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Settling Rule 23 Class Actions at the Precertification Stage: Is Notice Required

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SETTLING RULE 23 CLASS ACTIONS AT THE PRE-CERTIFICATION STAGE: IS NOTICE REQUIRED?

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The rule 23[1] federal class action is in conception and by design a plaintiff-oriented remedy. When it works properly, it obtains for deserving

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1. FED. R. CIV. P. 23 reads as follows:

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

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

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

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

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

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

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

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

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

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

plaintiffs maximum relief at minimum cost to litigants and society.[2] Class victories *on the merits* not only serve the policy goals of class litigation, but also vindicate the substantive and procedural aspects of the rule.[3]

There is, however, another side to class litigation, one that has nothing to do with the merits, if any, of the class' claims and that leaves the mechanism vulnerable to abuse. Too often class actions are instituted against carefully selected defendants solely to obtain cash settlements for plaintiffs and fees for their attorneys. The sheer magnitude of class action litigation and the expense and complexity of defending class claims often convince these defendants that a one-sided, undeserved cash settlement is preferable to whatever Pyrrhic victory might be won after months, if not years, of protracted litigation on the merits. "Strike suits,"[4] of course, are

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(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.

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

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

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

2. *See generally* Lesar, *Class Suits and the Federal Rules*, 22 MINN. L. REV. 34 (1937); Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 570-76 (1937); Moore & Cohn, *Federal Class Actions*, 32 ILL. L. REV. 307 (1937); Moore & Cohn, *Federal Class Actions—Jurisdiction and Effect of Judgment*, 32 ILL. L. REV. 555 (1938).

3. The historical and policy antecedents of present day rule 23 are discussed in 3B MOORE'S FEDERAL PRACTICE ¶ 23.02 (2d ed. 1977) [hereinafter cited as MOORE] and 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1751 (1972).

4. In one view a strike suit is a suit without merit brought in the hope of coercing a nuisance-value settlement. According to another view, a strike suit is a meritorious suit instituted primarily for the purpose of settlement. It is, in fact, this latter notion which clashes most directly with the view that settlement is a desirable way to alleviate court congestion. The explanation for the apparent anomaly lies in the representative nature of class and derivative actions and in the kind of settlement sought by a strike suiter.

not intended to be tried on the merits; if a plaintiff's tactics result in a settlement the class action mechanism has been successfully abused. The class action strike suit, which is filed solely to cower defendants into settlement negotiations, has been roundly criticized as a "Frankenstein monster,"[5] "legalized blackmail,"[6] and an "engine of destruction."[7]

Class actions do not spring full-grown from plaintiff counsel's brow. At the outset, the class aspects of a newly filed lawsuit are merely matters of allegation. The class must prove its viability *as a class*.[8] Only when a federal district court is satisfied that the requirements of rule 23 have been met[9] will an order be issued certifying the class. As a result of this procedure, class actions are subject to abuse at several different stages.

Once the class has been certified, it is usually only a matter of time before the defendant will offer to settle the case.[10] Most class actions never reach trial.[11] Defendants usually attempt, successfully, to accommodate the claims of a certified class through compromise and settlement.[12] This familiar pattern (filing suit, class certification, settlement) manifests itself not only when a guilty defendant simply throws in the towel rather than postpone the inevitable, but also in those cases in which an innocent defendant, unable to bear the expense, embarrassment and disruption of class litigation, pays whatever is necessary to be rid of the affair once and

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Dole, *The Settlement of Class Actions for Damages*, 71 COLUM. L. REV. 971, 974 (1971) (footnote omitted); *see, e.g.*, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 740-41 (1975); Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 371-72 (1966). *See also* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. at 755-61 (Powell, J., concurring).

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

6. Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971).

7. Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375 (1972).

8. *See, e.g.*, FED. R. CIV. P. 23(a), (b), (c)(1), *quoted in* note 1 *supra*. In practice, however, the burden of proof has shifted to the class defendant, who, typically, is called upon to *disprove* class viability. "The procedural posture of the certification hearing has sometimes caused courts to decide certification issues on the basis of presumptions—historically with a bias in favor of class treatment." *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1423 (1976) [hereinafter cited as *Harvard Study*].

9. FED. R. CIV. P. 23(c)(1), *quoted in* note 1 *supra*.

10. As the *Harvard Study*, *supra* note 8, at 1373, has noted, "[I]n practice, few class actions are fully litigated. Most class actions for damages are either dismissed before trial or settled . . . ."

> Certification of a class can transform a relatively simple lawsuit between named parties into a highly complex case involving thousands and even millions of "plaintiffs" who are brought before the court solely by the boilerplate class allegations of a complaint, and their failure to "opt out" in response to "notice" which they may never receive and, if received, may not understand . . . .

Simon, *supra* note 7, at 377.

11. *Harvard Study*, *supra* note 8, at 1536.

12. *See generally* Magana v. Platzer Shipyard, Inc., 74 F.R.D. 61 (S.D. Tex. 1977); Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L.J. 1123 (1974).

for all. The failure in either case to resolve matters on the merits means that "[t]he distinctions between innocent and guilty defendants and between those whose violations have worked great injury and those who have done little if any harm become blurred, if not invisible. The only significant issue becomes the size of the ransom to be paid for total peace."[13] The policy goals of rule 23 have been served in such cases only if the defendant is actually guilty, a fact known only to the parties who, as a typical condition of the settlement, are not talking.[14]

Rule 23 is also subject to abuse at the precertification stage. During this interim period between filing and a decision on the issue of class certification, the attention of the district court is directed not to the merits of the case but rather to rule 23 issues.[15] As one court has noted,

> Rule 23 abuse is at its height during the precertification stage when the defendant is literally threatened by potential class-wide liability. Because the existence of a class has not been determined, the likelihood increases that plaintiff and his counsel will unduly sacrifice the previously-asserted class interest for private gain.[16]

Since no class has been determined, the named plaintiff's counsel can be flexible in his settlement overtures. He or she will, of course, attempt to negotiate a *class* settlement because the payoff normally should exceed any individual claim. Confronted with a stubborn defendant, however, counsel may offer to forget about the class if defendant will merely satisfy the individual claims of the named plaintiff. Should this fail to produce a satisfactory settlement offer, and if the merits of plaintiff's claims are at best speculative, counsel is forced to make his bottom-line (but most typical and familiar) proposition: acceptance of the strike suit/nuisance value settlement. For a token sum, plus attorney's fees, counsel offers to abandon the lawsuit altogether and to dismiss the individual plaintiff's claim with prejudice. Defendant, rather than bear the expense and burden of precertification class discovery and related legal proceedings,[17] usually agrees and the case is settled. Such abuse of the legal process[18] victimizes "class" defendants

13. Handler, *supra* note 6, at 9. "The need for prudent exercise of this discretion [to certify a class action] is particularly great because certification of a class in not appealable, and because . . . *certification of a broad class often determines the entire case by coercing the defendants to settle even unmeritorious claims*." Simon, *supra* note 7, at 380 (emphasis added).

14. When the defendant is genuinely innocent, "Such a use of the class action may properly be called an abuse, because none of the policies underlying the creation of the device are advanced." *Harvard Study*, *supra* note 8, at 1540 (footnote omitted).

15. FED. R. CIV. P. 23(a) & (b), *quoted in* note 1 *supra*.

16. Magana v. Platzer Shipyard, Inc., 74 F.R.D. 61, 66-67 (S.D. Tex. 1977).

17. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975); text accompanying notes 144 & 145 *infra*.

18. *See* note 14 *supra*. Such conduct by the plaintiff bar is not a figment of the defense bar's imagination. "In its crudest form, this sort of compromise involves a sellout by the named

and cheapens the legal profession. Yet it is a fact of modern legal practice that occurs with dismaying frequency.[19]

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plaintiff and the class attorney, in which they agree to discontinue the class suit in return for personal reward." *Harvard Study*, *supra* note 8, at 1537.

> [C]orporate management naturally tends to seek insurance against whatever slight chance of success plaintiffs may have. Such insurance is usually available for a comparatively modest premium in the form of a settlement with the attorney who initiated the litigation and who purports to speak for vast numbers of people who have not retained him.

Simon, *supra* note 7, at 389-90. "This Court can only add that until such time as Rule 23 is revised, existing law clearly compels a court to monitor settlements in this legal area so that an honored profession does not deteriorate in the eyes of the public to the level of a racket." Magana v. Platzer Shipyard, Inc., 74 F.R.D. 61, 78 (S.D. Tex. 1977).

19. FED. R. CIV. P. 23 was completely rewritten in 1966. *See generally id.*, Advisory Committee's Notes; MOORE, *supra* note 3, ¶ 23.02-1, at 23-121 to -126; C. WRIGHT & A. MILLER, *supra* note 3, § 1753.

Because the scope of permissible federal class actions was expanded, the potential for and incidence of abuse has increased greatly. The vast majority of class actions filed in recent years have been civil rights cases, although securities, antitrust and consumer cases account for a significant percentage. The *Harvard Study*, *supra* note 8, published the following statistics provided by the Administrative Office of the United States Courts:

CLASS ACTIONS COMMENCED BY NATURE OF SUIT

	FY1973		FY1974		FIRST-HALF FY1975		FIRST-HALF FY1976	
Total Suits	2654	100.0%	2717	100.0%	1221	100.0%	1886	100.0%
Total Statutory Actions	2269	85.5%	2336	86.0%	1069	87.5%	1707	90.5%
Antitrust	157	5.9%	114	4.2%	77	6.3%	95	5.0%
Total Civil Rights	1539	58.0%	1592	58.6%	767	62.8%	1268	67.2%
Civil Rights	1248	47.0%	1294	47.6%	621	50.8%	1061	56.2%
Prisoner Petitions	291	11.0%	298	11.0%	146	12.0%	207	11.0%
Securities Laws	235	8.9%	305	11.2%	81	6.6%	122	6.5%
Other	338	12.7%	325	12.0%	144	11.8%	222	11.8%

CLASS ACTIONS PENDING ON DECEMBER 31, 1975

Total	5791	100.0%
Antitrust	450	7.8%
Total Civil Rights	3459	59.7%
Civil Rights	2851	49.2%
Prisoner Petitions	608	10.5%
Securities Laws	n.a.	

Id. at 1325 n.30 (sources omitted). *See also* Simon, *supra* note 7, at 375 n.3 (class actions in consumer cases).

Not surprisingly, in each of these areas of the law federal statutes authorize recovery of attorneys' fees. *See generally* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 260 n.33 (1975) (citing statutes). "The large fees that class actions can generate may create a conflict of interest between the attorney and the named plaintiffs and can provide an incentive to abuse the class action process by bringing suits of questionable legal merit." *Harvard Study*, *supra* at 1581-82 (footnote omitted).

> [T]he most serious long-range consequence of the indiscriminate use of class actions [is] the undermining of public confidence in the judicial system and the integrity of the

Settlements may reflect abuse of the class action mechanism, may occur before or after the class is certified[20] and may encompass the claims of the class as a whole or only those of one or more named plaintiffs. This article will focus upon the increasing frequency of *precertification* settlements of *individual* plaintiffs' claims and the role of federal district courts in supervising and monitoring such settlements.

I. THE NATURE OF THE PROBLEM

A few generalizations must be stated: Civil rights cases constitute by far the greatest percentage of class actions filed,[21] and allegations of employment discrimination in violation of Title VII of the Civil Rights Act of 1964[22] provide the basis for many of these cases.[23] Moreover, "it is a rare Title VII complaint that does not contain a class allegation . . . ."[24] Most Title VII "class actions" are settled at the precertification stage and typically provide only for the named plaintiff.[25] Since the class is never certified, notice of the filing of the lawsuit is usually not sent to alleged class members.[26] Precertification settlement of the named plaintiff's claim is without prejudice to other members of the alleged class, who are not bound by the settlement and are free to file their own lawsuits against the settling defendant.[27] The statute of limitations is tolled as to the claims of the alleged

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bar. Attorneys are members of an honorable profession and are duty-bound to put their clients interests above their own. The spectacle of lawyers reaping enormous profits from lawsuits which do not benefit their clients must be a source of embarrassment to both the judiciary and the bar. As one Court recently warned, both courts and attorneys must avoid the criticism implicit in the Italian proverb that "A lawsuit is a fruit tree planted in a lawyer's garden."

The judiciary should not participate in encouraging attorneys to become entrepreneurs who create business opportunities from which they reap large profits. The heart of professional immorality in class action fees is what one Court has called "the contingent fee syndrome."

Simon, *supra* note 7, at 390-91 (footnotes omitted).

20. Precertification abuse may even occur *before* the alleged class action is filed. *See* text accompanying notes 67-69 *infra*.

21. *See Harvard Study*, *supra* note 8, at 1325 n.30 table, *reprinted in* note 19 *supra*.

22. 42 U.S.C.A. §§ 2000e to 2000e-17 (West 1974 & Cum. Supp. 1977).

23. *See, e.g.*, Magana v. Platzer Shipyard, Inc., 74 F.R.D. 61 (S.D. Tex. 1977); Rodgers v. United States Steel Corp., 70 F.R.D. 639 (W.D. Pa.), *appeal dismissed*, 541 F.2d 365 (3d Cir. 1976); Duncan v. Goodyear Tire & Rubber Co., 66 F.R.D. 615 (E.D. Wis. 1975); Booth v. Prince George's County, 66 F.R.D. 466 (D. Md. 1975); American Fin. Sys., Inc. v. Harlow, 65 F.R.D. 572 (D. Md. 1974); Held v. Missouri P.R.R., 8 Fair Empl. Prac. Cas. 772 (S.D. Tex. 1974); EEOC v. Mobil Oil Corp., 6 Fair Empl. Prac. Cas. 727 (W.D. Mo. 1973); Muntz v. Ohio Screw Prods., 61 F.R.D. 396 (N.D. Ohio 1973); Baham v. Southern Bell Tel. & Tel. Co., 55 F.R.D. 478 (W.D. La. 1972).

24. Magana v. Platzer Shipyards, Inc., 74 F.R.D. 61, 76 (S.D. Tex. 1977).

25. *See id.* at 63 n.2, 78.

26. *See* FED. R. CIV. P. 23(c)(2), *quoted in* note 1 *supra*.

27. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974); Katz v. Carte Blanche Corp., 496 F.2d 747, 759-62 (3rd Cir. 1974).

class when the settling plaintiff files his "class action," and does not begin to run again until his case is dismissed.[28] Finally, it is likely that a plaintiff class never in fact existed,[29] and that class allegations were at best an "afterthought,"[30] at worst, calculated to intimidate the defendant into a settlement.

A typical employment discrimination case can be used to illustrate the problem. An employer, Acme Company, discharges an employee, Green, who falls within a protected category under Title VII. The reasons for the discharge are, for present purposes, irrelevant. Green promptly files an employment discrimination claim against Acme with the local office of the Equal Employment Opportunity Commission and consults an attorney who, on a contingent fee basis, agrees to represent him. One hundred eighty days pass without word from the EEOC concerning investigation or conciliation of Green's claim.[31] Green's attorney, therefore, requests and receives a "notice-of-right-to-sue" letter[32] from the EEOC authorizing Green to file suit against Acme within ninety days of receipt of the letter.[33]

At this point, Green's attorney probably has done nothing to ascertain whether his client's claim is essentially an individual grievance or one representative of similar claims of a class of individuals.[34] Nevertheless, counsel files a complaint that names as plaintiffs Green "and all others similarly situated," thereby initiating a "class action." Soon thereafter, Acme is served with a twenty-page set of form interrogatories relating to past and present employees, salaries, job classifications, promotions, fringe benefits, working conditions, hiring and recruitment policies, past discharges and terminations, breakdowns by sex, age and race. At some time before the answers to these interrrogatories are due, Acme's counsel receives a telephone call from Green's attorney, who informs him that Green

28. *See* American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 549 (1974); Wheeler, *Predismissal Notice and Statutes of Limitations in Federal Class Actions After American Pipe and Construction Co. v. Utah*, 48 S. CAL. L. REV. 771 (1975).

29. A defendant who truly fears class-wide liability is not likely to settle piecemeal with individual plaintiffs, but normally would prefer to have the class certification issue resolved before entering into settlement negotiations. The defendant who has little to fear from a ruling upon class certification, who is confident that its risk exposure to the putative "class" is negligible, will most likely agree to settle the individual plaintiff's claims for their nuisance value. *See, e.g.*, Simon, *supra* note 7, at 390.

30. Rothman v. Gould, 52 F.R.D. 494, 495 (S.D.N.Y. 1971).

31. *See* 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975) (if 180 days pass after the filing of a charge without a conciliation agreement between the parties, the aggrieved party shall be notified that a civil action may be brought).

32. *See* EEOC Procedural Regulations, 29 C.F.R. § 1601.25(c)(d) (1976).

33. *See* 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975) ("within ninety days after the giving of such notice a civil action may be brought").

34. *See* Magana v. Platzer Shipyard, Inc., 74 F.R.D. 61, 78 (S.D. Tex. 1977).

is prepared to settle the case for cash plus attorney's fees. Acme, staggered by the burden of compiling the information required to respond to Green's discovery, agrees to a settlement, usually in the one to three thousand dollar range.[35]

But what about the *class*? Acme has bought its peace only with Green. Because no class was ever certified Green's settlement cannot bind other members of the purported class.[36] Furthermore, the filing by Green of an alleged class action tolls the applicable statute of limitations as to the class from the moment of filing until the date of dismissal of Green's claim.[37] The class, if one exists, appears to be fully protected, its members free to pursue their individual or collective claims against Acme, unprejudiced by Green's voluntary dismissal.[38]

At this point complications most often arise. Voluntary dismissals with prejudice are governed by rule 41(a),[39] which by its terms permits dismissal by stipulation *without* order of the court, *except* in those cases where rule 23(e) applies.[40] In the example outlined above, the issue of the applicability of rule 23(e) is of paramount importance, for if it applies, the settlement that seemed simple and straightforward becomes infinitely more complex. Rule 23(e) issues have troubled and confused many federal judges, and more often than not those who have wrestled with the problem have either reached the wrong conclusion or have somehow stumbled upon the correct result for all the wrong reasons.

A. *Background of Rule 23(e)*

Rule 23(e) in its present form is a product of the 1966 amendment to rule 23.[41] "The purpose of subdivision (e) is to protect the nonparty members of the class from unjust or unfair settlements *affecting their rights* when the representatives become fainthearted before the action is ad-

35. *See id.* at 64 ($3,000 settlement proposed).

36. *See* text accompanying note 27 *supra*.

37. *See* text accompanying note 28 *supra*.

38. It is doubtful, however, that a viable class actually exists in cases of precertification individual settlements. *See* note 29 *supra*.

39. FED. R. CIV. P. 41(a)(1) provides:

(a) **Voluntary Dismissal: Effect Thereof.**

(1) *By plaintiff; by stipulation.* Subject to the provisions of Rule 23(e) . . . an action may be dismissed by the plaintiff without order of court . . . (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice . . . .

40. *Id.* 23(e), *quoted in* note 1 *supra*.

41. *See* note 19 *supra*. The origin of rule 23(e) can be traced from former Fed. R. Civ. P. 23(c), 28 U.S.C. app., rule 23(c) (1964), which read as follows:

Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or

judicated or are able to secure satisfaction of their individual claims by a compromise."[42] Rule 23(e) is thus intended to protect absentee class members against a "sale" of class rights by the named plaintiff who has undertaken to represent the entire class.[43] It would be manifestly unfair to hold absentees bound by a settlement negotiated by the representative plaintiff unless they first had been apprised fully of the terms and conditions of the proposed settlement of their claims.[44]

The rule speaks to settlement of *class actions*. What, then, of settlements that are negotiated at the *precertification* stage but nevertheless affect the rights of the class as a whole?[45] If the proposed settlement is directed at the claims *of the class* and if settlement is to be accompanied by a voluntary dismissal with prejudice to class rights, then the policy objectives of rule 23(e) can be fulfilled only by requiring notice to absentee class members, even though the class has not yet been certified. This precise problem confronted the district court in *Philadelphia Electric Co. v. Anaconda American Brass Co.*[46] The case involved allegations that a number of defendants had conspired to violate the federal antitrust laws, resulting in injury to plaintiff class. Before the class was certified, the named plaintiffs negotiated a settlement with three of the thirteen defendants, which settlement would have bound the entire class as to those particular defendants.

The district court stated that "[i]t is first necessary to consider whether Rule 23(e) has any application to an action which, while brought as a class action, has not yet been determined to be one."[47] Noting that the proposed settlement attempted "to compromise the claims of the class, not just the named plaintiffs,"[48] and troubled by potential limitations problems, the court ruled that:

> Whatever uncertainties exist as to the precise status of *an action brought as a class action*, during the interim between filing and the 23(c)(1) determination by the court, *it must be assumed to be a class action for purposes of dismissal or compromise under*

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compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.

Although the language differs, the two versions reflect consistent policy objectives.

42. 7A C. WRIGHT & A. MILLER, *supra* note 3, § 1797, at 226 (emphasis added).

43. *E.g.*, Nesenoff v. Muten, 67 F.R.D. 500, 502 (E.D.N.Y. 1974).

44. *E.g.*, Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324, 328 (E.D. Pa. 1967).

45. The Advisory Committee Notes shed little light on the situation: "Subdivision (e) requires approval of the court, after notice, for the dismissal or compromise of any class action." FED. R. CIV. P. 23, Advisory Committee Notes.

46. 42 F.R.D. 324 (E.D. Pa. 1967).

47. *Id.* at 326.

48. *Id.* at 327.

23(e) unless and until a contrary determination is made under 23(c)(1).[49]

The court explained that if class certification were later denied, the individual parties would not be harmed by delaying approval of the proposed settlement until such determination.[50] On the other hand, the court noted that if class certification were granted, "[T]hen there are absent parties whose rights should not have been permanently affected without notice."[51]

B. Precertification Individual Settlements

It must be emphasized that the rule in *Philadelphia Electric* was established in response to an attempt to settle certain claims of the class as a whole, not merely the individual claims of the named plaintiffs. Although the court clearly recognized the difference and hinted broadly that rule 23(e) might *not* apply to precertification settlement of individual claims,[52] this distinction was, unfortunately, not explicity drawn in the court's broad holding. As a result, a number of district courts have relied upon *Philadelphia Electric* in holding that precertification settlements of *individual* claims are subject to the rule 23(e) notice requrement.[53] These courts, in extending the *Philadelphia Electric* holding to include individual precertification settlements, have been forced to develop new rationales for so doing. Some have held that requiring rule 23(e) notice of individual precertification settlements will somehow curb abuse of the class action mechanism by plaintiffs' counsel.[54] Another suggests that absentee class members may have relied upon the pending, uncertified class action to vindicate their rights and that they should therefore be given notice that the litigation is being dismissed.[55]

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49. *Id.* at 326 (emphasis added).

50. *Id.* at 326-27.

51. *Id.* at 327.

52. "It is further contended that Rule 23(e) is not applicable to the present situation, since what is now sought does not amount to a dismissal or compromise of the entire action. . . . In an appropriate case, this . . . might well provide an escape from the literal application of Rule 23(e) in class actions." *Id.*

53. *See* cases discussed in text accompanying notes 76-103 *infra*. The rationale of these cases is difficult to comprehend. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), and Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir. 1974), held that absentee "class" members cannot be prejudiced or bound by individual settlements. 417 U.S. at 173; 496 F.2d at 758-60. Concern that the claims of absentees might in the future be barred by applicable statutes of limitation is also misplaced since in American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554 (1974), the Supreme Court held that running of the statute is tolled until the individual claims are dismissed.

54. *See* text accompanying notes 76-103 *infra*.

55. *Id.*

C. *The Notice Requirement*

The fact that notice is required in some cases at the precertification stage has generally come as a surprise to both parties and has introduced an unanticipated element into the litigaton.[56] One of the parties, usually the defendant,[57] is required to communicate a settlement or dismissal notice to all members of the uncertified class. In some cases courts have been satisfied with notices posted on the defendant's business premises[58] or, in rare cases, publication notice.[59] The typical notice informs the absentee of the nature of the litigation, the substance of the class allegations and the fact that the named plaintiff and defendant have agreed to settle that plaintiff's individual claims.[60] Not only may the notice inform the absent party of the amount of the settlement, but it may also provide the names and addresses of the attorneys involved.[61] Sometimes the "class members" are even encouraged to seek legal counsel in order to determine what their response to the proposed settlement should be.[62]

With respect to the defensive strategy and tactics of Title VII defendants in particular, the notice requirement is a devastating give-away. This notice, a legal document bearing the imprimatur of a United States district court judge, might best be described in the Title VII context as an "invitation to sue letter." The disclosure of a cash settlement will likely prove an irresistible temptation for many and serve only to solicit new party plaintiffs for a lawsuit now abandoned by its original champions. The lesson to be learned by recipients of the notice is that they should sue the named

56. *See, e.g.*, Duncan v. Goodyear Tire & Rubber Co., 66 F.R.D. 615 (E.D. Wis. 1975) (Gordon, J.); Rotzenburg v. Neenah Joint School Dist., 64 F.R.D. 181 (E.D. Wis. 1974) (Gordon, J.). The court's requirement of rule 23(e) notice caught the parties completely by surprise in Rothman v. Gould, 52 F.R.D. 494 (S.D.N.Y. 1971), and, for a time, wrecked their settlement plans.

57. *See* text accompanying notes 86-98 *infra*.

58. *E.g.*, Duncan v. Goodyear Tire & Rubber Co., 66 F.R.D. 615, 617 (E.D. Wis. 1974).

59. *E.g.*, Rothman v. Gould, 52 F.R.D. 494, 501 (S.D.N.Y. 1971). In form and content, rule 23(e) notice ought to be "scrupulously neutral," Grunin v. International House of Pancakes, 513 F.2d 114, 122 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975), or at least "neutrally worded," American Fin. Sys., Inc. v. Harlow, 65 F.R.D. 572, 576 (D. Md. 1974). Yet in most cases in which notice has been required, the overall tone, from defendants' point of view, has been unnecessarily inflamatory and provocative. *See* note 60 *infra*.

60. The notice required in Rothman v. Gould, 52 F.R.D. 494 (S.D.N.Y. 1971), for example, began by summarizing the action and identifying the parties. *Id.* at 502. It then went on to inform the "class" that the defendant had agreed to pay $13,000 to settle the claim of the named plaintiff. *Id.* Finally, the "class" was informed that "[i]t is a purpose of this Notice to afford an opportunity to interested parties to seek intervention in this action, to present arguments pertinent to the pending motions, and to seek, if they be so advised, substitution in plaintiff's stead as representatives of the alleged class." *Id.*

61. *See, e.g.*, Duncan v. Goodyear Tire & Rubber Co., 66 F.R.D. 615, 618 (E.D. Wis. 1974).

62. *See id.*; note 60 *supra*.

defendant and that, regardless of the merits of the claim, the defendant will probably pay a considerable sum to settle out of court. Such notices make Title VII defendants helpless targets for additional litigation.[63]

By failing to rule on class maintainability "[a]s soon as practicable"[64] and by requiring precertification settlement notice, a district judge can effectively coerce a defendant into providing relief to an entire class of persons that has never met its burden under rule 23.[65] An individual settlement at the precertification stage that must be communicated to an unknown number of unnamed potential plaintiffs is, from the defendant's perspective, worse than no settlement at all.[66] Members of the plaintiff bar, who are most likely to read published or posted notices, will immediately identify the defending party as a "settling defendant," leading to even greater abuse.

Paradoxically, the notice requirement may actually result in the *filing* of *fewer* class actions.[67] The prospect of precertification notice will provide

63. The dilemma of defendants confronted with an order requiring rule 23(e) notice of individual precertification settlements can be demonstrated by the following example. P1 sues D, claiming to represent a class of 100 potential plaintiffs. P1 settles his individual claim against D, but the court requires precertification notice to the remaining 99 "class members." Sensing a windfall, P2 (one of the 99) then sues D for himself "and others similarly situated." As expected, P2 settles with D prior to class certification. Will D be required to send out a *second* notice to the remaining 98? And if P3, P4 and P5 settle their individual claims respectively, must D repeatedly notify the dwindling members of a "class" which has never been called upon to prove its viability under rule 23? By the time P50 has received 49 legal settlement notices signed by a federal district judge, can it reasonably be expected that P50 will not have gotten the message—that he will not, in turn, file his own "class action"? Add the fact that this succession of individual "class actions" tolls the statute of limitations on all outstanding potential claims, thus extending D's risk exposure far beyond the anticipated time limits of the appropriate statute of limitations. This aspect of American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), has been sharply criticized by Wheeler, *supra* note 28, at 780-90, 804-09.

64. FED. R. CIV. P. 23(c)(1), *quoted in* note 1 *supra*.

65. Further, postponing the resolution of all other issues until the class action determination has been made deprives defendants of their ability to dispose of invalid or otherwise improper claims with alacrity. Thus, motions to dismiss for failure to state a claim upon which relief can be granted and all other procedures historically developed to rid the courts and defendants of clearly undeserving plaintiffs could be circumvented by a plaintiff for some period of time simply by alleging the existence and representation of a class. Indeed, if the class alleged is vast enough and problematical enough, discovery on the class action issue might drag on for several months. The result would be waste of scarce judicial resources and lack of fairness for defendants.

The absence of fairness bears analysis, since the degree of unfairness will vary according to the circumstances. Consider first the case in which neither the named plaintiff nor any other member of the alleged class could survive a motion to dismiss for failure to state a claim upon which relief can be granted. Even in such a case, disallowing such a motion until after the 23(c)(1) determination would require the defendant to litigate all aspects of the class action determination, since that determination goes first and since one can never be certain that the subsequent motion to dismiss will be granted. Thus, despite the absence of any valid claim, the defendant must litigate for what might be a substantial period at what might be substantial expense. Wheeler, *supra* note 28, at 798-99.

66. *E.g.*, Rothman v. Gould, 52 F.R.D. 494 (S.D.N.Y. 1971).

67. Measures designed to protect the interest of class members from sellouts by the class attorney and named plaintiffs may have the undesirable side effect of encourag-

plaintiffs with a powerful new weapon at the *prefiling stage*,[68] because once the class action is filed the notice requirement deprives the defendant of the ability to settle privately with named plaintiffs. Employees in Title VII cases will argue successfully that if the employer does not settle immediately, a pro forma class action will be filed, triggering the precertification notice requirement. The employee/plaintiff will know, moreover, that he will most likely never be called upon to prove a class under rule 23. If the case does reach the class certification stage, however, plaintiff's inability to prove a rule 23 class would not undermine the obvious advantages in originally filing suit as a class action. It thus would be clearly advantageous for employers to settle Title VII claims at the prefiling stage regardless of their merit or the viability of the looming plaintiff "class."[69]

The policy goals stated by the district courts that have required notice hardly justify this judge-made extension of rule 23(e). The cases usually speak of reliance of absentee members upon the purported "class action" and stress that rule 23(e), if applied in the individual precertification settlement context, will somehow curtail abuse of rule 23 by plaintiffs and their attorneys.[70] Little, if any, concern is expressed in any of the cases for the

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ing attorneys to attempt to negotiate individual settlements before filing a complaint. Prefiling bargaining is particularly open to abuse: an attorney may threaten to file a class suit unless the claim of a particular individual is settled. . . . Potential recovery in a class suit may be so much greater than the individual claim sought to be settled that the person threatened with class suit may satisfy the individual claim regardless of the merits of either the individual or the class claim.

Harvard Study, *supra* note 8, at 1542 n.33.

68. [U]nder such a rule plaintiffs can wield a bigger cudgel against defendants *before* filing complaints by emphasizing that if a complaint is filed, the parties will automatically be locked into costly litigation at least until the court defines the proper class for notice. Thus, defendants anxious to avoid costly litigation of class action issues will be put under pressure to settle before a complaint is filed.

Moreover, defendants will surely be less than grateful for a rule that, under the guise of helping them to avoid coercion from unscrupulous plaintiffs, makes settlement of expensive class action litigation very unlikely once a complaint is filed. Nor can there be any reasonable doubt that settlement will in fact be so unlikely; for once a defendant knows that notice of any settlement *must* be given, he will know that a new suit or intervention by one or more of the persons receiving notice is likely, thus destroying the rationale for early, prenotice, preclass-action-determination settlement. Indeed, if the group to be provided notice is not the alleged class, but is the class that would have been approved had an affirmative rule 23(c)(1) determination been made, plaintiffs also will have little incentive to settle before the 23(c)(1) determination. Thus, both sides will be channeled into an all-out litigation of every class action issue once the complaint is filed, thereby ensuring that every action brought as a class action will be costly and time-consuming for the parties, the court, and the public.

Wheeler, *supra* note 28, at 797.

69. Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure—it is a form of legalized blackmail. If defendants who maintain their innocence have no practical alternative but to settle, they have been de facto deprived of their constitutional rights to a trial on the merits.

Handler, *supra* note 6, at 388 n.63.

70. *See, e.g.*, cases discussed in text accompanying notes 76-103 *infra*.

defendant's plight. The defendant, who is the party directly abused by the plaintiff's machinations, should not, having settled with the plaintiff, be required to endure additional manhandling.

II. ROLE OF THE DISTRICT COURTS

The problem addressed by this article may be summarized as follows: Plaintiff files a complaint alleging specific individual claims and making general, pro forma class allegations. Prior to certification of the class, the parties reach settlement of plaintiff's individual claims only. Plaintiff and defendant seek to dismiss the action with prejudice to the plaintiff's individual claims; the class claims, if any, are not prejudiced. In this situation, what are the obligations and the responsibilities of the federal district court under rule 23(e)?

Reported cases disclose sharp division in the courts' perception of their role. No consistent pattern emerges, and the level of analysis is, for the most part, uncharacteristically shallow, perhaps suggesting the great difficulties confronting a federal district judge who would impose conditions upon settlement that neither of the legal advocates desires. The court is left to find its own way through the rule 23(e) maze because the legal entity the judge strives to protect, the absentee class, may not exist and is certainly unrepresented in the pending proceedings. It is perhaps understandable that the rationale offered by the district courts, as they attempt to protect hypothetical legal rights, is itself based on speculation and conjecture. Cases requiring that the uncertified class be given notice of individual settlements are invariably cast in a "might be, maybe, what if?" tone.

The cases fall into three rough categories. First, there are those that expand the *Philadelphia Electric*[71] holding beyond the *class* and require notice of *individual* settlements, citing as justification potential curbing of abuse and protection of reliance interests.[72] Second, a number of cases dutifully follow the *Philadelphia Electric* line, but dispense with notice on the basis of a second, corollary holding stated in *Philadelphia Electric*[73] and other cases: precertification notice of dismissal need not be given if the court concludes as a matter of law that the class would not have been certified, or if the class allegations are otherwise dismissed on the merits.[74] When confronted with a settlement proposal relating only to individual claims, courts in this second group simply proceed to decide the class certification

71. 42 F.R.D. 324 (E.D. Pa. 1967).
72. *See* text accompanying notes 76-103 *infra*.
73. 42 F.R.D. at 326.
74. *See* text accompanying notes 104-46 *infra*.

issue on the merits, usually holding that the class would never have been certified and that there is no one to whom notice can be given. Although this logic has a certain charm, the goals of preventing abuse and protecting reliance are not promoted by resort to legal fiction. These cases reach the proper result, but for the wrong reasons.

Finally, there are cases in which the courts correctly perceive that notice of individual precertification settlements is not required because: (1) rule 23(e) does not apply; (2) abusive practice will not be curtailed by requiring such notice; (3) no policy objectives are served absent clear proof of reliance by absentee "class" members; and (4) the burden of giving notice is unfair to the defendant in the uncertified class action.[75]

A. *Cases Requiring Notice*

Yaffe v. Detroit Steel Corp.[76] involved an alleged class of Detroit Steel shareholders who challenged the legality of a tender offer. After filing, the named plaintiffs made no effort to have a class certified despite repeated prodding by the trial judge. While the judge was away on vacation (and contrary to his explicit instructions), plaintiffs approached an emergency motions judge and requested leave to delete the class allegations of their complaint. The motion was granted and plaintiffs negotiated a settlement of their individual claims and sought to dismiss their action altogether.[77] The original judge, piqued at plaintiffs' conduct, refused to dismiss and vacated the amendment allowing deletion of class allegations, holding that such an amendment constituted an evasion of rule 23(e).[78] The court held that the proposed settlement could not be approved without notice to the as yet uncertified class because of the possible reliance interest of absentees:

> This lawsuit, and the acquisition it challenges, have received publicity in the financial press and, on at least one occasion, counsel for plaintiffs issued a press release which found its way into The Wall Street Journal. Moreover, counsel for plaintiffs participated in drawing up proxy material sent to Detroit Steel shareholders which mentioned that this lawsuit was filed as a class action. *It is altogether possible, therefore, that some class members, choosing to rely on this lawsuit as their means of redress, have decided not to file separate actions*. Consequently, permitting this amendment without notice could result in an unwitting forfeiture of their rights.[79]

75. *See* text accompanying notes 147-96 *infra*.
76. 50 F.R.D. 481 (N.D. Ill. 1970).
77. *Id* at 482.
78. *Id*. at 483.
79. *Id*. (emphasis added).

Although there was some evidence that absentee shareholders could have learned of the pending action because of the publicity it had received, the court failed to explain how, in light of *Katz v. Carte Blanche Corp.*[80] and *Eisen v. Carlisle & Jacquelin*,[81] settlement without notice could result in "an unwitting forfeiture of their rights."[82]

The court also held that "such an amendment is an impermissible abuse of the class action device. Armed with class action allegations in their complaint, and with the possibility of amendment as of right, the named plaintiffs have additional leverage when negotiating for settlements of their individual claims."[83] This logic, perhaps valid in the abstract, breaks down when applied to the facts before the court. If abuse had already occurred, and if the object of abuse (settlement of individual claims) had been realized, how could requiring rule 23(e) notice remedy the situation? How could disallowance of the settlement, combined with notice of its proposal, help the defendant who was the victim of the abuse? If the court meant to teach plaintiffs a lesson, the lesson to be learned is that in the future, sufficient pressure must be applied so that a satisfactory settlement can be reached prior to the filing of a complaint.[84] From the plaintiff's point of view, such prefiling agreements are preferable since they are beyond the supervision and control of the federal district judge. A stated judicial policy that notice will be required as a matter of course, moreover, provides the plaintiff with precisely the ammunition he needs to coerce prefiling settlements from potential defendants. Plaintiff's settlement leverage, inherent in every class action,[85] will only increase if it is held that defendants may no longer settle individual claims privately at the precertification stage.

Rothman v. Gould[86] involved a similar situation in which a single plaintiff sought to represent an alleged class of defrauded investors. The issue of class certification unresolved two years after filing, the named

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80. 496 F.2d 747 (3d Cir. 1974); *see* note 53 *supra*.
81. 417 U.S. 156 (1974); *see* note 53 *supra*.
82. 50 F.R.D. at 483.
83. *Id.*
84. *See* notes 67-69 and accompanying text *supra*.

> The class action device can be used to coerce a settlement even without filing suit. Most experienced defense counsel have participated in negotiations toward settlement of a dispute at which counsel for the potential plaintiff threatens to file a massive class action to intimidate the potential defendant into a favorable settlement. The weaker the potential plaintiff's claim, the more likely he is to make such a threat since a litigant with a valid claim could not expect as large a recovery as a member of a large class. Where the client in fact has a valid substantial claim, a class action is actually not in his self-interest.

Simon, *supra* note 7, at 390.

85. *See* cases discussed in text accompanying notes 104-46 *infra*.
86. 52 F.R.D. 494 (S.D.N.Y. 1971).

plaintiff agreed to settle his $40,000 claim for $13,000.[87] To facilitate the settlement, plaintiff moved for an order under rule 23(e) denying class certification on the ground that his class allegations were "no more than an afterthought."[88] This confession no doubt raised the eyebrows of the trial judge, who refused to strike class allegations unless notice of the proposed settlement was given to the purported class.[89] The court reserved judgment upon the form and content of the notice pending a further hearing.[90] Not surprisingly, defendant bristled at the introduction of a new and potentially prejudicial element into the case and withdrew the settlement offer.[91] Plaintiff, reversing his prior position, filed a motion for class certification and promised that, "[I]f the action is determined to be a class action, it is my intention to prosecute it vigorously."[92] Defendant responded by adopting plaintiff's prior position that the litigation was not properly certifiable as a class action. In the end, the court concluded that the absentee "class" should receive notice of the history of the whole tangled affair, but that publication notice would suffice.[93] As a final indignity, the hapless defendant was saddled with the cost of publishing the required notice in the *New York Times* and the *Wall Street Journal*.[94]

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87. *Id.* at 495.

88. *Id.*

89. *Id.* at 495-96. The tone of the opinion suggests the judge's suspicion that such class allegations, far from being an "afterthought," were deliberately inserted to maximize the individual plaintiff's settlement leverage:

> It must be presumed, or at least firmly expected, that responsible lawyers, before they put their names to class allegations, will have made some minimally careful explorations to satisfy themselves of the *prima facie* existence of a class, a claim on behalf of the class, and their suitability to present themselves in the fiduciary role of class representatives. . . . Counsel will not be allowed to forget the whole business on the mere assertion that it was a mistake to begin with.

Id.

Apart from abuse by the named plaintiff, the court also emphasized the possibility of absentee reliance:

> The very bringing of a class action . . . may deter the institution of suits by members of the ostensible class. . . .
>
> In a word, having nominated themselves as class representatives, both plaintiff and his counsel have undertaken responsibilities, and triggered possible consequences, that may not now be erased by routine acceptance of the resignation they now tender.

Id. at 496.

90. *Id.* at 496.

91. *Id.* at 497.

92. *Id.*

93. *Id.* at 498.

94. *Id.* at 501. Defendant again resisted the notice requirement, pointing out that such notice "could lead to the spector [*sic*] of unnecessary litigation." *Id.* at 499. Plaintiff's counsel then chimed in, professing shock at "so champertous a notice." *Id.* at 501. The court brushed aside these objections as "only a chimera rising in the heat of advocacy." *Id.* The outcome of the exchange of florid hyperbole was a steadfast determination by the court to require notice. The court did, however, suggest that absent some affirmative response by absentees, certification would be denied for lack of a suitable class representative. *Id.*

Precertification notice of individual settlements was also required in *Rotzenburg v. Neenah Joint School District*[95] and *Duncan v. Goodyear Tire & Rubber Co.*[96] Supporting the view that the momentum and force of legal precedent are more a function of repetition than analysis, the court in both cases relied on *Rothman* and *Philadelphia Electric* to require notice despite the parties' objections.[97] As it had in *Rothman*, the court again in *Duncan* required *defendant* to pay for the privilege of announcing to the world that it would pay cash money to anyone clever enough to file an alleged class action against it.[98]

It should be noted that in both *Rotzenburg* and *Duncan* the court stated no justification for requiring notice beyond its unshakable conviction that rule 23(e) does apply to precertification individual settlements and dismissals. Only two cases were cited,[99] *Rothman* and *Philadelphia Electric*, and these only for the "well settled" proposition that "for purposes of rule 23(e), a class action warrants the assumption that the putative class is viable."[100] This, apparently, sufficed to warrant the court's insistence on precertification notice. Concepts of abuse, reliance and protection of absentee class members evidently were thought unnecessary to explain what the court regarded as the positive mandate of rule 23(e).

In *McArthur v. Southern Airways*[101] the named plaintiffs in a Title VII sex discrimination case moved to amend their complaint to delete class allegations as part of a precertification settlement agreement. Emphasizing prevention of abuse and the possibility of reliance by absentee class members,[102] the Fifth Circuit held "that the district court comitted error in permitting plaintiffs to delete their class claims under rule 15(a) and proceed

95. 64 F.R.D. 181 (E.D. Wis. 1974).

96. 66 F.R.D. 615 (E.D. Wis. 1975).

97. *Id.* at 616; 64 F.R.D. at 182.

98. 66 F.R.D. at 616-17. If any evidence is needed that the courts view rule 23 as fundamentally a plaintiff-oriented remedy, consider Judge Gordon's justification in *Duncan* for requiring the defendant to pay the cost of the required notice:

> Each party insists that the other should bear the cost of the notice. I have already indicated that such burden should fall on the defendant. First, the plaintiff is indigent, and the defendant does not deny that it has the means to finance a method of notice entailing relatively modest costs. Secondly, *although the defendant insists on its lack of unlawful behavior, the plaintiff's position is vindicated to some extent since the defendant has agreed to pay him $10,000 in settlement.*

Id. (emphasis added). A mutually satisfactory settlement should never be viewed by a court as a tacit admission by the defendant of liability. As discussed throughout this article, too many other factors (including plaintiff's abuse and the court's attitude toward rule 23 in general) may lead a perfectly innocent defendant to settle purported class actions.

99. Rotzenburg, 64 F.R.D. at 182. *Duncan* cited no cases.

100. *Id.*

101. [1977] 7 LAB. REL. REP. (15 Fair Empl. Prac. Cas.) 1123 (5th Cir., July 22, 1977).

102. *Id.* at 1127.

to settlement without first providing the absentee class members with [rule 23(e)] notice of the proposed dismissal." [103]

B. *Cases Dispensing With Notice: Lack of Viable Class*

Philadelphia Electric has been interpreted by some courts as generally requiring notice while simultaneously providing a loophole whereby the giving of notice may be avoided. These same courts point to the "unless and until" reservation in the *Philadelphia Electric* rule: "[An alleged class action] must be assumed to be a class action for purposes of dismissal or compromise under 23(e) *unless and until* a contrary determination is made under 23(c)(1)."[104] Notice frequently has been dispensed with on the ground that the class, as a matter of law, could not have been properly certified. The self-deception inherent in this reasoning is apparent and courts embracing this theory have failed to explain how a negative determination of class viability in any way serves the policy objectives perceived in *Rothman* and *Philadelphia Electric*.

In *Berger v. Purolator Products, Inc.*,[105] two named plaintiffs and "all others similarly situated" sued defendant, alleging securities fraud. Their individual claims were settled without prejudice to the "class," and the parties sought the "directions" of the district court with respect to rule 23(e).[106] The court, however, believed the proposed settlement required a decision on the merits of class certification.[107]

Plaintiffs had done little, if anything, to prove the viability of the class;[108] the court, after reviewing the requirements of rule 23, held that plaintiffs' allegations failed to merit class action treatment.[109] Class allegations were ordered stricken from the complaint, and the individual settlements were permitted to proceed unimpeded by rule 23(e).[110]

The court in *Elias v. National Car Rental System, Inc.*[111] adopted an imaginative approach in eliminating the notice requirement for a proposed

103. *Id.*
104. 42 F.R.D. at 326 (emphasis added).
105. 41 F.R.D. 542 (S.D.N.Y. 1966).
106. *Id.* at 543.
107. "The issue to be determined by the court is whether the consolidated action is maintainable as a class action under new Rule 23 of the Federal Rules of Civil Procedure, effective July 1, 1966. *If it is not so maintainable, the compromise does not require approval by the court.* Rule 23(e), F.R.C.P." *Id.* (emphasis added).
108. This is a factor that has been considered by other courts. *See, e.g.*, Magana v. Platzer Shipyard, Inc., 74 F.R.D. 61, 64 (S.D. Tex. 1977).
109. 41 F.R.D. at 545. "Since none of the requirements of the three subsections of Rule 23(b) have been met, this action is not now maintainable as a class action and approval by the court of the proposed compromise is not required. Rule 23(e)." *Id.*
110. *Id.*
111. 59 F.R.D. 276 (D. Minn. 1973).

settlement of named plaintiff's securities fraud claim. The court, aware that plaintiff had never moved for certification of his alleged class, held that plaintiff's intense desire to settle was in and of itself sufficient to undermine his ability to fairly represent the class:

> First it is clear that plaintiff desires to withdraw as a plaintiff individually and personally. Were it not designated a class action, this would end the matter. In view of the requirements of rule 23(a)(4) *it is clear that a plaintiff who desires to withdraw personally as an individual is not one who will fairly represent and adequately protect the interests of the class*. One who wishes to cease his connection with the case cannot be a true class representative. There is no one sought to be substituted for him and so the action must fail for this reason alone.[112]

The purported class was dissolved without notice, and plaintiff's action was dismissed without prejudice to class rights.[113]

Until the very end of its opinion, the court in *Muntz v. Ohio Screw Products*[114] seemed determined to impose a blanket notice requirement for all precertification settlements. Citing *Philadelphia Electric*, the court held that "class treatment of the uncertified suit serves two important policies of the notice requirement"[115] and rejected defendant's protestations that settlements not prejudicial to class rights do not invoke rule 23(e).[116]

After stressing the policy objectives allegedly served by precertification notice, the *Muntz* court then did a curious thing: "Mindful of the shortcomings of weighing class certification with neither party forcefully advocating it, the Court will examine whether the class alleged in this suit is proper for certification *in order to avoid the vain act of giving settlement notice to an invalid class*."[117] The result: the class failed "for the reason

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112. *Id.* at 277 (emphasis added).

113. *Id.*

114. 61 F.R.D. 396 (N.D. Ohio 1973).

115. *Id.* at 398.

> [T]he Court may enter the settlement without notice only if it determines that this particular settlement is an exception to the notice requirement.
>
> . . . .
>
> The first policy served by requiring settlement notice prior to certification is that of reducing class allegations added solely to enhance the settlement of the representative plaintiff. The drafters of Rule 23 added the notice requirement to make it impossible for the class representative to sue and settle in the dark. . . . For purposes of this policy, the requirement of settlement notice is no less relevant prior to certification.
>
> Second, requiring notice prior to certification serves the policy of informing those persons who have refrained from pursuing their own relief in reliance on the representation of the class representative.

Id.

116. *Id.* at 399.

117. *Id.* (emphasis added).

that the class is not too numerous to permit joinder. Rule 23(a)."[118] The settlement was consummated without notice, a startling turnabout given the court's attitude toward precertification settlements. In the space of only six paragraphs, the court first embraced and then abandoned the "important policies" served by precertification notice. The notice requirement, which the court regards as mandatory on page 398[119] of its opinion, is discarded as a "vain act" on page 399.[120] The court at no point comes to grips with the proposition that, valid class or not, the named plaintiffs could still be guilty of abuse, or that absentee "class" members might have relied on the purported class action.

From a pure policy perspective, the impact of the judge's ruling is the same as if he had totally rejected the *Rothman* approach. The perceived policy objectives of precertification notice certainly cannot be realized if the notice is not given, regardless of the class' viability under rule 23. Courts that profess allegiance to the *Philadelphia Electric/Rothman* line, but nevertheless refuse to require rule 23(e) notice on grounds that the alleged class should not be certified, have entangled themselves in a hopeless logical and legal inconsistency. Their approach does nothing to delineate the rule 23(e) obligations of a court confronted with precertification individual settlements.

Yet the district court fell into this trap in *Held v. Missouri Pacific Railway*.[121] The judge adopted both elements of *Philadelphia Electric*, including the "until and unless" proposition,[122] and employed the device used in *Elias* to avoid giving notice: "The court finds a failure on the part of this individual plaintiff to adequately represent the class with a resulting nonsatisfaction of rule 23(a)(4)."[123] The court concluded that "with the question of maintainability resolved, the court is now in a position to approve an agreed-upon settlement."[124]

The proper conclusion must be that the "unless and until" language of *Philadelphia Electric* is wrong. The need to protect *class claims* supports the requirement that an alleged class action be treated as such at the precertification stage. The same factor militates against allowing district

118. *Id.*
119. *Id.* at 398.
120. *Id.* at 399.
121. Two *Held* opinions are involved. In the first, Held I, 8 Fair Empl. Prac. Cas. 772 (S.D. Tex. 1974), the district court judge postponed ruling on the parties' motions until trial briefs were provided. In the second, Held II, 8 Fair Empl. Prac. Cas. 774 (S.D. Tex. 1975), the district court ruled on these motions.
122. Held I, 8 Fair Empl. Prac. Cas. at 773.
123. Held II, 8 Fair Empl. Prac. Cas. at 775.
124. *Id.*

courts to avoid whatever responsibilities they might have to the alleged class by making hasty decisions to deny class certification merely because a proposed settlement is on the table.

The most recent case in this category is also the most carefully reasoned and thoroughly analyzed of rule 23(e) cases; yet the unfortunate outcome of *Magana v. Platzer Shipyard, Inc.*[125] clearly illustrates that this group of cases has relied on the wrong reasons in reaching its results.

Richard T. Magana sued his employer Platzer Shipyard, Inc. on behalf of himself and all "Black and Spanish surnamed American persons,"[126] alleging racial and national origin discrimination. As the court noted, however, apart from Magana's perfunctory list of thirty-seven interrogatories, "no significant effort was made by either counsel to ascertain whether or not the facts, if discovered, supported the existence of an employee class as alleged in the complaint."[127]

Three days after the deadline for discovery and briefing on the class certification issue had passed, the parties asked the court to approve an individual settlement, a $3,000 cash payment to Magana. Of this sum, plaintiff's counsel claimed a 40% contingency, or $1,200.[128] The proposed settlement, in the court's opinion, left two issues unresolved:

> If a class action is alleged by plaintiff but not as yet certified by the Court, and the proposed settlement is solely on behalf of the named plaintiff with no provision whatsoever for the putative class members, (1) is notice of the proposed compromise to potential class members necessary at this time; and (2) is the Court obligated under the law to review the reasonableness of the attorney's fee to be collected by plaintiff's counsel, even if the fee is based upon a contingent fee arrangement between counsel and the named plaintiff?[129]

Noting both that most Title VII claims are brought as alleged class actions and that the vast majority result in individual settlements at the precertification stage, the court held that "[t]he possibility for abuse of the Rule 23 device inherent in such a predictable pattern necessitates that the court expressly define the contours of its notice and attorney's fees responsibilities under Fed.R.Civ.P. 23 in the special context of public-oriented Title VII litigation."[130] The court made it clear that *collusive* abuse was not

125. 74 F.R.D. 61 (S.D. Tex. 1977). Although the court in this case strongly hinted that rule 23(e) notice will be invariably required, *id.* at 63 n.1, 65-66, it is included under this category because of language that also suggests that a negative decision on class certification would obviate the need for such notice.

126. *Id.* at 63.

127. *Id.* at 64.

128. *Id.*

129. *Id.* at 62.

130. *Id.* at 63.

its main concern. Throughout the nineteen page opinion the problem is defined as class action abuse by *plaintiff and his counsel*.[131] The court's stated dilemma is how to reconcile the principle of encouraging private settlements of legal disputes with the simultaneous need to protect against rule 23 abuse.[132] The court struck the balance in favor of curbing abuse, even if the result is to complicate privately negotiated settlement arrangements.[133]

Having once decided that class action abuse must be rooted out of Title VII litigation, the court then put forward two proposals for accomplishing this objective. The first, strict judicial scrutiny and predismissal approval of plaintiff's attorney's fee arrangements,[134] certainly cannot be faulted. Such a policy will likely deter abuse with little, if any, negative effect upon defendants.[135] The other, rule 23(e) notice to the putative class,[136] not only will *not* deter abuse, but will prove grossly unfair to defendants who are the target of abuse. Citing *Yaffe*, the *Magana* court held that: "The possibility of notice to absent class members and the soliciting of their objections, if any, to the disclosed settlement can serve as a deterrent to collusion on the part of the private parties to the litigation and help guarantee an adequate consideration of the class interest."[137] As discussed earlier, however, it is by definition impossible for rule 23(e) notice to *deter* abuse that has already occurred in a pending case, or to undo abuse that has already been done.[138]

To implement its policies, the court promulgated certain procedures to be followed in every precertification individual settlement case. In addition to furnishing copies of the proposed compromise and dismissal, the parties are required to provide information dealing with the history of settlement negotiations, the details of the settlement "package," the viability of the alleged class, absentee reliance and attorneys' fees.[139] The court also suggested that the parties' responses, considered with the results of discovery on the class certification issue, may result in an order denying class certification, thus permitting settlement as planned without notice.[140] The clear implication is that the court will, at that stage, make some ruling on class certification.

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131. *See, e.g., id.* at 71-78.
132. *Id.* at 64.
133. *Id.* at 68. The court considered and rejected the *Rothman* "reliance interest" rationale, instead regarding itself "compelled to place greater emphasis on the 'prevention of abuse' aim delineated above." *Id.* at 66.
134. *Id.* at 67, 72.
135. *Id.* at 71-72.
136. *Id.* at 67.
137. *Id.* at 68 (citing Yaffe v. Detroit Steel Corp., 50 F.R.D. 481 (N.D. Ill. 1970)).
138. *See* text accompanying notes 83-85 *supra*.
139. 74 F.R.D. at 78-79.
140. *Id.* at 79.

The next step presumes a valid class and, as a result, rule 23(e)'s applicability. At this point, the court would make a preliminary determination concerning the reasonableness of the proposed "settlement offer" (read "attorney's fee") as to the individual plaintiff and would make the rulings required to "ensure that the proposed compromise and dismissal is without prejudice to the rights of the putative class members."[141] Then, if satisfied that the settlement is reasonable, the court would determine whether notice is necessary, presumably on the basis of its "prevention of abuse" rationale. This process would involve at least one, possibly two, additional hearings.[142] Finally, after notice is given, yet another hearing would be held to determine the future of the alleged class in the event some absentee "class" member should appear to object to the settlement, intervene in the action or assume control of the class action as a named plaintiff.[143]

After all this, the settlement *may* then be approved and the plaintiff's claims dismissed.[144] The defendant, of course, may have completed only the first of many journeys through this complicated procedural nightmare, for a number of identical suits, provoked by the 23(e) notice and perhaps involving the same plaintiffs' attorney, may be lurking in the background.

The real problem with the *Magana* settlement procedure is that it failed to take into account what is perhaps the most compelling motive for settlement. *Magana* and all other courts that depend upon rule 23(c)(1) certification to trigger rule 23(e), and that rely upon a negative 23(c)(1) ruling to excuse their 23(e) responsibilities, overlook a crucial fact of contemporary class action practice: in many cases, if not the majority, defendants agree to settle class actions not because they fear classwide liability or exposure, but rather because they are prepared as a business proposition to pay plaintiff some nominal amount in order to avoid the enormous costs in time, personnel and legal expense involved in the discovery and legal skirmishing leading up to the 23(c)(1) certification hearing. It is generally recognized that to avoid class certification, the *defendant* bears the burden of disproving class viability.[145] This, of course, is back-

141. *Id.*

142. *Id.*

> If the Court concludes that notice is necessary, the views of all counsel will be solicited as to (1) the form and contents of the notice, (2) who should receive notice of the proposed dismissal, and (3) which party should bear the cost of the notice. . . . In addition, a hearing date will be set at which the objections of class members can be heard and evaluated.

Id. at 80.

143. *See id.* at 80.

144. *Id.*

145. *See* note 8 *supra*.

wards, but it is a fact of life. Accordingly, what defendant would spend $5,000 to defeat class certification when the named plaintiff is prepared to settle for $2,000? Furthermore, it is precisely this defendant, confident that class certification *could* be defeated, who is likely to be unconcerned about future suits by absentee members of a nonexistent class and who feels comfortable settling with the individual plaintiff.

A court that requires resolution of the class certification issue before determining its 23(e) responsibilities defeats the settling defendant's expectation that the matter will be resolved cleanly, quickly and privately. Rule 23(c)(1) proceedings and settlement approval procedures like those promulgated in *Magana* undermine defendants' primary incentive to settle. The complications involved in having an individual settlement approved in the *Magana* court are even more burdensome and involved than class certification itself; indeed, resolution of the class issue is part, but only a part, of the whole *Magana* settlement process.[146] Whatever the responsibilities of federal courts might be in the precertification individual settlement context, the cases in this category have clearly missed the point.

C. *Cases Holding No Notice Required: Inapplicabililty of Rule 23(e)*

A number of courts have concluded that precertification notice is not required. They have correctly discerned that 23(e) simply does not apply in the precertification individual settlement context and that no policy objectives of rule 23 are served by requiring notice. These cases have been decided correctly and can furnish the analytical framework for the flexible approach to rule 23(e) advocated in Part III of this article.

1. Rule 23(e) Does Not Apply[147]

Most rule 23(e) cases share a common ancestor, *Philadelphia*

146. Even if 23(e) notice is *not required* in a *Magana*-type procedure, plaintiff, who is presumed to have abused rule 23, is afforded infinitely greater settlement leverage by the mere existence of so complicated a settlement process. The prospect of suffering through a settlement proceeding, coupled with the obvious negative aspects of rule 23(e) notice (which will probably be required) will no doubt ensure that a defendant will promptly yield under plaintiff's threats and settle at the prefiling stage rather than risk its sanity in such a "procedural monstrosity." Dole, *supra* note 4, at 971.

147. Professor Wheeler thinks this issue has already been decided by the United States Supreme Court. In Sosna v. Iowa, 419 U.S. 393 (1975), the Court held that " '*[o]nce the suit is certified as a class action*, it may not be settled or dismissed without the approval of the court.' " *Id.* at 399 n.8, *quoted in* Wheeler, *supra* note 28, at 775 n.16 (emphasis added by Wheeler). Wheeler concludes that "[t]he clear implication of the italicized statement is that the requirement of court approval for settlement or dismissal embodied in rule 23(e) does not apply until an action has been certified as a class action." Wheeler, *supra* at 775 n.16a. The district courts have rejected the broad reach suggested by Wheeler's reading of *Sosna*'s footnote 8.

Electric.[148] Some cases, however, have drawn a crucial distinction that other courts, unfortunately, have overlooked.[149] They recognize that the broad holding of *Philadelphia Electric* must be understood in its proper factual context. As the court there so clearly emphasized, the precertification settlement was intended to bind the *entire class*, not just the individual parties, to the settlement agreement.[150] Upon this premise, the court's determination to treat *alleged* class actions as bona fide class actions, even at the precertification stage, is both understandable and appropriate. It would be manifestly unjust, and probably a denial of due process, to dismiss, compromise or settle the claims of the putative class without affording its members proper notice and an opportunity to object or intervene. These considerations do not apply, however, when the proposed settlement affects only the rights of the settling parties. *Philadelphia Electric* recognized this,[151] but many courts have simply extended the *Philadelphia Electric* doctrine to encompass cases in which the dismissal or settlement is explicitly without prejudice to the class.

The flaw in this expanded interpretation of *Philadelphia Electric* was prophesied by Judge John J. Parker in *Hutchinson v. Fidelity Investment Association*,[152] which held that the forerunner of modern-day rule 23(e)[153] was inapplicable to settlements of individual claims and required notice only of settlements of the class action itself.[154] The leading case, however, is *Weight Watchers, Inc. v. Weight Watchers International, Inc.*[155] Plaintiff appealed an order permitting defendant to communicate (under court supervision) with the alleged class. Plaintiff was concerned, apparently, that defendant's efforts to negotiate settlements with potential class members might undermine the numerosity required for class certification under rule 23(a)(1).[156] Chief Judge Friendly noted that:

> This Court cannot accept the negative implication urged by counsel that, in view of the above-quoted language, Rule 23(e) and its requirement of notice should not be presumed to apply prior to class certification. . . . Thus, in view of the unrelated nature of the question before the Supreme Court to the issues at hand, this Court is unwilling to attribute any special significance to the above-quoted language.

Magana v. Platzer Shipyard, Inc., 74 F.R.D. at 66. *See also* Duncan v. Goodyear Tire & Rubber Co., 66 F.R.D. at 616.

148. 42 F.R.D. 324 (E.D. Pa. 1967), *discussed at* text accompanying notes 46-51 *supra*.
149. *See* text accompanying note 152-65 *infra*.
150. 42 F.R.D. at 327.
151. *Id.* at 326-27.
152. 106 F.2d 431 (4th Cir. 1939).
153. Fed. R. Civ. P. 23(c), 28 U.S.C. app., rule 23(c) (1964); *see* note 41 *supra*.
154. 106 F.2d at 436.
155. 455 F.2d 770 (2nd Cir. 1972).
156. *Id.* at 772-73.

> Indeed, we are unable to perceive any legal theory that would endow a plaintiff who has brought [a class action] . . . with a right to prevent negotiation of settlements between the defendant and other potential members of the class who are of a mind to do this; *it is only the settlement of the class action itself without court approval that F.R.Civ.P. 23(e) prohibits.*
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> . . . .
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> Here, even if defendant should succeed in settling with so many franchisees that the court will be forced to deny class action status, plaintiff's complaint will remain untouched. As we have, in essence, already noted, plaintiff has no legally protected right to sue on behalf of other franchisees who prefer to settle; *F.R.Civ.P. 23(e), requiring court approval of the dismissal or compromise of a class action, does not bar non-approved settlements with individual members which have no effect upon the rights of others.*[157]

Although *Weight Watchers* did not cite *Philadelphia Electric*, the important distinction left unstated in the earlier case was clearly recognized: 23(e) is inapplicable *when the class is not affected.*

In *Nesenoff v. Muten*,[158] class representatives contended that settlement offers made to potential class members constituted a settlement or compromise of the "class action" without court approval. The court responded:

> Rule 23(e), Fed. R. Civ. P. is designed to guard against the possibility of a self-appointed class representative unilaterally settling or compromising his claim in derogation of the rights of the class as a whole. . . . Here, no such problem exists . . . . By accepting the offer, these potential class members have chosen to settle their claims through a relinquishment of their rights. *However, such settlements do not affect the rights of the other potential class members. The plaintiffs' class action complaint has not been disturbed, nor have the other potential class members been prohibited from intervening in the instant suit or commencing their own suit in the event that the plaintiffs' class action motion is denied.*[159]

The *Nesenoff* court also rejected the suggestion that it should nevertheless play a supervisory role in approving or disapproving the terms of settlement.[160]

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157. *Id.* at 773, 775 (emphasis added) (footnotes omitted).

158. 67 F.R.D. 500 (E.D.N.Y. 1974).

159. *Id.* at 502-03 (emphasis added) (footnote omitted).

160. Rule 23(e), Fed. R. Civ. P. is not intended to insure court supervision of the settlement of potential class member claims with a view towards the economic viability of intervention or commencement of separate lawsuits in the event that the numerosity requirement is eliminated. . . . As a result, Rule 23(e), Fed. R. Civ. P. not being applicable, there is no legal authority under which this court may undertake such a supervisory role.

Id. at 503 n.4. *See also* American Fin. Sys. Inc. v. Harlow, 65 F.R.D. 572 (D. Md. 1974); Moreland v. Rucker Pharmacal Co., 63 F.R.D. 611 (W.D. La. 1974).

In *Rodgers v. United States Steel Corp.*,[161] workers brought a class action alleging racial discrimination. Defendant sought to settle the individual claims of a number of potential class members by tendering back pay.[162] Approving the settlement, the court held:

> Plaintiffs . . . insist that the tender of back pay to eligible black employees at the Homestead Works who are members of the *Rodgers* class constitutes a settlement of that class action and is therefore directly governed by the requirements of Rule 23(e) of the Federal Rules of Civil Procedure. I do not agree . . . . *[A] brief consideration of rule 23(e) reveals that neither its plain language nor its underlying rationale embraces the circumstances presented here.* [emphasis added].
>
> By its terms, Rule 23(e) applies and is limited to dismissal or compromise of a class action *itself* . . . where application of its strictures is necessary to protect the rights of absentee or nonparty class members who may be bound or affected by a settlement of their claims by their class representatives. . . . In contrast, the Rule does not attach to direct settlements with *individual* class members which have no effect upon the rights of others. . . .
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> . . . The tender of back pay now at issue can in no way be deemed to constitute a settlement of the *Rodgers* class action itself. It is, rather, a compromise offer, made pursuant to a negotiated consent decree, to individual class members who are free to accept or reject it as they see fit. Those at Homestead who reject the tender will be neither bound nor prejudiced by the acceptance of others or by the Alabama settlement itself.[163]

There is thus established precedent that rule 23(e) is not applicable to cases involving precertification individual settlements. This literal inapplicability of 23(e), however, cannot and does not settle the issue. Despite *Nesenoff* there remains *discretionary* authority in the district courts to order notice of any settlement, dismissal or compromise upon whatever terms the court deems appropriate. Apart from the mandatory language of 23(e), rule 23(d)[164] can be read as giving a district court power and discretion to require

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161. 70 F.R.D. 639 (W.D. Pa.), *appeal dismissed*, 541 F.2d 365 (3d Cir. 1976).

162. *Id.* at 640.

163. *Id.* at 642-43 (emphasis in original except as indicated) (footnote omitted) (citations omitted); *accord*, Chrapliwy v. Uniroyal, Inc., 71 F.R.D. 461 (N.D. Ind. 1976).

> A voluntary dismissal under 41(a)(1) is subject to the provisions of Rule 23(e) which allows the dismissal or compromise of a class action only with the approval of the Court. *However, the language of 23(e) refers to the dismissal and compromise of the class action and does not appear to apply with equal force to individual claims.* Thus, although the class action itself may not be voluntarily dismissed without Court approval and scrutiny, *an individual claim in a 23(b)(3) [class] action may be settled and dismissed at the class member's own initiative.*

Id. at 464 (emphasis added) (citations omitted).

164. FED. R. CIV. P. 23(d), *quoted in* note 1 *supra*.

notice to the putative class of a proposed precertification individual settlement.[165] The question, therefore, is not whether the court *must* require notice but whether the court *should* require notice. The answer involves important policy considerations, because if no policy goals are served by the giving of either mandatory or discretionary notice, then notice should not be required.

2. No Policy Objectives Served

As noted above, courts that have required notice have done so in order to prevent or deter abuse of the class action mechanism and to protect those members of the purported class who may have relied upon the "class action."[166] Enough has been said to discredit the "prevention of abuse" rationale. The subject of reliance, however, presents a more stubborn problem.

It is unlikely that potential members of an uncertified class actually rely upon an uncertified class action. If they do, certainly theirs is not *justifiable* reliance. Although the argument for reliance may have some theoretical appeal, it is "not supported by a realistic appraisal of the actual amount and causes of reliance on pending class actions."[167]

The inadequacies of the reliance theory were drawn sharply into focus in *Magana*:

> [I]t is axiomatic that potential class members have a more speculative interest in the litigation than certified class members and that their expectations therefore should be accorded less weight. Thus, the "protection of class" function embodied in Rule 23(e), although important, is not paramount in the pre-certification stage, as it is once a class is actually defined.
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> . . . .
>
> *Until a class is actually defined, any interest or expectation by an alleged member in a recovery, monetary or otherwise, against the Defendant must be classified as speculative.*[168]

This theory presumes both a valid class and awareness of the pending, uncertified class action by a potential member of the presumably valid class.

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165. *E.g.*, Dole, *supra* note 4, at 985; *Harvard Study*, *supra* note 8, at 1548.

166. *See* text accompanying notes 76-103 *supra*.

167. Wheeler, *supra* note 28, at 807.

> [I]t is highly unlikely that more than a very few persons would have relied to their detriment upon a pending class action by not filing their own actions or motions to join or intervene in the action. . . . [T]he number of people so relying will be so small that there is no need for any protection; and as long as *American Pipe* is effective, those few people will be protected by the tolling of the statute of limitations.

Id. at 790. "An action that has no potential merit or feasibility has only nuisance value and does not constitute a significant interest of absentees." Dole, *supra* note 4, at 986.

168. 74 F.R.D. at 67, 69-70 (emphasis added).

Such presumptions are entirely unjustified when settlement occurs at the precertification stage unless there is positive evidence of actual reliance. To require defendants to deal with an alleged but uncertified class *as a class* merely because some member of this speculative class *might have* heard of the lawsuit contradicts rule 23's prerequisites for class certification that are designed in part to protect defendants against meritless class allegations.

Reliance was not a factor in *Philadelphia Electric*, and in *Elias v. National Car Rental System, Inc.*, the court flatly stated that it

> does not preceive it has any duty to notify those whom plaintiff's counsel might claim to be class members of the proposed dismissal. Rule 23 does not require notice under these circumstances and to do so is in a sense merely soliciting a client for plaintiff's counsel under the aegis of the court. This would be improper.[169]

As the court observed in *Pearson v. Ecological Science Corp.*:[170]

> [Amicus curiae for appellants] argues that the district court erred by failing to require that notice under Rule 23(e), F.R.Civ.P., be given to members of the asserted class of the proposed settlement. *[These arguments] ignore the difference between a class action and a non-class action. They place undeserved emphasis upon mere allegations of class action status by individual plaintiffs. . . .*
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> . . . .
>
> The appellants have not only failed to show any prejudice to nonparty members of the alleged class by the settlement and dismissal of this action, they have also been unable to show that any of those individuals were relying on [the pending action] . . . to exonerate their rights. *We fail to understand how individuals could have relied on the possibility that some day a court might determine that the suit was proper for class action determination . . . .*[171]

The *Pearson* court made another, even more revealing observation: "Further, since no Rule 23(c)(3) notice of the maintenance of this litigation was ever given or required to be given to nonparty members of the originally alleged class, *reliance by those individuals on this action to recover their losses would be particularly misplaced.*"[172] Courts that emphasize the reliance interest of absentee "class" members overlook the fact that no notice is required or generally given to the class (1) when the action is filed,[173] (2) when class certification is denied in an appropriate case,[174] (3)

169. 59 F.R.D. at 277.

170. 522 F.2d 171 (5th Cir. 1975).

171. *Id.* at 176, 178 (emphasis added) (footnotes omitted).

172. *Id.* at 178. (emphasis added).

173. Rule 23 first requires notice to a class upon its certification pursuant to subsections (b)(3) and (c)(1). *See* note 1 *supra*.

174. *See* cases discussed at text accompanying note 104-46 *supra*.

when class certification, once conditionally granted, is for some reason withdrawn before notice of the original certification is given to the class,[175] or (4) when the complaint or its class allegations are dismissed on the merits.[176] In circumstances (2), (3) and (4), the effect upon the "class" is precisely the same as if a dismissal without prejudice to the class had been entered in a precertification individual settlement situation. Yet courts have not thought the "reliance interest" of absentee class members sufficient to justify notice of judicial action that, in effect, ends the lawsuit upon which they allegedly have been relying. Indeed, the cases discussed in Part II(B) are totally inconsistent with the reliance theory.[177] Those cases refused to require notice on the ground that a demonstrably invalid class does not, at the precertification stage, trigger the notice requirements of rule 23(e).

In *Seligson v. Plumtree, Inc.*,[178] the district court conditionally granted plaintiff's motion for class certification, but ordered that no notice be sent to the class at that time. The court later concluded that "this action is inappropriate for class action treatment."[179] On the issue of notice to the conditionally certified class of its dissolution, the court held that "*[s]ince no notice was originally sent to prospective members, no one could have justifiably relied on our conditional class action determination. Therefore we need not send notice of this dissolution of the class.*"[180]

In *Booth v. Prince George's County*[181] the district court held that when the individual claims of a named plaintiff are mooted at the precertification stage, "the complaint of the class must be simultaneously dismissed for failure to set forth a case or controversy as required by Article III of the Constitution."[182] The court dismissed the action, but noted that the dismissal "is without prejudice, and, should the plaintiff class succeed in producing a new named plaintiff, no future action is barred by the Court's decision here."[183] Significantly, the *Booth* court did *not* require notice of the dismissal.

Requiring notice at the precertification individual settlement stage not only fails to achieve any ascertainable policy objectives but can actually undermine other, important policy goals. In most cases, the counterproduc-

175. *See id.*
176. *See, e.g.*, Booth v. Prince George's County, 66 F.R.D. 466 (D. Md. 1965).
177. *See* text accompanying notes 104-46 *supra*.
178. 61 F.R.D. 343 (E.D. Pa. 1973).
179. *Id.* at 345.
180. *Id.* at 346 (emphasis added).
181. 66 F.R.D. 466 (D. Md. 1975).
182. *Id.* at 476.
183. *Id.*

tive consequences of giving notice outweigh the perceived benefits in protecting the so-called reliance interest of absentee class members.

3. Policy Objectives Served by Not Giving Notice

Dispensing with notice, thereby permitting defendants and named plaintiffs to settle privately and without prejudice to the purported class, will reduce threats of class action litigation in prefiling settlement negotiations. Of greater importance is the principle of settlement itself. Amicable settlement of private disputes without resort to legal process has always enjoyed special favor and is highly encouraged, particularly in the sensitive area of employment discrimination litigation, which accounts for a significant percentage of all class action filings. Written into Title VII and EEOC regulations is the stated congressional preference for conciliation and settlement whenever possible; litigation is regarded as an undesirable last resort.[184] An employer who has bought peace with a former employee is entitled to have that agreement respected by federal district courts.

As the court noted in *Philadelphia Electric*, "a strong argument can be made that the parties should be allowed to compromise [the issue of class versus no class] . . . in advance of the court's determination."[185] In that case the proposed settlement would have bound the entire class, not only the named plaintiffs. Even so, the court recognized that its "conclusion that Rule 23(e) precludes court approval of the proposed settlements at the present time is not a totally satisfactory one."[186] Even less satisfactory is the situation involving only individual claims.

The notice requirement in *Rothman* left the parties' settlement agreement in ruins. Defendants decided they would rather fight to the finish than give notice to the class and withdrew their offer to settle.[187] A similar response can be expected from most defendants, who believe that rule 23(e) notice deprives them of the essence of their bargain.

Finally, requiring rule 23(e) notice puts the district court in the unseemly posture of soliciting additional clients for the named plaintiffs' attorney. The provocative aspects of "invitation to sue letters" are perhaps sufficient in themselves to warrant dispensing with notice. When the inherent unfairness to defendants is taken into account, combined with the inevitable contribution to court congestion that must follow, the balance should be struck against giving notice. As the court in *Elias* correctly noted, "Rule 23

184. *See* 42 U.S.C. § 2000(e)-5(f)(1) (Supp. V 1975); EEOC Procedural Regulations, 29 C.F.R. §§ 1601.19A, .20, .22, .24 (1976).

185. 42 F.R.D. at 328.

186. *Id.*

187. 52 F.R.D. at 497.

does not require notice under these circumstances and to do so is in a sense merely soliciting a client for plaintiff's counsel under the aegis of the court. This would be improper."[188]

Pan American World Airways, Inc. v. United States District Court[189] involved claims stemming from the crash of a jet liner near Paris, France, in March 1974. Numerous pending suits, including at least one alleged class action, where consolidated in the central district of California. At the pretrial stage, the district judge ordered defendants to produce the plane's passenger list and announced his intention to notify potential plaintiffs of the pending actions.[190] The aircraft manufacturer then moved that the judge not seek the passenger list and that he refrain from sending notice to nonlitigants. Both motions were denied.[191] When defendants filed a petition for mandamus in the court of appeals seeking to prevent the district judge from notifying potential plaintiffs of the pending lawsuits, the Ninth Circuit held:

> Notice from the court to potential plaintiffs not authorized explicitly by statute or rule is so extraordinary that review of such actions by mandamus will not frustrate the congressional policy permitting appeals only from final judgments. . . . *Furthermore, erroneous notice to potential plaintiffs cannot be remedied on appeal after final judgment. Petitioners cannot be relieved of the burden of actions filed in response to such notice.* . . . Finally, as will appear, the disputed order is erroneous not because the district court improperly resolved an issue properly before it but because it acted without authority sanctioned by statute, rule or the equitable powers of a Federal Court.[192]

In response to plaintiffs' argument that the district court possessed inherent equitable power to send the contemplated notice, the court of appeals stated:

> *[W]e hold that such notice is neither required by the due process clause nor permitted by any ascertainable source of judicial authority.*
>
> . . . So long as the persons sought to be notified do not become parties to these actions, they will not be bound by the outcome. Hence they will not be adversely affected by these actions and need not be notified of them. . . . *When no interest is threatened, no notice is required.*
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> . . . .
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> *Traditionally in our judicial system, courts are powerless to act until litigants bring claims before them. The issuance of notice to*

188. 59 F.R.D. at 277.
189. 523 F.2d 1073 (9th Cir. 1975).
190. *Id.* at 1075.
191. *Id.*
192. *Id.* at 1076 (emphasis added).

> *potential plaintiffs offends this principle in two ways: first, it permits a court to act upon a claim before it becomes the subject of a lawsuit; and second, it permits a court to acquire jurisdiction by encouraging lawsuits. So sharp a deviation from the traditional role of the judiciary requires justification. Resort to a residual power of unspecified origin is insufficient.*
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> . . . .
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> . . . Sending the notice to prospective plaintiffs cannot be grounded in the general equitable powers of the district court.[193]

The court also rejected plaintiffs' contention that notice should be sent pursuant to rule 23:

> *The district court did not find, and the respondents have not shown, that the action below meets the specific prerequisites of a class action.* . . . Respondents contend nevertheless that it falls within the notice provisions of Rule 23 because a case may be treated as a class action before it is found to be one. . . . However, none of the cited cases supports the notice sought in this case. . . . The admitted purpose of the notice in this case is to bring the claims of unnamed members of the plaintiff class before the court. Notice for this purpose usually has been thought to issue only after certification of a class action. . . . For that reason, *notice for the purpose of bringing the claims of unnamed members of the plaintiff class before the court may not issue before a class action has been certified.*[194]

In the interim, the trial judge had certified a plaintiff class under rule 23, stating as grounds for class certification defendants' earlier opposition to the court's proposed notice.[195] Again, defendants sought a writ of mandamus to reverse the district court, and the Ninth Circuit again agreed.[196]

Where does all this leave us? The district courts have differed in interpreting their responsibilities under rule 23(e). While notice should be required in some precertification settlements, it cannot be justified in others.

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193. *Id.* at 1077 & n.3, 1078 (citations omitted) (emphasis added).

194. *Id.* at 1078-79 (emphasis added).

195. McDonell Douglas Corp. v. United States Dist. Court, 523 F.2d 1083, 1086 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976).

196. *Id.* at 1086-87.

> We have already held that the district court could not issue notice to unnamed potential plaintiffs without first properly declaring a class action. The district court cannot circumvent this holding by finding opposition to notice to be sufficient grounds for a class action.
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> . . . .
>
> . . . The certification in this case constitutes a clear abuse of discretion sufficient to invoke this extraordinary writ. *Not only is the district court's decision contrary to our holding . . . , it is also inconsistent with any tenable interpretation of Rule 23.* . . . Repeated errors of this magnitude in applying the Federal Rules of Civil Procedure may be corrected by mandamus.

Id. (emphasis added).

On occasion notice may serve legitimate policy goals. More often, however, the giving of notice will have undesirable consequences. The nature of the problem calls for flexibility rather than dogmatic rigidity on the part of the courts. An open minded approach to rule 23(e) is needed, one that reconciles oftentimes conflicting policies and interests in fashioning an equitable result for the unique circumstances of each case.

III. A FLEXIBLE APPROACH

Communication is the key: (1) Communication (2) with the putative class (3) by one or both of the parties or by court order (4) at the prefiling, precertification or class action stage of the litigation is the source of most rule 23(e) problems. Reasonable yet firm controls upon such communication not only can curb class action abuse but also can help to achieve the genuine policy goals of rule 23(e).

Panaceas are beyond the scope of this article and the imagination of its author. The problem of class action abuse *generally*, for example, can be resolved by nothing less than a comprehensive reexamination, reevaluation and, perhaps, redrafting of rule 23 itself. Within the confines of the existing rule, however, the limited problems involving individual settlements of alleged class actions can be dealt with effectively. Any solution to the problems identified in this article must take several factors into account: (1) Class action "strike suits," prefiling abuse, class "sell-outs" and other abuses of rule 23 must be avoided and effectively deterred; (2) the interests of the putative class must be protected against settlement, dismissals or compromises that are binding upon them or otherwise prejudice their rights; (3) reliance by nonparty class members upon alleged class actions at the precertification stage must be prevented; and (4) the courts must be fair to parties who wish to settle individual claims at the precertification stage. This means rejection of procedures and proceedings that inject uncalled-for delays, expense and obstructions into the settlement process when the rights of others cannot reasonably be regarded as at stake.

Rule 23(e) notice is not a panacea. In most precertification individual settlements, it is not even a good idea. The "prevention of abuse" rationale is a classic example of too little, too late, and breeds its own peculiar brand of prefiling abuse. The "reliance interest" theory ignores the realities of modern legal practice: rarely does anyone rely upon an uncertified class action and gratuitous, speculative presumptions to the contrary by federal district judges must be rejected as false. Whenever reliance is a factor, it is a demonstrable one; in the absence of evidence of such reliance, the court's conscience ought not be troubled.

Both abuse and reliance are engendered by the ability of named plaintiffs and defendants to communicate with the purported class or to publicize the pending action prior to a ruling on class certification. If individual settlements are not to be allowed except as supervised and monitored by the courts, then certainly presettlement communication and publicity should be subject to similar restrictions.

As one commentator has noted,

> [T]he amended rule [23] has been taken as an invitation to solicit litigation. Some attorneys have not been content with the notice provisions of the rule, and have solicited clients either directly or through trade associations and even by the use of salesmen paid a commission for each class member recruited.[197]

Ethical considerations notwithstanding, the Madison Avenue techniques employed in organizing some class actions present an embarrassing public spectacle and degrade the legal profession. The publicity that often surrounds these self-promotional, organizational efforts can also foster the much feared reliance by nonparty "class members," which often triggers a rule 23(e) response from the court when the named plaintiffs attempt to settle. As a study by the *Harvard Law Review* (*Harvard Study*) has recognized, "These dangers are sufficiently serious to warrant some sort of check on the attorney's communications with the class."[198]

If the courts can establish an effective control upon precertification communication and publicity, many rule 23(e) problems will simply disappear. Reliance upon a lawsuit, for example, presumes actual knowledge of it. Reliance, as a factor of legal significance for purposes of rule 23(e) at least, can be eliminated by appropriate restrictions upon precertification communication and publicity.

An absolute ban on communication, of course, will not do. Such gag orders would probably violate the first amendment rights of plaintiff attorneys and would certainly interfere with their efforts to represent their clients adequately.[199] Communication and publicity, while not to be *prohibited*, can and must be *regulated* by the courts.

This is the approach favored by the *Manual for Complex Litigation*.[200]

197. Simon, *supra* note 7, at 392. In Carlisle v. LTV Electrosystems, Inc., 54 F.R.D. 237, 240 (N.D. Tex. 1972), the court cited solicitation of potential class members as grounds for refusing to certify the class.

198. *Harvard Study*, *supra* note 8, at 1598.

199. *See* Rodgers v. United States Steel Corp., 508 F.2d at 162-63.

200. FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION § 1.41 (1975). Gag orders reverse the rule in ordinary litigation that communications between attorney and client are freely permitted and, indeed, encouraged. The apparent rationale for this reversal is the court's fear that the class attorney may abuse communications

The *Manual*'s Suggested Local Rule 7[201] and sample Pre-Trial Order No. 15[202] both reflect an awareness that:

> The class action under Rule 23 is subject to abuse, intentional and inadvertent, unless procedures are devised and employed to anticipate abuse. . . . To anticipate and prevent these abuses, timely action should be taken by local rule or by orders in the particular civil action or by both such means.
>
> . . . [I]t is recommended that each court adopt a local rule forbidding *unapproved* direct or indirect written and oral communications by formal parties or their counsel with potential and actual class members who are not formal parties, provided that such proposed written communications submitted to and approved by order of court may be distributed to the parties or parties designated or described in the court order of approval.[203]

The *Harvard Study* concludes that such limited restraints upon communication and publicity are desirable and suggests that "rule 23(d) should be amended to give trial judges discretionary authority to establish procedures for screening communications with class members by both class representatives and the class opponent."[204] The *Harvard Study* then proposes that "rule 23(e) might be amended to make it clear that trial judges have *discretion* in fixing notice requirements in the event of settlement."[205]

A number of courts have imposed restrictions upon communications with the putative class.[206] Significantly, most of these courts have rejected

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with the class. He may, for example, solicit fee arrangements or misrepresent the benefits of participation in the class suit in order to prevent opt-outs. Another rationale, arising from the attorney's need to subordinate some class interest to others, is that the advice the attorney offers the class and the inquiries he makes of it may be skewed. These dangers are sufficiently serious to warrant some sort of check on the attorney's communications with the class. Any checks adopted, however, must be narrowly drawn to avoid restricting the flow of information from or counseling to the class.

Harvard Study, *supra* note 8, at 1598.

201. FEDERAL JUDICIAL CENTER, *supra* note 200, app. § 1.41, at 211-12.

202. *Id.* app. § 1.41, at 212-13.

203. *Id.* § 1.41. Note that the *Manual* would regulate communication by either plaintiff or defendant. *Id.* § 1.41 & app. § 1.41. Such an approach would forestall any attempted abuse of rule 23 when, for example, the defendant might seek to undermine class certification by "buying off" enough individual claims so that the numerosity requirements could not be satisfied. *See generally* Dole, *supra* note 4, at 993-94.

204. *Harvard Study*, *supra* note 8, at 1627.

205. *Id.* at 1628 (emphasis added).

206. Weight Watchers, Inc. v. Weight Watchers Int'l, Inc., 455 F.2d 770 (2d Cir. 1972); Magana v. Platzer Shipyard, Inc., 74 F.R.D. 61 (S.D. Tex. 1977); Chrapliwy v. Uniroyal, Inc., 71 F.R.D. 461 (N.D. Ind. 1976); American Fin. Sys., Inc. v. Harlow, 65 F.R.D. 572 (D. Md. 1974); Seligson v. Plumtree, Inc., 61 F.R.D. 343 (E.D. Pa. 1973). *But see* EEOC v. Mobil Oil Corp., 6 Fair Empl. Prac. Cas. 727 (W.D. Mo. 1973), where the court stated:

> Mobil Oil Corporation (Mobil) has moved the court for an order prohibiting communication with potential or actual class members. The Equal Employment Opportunity Commission (EEOC) opposes the motion. The motion will be denied.
>
> . . . .

rule 23(e) notice for individual precertification settlements.[207] As the courts in *Seligson*[208] and *Magana*[209] have observed, court supervision and monitoring of communication and publicity can effectively eliminate any justifiable reliance upon the pending action by absentee "class" members.

This article is not meant to suggest that rule 23(e) serves no useful purpose at the precertification stage. *Philadelphia Electric* is good law—as far as it goes. Settlements that compromise potential *class* claims require notice to the potential class. When only *individual* settlements are involved, however, and presuming reasonable restrictions are placed upon precertification communication and publicity as suggested above, notice should be required if and only if there are in fact *identifiable* persons who may have *justifiably* relied upon the actions being settled. Even then only those identifiable individuals should be notified, *not* the entire alleged class, and the form of such notice should be "scrupulously neutral."[210] Greater judicial self-restraint *must* characterize the courts' attitude toward rule 23(e) in the future. Only in this manner can an equitable balance be achieved between the interests of the parties, particularly defendants, and those of the class, whose existence at that crucial moment remains yet an unproven and perhaps unprovable allegation.

. . . Mobil's suggestions are strained, unrealistic, and smack of corporate paranoia. The court is singularly unimpressed with them.

Id. at 727, 728.

207. Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l., Inc., 455 F.2d 770 (2d Cir. 1972); Chrapliwy v. Uniroyal, Inc., 71 F.R.D. 461 (N.D. Ind. 1976); American Fin. Sys., Inc. v. Harlow, 65 F.R.D. 572 (D. Md. 1974); Seligson v. Plumtree, Inc., 61 F.R.D. 343 (E.D. Pa. 1973).

208. We specifically forbade notification to the class, as well as communication with other potential class members regarding this action, in order to protect against reliance by such potential class members before we made a final decision on class action status.

. . . .

This is an appropriate time to dissolve the class determination. Since no notice was originally sent to prospective members, no one could have justifiably relied on our conditional class action determination. Therefore we need not send notice of this dissolution of the class.

61 F.R.D. at 345-46 (emphasis added).

209. Obviously, recognition of this reliance interest presupposes that one or more class members has actual knowledge of the pending class action. If there has been little, if any, formal or informal publicity about the suit, then it is highly improbable that such an interest exists in fact. Moreover, in view of Local Rule 6 of the Southern District of Texas, which prohibits communications between any formal party or counsel to the litigation and absent class members without court approval, it is highly improbable that class members will possess knowledge of the action.

74 F.R.D. at 70.

210. *See* note 59 *supra*.