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ATTORNEY'S FEES, UNCLAIMED FUNDS, AND CLASS ACTIONS: APPLICATION OF THE COMMON FUND DOCTRINE

INTRODUCTION

The award of attorney's fees has been a central issue in the development of class action litigation.[1] The success of the class action as a procedural device may depend on the ability of courts to strike a balance between the desire to achieve the broader social purposes of class action suits,[2] and the need to regulate attorney profits.[3] The difficulty encountered in reaching an acceptable solution has produced a fundamental and often vehement controversy between the advocates and the opponents of class actions.[4] High awards of counsel fees in contrast to miniscule recoveries by individual class members in some suits have generated the harsh criticisms that class actions are "lawyer's lawsuits"[6] and that attorneys are the recipients of a "golden harvest of fees."[7] Courts and commentators have frequently expressed the

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1. *See, e.g.*, Van Gemert v. Boeing Co., 590 F.2d 433, 435 (2d Cir. 1978) (en banc), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327); Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., 481 F.2d 1045, 1049-50 (2d Cir.), *cert. denied*, 414 U.S. 1092 (1973).

2. One purpose of class actions under Fed. R. Civ. P. 23 is to give individuals the opportunity they would not otherwise exercise to obtain relief for small injuries. *See* Free World Foreign Cars, Inc. v. Alfa Romeo, 55 F.R.D. 26, 30 (S.D.N.Y. 1972). In addition, courts have recognized the utility of class actions in complex litigation which commonly involves small individual economic interests. For example, class actions provides one means of vindicating the congressional purpose underlying federal securities and antitrust laws. Individuals would be unable to afford such litigation, and therefore, class actions based on violations of these laws demand the award of sufficient counsel fees to encourage the initiation of suits. 3 H. Newberg, Class Actions § 6924b, at 1146 n.08 (1977) & cases cited therein.

3. City of Detroit v. Grinnell Corp., 495 F.2d 448, 469 (2d Cir. 1974); Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 Harv. L. Rev. 849, 915 (1975) [hereinafter cited as Dawson II].

4. *Compare* 3 H. Newberg, *supra* note 2, § 6900, at 1115-17 *with* Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. Legal Stud. 47 (1975) *and* Labowitz, *Class Actions in the Federal System and in California: Shattering the Impossible Dream*, 23 Buffalo L. Rev. 601 (1974).

5. *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1604 n.111 (1976) [hereinafter cited as *Developments—Class Actions*]; *e.g.*, Landau v. Chase Manhattan Bank, N.A., 556 F.2d 664 (2d Cir. 1977) (per curiam) (aggregate class recovery of approximately $25,000, from which each class member was entitled to thirty-five cents, and attorneys were awarded $12,500); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 47 F.R.D. 557 (E.D. Pa. 1969) (average recovery of approximately $15,000 per class member and attorney's fees of over $5 million). *Contra*, Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 Geo. L.J. 1123, 1155-56 (1974) (empirical data to the contrary) [hereinafter cited as *Empirical Study*].

6. *Developments—Class Actions*, *supra* note 5, at 1605.

7. Free World Foreign Cars, Inc. v. Alfa Romeo, 55 F.R.D. 26, 30 (S.D.N.Y. 1972); Smith, *Standards for Judicial Approval of Attorneys' Fees in Class Action and Complex Litigation*, 20 How. L.J. 20, 26-27 (1977). "Although some judges, media people, and the defense bar have characterized attorney's fees as a source of abuse and a stain on the escutcheon of the administration of civil justice, in reality there is a virtual absence of empiric data showing any significant incidence of excessive fees." 7A C. Wright & A. Miller, Federal Practice and Procedure § 1803, at 190 (1972 & Supp. 1979). *See also* Senate Comm. on Commerce, 93d Cong.,

fear that the award of exorbitant fees places the legal profession in ill repute, especially if it appears that the class action has benefited no one but the attorney who brought it.[8]

These criticisms are countered by the contention that the efficacy of class actions under Rule 23 of the Federal Rules of Civil Procedure[9] is dependent

2d Sess., Class Action Study 22-24 (Comm. Print 1974) (casting doubt on view that there are significant improper fee practices).

8. One court has warned that "[f]or the sake of their own integrity, the integrity of the legal profession, and the integrity of [Fed. R. Civ. P.] 23, it is important that the courts should avoid awarding 'windfall fees' and that they should likewise avoid every appearance of having done so." City of Detroit v. Grinnell Corp., 495 F.2d 448, 469 (2d Cir. 1974).

9. Fed. R. Civ. P. 23 provides:

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

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

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

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

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

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

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom

upon the initiative of the plaintiff's attorney.[10] Class actions involve a high risk for the attorney, as well as a large investment of time and labor. Therefore, sufficiently high fees must be offered as incentives to attorneys to undertake class suits that effectuate certain public policies.[11]

Generally, the courts have focused on the legal basis for granting the award[12] and the method to be applied in computing the fee.[13] These problems are further compounded, however, when the suit reaches a disposition in favor of the class, but a number of class members do not claim their shares of the damages.[14] This inability to effect full distribution, which has become a recurring problem with the significant number of class action suits filed,[15]

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the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

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

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

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

10. Dolgow v. Anderson, 43 F.R.D. 472, 494-95 (E.D.N.Y. 1968); *see* Kalven & Rosenfield, *The Contemporary Function of the Class Suit,* 8 U. Chi. L. Rev. 684, 717 (1941). *See also Developments—Class Actions, supra* note 5, at 1606 ("Regulation of attorneys' fees also creates opportunities for courts to structure the incentives of class attorneys.").

11. Halverson v. Convenient Food Mart, Inc., 458 F.2d 927, 931 n.5 (7th Cir. 1972); Dolgow v. Anderson, 43 F.R.D. 472, 494-95 (E.D.N.Y. 1968); Comment, *Ethical Obligations of the Attorney Under Rule 23—Abuses and Reforms,* 12 San Diego L. Rev. 224, 233 (1974) [hereinafter cited as *Ethical Obligations*]. Furthermore, the sufficiency of fee awards is a consideration in preventing potential abuses in the administration and representation of class actions, such as premature settlements and inadequate notice to and representation of absent class members. *See* pt. III *infra.*

12. *See* notes 45-74 *infra* and accompanying text.

13. *See* notes 39-44 *infra* and accompanying text.

14. *See* Van Gemert v. Boeing Co., 573 F.2d 733, 736 n.4, *rev'd en banc,* 590 F.2d 433 (2d Cir. 1978), *cert. granted,* 99 S. Ct. 2158 (1979) (No. 78-1327); Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?* 70 F.R.D. 199, 206 (1976); Simon, *Class Actions—Useful Tool or Engine of Destruction,* 55 F.R.D. 375, 377-78 (1972). Possible reasons for the failure of class members to claim their damages include the passage of time, *e.g.,* Grimm v. Whitney-Fidalgo Seafoods, Inc., 458 F. Supp. 5, 6 (S.D.N.Y. 1978) (mem.); difficulty in obtaining proof, *e.g.,* T. Bartsh, F. Boddy, B. King & P Thompson, A Class Action Suit That Worked 99-100 (1978); and a nominal pro rata recovery, *e.g., id.* at 100.

15. "Class actions have sprouted and multiplied like the leaves of the green bay tree." Eisen

raises several issues. First, when attorneys are awarded fees from the class recovery, it must be decided whether they should be permitted to claim a substantial share of a class action judgment when a significant portion never reaches the intended recipients. In determining whether to award attorney's fees from the class recovery in such a case, the policy of discouraging suits that seem to benefit only the initiating attorney[16] must be balanced with the policy of stimulating worthwhile litigation.

Second, when the damage fund has been established pursuant to a judgment, the ultimate distribution of the unclaimed portion may eliminate the justification for awarding fees against the total fund. If the unclaimed portion is returned to the defendant, an award of fees from both the claimed and unclaimed portions may conflict with the American Rule of attorney's fees, which prohibits the payment of fees by the losing party.[17] Finally, such an award may conflict with the rationale underlying the well-established common fund exception to the American Rule, which in order to prevent unjust enrichment, permits fee-shifting among those who benefit from the services of the attorney.[18] It has been questioned whether those class members who have never claimed the fruits of the litigation have benefited within the meaning of the common fund doctrine.[19] The Second Circuit squarely confronted these issues in a recent class action of first impression,[20] *Van Gemert v. Boeing Co.*[21] Reversing itself en banc, the court applied the common fund doctrine and held that attorneys in a successful class action could collect reasonable fees from the entire fund despite the fact that more than eighty percent of the fund remained unclaimed at the time of the petition.[22] However, the *Van Gemert* court declined to make a decision regarding the ultimate disposition of

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v. Carlisle & Jacquelin, 479 F.2d 1005, 1018 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 156 (1974). In fiscal year 1976, 3,584 class actions were initiated under Fed. R. Civ. P. 23. At the end of that year, 5,987 class actions were pending. Manual for Complex Litigation at viii (1978). *But see* notes 197-201 *infra* and accompanying text.

16. "Obviously the only persons to gain from a class suit are not potential plaintiffs, but the attorneys who will represent them." Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 571 (2d Cir. 1968) (Lumbard, C.J., dissenting); *accord*, Van Gemert v. Boeing Co., 590 F.2d 433, 443 (2d Cir. 1978) (en banc) (Van Graafeiland, J., dissenting), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327).

17. For a discussion of the American Rule, see notes 45-74 *infra* and accompanying text. For a discussion of the possibility of returning unclaimed funds to the defendant, see pt. II(A) *infra*.

18. For a discussion of the common fund doctrine, see pt. I(B) *infra*.

19. Van Gemert v. Boeing Co., 573 F.2d 733, *rev'd en banc*, 590 F.2d 433 (2d Cir. 1978), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327).

20. Van Gemert v. Boeing Co., 590 F.2d 433, 435 (2d Cir. 1978) (en banc), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327). It has been relatively rare that large class action suits for damages have reached judgment since the 1966 amendments of Rule 23. Van Gemert v. Boeing Co., 573 F.2d 733, 736, *rev'd en banc*, 590 F.2d 433 (2d Cir. 1978), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327); Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1018-19 (2d Cir. 1973) (23(b)(3) actions), *vacated and remanded on other grounds*, 417 U.S. 156 (1974); Simon, *supra* note 14, at 378; Note, *The* Cy Pres *Solution to the Damage Distribution Problems of Mass Class Actions*, 9 Ga. L. Rev. 893, 900 nn.34 & 35 (1975) [hereinafter cited as *Mass Class Actions*].

21. 590 F.2d 433 (2d Cir. 1978) (en banc), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327).

22. *Id.* at 435. At the time the appeal papers were filed in the Supreme Court, 45% of the fund remained unclaimed. Brief for Respondents at 5, Van Gemert v. Boeing Co., 590 F.2d 433 (2d Cir. 1978) (en banc), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327).

the unclaimed portion,[23] thereby ignoring the determination of an issue that is central to the justification for the award of fees from the entire fund.[24]

This Note contends that attorneys may be awarded reasonable fees for their services from both the claimed and unclaimed portions of a fund created by a class action[25] judgment. Part I discusses the mechanics of fee awards in class actions and contends that when the applicable criteria are met, the award of counsel fees from the entire fund is justified under the common fund exception to the American Rule. Under this doctrine, a judgment creating a fund for the class constitutes a benefit conferred on every class member. Part II contends that courts must decide the ultimate disposition of the unclaimed proceeds in order to determine whether the common fund exception can validly be applied. It presents possible dispositions of the unclaimed portion of the fund and argues that this portion should not revert to the defendant. Rather, the unclaimed damages should escheat to the state if the remaining class members do not collect their shares of the judgment. Part III analyzes the competing policy considerations involved and contends that they are best served by awarding attorney's fees from the entire fund.

I. How Fees Are Awarded in Class Action Suits

A. *Mechanics of Fee Awards*

In the typical class action suit, an attorney is initially engaged by the named or representative plaintiff or plaintiffs, and a fee is arranged between them.[26] The fee may be on a contingency basis or at a reasonable rate based on the value of the attorney's services.[27] No other fee provisions are usually made, except with class members who subsequently intervene.[28] Although there is no fee arrangement with the absent class members,[29] the attorney for the representative plaintiff has a duty to represent all members equally[30] once the entire class has been certified under Rule 23.[31]

One result of a settlement or judgment in favor of the class is the establishment or preservation of a damage fund.[32] When the fund consists of

23. Van Gemert v. Boeing Co., 590 F.2d 433, 440 n.17 (2d Cir. 1978) (en banc), *cert. granted,* 99 S. Ct. 2158 (1979) (No. 78-1327).

24. *See* pt. III *infra.*

25. The scope of this Note is limited to class actions brought under Fed. R. Civ. P. 23. The text of Rule 23 is set out in note 9 *supra.*

26. *Developments—Class Actions, supra* note 5, at 1606.

27. 3 H. Newberg, *supra* note 2, § 6924b, at 1144-45.

28. *Id.* at 1145.

29. *Id.,* § 6924c, at 1146.

30. Fed. R. Civ. P. 23(a)(4); 3 H. Newberg, *supra* note 2, § 6924c, at 1146; *see* note 9 *supra.*

31. Fed. R. Civ. P. 23; *see* note 9 *supra.*

32. *E.g.,* Van Gemert v. Boeing Co., 590 F.2d 433 (2d Cir. 1978) (en banc) (judgment), *cert. granted,* 99 S. Ct. 2158 (1979) (No. 78-1327); Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973) (settlement). Other possible dispositions include injunctive or declaratory relief, usually under Fed. R. Civ. P. 23(b)(2). *See* note 9 *supra.* Fees are often awarded in these actions under a statutory provision authorizing the court to charge fees to the unsuccessful party. *Developments—Class Actions, supra* note 5, at 1606; *see* note 54 *infra.* In a federal antitrust suit in which the only relief obtained is injunctive, fees will not be awarded absent a settlement agreement stipulating that the defendant will pay fees since such awards are incidental to the statutory right to damages. *See* Trans World Airlines, Inc. v.

cash or other tangible assets, such as stocks or debentures,[33] the attorney for the class may petition the court to charge the common fund for a reasonable fee.[34] The amount of fees awarded for representing the class is determined by the trial court. In setting this amount, the court is not bound by the terms of any individual fee contracts with the named plaintiffs.[35] Instead, the trial court may exercise its discretion in determining a reasonable amount, tempered by an awareness of the negative aspects of awarding excessive fees.[36] Even if no objection is made to the size of the fee requested, an evidentiary hearing must be held to assure a fair and adequate award.[37] Fee awards may subsequently be modified or remanded by the appellate court for redetermination.[38]

In determining a reasonable fee, many courts have shifted from a benefit conferred analysis, which sets fees according to a percentage of the class recovery,[39] to an evaluation of several factors calculated to measure the value of the services rendered by the attorney.[40] For example, the Second Circuit has stated that a reasonable fee should be computed by beginning with a " 'lodestar' rate," established by multiplying the number of hours spent by

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Hughes, 312 F. Supp. 478, 482-83 (S.D.N.Y. 1970), *aff'd*, 449 F.2d 51 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973); Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888, 899 (S.D.N.Y. 1948); R. Holstein & P. Lurie, *Fees*, in Class Actions § 13.5, at 13-3 (Ill. Inst. for Continuing Legal Educ. 1974).

33. 3 H. Newberg, *supra* note 2, § 6905a, at 1120.

34. Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 165 (3d Cir. 1973); *see* Central R.R. & Banking Co. v. Pettus, 113 U.S. 116, 124-25 (1885). If there is more than one attorney representing the class, they may each seek fees, which are apportioned according to the services rendered. The court may allocate fees, or the plaintiffs' counsel may agree among themselves on an allocation prior to petitioning the court for approval of the fee award. 3 H. Newberg, *supra* note 2, § 6965c, at 1246; *see, e.g.*, Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977); Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975); City of Detroit v. Grinnell Corp., 495 F.2d 448, 474 (2d Cir. 1974).

35. Manuel For Complex Litigation § 1.44, at 69-70 (1978); *Developments—Class Actions*, *supra* note 5, at 1607.

36. *See* City of Detroit v. Grinnell Corp., 495 F.2d 448, 469-70 (2d Cir. 1974).

37. *Id.* at 473-74; Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 169 (3d Cir. 1973); *see* Perkins v. Standard Oil Co., 399 U.S. 222, 223 (1970) (per curiam) (award of attorney's fees under § 4 of the Clayton Act).

38. The attorney may immediately appeal the order fixing the fee. 7A C. Wright & A. Miller, *supra* note 7, § 1803, at 291-92.

39. *E.g.*, Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 47 F.R.D. 557 (E.D. Pa. 1969).

40. *See* 3 H. Newberg, *supra* note 2, § 6910, at 1125; *see, e.g.*, City of Detroit v. Grinnell Corp., 560 F.2d 1093 (2d Cir. 1977); Grunin v. International House of Pancakes, 513 F.2d 114, 127 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-20 (5th Cir. 1974); Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 166-69 (3d Cir. 1973). *See generally* Manual for Complex Litigation § 1.47, at 97-106 (1978); Smith, *supra* note 7; Comment, *Computing Attorney's Fees in Class Actions: Recent Judicial Guidelines*, 16 B.C. Indus. & Com. L. Rev. 630 (1975); *see also* Prandini v. National Tea Co., 585 F.2d 47, 54-55 (3d Cir. 1978) (Weis, J., dissenting) (difficulty in applying these factors).

the usual hourly rate charged by attorneys of equivalent expertise.[41] Next, the district court should consider other "less objective factors" including "the 'risk of litigation,' the complexity of the issues, and the skill of the attorneys."[42] If these subjective factors increase the fee above the base amount, the district court must carefully articulate its findings.[43] The Second Circuit warned, however, that courts should not overemphasize the size of the class settlement or judgment as an indication of the quality of the attorney's efforts. "[A] large settlement [or judgment] can as much reflect the number of potential class members or the scope of a defendant's past acts as it can indicate the prestige, skill, and vigor of the class's counsel."[44]

B. *The Common Fund Doctrine*

The American Rule of attorney's fees bars a successful litigant from recovering fees from his opponent unless specifically authorized by statute.[45] The primary purpose of requiring parties to pay their own fees is to prevent the discouragement of meritorious claims and defenses which could result from the apprehension of bearing the burden of an opponent's fees if the suit is unsuccessful.[46] Two established exceptions to the American Rule are recognized as stemming from the inherent power of the court. The bad faith exception allows the court to order that fees be paid by a losing party who has acted in bad faith[47] or who has disobeyed a court order.[48] The fee award is in the nature of a penalty.[49]

The second exception[50] is the common fund doctrine and its derivative, the

41. City of Detroit v. Grinnell Corp., 560 F.2d 1093, 1098 (2d Cir. 1977).

42. *Id.*

43. *Id.*

44. *Id.* at 1099.

45. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247-50 (1975). This rule is known as the American Rule to distinguish it from the English Rule, which statutorily grants discretion to the courts to award counsel fees to successful plaintiffs. *Id.* at 247 n.18; *see* Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717-18 (1967); Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796).

In full recognition of the American Rule, Congress has enacted specific provisions for the award of attorney's fees in statutes designed to promote the enforcement of federal rights. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. at 260 & n.33 (1975) (listing statutes); *see* Federal Attorney Fee Awards Rep., Aug., 1979, at 2, 22; *see, e.g.*, Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-5(k) (1976); Clayton Act, 15 U.S.C. § 15 (1976).

46. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967). It has also been stated that the cost and time required to litigate the issue of a reasonable counsel fee would substantially burden the courts. *Id.* The American Rule has been severely criticized. *E.g.*, Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 Cal. L. Rev. 792 (1966); Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 Iowa L. Rev. 75 (1963); McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 Minn. L. Rev. 619 (1931); McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 Fordham L. Rev. 761 (1972).

47. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975); Vaughan v. Atkinson, 369 U.S. 527, 530-31 (1962).

48. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258 (1975); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 427-28 (1923).

49. Hall v. Cole, 412 U.S. 1, 5 (1973).

50. Although often referred to as the common fund "exception" to the American Rule, such

common or substantial benefit doctrine. These doctrines permit the court to assess fees among those who have benefited from the suit or judgment by the creation, protection, or increase of a common fund or common benefit.[51]

reference is actually a "misnomer". Under the common fund theory, the losing party is not charged with the successful litigant's fees; instead, the fees are shifted to those benefited by the suit, regardless of whether they are parties to the action. 3 H. Newberg, *supra* note 2, § 7245, at 1693-94; *see* Note, *Reimbursement for Attorney's Fees From the Beneficiaries of Representative Litigation*, 58 Minn. L. Rev. 933, 935-36 (1974) [hereinafter cited as *Reimbursement From Beneficiaries*]. This allocation is totally consistent with the American Rule. The term "exception" refers to the power of the court to award fees under the doctrine. The concept of an "exception" more appropriately applies to the common benefit doctrine, which does result in fee-shifting to the defendant.

51. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257-58 (1975); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391-95 (1970); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718-19 (1967).

Although related, the common fund and common benefit doctrines are distinguishable. Vincent v. Hughes Air West, Inc., 557 F.2d 759, 768 n.6 (9th Cir. 1977). Both doctrines provide for shifting litigation costs to those benefited in order to prevent unjust enrichment. *See, e.g.*, Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Trustees v. Greenough, 105 U.S. 527 (1881). The original cases imposed a charge on a fund created by the litigation. *E.g.*, Central R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885); Trustees v. Greenough, 105 U.S. 527 (1881). Fees were shifted to persons not party to the lawsuit who benefited by receiving an interest in the fund. The common benefit doctrine evolved through an expansion of the concept of benefit beyond a common fund, in order to award fees when the benefit conferred was not of a tangible or economic nature. The doctrine is illustrated by two Supreme Court cases. In Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), an injunction against a merger obtained through misleading proxies in violation of the securities laws was held to be a benefit to the shareholders. Attorney's fees were therefore charged to the recipient corporation in a derivative suit. In Hall v. Cole, 412 U.S. 1 (1973), the preservation of an individual union member's right to free speech resulted in the conferral of a benefit on all union members. Therefore, the fees were charged to the union. Both cases resulted in fee-shifting to the defendants because they were the actual beneficiaries of the actions. The common fund cases differ because fees are assessed against nonparty beneficiaries, rather than against the defendant. "[T]he [common] benefit doctrine was devised to permit fee-shifting in cases not covered by the common fund doctrine because of the absence of a pecuniary benefit but yet involving interests of broad public importance, interests that Congress sought to vindicate at least in part through private litigation." Vincent v. Hughes Air West, Inc., 557 F.2d at 768 n.7.

The Supreme Court may have limited the use of the common benefit doctrine in Alyeska Pipeline Serv. Co. v. Wilderness Soc'y., 421 U.S. 240 (1975). Although the Court reaffirmed the vitality of both doctrines, *id.* at 264-65 n.39, the decision created "uncertainty regarding the continued authority of *Mills* and *Hall*—in any area other than corporate and union 'therapeutics.' " Vincent v. Hughes Air West, Inc., 557 F.2d at 768 n.7. This uncertainty is due to *Alyeska's* limitation on the use of the private attorney-general rationale to shift fees to defendants in violation of the American Rule. *See* note 71 *infra* and accompanying text. It is arguable that too expansive a use of the common benefit doctrine to enforce public policy goals would result in blurring the distinction between the common benefit doctrine and the private attorney-general rationale discredited in *Alyeska*. The same considerations, however, would not result in restricting the common fund doctrine because fees are not shifted to the defendant. It has been further suggested that the common benefit doctrine may now be so limited as to require monetary benefits. *See* 3B Moore's Federal Practice ¶ 23.91, at 23-562 n.11 (2d ed. 1979). *See also* Academic Computer Syss., Inc. v. Yarmuth, 71 F.R.D. 198, 201 n.1 (S.D.N.Y. 1976) (possible requirement of a common fund in all cases after *Alyeska*). This Note focuses on the common fund doctrine.

Inasmuch as Rule 23 does not refer to the court's power to award attorney's fees,[52] the common fund and common benefit doctrines are the only equitable means to assess fees against those beneficiaries who have not contracted directly with the attorney who has successfully maintained the suit.[53] When no statutory[54] or contractual authority exists,[55] these doctrines have provided a clear basis for awarding attorney's fees in class action suits.[56]

1. Requirements for Invoking the Common Fund Doctrine

The common fund doctrine is based upon a theory of unjust enrichment.[57] Therefore, a pecuniary[58] benefit must be conferred upon those who are charged with the fee.[59] The concept of a fund has been interpreted broadly to include a wide range of identifiable assets over which the court has the power to exercise its authority.[60] Whether or not the suit has been brought as a class action, attorney's fees have been awarded when the action has resulted in, for example, the preservation of an express trust,[61] placement of assets in the reach of creditors,[62] or the creation of a money judgment[63] or settlement fund[64] in which persons other than the plaintiff are entitled to share. The fund itself is the source for satisfying the claim for attorney's fees.[65] Because no agreement has been made to pay for the attorney's services, personal

52. City of Detroit v. Grinnell Corp., 495 F.2d 448, 469 (2d Cir. 1974).

53. Huecker v. Milburn, 538 F.2d 1241, 1241, 1245-46, 1246 n.10 (6th Cir. 1976); City of Detroit v. Grinnell Corp., 495 F.2d 448, 469 (2d Cir. 1974).

54. *See* note 45 *supra.*

55. For example, as part of a settlement of the substantive claims, the defendant may agree to pay the plaintiff's counsel fees. *See* Colson v. Hilton Hotels Corp., 59 F.R.D. 324, 326 (N.D. Ill. 1972).

56. *See, e.g.,* Grunin v. International House of Pancakes, 513 F.2d 114, 127 (8th Cir.), *cert. denied,* 423 U.S. 864 (1975); 7A C. Wright & A. Miller, *supra* note 7, § 1803, at 286.

57. Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds,* 87 Harv. L. Rev. 1597 (1974) [hereinafter cited as Dawson I]; *see* pt. I(B)(2) *infra.*

58. Vincent v. Hughes Air West, Inc., 557 F.2d 759, 768-69 (9th Cir. 1977).

59. Van Gemert v. Boeing Co., 573 F.2d 733, 736, *rev'd en banc,* 590 F.2d 433 (2d Cir. 1978), *cert. granted,* 99 S. Ct. 2158 (1979) (No. 78-1327).

60. *Id.* at 770. It is not necessary that there be a fund consisting of "identified items already in the hands of a court appointee. . . . Determination of whether a fund exists is a combination of traditional and pragmatic concepts centering around the power of the court to control the alleged fund. A trust estate, whose only nexus with the court may be that the trustee is a party to the suit, is a fund . . . A decedent's estate is a fund. . . . Potential rebates segregated on the books of a utility pursuant to a court order are a fund." *In re* Air Crash Disaster at Fla. Everglades, 549 F.2d 1006, 1018 (5th Cir. 1977) (citations omitted).

61. Trustees v. Greenough, 105 U.S. 527 (1881).

62. Central R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885).

63. Van Gemert v. Boeing Co., 590 F.2d 433, 437-38 (2d Cir. 1978) (en banc), *cert. granted,* 99 S. Ct. 2158 (1979) (No. 78-1327).

64. *See, e.g.,* City of Detroit v. Grinnell Corp., 495 F.2d 448, 468-69 (2d Cir. 1974).

65. Dawson II, *supra* note 3, at 919; Note, *Attorney Fees: Exceptions to the American Rule,* 25 Drake L. Rev. 717, 731 (1976). It is not necessary that the fund actually be in the court. 1 S. Speiser, Attorneys' Fees § 11:7 (1973); *see* note 60 *supra.* The defendant may pay the amount of his liability into a court-controlled escrow account, pending distribution to the class members. *E.g.,* Van Gemert v. Boeing Co., 573 F.2d 733, 734, *rev'd en banc,* 590 F.2d 433 (2d Cir. 1978), *cert. granted,* 99 S. Ct. 2158 (1979) (No. 78-1327). Under some circumstances, the defendant may

liability for litigation costs is not imposed on the nonparty beneficiaries of the action.[66] A pro rata share of the fee is deducted from each member's recovery.

The Supreme Court's most recent articulation regarding the factors necessary to invoke the common fund doctrine is in *Alyeska Pipeline Service Co. v. Wilderness Society.*[67] The Wilderness Society had successfully contested the issuance of a permit to Alyeska, which was necessary for the commencement of construction on the trans-Alaska oil pipeline.[68] The Society petitioned the court for an award of attorney's fees. The court of appeals granted the petition on the basis of the private attorney-general rationale,[69] which requires that defendants compensate successful plaintiffs for expenses incurred in vindicating or enforcing important public policies.[70] The Supreme Court reversed, limiting judicial use of the private attorney-general rationale as a vehicle for shifting attorney's fees to the defendant to situations in which there is statutory authority.[71]

At the same time, however, the Court reaffirmed the vitality of the common fund doctrine.[72] The Court distinguished the facts of *Alyeska* from those of the common fund and common benefit cases,[73] and indicated when benefits

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reimburse the class members directly. *See, e.g.,* Illinois Bell Tel. Co. v. Slattery, 102 F.2d 58 (7th Cir. 1939). The application for fees may be made by the plaintiff who has incurred the expense of bringing the suit, Trustees v. Greenough, 105 U.S. 527 (1881), or by the plaintiff's attorney whose services have produced the fund. Central R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885).

66. National Council of Community Mental Health Centers, Inc. v. Mathews, 546 F.2d 1003 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 954 (1977); 7A C. Wright & A. Miller, *supra* note 7, § 1803; Dawson II, *supra* note 3, at 919.

Another requirement often discussed by the courts in applying the common fund doctrine is that the services of the attorney seeking the fee must actually produce the benefit for the class members. Therefore, fees may be collected only if incurred in preserving, creating, or increasing the fund. One issue on which there is a split of opinion is whether the fund may be charged with amounts expended by the attorney in trying to recover his fees. *See* 7A C. Wright & A. Miller, *supra* note 7, § 1803, at 192; *compare* City of Detroit v. Grinnell Corp., 560 F.2d 1093, 1102-03 (2d Cir. 1977) *with* Miller v. Mackey Int'l, Inc., 70 F.R.D. 533, 538 (S.D. Fla. 1976).

67. 421 U.S. 240 (1975).

68. *Id.* at 241, 244. Congress subsequently "passed legislation which effectively set aside the decision of the court." Note, *Private Attorney General Fees Emerge From The Wilderness,* 43 Fordham L. Rev. 258, 258 (1974) (footnote omitted); *see* 30 U.S.C. § 185 (1976); 43 U.S.C. §§ 1651-1653 (1976).

69. 495 F.2d at 1032 (D.C. Cir. 1974) (en banc).

70. The concept of the private attorney-general has been the basis for congressional provision for counsel fees in statutes designed to implement broad public policy objectives. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 260 n.33, 261 nn.34 & 35, 262 n.36 (1975) (citing statutes); Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 401-02 (1968).

71. "[C]ongressional utilization of the private-attorney-general concept can in no sense be construed as a grant of authority to the Judiciary to jettison the traditional rule against nonstatutory allowances to the prevailing party and to award attorneys' fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award." 421 U.S. at 263.

72. *Id.* at 257-58, 264 n.39.

73. *Id.* at 264 n.39; *see* Hall v. Cole, 412 U.S. 1, 5 n.7 (1973) (Court distinguished the private attorney-general theory from the common fund and common benefit cases); Brennan v. United

derived from litigation have properly served as a basis for fee-shifting to the beneficiaries of the action: "In this Court's common-fund and common-benefit decisions, the classes of beneficiaries were small in number and easily identifiable. The benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefiting."[74]

The Supreme Court's criteria "must be viewed in context."[75] The class of potential beneficiaries in *Alyeska* consisted of the unspecified "general public"[76]—"all those who would derive benefits from a pristine Alaskan wilderness."[77] When there is a well-defined class, however, the beneficiaries need not be small in "absolute numbers."[78] Greater stress should be placed on the requirement of identifiability of the beneficiaries than on mere size.[79] Identifiability is essential to spread the litigation costs proportionately among the beneficiaries, whereas a large number of beneficiaries does not preclude an equitable distribution. In addition, the identifiability criterion may be satisfied even though the name of each beneficiary is not ascertained at the time of recovery. It is sufficient if those comprising the benefited group may be identified so that benefits may be traced to the class of beneficiaries.[80] Litigation costs can be shifted with confidence to those benefiting by assessing a pro rata share to each recovery from the fund or by charging the entity which is the recipient in a common benefit case.[81]

The *Alyeska* criteria will be satisfied in most class actions that reach a judgment for damages. The size and identification requirements are aspects of class manageability considered by the court in its initial decision whether to certify the class.[82] When a common fund has been created by calculating the

Steelworkers, 554 F.2d 586, 600-01 (3d Cir. 1977) (*Alyeska* distinguished from common fund and common benefit cases).

74. 421 U.S. at 264 n.39.

75. Brennan v. United Steelworkers, 554 F.2d 586, 606 (3d Cir. 1977).

76. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 264 n.39 (1975).

77. Van Gemert v. Boeing Co., 590 F.2d 433, 438 (2d Cir. 1978) (en banc), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327).

78. Brennan v. United Steelworkers, 554 F.2d 586, 606 (3d Cir. 1977). In *Brennan*, it was held that a common benefit can accrue to 1,400,000 union members. *Id.* (citing Hall v. Cole, 412 U.S. 1 (1973) (class of approximately 85,000 union members); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) (class of 8,987 shareholders); Yablonski v. United Mine Workers of America, 466 F.2d 424 (D.C. Cir. 1972) (class of 162,000 union members), *cert. denied*, 412 U.S. 918 (1973)).

79. Brennan v. United Steelworkers, 554 F.2d 586, 606 (3d Cir. 1977).

80. "Ready identifiability is required to insure clear, concrete evidence that the fee-seeker's efforts produced actual benefits to others, and that fees are assessed only against beneficiaries—those who would be unjustly enriched by not sharing in the cost of producing the benefit—and not against persons whose positions are not substantially bettered because of the victorious lawsuit." United States v. Imperial Irrigation Dist., 595 F.2d 525, 530 (9th Cir. 1979). In *Imperial Irrigation*, members of the beneficiary class could subsequently be identified by their land purchases. *Id.* at 530 n.6.

81. *See* note 51 *supra*.

82. The size of the class must be large enough to satisfy the numerosity requirement. Fed. R. Civ. P. 23(a)(1); *see* note 9 *supra*. However, when the class is extremely large, use of the class action device may be inappropriate, and the court may refuse to certify the action. The court will consider whether class members are reasonably identifiable in order to meet the mandatory notice requirement under 23(b)(3), justify the binding effect of the judgment in all class actions, and

damages owed to individual class members, a charge on the fund assures that the beneficiaries are charged with fees in proportion to the benefits received from the litigation.[83] Thus, the tracing and shifting criteria will be met. A charge on the fund will shift fees to the beneficiaries of the action, a shift which could not have occurred in *Alyeska*, which involved "nebulous benefits accruing to a vast class of people."[84]

2. Theory of the Common Fund Doctrine—Conferral of the Benefit

It is well established that the rationale underlying the common fund doctrine is the prevention of unjust enrichment of those who would share in the benefits of the action without contributing to its costs.[85] The common fund cases, however, do not clearly analyze the concept of unjust enrichment. Although the courts justify the charge of attorney's fees on this basis, they have not identified when the benefit is conferred.

One approach requires an actual acceptance of the benefit in order to charge the fund. The proceeds must be claimed by those entitled to share in the recovery.[86] In originally invoking the doctrine, the courts may have assumed that the fund would be completely distributed.[87] For example, in the seminal common fund case of *Trustees v. Greenough*,[88] the plaintiff, on behalf of himself and other bondholders similarly situated, preserved a trust fund for the payment of principal and interest due on the bonds. The Supreme Court awarded attorney's fees and other expenses from the total fund even though some bondholders had not as yet filed claims.[89] Two factors indicate, however, that the Court may have based its finding of unjust enrichment on the assumption that all entitled would eventually collect their shares of the fund. First, by holding that an award of fees from the entire fund was more equitable than requiring all bondholders to individually contribute their pro rata shares, the Court implied that a charge on the fund would have the same

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overcome the administrative difficulties in the management of the action and the apportionment of the relief. *See* 3B Moore's Federal Practice ¶ 23.05[1], at 23-157 to -58 (2d ed. 1979). *See generally id.* at ¶ 23.45 [4.-4].

83. Therefore, if part of the fund has already been distributed to claimants, the undistributed portion of the fund may not be charged with all the attorney's fees. Each beneficiary must bear his pro rata share. *See* Ojeda v. Hackney, 452 F.2d 947, 948 (5th Cir. 1972).

84. Van Gemert v. Boeing Co., 590 F.2d 433, 438 (2d Cir. 1978) (en banc), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327). This analysis may not apply to a class that has been certified and yet does not meet the common fund criteria.

85. Mills v. Electric Auto-Lite Co., 396 U.S. 375, 392 (1970); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 719 (1967). "[I]ntrinsic in every case is the requirement that benefits must accrue to those against whom expenses are assessed." Van Gemert v. Boeing Co., 573 F.2d 733, 736, *rev'd en banc*, 590 F.2d 433 (2d Cir. 1978), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327).

86. Van Gemert v. Boeing Co., 590 F.2d 433, 444 (2d Cir. 1978) (en banc) (Van Graafeiland, J., dissenting), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327); Van Gemert v. Boeing Co., 573 F.2d at 736-37; *see* notes 108-10 *infra*.

87. Dawson I, *supra* note 57, at 1643-44.

88. 105 U.S. 527 (1881).

89. "[A] considerable amount of money was realized, and dividends have been made amongst the bondholders, most of whom came in and took the benefit of the litigation." *Id.* at 529.

effect as charging individual claimants.[90] Second, the Court noted that distribution of dividends in payment of coupons as yet unsatisfied would continue into the future for the benefit of the bondholders.[91] The nature of the action—preservation of an express trust—was such that the conservation of the fund conferred a benefit which would probably inure to all bondholders. They already had the right to cash in coupons, and acceptance of the benefit was likely because of the continuing nature of their rights as bondholders.[92]

Under a second approach to the common fund doctrine, the benefit is conferred by the judgment which establishes, preserves, or increases the fund.[93] This view is supported by the result in *Greenough*[94] and the reasoning in *Sprague v. Ticonic National Bank*.[95] In *Sprague*, the plaintiff sued individually to establish her right to a lien on the proceeds from the sale of bonds held by a bankrupt bank as collateral for a trust of which she was a beneficiary. In establishing her claim, she also established the right to the proceeds for fourteen beneficiaries of other trusts.[96] The fourteen other trust beneficiaries were not before the court and would have had to sue individually to recover. Nevertheless, with no indication that they would bring suit in the future, the Supreme Court held that fees and costs could be

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90. "It would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the funds an unfair advantage. [The plaintiff] has worked for [the other bondholders] as well as for himself; and if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution." *Id.* at 532.

91. *Id.* at 531.

92. Therefore, it may be said that "[t]he common fund doctrine emerged in situations where the interests of litigants and outsiders were so closely interlocked that success in the litigation inevitably brought evident and measurable gains to the outsiders." Dawson I, *supra* note 57, at 1652.

Similar confusion follows from a reading of the second common fund case, Central R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885). Unsecured creditors of a railroad company sued on behalf of themselves and other similarly situated creditors to establish a lien on property which had been purchased by other railroad companies. The Court granted the attorneys' petition to charge the fund created by the judgment, and indicated that compensation of the attorneys from the fund was required with "respect of unsecured creditors who accepted the fruits of [the attorneys'] labors by filing claims." *Id.* at 125. Although this language appears to indicate that acceptance of the proceeds was required to charge the fund, the facts of the case are ambiguous. It is possible that the attorneys requested that fees only be assessed against the portion of the fund which had been claimed. *See id.* at 126. Alternatively, there is no indication whether all eligible creditors had filed claims; if all had filed claims, the Court's decision to charge the fund would support either view of benefit. The Court would not have had to reach the decision whether the benefit is conferred by acceptance or by the judgment itself. *See* notes 93-99 *infra* and accompanying text.

93. Van Gemert v. Boeing Co., 590 F.2d 433 (2d Cir. 1978) (en banc), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327); *see* Dawson I, *supra* note 57, at 1646.

94. A charge was imposed on the fund although not all beneficiaries of the suit had filed claims. *See* notes 89-92 *supra* and accompanying text.

95. 307 U.S. 161 (1939).

96. *Id.* at 163.

recovered from the assets because of the *stare decisis* effect of the judgment.[97] The Court noted:

> [W]hen such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through *stare decisis* rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation.[98]

Therefore, *Sprague* supports the view that actual distribution is not a prerequisite to invoking the common fund doctrine; rather, unjust enrichment may result from the benefit conferred by a judgment which establishes the right of others to participate in a fund.[99]

If the entire fund is distributed to the intended beneficiaries, it is unnecessary to decide whether a benefit is conferred by a judgment or by acceptance by the beneficiaries.[100] The distinction becomes significant, however, when a portion of the fund established for the benefit of an entire class remains unclaimed. If the common fund doctrine requires all intended beneficiaries to actually receive their portions, attorney's fees may only be collected from the claimed portion of the fund. If, however, the judgment itself confers the benefit on all class members, claiming and nonclaiming alike, then the attorney for the class may collect fees from the total fund despite the failure of some members to claim.

3. *Van Gemert v. Boeing Co.*

Due to the small number of class actions that have reached judgment,[101] the award of attorney's fees from the total fund was challenged for the first time only recently in *Van Gemert v. Boeing Co.*[102] Holders of Boeing's converted subordinated debentures who had failed to convert their bonds into common stock by the redemption deadline brought a 23(b)(1) action[103] (*Van Gemert*

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97. *Id.* at 167.

98. *Id.*

99. Van Gemert v. Boeing Co., 590 F.2d 433 (2d Cir. 1978) (en banc), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327). *See also* Gibbs v. Blackwelder, 346 F.2d 943, 945 (4th Cir. 1965) (action by judgment creditors to collect attorney's fees when not all creditors had as yet asserted claims: "[We note] the principle that when one who, while establishing his own claim, also establishes the means by which others may collect their claims, a chancellor in equity may award counsel fees to the trail blazer out of the property made available for the satisfaction of all claims. The principle is applied so that the one who led in hewing the path to victory is not left saddled with extensive attorney's fees, which need not be incurred by his more timid fellows who held back until the fruits of the pioneer's success were laid before them.").

100. If all members of the class claim the fruits of the litigation, it is clear that under either view, a benefit has been conferred, and the common fund doctrine permits a charge on the fund as a means of having each class member contribute his pro rata share of the fees.

101. Van Gemert v. Boeing Co., 573 F.2d 733, 736, *rev'd en banc*, 590 F.2d 433 (2d Cir. 1978), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327); *see* note 18 *supra*.

102. 573 F.2d 733, *rev'd en banc*, 590 F.2d 433 (2d Cir. 1978), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327).

103. A class action may be certified under Fed. R. Civ. P. 23(b)(1) if it also satisfies the prerequisites of Rule 23(a). *See* note 9 *supra*.

I).[104] The district court held Boeing liable for providing inadequate notice.[105] Boeing paid over $3 million into a court-controlled escrow account to be distributed to the class members by a court-appointed special master.[106] The district court granted the class attorneys' request that fees be assessed against the total amount of the judgment, even though a significant number of claims had not as yet been filed.[107]

On appeal, (*Van Gemert III*), a three-judge panel of the Second Circuit reversed, and held that absent class members who had not claimed their shares had received no benefit from the attorneys' work.[108] Therefore, their undistributed shares in the fund could not be charged with attorneys' fees.[109] The fees could be collected only from the claimed portion of the fund.[110]

"Because of the significance of the issues in this case for the conduct of class action litigation,"[111] the Second Circuit reheard the case en banc (*Van Gemert IV*), and affirmed the district court judgment.[112] The court held that all class members—claiming and nonclaiming—should bear a pro rata share of the costs of producing the favorable judgment, and, therefore, the attorneys could collect their fees from the total fund.[113] On the issue of when a benefit has been conferred, the court found that once "a plaintiff class-member is adjudicated to have an interest in a fund, he has benefited within the meaning of the common fund doctrine."[114]

The initial basis of the *Van Gemert IV* decision was a finding that the class satisfied the three common fund criteria set forth in *Alyeska*.[115] The court noted that the size of the class was comparable to those in the original common fund cases.[116] Additionally, the court stated that the criteria of identifiability and tracing of the benefits were satisfied by the limited composition of the class—those who failed to convert a specific type of Boeing debentures. Although the individual names were not fully ascertainable, each debenture "[bore] an explicit number," and "the damages owed to each plaintiff [could] be traced to each debenture with perfect accuracy."[117]

The court buttressed its conclusion by contrasting the situation in *Van Gemert* with the facts of *Alyeska*. In that case, there was a "sprawling throng

104. 520 F.2d 1373 (2d Cir.), *cert. denied*, 423 U.S. 947 (1975).

105. *Id.*

106. Holders of the unregistered debentures who failed to learn of the redemption call until after the conversion deadline expired suffered damages of $213 per bond. Brief for Petitioner at 5, Van Gemert v. Boeing Co., 590 F.2d 433 (2d Cir. 1978), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327).

107. 590 F.2d at 436.

108. 573 F.2d 733 (2d Cir. 1978).

109. *Id.* at 737.

110. *Id.* In *Van Germert II*, 553 F.2d 812, 815 (2d Cir. 1977), the court had decided that any unclaimed damages should not be distributed to the claiming members.

111. 590 F.2d 433, 436 (2d Cir. 1978) (en banc), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327).

112. *Id.*

113. *Id.*

114. *Id.* at 439.

115. *See* notes 74-84 *supra* and accompanying text.

116. "The class of debenture holders here is comparable in size to that of the creditors in *Pettus* and the bondholders in *Greenough*." 590 F.2d at 438.

117. *Id.*

of potential beneficiaries,"[118] rather than the limited class present in *Van Gemert* and the original common fund cases.[119] Furthermore, in *Alyeska*, "sophisticated economic analysis would be required to gauge the extent to which the general public, the supposed beneficiary . . . would bear the costs."[120] In contrast, *Van Gemert IV* required only "elementary arithmetic . . . to determine the distribution of benefits."[121] Finally, the court held that costs could confidently be shifted with "complete exactitude" to those benefiting by simply prorating the cost of the suit to each debenture holder's recovery.[122]

The Second Circuit found further support for its decision in past common fund case law.[123] The court viewed these cases as permitting fees to be assessed against the shares of those individuals who have not claimed the proceeds of the litigation. The court interpreted *Greenough* as holding that attorney's fees could be collected from the total fund even though some bondholders had not filed claims.[124] The court also stressed that in *Sprague*, fees were recovered from all the assets realized by the litigation even though there was no indication that the other trust beneficiaries, given their rights by *stare decisis*, would assert their claims to the fund.[125]

As indicated, it is not clear whether the original common fund cases employed the equitable device of a charge on the fund under the assumption that it would achieve contribution by all class members who would eventually claim.[126] However, the result of *Van Gemert IV* is proper. The court's view that unjust enrichment would occur unless attorney's fees are collected from the entire fund, regardless of its distribution, is supported by the equitable purposes and protections embodied in Rule 23 of the Federal Rules of Civil Procedure. Rule 23 provides both the rationale and the necessary safeguards for applying the common fund doctrine even when all members of the class do not claim.

By its operation, Rule 23 supports the view that a benefit is conferred on all members of the class by a judgment in their favor. One of the purposes of the 1966 amendments to Rule 23 was to make judgments binding on all members of the class except for those who opt out.[127] The judgment which establishes

118. *Id.*

119. *Id.* The court further noted that the class was measurably smaller than those in the common benefit cases. *Id.* & n.12.

120. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 264-65 n.39 (1975).

121. 590 F.2d at 438.

122. *Id.*

123. *Id.* at 439.

124. *Id.*; *see* notes 88-91 *supra* and accompanying text.

125. *Id.*; *see* notes 95-98 *supra* and accompanying text.

126. *See* notes 85-99 *supra* and accompanying text.

127. Dawson II, *supra* note 3, at 918; Wright, *Class Actions*, 47 F.R.D. 169, 181 (1970). *See generally* 7A C. Wright & A. Miller, *supra* note 7, § 1789.

It is arguable that prior to the decision in Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), even those persons who opted out of the class may have been benefited by the judgment in the class's favor. They could subsequently have sued the defendant and asserted that collateral estoppel would have barred the defendant from relitigating the liability issue. *Parklane* prevented this use of offensive collateral estoppel in "cases where a plaintiff could easily have joined in the earlier action or where . . . the application of offensive estoppel would be unfair to a defendant."

the members' rights in the damage fund, therefore, binds all members of the class regardless of whether they claim the proceeds.[128] Once the class is certified, the action becomes the sole method of adjudicating the rights of the absent members.

Moreover, class members, at least in a 23(b)(3) action,[129] by failing to opt out and bring their separate claims, have impliedly accepted the services of the class attorney.[130] This argument for an implied acceptance is not as persuasive in a 23(b)(1) or 23(b)(2) action in which members are not given the opportunity to opt out.[131] However, by foreclosing the right to opt out of the action, it is arguable that Rule 23 creates, at the certification stage, an implied acceptance of the services of the class attorney, who is thereafter required to adequately represent the interests of all members.[132] The members have their rights litigated at no initial expense, and personal liability for fees is not imposed, regardless of the outcome of the action.[133] It is fair, therefore, to assess fees against the judgment produced in their favor.

II. THE EFFECT OF UNCLAIMED FUNDS

Although distribution of the fund is arguably unnecessary for the conferral of a benefit on absent class members, the ultimate disposition of the unclaimed portion is a critical factor in determining whether the common fund analysis may be applied to assess fees against the unclaimed portion. The

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Id. at 331-32. The Court's recognition that a plaintiff who had "adopt[ed] a 'wait and see' attitude," *id.* at 330, toward a first lawsuit had benefited from the judgment, lends analogous support to the contention that the binding effect of a judgment under Rule 23 benefits all class members. The *Parklane* decision also removes any fears that those who opt out will be charged for the benefit conferred on the class.

128. *See* Van Gemert v. Boeing Co., 590 F.2d 433, 438 n.11 (2d Cir. 1978) (en banc), *cert. granted,* 99 S. Ct. 2158 (1979) (No. 78-1327). *Contra,* Simon, *supra* note 14, at 377.

129. Fed. R. Civ. P. 23(b)(3); *see* note 9 *supra.*

130. Van Gemert v. Boeing Co., 590 F.2d 433, 439 n.14 (2d Cir. 1978) (en banc), *cert. granted,* 99 S. Ct. 2158 (1979) (No. 78-1327). *Contra,* Simon, *supra* note 12A, at 377.

131. Fed. R. Civ. P. 23(c)(3), *supra* note 9. Most circuits have decided that members of a Rule 23(b)(1) or (b)(2) class may not exclude themselves from the class. Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied,* 395 U.S. 977 (1969); Mungen v. Florida E. Coast Ry., 318 F. Supp. 720 (M.D. Fla. 1970), *aff'd,* 441 F.2d 728 (5th Cir.), *cert. denied,* 404 U.S. 897 (1971). The Ninth Circuit, however, has left the question open. Vincent v. Hughes Air West, Inc., 557 F.2d 759, 768 n.4 (9th Cir. 1977) (citing Bauman v. United States Dist. Court, 557 F.2d 650, 659-60 (9th Cir. 1977)).

132. "This provision represents the drafters' judgment that although many class members would not respond to a request for affirmative action, silence does not signify opposition to the maintenance of the suit." Note, *Damage Distribution in Class Actions: The Cy Pres Remedy,* 39 U. Chi. L. Rev. 448, 448 (1972) (footnotes omitted) [hereinafter cited as *Damage Distribution*].

133. 7A C. Wright & A. Miller, *supra* note 7, § 1803, at 188-89. Absent class members are generally considered participants, not parties, to the action. Lamb v. United Security Life Co., 59 F.R.D. 44 (S.D. Iowa 1973); *see* 2 H. Newberg, *supra* note 2, § 2780.

Holding class members personally liable for attorney's fees because a judgment has conferred rights would arguably enable the successful attorneys to both solicit and conscript clients. Dawson II, *supra* note 3, at 919. *See also* National Ass'n of Regional Medical Programs, Inc., v. Mathews, 551 F.2d 340 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 954 (1977), in which the court would not enter an *in personam* judgment for fees against individual class members because such a judgment would violate due process notions.

disposition of the unclaimed funds is within the court's discretion, and a number of possible dispositions are available. The failure of the Second Circuit to address this issue is a serious weakness of the *Van Gemert IV* decision. By holding that attorney's fees may be assessed against the total amount of the judgment without resolving the issue of the ultimate disposition of the unclaimed portion,[134] the court failed to confront a number of issues which depend upon who receives the fund.

A. *Return to the Defendant*

If the unclaimed damages are returned to the defendant, application of the common fund doctrine in order to assess attorney's fees against the total fund would conflict with the American Rule. If the defendant retains an interest in the unclaimed damages, the plaintiff's attorney would be collecting part of his fee from the defendant's portion, thereby indirectly charging the defendant with his opponent's fees.[135] Under varying circumstances, both courts and commentators have recognized the possibility of returning unclaimed funds in class actions to the defendant.[136] For example, unclaimed damages have been

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134. The Second Circuit stated that it "intimate[d] no view as to the appropriate ultimate disposition of the remainder of the fund." Van Gemert v. Boeing Co., 590 F.2d 433, 440 n.17 (2d Cir. 1978) (en banc), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327).

135. *See* Van Gemert v. Boeing Co., 573 F.2d 733, 737, *rev'd en banc*, 590 F.2d 433 (2d Cir. 1978), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327), in which the court stated: "Recognizing, however, the possibility that unclaimed funds will be returned to the defendant, we point to the Supreme Court holding in *Alyeska* as an additional reason why attorneys' fees should not now be charged against the entire escrow fund." *Id.* (footnote omitted).

136. *See, e.g.*, B. & B. Inv. Club v. Kleinert's Inc., 62 F.R.D. 140, 150 (E.D. Pa. 1974) (settlement fund); *In re* Antibiotic Antitrust Actions, 333 F. Supp. 267, 288 (S.D.N.Y. 1971) (settlement fund); Gordon, *Manageability Under the Proposed Uniform Class Actions Act*, 31 Sw. L.J. 715, 725 n.92 (1977) (judgment or settlement); Labowitz, *supra* note 4, at 646 (judgment or settlement); *Empirical Study*, *supra* note 5, at 1163-64 (study found 6 cases where unclaimed funds were returned to the defendant); Uniform Class Actions Act § 15(c)(5) (within the court's discretion).

A theory advanced by Boeing in its pending appeal in Van Gemert v. Boeing Co., 590 F.2d 433 (2d Cir. 1978) (en banc), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327), is that the judgment as to each class member is not final until that member claims his interest in the fund. Brief for Petitioner at 19-20, 22, 25, Van Gemert v. Boeing Co., 590 F.2d 433 (2d Cir. 1978) (en banc), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327). Boeing therefore contends that because "there is as yet no final judgment in favor of any nonclaiming class member . . . the common benefit from which plaintiff's attorneys can levy attorneys' fees consists only of the amount so far claimed by the class." *Id.* at 25. Under this analysis, Boeing maintains an interest in the unclaimed funds, and an award of attorney's fees from the entire fund would violate the American Rule. *Id.* at 26.

Boeing's argument may be criticized because it introduces a lack of symmetry into Rule 23. While Boeing argues that the judgment is not final as to the unclaiming class members, it ignores the fact that Rule 23 clearly makes the judgment final and binding on all members of the class. The judgment is accorded res judicata effect, and absent plaintiffs are therefore foreclosed from bringing future actions against the defendant. The finality of the judgment does not appear to depend upon whether or not all members claim the proceeds of the litigation. *See* notes 127-28 *supra* and accompanying text.

returned to the defendant when the settlement agreement provided for return if less than the total amount was claimed.[137]

The unclaimed damages should not, however, revert to the defendant once he has been adjudged liable for the full amount of damages. Unlike negotiated settlements, reversion to the defendant after judgment violates well-settled legal and equitable principles. Once a defendant pays an amount into the court in satisfaction of a judgment, he is a judgment debtor who no longer has an interest in the fund.[138] This principle has been specifically applied in circumstances analogous to Rule 23 actions to prevent return to the defendant of unclaimed funds in the possession of a federal court.[139]

In *Pennsylvania R. v. United States,*[140] a railroad company was adjudged liable to certain bondholders of its subsidiary and was directed to pay damages in satisfaction of the judgment to the trustee for the bondholders. The trustee was directed "to make payment to the bondholders whose claims had been proved and to deposit the balance of the fund in the registry of the court below."[141] Eighteen years later, the railroad, asserting ownership to the unclaimed balance of the fund, petitioned the court for repayment of the remaining money which had been deposited in the United States Treasury.[142] The Third Circuit refused to return the funds to the railroad, noting:

> When payment of the amount decreed was made by the Railroad Company it was a payment by that company of its indebtedness to the holders of the bonds. While the payment was made to a trustee for the bondholders the trustee was a mere distributing agent and each of the bondholders acquired title to his pro rata share of the fund. . . . Consequently thereafter the Railroad Company had no more title to the money than it would have had if it had used it to pay any other debt.[143]

Furthermore, the inequities of Boeing's argument are apparent. Return of the damages for which the defendant has been held liable raises problems of unjust enrichment. *See* notes 137-50 *infra* and accompanying text.

137. Different considerations are present when unclaimed funds from a settlement, rather than a judgment, are returned to the defendant. For example, there is a stronger argument against returning unclaimed damages to a defendant who has been adjudged liable of wrongdoing. Courts have approved settlement agreements in which the parties have negotiated the reversion of unclaimed funds to the defendant. *E.g.,* Voege v. Ackerman, 70 F.R.D. 693 (S.D.N.Y. 1976); *cf.* Beecher v. Able, 575 F.2d 1010 (2d Cir. 1978) (court refused to reform or rescind settlement contract to allow return to defendant where settlement provided that no portion of unclaimed funds would revert to defendant).

In Voege v. Ackerman, 70 F.R.D. 693 (S.D.N.Y. 1976), fees were awarded off the top of a settlement fund even though the defendant retained a reversionary interest in the unclaimed proceeds. Unlike judgments, this award does not violate the American Rule because the award of reasonable attorney's fees usually is part of the negotiated settlement.

138. *See* notes 140-46 *infra* and accompanying text.

139. Hansen v. United States, 340 F.2d 142 (8th Cir. 1965); Pennsylvania R. v. United States, 98 F.2d 893 (3d Cir. 1938).

140. 98 F.2d 893 (3d Cir. 1938).

141. *Id.* at 894.

142. *Id.*

143. *Id.* The railroad company also argued that the funds should be returned to it under the theory of a resulting trust where funds revert to the settlor if the trust cannot be carried through. The court disagreed, finding that each bondholder received title to his pro rata share of the fund. *Id. See also* Hansen v. United States, 340 F.2d 142, 144 (8th Cir. 1965).

Similarly, in *Hansen v. United States,*[144] the Eighth Circuit, in holding that the defendant could not recoup unclaimed damages paid into a fund and later transferred to the United States in trust, stated: "[D]efendant has no title or right to any money he paid to satisfy the judgment. A judgement debtor who has paid his judgment is not the rightful owner of unclaimed portions of the judgment deposited in a trust account in the Treasury pursuant to the statute."[145] The court noted that there was no statutory or precedential justification for permitting a judgment debtor to recover unclaimed amounts paid as damages in satisfaction of a judgment. Moreover, the court expressly found no equitable basis for returning money which the defendant had wrongfully obtained.[146]

A number of equitable considerations provide further support for a court, in the exercise of its discretionary powers, to deny a return of the unclaimed funds to the defendant. Although it may be argued that allowing the defendant to retain unlawful gains is more just than permitting the generation of unwarranted attorney's fees,[147] this is not a true alternative. A return of damages would constitute a windfall to the culpable defendant whose wrongdoing has been established.[148] In addition, by permitting reversion to the defendant, the court would, in effect, be sanctioning misfeasance. This would serve to counteract the avowed purpose of the particular class action, as well as the deterrent effect of class actions in general.[149]

These principles regarding judgment debtors should be applicable to the defendant who has paid into court the damages assessed in a class action judgment. The defendant should be considered to have no further interest in the fund established for the class and no right to have unclaimed damages returned to him.[150] When the defendant retains no legal right to the un-

144. 340 F.2d 142 (8th Cir. 1965).

145. *Id.* at 143. The judgment had required the defendant to pay into the General Accounting Office an amount representing rent overpayments retained in violation of federal law. The defendant subsequently brought a motion to have the judgment reopened and the unclaimed money remained in the account returned to him. *Id.* at 142-43.

146. *Id.* at 144-45.

147. *See* Labowitz, *supra* note 4, at 646.

148. *See Damage Distribution, supra* note 132, at 448.

149. These public policy considerations have often been noted in actions involving violations of, for example, federal securities laws or the Fair Labor Standards Act. *See, e.g.,* SEC v. Golconda Mining Co., 327 F. Supp. 257 (S.D.N.Y. 1971), in which the court would not permit the unclaimed portion of a settlement fund to revert to the defendant in an SEC enforcement action. Judge Weinfeld stated that "[t]o permit the return of the unclaimed funds, a portion of the illicit profits, would impair the full impact of the deterrent force that is essential if adequate enforcement of the securities acts is to be achieved." *Id.* at 259 (footnote omitted). He further indicated that "[t]he circumstance that some of the claimants cannot presently be found does not justify turning back to them their ill-gotten profits." *Id.* Similar policy considerations are arguably present in private enforcement actions. Regarding the Fair Labor Standards Act, *see, e.g.,* Hodgson v. Wheaton Glass Co., 446 F.2d 527, 535 (3d Cir. 1971); Brennan v. Emerald Renovators, Inc., 410 F. Supp. 1057, 1061 (S.D.N.Y. 1975).

150. The defendant should also have no further interest in the award of attorney's fees from the fund once he has paid the damages set by the court. This reasoning has been used in settlement actions. For example, in Haas v. Pittsburgh Nat'l Bank, 77 F.R.D. 382 (W.D. Pa. 1977), the defendants contributed an amount toward the settlement fund, with attorney's fees to

claimed portion, collection of attorney's fees from the total fund is consistent with the American Rule. Inasmuch as the judgment in favor of the class constitutes the benefit conferred on all members under the common fund doctrine, the entire amount of the fund equals the total liability of the defendant. Attorney's fees are thus assessed against the adjudged liability of the defendant and not in addition to that amount. Because "the fees of the attorneys for the class will be deducted from the amount for which defendant has *already* been held liable, [t]here is no 'surcharge' on the defeated litigant."[151]

B. *Distribution of the Unclaimed Portion to Claiming Class Members*

An alternative disposition of the unclaimed portion of the fund is a pro rata distribution to those class members who have properly filed proofs of claim.[152] Although this solution offers the advantage of distributing the damages to those who have actually been injured by the defendant, it is clearly unacceptable in an action which reaches judgment.[153] First, the proposal constitutes a form of fluid recovery.[154] Fluid or *cy pres* theories of recovery in class actions involve "distribution of the unclaimed portion to a 'next-best' class,"[155] when individual compensation may not be effected at all class members. This problem may occur when all class members cannot be identified or individual damages cannot be ascertained.[156] Although the use of fluid recovery has been advocated under certain circumstances,[157] such an

be provided from the fund. The court appointed a guardian ad litem to protect the interests of the class members in the determination of counsel fees. The court indicated the defendant's absence of interest in the fee determination: "The initial difficulty in setting counsel fees when a guardian is not appointed revolves around the defendants' total indifference to the proceedings. *Having agreed to contribute a fixed sum of money in settlement of the suit, the proportion of the fund allocated to counsel fees is of no moment to the defendants.* Consequently, defendants do not participate in the fee determination proceedings." *Id.* at 383 (emphasis added). *But see* McDonald v. Chicago Milwaukee Corp., 565 F.2d 416, 425 (7th Cir. 1977) (reversion provision is "an interesting solution" to the problem of defendant's indifference by providing "economic incentive" to contest class attorney's fee application).

151. Van Gemert v. Boeing Co., 590 F.2d 433, 441-42 (2d Cir. 1978) (en banc), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327).

152. This argument was advanced by the plaintiffs in Van Gemert v. Boeing Co., 553 F.2d 812, 815 (2d Cir. 1977).

153. *But cf.* Steinberg v. Carey, 470 F. Supp. 471, 474 (S.D.N.Y. 1979) (settlement provided for unclaimed portion to be distributed pro rata to claiming class members).

154. Van Gemert v. Boeing Co., 553 F.2d 812, 815-16 (2d Cir. 1977).

155. *Id.* at 815; *see* Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 156 (1974). Fluid recovery is also an aspect of manageability. The concept provides for substitution of the "class as a whole" for individual class members. Damages are not assessed on an individual basis, but to the class as a whole. *Id.* at 1010; Gordon, *supra* note 136, at 724-25. The concept has often been rejected. Windham v. American Brands, Inc., 565 F2d 59, 72 (4th Cir. 1977); *In re* Hotel Tel. Charges, 500 F.2d 86, 89-90, 92 (9th Cir. 1974); Eisen v. Carlisle & Jacquelin, 479 F.2d at 1018. The Supreme Court has expressly declined to consider the validity of fluid recovery. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 172 n.10 (1974).

156. Miller, *Problems in Administering Judicial Relief in Class Actions Under Federal Rule 23(b)(3)*, 54 F.R.D. 501, 504-08 (1972); *Mass Class Actions*, *supra* note 20, at 894.

157. *See, e.g.*, West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*,

"extraordinary remedy"[158] does not justify distribution to claiming class members because it would result in a double recovery and create a windfall for those who have filed claims.[159] The claiming class members would collect more damages than they were entitled to receive under the judgment. Moreover, such a windfall would be at the expense of the silent class members, whose claims, having been "expropriated," would not receive any compensation, directly or indirectly.[160]

Because these extra damages could be used, at least indirectly, to defray legal fees, such a plan of distribution would conflict with the American Rule. Claimants would not be contributing to the payment of their attorney's fees; instead, the defendant would be paying indirectly for the legal fees of the successful parties.[161]

C. *Escheat to the State*

A third possible disposition is for the unclaimed portion of the fund to escheat[162] to the state under the principles applied to unclaimed property.[163] The escheat of unclaimed damages remaining in the court is justified under both legal and equitable principles. It also affords a solution that can be applied simply.

In order to achieve maximum distribution to the class, the unclaimed fund should remain in the court for a reasonable time[164] while continuing efforts

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440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971) (pharmaceutical overcharges); Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967) (transportation overcharges; state statute).

158. Van Gemert v. Boeing Co., 553 F.2d 812, 816 (2d Cir. 1977).

159. *See id.* at 815-16 (2d Cir. 1977); *Damage Distribution, supra* note 132, at 453.

160. Van Gemert v. Boeing Co., 553 F.2d 812, 815-16 (2d Cir. 1977); *Damage Distribution, supra* note 132, at 453. Distributing unclaimed portions to the claimants might therefore encourage commencement of class actions which leave largely unclaimed damage funds. 553 F.2d at 815-16. Moreover, when claimants have an incentive to give inadequate notice to absent class members, there are potential problems of inadequate representation and infringement on the rights of the absent members. *See id.* at 816. However, these potential abuses by representative plaintiffs may be prevented by proper court supervision. *See* pt. III *infra*.

161. *See* Van Gemert v. Boeing Co., 553 F.2d 812, 816 (2d Cir. 1977). The court stated: "The simple answer to this argument is that, what appellants may not gain directly, [citing Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975)], they may not gain indirectly, and certainly not through such an imperfect vehicle as they have proposed." *Id. See also* Van Gemert v. Boeing Co., 590 F.2d 433, 436 (2d Cir. 1978) (en banc), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327).

162. The term "escheat" refers to the passage of property to the state. It encompasses both ownerless real property and unclaimed personal property. Comment, *Escheat of Intangibles: The Conflicts Problems Remain*, 34 U. Pitt. L. Rev. 671, 671 (1973); *accord*, State v. Phillips Petroleum Co., 212 Ark. 530, 206 S.W.2d 771 (1947); 27 Am. Jur. 2d *Escheat* § 1 (1966); *see* note 172 *infra*. *See generally* Hardman, *The Law of Escheat*, 4 L.Q. Rev. 318 (1888).

163. In Van Gemert v. Boeing Co., 590 F.2d 433 (2d Cir. 1978) (en banc), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327), New York State has asserted a claim for statutory escheat of the unclaimed portion of the class recovery. Brief for Respondent at 23, Van Gemert v. Boeing Co., 590 F.2d 433 (2d Cir. 1978) (en banc), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327).

164. The determination of what constitutes a reasonable time is dependent on the type of fact situation involved. Factors to consider would include the size of the class, the lapse of time from

are made to locate the absent members. The court may wish to appoint a special master for this purpose.[165] The benefits of this procedure are exemplified in *Van Gemert v. Boeing Co.*,[166] in which 45% of the absent class members have been located through the creative efforts of the special master.[167]

When these efforts have been exhausted, the special master should report to the court as to the amount of funds remaining.[168] It is at this point that the pertinent state and federal statutes may be applied.[169] Under federal law,

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the occurrence of the damage, and the length of time elapsed since the initiation of the lawsuit. The time that must elapse to trigger the operation of the unclaimed property and escheat statutes cited in note 72 *infra* is also a factor to consider. *E.g.*, Ala. Code § 35-12-28 (1975) (three years); Ariz. Rev. Stat. Ann. §§ 44-358 to -359 (1967) (seven years); Fla. Stat. Ann. § 716.02 (West 1969) (five years); Idaho Code § 14-508 (1979) (15 years).

165. The court has this power under Fed. R. Civ. P. 53. *See, e.g.*, Van Gemert v. Boeing Co., 590 F.2d 433 (2d Cir. 1978) (en banc), *cert. granted*, 99 S. Ct. 2158 (1979) No. 78-1327. The master's fee is assessed against the fund as an administrative expense. Fed. R. Civ. P. 53.

166. 590 F.2d 433 (2d Cir. 1978) (en banc), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327).

167. Brief for Respondent at 5, Van Gemert v. Boeing Co., 590 F.2d 433 (2d Cir. 1978) (en banc), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327). In Van Gemert, the court-appointed Special Master was authorized to "direct the parties in the necessary ministerial steps to effectuate the Judgment, receive all proofs of claim to participate in the Fund established by the Judgment, pass on the validity of same . . . and in general supervise the administration of the Judgment." *Amicus Curiae* Brief of Special Master at 7, Van Gemert v. Boeing Co., 590 F.2d 433 (2d Cir. 1978) (en banc), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327).

In *Van Gemert*, the Master initially worked with Chase Manhattan Bank, the trustee under the indenture agreement, to locate the debenture holders. A master list was prepared containing the names of all persons who had redeemed their debentures, as well as persons who had corresponded with Chase Manhattan concerning the debentures, and any banks and brokerage houses who had acted for redeeming holders. Notice was sent to persons on the list and to the banks and brokerage houses. Additionally, notice was published once a week for three weeks in *The New York Times* and the national edition of *The Wall Street Journal*.

Subsequently, Boeing published a notice in its quarterly report to stockholders, and research into the Chase Manhattan files continued. A professional search firm was utilized to locate debenture holders whose identities had been established but who had not responded to requests to file notice and proofs of claim. *Id.* at 12-13.

As of July, 1979, the results of these efforts were as follows: $706,600 of claims were filed and processed; proofs of claims were unfiled for $128,700 worth of debentures; $593,600 in debentures redeemed through banks and brokerage houses remained unidentified and unclaimed; $31,200 face amount of debentures were outstanding. *Id.* at 14-15. *See also* SEC v. Golconda Mining Co., 327 F. Supp. 257 (S.D.N.Y. 1971), in which the defendants were forced to disgorge profits realized in violation of 15 U.S.C. § 78j(b) (1976) (§10(b) of the Securities Exchange Act of 1934). The court-appointed trustee's efforts to locate all persons entitled to share in the fund included the "cooperation of SEC investigators, brokers, specialists in the stock, Stock Exchange officials and his own written communications, tracers and newspaper advertisements, . . . correspondence, telephone talks and face-to-face meetings with potential claimants." SEC v. Golconda Mining Co., 327 F. Supp. at 258.

168. *E.g.*, SEC v. Golconda Mining Co., 327 F. Supp. 258, 260 (S.D.N.Y. 1971); *Amicus Curiae* Brief of Special Master at 6, Van Gemert v. Boeing Co., 590 F.2d 433 (2d Cir. 1978) (en banc), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327).

169. *See* statutes cited notes 171-72 *infra*. *But cf.* National Ass'n of Neighborhood Health Centers, Inc. v. Mathews, 551 F.2d 321, 338-39 (D.C. Cir. 1976) (equitable power of court to continue availability of government funds beyond statutory lapse).

unclaimed property in federal courts is temporarily transferred[170] to the United States Treasury.[171] Thereafter, depending on the applicable statute,[172]

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170. "There is never a permanent escheat to the United States." Hodgson v. Wheaton Glass Co., 446 F.2d 527, 535 (3d Cir. 1971); *accord, In re* Moneys Deposited, 243 F.2d 443, 445 (3d Cir. 1957).

171. 28 U.S.C. §§ 2041, 2042 (1976); *see* Hodgson v. YB Quezada, 498 F.2d 5, 6 (9th Cir. 1974); Hodgson v. Wheaton Glass Co., 446 F.2d 527, 535 (3d Cir. 1971); Application of the People, 138 F. Supp. 661, 663 (S.D.N.Y. 1956); State v. Gallaher, 44 N.J. Super. 59, 67-68, 129 A.2d 593, 597-98 (Super. Ct. Ch. Div. 1957).

172. Thirty-two states have adopted the Uniform Disposition of Unclaimed Property Act, while 16 have similar statutes or a general escheat statute applicable to the situation. Two states have tenuous or limited statutes encompassing the situation.

The Uniform Act provides for the escheat of unclaimed funds in state courts. Uniform Disposition of Unclaimed Property Act § 8. Of the 32 states which have adopted the Act, 14 have specifically changed this section to cover federal courts, three have adopted a hybrid section covering funds in federal courts held for their residents, and two have omitted the section entirely. It is arguable that the section suggested in the Uniform Act, adopted in 13 states, covers unclaimed funds in class actions which are in federal courts because of diversity of citizenship. "For purposes of diversity jurisdiction a federal court is, 'in effect, only another court of the State.' " Angel v. Bullington, 330 U.S. 183, 187 (1947) (*citing* Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945)); *accord, In re* Escheat of Monies Deposited, 187 F.2d 131, 134 n.9 (3d Cir. 1951). In federal question cases, these states would have to rely on their general escheat statutes or the section of the Uniform Act which raises a presumption of abandonment for property not otherwise covered by the Act. Uniform Disposition of Unclaimed Property Act § 9. For these 13 states' statutes, see Ariz. Rev. Stat. Ann. §§ 44-358 to -359 (1967); Ark. Stat. Ann. §§ 50-627 to -628 (Supp. 1979); Ga. Code Ann. §§ 85-2009 to -2010 (1978); Hawaii Rev. Stat. §§ 523-8 to -9 (1976); Ill. Ann. Stat. ch. 141, §§ 108-109 (Smith-Hurd 1964 & Supp. 1979); Iowa Code Ann. §§ 556.8-.9 (West Supp. 1979); Act of Apr. 21, 1979, ch. 173, §§ 9-10, 1979 Kan. Sess. Laws 847 (1979) (adopting the Uniform Act); Md. Com. Law Code Ann. §§ 17-111 to -112 (1975); Mont. Code Ann. §§ 70-9-207 to -208 (1978); Okla. Stat. Ann. tit. 60, §§ 657-658 (West 1971); Or. Rev. Stat. §§ 98.336, .342 (1977); R.I. Gen. Laws §§ 33-21-18 to -19 (1970 & Supp. 1979); Wash. Rev. Code Ann. §§ 63.28.140-.150 (1966).

Fourteen states have expressly or implicitly included federal courts in their version of the Uniform Act. Ala. Code § 35-12-28 (1975); Fla. Stat. Ann. § 716.02 (West 1969); Idaho Code § 14-508 (1979); La. Rev. Stat. Ann. § 9:159 (West Supp. 1979); N.H. Rev. Stat. Ann. §§ 471-A:2(II)(c), :9 (1968); N.M. Stat. Ann. § 7-8-10 (1978); N.D. Cent. Code § 47-30-09 (1978); Pa. Stat. Ann. tit. 27, §§ 1-10 (Purdon Supp. 1979); Tenn. Code Ann. § 64-2909 (Supp. 1978); Utah Code Ann. § 78-44-8 (1977); Vt. Stat. Ann. tit. 27, § 1217 (1975); Va. Code § 55-210.9 (1974); W. Va. Code § 36-8-8 (Supp. 1979); Wis. Stat. Ann. § 177.08 (West 1974).

States which have adopted the Uniform Act and omitted the section on unclaimed funds in courts are Nebraska and South Dakota. Escheat could occur in these states under the Uniform Act's previously mentioned miscellany section. Neb. Rev. Stat. § 69-1308 (1976); S.D. Comp. Laws Ann. § 43-41A-9 (Supp. 1979). The remaining three states have adopted statutes that apply to state courts and funds in federal courts if the last known addressee is a resident of that state. Ind. Code Ann. §§ 32-9-1-10 to -11 (Burns 1973 & Supp. 1979); Minn. Stat. Ann. §§ 345.38-40 (West 1972 & Supp. 1978); S.C. Code §§ 27-17-90, -110 (1977).

The remaining 16 applicable statutes are of two types—unclaimed property statutes and general escheat statutes. Of the states with unclaimed property statutes, eleven expressly or implicitly include federal courts within their coverage. Cal. Civil Proc. Code § 1604 (West 1972); Conn. Gen. Stat. Ann. § 3-62b (West Supp. 1979); Ky. Rev. Stat. Ann. §§ 393.020, .068 (Baldwin 1972 & Supp. 1978); Me. Rev. Stat. Ann. tit. 33, § 1311 (Supp. 1978); Mass. Ann. Laws ch. 200A, § 6 (Michie/Law. Co-op 1969); Mich. Comp. Laws Ann. § 567.21 (Callaghan 1967); Miss. Code Ann. § 89-11-1 (1972); Mo. Ann. Stat. § 470.270 (Vernon 1956); N.Y. Aband. Prop.

the state may petition the court[173] for possession of the funds deposited in the Treasury.[174] The constitutionality of such a procedure is firmly established.[175] In *United States v. Klein*,[176] a judgment had been entered in federal district court on behalf of the plaintiffs and other bondholders similarly situated. Certain bondholders had never filed claims for recovery and could not be located.[177] The funds were deposited in the United States Treasury in compliance with the statute.[178] Subsequently, the Escheator of Pennsylvania petitioned a state court for escheat to the state of the funds within the district court's jurisdiction under the statute which covered federal courts located in Pennsylvania.[179]

Law § 1200 (McKinney 1944); N.C. Gen. Stat. § 116A-4 (1978); Ohio Rev. Code Ann. § 169.02(k) (Page 1978). One state includes only state courts. N.J. Stat. Ann. § 2A:15-76 to -77 (West 1952).

Four states would rely on general escheat provisions. Alaska Stat. § 09.50.070 (1973); Del. Code Ann. tit. 12, § 1197 (1974); Tex. Rev. Civ. Stat. Ann. art. 3272 (Vernon 1968); Wyo. Const. art. 21, § 4 and Wyo. Stat. §§ 9-8-603 to -604 (1977).

Nevada has limited statutory coverage relevant to this area of unclaimed funds. The key provision is Nev. Rev. Stat. § 704.550 (1973) (unclaimed refunds from utility overcharges). Colorado has no applicable statute although it implicitly recognizes common law escheat. *See* People v. People, 141 Colo. 459, 462, 349 P.2d 142, 144 (1960) (en banc); Colo. Const. art. IX, § 5 (1974).

The states which could not clearly lay claim to unclaimed funds under the foregoing statutes—Colorado, Nevada, and New Jersey—could rely on the common law doctrine of *bona vacantia*. Under the common law, personal property which no one claimed escheated to the Crown as *bona vacantia*. *See* In re Barnett's Trusts, [1902] 1 Ch. 847, 857; Comment, *Bona Vacantia Resurrected*, 34 Ill. L. Rev. 171, 178 (1939); *accord*, State v. Standard Oil Co., 5 N.J. 281, 297, 74 A.2d 565, 573 (1950), *aff'd*, 341 U.S. 428 (1951). The doctrine could be applied in the case of unclaimed funds as part of the common law heritage.

173. Application is usually made to the federal district court because it was the site of the litigation. *E.g.*, *In re* Moneys Deposited, 243 F.2d 443 (3d Cir. 1957); *In re* Escheat of Monies Deposited, 187 F.2d 131 (3d Cir. 1951); Application of the People, 138 F. Supp. 661 (S.D.N.Y. 1956); *In re* Moneys Deposited, 135 F. Supp. 55 (W.D. Pa. 1955); *In re* Moneys Deposited, 41 F. Supp. 792 (E.D. Pa. 1941). However, a state court can entertain the petition and award the escheat. United States v. Klein, 303 U.S. 276, 279, 282 (1938); Application of the People, 138 F. Supp. 661, 663 (S.D.N.Y. 1956); State v. Goodbar, 297 S.W.2d 525, 527 (Mo. 1957); State v. Gallaher, 44 N.J. Super. 59, 68, 129 A.2d 593, 599 (Super. Ct. Ch. Div. 1957).

174. The fact that the funds are temporarily deposited in the Treasury does not preclude a state from asserting title to the funds under the statutes cited in note 172 *supra*. *E.g.*, *In re* Moneys Deposited, 243 F.2d 443, 445 (3d Cir. 1957); United States v. Klein, 106 F.2d 213, 215 (3d Cir.), *cert. denied*, 308 U.S. 618 (1939); Application of the People, 138 F. Supp. 661, 664 (S.D.N.Y. 1956).

175. *See* United States v. Klein, 303 U.S. 276, 281-82 (1938); Hodgson v. Wheaton Glass Co., 446 F.2d 527, 535 (3d Cir. 1971); *In re* Moneys Deposited, 243 F.2d 443, 445 (3d Cir. 1957); *In re* Moneys Deposited, 41 F. Supp. 792, 793 (E.D. Pa. 1941); State v. Gallaher, 44 N.J. Super. 59, 67, 129 A.2d 593, 598 (Super. Ct. Ch. Div. 1957).

176. 303 U.S. 276 (1938).

177. The case had been brought over twenty years earlier and relief had been granted on grounds that the Pennsylvania Railroad had appropriated the bonds to itself. Brown v. Pennsylvania R. Co., 250 F. 513 (3d Cir. 1918); Pennsylvania Canal Co. v. Brown, 235 F.669 (3d Cir. 1916).

178. This occurred in 1926. United States v. Klein, 303 U.S. 276, 277 (1938). At that time, the statute was designated as 28 U.S.C. § 852.

179. 303 U.S. at 277-79. The suit was initially dismissed on the ground that Pennsylvania

The United States asserted that the state court "decree declaring the escheat [was] an unconstitutional interference with a court of the United States, an invasion of its sovereignty, and [was] an attempt, void under the Fourteenth Amendment, to exercise jurisdiction over the absent bondholders and the moneys, neither of which [were] shown to be within the state."[180] The Supreme Court held for Pennsylvania, stating: "[T]he jurisdiction and possession of the federal district court does not operate to curtail [a] power which the state may constitutionally exercise over persons and property within its territory."[181]

The *Klein* decision has been consistently applied to permit the escheat to states of unclaimed funds within the jurisdiction of the federal courts.[182] Therefore, the lack of constitutional infirmity and the precedents approving such a procedure clearly show that allowing unclaimed funds in both state and federal courts to escheat to the states under the applicable statutes is proper. Moreover, it has specifically been held that although "[a] State may succeed via escheat to the money, . . . the defendant may not claim the unpaid amounts."[183]

Assessment of attorney's fees against the unclaimed portion of the fund that would escheat to the state, under specific statutes or general laws,[184] is in accord with the common fund doctrine and does not violate the American Rule. The award of fees against the total fund must initially be justified under the common fund doctrine, thereby establishing that a benefit has been conferred upon all members of the class. The state's right to the unclaimed funds is not a direct right resulting from an award of damages. It is a derivative right of succession to the rights of the nonclaiming class members;[185] the state stands in the position of the beneficiaries of the action.[186]

"had not yet procured a declaration of escheat, which was deemed necessary in order to perfect the Commonwealth's title, and that the court was without jurisdiction to make such a declaration." *Id.* at 278. Pennsylvania amended its statute to cure these defects and the state courts granted the petition for escheat. *Id.* at 278-79 & n.1.

180. *Id.* at 280-81.

181. *Id.* at 282. The court expressly reserved decision as to the effect of the decree if "the fund's absence from the state, and the absence or nonresidence of the unknown claimants" were shown. *Id.* at 282-83.

182. *See, e.g.,* Hodgson v. Wheaton Glass Co., 446 F.2d 527 (3d Cir. 1971); *In re* Moneys Deposited, 41 F. Supp. 792 (E.D. Pa. 1941); Pokorny v. Wayne County, 322 Mich. 10, 33 N.W.2d 641 (1948); State v. Goodbar, 297 S.W.2d 525 (Mo. 1957); State v. Gallaher, 44 N.J. Super. 59, 129 A.2d 593 (Super. Ct. Ch. Div. 1957); *cf. In re* Moneys Deposited, 243 F.2d 443 (3d Cir. 1957) (bankruptcy case involving conflict with federal statute; court noted *Klein* doctrine); Application of the People, 138 F. Supp. 661 (S.D.N.Y. 1956) (same). *See also* Shackelford v. Pool, 156 Okla. 127, 9 P.2d 756 (1932) (pre-*Klein* case which approved statutory escheat to state of unclaimed deposits for costs paid to clerk of court).

183. Hodgson v. Wheaton Glass Co., 446 F.2d 527, 535 (3d Cir. 1971) (citation omitted) (violation of Fair Labor Standards Act); *accord,* Brennan v. Emerald Renovators, Inc., 410 F. Supp. 1057, 1061 (S.D.N.Y. 1975) (citing *Hodgson*).

184. *See* note 172 *supra.*

185. "The state's rights under [its version of the Uniform] [A]ct are derivative . . . ." Pacific Northwest Bell Tel. Co. v. Department of Revenue, 78 Wash. 2d 961, 964, 481 P.2d 556, 558 (1971) (en banc); *accord,* Bank of Amer. Nat'l Trust & Sav. Ass'n v. Cranston, 252 Cal. App. 2d 208, 60 Cal. Rptr. 336 (1967).

186. "[I]t is contended that the County, asserting escheat, did not claim as successor to the

Escheat to the state under abandoned property statutes is neither a type of fluid recovery[187] nor a *cy pres* remedy.[188] Although it is arguable that escheat is the form of fluid recovery known as distribution to the "next best class," in that the funds escheated to the state will eventually filter down to the general public, the two procedures are distinguishable. The escheat of the unclaimed funds is mandated by statute rather than directed by a court attempting to fashion an alternative remedy for the defendant's wrongdoing when the individual class members cannot be located.[189] Even if one terms the escheat a form of fluid recovery, it is a type mandated by the legislatures of forty-eight states.[190] It is thus arguably an area in which the legislatures have spoken, rather than an area of proscribed judicial activism.[191]

Finally, escheat to the state of the unclaimed property is equitably preferable to unjust enrichment of the defendant[192] or a windfall to the claiming plaintiffs. To the extent that they use state government-funded services, nonclaiming class members, at least indirectly, benefit from the judgment fund.[193]

III. POLICY CONSIDERATIONS

Allowing class action attorneys to claim fees against the total judgment fund may provide significant benefits for the conduct of class action suits. These benefits, however, have been criticized for creating windfalls for attorneys and giving rise to potential abuses in class action administration.[194] However, Rule 23, the American Bar Association Code of Professional Responsibility, and the broad discretion given to the court[195] provide the necessary checks to ameliorate many of the potential problems.

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decedent . . . . We cannot accede to this view." Christianson v. King County, 239 U.S. 356, 370 (1915); *see* Application of the People, 138 F. Supp. 661, 666 (S.D.N.Y. 1956) ("The state's right of escheat is the right of an ultimate heir; it does not assert a separate claim to the fund but stands in the shoes of those so-called unknown creditors who are deemed to have abandoned their claims.") (footnote omitted); Barker v. Leggett, 102 F. Supp 642, 644-45 (W.D. Mo. 1951), *appeal dismissed,* 342 U.S. 900 (1952); State v. Standard Oil Co., 5 N.J. 281, 298, 74 A.2d 565, 573 (1950), *aff'd,* 341 U.S. 428 (1951).

187. *See* Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded on other grounds,* 417 U.S. 156 (1974).

188. *See Mass Class Actions, supra* note 20; *Damage Distribution, supra* note 132.

189. *Compare* Market St. Ry. v. Railroad Comm'n, 28 Cal. 2d 363, 171 P.2d 875 (1946) (court ordered refunds and fare reductions to remedy transit overcharges) *with* Uniform Class Action Act § 15 (court given leeway in fashioning relief and distributing damages; unclaimed funds may be escheated to the state or returned to the defendant, depending on the existence of certain criteria).

190. *See* note 172 *supra.*

191. *See* Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1009-11 (2d Cir. 1973), *vacated and remanded on other grounds,* 417 U.S. 156 (1974).

192. *See Damage Distribution, supra* note 132, at 456.

193. *See* notes 189-91 *supra* and accompanying text.

194. *See, e.g.,* Van Gemert v. Boeing Co., 590 F.2d 433, 442-45 (2d Cir. 1978) (Van Graafeiland, J., dissenting), *cert. granted,* 99 S. Ct. 2158 (1979) (No. 78-1327); Van Gemert v. Boeing Co., 573 F.2d 733, *rev'd en banc,* 590 F.2d 433 (2d Cir. 1978), *cert. granted,* 99 S. Ct. 2158 (1979) (No. 78-1327).

195. The court in class action suits "assumes a more active role than it normally does" in order to "overcome the numerous difficulties that are likely to arise." Dolgow v. Anderson, 43 F.R.D. 472, 481 (E.D.N.Y. 1968).

A. *The Nature of Class Actions Under Rule 23*

The class action was conceived as an equitable device to afford a remedy when people affected by a decree were so numerous that joinder of all as parties would have been impossible or impracticable.[196] The 1966 amendments to Rule 23 expanded the utility of the class action device and simplified its application.[197] The recent trend in the Supreme Court, however, has restricted its use and made it more difficult for plaintiffs to initiate class actions. For example, in 23(b)(3) actions, individual notice must be given to all reasonably identifiable class members,[198] with the plaintiff bearing the expense of identifying and notifying all class members.[199] In addition, each class member must satisfy the jurisdictional minimum in a diversity action.[200] Class actions have been further restricted by the limitation of the private attorney-general rationale as a means of shifting fees to the defendant.[201]

B. *Initiation of Class Action Suits*

Limiting fees to the claimed portion of the recovery fund could destroy class actions. Attorneys would be discouraged from instituting meritorious class actions because of the fear of not recovering a reasonable fee when only a small percentage of class members actually claim.[202] In addition, by limiting fees to the claimed portion, the court would discourage the representative plaintiff from initiating a class action because class damages would be consumed by the class attorney's fees, which are measured by the services rendered to the entire class.[203] In essence, the result is a penalty on the

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196. *See* Kalven & Rosenfeld, *supra* note 10, at 688. "The class action was an invention of equity . . . mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs. . . . By Rule 23 the Supreme Court has extended the use of the class action device to the entire field of federal civil litigation by making it applicable to all civil actions." Montgomery Ward & Co. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948) (citations omitted).

197. Kaplan, *A Prefatory Note*, 10 B.C. Indus. & Com. L. Rev. 497 (1969); Notes of Advisory Comm. on 1966 Amendment to Rules, 39 F.R.D. 69, 98-107 (1966).

198. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974).

199. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978) (identification); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974) (notice).

200. Zahn v. International Paper Co., 414 U.S. 291, 301 (1973) (23(b)(3) actions).

201. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975); notes 68-71 *supra* and accompanying text. Although the Supreme Court has consistently recognized that Rule 23 permits "citizens to combine their limited resources to achieve a more powerful litigation posture," Hawaii v. Standard Oil Co., 405 U.S. 251, 266 (1972), the recent rulings may effectively eliminate those large class actions where none of the numerous plaintiffs have the resources to bear the prohibitive costs of notice and identification. Manual for Complex Litigation § 1.43, at 60-61 n.70 (1978).

202. Van Gemert v. Boeing Co., 590 F.2d 433, 440-41 (2d Cir. 1978) (en banc), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327).

203. *Id.* This concern is exemplified in *Van Gemert*. At the time of the *Van Gemert IV* decision, less than $2 million of the judgment was claimed, 590 F.2d 433, 436 n.5, 441, and the attorneys were seeking a fee of approximately $2 million. Van Gemert v. Boeing Co., 573 F.2d at 735 n.3. If this fee request is judicially deemed reasonable, the claiming class members would be left with virtually no recovery if the fees were assessed only against the claimed portion.

individual client who brings an action as a class suit, as well as on the other claiming members whose shares are disproportionately reduced by the fees assessed. Although a potential plaintiff may feel he will obtain a larger recovery for himself by bringing his suit as a class action,[204] this factor may be outweighed by the consideration that if it were brought as a separate action, the plaintiff would not be charged such exorbitant fees. Charging only the claimed portion of the judgment may "leave each plaintiff bereft of benefits" while creating a true " 'lawyer's lawsuit' ".[205] On the other hand, deduction of fees from the shares of the nonclaiming members will neither injure the nonclaimants[206] nor provide a windfall to the claimants who must still contribute their pro rata shares.

The opposing issues bear heavily on the fear of encouraging the initiation of class action suits which generate attorney's fees. Arguably, allowing attorneys to claim against the total judgment fund may encourage suits in which the attorney need not consider the likelihood of claimants filing. Once a favorable judgment has been entered, the attorney will receive his share regardless of the number of class members who actually receive notice of the action or consider it worthwhile to participate.[207] It is arguable that this method of awarding fees may promote improper solicitation of clients or maintenance of lawsuits.[208] However, the fitness of the attorney for the class relates generally to the issue of adequacy of representation.[209] Any such problems may be resolved by the exercise of judicial discretion at the certification stage.[210] Although concern has been expressed that the class action device could become a vehicle for improper solicitation by attorneys,[211] it has been rare for courts to deny class status to plaintiffs because of the attorney's misconduct.[212] This position supports the view that the devices available to monitor such abuses have been effective.[213]

204. *See* 3 H. Newberg, *supra* note 2, § 6935, at 1208 (1977).

205. Van Gemert v. Boeing Co., 590 F.2d 433, 441 (2d Cir. 1978) (en banc), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327).

206. *Id.* at 439 n.14.

207. Courts often do not require proofs of claim until after the defendant's liability or a settlement fund is established. *See, e.g.*, B. & B. Inv. Club v. Kleinert's Inc., 62 F.R.D. 140, 148-49 (E.D. Pa. 1974) (fear that plaintiffs may draw bargaining strength for settlement purposes from claims which will not be presented). It has been argued that the failure of class claimants to file should not be a basis for denial of class certification because of unmanageability. Under that view, having unclaimed funds is a better alternative than permitting the defendant to keep the gains. *See* Kohn & Kaplan, *The Antitrust Class Suit: A Manageable Instrument For Social Justice*, 41 Antitrust L.J. 292, 297 (1972); *Damage Distribution, supra* note 132, at 448.

208. Labowitz, *supra* note 4, at 640-44; *Reimbursement From Beneficiaries, supra* note 50, at 957.

209. Fed. R. Civ. P. 23(a)(4), *supra* note 9. *See generally Ethical Obligations, supra* note 11.

210. Korn v. Franchard Corp., [1970-1971 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,845 (S.D.N.Y. 1970), *rev'd on other grounds*, 456 F.2d 1206 (2d Cir. 1972).

211. *See Empirical Study, supra* note 5, at 1154, 1156-57. It is worthy of note that "interviews reflected little evidence that the named plaintiffs in the class actions under study had been solicited." *Id.* at 1156.

212. One court found only two such cases. Halverson v. Convenient Food Mart, Inc., 458 F.2d 927, 931-32 (7th Cir. 1972) (citing Taub v. Glickman, 14 Fed. R. Serv. 2d 847 (S.D.N.Y. 1970), and Korn v. Franchard Corp., [1970-1971 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,845 (S.D.N.Y. 1970), *rev'd on other grounds*, 456 F.2d 1206 (2d Cir. 1972)).

213. One such device would prohibit the counsel for the class from communicating with

C. *Class Action Administration*

An award of fees from the total fund may raise two problems affecting the nature of the relationship established between the attorney and the class members. First, if the method used to assess fees causes the interests of the attorney to conflict with those of the class members, potential problems such as inadequate representation of and insufficient notice to absent class members may arise.[214] If only the claimed portion is charged with attorney's fees, at the point when a sufficient number of claimants have appeared to cover the judicially-determined reasonable fee, the attorney's interest in notifying the remaining members may wane. The claimants, however, still have an interest in notifying class members in order to lessen their contribution. If, however, the fees are assessed against the total amount of the judgment, it is arguable that neither the claimants nor the attorneys are concerned with notification. Claimants are assessed their pro rata shares and attorneys will receive their fees no matter how many class members claim.

Second, an attorney's impetus to settle suits may be affected. In addition to encouraging early settlement, attorneys may settle for less to be assured of getting the full amount of the fee "off the top" regardless of whether the members claim.[215] Conversely, assessing fees against the total fund may have the detrimental effect of discouraging settlements. The attorney, knowing that he can collect against the total judgment regardless of the number of claimants, may continue the suit even after class members have lost interest.[216]

Rule 23, however, provides sufficient checks to manage these potential abuses. As indicated, it is within the court's discretion to award what it deems to be a reasonable fee.[217] The court may deny fees if the attorney has abused his position.[218] The likelihood of success is one factor to be considered in

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potential class members until the time for opting out to the court's notice has passed. Labowitz, *supra* note 4, at 642. *See also* ABA Canons of Professional Ethics No. 28; ABA Code of Professional Responsibility, DR 2-104(1), 2-104(5) (1976).

214. *See* Fed. R. Civ. P. 23(d)(2), *supra* note 9.

215. *See* Van Gemert v. Boeing Co., 590 F.2d 433, 441 (2d Cir. 1978) (en banc), *cert. granted,* 99 S. Ct. 2158 (1979) (No. 78-1327).

Because there is a danger of compromising the rights of the class members, substantial fees determined prior to court approval of the settlement may open the settlement itself to challenge. Therefore, the settlement agreement will often provide for the defendant to pay reasonable counsel's fees as determined by the court. It has been contended that arrangements in settlement agreements providing that fees be paid separately by the defendant "over and above the settlement" should not be permitted. Manual for Complex Litigation § 1.46, at 91-92 (1978). There is an inherent conflict of interest problem where the plaintiff's attorney must negotiate for counsel fees at the same time as for a settlement fund. Instead, all amounts to be paid by the defendants are properly part of the settlement fund and should be known and disclosed at the time the fairness of the settlement is considered. *See* Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977); Barnett v. Pritzker, 73 F.R.D. 430, 432 (S.D.N.Y. 1977); Smith, *supra* note 7.

216. This consideration must be tempered by the fact that the attorney is assuming the risk that the litigation will be unsuccessful.

217. *See* notes 35-44 *supra* and accompanying text. Although it is within the court's discretion to award fees, it must provide a statement of reasons supporting the amount granted. *See, e.g.,* Sabala v. Western Gillette Inc., 516 F.2d 1251, 1269 (5th Cir. 1975), *vacated on other grounds,* 431 U.S. 951 (1977).

218. *See* Blank v. Talley Indus., Inc., 390 F. Supp. 1, 7 (S.D.N.Y. 1975).

setting fees; therefore, part of an award may be attributed to an attorney who wins against great odds. As a safeguard, the court, in setting fees, may also consider the number of members likely to claim, although it should not be limited to that amount.

The court has several discretionary powers which enable it to protect the interests of absentee class members. The appointment of a special master to oversee the notice and claims process aids in prevention of abuses.[219] Rule 23(d) provides for intervention by the court if any question arises regarding the inadequacy of representation by the representative party or attorney.[220] Moreover, notice is sent to class members indicating the amount of fees requested.[221] Absent members may then object to the fee petition. Additionally, under Rule 23(e), the court's approval is required to dismiss or compromise a class action, and notice must be given to all members of the class.[222]

CONCLUSION

The common fund doctrine arose to prevent nonparty beneficiaries from reaping the benefits of an action without contributing to its costs. This rationale has retained its vitality through almost one hundred years of application in both class and nonclass actions. A limitation on the source of adequate compensation to an attorney for a class who has procured a judgment in its favor would unjustly penalize both the attorney and the claiming class members, when the entire class has benefited from the creation of the judgment. Continued effectuation of the goals of the class action device necessitates application of the doctrine to the full amount of the class's recovery in order to satisfy the aspirations of both the class action and the common fund doctrine.

Anita R. Golbey

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219. Fed. R. Civ. P. 53; *see Amicus Curiae* Brief of Special Master, Van Gemert v. Boeing Co., 590 F.2d 433 (2d Cir. 1978), *cert. granted,* 99 S. Ct. 2158 (1979) (No. 78-1327) (discussing master's actions aimed at locating and notifying class members); note 167 *supra.*

220. Note 9 *supra.*

221. *In re* Antibiotics Antitrust Actions, 410 F. Supp. 680, 689 (D. Minn. 1975); 3 H. Newberg, *supra* note 2, § 6960, at 1238-39. It has been held that an attorney may not collect fees from those class members who have not been adequately represented in the fee assessment. National Ass'n of Regional Medical Programs, Inc. v. Mathews, 551 F.2d 340 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 954 (1977). *See also* Haas v. Pittsburgh Nat'l Bank, 77 F.R.D. 382, 383 (W.D. Pa. 1977) (court appointed a guardian ad litem to represent class members' interests in the determination of reasonable attorney's fees).

222. Fed. R. Civ. P. 23(e); note 9 *supra.* For factors which the court should consider in deciding on the reasonableness of a proposed settlement in a class action suit, *see, e.g.,* City of Detroit v. Grinnell Corp., 495 F.2d 448, 462-63 (2d Cir. 1974); Young v. Katz, 447 F.2d 431 (5th Cir. 1971); Norman v. McKee, 431 F.2d 769 (9th Cir. 1970), *cert. denied,* 401 U.S. 912 (1971); Stull v. Baker, 410 F. Supp. 1326, 1332-35 (S.D.N.Y. 1976); Blank v. Talley Indus., Inc., 64 F.R.D. 125, 129 (S.D.N.Y. 1974).