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Due Process and the Putative Class: The Importance of Pre-Merits Certification Under Federal Rule 23, Class Actions

Eileen J. Newhouse

NOTES

DUE PROCESS AND THE PUTATIVE CLASS: THE IMPORTANCE OF PRE-MERITS CERTIFICATION UNDER FEDERAL RULE 23, CLASS ACTIONS

INTRODUCTION

Rule 23(c)(1) of the Federal Rules of Civil Procedure requires that "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." The court must determine whether the prerequisites of rule 23(a)—numerosity, common questions of law or fact, typicality of claims or defenses, and adequacy of representation—are met.[1] In addition, the action must fall within one of the three subsections of rule 23(b).[2] These three subsections

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1. FED. R. CIV. P. 23(a) provides that:

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.

2. FED. R. CIV. P. 23(b) provides that:

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 ac-

authorize a class action to proceed if an individual suit would foreclose the rights of others or create conflicting standards of conduct for the defendant, if the party opposing the class has acted on grounds that apply to the class as a whole making injunctive or declaratory relief appropriate, or if the class action would be the superior means of adjudicating a controversy involving a predominance of common questions. Although courts in most circuits give lip service to the "mandate" of rule 23(c)(1),[3] there are numerous decisions that give effect to a putative class judgment even though the class was never expressly certified,[4] certified after trial,[5] or certified on appeal.[6] In these situations, the goals of the class action procedure, protection of the interests of absent class members and achievement of a binding classwide judgment, are not adequately met.[7] Certification establishes the contours of the lawsuit by defining the class, thus facilitating settlement negotiations. Certification also protects the defendant from one-way intervention, a practice in which absent members of the putative class intervene only if the decision is favorable to the class. Most important, however, is the protection of due process rights that certification affords to ab-

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tions; (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.

3. *E.g.*, Shipp v. Memphis Area Office, Tenn. Dept. of Employment Security, 581 F.2d 1167, 1170 n.5 (6th Cir. 1978), *cert. denied*, 440 U.S. 980 (1979); Satterwhite v. City of Greenville, 578 F.2d 987, 998 (5th Cir. 1978), *vacated and remanded on other grounds*, 445 U.S. 940 (1980); Jimenez v. Weinberger, 523 F.2d 689, 697 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); Katz v. Carte Blanche Corp., 496 F.2d 747, 758 (3d Cir. 1974).

4. Jackson v. Hayakawa, 605 F.2d 1121, 1126 n.7 (9th Cir. 1979), *cert. denied*, 445 U.S. 952 (1980); Johnson v. General Motors Corp., 598 F.2d 432, 434 (5th Cir. 1979); United States v. East Baton Rouge Parish School Bd., 594 F.2d 56, 58 (5th Cir. 1979); Senter v. General Motors Corp., 532 F.2d 511, 521 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976).

5. *E.g.*, Alexander v. Aero Lodge No. 735, 565 F.2d 1364, 1369 (6th Cir. 1977), *cert. denied*, 436 U.S. 946 (1978); Gore v. Turner, 563 F.2d 159, 166 (5th Cir. 1977).

6. Rodriguez v. East Texas Motor Freight Sys., Inc., 505 F.2d 40, 52 (5th Cir. 1974), *vacated and remanded*, 431 U.S. 395, 403 (1977) (Supreme Court recognized but did not reach the issue of whether a court of appeals should ever certify a class).

7. Rule 23 was amended, in part, to develop "measures that might be taken during the course of the action to assure procedural fairness." Advisory Committee's Notes, 39 F.R.D. 98, 99 (1966). *See generally* Note, *Developments in the Law - Class Actions*, 89 HARV. L. REV. 1319, 1323 (1976) [hereinafter cited as *Developments*]; Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the 'Class Action Problem'*, 92 HARV. L. REV. 664, 669 (1979).

sent class members by ensuring that the court has assessed the adequacy of representation.

Due process normally requires notice and an opportunity to be heard. In the class action procedure, due process is satisfied if absent class members are adequately represented in the lawsuit.[8] Thus, rule 23 demands that the court consider the adequacy of representation prior to, or as a condition of, certification.[9] The rule also requires the court to take an active role in overseeing the class suit.[10] This oversight function requires some familiarity with the

8. Hansberry v. Lee, 311 U.S. 32, 42 (1940).

9. FED. R. CIV. P. 23(a).

10. FED. R. CIV. P. 23(c), (d), and (e) provide that:

(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 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 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.

(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 pleading 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

diversity and dimensions of the interests of absent class members. That familiarity can be gained most easily through consideration of the class maintainability question. By assessing the factors set out in rule 23 before trial on the merits, the court not only protects absent members of the putative class, but also facilitates the stability of the judgment.[11] An order defining and certifying a class makes collateral attack less likely and, if the judgment is attacked, allows the reviewing court to assume that representation was initially considered adequate. Consideration may then focus on the representation during the lawsuit. This review of the representation in the prior suit must be made on the basis of the trial record. However, since the interests of absent class members will not necessarily appear in the trial record, there is no guarantee that their interests will receive any consideration at all.[12]

The first part of this note explores the certification process, the policy reasons for preferring certification before a decision on the merits, the determination of what is "as soon as practicable," and the court's role in ensuring that certification takes place. The next section considers the due process rights of absent class members and the violation of those rights that occurs when express certification does not take place. Lastly, various alternatives for the protection of absent class members are examined in the light of due process concerns and the need for economy and stability in the courts.

THE CERTIFICATION PROCESS

The class action, an invention of equity, serves a variety of purposes.[13] It prevents multiplicity of suits, thus economizing time and effort,[14] preserves the constitutional rights of broad classes of people,[15] secures a remedy for the small claimant and for the unin-

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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.

11. *See* notes 63-65 *infra* and accompanying text.

12. *See* notes 122-25 *infra* and accompanying text.

13. WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, *Civil* § 1751 (1973) [hereinafter cited as WRIGHT & MILLER].

14. Advisory Committee's Notes, 39 F.R.D. at 102; Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 185 (1974) (Douglas, J., dissenting in part); Windham v. American Brands, Inc., 565 F.2d 59, 69 (4th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978).

15. *E.g.*, Jones v. Diamond, 519 F.2d 1090, 1097 (5th Cir. 1975).

formed,[16] protects the rights of those reluctant to file individual suits against defendants with whom they have continuing relationships,[17] and enhances the judicial focus on public policy issues derived from individual factual situations.[18] To fulfill these purposes, the interests of absent members of the class must be carefully considered since those members' due process rights depend on the representation they receive at the hands of the named representative. Rule 23 was drafted, in part, to ensure that those interests are adequately considered.[19] To achieve the goals of the class action procedure, it is important that the procedures embodied in the rule be observed. The initial, and often crucial, procedure is that of certification.[20]

The Need for Certification

Certification is often essential to the viability of the proposed class action. If certification is denied, and the plaintiffs' claims are too small to warrant individual suits, the defendant has, for all practical purposes, won the suit. Individual suits for minimal amounts will not justify the expense of further litigation.[21] On the other hand, if certification is granted, the potential liability in a class proceeding takes on frightening dimensions, thereby increasing the settlement value for the plaintiff.[22] The defendant is faced with the possibility of tremendous costs whether in damages to members of a class under rule 23(b)(3), or in the revision of its policies and procedures under a rule 23(b)(2) action for declaratory or injunctive relief. Certification, at a point early in the proceeding, then, is important to an efficient resolution of the lawsuit.[23]

16. *E.g.*, American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 551-52 (1974); Samuel v. University of Pittsburgh, 538 F.2d 991, 997 (3d Cir. 1976).

17. *E.g.*, Haynes v. Logan Furniture Mart, Inc., 503 F.2d 1161, 1164-65 (7th Cir. 1974); Duncan v. Tennessee, 84 F.R.D. 21, 27 (M.D. Tenn. 1979).

18. *E.g.*, Watson v. Branch County Bank, 380 F. Supp. 945, 957 (W.D. Mich. 1974), *rev'd on other grounds*, 516 F.2d 902 (6th Cir. 1975).

19. *See* note 7 *supra*.

20. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980). "A district court's ruling on the certification issue is often the most significant decision rendered in these class action proceedings."

21. *E.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 157, 161 (1974). Petitioner's individual claim was only $70. "No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all."

22. Jimenez v. Weinberger, 523 F.2d at 698.

23. Advisory Committee's Notes, 39 F.R.D. at 99. *Developments, supra* note 7, at 1427, catalogs some of the dangers inherent in early certification: [T]he decision may be made without enough information, the courts are reluctant to later alter an inappropriate class definition, an overbroad class may be named by the plaintiff in order

Protecting the Absent Class Member. The primary justification for certification lies in the desire to protect the interests of absent class members. Almost all contemporary class actions are based on a statute or the Constitution.[24] Thus, they inevitably affect the rights and interests of individuals who are not actually before the court.[25] Complex relief, fashioned largely through bargaining and negotiation, is often the only appropriate remedy.[26] The representation of the various interests that will be affected by the decree becomes a crucial safeguard for the rights of absent class members.[27] Although rule 23 does not delineate the means to protect these interests, the findings necessary for class certification ensure at least a threshold level of correspondence between the substantive claims and interests of the class representative and other class members. Rule 23(a) requires that the named representative meet the prerequisites of numerosity, commonality, typicality and adequacy of representation. These findings ensure that the issues to be resolved on the merits are framed with respect to the entire class rather than the particular circumstances of the named plaintiffs.

A judicial finding that the named plaintiff will adequately represent the class is the most obvious protection resulting from the

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to toll the statute of limitations and minimize costs, an underinclusive class may be named to facilitate quick settlement. All of these dangers, with the possible exception of the second, which arises no matter when certification occurs, can be avoided if the court requires some type of evidentiary hearing to evaluate the class concerns.

24. Recent statistics reveal the following breakdown in the number of class action suits filed by nature of suit:

	FY 1979		FY 1980	
Total Cases	2,084	100.0%	1,568	100.0%
Statutory	1,782	85.5%	1,340	85.5%
Contract	120	5.7%	63	4.0%
Property	8	0.4%	6	0.4%
Tort	150	7.2%	142	9.0%
Other	24	1.2%	17	1.1%

1980 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS.

25. *See* Watson v. Branch County Bank, 380 F. Supp. at 957; Chayes, *The Role of the Judge in Public Litigation*, 89 HARV. L. REV. 1281, 1294 (1976).

26. *See, e.g,* the school desegration plans involved in Calhoun v. Cook, 362 F. Supp. 1249 (N.D. Ga. 1973), *aff'd*, 522 F.2d 717 (5th Cir. 1975); and Norwalk CORE v. Norwalk Bd. of Educ., 298 F. Supp. 213 (D. Conn. 1969), *aff'd*, 423 F.2d 121 (2d Cir. 1970).

27. Scott v. University of Del., 601 F.2d 76, 83 (3d Cir. 1977), *cert denied*, 444 U.S. 931 (1979). "[T]here remains a duty upon the court to consider carefully the requirement of fair and adequate protection in view of the serious consequences of *res judicata* in class actions."

certification determination. Although based on foresight and only determinable after the fact, a judicial finding of adequate representation illustrates that the due process rights of absent class members are being considered by the court.[28] This finding of adequate representation can later be amended or altered if it becomes obvious that the representation in fact is not adequate.[29] Alternatively, the court of appeals can effectively decertify the class if it finds that the representation in the trial court was inadequate.[30] The tenets of judicial economy suggest that amending is the more effective approach. However, in some instances, the failure to adequately represent the absent members of the class does not become apparent until the appellate stage of the litigation.[31] In either case, adequacy of representation should be a principal concern of the court.

The court that allows a trial to proceed without certifying the class assumes that representation is adequate during trial and that the named plaintiff's claims are typical of the class claims. When the court subsequently holds absent class members bound to the decision in the putative class suit, these assumptions are generally accepted without question.[32] The due process rights of absent class members are often completely ignored. At a minimum, the court in a subsequent proceeding is under a duty to assess the adequacy of representation in the prior putative class proceeding. The court must view the representative's conduct of the entire litigation to ascertain if the interests of the class were "vigorously and tenaciously protected."[33] Although the reviewing court may be able to determine adequacy of representation from the trial record in the initial proceeding, rule 23 requires the trial court to make an express determination at a point early in the litigation that the named plaintiff will adequately represent the class. Furthermore, the trial court should not abdicate its responsibility to oversee the progress of the lawsuit and to alter, amend, or decertify the class if events so dictate.[34]

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28. Advisory Committee's Notes, 39 F.R.D. at 99.

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

30. FED. R. CIV. P. 23(d).

31. Gonzales v. Cassidy, 474 F.2d 67, 76 (5th Cir. 1973).

32. *E.g.*, Jackson v. Hayakawa, 605 F.2d at 1126; Johnson v. General Motors Corp., 598 F.2d at 435.

33. Gonzales v. Cassidy, 474 F.2d at 75.

34. FED. R. CIV. P. 23(c)(1); *see* Advisory Committee's Notes, 39 F.R.D. at 99 ("The amended rule . . . refers to measures which can be taken to assure the fair conduct of these actions"); Scott v. University of Del., 601 F.2d at 83; Neely v. United States, 546 F.2d 1059, 1070 (3d Cir. 1976).

Failure to certify before a decision on the merits may lead to problems for several reasons. Absent members of the putative class may rely on the supposed class representative, only later to find, because of the statute of limitations[35] and/or mooting of the named plaintiff's claim,[36] that they have lost their cause of action.[37] Several circuits have tried to remedy the problem of the so-called "headless" class action by remanding the case to the trial court with instructions to retain the action on its docket until a new plaintiff comes forward to represent the class.[38] This procedure has the effect of tolling the statute of limitations on behalf of the putative class members.[39]

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35. American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974). Wheeler, *Predismissal Notice and Statutes of Limitations in Federal Class Actions After American Pipe & Construction Co. v. Utah*, 48 S. CAL. L. REV. 771, 804, discusses the slight probability of actual reliance by a putative class member. *See* note 50 *infra*.

36. *E.g.*, Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 430 (1976); Board of School Comm'rs of Indianapolis v. Jacobs, 420 U.S. 128, 130 (1975). *See* Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative*, 1974 DUKE L.J. 573, 599. "[I]ssuance of a 23(c)(1) certification provides a primary line of demarcation between those actions which can continue to exist after the dismissal of the individual representative and those which cannot."

In Deposit Guar. Nat'l Bank v. Roper, 445 U.S. at 333; and United States Parole Comm'n v. Geraghty, 445 U.S. 388, 402, (1980), the Court held that the putative class representative has standing to appeal a denial of certification even if the representative's own claim has been mooted. The Court stated that class action proceedings involve two issues: [T]he merits of the claim and the named plaintiff's entitlement to represent the class. However, these decisions are limited to the context of appealing a denial of certification. United States Parole Comm'n v. Geraghty, 445 U.S. at 401-03. When the putative class representative has failed to seek certification, any entitlement to represent the class is questionable at best and should not survive the mooting of an individual claim on the merits. Thus, if there is no decision on class certification to appeal, the mooting of the putative representative's claim does not fall within the *Roper/Geraghty* rationale and results in the mooting of the entire class claim.

37. An unrealized right of action, lost when an absent class member's claim is barred by res judicata, has never been thought of as property in the constitutional sense. The only right the individual loses is a right to bring action himself. The remedy afforded by the class action procedure is considered a constitutionally sufficient alternative protection of the individual's underlying substantive claim. Only if the class judgment was substantively unconstitutional or the representation inadequate would the individual class member retain an individual cause of action. *Developments*, *supra* note 7, at 1404 & n.73.

38. *E.g.*, Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377, 1383 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 429 (8th Cir. 1970). *Cf.* Vanguard Justice Soc'y, Inc. v. Hughes, 471 F. Supp. 670, 677 (D. Md. 1979) (trial court decertified class and retained action on its docket for thirty days).

39. *See* Note, *Satterwhite v. City of Greenville and Breathing New Life into the Headless Title VII Class Action*, 32 STAN. L. REV. 743 (1980); Comment, *Goodman v. Schlesinger and the Headless Class Action*, 60 B.U.L. REV. 348 (1980).

Protecting the Defendant. While early certification is a vital concern to the putative class, it is also necessary from the defendant's point of view. Delayed certification risks unfairness to the defendant who wastes time and resources preparing to rebut class questions which may never arise.[40] Pre-merits certification also protects the defendant against one-way intervention, a practice the framers of amended rule 23 were seeking to avert.[41] Under old rule 23, and today, prior to certification of the class, an adverse decision on the merits will collaterally estop the defendant from denying liability to any putative class member who intervenes or files a subsequent suit. However, if the defendant prevails, a decision on the merits binds only the named plaintiffs.[42] The recent Supreme Court decision in *Parkland Hosiery Co. v. Shore*[43] to some degree undermines the continued validity of this argument as a current justification for early certification. *Parklane* endorsed the offensive use of collateral estoppel as long as the parties had a full and fair opportunity to litigate the issues in a prior suit.[44] However, the law of collateral estoppel still requires certain prerequisites to be met before allowing offensive use of the doctrine. One of those requirements is that the suit could not have been brought as part of a prior proceeding.[45] There is clearly no endorsement of piecemeal litigation in *Parklane.* The decision reinforces the need for stability of judgment and wide reaching res judicata effect that, in the class action context, can most easily be achieved through early certification and adequate representation.[46]

Facilitating Settlement. In addition to protecting the parties, early certification is also essential to facilitate settlement negotiations. Failure to certify makes settlement negotiations much more dif-

40. *See* Note, *Due Process Rights of Absentees in Title VII Class Actions - The Myth of Homogeneity of Interest,* 59 B.U.L. REV. 661 (1979) [hereinafter cited as Note, *Due Process Rights of Absentees*]. However, cost to the defendant is not adequate grounds for denying certification. *E.g.,* Neely v. United States, 546 F.2d at 1069; Samuel v. University of Pittsburgh, 538 F.2d at 996.

41. Advisory Committee's Notes, 39 F.R.D. at 105; Jimenez v. Weinberger, 523 F.2d at 700. The authors of *Developments* contend that the 1966 rulemakers' concern for broad res judicata effect was misplaced. If the legal climate is static, *stare decisis* will adequately protect the defendant. *Supra* note 7, at 1393.

42. Likewise, the defendant who moves for summary judgment before the class is certified assumes the risk that a favorable judgment will not afford protection from subsequent suits by putative class members. *E.g.,* Roberts v. American Airlines Inc., 526 F.2d 757, 763 (7th Cir. 1975), *cert. denied,* 425 U.S. 951 (1976).

43. 439 U.S. 322 (1979).

44. *Id.* at 332.

45. *Id.* at 331.

46. *Id.* at 329-30.

ficult.[47] The defendant may be unwilling to pursue any kind of settlement until the contours of the lawsuit are judicially defined since settlement with the named plaintiffs only, if the suit is never certified, does not protect the defendant from future litigation. Once the suit is certified, judicial oversight of settlement proposals is triggered.[48] This is an added protection for the benefit of absent members of the putative class. Settlements which benefit only the named plaintiffs should be viewed with suspicion since they indicate a failure to take seriously the fiduciary responsibility of representative status.[49]

Class Has No Legal Significance Until Certified. An additional justification for pre-merits certification lies in the doctrine that a class does not have a separate legal existence until the point of certification.[50] Certainly there is a controversy between individuals prior to that point, but until the class is certified, the controversy

47. Jimenez v. Weinberger, 523 F.2d at 700. "[T]he failure to certify may make it impossible for the parties to conduct meaningful settlement negotiations because of uncertainty with respect to both the magnitude of the contingent liability and the burdens of going forward with a trial."

48. FED. R. CIV. P. 23(e).

49. *E.g.*, Johnson v. General Motors Corp., 598 F.2d at 438.

50. Shelton v. Pargo, Inc., 582 F.2d 1298, 1304 (4th Cir. 1978) ("[I]t is the actual certification of the action as a class action under 23(c) and (a) which alone gives birth to 'the class as a jurisprudential entity'"); Shipp v. Memphis Area Office, 581 F.2d at 1171; Satterwhite v. City of Greenville, 578 F.2d at 994.

Although Professors Moore, Wright and Miller advocate the position that treats a putative class action as a class action until certification is granted or denied, 3B MOORE'S FEDERAL PRACTICE ¶ 23.80 (1980); WRIGHT & MILLER, *supra* note 13, at § 1797, this treatment causes problems in the area of pre-certification settlement. Treating the pre-certified action as a class action does protect any purported class members who rely on the filing of the lawsuit and consequently do not file an individual suit based on the same claim. This approach also lessens the attraction of pre-certification settlement. However, the slight possibility of actual reliance (requiring knowledge of the lawsuit, understanding of class procedure, determination that the individual falls within the purported class, knowledge of existing individual cause of action, plans to file suit on that claim, claim sizeable enough to interest an attorney and cover costs, failure to learn of dismissal, court approval of the class, and actual qualification as a member of the class) is outweighed by the undue burden placed on the plaintiff who is required to give notice to members of a judically unapproved class whose interests may not ultimately have been represented in the lawsuit. Wheeler, *supra* note 35, at 804. Requiring notice of pre-certification settlement clearly limits the effectiveness of the class action rule. Even if the required notice is limited to members of a proper class, the parties will have to litigate the class definition issue despite a desire to end the litigation. *Id.* Settlement of the individual named plaintiff's claims will not preclude putative class members from filing subsequent suits. Although failing to require notice makes settlement more attractive, the parties are free to weigh the advantages and disadvantages (i.e., less cost and time in court vs. broad res judicata effect).

between the defendant and the class has not been judicially recognized or defined as a litigable concern. If certification is the legal point of origin of class claims, any decision prior to that point should logically extend only to the named plaintiffs.

Certification thus defines the contours of the lawsuit. It protects the interests of absent class members by ensuring adequacy of representation, shields the defendant from the harassment of one-way intervention, and makes settlement negotiations more efficacious. For these purposes, certification is most effective if accomplished as soon as practicable after the commencement of the suit.

What is "As Soon As Practicable"?

"[T]he time when a hard determination is 'practicable' as to the propriety of a class action will obviously vary from case to case."[51] Courts have postponed a determination on certification pending completion of discovery,[52] determination of the effect of a consent decree in another court,[53] and termination of court supervised settlement negotiations.[54] Although there is no fixed time sequence for certification of a class, the decision on the class action question should rarely be made on the basis of the pleadings or affidavits of the parties alone.[55] Nor should a preliminary hearing on the merits precede the

51. Frankel, *Some Preliminary Observations Concerning Civil Rule* 23, 43 F.R.D. 39, 41 (1967). Judge Frankel adds that "it may not be possible to decide even tentatively near the outset of the case whether it should continue as a class action. It may be possible only to formulate a program of discovery and study under as stringent a timetable as the circumstances will allow, and then to reschedule the subject for determination under (c)(1)." *E.g.*, Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270, 274 (10th Cir. 1977) (rule 23 "does not exact hard and fast timing . . . but calls for as early a determination as the circumstances permit"); Jones v. Diamond, 519 F.2d at 1098 ("practicality . . . must be judged on the basis of factors such as the detail in the pleadings, the amount of discovery pending and completed, the nature of the suit, fairness to the parties, and judicial efficiency"); Katz v. Carte Blanche Corp., 496 F.2d at 758 ("as soon as practicable does not necessarily mean at the outset of the lawsuit"). *But cf.* Jimenez v. Weinberger, 523 F.2d at 697 (although rule 23(c)(1) allows discretion, it "certainly implies . . . that such a determination should be made in advance of the ruling on the merits").

52. Robinson v. Penn Central Co., 58 F.R.D. 436, 437 (S.D.N.Y. 1973); Gore v. Turner, 563 F.2d at 166.

53. Rodgers v. United States Steel Corp., 508 F.2d 152, 160 (3d Cir.), *cert. denied*, 423 U.S. 832 (1975).

54. American Finance Sys. Inc. v. Harlow, 65 F.R.D. 94, 99 (D. Md. 1974).

55. Marcera v. Chinlund, 565 F.2d 253, 255 (2d Cir. 1977) ("denial of class certification should not ordinarily be made without giving the plaintiffs an evidentiary opportunity"); Walker v. World Tire Corp. Inc., 563 F.2d 918, 921 (8th Cir. 1977) ("if the pleadings themselves do not conclusively show whether the Rule 23 requirements are

decision on class determination.[56] The Supreme Court stated that "such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it."[57] The Court also noted that the "procedure is directly contrary to the command of subdivision (c)(1)" and might result in substantial prejudice to the defendant.[58]

In most cases, an evidentiary hearing on the class question is necessary before trial on the merits.[59] Although rule 23(c)(1) does not require a hearing, the court must be familiar with the interests and circumstances of absent class members to oversee possible settlements and to ensure adequate representation.[60] This familiarity can most effectively be achieved through use of the evidentiary hearing. Both the named plaintiff and the court have a duty to attempt to uncover all relevant interests of absent members of the putative class.[61] A cursory examination of the pleadings generally will not satisfy this duty and, if the judgment is challenged, may be inadequate on review as a basis for determining whether the interests of absent class members were adequately represented.[62] An evidentiary hearing, on the other hand, will provide the reviewing court with the information necessary to assess the adequacy of representation in the first proceeding. Thus, class wide res judicata effect can also be achieved more effectively if there is an evidentiary hearing on the class maintainability question.

Certification is intended to give "clear definition to the action"[63] and, in order to do so effectively, must precede any decision on the merits of the claim.[64] Without a judicial delineation of

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met, the parties must be afforded the opportunity to discover and present documentary evidence on the issue"); Jones v. Diamond, 519 F.2d at 1099.

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

57. *Id.* at 177.

58. *Id.* at 178.

59. *See* note 55 *supra.*

60. Scott v. University of Del., 601 F.2d at 83.

61. *Id.*; Grigsby v. North Miss. Med. Center, Inc., 586 F.2d 457, 462 (5th Cir. 1978); National Ass'n of Regional Med. Programs, Inc. v. Mathews, 551 F.2d 340, 344-45 & n.31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 954 (1977). "Responsibility for ensuring adequacy of representation must devolve first of all on the trial court since it is the only person in a position to objectively assess the typicality of interests between the named representatives and the absent class members."

62. *See* notes 122-25 *infra* and accompanying text.

63. Advisory Committee's Notes, 39 F.R.D. at 102.

64. American Pipe & Constr. Co. v. Utah, 414 U.S. at 547. "The 1966 amendments were designed . . . to assure that members of the class would be identified before trial on the merits." *See* Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEORGETOWN L.J. 1123, 1141 (1974). In this study, sixty attorneys involved in

the contours of the litigation, the progress of the lawsuit is impeded. Settlement negotiations become impractical. Discovery on class questions may or may not be appropriate and therefore may not be begun for fear of wasting time and resources. The language of rule 23(c)(1) indicates that the framers intended certification to precede any consideration of the merits of the claim. If "[a]n order . . . may be altered or amended *before the decision on the merits*"[65] the initial certification order must necessarily be entered before trial on the merits. Although actions under rule 23(b)(3) clearly must be certified pre-merits in order to give effect to the notice and opt-out provisions, rule 23(c)(3) may be interpreted to allow certification of a (b)(1) or (b)(2) class along with the entry of judgment.[66] However, this interpretation is inconsistent with the concept of certification as soon as practicable as well as the allowance for alteration or amendment before trial on the merits.[67] Furthermore, the Supreme Court has endorsed the requirement that certification take place before trial on the merits.[68]

The Court's Role

Although it is evident that certification should precede any consideration of the merits, determining who is responsible for initiating class determination proceedings presents the courts with some difficulty. Courts differ as to whether they should take an active role in determining *sua sponte* whether an action brought as a class suit should be certified and allowed to proceed as a class action. Some courts place the burden squarely on the named plaintiff and dismiss the class claims if the plaintiff does not seek certification in a timely manner.[69] To achieve any economy of time, however,

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class action litigation in the D.C. Circuit were interviewed. Both plaintiff and defendant attorneys felt that postponing certification unnecessarily delayed the disposition of the case. *But cf. Response to the Rule 23 Questionnaire of the Advisory Committee on Civil Rules*, 5 CLASS ACT. REP. 3, 24, 28 (1978) [hereinafter cited as *Rule 23 Questionnaire*], where sixty-three percent of those responding* indicated a desire to see rule 23 amended to allow a preliminary hearing on the merits and fifty-one percent favored allowing post-trial certification.

*Questionnaires were sent to 1800 judges, practitioners, and teacher/scholars who had adjudicated, litigated or published about rule 23. Responses were received from 195 judges and 180 attorneys. *Id.* at 3.

65. FED. R. CIV. P. 23(c)(1) (emphasis added).

66. FED. R. CIV. P. 23(c)(2); Jimenez v. Weinberger, 523 F.2d at 697-98.

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

68. East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. at 405 ("careful attention to the requirements of Fed. Rule Civ. Pro. 23 remains nonetheless indispensable").

69. Green v. Philbrook, 576 F.2d 440, 446 (2d Cir. 1978) (Neither party moved for certification within 90 days of filing as required by the local rule. Held not abuse of

this procedure requires a local rule limiting the time within which a motion for certification must be made.[70] Although some courts

discretion to dismiss motion made after trial); International Soc'y for Krishna Consciousness v. State Fair of Tex., 480 F. Supp. 67, 68 n.1 (N.D. Tex. 1979) (failure to comply with local rules for certification requires the court to strike class allegations); Coffin v. Secretary of HEW, 400 F. Supp. 953, 956 (D.D.C. 1975), *appeal dismissed*, 430 U.S. 924 (1977). *But cf.* Gray v. Greyhound Lines, East, 545 F.2d 169, 173 n.11 (D.C. Cir. 1976) ("It is not clear that dismissal of the class allegations for failure to comply with the local time limit is consistent with Rule 23(c)(1), Fed. R. Civ. P., which may require the court to determine the merits of the claim to representative status."); Gilinsky v. Columbia Univ., 62 F.R.D. 178, 179 (S.D.N.Y. 1974) (The "drastic remedy . . . [of] dismissal of the action as a class action, is not warranted" by minimal delay).

70. On the 94 districts in the federal court system, 35 have local rules regarding class actions. S.D. ALA. LOCAL CIV. R. 9; E.D. CAL. LOCAL CIV. R. 124; N.D. CAL. LOCAL R. 200-6; S.D. CAL. LOCAL R. 200-4; D.C. LOCAL R. 1-13; M.D. FLA. LOCAL R. 4.04; N.D. FLA. LOCAL CIV. R. 17; S.D. FLA. LOCAL CIV. R. 19; N.D. GA. LOCAL R. 220; S.D. GA. LOCAL CIV. R. 14; N.D. ILL. LOCAL CIV. R. 22; S.D. ILL. LOCAL R. 28; S.D. IND. LOCAL R. 7; E.D. LA. LOCAL R. 2.12; MD. LOCAL R. 20; N.D. MISS. LOCAL R. C-7; S.D. MISS. LOCAL R. 18; S.D.N.Y. LOCAL CIV. R. 11A; W.D.N.Y. LOCAL R. 8; N.D. OHIO LOCAL CIV. R. 3.01; S.D. OHIO LOCAL R. 3.9; E.D. OKLA. LOCAL R. 17c; W.D. OKLA. LOCAL R. 17; OR. LOCAL R. 17; E.D.PA. LOCAL R. 45; M.D. PA. LOCAL R. 701.07; W.D. PA. LOCAL CIV. R. 34; R.I. LOCAL R. 30; M.D. TENN. LOCAL CIV. R. 14; N.D. TEX. LOCAL R. 10.2; S.D. TEX. LOCAL R. 6; VT. LOCAL R. 11; E.D. WASH. LOCAL R. 7; W.D. WASH. LOCAL R. CR 23; V.I. LOCAL R. 23.

Twenty-nine of these rules deal with the timing of certification. Over half occur in the following form:

> In any case sought to be maintained as a class action, within ____ days after the filing of a complaint, unless this period is extended upon motion for good cause appearing, the plaintiff shall move for a determination under Rule 23(c)(1) of the Federal Rules of Civil Procedure, as to whether the case is to be maintained as a class action. In ruling upon such a motion, the Court may allow the action to be so maintained, may disallow and strike the class action allegations, or may order postponement of the determination pending discovery or such other preliminary procedures as appear to be appropriate and necessary under the circumstances. Whenever possible, where it is held that the determination should be postponed, a date will be fixed by the Court for renewal of the motion.

E.g., S.D. FLA. LOCAL CIV. R. 19; S.D. IND. LOCAL R. 7.

The period of time within which the motion must be filed covers the following range:

Time Within Which Motion Must Be Made	No. of Rules
Immediately	2
45 days after answer filed	1
60 days after complaint filed	3
60 days after answer filed	1
60 days after pleading asserting claim filed	3
90 days after complaint filed	15
90 days after pleading asserting claim filed	1
120 days after case is at issue	1
6 months after party's first pleading	2
	29

dismiss class claims for failure to move for certification even without a local rule, generally there has been a much longer lapse between the filing of the complaint and the motion for certification.[71] Other courts consider the delay in making a motion for certification insignificant and ignore the lapse, proceeding with certification or the merits of the claim.[72]

Rather than dismissing class claims or ignoring the named plaintiff's failure to move for certification, the better remedy, exercised by a number of courts, requires the court to take an active role by setting up an evidentiary hearing *sua sponte* on the question of class certification.[73] Since rule 23(c)(1) imposes a requirement on the court to determine whether the action may be maintained as a class action, that requirement is necessarily independent of any motion by the parties for or against certification.[74] The *sua sponte* procedure fulfills the requirements of rule 23 since the interests of absent class members are, to that extent, protected by the pre-trial determination of adequate representation.[75] In addition, the *sua sponte* hearing is the most effective means of assuring judicial economy. The other alternatives make subsequent suits more probable. Dismissal of class claims makes it more likely that a subsequent class suit will be filed, thus ultimately requiring the court to consider the same class questions. On the other hand, ignoring the failure to move for certification makes subsequent attack on the validity of the class judgment more feasible since there was no initial determination that the named plaintiff would adequately represent the interests of absent class members.

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71. Sanders v. Faraday Lab., Inc., 82 F.R.D. 99, 102 (E.D.N.Y. 1979) (delay of four years, eleven months); Lyon v. State of Ariz., 80 F.R.D. 665, 667 (D. Ariz. 1978) (delay of over three years).

72. Castro v. Beecher, 459 F.2d 725, 731 (1st Cir. 1972) (reversed denial of certification based on untimely motion); Gilinsky v. Columbia Univ., 62 F.R.D. at 179.

73. *E.g.*, Shipp v. Memphis Area Office, 581 F.2d at 1170 n.5 ("court has duty to certify whether requested to do so or not"); Satterwhite v. City of Greenville, 578 F.2d at 993 n.7 ("The court is required to conduct such a hearing without motion from counsel"); Gore v. Turner, 563 F.2d at 165 ("court has an independent obligation . . . even if neither party moves for a ruling").

74. Advisory Committee's Notes, 39 F.R.D. at 104 (Rule 23(c)(1) "requires the court to determine"); Frankel, *supra* note 51, at 40-41 ("It may not be acceptable to leave with the parties control over the timing of a (c)(1) determination" citing statute of limitations and notice problems).

75. *E.g.*, Shelton, v. Pargo, Inc., 582 F.2d at 1306 (court has the "power and the duty . . . to see that the representative party does nothing . . . in derogation of the fiduciary responsibility"); Jones v. Diamond, 519 F.2d at 1098-99 ("court bears a substantial management responsibility over the conduct of the litigation which arises the moment the class is requested").

Although the determination on the maintainability of the class under rule 23(c)(1) must be made by the court, the method of judicial compliance is critical to the interests of absent class members. The rule contemplates that "the court shall determine *by order*"[76] whether the class is to be maintained. It further provides that the "*order* . . . may be conditional, and may be altered or amended before the decision on the merits."[77] This emphasis on an order indicates that the framers of the rule envisaged an express determination on the certification question. Recent decisions giving effect to implicit determinations of class certification fall outside the ambit of the rule.[78] Implicit certification occurs when there is no express finding on the maintainability of the action as a class proceeding. The action is brought as a class action and is treated as a class proceeding in that relief is often classwide. However, there is no judicial determination that the requirements for class treatment set out in rule 23 have been met. Courts have attempted to justify implicit certification by arguing that, if the court treats an action as a class proceeding and the action was brought as a class proceeding, to deny classwide effect elevates form over substance.[79] This form/substance theory subverts the goals of rule 23, adequate representation of absent class members and broad res judicata effect, in favor of judicial convenience. Class actions become class actions merely because the court says so.[80] Without an express ruling on the viability of a class proceeding, it becomes less likely that the court and the named representative adequately considered the interests of absent members of the class.[81] In addition, the requirement that adequacy of representation be considered throughout the course of the lawsuit does not receive the preeminence necessary to protect the interests of absent class members.

Although the Supreme Court has stated that uncertified class claims are outside of its jurisdiction if the claims of the named plain-

76. FED. R. CIV. P. 23(c)(1) (emphasis added).

77. *Id.* (emphasis added).

78. Jackson v. Hayakawa, 605 F.2d at 1126 & n.7; Johnson v. General Motors Corp., 598 F.2d at 435; Jimenez v. Weinberger, 523 F.2d at 696.

79. Jackson v. Hayakawa, 605 F.2d at 1126 n.7. The evidence actually only supports the fact that the action was treated as a class, not that it should have been.

80. Johnson v. General Motors Corp., 598 F.2d at 439 (Fay, J., concurring).

81. Lack of an express finding becomes especially critical if damage claims are involved. Without a class definition, notice cannot be sent. The result is either a test case approach or a series of collateral attacks on the putative class judgment. *See* notes 138-40 *infra* and accompanying text. Neither of these alternatives furthers the goal of judicial economy envisioned by the drafters of rule 23.

tiffs are mooted,[82] the Court has not yet ruled on the issue of the uncertified class in the context of res judicata.[83] Since the Court's jurisdiction is not in issue, a different question is presented. However, implicit certification violates the letter of rule 23 if not also the spirit. In the area of notice, the Court has rejected any attempts to avoid literal compliance with "the express language" of rule 23, even if inordinate cost prevents the suit from proceeding.[84] The Court has also stated that a preliminary hearing on the merits violates the "command" of subdivision (c)(1).[85] The Court's reliance on the literal language of the rule indicates a sensitivity to the goals sought to be achieved by the framers of the rule and a deference to their perceived notions of the best methods of achieving those goals. Thus, failure to comply with the "unambiguous requirement[s]" of the rule makes it less likely that these goals will be achieved.[86]

There is a definite lack of concensus among the courts on the question of the court's role in the certification process and the validity of implicit certification. Although rule 23 imposes certain requirements on the court, those requirements have been construed to cover a broad range of interpretations of the rule. In the final analysis, the purposes for adopting rule 23 must provide the bases for assessing the requirements of the rule. Thus, protection of the rights of the absent class members and achievement of classwide res

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82. *E.g.*, Pasadena City Bd. of Educ. v. Spangler, 427 U.S. at 429; Baxter v. Palmigiano, 425 U.S. 308, 310-11 n.1 (1976); Board of School Comm'rs of Indianapolis v. Jacobs, 420 U.S. at 130.

83. Although the majority opinions in the cases cited in note 82 *supra* indicate that strict compliance with rule 23 is required, in *Baxter*, Justices Brennan and Marshall limit the holding to the mootness context. "*Jacobs* applies only to the determination of mootness, and did not deal with whether, for example, a court of appeals may treat an action as a class action in the absence of formal certification by the district court." 425 U.S. at 325 n.1 (Brennan, J., with Marshall, J., concurring in part and dissenting in part). In *Jacobs*, Justice Douglas would not have dismissed the action since the suit was brought as a class and certification was intended and took place by means of informal statement. 420 U.S. at 131 (Douglas, J., dissenting). He conceded the positive results of enforcing strict compliance but felt it unjust to penalize the litigants for the district court's failure to comply with the "technical requirements" of the rule. *Id.* at 133.

84. Eisen v. Carlisle & Jacquelin, 417 U.S. at 175-76 ("individual notice to identifiable class members is . . . an unambiguous requirement of Rule 23"). *Cf.* Shapiro v. Doe, 396 U.S. 488, 489 (1970). The appeal was dismissed for failure to comply with a Supreme Court rule requiring docketing within 60 days of filing of a notice of appeal. The filing was two days late and one of those days was a Sunday. Justice Black dissented, considering this a technical defect that did not rise to jurisdictional proportions and could be waived by the court when the interests of justice required. *Id.*

85. Eisen v. Carlisle & Jacquelin, 417 U.S. at 177.

86. *Id.* at 176.

judicata effect emerge as the often antithetical objects of the court's attention. To some extent, the disparity in results can be explained on the basis of the court's preference for one goal over another. However, since the absent member of the class has no alternatives if the court invokes res judicata to foreclose access in a subsequent suit, the achievement of classwide res judicata effect should be conditioned on, and secondary to, the adequate protection of the due process rights of the absent class members.

DUE PROCESS AND THE PUTATIVE CLASS

Due Process in the Representative Action

Although class actions are without question "unique creatures," they are also a form of representative action. Thus, due process concerns in class proceedings must be considered in the light of due process concerns in representative actions.[87] Ordinarily, due process requires notice and an opportunity to be heard. In the class action context, since all of the members of the class are not before the court, adequate representation by the named plaintiff may serve as a substitute for actual notice or opportunity to be heard. In theory, if there is actual notice, adequacy of representation is immaterial since due process has been fulfilled. If there is no notice, due process is satisfied if there is adequate representation.[88] However, *Hansberry v. Lee*[89] sets out what has come to be accepted as the definitive statement on due process in the class action context. "There has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it."[90] Adequate representation, according to *Hansberry*, is the touchstone of due process. While actual notice may suffice to protect the interests of absent class members, it must be considered as a part of the overall requirement that representation be adequate.[91] Rule 23

87. Johnson v. General Motors Corp., 598 F.2d at 439. *See generally* Maraist and Sharp, *Federal Procedure's Troubled Marriage: Due Process and the Class Action*, 49 TEXAS L. REV. 1, 2 (1970).

88. *See* Maraist and Sharp, *supra* note 87, at 9.

89. 311 U.S. 32 (1940).

90. *Id.* at 42. *See* Maraist and Sharp, *supra* note 87, at 6-9, for an argument that, since *Hansberry* was not a class action, it is not good authority for this premise. In addition, adequate representation was essential to the due process rights of those not before the court only because no notice was given. *Id.*

91. *E.g.*, Chmieleski v. City Prod. Corp., 71 F.R.D. 118, 147-49 (W.D. Mo. 1976). The named representative's abandonment of class damage claims raised fundamental questions concerning the adequacy of representation. However, since notice would be given, absent class members would be free to opt out or to intervene.

expands this theory by requiring that representation be adequate even if actual notice is given to the members of the class, although the court's inquiry is generally more exacting when notice has not been given.[92]

Adequate representation of the class is crucial since absent class members are precluded, by virtue of their membership in the class, from bringing individual suits based on the same cause of action. Access to the court is foreclosed to these class members under the rule of res judicata that prohibits splitting a cause of action. This rule requires the plaintiff to present all theories and grounds for recovery in one action.[93] The would-be plaintiff, as a member of the class, has presented part of a claim and is therefore precluded from instituting a second suit on any other aspect of the claim.[94] However, this foreclosure of the subsequent suits of absent class members presumes that representation was adequate in the class proceeding.

Adequacy of Representation

Courts have espoused various standards for determining what constitutes adequate representation. The Supreme Court has stated that initially the named plaintiff must be a member of the class to be represented, that is, the named plaintiff must have the same interest in the litigation that the class has, and must have suffered the same injury.[95] This is merely another way of requiring that the plaintiff's claim be typical of those of the entire class.[96] Several cir-

92. Grigsby v. North Miss. Med. Center, Inc., 586 F.2d at 461; Duncan v. Tennessee, 84 F.R.D. at 27.

93. *E.g.*, United States v. California and Or. Land Co., 192 U.S. 355, 358 (1904) ("The whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim, . . . he cannot divide the grounds of recovery."); A. Musto Co., Inc. v. Satran, 477 F. Supp. 1172, 1176 (D. Mass. 1979). A cause of action may be split in one of three ways: 1) as to theories of recovery, 2) types of relief, or 3) arithmetically, that is, one claim divided more or less arbitrarily to include certain elements of damages in one action and others in a second action. Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339, 343-45 (1948). Justifications for the rule lie in a desire to prevent double recovery, to protect the defendant from repeated litigation and to promote the stability of judicial determinations. *Id.*

94. *E.g.*, International Prisoners Union v. Rizzo, 356 F. Supp. 806, 810 (E.D. Pa. 1973) (prior class suit for declaratory and injunctive relief precluded subsequent class suit for damages). *Contra*, Cotton v. Hutto, 577 F.2d 453, 454 n.4 (8th Cir. 1978) (citing Jones-Bey v. Caso, 535 F.2d 1360 (2d Cir. 1976)). However, in *Jones-Bey*, the plaintiff never received any notice of the prior suit. In addition, the class action was settled without reference to damage claims.

95. East Texas Motor Freight Sys. Inc. v. Rodriquez, 431 U.S. at 403.

96. FED. R. CIV. P. 23(a)(3).

cuits employ the "nexus" standard, which has been defined as "a tying or binding together, a fastening, joining, an interlacing, entwining, clasping."[97] However, the courts have not set forth the characteristics that distinguish a sufficient from an insufficient nexus. A third standard concentrates on two factors: The plaintiff's attorney must be qualified, experienced and capable of conducting the proposed litigation, and the plaintiff must not have interests antagonistic to those of the class.[98] Since the court is unlikely to question the qualifications of members of the bar, the second factor acquires more significance. However, absence of antagonism, without more, does not ensure adequate representation. Absence of antagonism does not ensure a homogeneity of interest nor even agreement on the proper form of remedy.[99] A fourth standard also consists of two components: The plaintiff's attorney must vigorously and tenaciously represent the class and, throughout the litigation, the judge must continually measure the quality of representation against the vigorous and tenacious criteria.[100] Unfortunately, this standard encourages late certification. In addition, there are no tests to show what violates the vigorous and tenacious standard other than failure to appeal[101] and prosecution of the named plaintiff's claims at the expense of the class claims.[102] The lack of consistent standards for assessing the adequacy of representation only serves to compound the problems of absent class members. The courts, in the interest of stability of judgment, are generally reluctant to find inadequate representation absent a blatant violation of the rights of the class. Thus, the absent class members are often held bound to a judgment where their due process rights were more subtly infringed, but infringed nonetheless.

Due Process and Implicit or Post-Merits Certification

Whatever the test or combination of standards used to assess the adequacy of representation, it is crucial to the interests of absent members of the class that the initial determination be made prior to the consideration of the merits of the class claim. Early certification is necessary for two reasons: An initial determination that

97. Wells v. Ramsay, Scarlett & Co., Inc., 506 F.2d 436, 437 n.3 (5th Cir. 1975); Rich v. Martin Marietta Corp., 522 F.2d 333, 340 (10th Cir. 1975).

98. Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 247 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975).

99. *See* Note, *Due Process Rights of Absentees*, note 40 *supra*.

100. Grigsby v. North Miss. Med. Center, Inc., 586 F.2d at 457.

101. Gonzales v. Cassidy, 474 F.2d at 75.

102. Grigsby v. North Miss. Med. Center, Inc., 586 F.2d at 461.

the named plaintiff will adequately represent the class provides for at least a minimal correspondence between the interests of absent members of the class and the interests of the named plaintiffs and also assures that the court is aware of the interests of the absent class members. An implicit or post-merits certification does not fulfill either of these goals. Implicit certification clearly violates the express command of rule 23(c)(1) that a court should determine as soon as practicable whether an action may be maintained as a class. In addition, this procedure, more afterthought than design, often ignores the essential element of class action due process—the adequacy of representation.

In *Bing v. Roadway Express, Inc.*,[103] the court concluded that certification had implicitly occurred if the suit was brought as a class, class relief was sought, class relief was given, the parties and the court believed that the action was a class and no objection was registered below.[104] Two later cases, *Jackson v. Hayakawa*[105] and *Johnson v. General Motors Corp.*,[106] condensed these requirements to find that implicit certification had occurred if the case was in fact a class action and was described and treated as such by the court.[107] Whether or not a case is in fact a class action appears to require consideration of the prerequisites for class certification found in rule 23(a). However, in neither *Jackson* nor *Johnson* did the court in-

103. 485 F.2d 441 (5th Cir. 1973).

104. *Id.* at 447.

105. 605 F.2d 1121 (9th Cir. 1979).

106. 598 F.2d 432 (5th Cir. 1979).

107. 605 F.2d at 1126; 598 F.2d at 435. Implicit certification has been recognized in some circuits, *e.g.*, Jackson v. Hayakawa, 605 F.2d at 1126; Johnson v. General Motors Corp., 598 F.2d at 434; Horn v. Associated Wholesale Grocers Inc., 555 F.2d at 274 n.1, and denied in others, *e.g.*, Roberts v. American Airlines, Inc., 526 F.2d 757, 763 (7th Cir. 1975) ("we cannot countenance a patent violation of Rule 23"); Davis v. Romney, 490 F.2d 1360, 1366 (3d Cir. 1974) ("Relief cannot be granted to a class before an order has been entered determining that class treatment is proper"). Apparently as an alternative to the concept of implicit certification, the *Jackson* court also cited Montana v. United States, 440 U.S. 147 (1979), to support the proposition that the courts are no longer bound by rigid definitions of parties. 605 F.2d at 1126. However, the facts of *Montana* do not warrant application to the absent members of a putative class. In *Montana*, the Court noted that the United States, though not a party, had a sufficient "laboring oar" in the state court litigation to justify application of estoppel to its proceeding in the later federal action. 440 U.S. at 155. Use of the term "sufficient" laboring oar implies a case by case analysis of the amount of control or involvement exercised by the absent party in the prior suit. In the context of class actions, the role of absent class members is clearly minimal at most and normally nonexistant. Even if the interests of absent class members are represented, those interests are not the primary power behind the lawsuit as the United States' interests were in *Montana*.

dicate any consideration of those four requirements. Instead, the requirement that the case be a class action in fact was found satisfied if the action was brought as a class proceeding. It is axiomatic that a suit brought as a class and treated as a class does not necessarily meet the requirements of rule 23. This interpretation of rule 23 ignores the specific requirements of subdivisions (a) and (b) enumerating the prerequisites for the maintainability of the class. Analysis of these prerequisites is particularly important to protect the due process rights of absent class members.

Since the due process rights of absent class members depend on the adequacy of representation in the class proceeding, in any case where a class judgment is collaterally attacked, the adequacy of representation should always be carefully assessed before access to the court is foreclosed. When the adequacy of representation in the prior suit is not carefully assessed, the due process rights of absent class members are impaired and become a secondary consideration instead of the primary focus of the court's inquiry. For instance, *Carrillo v. Hayakawa*[108] involved a challenge to the constitutionality of several state statutes following the arrests of demonstrating college students. The action for declaratory relief was never expressly certified and resulted in summary judgment for the defendant. Members of the putative class brought a subsequent action for damages in which the adequacy of representation in *Carrillo* was not fully addressed by the court.[109] Plaintiffs' arguments that there were different parties involved and that, since *Carrillo* was never certified, only the named parties should be bound by the judgment, were rejected by the court. Since *Carrillo* was brought as a class and treated as a class, the court held that the judgment would be binding on the class.[110]

The court further indicated that virtually all of those arrested were represented by counsel in *Carrillo*, although 400 of the students were represented by the public defender.[111] Representation by counsel, although relevant, clearly is not prima facie proof of adequate representation. However, it is clear that the court's decision was based on the merits of the putative class members' claims rather than on any analysis of the adequacy of representation. Under this theory, the putative class members are bound, even if

108. No. C-50808 (N.D. Cal., June 27, 1969).
109. Jackson v. Hayakawa, 605 F.2d at 1125.
110. *Id.* at 1126.
111. *Id.*

representation in the prior suit was inadequate, unless they can also show that there is a substantial likelihood that they will prevail on the merits. Much as with determining the propriety of a class action initially, "the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met."[112] Although this violation of due process is arguably justified by a concern for stability of judgment and judicial economy, the same result can be reached if the court holds that the putative class members are not bound by the prior judgment, but decides against them on the merits. Other class members will not sue since the collateral estoppel and *stare decisis* effect of the second suit militate against their success. Concern for stability of judgment and judicial economy are thus satisfied without violating the due process rights of absent members of the putative class.

The court's treatment of the adequacy of representation in *Johnson* demonstrates another aspect of the lessening of importance that results from the failure to consider fully the due process rights of absent class members. In *Johnson*, the named plaintiff, part of an uncertified class in a prior suit,[113] challenged the binding effect of that suit on three grounds: The class was never formally certified, there was no notice, and there was inadequate representation.[114] Johnson did not argue that the failure to certify indicated inadequate representation so the court easily disposed of that challenge by citing precedent to uphold implicit certification.[115] The court next considered the failure to give notice. Although the prior class was never expressly certified, the court referred to the action as one appropriate under rule 23(b)(2) and indicated that, even though notice is not mandatory under (b)(2), due process concerns must still be considered.[116] Johnson received no notice of the suit that would later bar his damage claim. However, instead of analyzing notice as a part of adequate representation, the court considered it as a sufficient basis for satisfying due process all by itself.[117] Rule 23 requires adequate representation regardless of whether notice is given.[118] Thus,

112. Eisen v. Carlisle & Jacquelin, 417 U.S. at 178 (quoting Judge Wisdom in Miller v. Mackey International, 452 F.2d 424 (5th Cir. 1971)).

113. Rowe v. General Motors Corp., 4 E.P.D. ¶ 7715 (N.D. Ga. 1969), *rev'd and remanded*, 457 F.2d 348 (5th Cir. 1972).

114. Johnson v. General Motors Corp., 598 F.2d at 434.

115. *Id.* at 435.

116. *Id.* at 436.

117. *Id.* at 437.

118. *See* notes 87-88 *supra* and accompanying text.

although the court in *Johnson* accurately decided that the plaintiff's claims should not be barred, it avoided any assessment of the touchstone of the plaintiff's due process rights, the adequacy of representation. The court's difficulty apparently lies in the nebulous concept of "adequacy", compounded by the reluctance to set aside a class judgment.[119]

The second concern of the class action procedure, in addition to protecting the rights of absent class members, is to assure the binding effect of the class judgment. However, binding effect is predicated on adequate representation. Failure to certify a class proceeding makes it less likely that that concern was carefully considered. Therefore, a class that is not certified pre-merits is more likely to be collaterally attacked by challenges to the adequacy of representation. In *Johnson*, for instance, the plaintiff, an absent member of an implicitly certified class, challenged the class judgment on the basis of inadequate representation, because the named plaintiffs in the putative class suit failed to seek classwide monetary relief.[120] The three named plaintiffs settled their individual claims for $1,000 each. Johnson's subsequent challenge could have been avoided if the court had certified the action. A consideration of the class claims would have revealed the existence of the back pay claims of the absent members of the class. Thus, if the court had upheld its duty to assess the adequacy of representation, the named plaintiffs may have been found inadequate representatives and the class claims may have been struck in the trial court proceeding, thus avoiding the subsequent challenge to the decision. On the other hand, if the class had been certified, rule 23(e) would require that all settlements be approved by the court and that notice of the proposed settlement be sent to all class members. Thus, absent class members could have challenged the settlement of the individual claims in the initial proceeding without resort to a subsequent challenge to the class judgment.

Rule 23 clearly requires the court to make a determination on the maintainability of the class proceeding. Failure to make an ex-

119. The court may uphold a part of the judgment (*e.g.*, for injunctive relief) and allow a subsequent proceeding on a remaining aspect (*e.g.*, damages). Johnson v. General Motors Corp., 598 F.2d at 438. The problem with this type of bifurcated proceeding is that the issues have already been decided without input from the absent class members. This method merely allows them to claim their relief. The court has determined whether such relief is appropriate and how to determine the remedy. Due process requires notice and an opportunity to be heard at a meaningful time. *See* Note, *Due Process Rights of Absentees*, *supra* note 40, at 685.

120. Johnson v. General Motors Corp., 598 F.2d at 434.

press decision on certification should not be considered a harmless error that post-trial certification will easily rectify. An appellate court's approval of implicit certification is, in essence, post-trial certification. Until that point, there has been no express judicial ruling on the propriety of a class proceeding or class relief. Even under the most lenient of standards, certification on appeal is not "as soon as practicable."[121] In addition, although it is argued that delay in certification does not necessarily prejudice the interests of absent parties, if the adequacy of representation is challenged, the appellate court must make its decision on the basis of the trial court record.[122] Since there was no hearing on the certification question, any decision on the propriety of the class proceeding must be made solely on the basis of the trial record and pleadings.[123] Although the trial record is not necessarily an insufficient basis for the decision, it is quite probable that the interests of some absent members of the putative class were never introduced in the proceeding.[124] Unless these absent class members challenge the judgment, the court will not have cause to consider their interests. If never challenged, perhaps these interests are not that crucial, but by failing to consider them, the trial court has not upheld its duty to ensure adequate representation of absent class members.[125] It is also possible that the absent members of the putative class were not able to

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

122. Jimenez v. Weinberger, 523 F.2d at 699.

123. Satterwhite v. City of Greenville, 578 F.2d at 998 & n.16 ("Error cannot be corrected on appeal if there has been no certification hearing at which the facts necessary for adequate review have been determined"); Walker v. World Tire Corp., Inc., 563 F.2d at 921 ("we conclude, on the basis of the trial record, that appellant is neither a member of the aggrieved class nor a suitable class representative"). See Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 HARV. L. REV. 589 (1974) for a discussion of the problems involved in *de novo* review of the adequacy of representation. The author suggests that the reviewing court should look to the conduct of both counsel and judge, and should find inadequate representation only if a defect in the representation by one of the two went uncorrected by the other. *Id.* at 603-04. This is precisely the problem presented by the failure to certify. However, the author adds the requirement that the defect in representation be prejudicial to absent members of the class. *Id.* This theory requires the absent members of the class to prove that they are likely to prevail on the merits before the court will call the representation in the prior suit inadequate. This deference to the goal of classwide res judicata effect is uncalled for in light of the protections afforded by the doctrines of *stare decisis* and collateral estoppel. *See* notes 111-12 *supra* and accompanying text.

124. *E.g.*, Jackson v. Hayakawa, 605 F.2d at 1125; Johnson v. General Motors Corp., 598 F.2d at 434.

125. American Pipe & Constr. Co. v. Utah, 414 U.S. at 552. "Rule 23 is not designed to afford class action representation only to those who are active participants in or even aware of the proceedings in the suit."

secure counsel to represent their interests in challenging the class judgment.[126] Courts are generally reluctant to strike a class decision and, since class actions under rule 23(b)(1) or (b)(2) normally do not involve large damage claims, the probability of financial gain from litigating such a suit is very tenuous. These possibilities reinforce the necessity for pre-merits certification. If interests are not brought forward or discovered by the court in an evidentiary hearing on certification, there is less reason to hold the court responsible for failing to ensure that representation was adequate.

Although the theory of implicit certification is appealing as a form of judicial economy, the danger of undercutting rule 23 should outweigh the possible hardships either to plaintiffs who must seek relief in a subsequent action or to defendants who face the costs of additional lawsuits. The procedures embodied in rule 23 are intended to protect absent class members and ensure binding classwide judgments. Implicit or post-merits certification focuses on the second goal at the expense of the first, while an express determination is the most effective means of achieving both goals. Allowing post-trial certification is a blatant violation of rule 23. Furthermore, assessing the adequacy of representation after trial on the merits does violence to the concept of a representative action.

REFORMS AND REMEDIES

This area of class certification and its aftermath needs some clarification. Since pre-merits certification benefits both class and defendant, there is no reason to allow a suit brought as a class action to proceed to trial without certification.[127] There are several methods by which pre-merits certification may be achieved or post-merits certification may be remedied.

Amendment of Rule 23(c)(1)

One method of achieving pre-merits certification would be to amend rule 23(c)(1) to require a motion for certification within a certain period of time. Such an amendment would ensure pre-merits certification provided that failure to move for certification would justify dismissal of the class claim.[128] Although there is a concensus among the federal district courts that a need exists for a time limit on certification questions,[129] there is not a concensus as to the effect

126. *See* note 21 *supra* and accompanying text.
127. *See* notes 21-49 *supra* and accompanying text.
128. *E.g.*, S.D. ALA. LOCAL CIVIL R. 9. *See* note 68 *supra*.
129. *See* note 70 *supra*.

of failure to comply with such a limitation. While some courts dismiss the class claim,[130] others regard the failure to comply with the rule as inconsequential.[131] The latter attitude obviously makes a time limitation rule superfluous. One of the goals of the 1966 amendments to the class action rule was to incorporate the better practices developed by some of the district court judges.[132] Local certification rules plainly fit within this category. However, the Advisory Committee on Civil Rules, after conducting a survey of attitudes toward rule 23, decided not to make recommendations for amending the rule.[133] The Advisory Committee informed the Standing Committee on Practice and Procedure in December 1977 that it felt any modification in class action practice should come from Congress.[134] The Judicial Conference approved this recommendation and there were no amendments to rule 23 in the 1980 amendments to the Federal Rules of Civil Procedure.

Placing the Burden on the Trial Court

Without the benefit of a federal rule requiring a motion for certification within a certain time period, the most logical method for ensuring pre-merits certification is to place the ultimate responsibility on the trial court. If the parties have not moved for or against certification within a certain period of time, the court should exercise its discretion and order a hearing on the class question *sua sponte.* The practicalities of such a procedure are, of course, troublesome. Judges cannot be expected regularly to scan their dockets for purported class proceedings. Requiring that a motion for a hearing on certification be filed along with the pleading brought on behalf of

130. Eagle v. Koch, 471 F. Supp. 175, 177 (S.D.N.Y. 1977) (direct violation of local rule cannot be ignored); Walker v. Columbia Univ., 62 F.R.D. 63, 64 (S.D.N.Y. 1973); Walton v. Eaton Corp., 563 F.2d 66, 74 & n.11 (3d Cir. 1977).

131. Umbriac v. American Snacks, Inc., 388 F. Supp. 265, 272 (E.D. Pa. 1975) (*de minimis* lapse); Gilinsky v. Columbia Univ., 62 F.R.D. at 179. This difference in attitude among the courts as to the effect of failure to comply with a local certification rule also is reflected in the resultant allocations of the burden of proof. Courts that dismiss if the requirement of a local certification rule is not met place the burden on the plaintiff. If the plaintiff can show some valid excuse for the failure to meet the time limit of the rule, the court may proceed with certification. Courts that consider such a lapse insignificant, on the other hand, place the burden on the defendant. In order to prevent certification from proceeding, the defendant must show that the case has been prejudiced by the failure to move for certification.

132. Advisory Committee's Notes, 39 F.R.D. at 99.

133. *Rule 23 Questionnaire,* note 64 *supra.*

134. Miller, *supra* note 7, at 684.

the class may provide one solution.[135] Since the pleadings must contain a class allegation,[136] the motion would in all likelihood define the class in the same general terms. Discovery might be necessary to accurately assess the interests and possible subclasses contained within the class. However, since rule 23(c)(1) gives the court the authority to amend or alter any class determination, an early decision can be challenged later if it fails to accurately define the class.

Alternatively, if the court prefers not to order a hearing *sua sponte*, it may refuse to try any case unless certification has been determined. Certification may immediately precede trial on the merits or the court might dismiss the class claims if no motion is made prior to the date set for trial. Requiring pre-merits certification obviously will not alleviate backlogged court calendars, but may assure that counsel act within a reasonable period of time, thus protecting the due process rights of absent class members.

Striking the Class Allegations

The remedies for situations where the mandate of rule 23(c)(1) has been ignored present similarly difficult questions. To strike the class allegations if the district court fails to certify the action certainly does not promote judicial economy. However, if the primary concern of the class action rule is the due process consideration of adequate representation for absent members of the putative class, judicial economy should not govern the situation. Since without certification an action is not considered a class action,[137] only the named plaintiffs should be bound by any judgment proceeding from the action.[138] This relegation to status as a test case would not appear to

135. *E.g.*, E.D. OK. LOCAL R. 17(c): Notice of Request for Class Determination: Whenever any action or proceeding is commenced which includes a request that the court certify the case or proceeding as a class action, the plaintiff shall immediately notify the judge to whom said action is assigned of the request for class action determination. If the plaintiff fails to do so, every other party receiving notice of such suit shall so notify the judge to whom the case is assigned, provided, however, that as soon as notice is given by any party the other parties are relieved of this obligation. The notice herein required shall be in writing and the clerk shall promptly notify the judge to whom the case is assigned of such notice.

136. *E.g.*, Wilson v. Zarhadnick, 534 F.2d 55, 57 (5th Cir. 1976).

137. Baxter v. Palmigiano, 425 U.S. at 310 n.1.

138. *E.g.*, United States v. East Baton Rouge Parish School Bd., 594 F.2d at 59 & n.7; Melong v. Micronesian Claims Comm'n, 569 F.2d 630, 631 n.1 (D.C. Cir. 1977); Roman v. ESB, Inc., 550 F.2d 1343, 1355 (4th Cir. 1976); Roberts v. American Airlines, Inc., 526 F.2d 757, 762 (7th Cir. 1975).

place an undue burden on the court.[139] Normally there will be one of two results. Either there will be a number of subsequent suits[140] or a second class action.[141] If members of the putative class bring subsequent suits, the doctrines of collateral estoppel or *stare decisis* are available to the court, making subsequent trial on the merits less burdensome.[142] Moreover, if declaratory or injunctive relief was the only form of relief sought, there may not be any subsequent actions since relief awarded to the named plaintiff would automatically inure to the benefit of the entire class.[143] If a second class action is

139. The Advisory Committee's Notes, 39 F.R.D. at 103, contemplate the test case as an alternative to be considered if "agreed to by the parties." Whether this rules out a judicial determination that a test case is a superior avenue is questionable in light of the amount of discretion left to the judge under rule 23. *See, e.g.*, Windham v. American Brands, Inc., 565 F.2d at 69 ("test case approach will likely accomplish the same result under principles of collateral estoppel without involving the court in a morass of individual claims that will bog the court system down interminably"); Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir. 1974) (nonmutuality requires consideration of the test case as an alternative to early class determination). Despite the court's professed reluctance to rank different causes of action according to net public benefit, it is clear that they frequently do use a net benefit calculus in deciding whether to certify a class. *E.g.*, City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974); Windham v. American Brands, Inc., 565 F.2d at 69. See Bernstein, *Judicial Economy and Class Actions*, 7 J. LEGAL STUDIES 349 (1978) for a study of the relative costs of class and non-class damage actions. "Class actions . . . have in fact been at least as efficient as non class actions - if not more so - in terms of judicial time expended per dollar of recovery effected and per dollar's worth of injury recompensed." *Id.* at 369.

140. *See* Kuahulu v. Employers Ins. of Wausau, 557 F.2d 1334, 1338 (9th Cir. 1979).

141. Jimenez v. Weinberger, 523 F.2d at 701.

142. *Id.* See George, *Sweet Uses of Adversity: Parklane Hosiery and the Collateral Class Action*, 32 STAN. L. REV. 655 (1980) for a discussion of how the rejection of mutuality in *Parklane* represents a convergence of collateral estoppel doctrine and doctrines of representation in class actions. In both instances, the victory of an unrelated plaintiff or defendant opens up the decision to a "class" of other plaintiffs or defendants who can share in the earlier victory.

143. Although the rule mentions the need to assess the superiority in the context of rule 23(b)(3) actions, the courts have expanded the inquiry to include putative class actions for injunctive or declaratory relief brought under (b)(2). Many courts refuse to certify a class if injunctive or declaratory relief for the named plaintiff will logically extend to the entire class. *E.g.*, Sandford v. R.L. Coleman Realty Co., Inc., 573 F.2d 173, 178 (4th Cir. 1978) ("Since the plaintiffs could receive the same injunctive relief in their individual action as they sought by the filing of their proposed class action, class certification was unnecessary"); Walker v. World Tire Corp., Inc., 563 F.2d at 920 ("we have both the authority and duty to frame a decree on the trial of plaintiff's claim to include injunctive and declaratory relief, sufficiently broad to enure to the benefit of the amorphous class"); Martinez v. Richardson, 472 F.2d 1121, 1127 (10th Cir. 1973) ("class action was not demanded [in suit for injunctive relief] because the same relief could be afforded without its use"). Since absent members of the putative class receive the benefits of injunctive or declaratory relief, yet are free to

brought, an evidentiary hearing on the question of certification may be necessary. However, the information gathered in this hearing should have been obtained in the initial proceeding and it cannot be considered a hardship on the court to require it to follow the practices set forth in the Federal Rules of Civil Procedure.

Rebuttable Presumption No Class Exists

As a measure somewhat less drastic than striking the class claims, one commentator has suggested that the court may, in the absence of express certification, establish a rebuttable presumption that no valid class exists.[144] If the party trying to uphold the judgment can show that all of the prerequisities for class certification were met, that the parties and the court treated the action as a class proceeding and that no one was harmed by the absence of certification, then the presumption may be overcome on an equitable theory of certification.[145] The party trying to uphold the judgment clearly will not go out of the way to assess the interests of absent class members. Thus, the requirement that no one be harmed will be only superficially explored, amounting to little more than a presumption that the failure to challenge the proposed post-trial certification is equivalent to an absence of harm. However, it may be difficult to secure counsel for a small claim. Furthermore, since the interests of absent class members may not appear in the trial record, the reviewing court will have an inadequate basis for assessing whether the representation was adequate.[146] The advantage of this remedy is that the burden is on the party seeking to uphold the class judgment. However, the general reluctance of the courts to undo

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bring any further individual claims, this theory is certainly preferable to the practice of certifying a class for injunctive relief and then barring subsequent individual suits under the prohibition against splitting a cause of action. *See* note 93 *supra*. *But cf.* Fujishima v. Board of Educ., 460 F.2d 1355, 1360 (7th Cir. 1972) ("If the prerequisites and conditions of Fed. R. Civ. P. 23 are met, a court may not deny class status because there is no 'need' for it"); Watson v. Branch County Bank, 380 F. Supp. at 959. "The substantive question [in a class suit] could nearly always be raised by one or a few named plaintiffs. However, a declaratory judgment binds only the named parties, and defendants may in some cases find petty distinctions in order to resist applying the terms of the judgment to non-parties to the original action. In such cases, aggrieved persons must bring additional suits or continue to suffer infringement of their basic rights. A comprehensive 23(b)(2) plaintiffs' class applies a judgment automatically to those whose rights have been violated, and normally avoids the necessity for a multiplicity of suits."

144. Comment, *Class Actions: Certification and Notice Requirements*, 68 GEORGETOWN L.J. 1009, 1026 (1980).

145. *Id.*

146. *See* notes 122-25 *supra* and accompanying text.

class judgments and the concern for judicial economy makes it possible that the courts will use a very lenient standard to determine if the criteria above are met. The result may be a bias in favor of upholding the class judgment.

Failure to Move for Certification Constitutes Inadequate Representation

A final alternative for remedying implicit or post-merits certification was suggested by the Supreme Court in *East Texas Motor Freight Systems, Inc. v. Rodriguez*,[147] where the Court indicated that "failure to protect the interests of class members by moving for certification surely bears strongly on the adequacy of representation."[148] Though certainly less effective than pre-merits certification, allowing the absent class member to challenge the adequacy of representation offers some relief if the class member's interests were not adequately addressed during the course of the lawsuit.[149] Since the putative class member is bound by the class judgment based on the adequacy of representation, the court has a duty to assess that representation independently from the merits of the class member's subsequent claim.[150] "Due process of law would be violated for the judgment in a class suit to be res judicata to the absent members of a class unless the court applying res judicata can conclude that the class was adequately represented in the first suit."[151] Failure to move for certification is strong evidence of the type of representation the absent members of the class received, although the courts usually do not consider failure to certify a sufficient basis by itself for setting aside a class judgment. However, when combined

147. 431 U.S. 395 (1977).

148. *Id.* at 405. Pashek v. Arizona Bd. of Regents, 82 F.R.D. 62, 63 (D. Ariz. 1979) ("failure to protect the interest of class membership by moving for class certification in a timely manner is a strong indication of the adequacy of representation those class members may expect to receive"); Brown v. Milwaukee Spring Co., 82 F.R.D. 103, 104 (E.D. Wis. 1979); Sanders v. Faraday Lab., Inc., 82 F.R.D. at 102.

149. Such a claim was presented in Johnson v. General Motors Corp., 598 F.2d at 434. There the court held that the failure to seek certification was an insufficient deficiency to annul the binding effect of the judgment.

150. *See* note 57 *supra* and accompanying text. *Cf.* Jackson v. Hayakawa, 605 F.2d at 1125-26 (court held that absent class members failed to show any prejudice even though they sought damages and the prior action was for injunctive and declaratory relief); Johnson v. General Motors Corp., 598 F.2d at 434-35 (failure to certify was not adequate grounds to attack the binding effect); Alexander v. Aero Lodge No. 735, 565 F.2d at 1372 (since brought as and considered a class, would be a miscarriage of justice to deny class relief on basis of failure to certify); Senter v. General Motors Corp., 532 F.2d at 521-22 (no one was misled as to the nature of the proceeding).

151. Gonzales v. Cassidy, 474 F.2d at 74.

with a failure to make or respond to discovery,[152] failure to prepare for pretrial,[153] or failure to exercise independent judgment,[154] the courts have more readily overturned the class judgment and allowed the putative class member's subsequent suit to proceed. The failure to move for certification should not be considered an insignificant lapse any more than the failure to prepare for any other aspect of trial. Certification represents a crucial safeguard to the rights of absent class members, rights that the courts have a duty to protect both in the initial litigation and in any subsequent proceeding.

CONCLUSION

The class action procedure provides an effective means for dealing with the claims of large numbers of people in a single lawsuit. However, since the due process rights of absent members of a class depend on the adequacy of representation afforded them by the named representative, the courts should carefully assess and oversee that representation. The failure to certify a class makes it questionable whether those considerations were made. Although pre-merits certification provides the most effective means of achieving the dual goals of the class action procedure, protection of the absent class members and achievement of broad res judicata effect, enforcement is clearly up to the trial courts in the first instance. Unless the trial courts are willing to enforce the mandate of rule 23(c)(1), putative class members whose interests are not represented must rely on the remedial measures available from the court in a subsequent suit. Since courts are generally reluctant to decertify or modify a class judgment, the due process rights of absent members of the putative class are severely impaired. These due process rights should be considered of primary importance. Therefore, the courts have a duty to carefully assess the adequacy of representation whether initially, in a certification hearing, or subsequently, in a collateral attack on the class judgment, before foreclosing the rights of absent members of a putative class.

Eileen J. Newhouse

152. Sanders v. Faraday Lab., Inc., 82 F.R.D. at 103.
153. Booker v. Anderson, 83 F.R.D. 272, 283 (N.D. Miss. 1979).
154. Pashek v. Arizona, 82 F.R.D. at 63.