupon obtain the benefits of the decision, even though they could have elected not to intervene if the decision was unfavorable, and so not be affected by it.[113]

The Advisory Committee portrayed the revision of Rule 23 as merely minor adjustments necessary to make the Rule operate as originally intended.[114] The problem, it seemed to say, was that the courts didn't know how to properly interpret the language of the original Rule, so that it was not working satisfactorily in practice. The

108. *See* Moore & Cohn, *Jurisdiction, supra* note 106, at 561.

109. *Id., quoting* First Nat'l Bank v. Edwards, 134 S.C. 348, 352, 132 S.E. 824, 825 (1926).

110. *See Advisory Comm. Note, supra* note 3, at 98.

111. *See id.* at 98-99.

112. *See id.* at 99.

113. *Id.* at 105-06.

114. *See* Note, *Federal Rules of Civil Procedure: Rule 23, The Class Action Device and its Utilization*, 22 U. FLA. L. REV. 631 (1970). "New rule 23 does not alter the underlying purpose of the former rule, but rather expands and clarifies it, and provides means better suited to accomplish its original purposes." *Id.* at 633.

new Rule would solve this problem by using clearer language and by spelling out exactly who was to be bound by the class judgment:

> *The amended rule* describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions.[115]

In fact revised Rule 23 was not merely a tuned-up version of its predecessor. Instead it was the embodiment of fundamental changes in the nature and purpose of the federal class action device. The 1966 amendments were intended to meet two increasingly insistent criticisms of the original Rule. First, the original Rule failed to provide a satisfactory vehicle for remedying wrongs done to large numbers of persons having no community of interest other than as victims of a common injury. Second, the Rule spawned constant questions as to the binding effect of class judgments with respect to absent members, and threatened the courts and the party opposing the class with the possibility of repetitious litigation over matters already once decided.

The notion that the federal class action should serve as a vehicle to remedy mass wrongs was apparently first set forth in a watershed law review article[116] written in 1941 by two members of the Illinois Bar, Harry Kalven, Jr. and Maurice Rosenfield. They argued that there was a vital and urgent need to transform the federal class action so as to provide a group remedy for individual injuries of a common nature that would otherwise go uncorrected:

> Modern society seems increasingly to expose men to such group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all. This result is not only unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of the sanctions which underlie much contemporary law. The problem of fashioning an effective and inclusive group remedy is thus a major one.[117]

Since the injured individuals making up such a class had independent rights against the offending party, joinder was not compulsory and the cause could not be brought as a "true" or "hybrid" class suit under original Rule 23. The "spurious" class suit, where joinder was permissive, was a possibly remedy, but an extremely unlikely one:

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115. *Advisory Comm. Note, supra* note 3, at 99.

116. Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941) [hereinafter cited as Kalven & Rosenfield]. *See* CHAFEE, *supra* note 102, at 199-200.

117. Kalven & Rosenfield, *supra* note 116, at 686.

> The cardinal difficulty with joinder, however, is that it presupposes the prospective plaintiffs' advancing en masse on the courts. In most situations such spontaneity cannot arise because the various parties who have the common interest are isolated, scattered, and utter strangers to each other. Thus while the necessity for group action through joinder clearly exists, the conditions for it do not. It may not be enough for society simply to set up courts and wait for litigants to bring their complaints—they may never come.[118]

The solution proposed by Kalven and Rosenfield was to do away with the concept of permissive joinder in class actions involving only common questions of law or fact, and instead allow one or a few class members to assert the claims of all.[119] After judgment the absent class members would be notified that they could participate in the benefits of the decree.[120] Through this scheme the individual who had suffered an injury involving only minor monetary damages would be able to obtain competent legal representation and bring a suit for redress even if the action should be a complex one, for the attorney, if successful in prosecuting the suit, would be entitled to a fee based on the claims of the entire class.[121]

Other commentators with different interests argued that original Rule 23 should be changed so as to meet the "public interest in avoiding unnecessary litigation and in bringing to an end in an efficient and economical fashion such litigation as there must be."[122] The concept of the "spurious" class suit, in which absent class members were not bound by the judgment, was particularly offensive, for an absent class member:

> may sit back and decline to participate in the class suit when it is brought and then later, after it has been carried through to judgment, sue in his own behalf with the benefit of full disclosure of his adversary's case.[123]

If principles of natural justice and fair play are to be considered, it was said, it is not fair or just to the party opposing the class to be called upon to fight a number of suits all turning upon the same issue.[124] And finally, it is much fairer to society as a whole—the group that pays

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118. *Id.* at 687-88.

119. *See id.* at 688, 691. Kalven and Rosenfield did not, however, believe that absent class members should be bound by an adverse judgment. They argued that the opposing party should be bound, because he has been afforded his day in court. The absent class members, on the other hand, have not had the opportunity to present their own cases in their own right, and should therefore not be bound. *See id.* at 712-14.

120. *See id.* at 691.

121. *See id.* at 715-17.

122. Keeffe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 CORNELL L.Q. 327, 334 (1948).

123. *Id.* at 343.

124. *Id.*

the bills for long-drawn-out and costly litigation—to settle as much as possible in a single suit.[125]

The difficulties the courts had in applying original Rule 23 were more likely to have resulted from attempts by the courts to meet these criticisms than from a lack of clarity in the language of the Rule. "One-way intervention," for example, provided an incentive to the attorney to bring a suit on behalf of a class of persons whose individual injuries were so slight that separate suits would be impractical. Attorneys' fees in class actions brought under original Rule 23 were usually based upon the amount of the common fund or property captured by the judgment.[126] Allowing absent class members to intervene to secure the benefits of the judgment thus ensured that an attorney could be found to take the case. If he prevailed and a large number of class members then chose to intervene and take the benefit of the judgment, the recovery would be great enough to provide adequate compensation for his efforts. Furthermore, "one-way intervention" resulted in the more expeditious and efficient disposition of litigation by eliminating the necessity for subsequent suits by the absent class members.[127]

The problems experienced by the courts in placing a class suit within the proper category of original Rule 23 were often clearly the result of attempts to meet new judicial needs rather than from confusion over the nature of the rights involved in the action. Some courts freely conceded that they classified suits as "true" rather than "spurious" even when the rights asserted were admittedly "several," in order that a favorable class judgment would be extended to absent class members who individually would not be able to afford the costs of obtaining legal redress.[128] Extension of the judgment to absent class members by this means also obviously served to prevent repetitious litigation.

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125. *Id.* It was also contended that a single suit whose judgment binds the entire class would afford a stronger protection against fraudulent suits, bad faith settlements, and phony dismissals, because each member of the class would be on his guard lest he find himself bound by such tricks through his failure to make a timely objection. *Id.* This argument is wholly unpersuasive, for there is no reason to engage in such tactics in the first place if the judgment obtained thereby will have no binding effect upon the absent members.

126. Simeone, *Procedural Problems of Class Suits*, 60 MICH. L. REV. 905, 950 (1962).

127. *See* Union Carbide and Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961). "Defendants' liability and the extent thereof has been completely proven by the named plaintiffs and it would be grossly redundant to say that it must be proven again by the unnamed members of the represented class." *Id.* at 589.

128. *See, e.g.*, System Fed'n No. 91 v. Reed, 180 F.2d 991 (6th Cir. 1950). In Weeks v. Bareco Oil Co., 125 F.2d 84, 89-90 (7th Cir. 1941), the court noted that the relative financial ability of the "individual small jobbers" and the "able, financially powerful companies" was such that "[t]o permit the defendants to contest liability with each claimant in a single, separate suit, would, in many cases give defendants an advantage which would be almost equivalent to closing the door of justice to all small claimants."

An examination of revised Rule 23 reveals that it too was an attempt to meet growing demands for a new group remedy which would provide redress for individual injuries of a common nature and avoid repetitious litigation of questions already once decided, rather than merely an instrument which would provide superior means for accomplishing the same purposes as its predecessor. Compulsory joinder was scrapped as a condition for maintaining a class action in the federal courts. Suits brought under the revised Rule were maintained on behalf of all the members of the described class,[129] and except for members of a (b)(3) class who requested exclusion the judgment was to embrace the entire class. The purpose of Rule 23 was no longer merely to permit an adjudication of rights in situations where such an adjudication would not otherwise be possible because jurisdiction could not to be obtained over all parties indispensable to the suit. Instead under the revised Rule:

> the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation.[130]

Notice, Due Process and Res Judicata

When compulsory joinder was eliminated as a requisite for maintaining a class action under Rule 23, the rationale previously used to hold a class judgment binding upon absent members could no longer be applied. Under original Rule 23 the absent members were said to have given an implied consent to suits on their behalf when they voluntarily entered into legal relationships which gave them common interests with a class.[131] But under the revised Rule the class representatives were free to bring suit on behalf of persons who have never done anything which could possibly be construed as conferring a power of agency upon complete strangers to act on their behalf.[132]

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129. "One or more members of a class may sue or be sued as representative parties on behalf of all . . . ." FED. R. CIV. P. 23(a).

130. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 560 (2d Cir. 1968). *See* Kaplan, *A Prefatory Note*, 10 B.C. IND. & COM. L. REV. 497 (1969); Kaplan, *supra* note 6, at 397-98; Comment, *Adequate Representation, Notice and the New Class Action Rule: Effectuating Remedies Provided by the Securities Laws*, 116 U. PA. L. REV. 889, 892-93 (1968).

131. *See* note 88 and accompanying text *supra*.

132. Professor Moore apparently contends that even under revised Rule 23 a legal relationship exists between class members in suits brought under subsections (b)(1) and (b)(2) which permits the courts to adopt the legal fiction that absent class members have delegated the representative party to protect their interests. "[A] judgment should be res judicata as to all the class, even in the absence of notice, in the (b)(1) and (b)

The Advisory Committee provided little guidance as to the basis upon which absent class members might now be bound by the class judgment. In actions maintained under subsection (b)(3), the Committee stated that the mandatory notice in such actions was designed to fulfill requirements of due process.[133] Nothing, however, was said about actions maintained under subsection (b)(1) and (b)(2), other than a cryptic statement that the court has discretion under subsection (d)(2) of the Rule to require notice, and sometimes may find it advisable to do so.[134] Yet subsection (b)(2) was specifically intended to reach class actions seeking to enjoin racial discrimination and other violations of civil and constitutional rights,[135] actions within the "spurious" category of the original Rule[136] so that absent members were not bound by the class judgment:

> That a class suit injunction, if issued, against racial discrimination and the violation of other civil rights would have a beneficial effect upon all closs [sic] members—including non-interveners—should not alter the general doctrine that a judgment in a spurious class action adverse to the class did not bind those who were not parties to the class suit.[137]

An examination of the possible grounds for giving binding effect to class action judgments will therefore be undertaken.

In order for a person's rights to be concluded by a judgment, the judgment must operate either as res judicata or as collateral estoppel with respect to his claims or defenses. If the person was a party or in privity with a party to the prior suit, the question is one of res judicata.[138] If the person was not a party or in privity with a party to the

(2) situations when the requirements of Rule 23 have been satisfied. On the other hand, in the (b)(3) type of class suit, where notice is mandatory, there is no jural relationship between the members. They are merely fellow travelers related only by some common question of law or fact and with a right to opt out of the class." 3B MOORE'S, *supra* note 1, ¶ 23.55, at 23-1153. Professor Miller also argues that judgments should bind absent class members in (b)(1) and (b)(2) suits because the absent members have an "ongoing association" with the class representatives. Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 315 (1973).

This contention is obviously an anachronism, has no reasonable basis in fact, and should not be accepted. The Supreme Court has warned that where a judgment purports to bind a person who did not receive effective notice of the proceeding, due process requires that "great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." McDonald v. Mabee, 243 U.S. 90, 91 (1916).

133. *See* note 6 and accompanying text *supra*.

134. *See* note 9 and accompanying text *supra*.

135. *See* note 73 and accompanying text *supra*.

136. 3B MOORE'S, *supra* note 1, ¶ 23.10[3], at 23-2651-23-2653.

137. *Id.*, ¶ 23.10-1, at 23-2769. *But see* Comment, *The Class Action Device in Antisegregation Cases*, 20 U. CHI. L. REV. 577, 589-92 (1953).

138. *See* Commissioner v. Sunnen, 333 U.S. 591, 597 (1948); Cromwell v. County of Sac, 94 U.S. 351, 352 (1876).

prior suit, or where a stranger seeks to assert the judgment from a prior suit against one of the parties thereto, the question is one of collateral estoppel.[139]

The class action as conceived in equity and under original Rule 23 was a suit in which all the members of the class were actually parties before the court, either personally or through agents having the consent of absent members to represent their interests.[140] The class judgment was said to operate as res judicata with respect to their claims and defenses.[141]

In *Hansberry v. Lee*[142] the Supreme Court recognized the principle that a judgment in a representative action could operate as res judicata with respect to the claims of persons not actually present, but the Court created an exception to that rule. The Court held that the doctrine could not be applied where the interests of the representative parties were in conflict with the interests of absent class members, for in such a situation the interests of the absent members were not adequately protected in the prior suit.[143]

Hansberry was decided before revised Rule 23 was adopted. Under the revised Rule the basis for presuming that absent class members have given an implied consent to have their interests championed by the representative party has been eliminated. It follows that the doctrine of res judicata can no longer operate with respect to the claims and defenses of absent class members merely by virtue of the fact that the suit is properly brought as a representative action. In order for the doctrine of res judicata to be applied under revised Rule 23, a new reason must be found for holding that absent class members are to be considered as parties to the suit. One possibility exists. Absent class members who receive notice of the action, informing them that they have the right to be excluded from the judgment or to enter an appearance through their own counsel, may be said to have been joined in the suit through receipt of that notice.

Mullane v. Central Hanover Bank & Trust Co.[144] is the leading case with respect to the extent of notice that is required in order for

139. *See* Note, *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 861-62 (1952).

140. *See* text accompanying notes 83-98 *supra*.

141. *See* RESTATEMENT OF JUDGMENTS § 86 (1942).

142. 311 U.S. 32 (1940).

143. *Id.* at 44-45.

144. 339 U.S. 306 (1950). Because *Mullane* was not a class action, the Court had no basis for adopting the legal fiction that absent persons whose interests were being adjudicated had delegated the party actually bringing the suit to act as their representative. The Court was thus confronted with the issue of whether persons not actually present were "parties" to a lawsuit so as to be bound by the judgment through the principles of res judicata.

a judgment to operate as res judicata with respect to the interests of persons not actually before the court. The Supreme Court held in *Mullane* that a statute providing for published notice to the beneficiaries of a trust, prior to judicial proceedings which would be binding and conclusive as to the propriety of the management of the common trust fund and the amount in each beneficiary's individual account, failed to satisfy due process because it was not "reasonably calculated to reach those who could easily be informed by other means at hand."[145] The Court spelled out the extent of notice that would be required by due process in various circumstances before the interests of an absent person could be concluded by the doctrine of res judicata. Fundamental to due process, the Court said, is the opportunity to be heard before being deprived of life, liberty or property:

> This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.[146]

Personal service within the jurisdiction is not always necessary, the Court said, for the interests or claims of individuals must be balanced against the interests of the state in settling issues of possible dispute.[147] Notice by mail may be adequate with respect to trust beneficiaries whose interests and addresses were known to the trustee,[148] but notice by publication was deemed sufficient only with respect to those beneficiaries whose interests or whereabouts could not with due diligence be ascertained.[149] Since notice by mail would be reasonably certain to reach most of those having interests in the trust, the rights of beneficiaries who were not informed of the proceeding could properly be concluded by it, for the interests of these beneficiaries would be identical with the interests of a class which was informed of the proceeding and provided an opportunity to be heard, and therefore those interests received adequate protection.[150]

In class actions brought pursuant to subsection (b)(3) of revised Rule 23, individual notice must be directed to all class members who can be identified through reasonable effort,[151] so most of the members of the class would be informed that a proceeding was pending in which their interests were at stake, and would be free to choose whether to appear, acquiesce to the representation, or request exclusion from the judgment. This is sufficient under the rule of *Mullane* to hold that all

145. *Id.* at 319.
146. *Id.* at 314.
147. *Id.* at 313-14.
148. *Id.* at 318.
149. *Id.* at 317.
150. *Id.* at 319.
151. *See* note 6 and accompanying text *supra.*

absent class members who do not request exclusion are parties to the suit, and that their interests will be concluded by the judgment through operation of the doctrine of res judicata.[152]

In class actions brought pursuant to subsections (b)(1) and (b)(2) of revised Rule 23, however, notice to absent class members is not required.[153] If the absent class members of (b)(1) and (b)(2) actions are to be bound by the judgment it cannot therefore be through operation of the judgment as res judicata with respect to their claims and defenses. The absent class members of (b)(1) and (b)(2) actions can only be bound through operation of the judgment as collateral estoppel.[154]

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152. The extent to which unnamed class members not actually before the court can be considered as "parties" to the suit for other purposes than as persons who will be bound by the judgment is one that is currently perplexing the courts. It has been held that unnamed class members can be required to submit to discovery under Federal Rules 33 and 34, discovery devices which are restricted to parties to the action, on pain of dismissal of their claims with prejudice for failure to respond; Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972); *see* Comment, *Party Discovery Techniques: A Threat to Underlying Federal Policies*, 68 NW. U.L. REV. 1063 (1974); Note, *Requests for Information in Class Actions*, 83 YALE L.J. 602 (1974); *cf.* Note, *Deposing Unnamed Plaintiffs in Class Actions: Southern California Edison Co. v. Superior Court*, 6 LOYOLA L. REV. (LOS ANGELES) 556 (1973); but that the unnamed class members are not parties against whom counterclaims may be asserted under Federal Rule 13. Donson Stores v. American Bakeries Co., 58 F.R.D. 485 (S.D.N.Y. 1973), *noted in* 87 HARV. L. REV. 470 (1973).

A related problem is whether class members who receive no notice of the proceeding but who do receive notice of an opportunity to contest a proposed settlement may be considered as parties to the settlement so as to be barred from seeking further relief in a new suit. *See* Mungin v. Florida E. Coast Ry. Co., 318 F. Supp. 720 (M.D. Fla. 1970), *aff'd per curiam*, 441 F.2d 728 (5th Cir. 1971). *But see* Williamson v. Bethlehem Steel Corp., 468 F.2d 1201 (2d Cir. 1972).

The Supreme Court has held that in an action brought under Rule 23, absent class members stand as parties to the suit for purposes of tolling a statute of limitations "until and unless they received notice thereof and chose not to continue." American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 551 (1974).

153. *See* notes 7-9 and accompanying text *supra*.

154. Some courts have held that notice is not required in order for a judgment to operate as res judicata and conclude the claims and defenses of absent class members, on the premise that adequacy of representation is the only requisite of due process for that purpose. *E.g.*, Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619, 636 (D. Kan. 1968), *aff'd in part, rev'd in part on other grounds*, 441 F.2d 704 (10th Cir.), *cert. denied*, 404 U.S. 951 (1971). The contention is that "the absence of an opportunity to participate would not be fatal as a matter of due process in situations where the interests of the absentees were harmonious with those of the parties to the suit," McCall, *supra* note 14, at 1393, and that "adequate representation cures inadequate notice" for "the absentee, in effect, will have had a day in court." Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 HARV. L. REV. 589, 605 (1974). *See* Note, *Proposed Rule 23: Class Actions Reclassified*, 51 VA. L. REV. 629, 636-40 (1965); *see also* Jacoby & Cherkasky, *The Effects of Eisen IV and Proposed Amendments of Federal Rule 23*, 12 SAN DIEGO L. REV. 1, 11-20 (1974); Note, *Civil*

Collateral Estoppel of Absent Class Members

The notion that a prior judgment may be invoked to preclude the claims and defenses of persons who were complete strangers to the suit is heretical and unhistorical, but it is not unprecedented. A recent note[155] analyzes six cases involving collateral estoppel of nonparties, and concludes that under appropriate circumstances due process does permit a judgment to bind persons who have never been afforded an opportunity to participate in the litigation. Among those appropriate circumstances are factors which are usually attendant to class actions.

The starting point of the analysis is the proposition set forth in *Mullane* that due process requires notice and an opportunity to be heard before a person may be deprived of life, liberty or property.[156] This right is not absolute, however, and must be balanced against the interests of the opposing party and the state.[157] Normally, the interests of a nonparty in not being bound by a prior judgment are more important than the interests of the opposing party in being able to assert the judgment against the nonparty.[158] The nonparty has not had the opportunity to choose the attorney whom he thinks will best represent him, nor to pursue particular arguments and strategies and otherwise shape the course of the litigation.[159]

Procedure—Federal Rule 23(c)(2)—Notice in Class Actions—Mullane Reconsidered, 43 TUL. L. REV. 369 (1969).

The Supreme Court was presented with this argument in *Eisen*, but expressed no opinion as to its validity. The Court said that regardless of what due process might or might not require, the statutory language of Rule 23(c)(2) clearly required individual notice to all class members who can be identified through reasonable effort. 417 U.S. at 176-77.

The argument is founded upon certain statements by the Supreme Court in *Hansberry v. Lee*, 311 U.S. 32 (1940). *See, e.g.*, McCall, *supra* note 14, at 1393. It has a fatal flaw. *Hansberry* was decided at a time when the legal fiction that the representative party in a class suit had the implied consent of absent class members to act as an agent on their behalf still possessed vitality. The 1966 amendments to Rule 23 eliminated the basis for that fiction, and the *Mullane* decision, which came after *Hansberry*, squarely held that absent persons who have not consented to representation of their interests by another must be provided with notice that their interests are at stake and be given an opportunity to be heard before they can be bound by the judgment as parties to the suit. 339 U.S. at 318-20. The Court's recognition and approval in *Hansberry* of the principle that a class judgment may operate as res judicata with respect to the claims and defenses of absent class members is therefore qualified today by the notice requirements subsequently enunciated by the Court in *Mullane*.

155. Note, *Collateral Estoppel of Nonparties*, 87 HARV. L. REV. 1485 (1974) [hereinafter cited as *Collateral Estoppel*].

156. *See id.* at 1496. *See* note 146 and accompanying text *supra*. *See also* Comment, *Can Due Process Be Satisfied by Discretionary Notice in Federal Class Actions?* 4 CREIGHTON L. REV. 268, 290-302 (1971).

157. *Collateral Estoppel, supra* note 155, at 1498.

158. *Id.* at 1496.

159. *Id.*

> Binding a nonparty on the basis of a judgment in an action in which he did not participate, and of which he may not even have been aware, also conflicts with important values basic to our judicial system: the right of a litigant to present his arguments to a tribunal before having his rights adjudicated, and the importance of such personal participation to the fairness of the decision-making process. The determination of a litigant's rights without his having had any part of that process may, regardless of the result ultimately reached, undermine the capacity of the court to command respect for its decisions, and may also exacerbate the sense of frustration or unfairness which a losing litigant might bear even after the fairest procedures.[160]

To be weighed against the interests of the nonparty are the opposing party's interests in "avoiding vexatious, lengthy, and costly relitigation of the issue of his liability, as well as the judicial system's interests in economy and avoiding inconsistent results . . . ."[161] This panoply of interests, it is said, can be more important than the interests of the nonparty in having his day in court.[162]

160. *Id.* at 1496-97.

161. *Id.* at 1499. It has also been said that due process permits a class judgment to bind absent members who have not been given notice and an opportunity to be heard when "maintenance of the proceeding will further an indirect but important state interest, and the impossibility or impracticability of giving actual notice would otherwise defeat the maintenance of the proceeding." Maraist & Sharp, *supra* note 88, at 9. The rights of individual class members of access to the courts and to participate in the litigation process through association have been advocated as examples of such indirect but important state interests which can predominate over the due process rights to notice of absent class members. *See* McCall, *supra* note 14, at 1378-87, 1396-97. Stated another way, in order to provide due process to some members of the class (the representatives), it is necessary to deny due process to other members of the class (the absentees). *See id.* at 1397; Schuck & Cohen, *The Consumer Class Action: An Endangered Species*, 12 SAN DIEGO L. REV. 39, 69-71 (1974). This, of course, was the justification for the class suit in equity, where numerous persons had rights in a common thing or association and it was impossible to bring them all before the court in order to adjudicate their interests. But the absent members in a modern class suit are not indispensable parties whose interests must necessarily be concluded in order to determine the interests of persons actually before the court. There is thus no longer a necessary relationship between the ability of individuals to bring suit on behalf of an injured class and the binding effect the class judgment must have upon class members not actually before the court, Kalven & Rosenfield, *supra* note 116, at 711, and therefore no longer any reason why the due process rights of the class representative must compete with the due process rights of the absentees.

Note also the context in which the argument is raised. The right of the representative party to bring a class suit is said to predominate over the due process rights to notice of absent class members in the typical consumer class action, where the injuries to be redressed are monetary in nature and probably of only slight significance to the individuals who have sustained them. *See* McCall, *supra* note 14, at 1390-92. Whatever persuasive force the argument may have in that context is surely lost when the action instead seeks to terminate and redress violations of the civil or constitutional rights of a class and thus involves injuries of much greater importance to the affected individuals.

162. *Collateral Estoppel, supra* note 155, at 1499. *But see* Maraist & Sharp, *supra*

Two of the six cases cited in the note could possibly stand as precedent on the issue of whether absent members to a federal class action may be collaterally estopped by the judgment.[163] In *Cauefield v. Fidelity & Casualty Co.*[164] the Fifth Circuit affirmed a judgment that the tort claims of two plaintiffs brought in federal court under diversity jurisdiction were estopped by a prior finding for the defendant in a suit brought by a different plaintiff in a Louisiana state court. A total of forty-one different suits had been filed in the Louisiana courts based on the same incident, and the suit which had been filed in federal court had been continued indefinitely until one of those suits was tried and a judgment entered.[165]

The Fifth Circuit first noted that the behavior of the numerous claimants suggested that the one state court case which had been prosecuted was tacitly intended to resolve all the identical claims.[166] In addition, the issues to be tried in federal court were the same as those already tried in state court, the plaintiffs had admitted that the evidence and testimony they would be able to produce would not differ from that presented in the state court, the plaintiffs and all the other possible claimants had testified in the prior trial, and they were represented by the same attorney who had tried the prior case.[167] The court said that the Louisiana courts, presented with these same facts, would find that under Louisiana law the plaintiffs were estopped by the prior judgment, so the case had been properly dismissed.[168]

In re Air Crash Disaster near Dayton, Ohio[169] involved a wrongful death action arising out of an aircraft collision. A prior judgment had

note 88, at 22: "Judicial efficiency, translated into the simple terms of a class action that seeks merely to combine large numbers of similar but basically separate claims, means judicial economy; and judicial economy has never been thought to override individual rights stemming from Anglo-American concepts of due process—the 'traditional notions of fundamental justice and fair play' often alluded to by the Court."

163. Three of the four remaining cases cited in the note were tort claims in community property states that were brought by one spouse after the other spouse had already participated in litigation arising out of the same incident. *See Collateral Estoppel, supra* note 155, at 1486-90. Operation of the prior litigation as a bar to the subsequent claim in these cases was more likely an incident to the community property laws rather than an application of collateral estoppel against a nonparty.

In the last case cited in the note a decision in a lower state court applying collateral estoppel to nonparties was subsequently reversed on other grounds. *See id.* at 1494.

164. 378 F.2d 876 (5th Cir.), *aff'g* 247 F. Supp. 851 (E.D. La. 1965), *cert. denied*, 389 U.S. 1009 (1967).

165. *Id.* at 877.

166. *Id.*

167. *Id.* at 877-78.

168. *Id.* at 879.

169. 350 F. Supp. 757 (S.D. Ohio 1972), *rev'd sub nom.*, Humphreys v. Tann, 487 F.2d 666 (6th Cir. 1973).

exonerated one of the defendants, and the federal district court held that the prior judgment insulated the defendant from liability to the present plaintiff, even though he was not a party to the action.[170] The Sixth Circuit reversed.[171] *Cauefield* was distinguished on its facts. There both sets of plaintiffs were represented by the same attorney, and the plaintiffs in the second action had testified in the trial of the first, to the very facts which were to be the basis for recovery in the second trial. The jury had rejected their testimony and found for the defendants.[172] Here different attorneys and litigation strategies were employed, and there was nothing in the proceedings to suggest that persons not joined as plaintiffs in the first trial had agreed to be bound by its outcome.[173] Plaintiffs in the second action here could not therefore be considered as parties or in privity with parties in the first action, and the prior judgment could not properly be asserted against them.[174] This conclusion was supported by a quotation from a recent Supreme Court decision:

> Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.[175]

Of special importance here is the fact that *Hansberry v. Lee*[176] was cited by the Supreme Court as a decision establishing this rule,[177] even though *Hansberry* involved a class action and the suit before the Court did not. This would seem to indicate that the Court will make no distinction between nonparties to a class action and nonparties to an individual action for the purpose of deciding whether due process permits a nonparty to be collaterally estopped by a judgment.

A reasonable reading of the *Cauefield* and *Air Crash Disaster* cases would indicate that they controvert rather than support the proposition set forth in the note. The interests of judicial economy and of avoiding repetitious litigation and inconsistent results do not permit a judgment to operate as collateral estoppel so as to preclude the claims and defenses of strangers to the action. The facts in *Cauefield* were such that the plaintiffs in the second action could reasonably be said to have been parties or in privity with parties to the first action, rather

170. *Id.* at 766-68.
171. Humphreys v. Tann, 487 F.2d 666 (6th Cir. 1973).
172. *Id.* at 670.
173. *Id.* at 671.
174. *Id.*
175. Blonder-Tongue v. University Foundation, 402 U.S. 313, 329 (1971) (dictum).
176. 311 U.S. 32 (1940). *See* notes 142-43 and accompanying text *supra.*
177. 402 U.S. at 329.

than strangers to it, and the reversal of the *Air Crash Disaster* case by the Sixth Circuit was a square holding that collateral estoppel of nonparties violates due process. Although the authority cited by the Sixth Circuit for its decision may have only been dictum by the Supreme Court, it was nevertheless dictum entitled to great weight, for it was intended to define the bounds of the Court's holding that due process does permit a prior judgment to collaterally estop a *party* to the action from asserting a claim against a nonparty.[178] The unambiguous and unqualified statement by the Supreme Court that due process does not permit a litigant who never appeared in a prior action to be bound by the judgment, together with the Court's citation of *Hansberry v. Lee* as a case in accord, compels the conclusion that the claims and defenses of absent class members in Rule 23(b)(1) and (b)(2) actions, where no notice is given, may not be precluded by the class judgment through operation of the judgment as collateral estoppel.

Collateral Estoppel of the Opposing Party

If a class judgment may not operate as collateral estoppel to preclude the claims and defenses of absent class members in Rule 23(b)(1) and (b)(2) actions, may it nevertheless operate to preclude the claims and defenses of the opposing party? It will be recalled that this question was answered in the negative by the Sixth Circuit in *Zeilstra v. Tarr*[179] and the Seventh Circuit in *Schrader v. Selective Service System*[180] on the basis that it would be unfair to hold the government bound when absent class members would not be similarly bound.[181] In so holding, these courts engrafted the doctrine of mutuality of estoppel onto Federal Rule 23. The justification for doing so is dubious at best, for mutuality of estoppel is today generally considered "a dead letter."[182]

The mutuality doctrine is that "unless both parties (or their privies) in a second action are bound by a judgment in a previous case, neither party (nor his privy) in the second action may use the prior judgment as determinative of an issue in the second action."[183] In 1912 the United States Supreme Court stated that it was "a principle of general elementary law that the estoppel of a judgment must be mutual."[184] The wisdom of the doctrine was often challenged, and in

178. *See* notes 187-94 and accompanying text *infra.*

179. *See* note 70 *supra.*

180. *See* note 66 *supra.*

181. *See* notes 66-71 and accompanying text *supra.*

182. B.R. Dewitt, Inc. v. Hall, 19 N.Y.2d 141, 147, 225 N.E.2d 195, 198, 278 N.Y.S.2d 596, 601 (Ct. App. 1967).

183. Blonder-Tongue v. University Foundation, 402 U.S. 313, 320-21 (1971).

184. *Id.* at 321, *quoting* Bigelow v. Old Dominion Copper Co., 225 U.S. 111, 127 (1912).

1942 the California Supreme Court unanimously rejected it in *Bernhard v. Bank of America*.[185] Many state and federal courts followed,[186] and finally, in 1971, the United States Supreme Court held in *Blonder-Tongue v. University Foundation*[187] that the doctrine would no longer be blindly observed. An earlier decision was overruled and a defendant in a patent infringement suit was permitted to assert as an estoppel plea a previous judgment in favor of a different defendant that the patent was invalid.[188]

A prior judgment may be invoked either offensively or defensively by nonparties as collateral estoppel. Defensive collateral estoppel is the assertion against a plaintiff of a prior judgment on the same issue against the plaintiff but in favor of a different defendant. The prior judgment operates to bar the plaintiff's claim against the second defendant.[189] This was the form of collateral estoppel approved and adopted by the Supreme Court in *Blonder-Tongue*.[190]

Offensive collateral estoppel is the assertion against a defendant of a prior judgment on the same issue in favor of a different plaintiff. The prior judgment operates to hold the defendant liable to the second plaintiff without relitigation of the defendant's wrongdoing.[191] This is the form of collateral estoppel which would operate to hold the opposing party in a class suit liable to absent class members through a favorable judgment obtained by the representative party.

The courts have been more hesitant to accept offensive collateral estoppel than defensive collateral estoppel,[192] even though the rationale for defensive and offensive collateral estoppel is fundamentally the same.[193] The Supreme Court said in *Blonder-Tongue* that it is no longer tenable to afford a litigant more than one opportunity for judicial resolution of the same issue, for this results in an unjustified misallocation of the resources of the opposing party and of the judiciary and fosters an unacceptable lack of judicial orderliness.[194] The due process

185. 19 Cal. 2d 807, 122 P.2d 892 (1942).

186. Blonder-Tongue v. University Foundation, 402 U.S. 313, 324 (1971); *see, e.g.*, cases cited at 402 U.S. 325 n.13, 402 U.S. 326 n.14.

187. 402 U.S. 313 (1971).

188. *Id.* at 350, *overruling* Triplett v. Lowell, 297 U.S. 638 (1936).

189. Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010, 1019 (1967) [hereinafter cited as *Defensive and Offensive Estoppel*].

190. *See* 402 U.S. at 330, 349-50.

191. *See Defensive and Offensive Estoppel, supra* note 189, at 1032-33.

192. *See* Blonder-Tongue v. University Foundation, 402 U.S. 313, 329-30 (1971); *Defensive and Offensive Estoppel, supra* note 189, at 1037.

193. *See* B.R. Dewitt, Inc. v. Hall, 19 N.Y.2d 141, 143-47, 225 N.E.2d 195, 196-98, 278 N.Y.S.2d 596, 597-601 (Ct. App. 1967).

194. *See* 402 U.S. at 328-29.

considerations which prohibit collateral estoppel of the claims and defenses of litigants who have never had a chance to present their evidence and arguments have no application, for those who are to be bound by the prior judgment have already been given the opportunity for a full and fair trial.[195]

Two principal arguments are made for denying offensive use of collateral estoppel. First, it is said to hinder rather than foster judicial orderliness. Where a number of claimants have identical claims against a defendant, if the first or any number of plaintiffs sue and lose, the defendant may not assert those judgments as a bar in the remaining suits. But if any plaintiff should win, the defendant is then estopped from denying liability to all plaintiffs whose claims were as yet untried.[196] Second, it is said to be fundamentally unfair to the defendant, who may not know the full extent of the potential damages that may be levied against him. If the first claimant seeks only nominal or small damages, the defense may be limited accordingly. Afterwards a large group of claimants may come forward asserting much more significant claims, all of which were totally unexpected at the time of the original action, and the defendant will be barred from denying liability.[197]

Neither of these arguments has persuasive force when applied to class actions. Practically speaking, stare decisis provides a substantial deterrent to repeated litigation against the same defendant by multiple claimants. "It is unlikely that the same or a lower court will reach different results on the law in related cases."[198] And, where an action is brought as a class suit, the defendant is made fully aware of the extent of his potential liability and has adequate incentive to defend the suit as ably as he can.

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195. *Id.* at 329-30.

196. Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 285-89 (1957).

197. *Defensive and Offensive Estoppel, supra* note 189, at 1036.

198. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFFALO L. REV. 433, 446 (1960). *See id.* at 446-47; Schuck & Cohen, *The Consumer Class Action: An Endangered Species*, 12 SAN DIEGO L. REV. 39, 70 (1974). The widely-differing results in suits brought to enforce the class judgment of *Gregory v. Hershey* suggest, however, that the principle of stare decisis may not be given much weight when a prior judgment rendered by a court in a different district or jurisdiction is found to be distasteful or otherwise objectionable. *Compare* Schrader v. Selective Serv. Sys., 329 F. Supp. 966 (W.D. Wis. 1971), *rev'd*, 470 F.2d 73 (7th Cir.), *cert. denied*, 409 U.S. 1085 (1972); Whitmore v. Tarr, 318 F. Supp. 1279 (D. Neb. 1970), *vacated*, 443 F.2d 1370 (8th Cir.), *cert. denied*, 403 U.S. 922 (1971); Germonprez v. Director of Selective Serv., 318 F. Supp. 829 (D.D.C. 1970), *with* Pasquier v. Tarr, 318 F. Supp. 1350 (E.D. La. 1970), *aff'd per curiam*, 444 F.2d 116 (5th Cir. 1971); McCarthy v. Director of Selective Serv. Sys., 322 F. Supp. 1032 (E.D. Wis. 1970).

The *Zeilstra* and *Schrader* decisions were not prompted by these considerations, however. The rationale of the Sixth and Seventh Circuits in refusing to hold the opposing party bound by the class judgment was instead the reasoning expressed by the district court in *Pasquier v. Tarr*, that to do so would "give absent members of the class two bites at the apple at the expense of the defendant."[199] But this same argument was recently presented to the Supreme Court in a similar context, and unceremoniously rejected. In *Alexander v. Gardner-Denver Co.*[200] the defendant-employer contended that an arbitral decision adverse to an employee's claim of racial discrimination barred the employee from filing the same claim in federal district court under Title VII of the Civil Rights Act of 1964,[201] for the employer would have been bound by the arbitration award if he had lost.[202] The district court and the Tenth Circuit agreed, on the basis that a philosophy could not be accepted "which gives the employee two strings to his bow when the employer has only one."[203] The Supreme Court responded that the lower courts misunderstood the nature of the statutory rights involved. "An employer does not have 'two strings to his bow' with respect to an arbitral decision for the simple reason that Title VII does not provide employers with a cause of action against employees. An employer cannot be the victim of discriminatory employment practices."[204]

The same rationale supports rejection of the mutuality doctrine in class suits. Permitting absent class members to invoke a class judgment against the opposing party, even though the absent class members would not be similarly bound by a judgment adverse to their interests, would not give the absent class members two bites at the apple at the expense of the defendant, for the defendant had no bites at the apple to begin with. Except for the fact that the expense of the suit would be prohibitive in relation to the possible recovery, each member of the class would have been free to bring his claim in a separate action instead of seeking a group remedy, and the opposing party would have been required to defend in each of these actions. The purpose of the class suit under revised Rule 23 was not to allow a defendant to force all persons with similar claims against him to combine their claims into a single litigation. Instead, the federal class action was intended to pro-

199. 318 F. Supp. 1350, 1354 (E.D. La. 1970); *see* notes 49-53, 66-71 and accompanying text *supra*.

200. 415 U.S. 36 (1974).

201. 42 U.S.C. §§ 2000e *et seq.* (1970).

202. *See* 415 U.S. at 54.

203. *Id., quoting* Alexander v. Gardner-Denver Co., 346 F. Supp. 1012, 1019 (D. Colo. 1971).

204. *Id.*

vide the small claimant with a method of redress where none was previously available and to avoid repetitious litigation of questions already once decided. Both of these purposes would clearly be served by permitting absent class members to invoke a favorable class judgment against the opposing party as collateral estoppel.

Proposals for Change

The courts have begun to recognize the possibility that modern principles of collateral estoppel can be used to avoid closing the courthouse door on small claimants who cannot afford the costs of sending notice to absent class members. The leading case is the decision of the Third Circuit in *Katz v. Carte Blanche Corp.*[205]

Paradoxically, in *Katz* the Third Circuit held that the suit before it could *not* be brought as a class action. The plaintiff's complaint alleged violations of the Truth in Lending Act,[206] and sought relief for all persons who held credit cards issued by the defendant.[207] The district court approved the suit as a class action and the defendant appealed, contending that it would be substantially prejudiced by the mailing of notice because its credit account debtors might withhold their payments upon learning of the basis for the suit.[208] The Third Circuit reversed, stating that the possible injury to the defendant militated against permitting the suit to be maintained as a class action.[209] Instead, the suit should be considered as a "test case," and the issue of the defendant's liability should be determined solely with respect to the class representative.[210]

Relying upon the Supreme Court's decision in *Blonder-Tongue v. University Foundation*[211] abolishing the doctrine of mutuality of estoppel, the court said that a judgment for the plaintiff in a test case would be binding upon the defendant in subsequent suits brought by the persons who would otherwise have been class members.[212] Prosecution of the action as a test case would therefore provide the plaintiff and the court with all the advantages of a class suit, but would avoid prejudicing the interests of the defendant. The plaintiff would be able

205. 496 F.2d 747 (3d Cir.), *cert. denied*, — U.S. —, 95 S. Ct. 152 (1974); *followed*, Boring v. Medusa Portland Cement Co., 63 F.R.D. 78 (M.D. Pa. 1974); Nash v. Boeing Co., 63 F.R.D. 451 (E.D. Pa. 1974); noted in 88 HARV. L. REV. 825 (1975).

206. 15 U.S.C. §§ 1601-1681t (1970).

207. 496 F.2d at 750-51.

208. *Id.* at 757-58.

209. *Id.* at 758-62.

210. *Id. See generally Advisory Comm. Note, supra* note 3, at 103; *Defensive and Offensive Estoppel, supra* note 189, at 1046-49.

211. *See* note 187 and accompanying text *supra.*

212. 496 F.2d at 758-59.

to find an attorney to prosecute his claim, because the attorney's fee would still be measured by the benefit conferred upon the entire class.[213] Relitigation of the issues is not likely to occur, for if the finding is for the plaintiff the absent persons who would have been class members can assert the judgment against the defendant as collateral estoppel, and if the finding is for the defendant new claims against him will be discouraged by the principle of stare decisis.[214] Furthermore, the plaintiff in the test case will be protected from the expense of mailing notice to the class, a cost estimated to be $37,500.[215] If the plaintiff prevails, then the trial court can convert the suit into a class action, and require that notice be sent to all the class members at the expense of the defendant, advising them that they are entitled to the benefits of the judgment.[216]

In *Haas v. Pittsburgh National Bank*[217] a federal district court in Pennsylvania adopted the reasoning of *Katz* and held that summary judgment could be granted in a class action prior to requiring that notice be sent to absent class members when it is the defendant who has moved for summary judgment and thereby evidenced a willingness to rely only upon the principle of stare decisis to protect himself from subsequent suits by other potential class members.[218] This result, the court said, would "avoid a potentially needless expenditure of court time and plaintiff's money . . . ."[219]

The procedures adopted in *Katz* and *Haas* indicate that the notice requirements of revised Rule 23 can be circumvented in cases where the party opposing the class is willing to forego notice and rely upon the principle of stare decisis as the sole deterrent to repetitious litigation. In other cases, however, the party opposing the class may have strong interests in obtaining a judgment which will conclude the claims of all potential class members, regardless of whether it is favorable or unfavorable to his interests. Furthermore, strong policy reasons condemn the procedure adopted in *Katz* of converting a litigation from an individual suit to a class action after judgment.[220] Both the plaintiff and the defendant deserve to know the extent of the defendant's potential liability before litigation strategies are planned and executed. Different problems of proof may arise when a suit seeks to show class

213. *Id.* at 761.
214. *Id.* at 760.
215. *Id.* at 761.
216. *Id.* at 760-61.
217. 381 F. Supp. 801 (W.D. Pa. 1974).
218. *Id.* at 805-06.
219. *Id.* at 805.
220. *See generally* Note, *Title VII and Postjudgment Class Actions*, 47 IND. L.J. 350, 363-64 (1972); Note, *Federal Civil Procedure—Judicially Directed Conversion to Class Action After Judgment*, 18 WAYNE L. REV. 853, 862-63 (1972).

rather than individual injuries, and the form of the requested remedy may not be the same. Finally, the filing of a class suit tolls the statute of limitations for the claims of the entire class, while the filing of an individual action as a "test case" may not.[221]

Thus, the majority of class action cases will still be subject to the notice provisions that are presently set forth in revised Rule 23. But these notice provisions operate to defeat rather than promote the purposes the Rule was intended to achieve. In actions maintained under subsections (b)(1) and (b)(2) of the Rule, notice is not required. Consequently due process does not permit absent class members to be bound by the judgment, and the opposing party has no way of protecting himself against the possibility of repetitious litigation over questions already once decided. In actions maintained under subsection (b)(3) of the Rule, the representative party is required to pay the expense of providing notice to the absent class members. Consequently, small claimants will be deterred from obtaining redress for their injuries by the disproportionate expense of bringing suit. This inconsistency between the provisions of the Rule and the purposes it was intended to achieve may have been acceptable at the time the Rule was adopted in 1966, for mutality of estoppel was still the law in the federal courts. But that doctrine has now been abolished, and no reason exists today for maintaining the Rule in its unsatisfactory state.

The principal change necessary to make the notice provisions of Rule 23 consistent with its modern purposes is to eliminate the concept of mandatory notice to absent class members. Mandatory notice carries with it the requirement that the costs of that notice must be imposed on one of the parties before the court. Imposing the costs of notice on the representative party, however, shuts the courthouse door on the very persons the Rule was intended to benefit—claimants whose individual damages are too small to warrant the expense of litigation.[222]

221. The Third Circuit assumed in *Katz* that a test case would operate in the same manner as a class action for the purpose of tolling the statute of limitations for the claims of absent class members. *See* 496 F.2d at 760-61.

222. Justice Douglas suggests that under revised Rule 23 the representative party can avoid the problem of excessive notice costs by narrowing the scope of the class, as by including within it only those persons who were injured during a limited period of time. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 179-83 (1974) (Douglas, J., dissenting in part). He notes, however, that this solution would raise difficult new questions as to whether the statute of limitations would be tolled for persons who could have been included in the class but were omitted for the purpose of minimizing notice costs, and as to whether persons who were omitted from the class would nevertheless be able to assert the class judgment against the opposing party as collateral estoppel. *See id.* at 181-82.

A question of even greater difficulty would arise in class suits which seek predominately injunctive relief, as in actions alleging violations of civil and constitutional rights.

The alternative of imposing the costs of notice on the party opposing the class may deprive that party of his property without due process, for there will often be a substantial likelihood that he cannot recover his expenses if he prevails because the class representatives are impecunious.[223] Furthermore, even if the costs of notice were to be imposed upon the opposing party, potential litigants would likely be discouraged from bringing suit by the knowlege that should they lose they would be required to reimburse the opposing party for the substantial expenses he sustains.[224]

Instead, notice to absent class members should be at the option and nonrecoverable expense of the party opposing the class in all actions maintained under the Rule. Such a provision would accommodate the interests of all the parties and promote the modern purposes of the federal class action device to the greatest extent permissible under the constitutional limitations of due process. The small claimant would not be precluded from filing his suit by the threatened imposition of litigation costs which are prohibitively high in relation to his possible recovery. He would be able to find an attorney willing to prosecute his suit, for the attorney's fee would be measured by the benefit conferred upon the entire class through operation of the judgment as res judicata if the opposing party elects to send notice, or as collateral estoppel if he does not. The class representative and the opposing party would each know the extent of possible liability before they were required to plan their litigation strategies and present their evidence. The interests of absent class members would be protected, for they would be given an opportunity to participate in the litigation if the opposing party elects to send notice,[225] and they would not be bound by

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If a number of such suits could be brought against the same party by persons who have limited the size of each class in order to avoid excessive notice costs, the judgments in the separate actions may impose incompatible standards of conduct on the party opposing the class, a result which Rule 23 was intended to avoid. *See Advisory Comm. Note, supra* note 3, at 100. Thus, while an artificial separation of a class into subclasses based on factors other than common issues of law or fact may perhaps be an acceptable solution to the problem of excessive notice costs in a consumer class action, it would be entirely unsatisfactory in class suits arising from injuries for which equitable relief is required. Consequently, there is a need for a more comprehensive change in the present perspective of the class suit than that set forth by Justice Douglas.

223. *See* Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1020 (1973) (Hays, J., concurring); *cf.* Fuentes v. Shevin, 407 U.S. 67 (1972) (statute permitting prejudgment seizure of defendant's property held to violate due process). *But see* Note, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin*, 87 HARV. L. REV. 426, 444, 444 n.111, 445 n.114 (1973).

224. *See also* Note, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin*, 87 HARV. L. REV. 426, 442 (1973).

225. In actions maintained under subsection (b)(3) of revised Rule 23 absent class members are given the right to request exclusion from the judgment. This right was

an adverse judgment if he does not. Finally, the opposing party would be free to weigh his interests in avoiding repetitious litigation by ensuring that the judgment was conclusive with respect to the claims of all absent class members against the expense of providing notice, and to choose the alternative he prefers. Since it is only the opposing party who benefits from the provision of notice to absent class members,[226] it is fair that he should bear the entire burden of its expense.

Any forthcoming revision to Rule 23 should also be accompanied by a clear and cogent statement by the Advisory Committee of the purposes the Rule is intended to accomplish after the change, together with a full explanation of the basis envisioned by the Advisory Committee for giving the class judgment binding effect. Many of the difficulties that the courts have encountered in interpreting and applying the present Rule must ultimately be attributed to the uncommendable failure of the Advisory Committee to provide adequate guidance in these respects.

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believed necessary in order to avoid infringing upon strong interests that individual class members may have in pursuing their own litigations separately. *Advisory Comm. Note, supra* note 3, at 104-05. Granting absent class members this right seems unwise, however, for it defeats the Rule's purpose of avoiding repetitious litigation. Class members who request exclusion are free to "institute separate actions which might produce the 'inconsistent or varying adjudications' which Rule 23 is designed to prevent." Brandt v. Owens-Illinois, Inc., 62 F.R.D. 160, 167-68 (S.D.N.Y. 1973). The opposing party is unable to ensure that the judgment will operate as res judicata with respect to the claims of absent class members if they have the right to request exclusion, and they will be free to sit on the sidelines with impunity, knowing that they will not be bound by an unfavorable judgment, but that they will be able to assert a favorable judgment as collateral estoppel. Note, *Proposed Rule 23: Class Actions Reclassified*, 51 VA. L. REV. 629, 652-54 (1965). *But see* Wright, *Class Actions*, 47 F.R.D. 169, 181 (1970); Note, *Revised Federal Rule 23, Class Actions: Surviving Difficulties and New Problems Require Further Amendment*, 52 MINN. L. REV. 509, 525-26 (1967). In order to fulfill the Rule's purpose, when the opposing party elects to send notice in order to obtain a greater degree of protection against subsequent suits than that afforded by the principle of stare decisis, the alternatives of absent class members should be limited to entering an appearance in the action through their own counsel or acquiescing to representation of their interests by the parties before the court.

226. The representative party gains no benefit from the provision of notice to absent class members. Since a class judgment can be asserted by the absent members as collateral estoppel, the representative party can bring an action on behalf of the absent members even when notice is not provided and the absent members are free to elect not to be bound by the judgment if it should be adverse. The argument that the representative party should pay for notice because it is he who benefits by being able to maintain the class action to redress his claim fails to recognize that there is no necessary relationship between the ability of the representative party to bring the action on behalf of absent class members and the binding effect the judgment must have upon the absent members.

Conclusion

Revised Federal Rule 23 was intended to provide a group remedy for redressing individual injuries of a common nature which would otherwise be too small to warrant a lawsuit, and to avoid repetitious litigation over questions already once decided. These purposes have not been accomplished. One reason is that the courts have experienced confusion over the relationship of the notice requirements in the Rule to the binding effect that is to be given the class judgment. This confusion exists because the traditional basis for holding absent class members bound by a class judgment can no longer be applied. Historically, absent class members were held to be parties before the court through the application of a legal fiction that they had delegated the class representatives to act as agents on their behalf. Today, in order for a class judgment to operate as res judicata with respect to the claims and defenses of the class members not actually before the court, these class members must be provided with notice and an opportunity to be heard. Because of this requirement, some courts have refused to permit class actions in cases alleging violations of civil rights and in similar cases where the class members are numerous and cannot be readily identified. If modern principles of collateral estoppel were incorporated into the Rule, however, absent class members could assert a judgment favorable to their interests against the opposing party, even though those class members had not received notice of the proceeding and would therefore not be similarly bound if the judgment had been adverse to their interests. Recent Supreme Court decisions indicate that a revision to the notice requirements of the Rule based upon these principles would satisfy due process and fundamental concepts of fairness.[227]

The Supreme Court's interpretation of the Rule as requiring the class representatives to bear the cost of the notice presently required by the Rule also serves to discourage small claimants from filing class suits, and further defeats the purposes of the Rule. To impose mandatory notice costs on the opposing party would not solve the problem, however, for the class representatives would still be faced with the possibility that if they lost they may be required to reimburse the opposing party for those costs. A question would also be raised as to whether the opposing party is being deprived of his property without due process.

These considerations demand that Rule 23 be changed so that notice is no longer mandatory in actions maintained under subsection (b) (3) of the Rule and discretionary in actions maintained under subsec-

227. *See* notes 194-95, 200-04, and accompanying text *supra.*

tions (b)(1) and (b)(2). The Rule should provide that notice is at the option and nonrecoverable expense of the party opposing the class. This change would permit the Rule to accommodate the interests of the class representatives, the absent class members, and the opposing party to the greatest extent permissible under the constitutional limitations of due process. The judgment would operate as res judicata with respect to the claims of absent class members if the opposing party elects to send notice, or as collateral estoppel if he does not. Therefore a favorable judgment would confer a benefit upon the entire class. Attorney's fees, which are measured by the extent of the benefit, would be sufficient to enable the class representatives to find an attorney willing to prosecute the suit. The interests of absent class members would be protected, for they would be given an opportunity to participate in the litigation if the opposing party elects to send notice, and would not be bound by an adverse judgment if he does not. Finally, the option given to the opposing party of providing notice to the class permits him to protect himself against repetitious litigation over questions already once decided. This change would make the notice requirements of the Rule logically consistent with the purposes the modern class action device was intended to achieve.