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Defendant Class Actions

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I. INTRODUCTION

In a 1975 California case, *Eskaton v. Driver*,[1] a group of hospitals brought claims against several hundred participants in a bankrupt health maintenance organization by suing five participants both individually and as representatives of all participants who had used the hospitals' facilities. *Eskaton* was a defendant class action, a procedural device that allows one who has a common grievance against a multitude of persons to resolve the whole dispute by suing only a few members of the "class." If the chosen few represent the class adequately, all class members are bound by the resolution of the common issues.[2]

Plaintiff begins the action by selecting representatives from among the class members and serving them with process in the same fashion that parties defendant would be served in a nonclass suit. The mechanics of the subsequent possible steps—class certification, notice to absentees, exclusion of, or intervention by absentees, litigation of common issues, settlement proposal and approval—are virtually the same for defendant and plaintiff class actions. The significant difference comes at the very end of the proceedings. Provided individual issues were not left to be resolved outside the class proceeding, a judgment in favor of a plaintiff class is enforceable against the defendants just as in a nonclass suit. A judgment against a defendant class, however, is no more than a declaration of rights or duties on common issues.[3]

Plaintiffs have found defendant class actions increasingly useful in recent years[4]—useful in prosecuting claims that otherwise would

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1. Civil No. 257-471 (Sacramento County, Calif. Super. Ct. Oct. 10, 1975).

2. *See* notes 17-36 *infra* and accompanying text.

3. *See* notes 47-48 *infra* and accompanying text. When monetary relief is sought, plaintiff must later bring collateral suits against the various defendants individually to execute on the judgments.

4. *See, e.g.*, the following defendant class actions: Trainor v. Hernandez, 97 S. Ct. 1911, (1977); Gerstein v. Pugh, 420 U.S. 103 (1975); Kline v. Coldwell, Banker & Co., 508 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); Appleton Elec. Co. v. Advance-United Expressways, 494 F.2d 126 (7th Cir. 1974); Callahan v. Wallace, 466 F.2d 59 (5th Cir. 1972); United States v. Trucking Employers, Inc., 72 F.R.D. 101 (D.D.C. 1976); Hopson v. Schilling, 418 F. Supp. 1223 (N.D. Ind. 1976); Thompson v. Board of Educ., 71 F.R.D. 398 (W.D. Mich. 1976); Bradford Trust Co. v. Wright, 70 F.R.D. 323 (E.D.N.Y. 1976); Redhail v. Zablocki, 418 F. Supp. 1061 (E.D. Wis. 1976); Tucker v. City Bd. of Comm'rs, 410 F. Supp. 494 (M.D. Ala. 1976); United States v. Truckee-Carson Irrigation Dist., 71 F.R.D. 10 (D. Nev. 1975); Mudd v. Busse, 68 F.R.D. 522

be economically infeasible;[5] in overcoming troublesome venue and jurisdictional requirements;[6] in avoiding statute of limitations problems;[7] in preventing the doctrine of collateral estoppel from eliminating a cause of action against a multitude of persons by a single adverse result in a suit against one of them;[8] and in avoiding being subject to incompatible decrees from successive suits brought by several members of a group of similarly situated persons.[9]

Despite the advantages of the defendant class suit and its availability for several centuries,[10] few have understood or used it until recently. There are undeniably problems in any defendant class action, but they are not insurmountable. Although adequate representation is said to be assured in plaintiff class actions, some authorities con-

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(D. Ind. 1975); Jones v. United States Dep't of Hous. and Urban Dev., 68 F.R.D. 60 (E.D. La. 1975); Sommers v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 66 F.R.D. 581 (E.D. Pa. 1975); Kidd v. Schmidt, 399 F. Supp. 301 (E.D. Wis. 1975); Paxman v. Wilkerson, 390 F. Supp. 442 (E.D. Va. 1975); Kendall v. True, 391 F. Supp. 413 (E.D. Va. 1975); Manning v. Palmer, 381 F. Supp. 713 (D. Ariz. 1974); Ruocco v. Brinker, 380 F. Supp. 432 (S.D. Fla. 1974); Taliaferro v. State Council of Higher Educ., 372 F. Supp. 1378 (E.D. Va. 1974); Chevalier v. Baird Sav. Ass'n, 371 F. Supp. 1282 (E.D. Pa. 1974); Arenson v. Board of Trade, 372 F. Supp. 1349 (N.D. Ill. 1974); Kane v. Fortson, 369 F. Supp. 1342 (N.D. Ga. 1973); Gibbs v. Titelman, 369 F. Supp. 38 (E.D. Pa. 1973), *rev'd on other grounds*, 502 F.2d 1107 (3d Cir.), *cert. denied*, 419 U.S. 1039 (1974); Lewis v. Baxley, 368 F. Supp. 768 (M.D. Ala. 1973); Dudley v. Southeastern Factor & Fin. Co., 57 F.R.D. 177 (N.D. Ga. 1972); Danforth v. Christian, 351 F. Supp. 287 (W.D. Mo. 1972); Cotchett v. Avis Rent A Car Sys., Inc. 56 F.R.D. 549 (S.D.N.Y. 1972); Northern Cheyenne Tribe v. Hollowbreast, 349 F. Supp. 1302 (D. Mont. 1972); Coniglio v. Highwood Servs., Inc., 60 F.R.D. 359 (S.D.N.Y. 1972); Samuel v. Univ. of Pittsburgh, 56 F.R.D. 435 (W.D. Pa. 1972); Pennsylvania v. Local 542, Operating Eng'rs, 347 F. Supp. 268 (E.D. Pa. 1972); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972); Dale Elec., Inc. v. R.C.L. Elec., Inc., 53 F.R.D. 531 (D.N.H. 1971), *order rescinded on other grounds*, 178 U.S.P.Q. 525 (D.N.H. 1973); Ferguson v. Williams, 330 F. Supp. 1012 (N.D. Miss. 1971), *vacated on merits*, 405 U.S. 1036 (1972); Sellers v. Contino, 327 F. Supp. 230 (E.D. Pa. 1971); Management Television Sys., Inc. v. National Football League, 52 F.R.D. 162 (E.D. Pa. 1971); Bourns, Inc. v. Allen Bradley Co., 173 U.S.P.Q. 567 (N.D. Ill. 1971), *dismissed on other grounds*, 348 F. Supp. 554 (N.D. Ill. 1972), *modified*, 480 F.2d 123 (7th Cir. 1973); Rakes v. Coleman, 318 F. Supp. 181 (E.D. Va. 1970); Union Pac. R.R. v. Woodahl, 308 F. Supp. 1002 (D. Mont. 1970); United States v. Cantrell, 307 F. Supp. 259 (E.D. Pa. 1969); Research Corp. v. Pfister Associated Growers, Inc., 301 F. Supp. 497 (N.D. Ill. 1969), *appeal dismissed*, 425 F.2d 1059 (7th Cir. 1970); Anderson v. Ellington, 300 F. Supp. 789 (M.D. Tenn. 1969); Hadnott v. Amos, 295 F. Supp. 1003 (M.D. Ala. 1968), *rev'd on other grounds*, 394 U.S. 358 (1969); Technograph Printed Circuits, Ltd. v. Methode Elec., 285 F. Supp. 714 (N.D. Ill. 1968); Jehovah's Witnesses v. King County Hosp. Unit No. 1, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd on other grounds*, 390 U.S. 598 (1968); Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd per curiam*, 390 U.S. 333 (1968); Diamond v. General Motors Corp., 20 Cal. App. 3d 374, 97 Cal Rptr. 639 (1971); Eskaton v. Driver, Civil No. 257-471 (Sacramento Cty., Calif. Super. Ct. Oct. 10, 1975); Kronisch v. Howard Sav. Inst., 133 N.J. Super. 124, 335 A.2d 587 (1975).

5. *See* notes 58-61 *infra* and accompanying text.

6. *See* notes 68-71 *infra* and accompanying text. In Dale Elec., Inc. v. R.C.L. Elec., Inc., 53 F.R.D. 531, 543 (D.N.H. 1971), *order rescinded on other grounds*, 178 U.S.P.Q. 525 (D.N.H. 1973) the court, holding that joinder of twenty-three defendants was impracticable for purposes of certifying a defendant class action, stated: "In the instant case . . . the location of the defendants ranges from California to New York and from North Carolina to Nebraska. Joinder is not only impracticable, but impossible."

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

8. *See* notes 72-74 *infra* and accompanying text.

9. *See* notes 75-82 *infra* and accompanying text.

10. *See* notes 19-31 *infra* and accompanying text.

sider adequate representation in defendant class actions impossible.[11] Whereas the prospect of a fund to compensate class counsel appears to hold the plaintiff class suit together,[12] the defendant class has no such ready device. Thus, the reluctant defendant-representative fares badly in comparison with the eager plaintiff class champion.[13] Whatever utility defendant class actions are thought to have is considered by some to be lost by the possibility of defendant class members opting out.[14] In addition, due process concerns have at times inhibited the use of the defendant class action.[15]

This article will demonstrate that the defendant class action is a useful device. The first part of the article will deal with the effect of the judgment on absent defendants and will indicate that previous concerns regarding due process are unwarranted. Next, the advantages of a defendant class action are examined to show that in some instances it may be the only feasible manner in which to proceed. Finally, the problems of adequate representation and exclusion are analyzed and the conclusion is reached that the device's utility can be employed without sacrificing adequate representation, and it is not impaired by the possibility of exclusion.

II. EFFECT OF JUDGMENT

A. *Who is Bound*

The utility of a defendant class action is destroyed if the judgment that is rendered against the representatives does not also determine the issues with respect to the absent defendants. Collateral proceedings are far more likely in defendant class actions than in plaintiff class actions because they must be used to enforce the judgment.[16] Thus, the questions whether absentees are bound by class adjudication and the extent to which they are bound are more significant in defendant class actions.

The Anglo-American legal tradition generally limits the res judicata effect of the judgment to parties that have been given a chance to participate in the trial. This principle has been embodied in the United States Constitution in the due process requirements of notice and an opportunity to be heard.[17] An analysis of the historical development of the defendant class action, however, reveals that, as-

11. *See* authorities cited in note 85 *infra*.

12. *See* notes 111-12 *infra* and accompanying text.

13. *See* authorities cited in note 85 *infra*.

14. *See* notes 131-32 *infra* and accompanying text.

15. *See* notes 37-44 *infra* and accompanying text.

16. The plaintiff cannot simply execute on the judgment. *See* notes 47-48 *infra* and accompanying text.

17. Due process requirements must be interpreted in light of the Constitution's common-law antecedents. *See* Mattox v. United States, 156 U.S. 237, 242-43 (1895).

suming adequate representation,[18] this action is an exception to the general due process mandate. The class suit evolved during the seventeenth and eighteenth centuries in the English courts of equity. Earlier Chancery practice had required plaintiff to bring before the court all persons interested in the subject matter of the suit. This compulsory joinder rule was occasioned by courts' refusal to render decrees affecting a person's rights except in his presence[19] and by courts' desire to resolve entire disputes at one time.[20] The English Chancery Court, however, in several cases reported before the enactment of the Constitution, held absent defendant class members bound by the judgment.

The English chancellors came to recognize that when parties on either side of a controversy were numerous, strict application of equity's compulsory joinder rule could leave plaintiff without a remedy, particularly because jurisdiction typically required the physical presence of the parties before the court.[21] Consequently, the chancellors

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18. The problems of adequate representation are discussed in section IV. *infra.*

19. The common-law requirements of notice and opportunity to be heard have long been held embodied by the due process clause of the fourteenth amendment. *See, e.g.*, Iowa Cent. Ry. v. Iowa, 160 U.S. 389 (1896).

20. *See generally* F. CALVERT, A TREATISE UPON THE LAW RESPECTING PARTIES TO SUITS IN EQUITY 2-3, 13 (2d ed. 1847); J. STORY, COMMENTARIES ON EQUITY PLEADINGS 74 (10th ed. 1892) [hereinafter cited as STORY]. At law, every effort was made to confine consideration to a single disputed issue, with choice of the proper writ being all-important. At law, unlike equity, only those with a direct legal interest in the subject matter of the suit were proper parties. STORY, *supra*, at 77. The differences in approach between the courts may well have been, as some commentators assert, a function of the different nature of legal and equitable remedies. Lewis, *Mandatory Joinder of Parties in Civil Proceedings: the Case for Analytical Pragmatism*, 26 U. FLA. L. REV. 381, 384 (1974) [hereinafter cited as Lewis]; Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 331, 483 (1957) [hereinafter cited as Reed], although it should be noted that equity could render a decree for payment of money (in trust surcharge matters, for example) just as the law courts could. With the merger of law and equity, the equity rule was generally adopted. Reed, *supra*, at 331.

Since the eighteenth century, problems that engendered class actions have diminished. Service of process by sheriff, or private process server, or mail for in personam actions have replaced arrest of the defendant so that it is now less difficult to bring persons before the court. Courts today are more willing to do justice between the parties before them without compelling joinder of others. *See generally* Hazard, *Indispensable Party: the Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961); Lewis, *supra*. *But see* Reed *supra*, at 329.

Just as old problems began to disappear, however, the multi-jurisdictional nature of our judicial system created new ones. *See* notes 68-70 *infra* and accompanying text.

21. The common law had, in the semi-criminal action of trespass vi et armis, an action in which process followed the criminal model. *See* 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 626 (5th ed. 1942) [hereinafter cited as HOLDSWORTH]. The action was commenced by a writ of capias ad respondendum, which commanded the sheriff to take defendant and keep him safely so that he may have his body before the court on a certain day to answer the plaintiff in the action. 3 W. BLACKSTONE, COMMENTARIES *282. The writ notified the defendant to defend the action and procured defendant's arrest until security for the plaintiff's claim was furnished.

In the thirteenth century, the writ of capias ad respondendum was extended to actions of account (52 Henry III c.23); in the fourteenth century to actions of debt, detinue, and replevin (25 Edward III c.17); and at the beginning of the sixteenth century to actions on the case (19 Henry VII c.9). 8 HOLDSWORTH, *supra*, at 231.

held that "[w]here it is impracticable the rule shall not be pressed. . . . The Court therefore has required so many, that it can be justly said, they will fairly and honestly try the legal right between themselves, all other persons interested, and the Plaintiff."[22] The class action was a device that gave plaintiff its remedy without leaving those who might be affected by the outcome of the suit—absentee defendants or plaintiffs—unprotected.

In *Brown v. Vermuden*,[23] for example, a vicar brought suit in 1676 to enforce a judgment rendered in an earlier defendant class proceeding[24] in which the right of the church to collect tithes from miners in a parish had been declared. The chancery court in the collateral proceeding held defendant bound by the decree rendered in the original suit despite the plea that defendant was "not Party or privy" to the suit.[25] In *Brown v. Booth*,[26] the vicar of another parish brought suit in 1690 against several miners to enforce an earlier decree that "all the *miners* within the said parish, as well for the time being, as to come, should pay the tenth dish of lead-ore . . . to the vicar . . . for tithes."[27] Defendants in the second suit were held bound even though some of them had neither notice nor opportunity to be heard in the original class suit.

In an early eighteenth century case, *City of London v. Perkins*,[28] defendant importers were held bound by a prior decree rendered in what appears to have been a defendant class suit[29] brought by the city to establish its rights to collect duties on all cheese imported into the city. Likewise, in *Cort v. Birkbeck*,[30] a decree establishing a custom that all inhabitants of Manchester send their corn to be ground at the plaintiff's mills was held binding on "all persons under the same description with the original defendants."[31]

In the United States, the constitutional due process requirements mandate that a person normally cannot be bound by an in personam judgment in an action to which neither he nor his privies

22. Adair v. New River Co., 32 Eng. Rep. 1153, 1159 (Ch. 1805).

23. 22 Eng. Rep. 796 (Ch. 1676).

24. The report reads: "[The plaintiff's] Predecessor, sued divers Miners there, grounding his Suit by Prescription. Four Persons were named by the miners to defend the Suit for them." *Id.* at 797. It is not clear whether the suit was brought as a class action or whether some of the defendants agreed to be bound by a trial suit. The former seems more likely because the defendant in the collateral proceeding was not a party to any agreement.

25. *Id.*

26. 23 Eng. Rep. 720 (Ch. 1690).

27. *Id.* at 720-21. The reason so many party defendant class actions were brought for tithes seems to be that it was never held necessary that plaintiff establish his right at law before going to equity for a decree, unlike non-tithe cases.

28. 1 Eng. Rep. 1524 (Ex. 1734).

29. City of London v. Perkins (Court of Exchequer 1722) (unreported). This case is discussed in Mayor of York v. Pilkington, 25 Eng. Rep. 946 (Ch. 1737).

30. 99 Eng. Rep. 143 (K.B. 1779).

31. *Id.* at 145 n.13.

have been made parties.[32] For a judgment to be valid, so that it may be enforced or pleaded as a bar,[33] the parties normally must be given adequate notice and opportunity to be heard, and the court rendering the judgment must have legitimately exercised its power over the parties. In the English tradition, however, the rights to notice and hearing on an individual basis yield to convenience and necessity in class actions.[34] In both defendant and plaintiff class suits,[35] adequate representation of absentees has been held a sufficient substitute for at least the first due process requirement: individual notice and opportunity to be heard. As the Supreme Court noted in *Hansberry v. Lee*,[36] when the interests of absent persons are adequately represented in a class suit, those persons will be bound by the judgment in the action. Commentators have asserted, however, that adequate representation in defendant class actions is an insufficient substitute for individual notice and hearing.[37] Several commentators have expressed the opinion that in *Christopher v. Brusselback*[38] the Supreme Court held that the jurisdiction of federal equity courts to render a decree binding upon absent defendants extends only to the defendants' interest in property within the jurisdiction of the court.[39] This erroneous con-

32. Pennoyer v. Neff, 95 U.S. 714 (1877). It may beg the question somewhat to ask who are privies. Privity has been said to be merely a short-hand way of declaring that under the particular circumstances of a case, a person is bound by, or entitled to the benefits of, the rules of res judicata. RESTATEMENT OF JUDGMENTS § 83, comment a (1942). Privies generally are held to include successors in interest, persons whose interests are represented, and non-parties who openly control the prosecution or defense of proceedings.

33. The Constitution requires that: "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State." U.S. CONST. art. IV, § 1. If a state court judgment is sought to be enforced in federal court, 28 U.S.C. § 1738 (1970) dictates the same result as the full faith and credit clause. When the original judgment is rendered by a federal court and enforcement is sought in a state court or in another federal court, the doctrine of res judicata applies. Seemingly, federal standards of res judicata obtain, at least when the initial suit involved a federal question. *See* Stoll v. Gottlieb, 305 U.S. 165 (1938).

34. Determinations of persons owning estates in land often present another instance. The same policy that allows absentees to be bound in class actions permits the rules of res judicata to operate against persons who have future interests in land but who cannot be made parties either because their identities are not ascertainable or because they are not yet in existence. In general, these persons are bound when parties whose interests are identical are parties to the action or when provision is made for the appointment of persons to represent the holders of future interests. *See generally* RESTATEMENT OF PROPERTY §§ 180-86 (1936).

35. For example, in Brown v. Howard, 21 Eng. Rep. 960 (Ch. 1701), a plaintiff class action brought in the English Chancery Court by a few tenants of a manor against the lord to settle customs of the manor as to fines, the court stated:

> [I]t was insisted upon, that there being but some of the Tenants Parties to this Bill, the rest would not be bound by this Trial; but Ld. K. held they would . . . else, where there are such numbers, no Right could be done, if all must be Parties; for there would be perpetual Abatements.

36. 311 U.S. 32, 41 (1940).

37. *See, e.g.*, 2 H. NEWBERG, CLASS ACTIONS §§ 2300, 2325 (1977).

38. 302 U.S. 500 (1938).

39. *See, e.g.*, ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION, CLASS ACTIONS § 1.5 (1974); Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 HARV. L. REV. 589, 590 n.10 (1974).

clusion appears to stem from a misreading of the opinion. The Court, in speaking of the equity rules it had adopted, stated:

> Their purpose was to prescribe the procedure in equity to be followed in cases within the jurisdiction of the Federal courts and not to enlarge their jurisdiction. The omission from old Rule 48 . . . of the phrase " . . . the decree shall be without prejudice to the rights and claims of all absent parties" preserved unimpaired the jurisdiction of Federal courts of equity in a class suit to render a decree binding upon absent defendants affecting their interest in property within the jurisdiction of the court.[40]

What the commentators apparently overlooked was that in *Christopher*, as clearly appears from the circuit court's opinion in *Brusselback v. Arnovitz*,[41] the class was plaintiff, not defendant. The "absent defendants" referred to were not class members.

Christopher was an action brought by several creditors of a corporation on behalf of others similarly situated seeking a decree assessing stockholders of the insolvent corporation. There are dozens of reported cases in which decrees assessing stockholders of insolvent corporations on unpaid stock subscriptions or other statutory liability were held conclusive against nonresident stockholders even though the stockholders had neither been served with process in the state where the decrees were rendered nor otherwise made parties to the proceedings.[42] As the Supreme Court has noted, binding shareholders under those circumstances conforms to accepted principles of due process because the shareholders have voluntarily and knowingly assumed a corporate relationship that is subject to local regulatory power.[43]

When that basis for establishing in personam jurisdiction is not present, absent shareholders will not be bound, in spite of the representative nature of the proceedings. The shareholders in *Christopher* —the "absent defendants" to whom the Court referred—were held not bound by the decree in the prior plaintiff class action against the corporation only because there was no statute to put defendants on notice that the corporation would stand in judgment for them, and there existed no other jurisdictional nexus.[44]

B. *Preclusion*

In addition to the question whether absent defendants are bound, the *extent* to which they are to be bound must also be determined. A class action is no more than a device for resolving in one proceeding

40. 302 U.S. at 505.

41. 87 F.2d 761 (6th Cir. 1936), *rev'd*, 302 U.S. 500 (1937).

42. *See* Annot., 48 A.L.R. 669 (1927).

43. *See, e.g.*, Chandler v. Peketz, 297 U.S. 609 (1936); Selig v. Hamilton, 234 U.S. 652 (1914); Converse v. Hamilton, 224 U.S. 243 (1912).

44. 302 U.S. at 504.

questions common to a group of people. Thus, absent defendants should not be affected by results in the class proceeding that are dictated by deficiencies peculiar to the representatives.[45] For instance, when an offset to class liability is denied because the representative is guilty of laches or because he compromised his claim against plaintiff, absentees should not be precluded from asserting the offset.

Likewise, absent defendants are free to interpose defenses peculiar to them. As the English Chancery Court noted in the 1737 case of *Mayor of York v. Pilkington*: "Notwithstanding the general right is tried and established the defendants take advantage of their several exemptions, or distinct rights."[46] An absentee could assert that plaintiff released any claims against him or assumed a particular risk in their relationship, or that plaintiff was guilty of laches or unclean hands.

Because absent members of what has been certified to be the defendant class may raise individual defenses—including the defense that they are not members of the class—the plaintiff that has obtained judgment for monetary relief will not be able simply to execute on the judgment against the absentees.[47] It has long been held that, with respect to absent defendants, an adverse judgment operates only as a declaration of rights and duties concerning the common issues.[48] Thus, in a class action by a creditor of a corporation to determine whether, and in what amount, shareholders are to be assessed, a judgment favorable to the creditor would simply furnish a basis upon which actions could later be brought against absent class members. During subsequent proceedings the individual shareholders of the corporation would be entitled to raise the defenses that they were not shareholders when the obligation was contracted or that their stock was fully paid.

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45. *See* RESTATEMENT OF JUDGMENTS § 86, comment g (1942).

46. 25 Eng. Rep. 946, 947 (Ch. 1737).

47. Local 500, Bhd. of Painters v. Wise, 269 S.W.2d 721 (Ky. App. 1954), was a defendant class action for libel successfully brought against a labor union. Plaintiff tried to execute on the judgment against one of the union's members who was not a named party to the class suit. The court, citing the Restatement of Judgments, directed that plaintiff's proceeding be dismissed:

> A court has no jurisdiction to render a personal judgment against members of a class who are not personally subject to the jurisdiction of the court. It can, however, make a final determination as to the issues decided in the class action which will be conclusive as to those issues not only as to the parties who are personally subject to the jurisdiction of the court but also as to those who are not so subject.
>
> A judgment in a class action is determinative as to the issues involved, whether the judgment is in favor of or against the members of the class.

RESTATEMENT OF JUDGMENTS § 26, comment a (1942). *See also* Guy v. Abdulla, 57 F.R.D. 14 (N.D. Ohio 1972).

48. *See, e.g.*, Markt & Co. v. Knight Steamship Co., [1910] 2 K.B. 1021; Commissioners of Sewers v. Gellatly, 3 Ch. D. 610 (1876); Powell v. Powis, 148 Eng. Rep. 627, 630 (Ex. 1826); Mayor of York v. Pilkington, 25 Eng. Rep. 946, 947 (Ch. 1737).

The more difficult question relates not to personal claims or defenses but to common issues. Are absentees to be precluded from later raising common defenses that could have been but were not raised by the class representative, or are they precluded only from raising common defenses that were actually litigated by the representative and were necessary to the decision in the class suit? Some courts seem to favor the former rule, while other courts and apparently the Restatement of Judgments favor the latter.[49]

The doctrine of res judicata operates to prevent the parties from asserting what they feel to be the truth. It derives from the notion that judicial economy as well as fairness to the parties require that the parties be allowed but one day in court. These considerations apply to class actions as well as individual suits. With respect to class actions, considerations of judicial economy and protection of either the class members or the class opponent dictate that a matter be settled even though persons affected have had their days in court only vicariously. The class suit would be of much less practical value if absent defendants could raise common defenses such as laches, failure of consideration, statute of limitations, statute of frauds, and the like, which could have been but were not raised by the class representative.

A middle ground between the competing interests of final resolution of a dispute and protection of absent defendants is suggested by *Waybright v. Columbian Mutual Life Insurance Co.*[50] The underlying lawsuit, *Garland v. Columbian Mutual Life Insurance Co.*,[51] was a plaintiff class action brought in Tennessee state court by members of a fraternal benefit society against the society for an accounting and a declaration that an assessment was invalid. The action was dismissed, and another group of members later filed a similar suit in federal court.[52] The federal court of appeals, in affirming dismissal of the case on the grounds of res judicata, noted that Tennessee[53] followed the usual rule "that there is an estoppel by judgment when issues which

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49. *See* RESTATEMENT OF JUDGMENTS § 86 (1942) and comments thereto. *Compare* Commissioners of Sewers v. Gellatly, 3 Ch. D. 610 (1876) *with* Conover v. Packanack Lake Country Club & Community Ass'n, 94 N.J. Super. 275, 228 A.2d 78 (1967).

50. 122 F.2d 245 (6th Cir. 1941).

51. No. 42370 R.D. (Tenn.) (unreported).

52. 30 F. Supp 885 (W.D. Tenn. 1939).

53. The question of res judicata is determined by reference to the law of the forum in which the judgment was rendered. The full faith and credit clause does not require that greater effect be given to a statute or judgment of a state than is given by the courts of that state. Ohio v. Chattanooga Boiler & Tank Co., 289 U.S. 439, 443 (1933); Murray v. Louisiana, 347 F.2d 825, 827 (5th Cir. 1965). Thus, when F_1 requires mutuality of estoppel in a particular instance and F_2 does not, it would seem that when F_2 renders a judgment, F_1 could not require mutuality although, no doubt, according more weight to a judgment than the forum state would be according the judgment. When F_1 renders a judgment, F_2 can choose to require mutuality or not, as it sees fit.

might have been determined in the earlier case are later raised."[54] The circuit court declared that even though different grounds were raised for invalidating the assessment, they were "like issues."[55]

The following hypothetical might explain the "like issue" test in the context of a defendant class action. A company that fabricates and installs plumbing fixtures in large housing developments is instructed by its largest developer customer to have all its employees sign covenants not to compete with the company for a period of two years after they leave the company's employ. All the employees sign. Shortly thereafter, the company informs its employees, all of whom are union members, that if any group of employees form a plumbing installation business and hire nonunion employees, the company will sell them fixtures and secure customers for them. A large group of employees leave the company and spend considerable amounts of money equipping their own business. The company sues several employees as representatives of the group to enjoin the employees from competing with it.[56] The representatives defend on the grounds that, first, the company caused the employees to change their position in reliance on the company's actions and thus should be estopped from asserting the restrictive covenant, and second, because the employees derived neither additional job security nor any other advantage from signing the restrictive covenants, the covenants fail for lack of consideration.[57]

If the company prevails, the absent defendants should be foreclosed from asserting that the company waived the restrictive covenant or that, because the restrictive covenant was not embodied in an employment agreement with any substance beyond the covenant itself, the restraint was not ancillary to a genuine contract of employment or sale of business and hence was an unreasonable restraint of trade. The considerations underlying these two defenses and the facts supporting them are nearly identical to the considerations and facts associated with the two defenses raised by the class representatives.

54. 122 F.2d at 247. The court thus declined to apply merely issue or "collateral" estoppel.

55. *Id.*

56. Grand's Plumbing Co. v. Montgomery, Civil No. 322871 (Maricopa County, Ariz. Super. Ct., filed Nov. 6, 1975).

57. As with any other promise, a covenant not to compete s not enforceable unless supported by consideration. An agreement not to compete entered into after the employment has commenced is not by that fact alone supported by new consideration. *See, e.g.*, Kadis v. Britt, 224 N.C. 154, 29 S.E.2d 543 (1944); Mastrom, Inc. v. Warren, 18 N.C. App. 199, 196 S.E.2d 528 (1973). *See generally* Annot., 51 A.L.R.3d 825 (1973). Various benefits conferred on the employee by a new contract have been held sufficient to constitute consideration, *see, e.g.*, Daughtry v. Capital Gas Co., 285 Ala. 89, 229 So.2d 480 (1969) (new contract provided for a minimum term of employment of three months); M.S. Jacobs & Assocs., Inc. v. Duffley, 452 Pa. 143, 303 A.2d 921 (1973) (change in employee's status). The mere addition of a notice provision will not be sufficient. Maintenance Specialties, Inc. v. Gottus, 455 Pa. 327, 314 A.2d 279 (1974).

In spite of its value the "like issue" test might prove difficult to apply in practice. Are laches and unclean hands like issues? Are unclean hands and fraud like issues? Are contributory negligence and assumption of risk like issues? What might be like issues on one set of facts, might properly be characterized as unlike issues on another. The difficulty of application may militate in favor of a broader use of the principles of preclusion. Even when the defenses are plainly dissimilar it would appear that absentees should be precluded from raising defenses not raised by the representative. Assuming adequate representation, absentees appear sufficiently protected to allow a conclusion that the advantages of finally resolving common questions in one lawsuit outweigh the danger to absentees occasioned by not allowing relitigation of common questions. Of course, when the representative fails to assert a fairly obvious defense his representation becomes inadequate, which prevents absentees from being bound.

III. ADVANTAGES OF DEFENDANT CLASS ACTIONS

To demonstrate the advantages of defendant class actions, it is useful to step into the shoes of the hospitals' counsel in *Eskaton* to see what considerations could have led to a defendant class action rather than one mass nonclass suit against the several hundred participants, or several hundred separate suits against the participants individually.

A. *Mass Nonclass Suit*

The manageability of a complex multiparty lawsuit is inversely proportional to the number of lawyers involved. More lawyers mean more motions, higher xeroxing and mailing costs, lengthier hearings, more views on how legal issues ought to be resolved, less chance easily to resolve disputed mechanical and procedural problems, and less chance to accommodate all parties on one day for depositions and hearings. Unless the several hundred participants organize and agree on one or two lawyers, the mass nonclass suit will be a costly, cumbersome, and lengthy affair.

A defendant class action would save the hospitals service of process costs or at least enable them to defer paying those costs until they are assured of recouping the expense. If the participants are sued individually, each must be personally served.[58] The cost of service by sheriff or private process server would probably exceed ten thousand dollars—a considerable amount of money to risk when the chances of success are not particularly high. The issue whether partic-

58. In United States v. Truckee-Carson Irrigation Dist., 71 F.R.D. 10, 16 (D. Nev. 1975), the court noted that serving the 3800 absent defendants "in the traditional manner" would take six to twelve months and would involve considerable additional expense.

ipants of an insolvent health maintenance organization are personally liable for services provided them is complex and troublesome. In addition, there is the prospect of an unsympathetic jury in a suit by large hospitals against a group of individual participants who had thought themselves insured.

If only five representative participants were sued, however, the combined cost of personal service on the five and notification by mail of the rest[59] would be less than two hundred dollars. If the hospitals prevailed in the class action, they would obtain a declaration[60] against the several hundred participants that, absent personal defenses peculiar to them, each participant would be liable to the hospitals for the amount of his bill. The hospitals would then sue the participants individually. At this time the participants could argue that they were not class members, that they were not represented adequately in the class proceeding, that they already paid their respective bills, and other individual defenses. The participants would not be able to relitigate common issues[61] such as whether participants of a health maintenance organization can be liable to health care providers when the organization fails.

Although the hospitals would eventually have to bear the considerable expense of service, the expense would be borne only after the hospitals were assured of obtaining judgments against most participants and being awarded costs of service as part of the judgments. In addition, a number of the participants would probably pay the hospitals voluntarily after notification of the adverse declaration, thereby avoiding service costs. Legal fees in the subsequent suits would be minimal because, unless the individual defendants had some defense or they considered representation inadequate, most of the remaining participants would probably fail to answer and be defaulted.

The class action may have psychological advantages in addition to the economic benefits just considered. The hospitals' case may be-

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59. In federal court class actions brought solely on the basis of common questions of law or fact, 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." FED. R. CIV. P. 23(c)(2). In Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), the Court held that when the names and addresses of 2,250,000 class members were easily ascertainable and there was nothing to show that individual notice could not be mailed to each, the "best notice practicable" was individual mailing rather than mailing to a random sampling and publication for the rest. It should be noted that rule 23(c)(2) is framed in terms of the court's "directing" notice to absentees rather than the absentees "receiving" notice.

Rule 23 itself does not require notice in connection with actions brought under subdivisions (b)(1) or (b)(2). There is a split of authority whether due process requires notice for actions brought under those two subdivisions or whether it is discretionary as subdivision (d)(2) states. *See* note 90 *infra*.

60. *See* notes 47-48 *supra* and accompanying text.

61. *See* notes 49-57 *supra* and accompanying text.

come more appealing to a jury by creating the illusion through class suit that the hospitals are pitted against a monolithic, three hundred thousand dollar debtor rather than against many individual participants.[62] Hence, even if all the participants could be sued individually in one lawsuit, class suit is preferable for psychological as well as economic reasons.

The statute of limitations also poses problems for the mass nonclass suit. The hospitals would have been unable to serve many of the participants because some had moved and could not be readily located or because others were evading service. The identity of still others might not be immediately known. To avoid great delay, it might be necessary to pursue the litigation against served participants and bring separate suits against the others as they were found. The statute of limitations might prevent suits against those participants that were not found soon enough.[63] Because fictitious defendants may not be named in federal diversity actions,[64] a defendant class action is useful to the plaintiff that cannot readily locate or identify all the defendants. Bringing a defendant class action undoubtedly satisfies the statute of limitations requirement of commencing an action with respect to all defendant class members, just as bringing a plaintiff class action tolls the statute with respect to all absent plaintiff class members.[65] Defendants that cannot be found immediately can be sought throughout the pendency of the class action and afterward. As participants are found, suits utilizing the declaration obtained can be brought.

B. *Separate Actions*

Joinder rules may make one nonclass suit impossible. In the absence of a defendant class action, therefore, the hospital would be

62. When injunctive relief is sought, creation of a large monolithic defendant may have a negative effect on the court's weighing the harm caused to plaintiff if relief is denied, against the amount of harm caused to defendant if relief is granted.

63. In state court actions, fictitious defendants can be named. Because fictitious parties are not permitted in federal diversity actions, *see* note 64 *infra*, the federal court plaintiff cannot skirt the statute of limitations so easily. Even in state court, the fictitious defendants must be found prior to judgment in the suit.

64. Molnar v. National Broadcasting Co., 231 F.2d 684, 687 (9th Cir. 1956). The rationale is that federal courts derive their jurisdiction from the plaintiff's establishing that plaintiff's citizenship is diverse to all defendants; unless plaintiff demonstrates this in its pleading, the court has no jurisdiction. Some federal court local rules require leave of court for filing an action based on a federal question in which some defendants are fictitious. *See, e.g.*, Rules for the District Court of the District of Arizona, rule 10(d).

65. The courts should hold that filing a class suit tolls the statute of limitations at least with respect to all those who could reasonably rely upon the representation of their interests by the named plaintiff. *See* American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974); Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969) (commencement of class action halts running of statute of limitations against all class members); Malcom v. Cities Serv. Co., 2 F.R.D. 405 (D. Del. 1942) (suit by one class member relieves others from imputation of laches); Overfield v. Pennroad Corp., 39 F. Supp. 482 (E.D. Pa. 1941); *but see* Monarch Asphalt Sales Co. v. Wilshire Oil Co., 511 F.2d 1073 (10th Cir. 1975).

forced to bring suits against the individual debtors. With respect to individual suits it is necessary to examine first, what circumstances would preclude joinder of the several hundred participants in one lawsuit and second, what problems and expenses could be avoided by bringing a class action rather than several hundred individual suits.

1. *Inability to Join*

Joinder of claims rules pose the first obstacle because those rules might prevent suing all *Eskaton* participants in one action. Despite the liberality of modern joinder rules, joinder generally requires that the claims arise out of the same series of transactions or occurrences.[66] Although the claims in *Eskaton* present common issues of law that would justify class action treatment, the transactions giving rise to the claims are wholly separate.[67] Because joinder is not possible, therefore, a defendant class suit is the only way to avoid having to bring several hundred separate actions.

Jurisdiction and venue requirements may pose a second obstacle to joinder of all participants.[68] If some of the hospitals and their patients in *Eskaton* had been in California and others had been in Arizona and Nevada, jurisdictional barriers would have necessitated at least three separate nonclass suits. Although coordination among the three sets of counsel would be possible, considerable extra expense would result.

At least in federal question class actions brought in federal courts, plaintiff may be able to bind personally defendants that have no contact with the forum.[69] In federal diversity actions, plaintiff

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66. *See, e.g.*, County Theatre Co. v. Paramount Film Distrib. Corp., 146 F. Supp. 933 (E.D. Pa. 1956), in which joinder of defendants was held improper under FED. R. CIV. P. 20(a); Kevin v. Newburger, Loeb & Co., 9 Fed. R. Serv. 2d 20a.2 (S.D.N.Y. 1965).

67. Inability to join is perhaps more clear when there is no common link like the health maintenance organization to connect the class members' activities. Assume, for example, that a large number of land developers or lending institutions are alleged to have failed in the same way to make disclosures required by the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1970); or the Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1681t (1970); or the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701-1720 (1970); or the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 3500.1-.14 (Supp. V., 1975). The same would be true of a suit against a multitude of gasoline service stations for having violated a state consumer fraud law by failing to post prices for premium gasoline or for failing to note that posted prices do not include sales tax.

68. For an example of an instance in which a defendant class action was brought partly for this reason, see Thompson v. Board of Educ., 71 F.R.D. 398, 411-12 (W.D. Mich. 1976).

69. Just as Congress can authorize nationwide service of process in federal court actions, Robertson v. Railroad Labor Bd., 268 U.S. 619, 622 (1925), there is little doubt that Congress constitutionally could provide that judgments rendered in federal court class actions would bind absentees whether the absentees had any contact with the state in which the federal court was held and regardless of the basis for subject matter jurisdiction. The question is whether Congress, by confining the territorial limits of the federal district courts and by passing the Rules Enabling Act, 28 U.S.C. § 2072 (1970), has narrowed the applicable forum for federal class actions. The Act authorized the Supreme Court to promulgate rules of procedure for the federal district courts. The Act specifically directed that such rules not "abridge,

may also achieve subject matter jurisdiction over defendants that are his co-citizens by naming only members of the defendant class whose citizenships are diverse.[70] Plaintiff may avoid venue problems by naming only class members to whom venue is satisfied.[71] Furthermore, even though joinder in one suit may be permitted, it might not be feasible. As noted earlier, the hospitals would be unable to serve many of the participants because their location or identity were unknown. The class action will preserve claims against these participants from statute of limitations defenses until they can be found.

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enlarge or modify any substantive right." This proscription is also contained in FED. R. CIV. P. 82.

If rule 23 were construed to allow federal courts in diversity cases to apply the law of the state in which the court is located to absentees of different citizenship from that of the class representatives, rule 23 would violate the Act's prohibition when the only courts in which the absentees could be bound in either individual federal court actions or state class actions would apply the law of another state. For example: A plaintiff is aggrieved by actions of numerous defendants, some of whom are domiciled in North Dakota and some of whom are domiciled in South Dakota. The South Dakota defendants have no contacts with North Dakota, and the conflict of laws principles of South Dakota require that state courts apply the internal law of South Dakota to the controversy between the plaintiff and its domiciliaries. If rule 23 enabled the plaintiff in a defendant class action brought in North Dakota federal court to have North Dakota's internal law applied to the South Dakota defendants, the rule would change the rules of decision by which the litigants' rights will be adjudicated and hence contravene the Act's prohibition against affecting substantive rights. *See* Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 446 (1946), upholding federal rule 4(f) (process "may be served anywhere within the territorial limits of the state in which the district court is held") on the basis that the rule "does not operate to abridge, enlarge or modify the rules of decision" by which the federal district court adjudicates the litigants' rights.

Forum shopping would be encouraged by allowing the federal courts to apply a different law from the law that would be applied in the state court. If the decisional scope of the federal courts is suffered to be broader than that of the states in which the federal district courts sit, the federal courts exceed the roles assigned them. In all matters except those in which the need for national uniformity was perceived, the citizens of each state were to be governed by the different laws of their states, those laws varying according to the different needs and attitudes of the respective states' citizens. Allowing the citizens of one state to be governed by the laws of another where those citizens have done nothing to warrant application of another state's laws conflicts with this scheme and also frustrates the citizens' expectations.

When plaintiff seeks to enforce claims arising under federal law, however, there is less reason for limiting the territorial reaches of judgment. The law to be applied is the same regardless whether the absentees reside in the state in which the federal court is held. Considerations of forum shopping and concern over conduct of one state's citizens being governed by another state's laws do not apply. Nor, for the same reason, does the Rules Enabling Act's prohibition as interpreted in *Mississippi Publishing* present any problem.

On the other hand, nationwide scope for the federal courts' jurisdiction is at odds with basic notions underlying the doctrine of *forum non conveniens* and rules of venue. Absentees may be prejudiced unfairly by not being able to intervene in a class action conducted in a distant federal court, particularly when exclusion is not permitted. Expansion of the court's jurisdiction also might result in inefficient allocation of cases among the federal courts.

70. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921). This assumes, of course, that the jurisdictional amount requirement is satisfied with respect to each defendant. *See* Zahn v. International Paper Co., 414 U.S. 291 (1973); Snyder v. Harris, 394 U.S. 332 (1969); Georgia Power Co. v. Hudson, 49 F.2d 66 (4th Cir. 1931). *See generally* Annot., 2 A.L.R. Fed. 18 (1969); Annot., 30 A.L.R.2d 602 (1953).

71. *See* 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1757 (1972) [hereinafter cited as WRIGHT & MILLER]. *Cf.* Brown v. Bache, 66 App. Div. 367, 72 N.Y.S. 687 (1901) (unnamed plaintiff in a class action cannot be regarded as a party on a motion for change of venue within the provision of a statute requiring that an action be commenced in the county where either the plaintiff or defendants reside).

2. *Class Action versus Numerous Individual Suits*

The most significant advantage of defendant class actions is that they allow plaintiffs to enforce claims against a number of defendants when the size of the individual claims or the complexity of the issues makes numerous individual suits economically infeasible.

The hospitals can obviously not afford to litigate a complex liability question when a participant's bill amounts to ten dollars. Hence, the discovery and trial costs and the legal fees necessary to litigate several hundred claims of this nature would be prohibitive.

In a class action against representative participants, depositions would be conducted and motions submitted only once on the issue whether participants of a health care maintenance organization can be liable to health care providers when the organization fails. If the hospitals prevail, they will have reduced some of the cost of service of process and deferred paying the rest until assured of recovering the cost. If the hospitals lose, they will have lost—in addition to their claim—the legal fees and costs of a single lawsuit rather than several hundred.

The economic burden of numerous individual suits is not the only circumstance that makes the defendant class action attractive. The recently liberalized attitude of courts in binding litigants without requiring mutuality of estoppel[72] has created an additional incentive

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Defendant class actions in which federal jurisdiction is based solely upon diversity of citizenship present no difficulty. Absent special statutory provisions, venue is proper where either all plaintiffs or all defendants reside. 28 U.S.C. § 1391(a) (1970). The need to circumvent venue requirements through strategic selection of class representatives arises in suits founded upon general federal question jurisdiction, where venue is proper only in the district where all defendants reside or where the claim arose. 28 U.S.C. § 1391(b) (1970). The same problem occurs in actions brought under various federal statutes that incorporate special venue provisions. Suits for patent infringement, for example, must be brought in the district where all defendants reside, or where all defendants have committed acts of infringement and have regular places of business. 28 U.S.C. § 1400(b) (1970) ("in the judicial district where the defendant resides"); Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 229 (1957) (patent venue statute is exclusive and must be satisfied with respect to all defendants). Most federal courts that have allowed patent infringement suits against defendant classes have held that venue applies only to the representative defendants. Dale Elecs., Inc. v. R.C.L. Elecs., Inc., 53 F.R.D. 531, 538 (D.N.H. 1971), *order rescinded on other grounds*, 178 U.S.P.Q. 525 (D.N.H. 1973); Research Corp. v. Pfister Associated Growers, Inc., 301 F. Supp. 497, 591 (N.D. Ill. 1969), *appeal dismissed*, 425 F.2d 1059 (7th Cir. 1970); Bourns, Inc. v. Allen Bradley Co., 173 U.S.P.Q. 567, 569 (N.D. Ill. 1971), *dismissed on other grounds*, 348 F. Supp. 554 (N.D. Ill. 1972), *modified*, 480 F.2d 123 (7th Cir. 1973). *Contra*, Technitrol, Inc. v. Control Data Corp., 164 U.S.P.Q. 552 (E.D. Va. 1972).

One court has suggested that a class action might be appropriate to overcome jurisdiction and venue problems when three persons claimed rights to certain insurance policies. Prudential Ins. Co. of America v. Trowbridge, 313 F. Supp. 428, 429 n.1 (D. Conn. 1970).

In Weit v. Continental Illinois Nat'l Bank and Trust Co., Civil No. 70 C 1926 (N.D. Ill. 1970), one reason for using the defendant class action device was to circumvent the venue requirements of 12 U.S.C. § 94 (1970), limiting venue in actions against national banking associations.

72. *See, e.g.*, Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971); James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451 (5th Cir.), *cert.*

for utilizing defendant class actions. If the hospitals in *Eskaton* chose individual suits and lost any one suit they could be collaterally estopped from relitigating the common issues in subsequent suits. This risk of being barred from recovering all the claims as a result of one adverse adjudication is an incentive for using defendant class actions.

If the hospitals sue ten participants individually and win each time, they still must relitigate the liability issue in subsequent suits. A defendant who was not a party to the original action or the original defendant's privy cannot for due process reasons be bound.[73] If the hospitals lose the eleventh suit, however, they could be precluded from asserting the participants' liabilities in subsequent suits. Principles of estoppel may have different application depending on whether the party asserting it was originally a plaintiff or defendant. Some courts have tended to apply collateral estoppel more readily when, as in the hospitals' case, the party asserting collateral estoppel uses the doctrine as a shield rather than as a sword.[74] The hospitals could avoid these dangers only by suing all members in one lawsuit. In view of the difficulties inherent in one nonclass suit, the defendant class action is an attractive alternative.

Individual, nonrelated plaintiffs are also not bound by an adverse decree against any one of them. Thus, the defendant class action permits a prospective defendant to avoid being subject to incompatible decrees from multiple determinations in suits brought or threatened by numerous potential plaintiffs. A prospective defendant can avoid this problem by suing the class for a declaration of right or of nonliability.[75]

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denied, 404 U.S. 940 (1971); Seguros Tepeyac, S.A. Compania Mexicana v. Jernigan, 410 F.2d 718 (5th Cir.), *cert. denied*, 396 U.S. 905 (1969); Bernhard v. Bank of America, 19 Cal. 2d 807, 122 P.2d 892, (1942); Giedrewicz v. Donovan, 277 Mass. 563, 179 N.E. 246 (1932). *See generally* Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957).

73. *See, e.g.*, Litchfield v. Goodnow's Adm'r, 123 U.S. 549 (1887); Burton v. Hazzard, 4 Del. 100 (4 Harr. 1844); Fletcher v. Perry, 104 Vt. 229, 158 A. 679 (1932).

74. *See, e.g.*, Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966); Elder v. N.Y. & Pa. Motor Express, Inc., 284 N.Y. 350, 31 N.E.2d 188 (1940); Johnson v. New Rochelle Mun. Hous. Auth., 44 Misc. 2d 138, 253 N.Y.S.2d 39 (1964), in which the courts refused to allow affirmative use of collateral estoppel. Other courts, however, have allowed collateral estoppel to be used as a sword. *See, e.g.* Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964). No doubt, the application of collateral estoppel should depend upon balancing a number of factors—opportunity of the party to be bound to litigate the concluded issue earlier, the foreseeability of subsequent litigation, whether the court in the initial decision was a court of limited competence, the relative amounts at stake in the two proceedings. The use of collateral estoppel as a sword or a shield is only one criterion.

75. Subdivision (b)(1)(A) of federal rule 23 allows a class action to be maintained when:

> (1) the prosection 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 . . . .

Separate actions by individuals against a municipality to declare a bond issue invalid or to condition it; actions to prevent or limit a proposed appropriation; suits to compel or invalidate an assessment or dividend declaration—any of these actions might result in the party opposing the class having a legal obligation both to proceed and at the same time not to proceed with a particular course of conduct.[76] Directors might be bound by articles of incorporation to declare and pay a dividend yet be forbidden by court decree from doing so. Likewise, individual litigation of the rights and duties of riparian owners or of landowners' rights and duties respecting a claimed nuisance could create a possibility of inconsistent adjudications. The potential defendant can escape this unenviable position by asking the court to hold all potential plaintiffs necessary parties to any one suit and require their joinder.[77] As an alternative, or where joinder of all potential litigants is not feasible and the court declines to dismiss, defendant can protect itself from multiple liability by interpleader and from inconsistent obligations by class suit.[78]

In *Georgia Power Co. v. Hudson*,[79] for example, a corporation that operated a dam had been sued in separate state court suits by riparian owners below the dam who alleged that interference with the natural flow of water injured their farms. The corporation filed a defendant class action to have its dam operating rights determined in one suit.[80]

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76. *See, e.g.*, Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921) (plaintiff class suit by certificate holders to invalidate reorganization of mutual benefit society); Gart v. Cole, 263 F.2d 244 (2d Cir.) (plaintiff class suit challenging validity of urban renewal project), *cert. denied*, 359 U.S. 978 (1959); Maricopa County Mun. Water Conservation Dist. v. Looney, 219 F.2d 529 (9th Cir. 1955) (plaintiff class suit by bondholders to recover from water conservation district increased interest as specified on bond coupons in face of contention that such payments were unauthorized); Romick v. Bekins Van & Storage Co., 197 F.2d 369 (5th Cir. 1952) (plaintiff class suit to compel cash and stock dividend); Rank v. Krug, 142 F. Supp. 1 (S.D. Cal. 1956) (plaintiff class suit by riparian owners to enjoin the United States from impounding water at government dam), *modified*, 293 F.2d 340 (9th Cir. 1961).

77. *See* FED. R. CIV. P. 19(a). Part of the language of rule 19(a) closely parallels rule 23(b)(1). That part of rule 19 and rule 23(b)(1) are both designed to avoid prejudicing rights of those who are not parties to the lawsuit. Both rules were reformulated in 1966 to take these practical problems into consideration. According to the Advisory Committee's reporter, the rules' interrelation, to which specific attention was directed in 1966, is "not accidental but logical." Kaplan, *Continuing Work of the Civil Committee: 1965 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 389 (1967). *See also* Atlantis Dev. Corp. v. United States, 379 F.2d 818 (5th Cir. 1967).

78. To prevent great prejudice, the class action plaintiff must be able not only to prevent individual suits but also to enjoin prosecution of those already brought. The class action plaintiff will usually be unable to enjoin in federal court suits that have already been commenced in state court. Federal courts are forbidden from enjoining state court proceedings except as expressly authorized by federal statute, or when necessary in aid of their jurisdiction, or to protect or effectuate their judgments. 28 U.S.C. § 2283 (1970). Class actions have been held not to constitute such exceptions. Romick v. Bekins Van & Storage Co., 197 F.2d 369 (5th Cir. 1952); Georgia Power Co. v. Hudson, 49 F.2d 66 (4th Cir. 1931).

79. 49 F.2d 66 (4th Cir. 1931).

80. The suit was dismissed for failure to meet the jurisdictional amount requirement. *See* note 70 *supra*. The court also held that it was precluded by 28 U.S.C. § 2283 from enjoining the state court actions. *See* note 78 *supra*.

Without the class action, the corporation might have been faced with an obligation to use certain means of flood control with respect to some riparian owners but a prohibition from using the same methods with respect to others.[81] *Georgia Power* is an example of what was once referred to as a bill of peace, that is, a declaration of a right of nonliability against a group of prospective plaintiffs. Unlike *Eskaton*, defendant class actions brought to avoid inconsistent obligations are essentially potential plaintiff class actions in which defendant sues first.

A defendant may also be able to make affirmative use of a plaintiff class action brought against it by pursuing a counterclaim against an erstwhile plaintiff class.[82] Defendant class counterclaims will not be fraught with the problems of adequate representation or exclusion considered by some to be inherent in defendant class actions because the defendant is pursuing its claim against an already defined class. There are numerous advantages to unitary resolution of an issue common to a multitude of defendants. Class action is the preferable, and often the only, means of achieving such a resolution.

IV. ADEQUACY OF REPRESENTATION

Adequacy of representation is of vital concern to the plaintiff as well as the defendant in a defendant class action. Because adequate representation has been viewed as a substitute for the requirement of individual notice and opportunity to be heard,[83] the plaintiff's ability to bind absent defendants is dependent on the selection of adequate representative defendants.

Adequacy of representation has a double aspect. First, the persons named as parties by the opponent of the class must have interests similar enough to the interests of absent class members to ensure that the named parties are truly representative of the class. Second, the representatives must conduct the litigation in a manner that ensures full and fair consideration of the common issues.[84] The first aspect

81. A similar problem would face an alleged trespasser on land held by numerous tenants in common, some of whom threaten ejectment actions. Because each tenant is entitled to possession of the whole, any tenant can by himself bring an action in ejectment. *See, e.g.*, Locklear v. Oxendine, 233 N.C. 710, 65 S.E.2d 673 (1951); Madrid v. Borrego, 54 N.M. 276, 221 P.2d 1058 (1950). The tenancy in common situation may differ somewhat from the riparian owner example because recovery of possession by one tenant is held to inure to the benefit of his cotenants. Winborne v. Elizabeth City Lumber Co., 130 N.C. 32, 40 S.E. 825 (1902); Hanley v. Stewart, 155 Pa. Super. 535, 39 A.2d 323 (1944).

82. *See, e.g.*, Jones v. United States Dep't of Hous. and Urban Dev., 68 F.R.D. 60 (E.D. La. 1975); Cotchett v. Avis Rent A Car Sys., Inc., 56 F.R.D. 549 (S.D.N.Y. 1972). Defendants seeking to bring counterclaims must comply with all the usual rule 23 requirements, even if the counterclaim is compulsory. Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 485 (S.D.N.Y. 1973).

83. *See* notes 35-37 *supra* and accompanying text.

84. Hansberry v. Lee, 311 U.S. 32 (1940). This two-pronged inquiry is well established. *See, e.g.*, Commissioners of Sewers v. Gellatly, 3 Ch. D. 610 (1876) ("[T]he court being satisfied that the parties are fairly represented, and the matter fairly contested . . . everyone not present is bound.").

might be called "character of representation"; the second, "quality of representation."

Commentators almost uniformly contend that problems of adequacy are more serious in defendant class actions than in plaintiff class actions.[85] Two commentators, for example, noted these difficulties:

> First, apparently the selection of representatives is left to the plaintiff. Second, virtually none of the defendants may have any incentive to endure the expenses of defending a big suit on behalf of the entire class when the expense may be utterly disproportionate to his stake. Third, there is no easy way of compensating the defendants' counsel for the benefits conferred upon the class.[86]

One could add to this list the special problems of adequacy in the settlement process and the difficulty of assessing adequacy of representation.

A. *Selection of Representatives*

At least with respect to defendant class actions like *Eskaton* in which monetary relief is sought, the plaintiff's ultimate purpose is to use the res judicata effect of a favorable judgment in subsequent suits brought by or against absent class members. Although plaintiff's chances of succeeding in the class suit normally will be greatest when it selects the weakest possible class members to represent the class, the likelihood of binding absent parties increases as adequacy of representation is enhanced. Hence, plaintiff can generally be expected to select the most adequate defendants to maximize the possiblity that the judgment will be binding.

Because absentees will be bound whether the representatives are the strongest or just capable enough to be barely adequate, a less prudent plaintiff might select the weakest acceptable defendants. Plaintiffs with weak cases might even select wholly inadequate representatives in the hope of benefiting from a favorable judgment, despite the risk of ultimately gaining nothing after having borne the trouble and expense of litigation. When monetary relief is sought and collateral proceedings thus required, plaintiff may gamble that some absentees will lack resources sufficient to mount an attack on the named defendants' adequacy in subsequent actions, or that financially able absentees will be unaware of the possibility of collaterally attacking ade-

85. *See, e.g.*, Anderson & Roper, *Limiting Relitigation by Defendant Class Actions From Defendant's Viewpoint*, 4 J. MAR. J. OF PRAC. AND PROC. 200 (1971) [hereinafter cited as Anderson & Roper]; Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941) [hereinafter cited as Kalven & Rosenfield]; Comment, *Federal Rule of Civil Procedure 23—Class Actions in Patent Infringement Litigation*, 7 CREIGHTON L. REV. 50 (1973); Note, *Binding Effect of Class Action*, 67 HARV. L. REV. 1059 (1954) [hereinafter cited as 1954 Harvard Note].

86. Kalven & Rosenfield, *supra* note 85, at 697 n.39.

quacy of representation.[87] If the ultimate relief sought is declaratory or injunctive so that plaintiff normally need conduct no litigation beyond the class suit, plaintiff may gamble that absent members will not bring collateral suits to challenge adequacy.[88]

Although it is theoretically possible that a plaintiff will choose weak defendant representatives, it is extremely unlikely. Plaintiffs like the hospitals in *Eskaton*, for example, are simply unwilling to spend thousands of dollars for legal fees and costs to risk coming away with nothing if the court in the middle of the class action proceeding concludes that the representatives are inadequate; or if just one of the several hundred participants brings an independent collateral action for a declaration that because representation was inadequate the entire proceeding was a nullity; or if several of the participants who each owe the hospitals ten or twenty thousand dollars do indeed challenge adequacy of representation when the hospitals bring collateral proceedings to secure judgments against the participants.

The hospitals' selection of defendant-representatives in *Eskaton*, for example, was undoubtedly influenced by the knowledge that collateral suits would have to be brought against each absent class member.[89] In many of the suits—especially those in which the bills were several thousand dollars—adequacy of representation would be challenged. Plaintiff is unlikely to risk losing such a challenge by choosing weak representatives.

The strong incentive to choose adequate representatives in defendant class actions does not exist in plaintiff class actions. To begin with, the selection process the defendant class action plaintiff can use to ensure adequacy is not available to the plaintiff representative. The defendant class action plaintiff can search and investigate until it is satisfied that adequate defendant representatives exist. Only if there are none must it face the decision either to select inadequate representatives or forego class suit. A prospective plaintiff-representative that considers itself inadequate, however, faces the decision at once. Although the plaintiff-representative may be concerned about findings

87. Assuming adequacy is collaterally attacked, there is no assurance that the court will refuse to hold the absent party bound even when the class action court erroneously determined that representation was adequate. The most obvious though perhaps least likely possibility is a further erroneous decision in the collateral proceeding followed either by failure to appeal or appeal with perfunctory affirmance or failure to exercise jurisdiction by an appellate court.

88. Even if absentees were inadequately represented and hence could not constitutionally be bound by any injunctive decree, absentees would act at their peril by not obeying the decree. Except when the court's assertion of jurisdiction is frivolous and not substantial, persons enjoined by the court cannot defend contempt charges by asserting the unconstitutionality of the injunction. Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968); Walker v. City of Birmingham, 388 U.S. 307 (1967); Howat v. Kansas, 258 U.S. 181 (1922). Violators of court orders are subject to contempt even though the order is set aside on appeal, Worden v. Searls, 121 U.S. 14 (1887), or even though the underlying action has become moot, Gompers v. Buck's Stove & Range Co., 221 U.S. 418 (1911).

89. *See* notes 47-48 *supra* and accompanying text.

of inadequacy during the pendency of the class proceeding, he will be totally unconcerned about collateral proceedings. Unlike the defendant class action plaintiff, the plaintiff-representative runs no risk of prevailing on a class basis only to lose the benefits of the lengthy class proceeding through collateral suit. The plaintiff-representative need bring no collateral suits to enforce a judgment.

Plaintiff class actions contain a disincentive to making the representative's interests coincide precisely with the class' interests. Except for instances in which cost of notice[90] is a problem, it is in the interest of the plaintiff-representative's attorney to make the class as large as possible because an important factor in the attorney's compensation will be the size of the class.[91] For the same reason, the attorney will be reluctant to suggest subclasses[92] even when clear

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90. Federal rule 23 (c)(2) requires notice of opportunity to opt out or intervene in actions under subdivision (b)(3) to all class members: "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." Despite the fact that the rule specifically requires notice only in actions under subdivision (b)(3), some authorities have held that due process requires notice in all class actions. *See* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564 (2d Cir. 1968); Richmond Black Police Officers Ass'n v. Richmond, 386 F. Supp. 151, 158 (E.D. Va. 1974); Lynch v. Sperry Rand Corp., 62 F.R.D. 78 (S.D.N.Y. 1973); Brandt v. Owens-Illinois, Inc., 62 F.R.D. 160, 171 (S.D.N.Y. 1973); Zachary v. Chase Manhattan Bank, 52 F.R.D. 532, 535 (S.D.N.Y. 1971); Lopez v. Wyman, 329 F. Supp. 483, 486 (W.D.N.Y. 1971), *aff'd*, 404 U.S. 1055 (1972); Fowles v. American Export Lines, Inc., 300 F. Supp. 1293, 1295 n.1 (S.D.N.Y. 1969), *aff'd*, 449 F.2d 1269 (2d Cir. 1971); Clark v. American Marine Corp., 297 F. Supp. 1305, 1306 (E.D. La. 1969). *But see* Hammond v. Powell, 462 F.2d 1053, 1055 (4th Cir. 1972); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969) (*semble*); Burwell v. Eastern Airlines, Inc., 68 F.R.D. 495, 499 (E.D. Va. 1975) (dictum); Richerson v. Fargo, 61 F.R.D. 641 (E.D. Pa. 1974), *vacated*, 64 F.R.D. 393 (E.D. Pa. 1974); White v. Local 207, Laborer's, 387 F. Supp. 53, 54 (W.D. La. 1974); Ostapowicz v. Johnson Bronze Co., 54 F.R.D. 465, 466 (W.D. Pa. 1972) (*semble*); Johnson v. City of Baton Rouge, 50 F.R.D. 295, 301 (E.D. La. 1970); Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619, 636 (D. Kan. 1968), *modified*, 441 F.2d 704 (10th Cir.), *cert. denied*, 404 U.S. 951 (1971); 3B MOORE'S FEDERAL PRACTICE ¶ 23.45[1] (2d ed. 1971); WRIGHT & MILLER, *supra* note 71, at § 1786. The Supreme Court's decision in *Eisen* did not settle the split of authority. The Court there held only that rule 23 itself requires individual notice in actions brought under subdivision (b)(3). Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974).

In view of numerous Supreme Court opinions passing upon various aspects of class actions without ever, in a non-subdivision (b)(3) class action, discussing notice, it seems unlikely that notice is required in all cases. It is possible, of course, that the question of notice was simply never raised in those cases. More significant perhaps are the various English cases decided prior to the enactment of the Constitution in which notice plainly was not required. *See* notes 23-31 *supra* and accompanying text. Those common-law antecedents were likely embodied in the Constitution's notion of due process.

91. The following criteria are the most important factors in determining the plaintiff-representative's attorney's fees: the amount of economic benefit conferred on the class; the time spent by the attorney; the skill of the attorney; the complexity of the issues; and the contingent nature of the recovery. For some cases discussing the various factors, see Arenson v. Board of Trade, 372 F. Supp. 1349 (N.D. Ill. 1974); Colson v. Hilton Hotels Corp., 59 F.R.D. 324 (N.D. Ill. 1972). The most significant criterion is the size of the economic benefit conferred upon the class as a result of the attorney's work. *See, e.g.*, City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971) (recovery of $29,875,000; award of $6,111,000); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 47 F.R.D. 557 (E.D. Pa. 1969) (recovery of $22,175,000; award of $5,500,000).

92. Federal rule 23 (c)(4) provides that when appropriate, "an action may be brought or maintained as a class action with respect to particular issues, or . . . a class may be divided into subclasses and each subclass treated as a class . . . ."

conflicts of interest appear. Because the defendant class action plaintiff has a motive for ensuring adequate representation, it does have an incentive to create subclasses when they are needed.[93]

Assume that half the franchise agreements for one particular chain of fast food drive-ins obligate the franchisees to purchase their requirements of meat, buns, soft drinks, and other products from the franchisor. The other half contain the same obligation but provide for waiver of the requirement if the franchisees can demonstrate to the franchisor's reasonable satisfaction that products obtainable elsewhere are of top quality. Several of the franchisees in each of the two groups violate the requirements clause, and the franchisor terminates their franchises.

There are at least three groups with conflicting interests. The terminated franchisees would be best served by suing for damages regardless of the harm resulting to the franchise operation. The existing franchisees with bare requirements provisions might prefer only injunctive or declaratory relief against the probable antitrust violation[94] because they would be concerned with the impact of a damage suit on the franchise operation and because their damages, if any, would be far smaller than damages of franchisees who had lost their businesses. Existing franchisees whose contracts contained waiver provisions might be best served by leaving the agreement intact because the requirements clause could benefit the franchise operation by providing quality control.

Nevertheless, because the plaintiff's counsel will probably receive a larger fee if the class is larger, he has an incentive to include all three groups in the class. If a lawyer were retained by a terminated franchisee to bring a plaintiff class action against the franchisor, the lawyer might include existing franchisees in the class even though the class would then contain groups with clearly conflicting interests.[95]

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93. There is one disincentive to creating subclasses in both defendant and plaintiff class actions—the added trouble and expense subclasses would entail.

94. Clayton Act § 3, 15 U.S.C. § 14 (1970) makes it unlawful to lease or sell goods in interstate commerce on the condition that the lessee or purchaser not use or deal in goods of a competitor of the lessor or seller where the effect of the lease or sale may be substantially to lessen competition or tend to create a monopoly in a line of commerce. The best known example of an illegal tying arrangement in the franchise area is Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972). *See generally* Annot., 14 A.L.R. Fed. 473 (1973).

95. Terminated retailers and franchisees are generally denied representative status. *See, e.g.*, McMackin Hardware Co. v. Schwinn Bicycle Co., [1974-1] CCH Trade Cas. ¶ 75,047 (N.D. Ill. 1973); Free World Foreign Cars, Inc. v. Alfa Romeo, 55 F.R.D. 26 (S.D.N.Y. 1972); Gaines v. Budget Rent-A-Car Corp. of America, 16 Fed. R. Serv. 2d 60 (N.D. Ill. 1972). *But see* Kramer v. Gold Medal Bakeries, [1973-1] CCH Trade Cas. ¶ 74,543 (E.D. Pa. 1973); Seligson v. Plum Tree, Inc., 55 F.R.D. 259 (E.D. Pa. 1972).

The *McMackin* court, while denying representative status when it perceived antagonism

If the franchisor wished to bring a defendant class action against the franchisees to recover lost profits from breach of the requirements clause, however, the franchisor would not be tempted to squeeze all franchisees into one class. The added cost of bringing two class actions rather than one would be small compared to the risks the franchisor would run if representation were found inadequate because the representatives' interests were inconsistent with the interests of some absentees. The franchisor would certainly either file more than one defendant class action or create subclasses within a single class suit, each subclass containing its own representatives.

The plaintiff in a defendant class action initially selects the representatives,[96] but the court may rule that the action can be maintained only if representation is improved through intervention by additional parties of a stated type.[97] Thus, one way to allay the concern of those who doubt the eagerness of plaintiffs to select adequate defendant representatives is to have the court originally select the representatives.[98] Plaintiff would submit a list of all known defendants. The court, or plaintiff under the court's direction, could send defendants questionnaires concerning their stakes in the lawsuit, their financial resources, and so forth. Defendants that declined to answer would not be allowed to complain later of inadequacy.

B. *Motive to Press or Defend Claims and Protect Class*

The representatives in a defendant class action may be forced individually to sustain a heavy financial burden but at the same time share any resulting benefits with the members of the class. This, of course, is not very appealing to a prospective representative. Simply because none of the defendant class members may have any *desire*[99] to endure the expenses of defending a big suit on behalf of the entire class, however, it does not follow that none of them has any *motive* to do so. The rationale for allowing the few to represent the

between interests of existing and terminated franchisees, suggested a middle ground. If the franchise had been terminated and other present franchisees were threatened with similar action, the chance of conflict would be much less and the terminated franchisee could represent all franchisees.

96. "No doubt the plaintiff must have the right of selecting the defendants." Commissioners of Sewers v. Gellatly, 3 Ch. D. 610 (1876).

97. Advisory Committee's Note, 39 F.R.D. 69, 104 (1966).

98. In Conover v. Packanack Lake Country Club and Community Ass'n, 94 N.J. Super. 275, 228 A.2d 78 (1967), the court appears to have selected the representatives.

99. It has been suggested that desire to defend should be an important consideration when the class is the defendant. Note, *Class Actions in Patent Suits: An Improper Method of Litigating Patents?*, 1971 U. ILL. L.F. 474, 483 [hereinafter cited as Illinois Note]. The courts, however, have properly recognized that desire to defend should at most be a small factor in determining quality of representation at the outset of the litigation. For instance, the court in Research Corp. v. Pfister Associated Growers, Inc., 301 F. Supp. 497 (N.D. Ill. 1969), *appeal dismissed*, 425 F.2d 1059 (7th Cir. 1970), gave only token consideration to the representatives' explicit denial of desire to represent the class. The court found that the representatives' ability and intention to defend outweighed this desire. *Accord*, Thompson v. Board of Educ., 71 F.R.D. 398, 407 n.13 (W.D. Mich. 1976); Hopson v. Schilling, 418 F. Supp. 1223, 1237 (N.D. Ind. 1976).

many is grounded not on any supposed concern the representatives have for the interests of other class members, but upon the representatives' self-interests.[100] If the interests of the representatives substantially coincide with the interests of absent class members, the representatives automatically protect the others to the limit of their ability by advancing their own interests.[101]

Even if the interests of the representatives in a plaintiff class action are by chance identical with the absentees' interests, the rationale that self-interested representatives automatically advance the class cause does not generally apply in a plaintiff class action. The plaintiff class action is more a lawyer's potentially well-paid vindication of semi-public rights than an action in which one person presses his claim or defense and incidentally represents others similarly situated. It is the lure of winning rather than the duty of effective representation that fuels the plaintiff class action and its lawyer-champion; however, winning is not always synonymous with effective representation.

Assume that an industrial water user is unlawfully diverting stream water for its use to the injury of riparian farmers downstream. The plaintiff representative's attorney might be tempted to seek damages for the farmers even though they would be better served by injuctive relief. Although courts have awarded fees to the plaintiff representative's counsel when nonmonetary relief was secured,[102] the lawyer is more likely to be compensated or at least be better compensated if damages are obtained for the class.

Another illustration of the conflict between plaintiff class action representatives and their counsel is a state that suspends without hearing drivers licenses after conviction for certain traffic offenses. The court in a plaintiff class action in which the class includes all drivers who have had their licenses suspended, holds that the practice denies due process but declares that its ruling is prospective only. Although the suspension is not removed from the records of those who have already had their licenses suspended without hearing, their attorney has prevailed, and he is compensated.[103]

Just as the lure of large fees is not necessarily an effective substitute for identity of interests, neither is it always an adequate re-

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100. Hartford Life Ins. Co. v. IBS, 237 U.S. 662, 672 (1915); Aalco Laundry & Cleaning Co. v. Laundry Linen & Towel Local 366, 115 S.W.2d 89, 90 (Mo. App. 1938); Weale v. West-Middlesex Waterworks, 37 Eng. Rep. 412 (Ch. 1820). *See generally* 1954 Harvard Note, *supra* note 85, at 1059. Regardless whether the defense is vigorous or otherwise adequate, the named members will be bound by any judgment because they are sued in their individual as well as representative capacities. *See* RESTATEMENT OF JUDGMENTS § 116, comment b (1941).

101. Webster v. State Mut. Life Assurance Co., 50 F. Supp. 11, 15 (S.D. Cal. 1943); Los Angeles County v. Winans, 13 Cal. App. 234, 109 P. 640 (1910).

102. *See* note 111 *infra* and accompanying text.

103. Gonzalez v. Cassidy, 474 F.2d 67 (5th Cir. 1973). *See* note 130 *infra*.

placement for the watchful eye of the class representative. Apart from the courts' scrutiny and the intervention of absentees, there is little check on the way the plaintiff-representative's attorney conducts the case. Although the plaintiff-representative is in a position to monitor the litigation, he has little power over the lawyer because the plaintiff-representative does not pay the lawyer's fee. Furthermore, the class' lawyer may feel justified in disregarding the representative's wishes because the attorney's ethical obligation in the event of conflict is to the class as a whole rather than to the representative. Because little contact occurs or is even permitted between absent class members and the lawyer for the class,[104] the primary ethical obligation is owed to a group with which the lawyer has little or no contact. Hence, the plaintiff-representative's attorney is in a practical sense beholden neither to the representative who hires him nor to the class.

The defendant class action provides more protection for the representative class than a plaintiff class action. Because the defendant-representative pays his lawyer's fee, the attorney will likely feel responsible to the representative and seek primarily to advance the representative's interests. With the identity of interests that is more assured in defendant class actions than plaintiff class actions, absent members of the class will be protected.

Assume that the five representatives selected by the hospitals in *Eskaton* have bills in excess of ten thousand dollars and that individually or collectively the representatives have the financial ability to pay the legal fees necessary to defend the case. Because it is in the interest of all participants to establish that members of a health maintenance organization are not personally liable for obligations of the organization, it benefits all participants when the representatives' lawyers urge this defense. In fact, debtors with small bills or limited financial resources will obtain far better legal representation in the class suit than they could have secured if they were sued individually in separate suits.

C. *Compensating Counsel for Benefits Conferred Upon the Class*

The time and expense plaintiff saves by bringing a defendant class action is realized partly at the expense of the defendant-representatives because the greater procedural and substantive complexity of the class suit creates added legal fees for the named parties. The representatives must be both willing and able to pay substantial legal fees if they are to be considered adequate. Continuity of inter-

104. The MANUAL FOR COMPLEX LITIGATION § 1.41 (West 1977) suggests that formal parties be forbidden, absent court approval, from communicating with actual or potential class members who are not formal parties.

est will protect absent members only when the representatives have enough at stake to make them want to defend vigorously as well as sufficient resources to ensure a capable defense.

The problem of adequate representation is not serious. The court must simply make sure plaintiff has named either a sufficiently large number of defendant-representatives or at least one[105] wealthy defendant, in either case insuring substantial stakes in the outcome of the suit. Financial ability of the representatives and their stakes in the suit are matters the court can readily assess. The court must consider factors like the financial resources of the representatives, the extent of their possible liability, the sophistication of the representatives, and the ability of their counsel.[106] There are some instances, however, in which financial considerations simply will not permit defendant class actions. Aside from the oft-breached ethical consideration that prevents the class attorney from bearing ultimate responsibility for costs,[107] a class suit on behalf of five hundred plaintiffs none of whom have been wronged by more than one hundred dollars is feasible. A class suit against five hundred similar defendants is probably not.

The arithmetic involved in determining representatives' adequacy is fairly simple and can be illustrated by returning to the situation in *Eskaton*. The hospitals should first estimate the total expense of defending the class suit—assume ten thousand dollars. Unless defendants successfully solicit contributions from the class, a defendant or

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105. One representative may be sufficient. *See* Illinois Note, supra note 99, at 484. This is clear at least under the federal rules. The April 1937 draft of rule 23 read, "such of them as will fairly insure . . . adequate representation." In final form, the rule read, "such of them *one or more*, as will fairly insure . . . adequate representation." (emphasis added). Moore & Cohen, *Federal Class Actions—Jurisdiction and Effect of Judgment*, 32 ILL. L. REV. 555 (1938). The present federal rule retains the "one or more" language. FED. R. CIV. P. 23(a). The clarification was perhaps occasioned by a reading of early English cases that appeared at least superficially to concentrate on the number of named parties. *See* Meux v. Maltby, 36 Eng. Rep. 621 (Ch. 1818) ("It is quite clear that the present suit has sufficient parties and that the Defendants may be considered as representing the company."); Adair v. New River Co., 32 Eng. Rep. 1153, 1159 (Ch. 1805). *But see* Pickering v. Ilfracombe Ry., 15 L.T.R. (n.s.) 461 (V.C. 1867) (two out of 64 sufficient); Hoole v. Great Western Ry., 17 L.T.R. (n.s.) 193 (Ch. 1867) (one representative sufficient). *See also* Revised Rules of Equity rule 48, *quoted in* 2 W. ROSE, CODE OF FEDERAL PROCEDURE 1796 (1907) (emphasis added): "Where the parties on either side are very numerous . . . the court . . . may proceed in the suit, *having sufficient parties* before it to represent all the adverse interests . . . ."

106. The test used by the court in Technograph Printed Circuits, Ltd. v. Methode Elec., 285 F. Supp. 714 (N.D. Ill. 1968), was whether the "parties defendant possess the means, skill and integrity to protect fairly and adequately the interests of the class." *Id.* at 721. The courts generally exercise broad discretion in scrutinizing defendants' adequacy. *See, e.g.*, Gibson v. Local 40, Supercargoes & Checkers of the Int'l Longshoremen's and Warehousemen's Union, 543 F.2d 1259 (9th Cir. 1976); Cobb v. Avon Prods., Inc., 71 F.R.D. 652 (E.D. Pa. 1976); Thompson v. T.F.I. Co., 64 F.R.D. 140, 148 (N.D. Ill. 1974).

107. The ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-103(B) (1977) states: "While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation . . . provided the client remains ultimately liable for such expenses."

oup of defendants will not bother to defend the suit unless potential liability significantly exceeds total expense of defending the suit. Assuming no solicitation of absentees, therefore, it will be necessary to find defendants that have an aggregate potential liability above ten thousand dollars (probably about fifteen thousand dollars) and that also have at least ten thousand dollars to spend. There may be a certain unfairness in requiring the representatives to bear the entire burden of defending class interests.[108] The representatives may succeed, however, in getting some of the unnamed defendants to bear a portion of the expenses, particularly when plaintiff seeks monetary relief, because defendants facing liability will probably be more concerned with adequate representation than absentee plaintiffs that are informed they may be beneficiaries of a class recovery.

One option the courts should consider is requiring plaintiff to pay court costs and reasonable attorneys' fees incurred by the defendant-representatives regardless of the suit's outcome.[109] The expense seems a fair price for allowing plaintiff to bring a class suit. Furthermore, problems of the representatives' financial abilities to mount an adequate defense would be largely eliminated. A more equitable arrangement would be to place the initial burden of costs and attorneys' fees on the plaintiff and later shift all or part of the burden to absent defendants. Because absentees will be able to assert their

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108. The ABA Code of Professional Responsibility apparently condones solicitation of absent class members by the representative but not by the attorney:

> A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that . . . (5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-104 (1977). *But see* ABA OPINION 111 (1934). At least with respect to defendant class actions, there would seem to be no ethical problems with solicitation. As an English chancery court pointed out in one defendant class action, Brown v. Howard, 21 Eng. Rep. 960 (Ch. 1701): "[I]t is no Maintenance for all the Tenants to contribute, for it is the Case of all . . . ." Prohibitions against communicating with class members are probably designed to avoid barratry, which has been defined as "the offense of frequently exciting and stirring up suits and quarrels between his majesty's subjects." 4 BLACKSTONE, COMMENTARIES *133. Because it is plaintiff that has stirred up the litigation and not the defendant representative, the rationale of forbidding solicitation appears not to apply to defendant class actions, at least absent collusion between the plaintiff and the representative.

To the extent that such solicitation is made on a mass basis, court supervision should be required. As the Manual for Complex Litigation notes: "[T]o the party solicited, solicitation may appear to be an authorized activity approved by the court." MANUAL FOR COMPLEX LITIGATION § 1.41 (West 1977). In the plaintiff class action there is little chance that excessive fee contracts will be solicited because all fees are awarded by the court on a more or less quantum meruit basis; however, defendant class actions do present such occasion.

109. The rule is well established in plaintiff class actions that only named plaintiffs are liable for costs. *See, e.g.*, Lamb v. United Security Life Co., 59 F.R.D. 25 (S.D. Iowa 1972) (*semble*); Scott v. Pascall and Adams, 60 Eng. Rep. 736 (V.C. 1847); Note, *Recurrent Problems in Action Brought on Behalf of a Class*, 34 COLUM. L. REV. 118 (1934). The reasons given in the cases, however, seem in general only to apply to plaintiff class actions. *But see* Price v. Rhondda Urban School Dist. Council, [1923] All E.R. 679, 680 (Ch.), in which the court spoke of lack of jurisdiction as the reason. The Court of King's Bench, for example, gave as the

own separate defenses against the plaintiff's class declaration,[110] expense shifting is feasible only when collateral proceedings are contemplated by the plaintiff, as when monetary relief is sought.

Assume there are five hundred participants in a health maintenance organization. Ten have hospital bills over ten thousand dollars, and five of those participants are named representatives. Assume further that the issues involved are, as they will be in most defendant class proceedings, issues of law, that can be decided by summary judgment. The cost of defense is nine thousand dollars. The hospitals prevail. Recoverable costs amount to one thousand dollars.

Under the first suggestion—requiring the plaintiffs to bear costs and fees—the hospitals would bear that portion of the thousand dollars they previously paid and reimburse the representative for whatever deposition costs and the like that defendants had already paid. The hospitals would pay the representatives' lawyer nine thousand dollars, provided the court finds the fee reasonable. The court might be given discretion to require the representatives to pay costs but not fees or costs and a percentage of the legal fees.

Under the second suggestion—shifting the ultimate burden—the hospitals would initially bear the entire ten thousand dollar expense. When the hospitals then use the favorable class declaration in subsequent suits against the five hundred class members, a recoverable cost of each of those suits would be twenty dollars, that is, ten thousand dollars divided by five hundred. The expense may also be allocated in proportion to the estimated liability of each class member. Thus, the costs allocated to a one hundred dollar claim would be three dollars and the costs allocated to a one thousand dollar claim, thirty dollars. Alternatively, plaintiff might be permitted to shift only half the burden. Although each of these suggestions may eliminate the need to name wealthy defendant-representatives, plaintiff should still be required to name defendants with substantial potential liability and some ability to respond to damages. Otherwise, the representatives might not feel compelled to monitor the litigation, and the class attorney would be as much on his own as an attorney in the plaintiff class suit.

In plaintiff class actions compensation of class counsel normally presents little problem. There is a fund from which the attorney can be compensated. Even when nonmonetary relief is sought, defendant will often be made to compensate the attorney's successful efforts.[111]

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reason for the rule in plaintiff actions: "In representative actions . . . [t]he plaintiff is the self-elected representative of the others. He has not to obtain their consent. . . . [C]onsequently they are not liable for costs . . . ." Markt & Co. v. Knight Steamship Co., [1910] 2 K.B. 1021, 1039. *See also* Scott v. Pascall and Adams, 60 Eng. Rep. 736 (V.C. 1847).

110. *See* notes 47-48 *supra* and accompanying text.

111. This is not universally the rule. For instance, the creation of a fund out of which fees can be paid is often considered a prerequisite to award of attorneys' fees when class suit

The mere prospect of large fees, however, does not ensure financial ability to advance the class' cause vigorously. The lawyer generally receives no compensation until litigation is concluded;[112] he is not paid at all unless he wins. In the meantime, he may be tempted or obliged to minimize his efforts.

This danger is well illustrated by a federal district court plaintiff class action, *Herman v. Doug Frank Development Corp.*[113] Real estate syndicators were sued under the federal securities laws for allegedly making false statements in prospectuses and misappropriating over two million dollars of investors' money. In addition to the syndicators, the accountants involved in preparing the prospectus and other secondary defendants were also sued. The plaintiffs and syndicators proposed a settlement. The syndicators would pay eight thousand dollars to defray the plaintiffs' costs and would assist the plaintiffs in developing their case against the other defendants. The court approved the settlement on the strength of plaintiff-representatives' claims that settlement was proposed because the syndicators were unable to satisfy a larger judgment. Although it is possible that plaintiffs' contention in urging approval of the settlement was made in good faith, it is also possible that plaintiffs' attorneys were financially unable or unwilling to continue advancing costs.

D. *Settlement*

Defendant class actions are not likely to be compromised as frequently as plaintiff actions in which fear of enormous judgments often pressures defendants to settle.[114] Unlike plaintiff class actions, the

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is brought against a governmental body for the recovery of public funds. *See* Doran v. Cullterton, 51 Ill. 2d 553, 283 N.E.2d 865 (1972); Rosemont Bldg. Supply, Inc. v. Illinois Highway Trust Auth., 51 Ill. 2d 126, 281 N.E.2d 338 (1972); Hoffman v. Lehnhausen, 48 Ill. 2d 323, 269 N.E.2d 465 (1971). Traditionally, courts have awarded fees when parties have through litigation created, protected, or enhanced a fund, thereby benefiting those with interests in the fund, the theory being that the expense of such litigation ought to be shared by all benefited. *See generally* Hornstein, *Legal Theraputics: The "Salvage" Factor in Counsel Fee Awards*, 69 HARV. L. REV. 658 (1956). The federal courts have required the defendants in plaintiff class actions to pay attorneys' fees even when there was no fund within the control of the court but when the action had a beneficial effect upon a broad class of persons. *See, e.g.*, Mills v. Elec. Auto-Lite Co., 396 U.S. 375 (1970) (dissolution of merger because of misleading proxy statements sought as ultimate relief). On the theory that the plaintiff class counsel was acting as a "private attorney general" who would be encouraged to advance the public interest by invoking the injunctive powers of the court, federal courts have awarded attorneys' fees when only injunctive relief was sought. Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971); NAACP v. Allen, 340 F. Supp. 703 (M.D. Ala. 1972).

112. *But cf.* Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 389-97 (1970) ("The fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid does not preclude an award [of attorney's fees] . . . .").

113. Civil No. 74-803 (D. Ariz. Aug. 2, 1974).

114. This conflict is possible in plaintiff class actions even though class counsel is not paid by the representative. For an example, see Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973), discussed in note 130 *infra*.

likelihood of conflict between interests of the class and the class counsel in defendant class action settlements is slight. Because the attorney is paid by the named defendants rather than the class' opponent, the greatest potential conflict in defendant class action settlement negotiations occurs between the representatives and the class.[115]

Assuming again that the representative has interests identical to those of absentees, the conflict can only manifest itself by some special advantage the representative gets from settlement. Any special treatment should be apparent to the court in the initial suit[116] or in any collateral proceedings in which the class action judgment is sought to be enforced or attacked.[117] Because special advantage accorded the representative, if discovered, would dictate a finding that the class was inadequately represented,[118] plaintiff may eschew such a settlement.

The possibility of collusion between plaintiff and the named representative certainly exists, but to no greater extent than the possibility in plaintiff class actions of *sub rosa* payments to class counsel in return for acquiescence in an unfair settlement. When the amount of the plaintiff-representative's counsel fee is negotiated as part of an overall settlement[119] subject to court approval,[120] the potential for conflict between the interests of the class and the interests of its counsel is great.

It has been suggested by a commentator, concerned with protecting absentees in compromised defendant class actions, that any class member that does not wish to settle on the basis proposed be allowed to take over the defense as a representative party.[121] This, however, would enable a stubborn defendant to deprive the entire class of a beneficial compromise. It has also been suggested that settlement be made binding only on the named defendants.[122] Absentees could then take advantage of the proposed settlement if they con-

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115. Any settlement must be approved by the trial court. *See* note 120 *infra.*

116. For an example of a case in which the court in collateral proceedings found such an advantage to exist, see Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973), discussed in note 130 *infra.*

117. *See id.*

118. *See, e.g., id.*

119. *See, e.g.*, Colson v. Hilton Hotels Corp., 59 F.R.D. 324 (N.D. Ill. 1972).

120. "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." FED. R. CIV. P. 23(e). Notice might be required even when there has never been a judicial determination that the case is a proper class action and even though the plaintiff is willing to strike class action allegations in the complaint. *See* Yaffe v. Detroit Steel Corp., 50 F.R.D. 481 (N.D. Ill. 1970); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324 (E.D. Pa. 1967). The theory is that the representative has used the class allegations as leverage to obtain a more favorable settlement and that this benefit more properly belongs to the class.

121. Anderson & Roper, *supra* note 85, at 210.

122. Anderson & Roper, *supra* note 85, at 209-10.

sidered it beneficial. This latter suggestion would in most cases deprive the defendant class action of its effectiveness. This suggestion, like the first, would tend to prevent compromise. Plaintiffs would not want to risk being unable to bind absentees. The overwhelming majority of suits filed—whether class or individual—are settled. Placing serious obstacles in the path of settlement would foster an inefficiency in the judicial system that would outweigh the benefits of these suggested settlement procedures.

E. *Who Questions Adequacy?*

Another potential problem in ensuring adequate representation in defendant class actions is the difficulty of assessing adequacy. In the plaintiff class action, there is a natural opponent to question adequacy. To the extent defendant believes absent plaintiffs will not sue on their own, defendant will attempt to have the class action dismissed by arguing that representation is inadequate; to the extent defendant either believes it will prevail, or contemplates defeat and plans to settle, it may want to ensure adequacy so that absent plaintiffs will be bound. Defendant-representatives may have no incentive to deny the similarity of their interests with absent defendants' interests when liability is several, at least when the named parties believe plaintiff would prosecute individual actions if class status were denied. The named parties may wish to obtain contribution from absent members and pooling from named members for litigation expenses. For the same reason, defendant-representatives have no motive to argue that plaintiff has not sufficiently restricted the class.

On the other hand, defendant in a plaintiff class action does not have an interest in questioning adequacy in all suits or at all stages of litigation. When defendant believes quality of representation is inadequate or when defendant anticipates a multiplicity of individual suits if the class action is dismissed, it may choose to proceed to a decision on the merits.[123] When a lump-sum settlement figure has been reached, defendant may attempt to fix the class as broadly as possible without considering character of representation in order to obtain the broadest possible res judicata effect.[124] Hence, in both plaintiff and defendant class actions, but especially in the latter, the court may be the only participant to question adequacy. Because the court is designed to act as an impartial referee in adversary con-

123. As in the defendant class action situation, the class opponent must weigh the possibility of gaining advantage in this way against the possibility of having adequacy collaterally attacked after the expense and effort of class litigation has been borne.

124. To the extent, however, that defendant believes the judge will award the class attorney larger fees when the class is larger, defendant has a motive to press for a smaller class. Of course, when the settlement provides for a fixed amount per claimant rather than a lump sum to be divided among the class, the considerations are different.

tests, it may be ill-suited to champion the absentees' cause, however fitting it may be for the court to intervene.

Even when adequacy is actively contested by the class opponent,[125] it will often be inaccurately assessed in the class proceeding. With respect to quality of representation, assessment is likely to be flawed because the court does not choose to conduct or entertain a vigorous inquiry; when character of representation is concerned, incorrect evaluation is likely because making the assessment is difficult.

Although many guidelines for quality of representation have emerged,[126] at least in plaintiff class actions the guidelines are rarely invoked to deny class status[127] unless there is obvious inadequacy, as when the class representative acts as his own lawyer.[128] In plaintiff class actions, this judicial laxity is attributable in part to the courts' awareness that in many cases the rights of absent plaintiffs would never have been asserted had it not been for the institution of class suit. A zealous inquiry into adequacy of representation might simply cause absentees' interests to vanish in practical effect rather

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125. Plaintiff has the burden of convincing the court that named representatives of a defendant class satisfy adequacy requirements. Tucker v. City of Montgomery Bd. of Comm'rs, 410 F. Supp. 494 (N.D. Ala. 1976). Plaintiff also has this burden in plaintiff class actions. *See, e.g.*, Muth v. Dechert, Price & Rhoads, 70 F.R.D. 602 (E.D. Pa. 1976); Gates v. Dalton, 67 F.R.D. 621 (E.D.N.Y. 1975).

126. The criteria most frequently applied are the probability of vigorous prosecution or defense, *see, e.g.*, Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968); Cannon v. Texas Gulf Sulphur Co., 47 F.R.D. 60 (S.D.N.Y. 1969); Doglow v. Anderson, 43 F.R.D. 472, 495-96 (E.D.N.Y. 1968); and the competence of counsel, *see, e.g.*, Fogel v. Wolfgang, 47 F.R.D. 213 (S.D.N.Y. 1969); Weisman v. MCA Inc., 45 F.R.D. 258, 262 (D. Del. 1968); Minnesota v. United States Steel Corp., 44 F.R.D. 559, 567-68 (D. Minn. 1968). With respect to competence of counsel, the courts have looked at the quality of the pleadings, briefs, and arguments presented to the court, Anderson v. Moorer, 372 F.2d 747, 751 n.5 (5th Cir. 1967); Pelelas v. Caterpillar Tractor Co., 113 F.2d 629 (7th Cir.), *cert. denied*, 311 U.S. 700 (1940). Schulman v. Ritzenburg, 47 F.R.D. 202, 207 (D.D.C. 1969); Dolgow v. Anderson, 43 F.R.D 472, 496 (E.D.N.Y. 1968); the general inexperience of counsel, Shields v. Valley Nat'l Bank of Arizona, 56 F.R.D. 448, 449 (D. Ariz. 1971); and the experience of counsel in the particular type of litigation involved, Carpenter v. Hall, 311 F. Supp. 1099, 1114 (S.D. Tex. 1970).

127. In plaintiff class actions, the courts typically pay little attention to the representative's sophistication, financial resources, or the amount of his claim. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968); Lamb v. United Security Life Co., 59 F.R.D. 25, 31 (S.D. Iowa 1972). Likewise, nearly every court in which the issue has arisen has held that the competence of plaintiff class counsel should be presumed. *See, e.g.*, Aboudi v. Daroff, 65 F.R.D. 388, 393 (S.D.N.Y. 1974); Sunrise Toyota, Ltd. v. Toyota Motor Co., 55 F.R.D. 519 (S.D.N.Y. 1972); Siegel v. Realty Equities Corp., 54 F.R.D. 420 (S.D.N.Y. 1972); City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971). One commentator has pointed out that a challenge to the class counsel may prove to be a tactical mistake. Donelan, *Prerequisites to a Class Action under New Rule 23*, 10 B.C. IND. & COM. L. REV. 527, 536 (1969).

128. Such inadequacy can concern the quality when the plaintiff appears pro se, *see, e.g.*, Ihlenfeldt v. State Election Bd., 425 F. Supp. 1361 (E.D. Wis. 1977); Martin v. Middendorf, 420 F. Supp. 779 (D.D.C. 1976); Shaffery v. Winters, 72 F.R.D. 191 (S.D.N.Y. 1976); Costello v. City of Los Angeles, 54 Cal. App. 3d 28, 126 Cal. Rptr. 462 (1975); or the character of representation when the named plaintiff is a lawyer, *see, e.g.*, Eovaldi v. First Nat'l Bank, 57 F.R.D. 545, 546-47 (N.D. Ill. 1972); Shields v. First Nat'l Bank, 56 F.R.D. 442, 444 (D. Ariz. 1972); Shields v. Valley Nat'l Bank, 56 F.R.D. 448, 449-50 (D. Ariz. 1971).

then be safeguarded. Courts may also be reluctant to make searching inquiries into such questions as the proficiency of class counsel.

Greater difficulties occur when the class action court assesses character of representation. Even when there is no party that wants to contest quality of representation, the court should have little trouble judging things like the ability of class counsel or the financial capacity of the representative or what he has at stake in the lawsuit. This is not true with character of representation. The court can only assuredly answer questions of similarity between the representative's interest and the absentees' interest with respect to particular absentees in collateral proceedings, not in the abstract as the initial court in the class proceeding must do. Even when quality of representation is at issue, it is simpler and fairer to determine the adequacy of representation after representation is concluded.

There are two potential "safety valves" that stand ready to question adequacy with respect to particular absentees when the class action court has erred or appears likely to err in gauging adequacy: collateral attack on adequacy in subsequent proceedings and intervention in the class proceeding by particular class members.[129] Intervention is more likely in defendant class actions than in plaintiff class actions. Given the natural inclination to be more concerned when persons are potentially liable to pay money than when they are potentially entitled to it, absent defendants will probably intervene to contest adequacy more often than absent plaintiffs. In collateral proceedings, courts have recognized the difficulty a class action court has in assessing adequacy in the abstract and have conducted de novo reviews of adequacy.[130] Where concern for adequacy is

129. FED. R. CIV. P. 23(d) provides:
In the conduct of actions to which this rule applies, the court may make appropriate orders . . . requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given . . . 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

130. The readiness of the court in the collateral proceeding to sustain a plea of inadequacy depends upon the standard of review the court chooses or feels constrained to utilize. The question of the proper standard to apply has been squarely confronted in two cases involving collateral attacks upon class actions brought under the present federal rules: Gonzales v. Cassidy, 474 F.2d 67, 71 (5th Cir. 1973), and Research Corp. v. Edward J. Funk & Sons Co., 15 Fed. Rules Serv. 2d 580 (N.D. Ind. 1971). The appellate court in *Gonzales* held that absent members of the plaintiff class had not been adequately represented. In the original action, Gaytan v. Cassidy, 317 F. Supp. 46 (W.D. Tex. 1970), *vacated*, 403 U.S. 902 (1971), the court had granted declaratory and injunctive relief to the plaintiff with respect to a state statute alleged to have been unconstitutional. The court, however, granted retroactive application of the relief only to the named representative, who did not appeal. Declaring the standard to be "whether the representative, through qualified counsel vigorously and tenaciously protected the interests of the class," the Fifth Circuit held that the failure to appeal constituted inadequate representation. 474 F.2d at 75.

The courts in both *Gonzales* and *Research Corp.* conducted a full de novo inquiry into both aspects of adequacy. The courts adopted the view that the court in the original action is ill-equipped to gauge the character or even quality of representation. Moreover, it was felt

probably greatest—in defendant class actions in which monetary relief is sought—the winning plaintiff must subsequently bring individual actions against the absentees to secure judgment for a specific dollar amount that will bind the absentees. Collateral proceedings are not a necessary or even a likely consequence when a plaintiff class loses.

V. EXCLUSION

Suits against classes of defendants are mainly useful only to the extent unnamed parties either cannot or will not exclude themselves from the actions. Commentators and courts are unanimous in concluding or assuming that absent members of a defendant class are entitled to exclude themselves from actions brought in federal court under subdivision (b)(3) of rule 23, the subdivision under which most defendant class actions for money damages will be brought.[131] It is difficult to reach a contrary conclusion given the plain language of rule

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that these questions, particularly the question of character of representation, can best be answered with respect to a particular person, not in the abstract as the court in the original proceeding must do. *See generally* 1954 Harvard Note *supra* note 85. This standard prevents plaintiff from taking advantage of an erroneous finding with respect to adequacy. It has been suggested, however, that the standard of review should be lower than de novo consideration. The value of class actions is said by some to be lost if each member could in effect relitigate the merits of the case by showing in detail that the class suit was not conducted ably enough. *Id.* at 1065; Note, *Federal Class Actions: A Suggested Revision of Rule 23*, 46 COLUM. L. REV. 818, 831 (1946) [hereinafter cited as Columbia Note]. One commentator has gone as far as suggesting that whenever the issue of adequacy of representation has been actually litigated, "a finding of adequacy by the trial court" in the original proceeding "should be res judicata as to the adequacy of representation up to that point in the course of litigation." Note, *supra* note 39, at 604. The anomaly of making conclusive the outcome of litigation as to adequacy by a party alleged to be an inadequate representative is apparent. A weak and ineffectual defendant-representative could hardly be expected to argue effectively that he is indeed inadequate, particularly when he has little incentive to do so. Other writers have argued that absent parties should have to show "clear proof" of "gross error" in the original suit to escape being bound, *e.g.*, 1954 Harvard Note, *supra* note 85, at 1065. The courts have not appeared to subscribe to any of these views. *But cf.* Mayor of Reading v. Winkworth, 146 Eng. Rep. 668 (1818), in which Lord Richards stated that absent defendants bear the burden of showing that the earlier suit was collusive. *Accord*, Research Corp. v. Pfister Associated Growers, Inc., 301 F. Supp. 497 (N.D. Ill. 1969), *appeal dismissed*, 425 F.2d 1059 (7th Cir. 1970).

131. *See, e.g.*, 3B MOORE'S FEDERAL PRACTICE ¶ 23.02-1, at 23-124 (2d ed. 1977). The language of the other subdivisions would prevent their use for monetary relief. Use of subdivision (b)(1)(A) as a tool for nondeclaratory relief is possible only when the class is plaintiff, not defendant, as for instance, when one riparian owner as representative of all owners sues to enjoin or condition the corporation's right to use the dam. It is difficult to imagine an instance in which prosecution of separate actions "against" a class (rather than "by" a class) would create incompatible standards of conduct for the class action plaintiff despite the language of subdivision (b)(1)(A), which covers both situations. For a contrary view see cases discussed in note 135 *infra*.

Although subdivision (b)(1)(A) focuses upon potential unfairness to the party opposing the class, subdivision (b)(1)(B) is aimed at protecting class members. A person cannot, consistent with due process, be bound by judgment in a proceeding to which neither he, his privies, nor a person adequately representing him is a party. Still, when it is not feasible to confine the effects of judgment to parties in a lawsuit, absent persons may as a practical matter have their interests concluded or impaired. Subdivision (b)(1)(B) permits class suits to be brought when

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of . . . (B) adjudications with respect to individual members of

23: "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. . . . The notice *shall* advise each member that . . . the court will exclude him from the class if he so requests . . . ."[132]

The obstacle posed by exclusion is not insurmountable in most instances. When the claims involved are not within the federal court's exclusive jurisdiction, the simple solution is to bring the action in state court. Many state class action statutes such as the statute in *Eskaton* do not permit exclusion.[133]

Moreover, in actions under federal rule 23, exclusion is not uniformly permitted. Absentees may not exclude themselves from actions that are brought under subdivisions (b)(1) or (b)(2).[134] Probably for this reason, several lower federal courts have strained to find defendant class actions that might have been more properly classified as (b)(3) actions to be proper (b)(1) or (b)(2) actions as well.[135] Nor

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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.

FED. R. CIV. P. 23 (b)(1)(B) (emphasis added).

Defendant class actions under (b)(1)(B) will only be for declaratory relief—for example, suit by a corporation for a declaration that preemptive rights prescribed by statute or articles of incorporation do not apply to a particular conveyance of its authorized but unissued stock; or that certain preferential dividends need not be paid; or that particular options to convert callable senior securities into noncallable junior securities are not exerciseable once call has been made; or for relief such as reformation or rescission of a contract or deed. *See, e.g.*, Spanner v. Brandt, 1 F.R.D. 555 (S.D.N.Y. 1941) (contract rescission).

Rule 23 (b)(2) encompasses situations in which in the absence of class action treatment, a person violating the rights of many would otherwise be allowed to continue the violation. The requirements for maintaining class actions under subdivision (b)(2) are met only when actions of the party opposing the class, rather than actions of the class itself, make final injunctive relief appropriate; that is, when "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." Defendant class actions under this subdivision are not vehicles for nondeclaratory relief. When, for instance, a number of manufacturers are alleged to have infringed a patent, the patentee may not properly bring a class suit under this subdivision because it is the actions of the class itself that are asserted to justify injunctive relief.

132. FED. R. CIV. P. 23(c)(2) (emphasis added).

133. *See, e.g.*, ALA. CODE tit. 7 § 128 (1958) (*also, see* ALA. CODE tit. 7, Appendix, Equity Rule 31, which follows the 1938 Federal Rule 23); ARK. STAT. ANN. § 27-809 (1947); CAL. CIV. PRO. CODE § 382 (West 1959); CONN. GEN. STAT. ANN. § 52-105 (West 1960); FLA. STAT. ANN. § 1.220 (West 1967); NEB. REV. STAT. § 25-319 (1943); N.C. GEN. STAT. § 1A-1 Rule 23 (1969); OKLA. STAT. tit. 12 § 233 (1960); S.C. CODE § 10-205 (1962); WIS. STAT. § 260.12 (1957).

134. Exclusion under subdivision (b)(1)(A) would thwart the purpose of that subdivision, specifically to protect the class opponent against incompatible obligations arising from inconsistent determinations in different suits on the same issues. Because subdivision (b)(1)(B) protects against absentees being bound as a practical matter by adjudication to which they are not parties, exclusion would serve no purpose.

135. In Technograph Printed Circuits, Ltd. v. Methode Elec., 285 F. Supp. 714 (N.D. Ill. 1968) and Research Corp. v. Pfister Associated Growers, Inc., 301 F. Supp. 497 (N.D.Ill. 1969), *appeal dismissed*, 425 F.2d 1059 (7th Cir. 1970), for example, the District Court for the Northern District of Illinois held that a patent holder could maintain a class action under rule 23 (b)(1)(A) against numerous alleged infringers. *See* note 75 *supra* for text of that subdivision. The district court reasoned that if the patentee had to bring individual suits, it might be prevented from enforcing the patent against some alleged infringers and not others. Such varying ad-

are all subdivision (b)(3) class members given the choice of opting out or being bound; presumably, the rule contemplates that absentees to whom the prescribed notice of suit and opportunity for exclusion is sent or directed, but who do not in fact receive notice, are bound to the same extent as those who receive notice but fail to exclude themselves.[136]

Even when exclusion is possible it does not follow that defendants will uniformly choose to exclude themselves, despite the belief of some courts and commentators[137] that rational defendants would exercise this prerogative to benefit from collateral estoppel if plaintiff were to lose but relitigate the issues involved if plaintiff were to win and subsequently sue the excluded members. Despite the assumptions of these commentators,[138] it is unlikely that an absentee who excludes himself will be entitled to benefit later from a decision in the class suit favorable to the class.[139]

Exclusion is not likely in complex commercial litigation in which large claims are involved. Because defendants in these cases can be

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judications would not result in establishment of incompatible standards of conduct, as required by rule 23 (b)(1)(A), any more than in any instance in which a plaintiff had claims against more than one defendant. The inconsistency in these patent infringement situations is completely different from, for example, separate actions by individuals against a municipality to declare a bond issue invalid.

The district court in *Technograph* and *Research* also found that these actions against classes of alleged patent infringers satisfied the requirements of rule 23 (b)(1)(B). The court reasoned that the ability of defendants that are not parties to an initial proceeding to protect their interests might be greatly impaired because comity would dictate that prior adjudications of other courts be accorded significant weight in later actions. Again, the effect of comity or even stare decisis would be no different from such an effect in any situation in which a common question is at issue among a plaintiff and numerous defendants. The interests of the class members in the patent infringement example would not be affected in the same manner that a negative or mandatory injunction secured by a member of a class would operate to prevent or hinder the opponent of the member in performing claimed duties owed other members of the class.

With respect to subdivision (b)(2), the court in *Technograph* felt that plaintiff had acted on grounds generally applicable to the whole class by obtaining patents, by notifying some alleged infringers, by threatening to bring actions against some alleged infringers, and by bringing suits against some of them. It is the acts of the members of the class in making infringing products that make appropriate final injunctive relief, not acts of the plaintiff in bringing suits.

136. FED. R. CIV. P. 23(c)(3) provides:

> 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.

137. *See, e.g.*, Guy v. Adbulla, 57 F.R.D. 14 (N.D. Ohio 1972); Technitrol, Inc. v. Control Data Corp., 164 U.S.P.Q. 552 (D. Md. 1970); H. NEWBERG, CLASS ACTIONS 250 (1977); Illinois Note, *supra* note 99, at 494.

138. *See, e.g.*, Comment, *Class Actions in Suits for Patent Infringement in Light of Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 13 B.C. IND. & COM. L. REV. 1473, 1499 (1972).

139. On the other side of the coin, it is possible that a person who purposely bypasses an adequate opportunity to intervene in an action may be bound by the decision in the action. *Cf.* Provident Tradesmens Banks & Trust Co. v. Patterson, 390 U.S. 102, 114 (1968) (automobile owner's failure to intervene in the litigation may cause him to lose his rights by his own inaction).

fairly sure that individual suits will be brought if plaintiff cannot proceed by class suit, defendants should prefer the pooling of expenses that class action permits. Claims brought in federal court where exclusion is possible—antitrust or patent matters for example[140]—are likely to be of this complex character. For the same reasons, named defendants with large potential liability in other cases stand to gain little by opting out.

If class members begin to opt out, plaintiff can sue them individually as they do and thus remove avoidance of liability as an incentive to opt out. The remaining defendants will get the message. In *Weit v. Continental Illinois National Bank and Trust Co.*,[141] for example, a defendant class action was brought by a class of plaintiffs to recover a billion dollars for antitrust violations by more than five hundred banks. Many of the smaller banks could not have afforded the legal fees this complex litigation would have required and hence would not likely have risked being sued individually.

When the defendant class action is in federal court, individual suits against excluded absentees should not be very costly, even when absentees must be sued in another state. Litigation initiated against excluded class members may be transferred to a single forum under 28 U.S.C. § 1407 and consolidated with the original class action for all pretrial purposes. The tactic of suing excluded class members will be particularly useful when suing defendants individually would have been economically feasible in the first instance but class action was chosen for reasons of jurisdiction, venue, statute of limitations, or avoidance of collateral estoppel or incompatible decrees.

VI. CONCLUSION

The defendant class action has been available for centuries. Its availability has not been well known, however, and its use has been misunderstood. At times, the defendant class action may be the most attractive and most feasible way to proceed.

This article has attempted to demonstrate that many of the problems in bringing a defendant class action are not as severe as some commentators have thought. Perhaps the most crucial problem is assuring adequate representation. The motives of the defendant-representatives will contribute to a certain extent toward assuring adequate representation. The courts also have some flexibility to assure that absent defendants are protected. The problem of exclusion as well should not prevent the effective use of this procedure.

Although the defendant class action is not free from problems,

140. *See* 28 U.S.C. § 1338 (1970) (patent and copyright). Exclusivity under antitrust actions has been determined by judicial decision.

141. 60 F.R.D. 5 (N.D. Ill. 1973).

the difficulties are no more insurmountable than those inherent in plaintiff class actions. And the advantages of a defendant class action oftentimes outweigh the problems. The defendant class action can result in judicial economy by resolving complex issues in one proceeding. It can also prevent unfairness and needless expense for both plaintiffs and defendants without sacrificing procedural due process.