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NOTICE, COSTS, AND THE EFFECT OF JUDGMENT IN MISSOURI'S NEW COMMON-QUESTION CLASS ACTION

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I. INTRODUCTION

On December 1, 1972, the Missouri Supreme Court greatly expanded the potential usefulness of the class action device in our state courts by adopting the most recent version of the federal class action rule.[1] The

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1. Mo. R. CIV. P. 52.08. The provisions of this rule and FED. R. CIV. P. 23 are identical; subdivision designations are parallel. Hereinafter, footnote citations to the class action rule may be by subdivision designation only. The text of Mo. R. CIV. P. 52.08 and FED. R. CIV. P. 23 is as follows:

> *(a) Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
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> *(b) Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> (1) the prosecution of separate actions by or against individual individual members of the class would create a risk of
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> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
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> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
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> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
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> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other

single most significant change brought about by this amendment—beyond reformulation of the general criteria for the availability of the device—is the sanctioning of the class action where a group of persons is related to one another solely by virtue of having claims or defenses involving common questions of law or fact. Under the original federal rule, this variant was dubbed by its draftsman, Professor Moore, the "spurious" class action, to reflect the fact that a judgment in this type—unlike the others called "true" and "hybrid"—would not bind members of the class who

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available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(D) the difficulties likely to be encountered in the management of a class action.

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

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

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

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

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

(d) Orders in Conduct of Actions. In the conduct of actions to which this Rule applies, the court may make appropriate orders:

(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct

were not formally joined as individuals.[2] For this reason, class-action treatment was unavailable in such cases in Missouri state courts, even after adoption in 1943[3] of the federal class action rule (including the common-question or "spurious" category), because the Missouri Supreme Court added a prohibition against class actions where the judgment would not bind all members of the class.[4] Because the 1966 version of the federal rule makes the judgment purport to bind absent members of the class who are specified or described in the judgment, the prohibition in the state rule appeared to be superfluous and was dropped.

In order to accomplish this extension of res judicata effect in common-question class actions, however, the draftsmen of the new federal rule considered it necessary to pay a substantial price in added criteria and administrative requirements. Two special prerequisites, applicable only to common-question cases, are laid down in the rule: (1) The common questions of law or fact must predominate over those individual to the members,[5] and (2) the court must find that the class action device is superior to other means of adjudication.[6] The federal advisory committee intended these to ensure that judicial economy—the raison d'être of the common-question class action[7]—would be served.[8] In addition, the rule requires

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to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 62, and may be altered or amended as may be desirable from time to time.

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

2. *See* 3B J. MOORE, FEDERAL PRACTICE ¶ 23.10(I) (2d ed. 1969). The terminology is attributed by most writers originally to T. STREET, FEDERAL EQUITY PRACTICE § 548, at 342 (1909). *See* Keeffe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 CORNELL L.Q. 327, 328 (1948).

3. Mo. Laws 1943, at 362, § 19.

4. Mo. R. CIV. P. 52.09(d), RSMo 1969: "No class suit shall be maintained under Rule 52.08 unless the judgment or decree will be binding upon all members of the class." This provision was first adopted in 1944 as Supreme Court Rule 3.07(d), supplementing the Civil Code of 1943 (*see, e.g.*, Crawford, *Class Actions under the Missouri Code*, 18 U.K.C.L. REV. 103, 114 (1950)), and then incorporated into the Rules of Civil Procedure in the 1960 Revision.

5. Subdivision (b)(3).

6. *Id.*

7. PROP. FED. R. CIV. P. 23, Advisory Committee's Note, 39 F.R.D. 69, 102-03 (1966) [hereinafter cited as Advisory Note] states:

Subdivision (b)(3). In the situations to which this subdivision relates, class-action treatment is not as clearly called for as in those described above, but it may nevertheless be convenient and desirable depending upon the

(1) that notice must be given at an early stage of such actions to absent members of the class,[9] and (2) that absent members be given the opportunity to appear through an attorney or to remove themselves from the class without regard to reasons ("opt out").[10] The draftsmen considered these procedural safeguards essential to satisfy the demands of due process.[11]

In the six-year experience of the federal courts under the new rule, the most troublesome of these additional requirements and procedural safeguards has been that of notice, along with the special privileges given to the absent members. A host of practical and theoretical problems, many of which are not clearly answered by the rule, have surfaced. Why is pretrial notice mandatory only in common-question class actions? Why are absent members of such classes given the privilege of "opting out"? Can the rule's requirement of individual notice to all persons who can be identified with relative ease be relaxed in particular cases, where the cost of such notice is too great? If so, what will be the effect of any judgment rendered? Will an absent member not otherwise within the court's personal jurisdiction be bound by the alternatives given in the notice, or can he ignore the notice as he might ignore a civil summons? By whom should the notice be sent, and who is to bear the cost of sending it—the representative, the opponent, or the court? When must the notice be sent: is there room for delay until some preliminary matters, such as discovery, have been completed?

Decisions of the United States Supreme Court bearing on these questions are extremely scarce and of uncertain import. For the most part the Court—both as rule-maker and as appellate decision-maker—has left the lower courts to their own devices. They have not reached uniform results. No doubt this was expected and desired, to the extent that the problems are highly specific to the particular case, and are better regulated by a casuistic approach. On the other hand, some mandatory features of the

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particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.

8. The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device. . . . *Id.* at 103.

9. Subdivision (c)(2).

10. Subdivisions (c)(2), (c)(3). "Option out" is unavailable in the other types of class action. *See* Housing Authority v. United States Housing Authority, 15 Fed. Rules Serv. 2d 1239 (D. Neb. 1972) (denying requests for exclusion in a 23(b)(2) case); Van Gemert v. Boeing Co., 259 F. Supp. 125 (S.D.N.Y. 1966); 3B J. MOORE, FEDERAL PRACTICE ¶ 23.55 (2d ed. 1969).

11. *See* Advisory Note, *supra* note 7, at 107:

This mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject. . . .

rules have proven to be uncomfortable in application, and courts have been tempted to fudge a bit to achieve satisfactory results. Indeed, the experience of the federal courts has been sufficiently uneasy that some consideration is being given, in the context of a comprehensive reevaluation of federal rule 23, to various proposals for further revision of the rule.[12]

Since most of the problems plaguing the federal courts will also present themselves to state courts administering an identical rule, a review and analysis of the federal experience seems appropriate. This article offers such a review and analysis. It begins with a description of some typical cases likely to occur in the state courts under the new rule, aiming thereby to identify the peculiar characteristics of the common-question class action, if any, that justify special treatment as compared to other types. After considering in detail the handling of the notice requirement of federal rule 23 (c) (2) in the federal courts and the probable effect of judgment in such actions, the article will discuss some proposals for further reform of the rule with a view toward their possible adoption in Missouri. In particular, it will be argued that the "option out" provision is constitutionally unnecessary and therefore undesirable because it makes more burdensome notice constitutionally necessary.

II. Characteristics of the Common-Question Category

A. *Some Typical Cases*

In the federal courts, the availability of the common-question class action has been drastically limited by the decision in *Snyder v. Harris*,[13] in which the Supreme Court held that the jurisdictional amount requirements of sections 1331 and 1332 of the Judicial Code[14]—the general federal question and diversity-of-citizenship provisions—cannot be met by cumulating the several claims of the members of a common-question class.[15] As a practical matter, therefore, the claims of or against a common-question class must arise under special federal laws with respect to which the federal courts have jurisdiction without regard to the amount in controversy. By far the most fruitful such provisions have been section 4 of the Clayton Act,[16] which provides for private treble damage claims for violation of

12. Letter from Hon. A. Sherman Christensen, Senior District Judge and member of the Advisory Committee, to the author, February 28, 1973. Judge Christensen is also a member of a special subcommittee of the Committee on Court Administration of the Judicial Conference of the United States, which recently conducted a study of fiscal and administrative problems of the court in giving notice under rule 23 (c) (2). The present author, among many others, was asked for his views; that request, along with Judge Christensen's admirable Report and Recommendations distilling the results of his inquiry, provided a major stimulus to the preparation of this article.

13. 394 U.S. 332 (1969).

14. 28 U.S.C. §§ 1331, 1332 (1968).

15. *See* note 42 *infra*.

16. 15 U.S.C. § 15 (1970). Jurisdiction is expressly provided for without regard to the amount in controversy.

the antitrust laws, and various provisions of the securities laws[17] that create (expressly or by judicial implication) private damages claims for certain violations of those laws.[18] The public policy underpinnings of those statutes[19] may contribute significantly to the usually liberal interpretation of the class action rule by the federal courts, and may suggest a reason for somewhat less expansive treatment in the state courts.

In the state courts, of course, the jurisdictional amount problem is not presented at the trial level. Therefore, the range of fact situations in which class action treatment may be proper should be greater. *Snyder v. Harris* itself, for example, came out of Missouri at a time when the class action device probably would not have been available,[20] but it would be a good candidate under the new rule.[21] In *Snyder,* a stockholder in a Missouri life insurance company sued members of the board to recover, for distribution to herself and all other stockholders ratably, amounts received by the directors from sale of their shares in excess of fair value, apparently as a premium for control. Four thousand stockholders were represented, with claims totalling about $1.2 million; Mrs. Snyder's own claim was worth $8,740. In the companion case decided in the same opinion, *Gas Service Co. v. Coburn,*[22] a gas customer sued to recover city franchise taxes collected by the company; he sued on behalf of himself and all other customers who paid the tax but who, like himself, lived outside the city limits and were therefore not subject to the tax.

A less likely candidate for class action treatment that is, nonetheless, sometimes nominated is the so-called mass accident situation, in which a large number of persons are injured in a single catastrophic event. If this is a class action situation, the action would be of the common-question type.[23] Attempts at class action treatment for such cases in the courts have been rare, but not always unsuccessful.[24] The federal advisory com-

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17. *See* Securities Act of 1933 §§ 11, 12, 15 U.S.C. §§ 77k, 771 (1970); Securities Act of 1933 § 12, 15 U.S.C. § 77a (1970); Securities Exchange Act of 1934 § 9(e), 15 U.S.C. § 78i(e) (1970); Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j(b) (1970) *in conjunction with* SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1971); Securities Exchange Act of 1934, § 18, 15 U.S.C. § 78r (1970). Federal court jurisdiction over cases arising under these provisions is governed by the Securities Act of 1933 § 22, 15 U.S.C. § 77k (1970), and the Securities Exchange Act of 1934 § 27, 15 U.S.C. § 78aa (1970); neither sets forth a jurisdictional amount.

18. *See* the discussion of these cases in 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1781, at 79 (1972).

19. *See* text accompanying note 178 *infra.*

20. *See* note 4 and accompanying text *supra.*

21. According to the Supreme Court's opinion in *Snyder,* by the time the appeals had reached that court another action had already been instituted in Missouri state courts. 394 U.S. at 341. It has not surfaced in the reports.

22. 394 U.S. 332 (1969).

23. If, however, an insurance policy was involved, the first opinion in Barnard v. Murphy, 365 S.W.2d 614 (Mo. 1963), might afford precedent for classifying the action as a "hybrid," now covered by Mo. R. Civ. P. 52.08(b)(1)(B).

24. *See generally* Comment, *Mass Accident Class Actions,* 60 CALIF. L. REV. 1615 (1972).

mittee[25] and at least one commentator[26] have assumed that the mass accident case would normally involve too many individual questions and would therefore be inappropriate for class action treatment; other commentators have disagreed.[27]

Consumer cases are certain to be pressed on the state courts as almost textbook examples of what some regard as the peculiar mission of the class action: the assertion of many claims, large in overall impact but each too small to be sued on individually.[28] *Barnard v. Murphy*,[29] a 1964 case that the Missouri Supreme Court found to be an improper class action, might well fare better under the new rule. Three lessees of lockers in a food locker plant sued the plant for themselves and about 260 others, claiming damages for spoilage due to inadequate cooling. The action was held improper because there was no common fund involved, the plant's insurance policy having been removed from the case.[30] The common fund requirement is presumably abolished by the new rule, although there might be substantial individual questions of causation as well as damages, so that the "predominance" test might not be met (in the actual case liability to all class members was admitted).[31]

Even consumer fraud may be the subject of a class action for damages under a sympathetic reading of the federal rule. In *Vasquez v. Superior Court*[32] the California Supreme Court, drawing on the federal model in interpreting a rather vague code provision traditionally given much narrower scope,[33] found a class action proper. Purchasers of food freezers and

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25. Advisory Note, *supra* note 7, at 103.

26. *See* Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFFALO L. REV. 433, 469 (1960).

27. *See* 3B J. MOORE, FEDERAL PRACTICE ¶ 23.43, at 811 n. 35 (2d ed. 1969); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1783 (1972); Comment, *Mass Accident Class Actions*, 60 CALIF. L. REV. 1615, 1615-16 (1972).

28. *See* Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941); Kirkpatrick, *Consumer Class Litigation*, 50 ORE. L. REV. 21 (1970).

29. 378 S.W.2d 446 (Mo. 1964).

30. *See* Martin, *Procedure—The Common Fund Problem in Missouri Class Actions*, 29 Mo. L. REV. 77 (1964), criticizing the first decision in the case, Barnard v. Murphy, 365 S.W.2d 614 (Mo. 1963), which had held that the insurance policy, required by state law, constituted a common fund (at that time the insurer was a party).

31. It is well-settled that mere variation in the amount of damages among the members of the class does not preclude a finding of "predominance" of common questions. *See* 3B J. MOORE, FEDERAL PRACTICE ¶ 23.45[2] nn. 29 & 30 (2d ed. 1969); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1788, at 54-55 (1972).

32. 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).

33. CALIF. CIV. PRO. CODE § 382 (1954):

> [W]hen the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the Court, one or more may sue or defend for the benefit of all.

As recently as 1948 the California Supreme Court had interpreted this provision as in effect precluding common-question class actions where the causes of action

supplies under installment sales contracts sued the seller and the finance companies to which the contracts were assigned; plaintiffs demanded rescission and damages on the ground of fraudulent misrepresentations as to quality, warranty, and price. The defendants insisted that the nature of the misrepresentations and the element of reliance would vary from plaintiff to plaintiff, so that class action treatment would be inappropriate. The complaint alleged, however, that the misrepresentations followed a consistent pattern with respect to the class of 200-odd purchasers in the area, and the court held on demurrer that this satisfied the common question requirement. The element of reliance was supplied in turn by a presumption from the circumstances, subject to rebuttal by the defendants.[34]

A case recently decided by an Illinois appellate court will serve to illustrate some of the more complex problems of class actions in state courts. In *Reardon v. Ford Motor Co.*[35] the plaintiff, a purchaser of an allegedly defective automobile, sued the manufacturer on behalf of himself and all other purchasers of cars of the same make in certain model years in the entire country. The class was allegedly 4,000,000 persons strong; the relief sought was compensatory damages, punitive damages, and a "mandatory injunction" requiring recall and replacement of an allegedly defective part. The Illinois court was able to rid itself of the class action aspect under its common law precedents, which precluded the device where the claims of the class were technically separate and independent.

Under the new Missouri rule a different analysis would be required, and the result would not be so easy to reach. Proper analysis under the Missouri rule would involve at least the following questions:

(1) To what extent are the claims of different class members governed by different state laws? Liability to be determined according to different laws can hardly be said to be a "common question." Can the class be divided into subclasses according to the state laws that will govern? Rule 52.08 (c) (4) authorizes such subdividing "when appropriate."

(2) Given common questions, to which category does the case belong?

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were technically separate and substantial individual questions would arise. *See* Weaver v. Pasadena Tournament of Roses, 32 Cal. 2d 833, 198 P.2d 514 (1948). In 1970, the state legislature adopted a Consumer Legal Remedies Act, CALIF. CIV. CODE §§ 1740, 1781 (1970), which provides for class actions on essentially the same terms as the federal common-question provision in cases involving certain proscribed deceptive practices. The provision was inapplicable to *Vasquez* because it was not in effect until after the litigation was begun. The supreme court had already begun interpreting the old Field Code provision more liberally, however, by the time *Vasquez* arose. *See* Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967). An extensive historical review of class actions in California appears in Comment, *Class Actions for Consumer Protection*, 7 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 601, 607-18 (1972). *See also* Degnan, *Forward: Adequacy of Representation in Class Actions*, 60 CALIF. L. REV. 705 (1972); Lobell, *Comments on Vasquez v. Superior Court*, 18 U.C.L.A.L. REV. 1042 (1971).

34. *See also* LaSala v. American Sav. & Loan Ass'n, 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971).

35. 7 Ill. App. 2d 838, 287 N.E.2d 519 (1972).

Is the claim for "mandatory injunction" sufficient to bring the action under 52.08 (b) (2), obviating the "superiority" and "predominance" criteria as well as mandatory notice with option out?[36]

(3) Given the applicability of the common-question category, is there any satisfactory alternative to litigation as a class action, such as an administrative proceeding resulting in a recall order? If not, probably the "superiority" test is met.

(4) To what extent are damages claimed beyond the cost of replacing the defective part? Such claims may present issues individual to the members.

(5) Does a state court have the power to entertain an action in which claims are adjudicated that (a) arose elsewhere and (b) are held by persons having no contact with the forum? For example, if the defect is one of design, which was created in Detroit, but the automobiles in question were all assembled in Missouri, could a Missouri court adjudicate the claim of a Florida citizen who bought his car in Florida? Would a notice under rule 52.08 (c) (2), informing the Florida purchaser that he may either drop out, appear by counsel, or remain passively in the class, suffice to provide such jurisdiction? Note that rule 52.08 (b) (3) (C) requires consideration of the desirability of concentrating the litigation in the particular forum.

(6) If individual notice is to be sent to a 4,000,000-member class, at a minimum cost of $320,000, who is to bear that cost? Can it be reduced by using selective individual notice, or publication? Is there any publication that would be likely to reach a substantial number of purchasers of cars of a given make across the nation? If full notice is impossible and

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36. There is room for doubt, perhaps, that this claim for relief should properly be characterized as "injunctive" within the meaning of subdivision (b) (2), because it cannot be provided otherwise than by specific services rendered separately to each individual member of the class, and then only if they request it. On the other hand, it can be regarded as the functional equivalent of a declaration of the right to replacement of a part without charge, combined undoubtedly with an order to provide adequate notice of the right to the affected persons. It is more analogous, however, to specific or "natural" compensation—repair of a damaged thing by the wrongdoer rather than mere payment of the dollars-and-cents cost of repair—a form of "damages" unknown to our law but constituting at least the theoretical model for German damages law. *See* BGB § 249:

> Whoever is obligated to provide compensation for injury is required to restore the situation which would obtain, if the circumstance giving rise to the obligation to compensate had not occurred. If compensation is to be provided for injury to a person or damage to a thing, the person entitled thereto may demand, in place of restoration, the amount of money required for such restoration.

(Author's translation)

See, e.g., I K. LARENZ, LEHRBUCH DES SCHULDRECHTS 185-86 (9th ed. 1969); 1 E. COHN, MANUAL OF GERMAN LAW 105-56 (2d ed. 1968). In any event, the difficulty in categorizing the relief so as to bring the action under Mo. R. CIV. P. 52.08 (b) (2), thus dispensing with the notice and "option-out" requirements under 52.08 (b) (3), emphasizes the questionable nature of the attempt to retain even pragmatically defined categories in the rule. *See* part II, § B.

lesser notice will not reach everyone, can the court nonetheless proceed with lesser notice and let the parties take their chances?

B. *Relationship to Other Categories*

A comprehensive survey of the historical development of the class action is available elsewhere.[37] It should be enough to note here that both the original formulation of federal rule 23 and the 1966 revision now adopted in Missouri were attempts to describe the essential characteristics of typical cases in which class action treatment is appropriate; the revision constitutes a response to what numerous critics found to be the restrictive effects of the classification system of the original.[38] Since the 1966 revision also responded to the need to specify procedures for handling class actions and to specify (to the extent possible) the consequences of class action judgments, not only the *availability* but also the *treatment* of class actions has now become tied to the system of categories.

Common to both formulations of federal rule 23, in any event, is a parallel to the regulation of joinder of parties[39] on the one hand, and to intervention[40] on the other, paying due respect to the twin gods of Necessity and Convenience. Essentially similar criteria determine what parties ought to be joined under federal rule 19(a), what parties have a right to intervene under federal rule 24(a), and what parties constitute a proper or "true" class under old federal rule 23(a)(1) or new rule 23(b)(1). This reflects the origin of the class action as a device for "avoiding the rigors of compulsory joinder":[41] when parties who ought to be joined are so numerous that it is impracticable to do so, then let some represent the interests of all, rather than dismiss for failure to join. Similarly, the existence of common questions of law or fact supports, as a matter of convenience, "permissive joinder" under federal rule 20, "permissive intervention" under federal rule 24(b), and the common-question class action under old rule 23(a)(3) or new rule 23(b)(3).[42]

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37. Most notably in Z. CHAFEE, SOME PROBLEMS OF EQUITY chs. V, VI, VII (1950). *See also* Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 609-29 (1971); Keeffe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 CORNELL L.Q. 327 (1948).

38. *See* Z. CHAFEE, SOME PROBLEMS OF EQUITY chs. V, VI, VII (1950); F. JAMES, CIVIL PROCEDURE 500-01 (1965); Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941); Keeffe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 CORNELL L.Q. 327 (1948); Simeone, *Procedural Problems of Class Suits*, 60 MICH. L. REV. 905 953-59 (1962); *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 929-33 (1958).

39. FED. R. CIV. P. 19, 20.

40. FED. R. CIV. P. 24.

41. F. JAMES, CIVIL PROCEDURE § 10.18, at 497 (1965). *See also* 3B J. MOORE, FEDERAL PRACTICE, ¶ 23.08(1) (2d ed. 1969).

42. Snyder v. Harris, 394 U.S. 332 (1969), the Supreme Court's only pronouncement to date on the categories of the new rule, emphasized this parallel between permissive joinder, permissive intervention, and the common-question class action in holding that the individual claims of common-question class members

The concept of necessity appears to support the first two categories of federal rule 23(b). What the federal advisory committee was looking for, according to its reporter, Professor Benjamin Kaplan, was the "natural class action",[43] which the committee envisioned as one in which the final relief had to be unitary in order to protect the interests of those deliberately or inevitably affected ((b)(1)), or in which the final relief can be unitary because it extends only to common rights (injunctive or declaratory relief, (b)(2)). It might be said, at a rather high level of abstraction, that categories (b)(1) and (b)(2), in revised form, concern themselves with claims for relief having an intended or incidental *prospective* effect: The effect of multiple adjudication on the opponent's conduct, under (b)(1)(A); the ability of absent members to vindicate their rights after adjudication of the representatives' claims or defenses, under (b)(1)(B); the injunctive order against the opponent to do or refrain from doing something, or the declaration (for future reference) of rights and duties, under (b)(2). As to categories (b)(1) and (b)(2), the contribution of the revision consists in shifting from a description of the "jural relations" among the members of the class to a description of the impact of judgment in individual actions on the interests of those affected.[44]

Subdivision (b)(3) is then left as a catchall for the situations in which totally or partially unitary adjudication is not thought to be necessary or natural, but convenient. It is generally supposed that an action for damages only is not a "natural" for class-action treatment in this sense, because multiple judgments can be enforced in isolation from one another.[45] Accordingly, the courts have held that stare decisis in and

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cannot be cumulated for jurisdictional amount purposes. The Court pointed out that the rule against aggregation of distinct claims was first enunciated in a joinder-of-claims case:

> When two or more plaintiffs having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount . . . .

Troy Bank v. Whitehead & Co., 222 U.S. 39, 40 (1911). The principle applies equally, said the Court, to the common-question class action, even as now structured. The argument that because the judgment now binds absent members even in common-question cases, the claims should no longer be considered separate, was refuted by simply pointing out that in permissive joinder cases the judgment also binds all those joined. To the court's argument one might add that since absent members of common-question classes are not bound if they utilize the "option-out" feature, a distinction cannot be made between voluntary joinder for convenience under FED. R. CIV. P. 20 and involuntary joinder for convenience under FED. R. CIV. P. 23(b)(3).

43. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 387 (1967).

44. *See, e.g.*, C. WRIGHT, FEDERAL COURTS § 72, at 307 (2d ed. 1970).

45. *See* Rodriguez v. Family Publications Serv., 57 F.R.D. 189, 192-93 (C.D. Calif. 1972); Travers & Landers, *The Consumer Class Action*, 18 KAN. L. REV. 811, 823-24 (1970); Comment, *Rule 23: Categories of Subsection (b)*, 10 B.C. IND. & COMM. L. REV. 539, 540 (1969).

of itself does not satisfy the requirements of subdivision (b)(1)(B).[46] To hold otherwise, of course, would leave the common-question category empty, except for questions of fact. On the other hand, to the extent that a depletable common fund may be involved, so that satisfaction of individual claims in isolation might jeopardize satisfaction of others in a more concrete fashion, subdivision (b)(1)(B) has been applied to the exclusion of subdivision (c)(2)-type notice.[47]

Occasionally, however, the fact that subparagraph (b)(1) requires not only the possibility of multiple adjudications,[48] but also either incompatible standards for the opponent or impairment of protection for the absent member, seems to escape the courts. The most troublesome cases have involved defendant classes, for the peculiar characteristics of which the rule unfortunately makes no allowance. In *Guy v. Abdulla*[49] a trustee in bankruptcy sued to recover certain voidable preferences and fraudulent conveyances from a class of creditors alleged to have conspired to obtain such preferences. The district court held that subparagraph (b)(1) applied, *though only with respect to specified common issues,* thus precluding "option out" by the absent members of the defendant class. The court stated two grounds for the decision: (1) Separate actions could produce recovery against some defendants and not others, an "anomalous" result that rule 23 was intended to avoid; and (2) the possible stare decisis effect of one adjudication would, within the meaning of (b)(1)(B), be practically dispositive of the other claims. The unmistakable concern of the court was to avoid the application of subdivision (c)(2), which allows "option out": "Obviously, a defendant class whose members could remove themselves would not be very meaningful."[50] Similar considerations

46. Rodriguez v. Family Publications Serv., 57 F.R.D. 189 (C.D. Calif. 1972).

47. *See* Walker v. City of Houston, 341 F. Supp. 1124 (S.D. Tex. 1971), in which ex-members of firemen's and policemen's pension systems sought to establish the right to withdraw their employees' contributions to the funds after termination of their employment. *See also* Berman v. Narragansett Racing Ass'n, 48 F.R.D. 333, 337 (D.R.I. 1969), involving claims to a specified share of track receipts as a purse fund.

It is often stated as a general principle that if a class falls into subdivision (b)(1) or (b)(2), it should be treated as a (b)(1) or (b)(2) class, even though the criteria of subdivision (b)(3) are also met (as they usually would be). Van Gemert v. Boeing Co., 259 F. Supp. 125 (S.D.N.Y. 1966) (leading case); Zachary v. Chase Manhattan Bank, 52 F.R.D. 532, 534 (S.D.N.Y. 1971); Mungin v. Florida E. Coast Ry., 318 F. Supp. 720, 730 (M.D. Fla. 1970), *aff'd without opinion,* 441 F.2d 728 (5th Cir. 1971); Berman v. Narragansett Racing Ass'n, 48 F.R.D. 333 (D.R.I. 1969); 3B J. MOORE, FEDERAL PRACTICE ¶ 23.31[3] (2d ed. 1969); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1772, at 7 (1972).

48. It was held in Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564 (2d Cir. 1968), that where individual claims were so small as to make individual actions economically impracticable, there was no risk of multiple litigation and (b)(1) was inapplicable.

49. 57 F.R.D. 14 (N.D. Ohio 1972).

50. *Id.* at 17. One quite plausible, though unstated, reason for the result would be the strong federal policy embodied in the bankruptcy laws, a factor also present in the patent cases. But the stated reasoning is nonetheless faulty and misleading.

may be behind decisions that apply subdivision (b) (1) to actions against defendant classes of alleged patent infringers.[51] On the other hand in *Dudley v. Southeastern Factor & Finance Corp.*[52] the court found that an action against a defendant class of shareholders for restitution of shares received in a corporate purchase of another company's stock, allegedly in violation of plaintiffs' rights as preferred shareholders in the merged corporation, was properly a common-question case calling for (c) (2)-type notice.

Where the action involves claims for a mixture of injunctive or declaratory relief and damages, such as a Civil Rights Act claim based on employment discrimination where both back pay and an injunction against further discrimination are demanded, the courts have preferred non-(b) (3) treatment[53] and have excluded (c) (2)-type notice.[54] On the

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51. Research Corp. v. Pfister Associated Growers, Inc., 301 F. Supp. 497 (N.D. Ill. 1969); Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc., 285 F. Supp. 714 (N.D. Ill. 1968). In Dale Electronics, Inc. v. R.C.L. Electronics, Inc., 53 F.R.D. 531 (D.N.H. 1971), two grounds were made explicit: (1) Injunctive relief (though apparently not demanded in the complaint) would be a natural and necessary remedy to prevent future infringements; and (2) the practical impact of a decision on the validity of a patent on the conduct of other licensees, and of varying decisions on the position of the plaintiff, satisfies subdivision (b) (1).

The second ground is highly doubtful, because neither branch of subdivision (b) (1) literally covers the situation. Subdivision (b) (1) (A) requires a risk of establishing "incompatible standards of conduct for the party opposing the class"; subdivision (b) (1) (B) requires a risk of disposition of the interests of absent members, or of substantial impairment of *their* ability to protect their interests. A claim seeking class-action relief *against* a class in favor of a single plaintiff, however, fails on both counts: Impairment of the plaintiff's ability to protect his interests does not matter; and separate actions resulting in some adjudications of validity and some of invalidity may destroy the value of the patent but impose no standards of conduct whatsoever on the plaintiff. *See In re* Yarn Processing Patent Litigation, 16 Fed. Rules Serv. 2d 835, 839 (S.D. Fla. 1972).

The application of subdivision (b) (2) to claims for injunctive relief *against* a class in favor of a single plaintiff is equally open to question. Indeed, the patent cases appear to rely in part on the probability that the defendant class will want injunctive relief against the plaintiff in the event of a finding of invalidity, even if they have not asked for it. *See, e.g.*, Research Corp. v. Pfister Associated Growers, Inc., *supra* at 500: "The defendants would certainly require that the plaintiff not sue them further, if the patent were held invalid . . . ." In any case, the commentators are in agreement that subdivision (b) (2) was intended to cover only injunctive relief *in favor* of the class. *See, e.g.*, 3B J. MOORE, FEDERAL PRACTICE § 23.40 n.17 (Supp. 1972); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1775, at 21-22 (1972); Note, *Class Actions in Patent Suits: An Improper Method of Litigating Patents?*, 1971 U. ILL. L.F. 474, 489-90 (1971). All of the illustrations in the Advisory Note, *supra* note 7, at 102, involve claimant classes. The reason for the distinction is nowhere explained and is unclear; it may have to do with the notion that injunctive relief *against* a class is to be regarded as personal to each individual member, comparable to the claim for damages for or against a class.

52. 57 F.R.D. 177 (N.D. Ga. 1972).

53. Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Baxter v. Savannah Sugar Ref. Corp., 350 F. Supp. 139 (S.D. Ga. 1972); Boles v. Union Camp Corp. 57 F.R.D. 46 (S.D. Ga. 1972). *See also* Samuel v. University of Pittsburgh, 56 F.R.D. 435 (W.D. Pa. 1972), applying FED. R. CIV. P. 23 (b) (2) to an action to enjoin en-

other hand, where courts have found that claims for prospective relief are secondary and the predominant claim is for damages, subdivision (b)(3) has been held applicable.[55] Here again, however, confusion has cropped up. In *Contract Buyers League v. F & F Investment*,[56] an action by Negro purchasers of homes on installment land contracts against lenders and sellers who allegedly conspired to exploit the housing segregation problem by fixing unconscionable prices and conditions, the court found both (b)(2) and (b)(3) applicable, and determined that the final relief sought did not relate "predominantly to money damages," but ordered (c)(2)-type notice anyway.[57] And in *Ostapowicz v. Johnson Bronze Co.*,[58] an employment discrimination case in which plaintiffs claimed both injunctive and monetary relief on behalf of a class including *future* female employees at the defendant's plant, the court found both subdivisions (b)(2) and (b)(3) applicable, yet ordered (c)(2)-type notice with "option out" with respect to all but future employees.

The courts have disagreed in such mixed-relief cases on the extent to which they should be treated as part (b)(2), part (b)(3) cases. Some courts have expressly reserved the back pay portion for distinct treatment at a later stage,[59] while others have assumed that if subdivision (b)(2) applies at all, the option-out and appearance privileges are excluded as to the entire case.[60] If the distinction is to be made at all, it would seem that this should depend on the separability of the issues raised by the different claims for relief: the more issues in common, the less meaningful the special privileges for the damages claim, and the less likely that (c)(2)-type notice will serve a useful purpose.

It can scarcely be denied that the new system of categories, with its emphasis on the practical consequences of individual action and on the judicial economy of class action treatment, has greatly eased the task

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forcement of a rule classifying married female students as nonresidents solely because their husbands were so classified and to recover the amount of excess fees exacted as a result of that rule.

54. *See* Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Baxter v. Savannah Sugar Ref. Corp., 350 F. Supp. 139 (S.D. Ga. 1972).

55. *E.g.*, Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564 (2d Cir. 1968); Goldman v. First Nat'l Bank, 56 F.R.D. 587 (N.D. Ill. 1972); Free World Foreign Cars, Inc. v. Alfa Romeo, S.p.A., 55 F.R.D. 26, 30 n.9 (S.D.N.Y. 1972). In Baham v. Southern Bell Tel. & Tel. Co., 55 F.R.D. 478 (W.D. La. 1972), it was held that mootness of the claim for injunctive relief precluded class-action treatment of the back pay claim under subdivision (b)(2).

56. 48 F.R.D. 7 (N.D. Ill. 1969).

57. *Id.* at 13-14 n.2. *See also* Mack v. General Elec. Co., 15 Fed. Rules Serv. 2d 113, 799 (E.D. Pa. 1971), a civil rights action in which both injunctive relief and damages were demanded but subdivision (c)(2)-type notice with option out was ordered.

58. 54 F.R.D. 465 (W.D. Pa. 1972).

59. *E.g.*, Boles v. Union Camp Corp., 57 F.R.D. 46 (S.D. Ga. 1972). *See also* 3B J. MOORE, FEDERAL PRACTICE ¶ 23.45, at 708 (2d ed. 1969).

60. Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); Jacobi v. Bache & Co., 16 Fed. Rules Serv. 2d 70 (S.D.N.Y. 1971).

of determining whether or not a class action of some sort is proper. The job of determining *which* category applies, however, seems as difficult as ever. When an action for damages can be brought under subdivision (b)(1) because of stare decisis, in order to prevent "option out"; when an order to recall and replace might be brought under subdivision (b)(2) while an action for the cost of replacement would be subsumed under (b)(3); and when a court faced with a claim for both prospective and monetary relief must decide, unaided, whether to treat the case as all (b)(2), all (b)(3), or partly each, merely because the *procedural* prerequisites and consequences are different, the system is functioning improperly.

The fact of the matter seems to be that the categories are not so distinguishable from one another as to justify the difference in treatment. Not even the distinction between "natural" and merely "convenient" class actions—the justification offered by the Advisory Committee for the difference in treatment—will serve. For example, the case of a large number of small damage claimants who could not afford to sue separately, but who could afford to sue together, is just as much a "natural" for class action treatment as the common fund situation. Nonetheless it is clear that the former belongs to subdivision (b)(3), while the latter belongs to subdivision (b)(1)(B). To be sure, the alternative for the small claimants is not separate litigation, which in the common fund situation would result in an inequitable distribution of limited compensation; the alternative is no litigation at all, which would result in the equally undesirable frustration of legitimate claims. If categories can be formulated so as to include only "natural" class actions on the one hand, or "convenient" class actions on the other, it is submitted that this has not yet been done.

III. NOTICE

A. *The Requirements of Due Process: Notice, Adequate Representation, or Both?*

The difficulties of applying the categories, aggravated by a judicial coolness toward the concept of "opting out," have helped also to confuse the debate over whether the concepts of due process, enunciated principally in *Mullane v. Central Hanover Bank & Trust Co.*,[61] require some form of notice to be directed to the absent members of the class in *all* class actions, in order for the court to have the power to render a decision binding on the class. While the cases seem to be numerically split on the larger question,[62] it is frequently unclear whether the courts refusing

61. 339 U.S. 306 (1950).

62. *Notice required in all class actions:* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564-65 (2d Cir. 1968), is the leading case, although it was dictum, because subdivision (b)(3) was held applicable; Schrader v. Selective Serv. Sys. Local Bd. No. 76, 470 F.2d 73 (7th Cir.), *cert. denied*, 93 S. Ct. 689 (1972); Zeilstra v. Tarr, 466 F.2d 111 (6th Cir. 1972); Arey v. Providence Hosp., 55 F.R.D. 62 (D.D.C.

to order notice were refusing it generally, or refusing only the specific form and content of notice prescribed in subdivision (c)(2). It is often equally unclear whether the courts insisting on the requirement of notice were insisting on the full *Mullane* treatment as to each class member, or only complaining of a lack of *some* sort of notice.

For purposes of this article, we are ultimately concerned with the question of whether the literal language of subdivision (c)(2)—"individual notice to all members who can be identified through reasonable effort"—is to be regarded as expressing a *constitutional* standard for (i) the maintenance of a (b)(3) class action at all, or at least for (ii) res judicata effect of the judgment vis-à-vis identifiable but unnotified members of the class.[63] We begin, however, with the broader question: does due process require *Mullane*-type notice for *all* class actions? In the next two sections of part III, *B* and *C*, we will deal with the special characteristics of the common-question category.

The steadfast position of the federal advisory committee since 1938 has been to avoid foreclosing the question of due process in the text of the rule itself, on the ground that the only true test of due process comes on collateral attack in a separate proceeding.[64] The old rule required notice in the case of dismissal or settlement of "true" class actions,[65] but made no further mention of the subject. The new rule extends the requirement of notice in these two situations to all types of class actions,[66] and makes pretrial notice of a special sort mandatory also in the case of common-question classes, while expressly providing for discretionary no-

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1972); Zachary v. Chase Manhattan Bank, 52 F.R.D. 532 (S.D.N.Y. 1971); McCarthy v. Director of Selective Serv. Sys., 322 F. Supp. 1032 (E.D. Wis. 1970), *aff'd on alternative grounds*, 460 F.2d 1089 (7th Cir. 1971); Pasquier v. Tarr, 318 F. Supp. 1350, 1353-54 (E.D. La. 1970), *aff'd on alternative ground*, 444 F.2d 116 (5th Cir. 1971); Fowles v. American Export Lines, 300 F. Supp. 1293 (S.D.N.Y. 1969); Snyder v. Board of Trustees of Univ. of Ill., 286 F. Supp. 927 (N.D. Ill. 1968).

Notice not required in non-(b)(3) class actions: Northern National Gas Co. v. Grounds, 292 F. Supp. 619 (D. Kan. 1968), is the leading case, although the court did order prejudgment notice; Hammond v. Powell, 16 Fed. Rules Serv. 2d 214 (4th Cir. 1972); Baxter v. Savannah Sugar Ref. Corp., 16 Fed. Rules Serv. 2d 871 (S.D. Ga. 1972); Woodward v. Rogers, 16 Fed. Rules Serv. 2d 241 (D.D.C. 1972); Francis v. Davidson, 340 F. Supp. 351 (D. Md. 1972); McGriff v. A.O. Smith Corp., 51 F.R.D. 479 (D.S.C. 1971); Mungin v. Florida E. Coast Ry., 318 F. Supp. 720 (M.D. Fla. 1970), *aff'd mem.* 441 F.2d 728 (5th Cir. 1971); Gregory v. Hershey, 51 F.R.D. 188 (E.D. Mich. 1970), *rev'd on other grounds sub nom.* Gregory v. Tarr, 436 F.2d 513 (6th Cir. 1971); Johnson v. City of Baton Rouge, 50 F.R.D. 295 (E.D. La. 1970).

63. This section of the article discusses part (i) of the question; for a discussion of the res judicata aspect, see pt. IV below.

64. 3B J. MOORE, FEDERAL PRACTICE ¶ 23.11[1] (2d ed. 1969); *cf.* Moore's own recommendation in Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 571 (1937).

65. FED. R. CIV. P. 23(c) (1938).

66. FED. R. CIV. P. 23(e) (1966). It has been held that "dismissal" means only *voluntary* dismissal. Dolgow v. Anderson, 53 F.R.D. 664 (E.D.N.Y. 1971).

tice in subdivision (d) (2). Although subdivision (c) (3) defines the scope that the judgment in a class action should *purport* to have, the Committee explicitly disclaimed any power to determine in advance what the ultimate res judicata effect of the judgment should be.[67]

The argument that due process requires notice of the pendency of the action to the absent members of the class rests on the opinion in *Mullane v. Central Hanover Bank & Trust Co.*,[68] in which the issue was the validity of a provision for notice by publication in the New York common trust fund statute. The statute allowed banks to establish common trust funds in which they could pool the assets of individual trusts of which they were trustees, but required a periodic judicial accounting at which beneficiaries of participating trusts could assert claims of mismanagement or other breach of fiduciary duty. The judicial settlement would bind all beneficiaries with respect to such claims. All beneficiaries not appearing were represented by a guardian *ad litem*—not himself a beneficiary—appointed by the court; the only attempt to notify any beneficiaries was four weekly advertisements in a local newspaper. The Supreme Court held, on a direct challenge to the local court's jurisdiction, that the notice was insufficient and that the judgment of settlement was inconsistent with due process. In stating the general principle, the Court delivered itself of the following ringing language:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.[69]

The Court then proceeded to outline two broad categories of trust beneficiaries, with respect to whom the notice requirements is different: (1) Beneficiaries whose interests are conjectural or future or whose whereabouts are unknown may be notified by publication, because there is no better way; (2) beneficiaries who have present interests, and whose recent whereabouts are known, must be given a more direct notice. Clearly, this is the standard incorporated into subdivision (c) (2) of the class action rule, which requires "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."

To be sure, *Mullane* itself was not a class action. Nevertheless, to the extent that the rights and duties of a class member are to be finally adjudicated without his consent or participation, and he is represented by persons not of his own choosing, the principle stated thus broadly

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67. PROP. FED. R. CIV. P. 23, Advisory Committee's Note, 39 F.R.D. 69, 106 (1966) [hereinafter cited as Advisory Note].
68. 339 U.S. 306 (1950).
69. *Id.* at 314.

must apply. This argument has been accepted by a number of courts, most notably the Second, Sixth, and Seventh Circuits,[70] and by several commentators.[71]

The argument against a due process requirement of notice in class actions is somewhat more complex, but it is based on the proposition that in representative actions it is adequate representation, not notice, that satisfies due process.[72] Typically the argument traces back to *Hansberry v. Lee*,[73] in which the Supreme Court held that plaintiff landowners seeking to enforce a restrictive covenant against another landowner about to violate it, where the enforceability of the covenant was at issue, could not constitutionally represent a class of landowners some of whom were interested in invalidating the covenant. In that case it was emphasized that the representative action was a recognized exception to the general rule that a judgment could not bind persons not formally joined as parties; the use of notice to absent parties as a means of satisfying due

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70. Schrader v. Selective Serv. Sys. Local Bd. No. 76, 470 F.2d 73 (7th Cir.), *cert. denied*, 93 S. Ct. 689 (1972); Zeilstra v. Tarr, 466 F.2d 111 (6th Cir. 1972) (alternative ground); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564-65 (2d Cir. 1968) (dictum).

71. *See* Ward & Elliott, *The Contents and Mechanics of Rule 23 Notice*, 10 B.C. IND. & COMM. L. REV., 557, 560 (1969); Comment, *Can Due Process be Satisfied by Discretionary Notice in Federal Class Actions?*, 4 CREIGHTON L. REV. 268, 300-02 (1971); Comment, *Revised Federal Rule 23, Class Actions: Surviving Difficulties and New Problems Require Further Amendment*, 52 MINN. L. REV. 509, 521-24 (1967). This view was represented before *Mullane*, *See* Keeffe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 CORNELL L.Q. 327, 338-39 (1948), interpreting *Hansberry v. Lee* itself (*see* text accompanying notes 72-78 *infra*) as turning on the lack of notice; Comment, *Federal Class Actions: A Suggested Revision of Rule 23*, 46 COLUM. L. REV. 818, 833-36 (1946); *cf.* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 396 (1967). *See also* Simeone, *Procedural Problems of Class Suits*, 60 MICH. L. REV. 905, 954-59 (1962).

72. Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619, 636 (D. Kan. 1968); *see* cases cited note 62 *supra*, which hold notice is not required in non-(b)(3) class actions. A numerical majority of the commentators agree that it is adequate representation, not notice, that satisfies due process. *See* 3B J. MOORE, FEDERAL PRACTICE ¶ 23.55, at 1152-53 (2d ed. 1969); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1786, at 142-44 (1972); Subrin & Sutton, *Welfare Class Actions in Federal Court: A Procedural Analysis*, 8 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 21, 69-73 (1973); Degnan, *Adequacy of Representation in Class Actions*, 60 CALIF. L. REV. 705, 718-19 (1972); Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 645-46 (1971); Kirkpatrick, *Consumer Class Actions*, 50 ORE. L. REV. 21, 37-38 (1970); Maraist & Sharp, *Federal Procedure's Troubled Marriage: Due Process and the Class Action*, 49 TEXAS L. REV. 1, 9-10 n.37 (1970); Travers & Landers, *Consumer Class Actions*, 18 KAN. L. REV. 811, 827 (1970); Comment, *Class Actions Under Federal Rule 23(b)(3)—The Notice Requirement*, 29 MD. L. REV. 139, 145-57 (1969); Comment, *Adequate Representation, Notice and the New Class Action Rule: Effectuating Remedies Provided by the Securities Laws*, 116 U. PA. L. REV. 889, 914 (1968); Note, *Proposed Rule 23: Class Actions Reclassified*, 51 VA. L. REV. 629, 638 (1965).

73. 311 U.S. 32 (1940).

process was not mentioned.[74] The *Hansberry* opinion also contains broad language tending to support adequate representation as a self-sufficient criterion:

> It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties, . . . or where the interests of the members of the class, some of whom are present as parties, is joint, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter. . . .[75]

Mullane, it is pointed out, was not a class action, because the "representative" was not a member of the class or classes of beneficiaries of the trusts. There were thus no "interested parties" originally joined. Rather, the opinion set up a model for service of process—the acquisition of personal jurisdiction over defendants—whereas it is of the essence of the class action that jurisdiction need not be acquired over all members of the class.[76] To apply *Mullane* to all class actions would be to destroy the usefulness of the device.[77] Therefore *Mullane* cannot be regarded as restricting the broader view intimated in the *Hansberry* opinion:

> Nor do we find it necessary for the decision of this case to say that, when the only circumstance defining the class is that the determination of the rights of its members turns upon a single issue of fact or law, a state could not constitutionally adopt a procedure whereby some of the members of the class could stand in judgment for all, provided that the procedure were so devised and applied as to ensure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue. . . .[78]

The best that can be said of the Supreme Court cases on the constitutional question is that they present a mixed picture, ripe for speculation.[79] Actually, the issue seldom arises in pure form, *i.e.* under a plea of

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74. In one leading case that held a class action proper, Smith v. Swormstedt, 57 U.S. (16 How.) 288 (1853), and in another that held a class action judgment binding on collateral attack, Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921), notice was likewise neither given nor discussed.

75. 311 U.S. at 42-43.

76. *See* Homburger, *supra* note 72, at 645.

77. Maraist & Sharp, *supra* note 72, at 15.

78. 311 U.S. at 43.

79. Certainly the most ambitious attempt to distill working rules out of the cases on notice is that of Professors Maraist & Sharp, *supra* note 72. They formulate the rule that a class member can be bound by a judgment only if:

(1) Actual notice, either by personal service or by mail, is given to the party; or

res judicata in a subsequent proceeding. Since the adoption of the 1966 revision of the federal rule, there are few reported lower-court cases.[80] One involved a collateral challenge to the sufficiency of 23 (c) (2) notice, in which the court held that actual participation in the proceedings through an attorney of their choice precluded plaintiffs from challenging a settlement.[81]

A second case, *Research Corp. v. Edward J. Funk & Sons Corp.*,[82] was an action to enforce a judgment that the plaintiff had obtained against a defendant class of patent infringers; the defendant in the enforcement action resisted on the grounds that it had not been served with process

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(2) No actual notice is given, but
  (a) the state has a direct and compelling interest that may be vindicated in the proceeding, or
  (b) the interests of the absent parties are adequately represented in the proceeding, and
    (i) the absent party has consented to the representation, or
    (ii) the state has an indirect but important interest that will be served by the proceeding and that will be defeated if the proceeding cannot be maintained without actual notice to the absent parties.

Id. at 19. A "direct and compelling interest" is one held by the sovereign itself or its subdivisions, and includes improving public lands and works, compelling a father to support his child, distributing abandoned property, and collecting taxes. *Id.* at 3. "Consent" by an absent party includes formation of a corporation, purchasing corporate stock, joining an unincorporated association, or employing an attorney to represent him in litigation. *Id.* at 4. "Indirect but important interest of the state" includes that of finality in the administration of estates, for example. *Id.* at 5. The state's interest in enforcement of important regulatory schemes such as the antitrust and securities laws also probably qualifies, but the judicial economy, as such, that is achieved by a class action "that seeks merely to combine large numbers of similar but basically separate claims" probably does not qualify. *Id.* at 21 & 22.

Probably the last assertion is the most difficult to support on the basis of the cases up to *Mullane*, since none of them dealing with notice involved class actions, and none of the class action cases involved notice. It is supported, however, by the decision in *Snyder v. Harris*, which emphasized the lack of that special federal concern with diversity-of-citizenship cases that would justify changing the restrictive rules governing jurisdictional amount. Most of these cases, said the Court, should be tried in state courts. In the context of this article the remaining question would be, of course, whether *state* courts should be more concerned with judicial economy, because they must try the cases anyway; the federal courts, by denying class action treatment, rid themselves of the case altogether.

Especially important to note, however, for purposes of this article, is that Maraist and Sharp view the matter as one of balancing the interests of the state with those of the members of the class; they believe that between actual notice to all members and no notice to any of them lies a spectrum of intermediate measures, such as selective individual notice and publication, and that the more notice given the less strong the public interest in unitary adjudication need be. Maraist & Sharp, *supra* note 72, at 20-21.

80. Excluded are cases in which the right of appeal was denied to class members who had received notice of a settlement but failed to intervene or object or otherwise appear at the trial level. *See, e.g.*, Research Corp. v. Asgrow Seed Co., 425 F.2d 1059 (7th Cir. 1970).

81. Connors v. Chas. Pfizer & Co., 333 F. Supp. 296 (S.D.N.Y. 1971).

82. 15 Fed. Rules Serv. 2d 580 (N.D. Ind. 1971).

and it had not been adequately represented in the first action, but offered no evidence to support the latter contention. The court held that formal service of process was unnecessary in a class action, and that defendant had not met its burden of proof on the defense of inadequate representation. The fact that no notice was given to absent members[83] was not mentioned in the opinion.

Finally, a series of confusing and conflicting decisions has come down collateral to a draft classification suit. *Gregory v. Hershey*[84] was an action brought by registrants for a declaratory judgment that they were entitled to a III-A classification (so-called fatherhood deferment). They had been denied that classification under an exception for persons who had had undergraduate II-S deferments after a certain date; they argued that the exception was inapplicable, because their II-S deferments had been graduate rather than undergraduate deferments. They sued the Selective Service System on behalf of themselves and all other persons in the country similarly situated. The defendants sought dismissal for lack of jurisdiction, on the ground of the statutory prohibition against preinduction review.[85] The district court held that the plaintiffs' interpretation of the regulations was correct, and that there was no discretion in the local board to deny the deferment, so that the preinduction review prohibition was inapplicable.[86] A declaratory judgment was granted to the effect that the plaintiffs were entitled to the fatherhood deferment. No notice was ordered or given, on the ground that none was required and it would be impractical to attempt any in view of the number and difficulty of identifying the members of the class.

While this judgment was in effect, but on appeal, five United States district courts decided cases in which members of the *Gregory* class sought the benefit of the judgment, either to enjoin induction or to require reclassification. Two of these decisions held that the judgment was binding;[87] one held that while the lack of notice might have invalidated a judgment unfavorable to the class, the doctrine of mutuality did not require the defendants, who had had their day in court, to be relieved

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83. *See* Research Corp. v. Pfister Associated Growers, Inc., 301 F. Supp. 497 (N.D. Ill. 1969). *See also* Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973), in which res judicata effect of a prior class action judgment was denied on the ground of inadequate representation, and in which the question of notice appears not to have been raised.

84. 311 F. Supp. 1 (E.D. Mich. 1969), *rev'd sub nom.* Gregory v. Tarr, 436 F.2d 513 (6th Cir.), *cert. denied,* 403 U.S. 922 (1971).

85. Selective Service Act of 1969 § 10(b)(3), 50 U.S.C. § 460(b)(3) (Supp. 1970).

86. The court relied on Oesterreich v. Selective Serv. Sys. Local Bd. No. 11, 393 U.S. 233 (1968).

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

of the burden of the judgment favorable to the class;[88] and two held that the lack of notice precluded res judicata effect against the defendants, on the principle of mutuality of estoppel.[89] The latter two, of course, also reached the opposite result on the jurisdictional issue and dismissed the actions.

In January, 1971, *Gregory* was reversed by the Sixth Circuit on the ground that the prohibition against preinduction review did in fact apply.[90] At this point the argument of the *Gregory* class members in their individual suits shifted to the proposition that acts of local boards in violation of the *Gregory* judgment while it was still in effect were "lawless" and void. Two of the three district courts that had originally upheld the res judicata plea reaffirmed their judgments on this new ground.[91] The two decisions originally rejecting the res judicata plea for lack of notice to the winning class members were affirmed on appeal by the Fifth and Seventh Circuits respectively, but this time on the ground that the *Gregory* judgment itself was void for lack of subject matter jurisdiction.[92] Two additional district courts, deciding for the first time, split on the question; one accepted the "lawlessness" argument,[93] but the other rejected it on the jurisdictional ground.[94]

Two United States courts of appeals then decided appeals from decisions accepting the "lawlessness" argument, and both reversed. The Sixth Circuit held that the *Gregory* judgment was without any binding effect, *both* because it was void for lack of subject matter jurisdiction and because for lack of notice it was not a valid class action.[95] The Seventh Circuit, on the other hand, having relied on the jurisdictional defect a year before,[96] placed its decision in *Schrader v. Selective Service System Local Board #76*[97] squarely on the lack of notice in *Gregory*.

These decisions, along with *Eisen v. Carlisle & Jacquelin*,[98] from the Second Circuit, make up the sum total of appellate decisions on the question of whether due process requires notice in all class actions. *Eisen* was

88. Schrader v. Selective Serv. Sys. Local Bd. No. 76, 329 F. Supp. 966 (W.D. Wis. 1971), *rev'd*, 470 F.2d 73 (7th Cir.), *cert. denied*, 93 S. Ct. 689 (1972).

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

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

91. Whitmore v. Tarr, 331 F. Supp. 1369 (D. Neb. 1971); Schrader v. Selective Serv. Sys. Local Bd. No. 76, 328 F. Supp. 891 (W.D. Wis. 1971), *rev'd*, 470 F.2d 73 (7th Cir.), *cert. denied*, 93 S. Ct. 689 (1972).

92. McCarthy v. Director of Selective Serv. Sys., 460 F.2d 1089 (7th Cir. 1972); Pasquier v. Tarr, 444 F.2d 116 (5th Cir. 1971).

93. Zeilstra v. Tarr, 466 F.2d 111 (6th Cir. 1972) (trial court opinion not published).

94. Sandler v. Tarr, 345 F. Supp. 612 (D. Md. 1971), *aff'd*, 463 F.2d 1096 (4th Cir.), *cert. denied*, 93 S. Ct. 321 (1972).

95. Zeilstra v. Tarr, 466 F.2d 111 (6th Cir. 1972).

96. McCarthy v. Director of Selective Serv., 460 F.2d 1089 (7th Cir. 1972).

97. 470 F.2d 73 (7th Cir.), *cert. denied*, 93 S. Ct. 689 (1972).

98. 391 F.2d 555 (2d Cir. 1968).

dictum (although subsequently followed); the Sixth Circuit's ruling in *Zielstra* was an alternative ground; and the Seventh Circuit's ruling in *Schrader,* though unequivocal, was probably unnecessary.

It is clear that notice to members of the class, as a due process requirement, played no role in the Missouri law prior to adoption of the new rule. Because the common-question class action in its "spurious" form was not allowed, the question did not arise in that context. It was equally absent, however, from the "true" and "hybrid" class actions that were allowed. Rather, the emphasis was on the adequacy of representation, as indicated by former rule 52.09(a):

> Whenever an action is instituted by one or more plaintiffs as representative or representatives of a class or against one or more defendants as representative or representatives of a class, the petition shall allege such facts as shall show that they or the defendants specifically named and served with process have been fairly chosen and adequately and fairly represent the whole class. The plaintiff shall be required to prove such allegations, unless all of the members of the class have entered their appearance, and it shall not be sufficient to prove such facts by the admission or admissions of the defendants who have entered their appearance.

The emphasis not only on the fact of representativeness but also on the manner of choice clearly implies involvement of the members of the class (at least where the class is plantiff) in the selection of representatives—a pre-existing cohesion of the sort that has been presumed to be present in the "true" class action.[99] In such a situation, apparently, notice to absent members in the context of the litigation would be considered superfluous, because they (or a substantial portion of them) would have been involved in the decision to sue in the first place. In the case of defendant classes, which have been involved chiefly in annexation cases under the Sawyer Act,[100] it is not the class members but the plaintiff city that does the choosing, and the chief concern has been for obtaining (1) a cross section of the types of existing land use in the area to be annexed, and (2) representation of those who have actively opposed annexation.[101]

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99. *See* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1786, at 143 (1972).

100. § 71.015, RSMo 1969.

101. City of Aurora v. Coleman, 490 S.W.2d 668 (Mo. App., D. Spr. 1973); City of St. Charles v. Schroeder, 474 S.W.2d 55 (St. L. Mo. App. 1971); City of Montgomery v. Newson, 469 S.W.2d 54 (St. L. Mo. App. 1971); City of Salisbury v. Nagel, 420 S.W.2d 37 (K.C. Mo. App. 1967); City of Lebanon v. Holman, 402 S.W.2d 832 (Spr. Mo. App. 1966); City of St. Ann v. Buschard, 356 S.W.2d 567 (St. L. Mo. App. 1962). *See also* Sheets v. Thomann, 336 S.W.2d 701 (St. L. Mo. App. 1960), an action to invalidate the renewal of subdivision restrictions under a trust indenture, in which both sides were classes, and in which only the defendant class was discussed on appeal; a large group of persons in the defendant class had met

In a few cases the absence of allegations as to the manner of choice of representatives of a plaintiff class has been held to be fatal to the class feature. In *Milton Construction & Supply Co. v. Metropolitan St. Louis Sewer District*,[102] for example, the developer of a subdivision sought to recover deposits of $200 per lot made to the sewer district to secure financing of sewer construction, after the developer constructed the sewers at its own expense. Two sets of intervenors filed petitions purporting to represent all lot owners, claiming that their purchase price included the $200 and that therefore they, not the developer, were entitled to return of the deposits. The petition of a husband and wife, who owned one lot, did not allege anything about choice or adequacy of representation; the petition of owners of 100 of the 297 lots alleged that they were adequate representatives because they constituted a cross section, but did not allege anything about the manner of choice. The St. Louis Court of Appeals held that both petitions were insufficient and should not have been granted as class claims. In *Kansas City Terminal Railway v. Industrial Commission*[103] the court pointed out that rule 52.09(a) was formulated with a view toward satisfying due process requirements enunciated in *Hansberry v. Lee*.[104]

It seems highly unlikely that the question will be resolved by the Supreme Court in such dogmatic fashion as is suggested by the *Mullane*-or-nothing debate. It is surely more important to inquire into the purpose of notice in the due process scheme. In the first instance, what is crucial is the opportunity to be heard. In the case of the individual defendant, notice and the opportunity to be heard go together because in the absence of notice there *is* no opportunity to be heard; the defendant's position will not be presented and the case will be decided on the basis of the unilateral offerings of the plaintiff.[105] In *Mullane* the same was true, insofar as a method of notice (publication) was utilized that was not reasonably calculated to reach *any* significant number of beneficiaries, because none of the persons whose interests were to be affected were formally joined as parties; there was, in the procedure used, no assurance that the position of the beneficiaries would be forcefully asserted at all. The standard of notice developed in the *Mullane* opinion, however, expressly accepts the inevitability that not all beneficiaries can be effectively notified. The requirement is not to reach all beneficiaries, but to reach enough of them to ensure representation of what is a *common* interest in holding the

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and had chosen the attorney of the named representatives to represent them. The court held that to be a fair basis for choice.

102. 308 S.W.2d 769 (St. L. Mo. App. 1958).

103. 396 S.W.2d 678 (Mo. 1965).

104. *See* text accompanying notes 73-78 *supra*.

105. The leading cases applying a notice requirement to the two-party situation are: Fuentes v. Shevin, 407 U.S. 67 (1972) (prejudgment replevin); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (prejudgment garnishment); Schroeder v. New York, 371 U.S. 208 (1962) (condemnation); Walker v. City of Hutchinson, 352 U.S. 112 (1956) (condemnation); McDonald v. Mabee, 243 U.S. 90 (1917).

trustee to its fiduciary obligations; personal jurisdiction over each is not required.

> This type of trust presupposes a large number of small interests. The individual interest does not stand alone but is identical with that of a class. The rights of each in the integrity of the fund and the fidelity of the trustee are shared by many other beneficiaries. Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objection sustained would inure to the benefit of all.[106]

What is required by due process in class actions, therefore, is such notice *to the class* as will ensure that the entire group will be adequately represented. This is further emphasized by the fact that each member of a class does not have a right to be heard as a full-fledged party, even if he is notified. He has only the right to monitor the quality of representation, and to intervene formally if it is inadequate.[107] It should follow, then, that if the representation of the class interests is adequate in the members formally joined, the absence of notice as such should not be a barrier to a judgment including the entire class.[108] Because the class action may not be maintained at all unless the court finds that the representation is adequate, according to rule 52.08 (a) (4), the proper role of notice is to give the court added assurance that its finding is correct. In all probability, the court should resolve doubts in favor of ordering notice, so as to protect the integrity of the judgment against possible collateral attack.

B. *The Perquisites of Rule 52.08(c)(2): Opting Out or Appearing*

Whether a requirement of *Mullane*-type notice would apply to a common-question class action, though not necessarily to other types, depends of course on the peculiar characteristics of the category. The rule makes notice mandatory; but it goes further than that, and provides two privileges to absent members not available in other types of class actions: they may either remove themselves from the class altogether, or they may enter an appearance through counsel. Clearly these privileges could not be effectively exercised without early notice of the pendency of the action. These perquisites, it would seem, make (c) (2) notice necessary even if due process otherwise would not.[109]

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106. 339 U.S. at 319.

107. *See* the intervention rule, Mo. R. Civ. P. 52.12 (a) and Fed. R. Civ. P. 24 (a). In practice, however, the federal courts have been liberal in allowing intervention by class members. *See* Advisory Note, *supra* note 67, at 110; 7A C. Wright & A. Miller, Federal Practice and Procedure § 1799, at 254 (1972).

108. *See, e.g.*, Homburger, *supra* note 72, at 609.

109. *See* Advisory Note, *supra* note 67, at 106-07, which states:

> [U]nder subdivision (c) (2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b) (3) class action an opportunity to secure exclusion from the class.

Why should absent members be allowed to opt out, or to file an appearance? The advisory committee's Note contents itself with a passing reference to "individual interest";[110] Professor Kaplan terms it "individual preference".[111] The preliminary draft and notes add no clarification, although the original proposal would have allowed the court to deny option out to any absent members whose presence was considered essential to a fair adjudication.[112]

The explanation appears to lie in the historical assumption that technically separate claims cannot be joined in a class unless their holders in some way agree to such a treatment. Since the judgment in the old "spurious" class action was assumed to extend only to parties individually joined,[113] and since in such cases many courts were moved—in order to maximize the economies of class action treatment—to allow so-called one-way intervention by absent members of the "spurious" class (that is, intervention after judgment where the judgment is favorable to the class, without being bound by an unfavorable judgment),[114] the advisory committee sought out a compromise between permissive joinder and true class-action treatment. As one commentator put it, the chosen model was the Book-of-the-Month Club.[115] Obviously it was thought that mere notice of the pendency of the action, analogous to (but not identical with) service of process, would be insufficient to permit the court to render a binding judgment; the presentation to the absent member of a prejudgment take-it-or-leave-it ultimatum was thought to solve the problem. According to one explanation increasingly adopted by the courts, the privileges were thought to be necessary to overcome the inference of inadequate repre-

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110. *See id.* at 104.05:

> *Subdivision (c)(2)* makes special provision for class actions maintained under subdivision (b)(3). As noted in the discussion of the latter subdivision, the interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected.

111. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 391 (1967).

112. *Id.* at 391 n.136. The original proposal read as follows:

> In any class action maintained under subdivision (b)(3), the court shall exclude those members who, by a date to be specified, request exclusion, unless the court finds that their inclusion is essential to the fair and efficient adjudication of the controversy and states its reasons therefor. To afford members of the class an opportunity to request exclusion, the court shall direct that reasonable notice be given to the class, including specific notice to each member known to be engaged in a separate suit on the same subject matter with the party opposed to the class.

PROP. FED. R. CIV. P. 23(c)(2), 34 F.R.D. 385, 386 (1964).

113. For the most comprehensive discussion see 3B J. MOORE, FEDERAL PRACTICE ¶ 23.11[3] (2d ed. 1969).

114. Advisory Note, *supra* note 67, at 105-06, refers to the cases and emphasizes its purpose to eliminate the practice.

115. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 44 (1968).

sentation drawn from the fact that members of a common-question class are "only loosely associated by common questions of law or fact, rather than by any pre-existing or continuing legal relationship."[116]

The right to enter an appearance is not described or defined either in the rule itself or in the advisory committee's notes. Professor Kaplan understood the primary benefit of such an appearance to be the right to receive copies of papers, so as to be informed on a running basis. The right to participate actively by introducing evidence, cross-examining witnesses, argument, and the like, would be subject to limitation by the court under subdivision (d)(1),[117] as well as subject, presumably, to the prerequisites of the intervention rule.[118]

It is submitted that the "option out" feature of the new rule is not justified by any characteristics peculiar to the common-question class action. In the first place, as the courts have discovered, the privilege is incongruous in the case of defendant classes.[119] In the second place, in the far more common plaintiff-class case, the special prerequisites of subdivision (b)(3) would seem to provide adequate protection for any individual interest of class members. Third, the privilege unnecessarily increases the notice requirements, thereby increasing the potential costs of a device that is designed to increase the efficiency of litigation.[120] Finally, the categories are too difficult to distinguish from one another to justify the sharp distinction in treatment.[121]

Wherein can the "individual interest" or "individual preference" be supposed to consist? It would seem that a member of a plaintiff class might wish to opt out for two reasons: either he wants to sue alone, or he does not want to sue at all. He may want to sue alone because he thinks he can get a better award; but this will be so only if his recovery potential is high, because the costs to him of separate suit will inevitably be higher, unless he expects to be able to take advantage of the pendency of the big class suit to get a fat and early separate settlement. However, to the extent that the case as alleged by the original class representative indicates a potential for large individual recoveries, the court must consider this before allowing the class action in the first place. Subdivision (b)(3)(A,B) requires the court to consider, in determining whether the class action device is superior, the extent to which individual members of the class may be interested in controlling their own lawsuit *and*

116. 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1786, at 143 (1972), and cases therein cited.
117. Kaplan, *supra* note 111, at 392 n.137.
118. *See* note 107 supra.
119. *See* notes 49-52 and accompanying text *supra*.
120. In practice, to be sure, the federal courts have sometimes given the express requirements of subdivision (c)(2) a liberal, not to say cavalier, interpretation. *See* text accompanying notes 129-145 *infra*. The willingness of some courts to ignore the requirements themselves indicates dissatisfaction, however, and some cases have been abandoned because of the prospective costs of (c)(2) notice.
121. *See* pt. II, § B of this article.

the extent to which members of the class have already become involved in litigation. Moreover, the court has the power to limit class action treatment to particular issues, leaving others, with respect to which individual interest is greater, to separate treatment.[122] Finally, the court has the power, under subdivision (c) (1), to alter or amend orders certifying class action treatment at any time before judgment, so that individual interests discovered later can be accommodated by dropping the class action feature, or by limiting it to particular issues, or by allowing absent members to intervene individually.[123]

If an individual member's preference is not to sue at all, it is difficult to imagine how this can be greatly prejudiced. If the claims are for damages, as most subdivision (b) (3) class action claims are, the reluctant plaintiff can simply refrain from asserting his claim when the time comes to prove up damages—a stage that most authorities agree must very frequently be separate from the disposition of the common questions.[124] To be sure, if enough class members are either indifferent or opposed to suit, doubt would be cast on the propriety of class action treatment,[125] but this surveying of attitude can be done in other, less automatically preclusive ways through the use of discretionary notice under subdivision (d) (2).[126] In any case, the experience to date indicates that class members seldom opt out,[127] and that when they do it is frequently for lack of understanding.[128]

C. *Requirements of Missouri Rule 52.08(c)(2): Manner and Form of Notice*

The first sentence of rule 52.08 (c) (2) reads as follows:

In any class action maintained under subdivision (b) (3), the court

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122. Subdivision (c) (4); Guy v. Abdulla, 57 F.R.D. 14 (N.D. Ohio 1972).

123. "An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." Mo. R. Civ. P. 52.08 (c) (1); Fed. R. Civ. P. 23 (c) (1).

124. *See, e.g.,* Prop. Fed. Civ. P. 23 Advisory Committee's Note, 39 F.R.D. 69, 100 (1966); Frankel, *Some Preliminary Observations Concerning Civil Rule 23,* 43 F.R.D. 39, 47 (1967); Miller, *Problems in Administering Judicial Relief in Class Actions Under Federal Rule 23(b)(3),* 54 F.R.D. 501, 504 (1972); Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions,* 70 Mich. L. Rev. 338, 361-63 (1971).

125. *Cf.* Korn v. Franchard Corp., 456 F.2d 1206 (2d Cir. 1972), in which the court held that it was error to drop class-action treatment under subdivision (b) (3) after responses indicating about 10 percent exclusion and 80-90 percent "inadequate" proof-of-claim forms.

126. The technique was used, for example, in Arey v. Providence Hosp. 55 F.R.D. 62 (D.D.C. 1972), an employment discrimination case maintained under subdivision (b) (2).

127. *See, e.g.,* Berland v. Mack, 48 F.R.D. 121, 129 (S.D.N.Y. 1969); Travers & Landers, *The Consumer Class Action,* 18 Kan. L. Rev. 811, 829 (1970).

128. An amusing yet revealing collection of responses to the notice sent to North Carolina consumers of antibiotics, the manufacturers of which were involved in the nation-wide antitrust case (*see, inter alia,* West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir. 1971)) is reproduced in *Sorry I Can't Attend Your Class Action,* 4 Univ. N.C.L. Record No. 3, at 4 (1971).

> shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

The language of the rule, taken at face value, requires that every class member whose identity and location is known or can be ascertained with reasonable effort be given individual notice. In the great majority of reported cases under federal rule 23 (c) (2), the courts appear to have followed this command to the letter.[129] In several instances, pursuant to the mandate of subdivision (b) (3) (D) to consider management problems in making findings of superiority, courts have refused class action treatment in part on the ground of difficulties in effecting the individual notice called for by subdivision (c) (2).[130]

Occasionally, however, courts have been faced with actions that they consider otherwise appropriate for class action treatment, but in which the giving of (c) (2) notice would be so costly and cumbersome that they have felt compelled to compromise with the rule in order to save the lawsuit. The most instructive example is the second United States district court decision in *Eisen v. Carlisle & Jacquelin*,[131] on remand from the Second Circuit decision that is the leading opinion for the proposition that due process requires notice to absent class members in all cases.[132]

Eisen is an antitrust action for treble damages against the New York Stock Exchange and two major odd-lot brokerage firms, alleging a conspiracy among the firms to monopolize odd-lot trading and to fix the "odd-lot differential" (special fee to odd-lot dealers in addition to regular brokerage fee) at excessive levels. The plaintiff investor sued for himself and all other odd-lot investors who purchased over a seven-year period. The class was preliminarily estimated to exceed 6,000,000 persons; Judge Tyler found that the records of the defendant firms would allow identification through reasonable effort of about 2,000,000. It was further estimated that (c) (2) notice, including individual notice by mail to all those who could be identified, would cost about $300,000, plus $200,000 for the cost of processing inquiries and claims.[133] The court held (1) that due

129. *See, e.g.*, Lamb v. United Sec. Life Co., 16 Fed. Rules Serv. 2d 38 (S.D. Iowa 1972); Katz v. Carte Blanche Corp., 53 F.R.D. 539 (W.D. Pa. 1971); Battle v. Municipal Housing Authority, 53 F.R.D. 423 (S.D.N.Y. 1971); Korn v. Franchard Corp., 50 F.R.D. 57 (S.D.N.Y. 1970); Harris v. Jones, 41 F.R.D. 70 (D. Utah 1966); 3B J. MOORE, FEDERAL PRACTICE ¶ 23.55 n.28 (2d ed. 1969, Supp. 1972); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1786 n.17 (1972).

130. Lawson v. Brown, 349 F. Supp. 203 (W.D. Va. 1972); Cotchett v. Avis Rent-a-Car Sys., Inc., 56 F.R.D. 549 (S.D.N.Y. 1972); Inmates of Milwaukee County Jail v. Petersen, 51 F.R.D. 540 (E.D. Wis. 1971); School Dist. v. Harper & Row Publishers, Inc., 267 F. Supp. 1001 (E.D. Pa. 1967) (reconsidered after consolidation and notice found feasible, Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484 (N.D. Ill. 1969)); Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147 (S.D.N.Y. 1966); *rev'd* 391 F.2d 555 (2d Cir. 1968).

131. 52 F.R.D. 253 (S.D.N.Y. 1971).

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

133. 52 F.R.D. at 263.

process does not require individual notice to every member of the class, (2) that such a requirement would "amount to an insuperable tariff on prosecution of the case",[134] and (3) that rule 23 (c) (2), despite its language, did not add to the requirements of due process. The court therefore ordered individual notice to two groups out of the 2,000,000: (1) All of the approximately 2,000 investors who engaged in more than 10 transactions during the relevant period; and (2) 5,000 randomly selected from the remainder "in order to insure adequate representation and to gain more information about the nature of the class."[135] In addition, publication of notice was ordered in newspapers likely to reach investors, in order to reach those who were not to receive individual notice.[136]

This interpretation of subdivision (c) (2) finds resonance in the literature,[137] and it is almost certainly consistent with the requirements of due process in class actions generally.[138] There can be scarcely any doubt, however, that it is a strained reading of the language of the rule. It remains to be seen whether Judge Tyler's ruling will survive appellate review. For the moment it seems more likely to be a hard case, an extreme situation, that would not authorize routine evasion of the rule's requirements. *Eisen* may well be firm precedent only where the court is faced with truly prohibitive costs, so that relaxation of the notice requirements is the only alternative to abandonment of the action. Judge Tyler's emphasis on the meritoriousness of the claims of the class, the small size of the individual claims (making interest in individual litigation highly unlikely), "the strong public policy behind the antitrust laws in general, and the fundamental role of the private treble-damage action in enforcing those laws,"[139] indicates the parameters of the claimed discretion.[139a]

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134. *Id.* at 267.
135. *Id.*
136. Certainly *Eisen* is the most dramatic example of deviation from the express notice requirements of subdivision (c) (2). Indeed, there appears to be only one other recorded case of a notice order that deliberately refrained from individual notice to readily identifiable members. In Herbst v. Able, 47 F.R.D. 11 (S.D.N.Y. 1969), several plaintiff classes sought damages for securities fraud; the petitions alleged misrepresentations by a corporation and by brokers dealing in its securities that artificially inflated the market price. Four of the five classes consisted of holders and purchasers of debentures that were converted in the relevant period into shares of stock; the fifth consisted of purchasers of the stock itself. As to the first four, individual notice to all identifiable purchasers was ordered. As to the fifth class, however, the court noted that it would be difficult if not impossible to identify *all* the purchasers for purposes of individual notice, and therefore ordered *no* individual notice; instead, the supplementary published notice utilized for the first four classes was expanded to include the fifth.
137. *See* articles cited note 72 *supra.*
138. *See* text accompanying notes 73-78 *supra.*
139. 52 F.R.D. at 270.
139a. Since the text was written the Second Circuit has reversed Judge Tyler's ruling and has ordered dismissal of the class action on grounds of manageability. Eisen v. Carlisle & Jacquelin, ___F.2d___, 41 U.S.L.W. 2586 (2d Cir., May 1, 1973). With respect to the propriety of omitting individual notice to identifiable members

D. *Requirements of Rule 52.08(c)(2): Content, Timing and Source of Notice*

Subdivision (c) (2) specifies three items that must be included in the required notice to members of a (b) (3) class: (1) The right to request exclusion; (2) the binding effect of the judgment if exclusion is not requested; and (3) the right to enter an appearance. The courts have not had great difficulty with these items, and the forms of notice are set forth in a number of reported opinions.[140] One matter has caused some dispute, however: to what extent may the notice require some affirmative response from the absent members, indicating a willingness to participate in the recovery and assert a claim? In a few cases, the court has ordered notice to members of a plaintiff class that would require submission of a proof-of-claim form, or a declaration of intention to assert a claim, within a specified period of time, on pain of being barred from recovery.[141] There is some advantage to be gained from the procedure, in the form of early information as to the ultimate size of the class and the overall exposure of the defendant. In at least one instance, the court was noticeably bothered by the fact that the actions were brought a few days before the expiration of the statute of limitations, and may have wished to minimize the uncertainty occasioned by the tolling effect of the class action.[142] It would seem, however, that attaching preclusive effect to a failure to file a proof of claim is inconsistent with the purpose of the representative action, as well as with the terms of subdivision (c) (2).

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of the class, the court simply referred to the text of the rule and to its own prior opinion, 391 F.2d 555, 568, as requiring individual notice to readily identifiable members, and dismissal of the class action if such notice is impossible. The court's concern with other factors in the case, however—the minuteness of the individual claims ($3.90 on the average), the disproportionate cost of distribution of any award, the difficulty of reaching most class members with any notice, and doubts as to the propriety of the treble-damage remedy vis-á-vis regulatory action—may leave some spark of life in Judge Tyler's analysis of the notice requirements for a case properly characterizable as extreme, meritorious, and apt for class-action treatment.

140. *See, e.g., In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 291, 294 (S.D.N.Y. 1971); *In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 274 (S.D.N.Y. 1971); Katz v. Carte Blanche Corp., 53 F.R.D. 539 (W.D. Pa. 1971); Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (S.D.N.Y. 1971); Mack v. General Elec. Co., 15 Fed. Rules Serv. 2d 799 (E.D. Pa. 1971); Bragalini v. Biblowitz, 13 Fed. Rules Serv. 2d 23b.3, Case 8 (S.D.N.Y. 1969).

141. *In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 274, 276 (S.D.N.Y. 1971); Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391 (S.D. Ia. 1968); Minnesota v. United States Steel Corp., 44 F.R.D. 559 (D. Minn. 1968); Philadelphia Elec. Co. v. Anaconda American Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968); *cf.* Lamb v. United Sec. Life Co., 16 Fed. Rules Serv. 2d 38 (S.D. Iowa 1972), in which proof-of-claim notice was postponed until a later, but obviously still pre-trial, stage; a similar procedure was utilized in Harris v. Jones, 41 F.R.D. 70 (D. Utah 1966).

142. Philadelphia Elec. Co. v. Anaconda American Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968).

For this reason other courts utilizing the proof-of-claim form for informational purposes have expressly rejected any preclusive effect of failure to respond.[143] Once a judgment favorable to the class has been rendered, however, and damages are to be calculated and paid, the situation is different; then, the order to assert the claim or lose it is entirely appropriate. On the other hand a requirement that a class member exercise the privilege of opting out within a reasonable period of time after receiving notice is clearly appropriate.[144]

The rule says nothing about the timing of notice under subdivision (c) (2), although the determination of propriety under subdivision (c) (1) is required to be made "as soon as practicable after commencement" of the action. A number of courts have found it desirable to postpone the sending of notice until pretrial proceedings (*e.g.*, discovery) have been completed, apparently in order to allow reconsideration of the determination of propriety after the evidence is more fully developed.[145] The difficulty with this approach, of course, is that it may reduce the usefulness of the absent member's privileges under the rule.[146] Doubtless it would be impossible to formulate a useful general rule any more precise than the "as soon as practicable" phrase of subdivision (c) (1). Adoption of that standard for subdivision (c) (2) would still leave room for some delay for preliminary motions and discovery, at least where additional information is needed in order to identify class members or to determine whether the opposing party or the court should bear some of the costs of notice.[147]

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143. West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir. 1971); Arey v. Providence Hosp., 55 F.R.D. 62 (D.D.C. 1972); *In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 291 (S.D.N.Y. 1971); Mack v. General Elec. Co., 15 Fed. Rules Serv. 2d 799 (E.D. Pa. 1971); Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (S.D.N.Y. 1971); Cohen v. Franchard Corp., 51 F.R.D. 167 (S.D.N.Y. 1970); Korn v. Franchard Corp., 50 F.R.D. 57 (S.D.N.Y. 1970). Proof-of-claim forms were rejected altogether in Abulaban v. S.W. Pressprich & Co., 51 F.R.D. 496 (S.D.N.Y. 1971) and *In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 15 Fed. Rules Serv. 2d 572 (S.D.N.Y. 1971).

144. Subdivision (c) (2). *See* cases cited note 140 *supra*, in each of which the notice contained a specification of the date on or before which requests for exclusion must be made.

145. *See, e.g.*, Seligson v. Plum Tree, Inc., 1972 Trade Cas. ¶ 74,098 (E.D. Pa. 1972); City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971); Cusick v. N.V. Nederlansche Combinatie voor Chemische Industrie, 317 F. Supp. 1022 (E.D. Pa. 1970); City of Philadelphia v. Emhart Corp., 50 F.R.D. 232 (E.D. Pa. 1970); Dolgow v. Anderson, 43 F.R.D. 472 (S.D.N.Y. 1968); Fischer v. Kletz, 41 F.R.D. 377 (S.D.N.Y. 1966); *But cf.* Richland v. Cheatham, 272 F. Supp. 148 (S.D.N.Y. 1967), which suggested that tentative or conditional class action treatment is improper.

146. *See* Lamb v. United Sec. Life Co., 16 Fed Rules Serv. 2d 38, 56 (S.D. Iowa 1972); 3B J. MOORE, FEDERAL PRACTICE ¶ 23.55, at 23-1159 to 1160 (2d ed. 1969).

147. *See* Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (S.D.N.Y. 1971), which postponed sending notice until a preliminary hearing on the merits to decide how to allocate the cost burden; City of Philadelphia v. Emhart Corp., 50 F.R.D. 232 (E.D. Pa. 1907). As to *Eisen*, now reversed in this respect, *see* note 161 *infra*.

There has been some disagreement among the federal courts—arising often in the context of a cost-allocation dispute, but sometimes as a separate issue—as to the proper source of the notice. Subdivision (c)(2) would seem to require that the notice emanate from the court: "the court shall direct to the members of the class . . . ." Two reasons have been offered for having the notice go out on official stationery or at least over the court clerk's name: (1) A notice is more likely to be read and heeded if it comes from a court; and (2) notice coming from a self-appointed class representative may be subject to the charge of solicitation of business for the representative's lawyer (who is in most instances the real force behind the suit).[148]

The first reason is persuasive, the second much less so. The solicitation objection had great merit in the former "spurious" class action, where the absent members of the class would not be included in the judgment unless they intervened, and therefore the notice would be an invitation to join and swell the total recovery.[149] Under the new rule, absent members will be included in the judgment unless they exclude themselves; what is being solicited by the notice, therefore, is not inclusion but exclusion, or at most appearance, presumably through another attorney. The notice protects the absent members against inadequate representation, and thus reinforces the court in assuring that the named parties protect the interests of those represented. In this sense it should be a communication from the court analogous in function to the summons. So long as the court monitors the content and language of the notice, it is difficult to see barratry even in notice sent out over the representatives' signature.[150]

E. *Costs of Notice*

A question that should be entirely independent of that of the

148. *Cf. In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 274, 294 (S.D.N.Y. 1971); Berman v. Narragansett Racing Ass'n, 48 F.R.D. 333, 338 (D.R.I. 1969); Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484, 494 (N.D. Ill. 1969); School Dist. v. Harper & Row Publishers, Inc., 267 F. Supp. 1001, 1004-05 (E.D. Pa. 1967). *See also* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1788, at 164-65 (1972); Ward & Elliott, *The Contents and Mechanics of Rule 23 Notice,* 10 B.C. IND. & COM. L. REV. 557, 563-64 (1969).

149. In Cherner v. Transitron Electronic Corp., 201 F. Supp. 934, 936 (D. Mass. 1962), Judge Wyzanski denied plaintiff's motion to authorize notice to absent members of a spurious class, on the ground that "[n]o precedent supports the suggestion that the plaintiffs or their counsel have a moral duty to act as unsolicited champions of others." He was also concerned with the possible implication in such a notice (in effect, under the old rule, an invitation to intervene) that the court considered the claims meritorious; under the new rule courts have sometimes included an express disclaimer of any such opinion. *See, e.g., In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 274, 276 (S.D.N.Y. 1971); Katz v. Carte Blanche Corp., 53 F.R.D. 539, 547 (W.D. Pa. 1971).

150. *Cf.* Ward & Elliott, *supra* note 148, at 561 ("The cure lies in the tenor of the notice."); Lamb v. United Sec. Life Co., 16 Fed. Rules Serv. 2d 38, 58 (S.D. Iowa 1972); Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 268-69 (S.D.N.Y. 1971).

purported source of the notice is the more troublesome one of who should pay for it. A few courts have assumed that subdivision (c)(2) required them not only to order notice but also to bear the costs.[151] While this appears not to have been a regular practice, the resulting charges of the Post Office against the Administrative Office of the United States Courts so alarmed the latter that it instructed the courts that the budget would not allow such mailings.[152] It can be assumed that state court administrative budgets will be no less constricted, so that unreimbursed mailings at court expense will be impracticable. So long as the court controls the content, form, and manner of notice, however, and appears as the source of the notice, there seems to be no reason in policy to require the procedure to be at public expense.[153]

The more realistic alternatives for bearing the ultimate financial burden of notice are the plaintiffs, the defendant(s), and the absent members of the class, or some combination of these. Most courts and commentators begin with the premise that the plaintiff, as the one who requests the class action treatment, should bear the cost of (c)(2)-type notice.[154] It will frequently happen, however, especially in the case of a plaintiff class in which the representatives' claims are relatively small, that the cost of notice will exceed the value of the named plaintiffs' claims. A few courts have denied class action treatment where the representatives were unable or unwilling to assume the burden,[155] or have

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151. *In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 278, 290 (S.D.N.Y. 1971); School Dist. v. Harper & Row Publishers, Inc., 267 F. Supp. 1001, 1005 (E.D. Pa. 1967).

152. Memorandum No. 562 from William R. Sweeney, Assistant Director for Management Affairs, Administrative Office of the United States Courts, to all United States District Judges and Clerks of United States District Courts, December 21, 1971. The memorandum explicitly mentions the antibiotic drug cases, in which "occupant"-type mailings at court expense reached "alarming proportions."

153. *Cf.* Ward & Elliott, *supra* note 148, at 566:

> [Assumption of costs by the court] would involve a misappropriation of public funds and would tend to give the court a stake in the outcome of the litigation. By initially bearing the cost of notice, the court would be making it possible for one party to proceed, when it could not have done so before. Such an action is unprecedented and inconsistent with any pretense of judicial impartiality.

154. *See* Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968); Lamb v. United Sec. Life Co., 16 Fed. Rules Serv. 2d 38 (S.D. Iowa 1972); Katz v. Carte Blanche Corp., 53 F.R.D. 539 (W.D. Pa. 1971); Cusick v. N. V. Nederlandsche Combinatie voor Chemische Industrie, 317 F. Supp. 1022 (E.D. Pa. 1970); Feder v. Harrington, 52 F.R.D. 178 (S.D.N.Y. 1970); Korn v. Franchard Corp., 50 F.R.D. 57 (S.D.N.Y. 1970); Weiss v. Tenney Corp., 47 F.R.D. 283 (S.D.N.Y. 1969); Herbst v. Able, 47 F.R.D. 11 (S.D.N.Y. 1969); Richland v. Cheatham, 272 F. Supp. 148 (S.D.N.Y. 1967); 3B J. MOORE, FEDERAL PRACTICE ¶ 23.55, at 1154-55 (2d ed. 1969); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1788, at 168 (1972); Ward & Elliott, *supra* note 148, at 566-67; Comment, *Class Actions Under Federal Rule 23(b)(3)—The Notice Requirement*, 29 MD. L. REV. 139, 155-56 (1969).

155. *E.g.*, Buford v. American Fin. Co., 333 F. Supp. 1243 (N.D. Ga. 1971); Eisen v. Carlisle & Jacquelin, ___F.2d___, 41 U.S.L.W. 2586 (2d Cir., May 1, 1973).

indicated that the ability or willingness to pay for notice may be considered in determining the adequacy of representation.[156] In a number of cases, however, the burden has been placed at least in part on the defendant.[157]

It is generally agreed that placing the burden of notice on the defendant requires some evaluation of the probability that the plaintiff class will win. There is disagreement among the courts, however, on the necessity or advisability of a preliminary evidentiary hearing on the merits of the claims of the class. The lead was taken by Judge Weinstein who, in *Dolgow v. Anderson*,[158] ordered an evidentiary "mini-hearing" prior to certification of the class action as such. A preliminary hearing on the merits prior to allocation of costs of notice was ordered in *Eisen v. Carlisle & Jacquelin*,[159] because plaintiffs, despite the dramatic reduction in notice costs allowed by that decision (from $300,000 to something less than $25,000), were unable to foot the bill themselves in view of the size of their individual claims. A year later, the court found that the plaintiffs were "more than likely to prevail at trial or upon a motion for summary judgment," and imposed 90 percent of the costs of notice on the defendants.[160] It is clear that this procedure should be used with great caution, because the "mini-hearing" can have a devastating effect on the losing party's position on the merits, yet it cannot by hypothesis be the full trial to which the party is entitled.[161] Other courts have imposed part or all of the costs of notice on the defendant without an evidentiary hearing. In *Berland v. Mack*,[162] a securities fraud case, the court in effect required the defendants to prepare the mailing lists and plaintiff to bear the cost of dissemination, subject to a later allocation at the end of the litigation. The court noted that a previous action by the SEC for injunction resulted in a finding that misleading statements had been made ("a *prima facie* meritorious case"), and that the defendants had an interest in maximizing the res judicata effect of the judgment (they intended to move for partial summary judgment themselves), as justifying imposition of some costs on the defendants. That the costs were not inordinately high in relation to the total estimated damages, and that

156. *Cf.* Cusick v. N. V. Nederlandsche Combinatie voor Chemische Industrie, 317 F. Supp. 1022 (E.D. Pa. 1970).

157. Bragalini v. Biblowitz, 13 Fed. Rules Serv. 2d 23b.3, Case 8 (S.D.N.Y. 1969); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1788, at 168-70 (1972). The Second Circuit's latest opinion in *Eisen* does not exclude this possibility in a proper case. *See* ___F.2d___ n.5.

158. 43 F.R.D. 472 (E.D.N.Y. 1968).

159. 52 F.R.D. 253 (S.D.N.Y. 1971).

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

161. The Second Circuit has now disapproved this practice in unequivocal terms (*see* Eisen v. Carlisle & Jacquelin, ___F.2d___, 41 U.S.L.W. 2586 (2d Cir., May 1, 1973)), although it also noted that the mini-hearing ordered in that case exceeded the trial judge's limited mandate on remand from an earlier appellate decision. *See also* Miller v. Mackey Internat'l, Inc., 452 F.2d 424, 427 (5th Cir. 1971).

162. 48 F.R.D. 121 (S.D.N.Y. 1969).

the named plaintiffs were themselves numerous and not indigent, justified imposing the remainder of the costs on the plaintiffs.[163]

There appears to be little precedent in Missouri law for the handling of costs of notice in class actions, inasmuch as the problem has not yet arisen. There is no reason to doubt, however, that the recognized discretionary power of the court in assessing costs in civil actions would suffice to allow the imposition of the initial expense of notice in a proper case in whole or in part on the defendant.[164] In the case of consumer actions, *e.g.*, credit-card holders suing issuers for violation of the Truth-in-Lending Act,[165] the defendant will frequently be in regular communication with the potential class members, so that dissemination of the notice can be accomplished without great additional expense.

IV. Effect of Judgment

A. *Judgment Unfavorable to the Class*

The fundamental principle adopted in the new class action rule is that a judgment will include all members of the class, whether the judgment is favorable or not.[166] The rule also requires that the judgment identify at least by description those who are members of the class. The ultimate test of res judicata effect, however—collateral attack in a subsequent proceeding—has seldom been faced by a class action judgment,[167] so that little direct authority is available. The reasons for this are no doubt many: Courts probably incline, in cases that appear to be of questionable merit, to deny class action treatment before dismissing or granting summary judgment; once an action is ruled proper under subdivision (c)(1), the pressure on the opponent to settle rather than litigate to the end will very frequently prove too great; and by the time a final determination on the merits of a certified class action is made, the statute of

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163. *Id.* at 132-33.

164. The equitable origins of the class action have been recognized in Missouri. *See* Crawford, *Class Actions Under the Missouri Code,* 18 U.K.C.L. Rev. 103, 103-04 (1950). The cases recognize an inherent discretionary power of courts of equity to apportion costs among the parties provisionally as well as finally. *See* Gieselmann v. Stegeman, 470 S.W.2d 522, 525 (Mo. 1910) (allocation of costs of receivership *pendente lite* among defendants in stockholders' suit); Schwartz v. Shelby Constr. Co., 338 S.W.2d 781, 794 (Mo. 1960); Sitzes v. Raidt, 335 S.W.2d 690 (Spr. Mo. App. 1960); Amitin v. Izard, 262 S.W.2d 353, 356 (St. L. Mo. App. 1953). The Missouri Rules of Civil Procedure afford some analogous instances of interlocutory costs award, such as Mo. R. Civ. P. 77.07 (Costs on Motions). It may be doubted, further, whether an order requiring a party to effect notice at his expense need be regarded as an award of costs as such.

165. *Cf.* Katz v. Carte Blanche Corp., 53 F.R.D. 539, 546-47 (W.D. Pa. 1971); Zachary v. Chase Manhattan Bank, 52 F.R.D. 532, 535 (S.D.N.Y. 1971); Dolgow v. Anderson, 43 F.R.D. 472, 500 (E.D.N.Y. 1968).

166. Subdivision (c)(3).

167. *Cf.* notes 80-98 and accompanying text *supra.*

limitations on any separate action that might be brought by an absent member will usually have run.[168]

For whatever reason, it is likely that collateral attack on a judgment unfavorable to a class—especially a plaintiff class—will continue to be a rare bird indeed. Nonetheless, so long as the doctrine of mutuality remains alive, the res judicata effect of an unfavorable judgment will be a crucial factor in the somewhat more probable collateral attack on a judgment favorable to the class.[169] We start, therefore, with the more remote possibility. The discussion centers around three defenses: Lack of jurisdiction in the "minimum contacts" sense; insufficient notice; and inadequate representation.

1. Lack of Jurisdiction

Although the decided cases are sparse and the critical literature scarcely lush, there is agreement that the formal *acquisition* of personal jurisdiction over all class members—even in the case of a defendant class—is not required in order to support a judgment that binds absent members.[170] It is sufficient that members of the class qualified by interest and typicality to represent the entire group be brought within the court's jurisdiction. This is a necessary consequence of the class action's function of dealing with cases in which all proper or necessary parties cannot be formally joined because of their numbers. It does not follow, however, that persons not otherwise *subject* to the court's jurisdiction may constitutionally be bound by a judgment unfavorable to the class. On the contrary, there is no reason to suppose that the usual territorial limitations on state judicial power are inapplicable to class actions.[171] In the case of common-question class actions, subdivision (b)(3)(C) also expressly enjoins the court to consider the desirability of concentrating the litigation in the particular forum.

The extent to which a court may reach nonresidents in class actions should be dictated by the state's interest in obtaining a unitary adjudica-

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168. The impact of pendency of a class action on the running of the statute of limitations against an absent member is uncertain. *Cf.* Philadelphia Elec. Co. v. Anaconda American Brass Co., 43 F.R.D. 452, 460-61 (E.D. Pa. 1968).

169. It may be supposed that collateral attack even on a judgment favorable to the class is so unlikely as to make the weaknesses of the rule relatively insignificant. In the usual common-question case the relief sought will be damages, and the distribution of damages to absentees will usually be administered in the main action itself, so that it is unlikely that an absentee will need to institute a subsequent proceeding in order to obtain his individual recovery. The fact remains, however, that because of the imperfections of notice absentees will not always know about the lawsuit until it is over, and there is no assurance that attempts by the court to foreclose late claims will be binding on unnotified absentees.

170. *See* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1757 (1972); Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 645 (1971).

171. For excellent analysis, *see* Comment, *Expanding the Impact of State Court Class Action Adjudications to Provide an Effective Forum for Consumers*, 18 U.C.L.A.L. REV. 1002, 1008-12, esp. 1011 (1971).

tion. The Supreme Court's decisions have recognized some power in the state courts to bind nonresidents, particularly in cases involving common funds effectively located in the state or the internal organization of associations formed under the laws of the adjudicating state. In *Hartford Life Insurance Co. v. Ibs*[172] a Connecticut state court had upheld assessments by a Connecticut company's mutual insurance fund against a challenge, brought by participants as representatives of all participants in many states, on the ground that the company could not assess the members to reimburse payment of benefits so long as the current balance was sufficient to pay all current claims. A Minnesota state court, in a suit brought by the widow of a Minnesota participant for death benefits, rejected the company's defense of cancellation for non-payment of assessments. The United States Supreme Court held that the Connecticut court's judgment was binding on the Minnesota participant, who was not a formal party to the action and had not been served or notified.[173] In *Supreme Tribe of Ben-Hur v. Cauble*[174] a federal court in Indiana, basing its jurisdiction on diversity of citizenship, had rendered a judgment for the defendant fraternal benefit society (organized under Indiana law) in an action brought by nonresident certificate holders on behalf of themselves and all other holders of the same class of certificates, challenging the propriety of a proposed reorganization of the society. Thereafter a second action was brought in an Indiana state court by resident certificate holders, and the society sought an injunction from the federal court prohibiting such relitigation of the issues that it had already decided. The Supreme Court held that the injunction should have issued because the judgment bound the entire class, including both resident and nonresident absentees. In these cases the Court emphasized the need for unitary adjudication of rights to common funds, and the power of a state court to decide issues concerning the internal structure of companies organized under the laws of that state.

Mullane and *Hansberry* are both consistent with this analysis, although *Mullane* did not involve class action treatment and the *Hansberry* judgment was denied class action effect. *Mullane* involved the legal incidents of a common trust fund operated by a New York bank under New York law;[175] *Hansberry* involved the validity of contractual restrictions on the sale of property located in Illinois.[176]

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172. 237 U.S. 662 (1915).

173. In Hartford Life Ins. Co. v. Barber, 245 U.S. 146 (1917), the Missouri courts were required to recognize the same judgment that was involved in *Ibs*. *See also* Sovereign Camp of the Woodmen of the World v. Bolin, 305 U.S. 66 (1938); Supreme Council of the Royal Arcanum v. Green, 237 U.S. 531 (1915); Carpenter v. Pacific Mut. Life Ins. Co., 10 Cal. 2d 307, 74 P.2d 761 (1937), *aff'd sub nom.* Neblett v. Carpenter, 305 U.S. 297 (1938).

174. 255 U.S. 356 (1921).

175. *See* notes 68 & 69 and accompanying text *supra*.

176. *See* notes 73-78 and accompanying text *supra*.

The federal courts have been relatively untroubled by the inclusion of nonresidents in classes represented before them, although federal courts are, in the absence of statute, generally limited in territorial reach of personal jurisdiction to the state in which they sit.[177] The overwhelming majority of federal court class actions arise under federal laws that evince strong public policy;[178] some, such as the antitrust laws[179] and the securities laws,[180] expressly provide for nationwide service of process. The federal cases are consistent, therefore, with a requirement that the forum have a governmental interest in a unitary adjudication including nonresidents.

To the extent that the common-question class action is justified primarily by judicial economy, it is relevant to inquire whether the forum state itself has an interest in promoting such economy strong enough to justify adjudicating the claims of nonresidents. If the separate litigation that would be avoided by class action treatment would be brought in other states, the forum's interest is doubtful. By contrast the federal system is a unitary one, so that the avoidance of separate litigation in other federal districts is in the interest of the entire system.

On this analysis the nationwide consumer class action brought in a state court, such as *Reardon v. Ford Motor Co.*,[181] would present substantial difficulties in the case of a judgment unfavorable to the class. It would strain the concept to find a state interest in adjudicating claims of nonresidents to be governed in part by the laws of another state, where the nonresidents have no contact with the state, merely because the claims have issues in common with claims asserted by residents. If the presence of the nonresidents as members of the class was essential to the vindication of the residents' claims—if the class would otherwise not be large enough to justify class action treatment or to make litigation economically feasible—a case might be made, so long as another forum was not more appropriate. Conceivably the fact that the opponent's wrongful conduct (*e.g.*, improper assembly) took place in the state would provide a basis for jurisdiction to adjudicate nonresidents' claims; perhaps the state's interest in providing a single forum for the adjudication of claims against a domestic enterprise would also suffice.[182] There is no direct precedent for such power, however, and decisions like *Hanson v. Denckla*,[183] in

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177. *See* FED. R. CIV. P. 4 (f); 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1124 (1969).

178. Antitrust, securities regulation, and civil rights cases are the most frequent. *See* notes 29-36, 40-42 and accompanying text *supra*.

179. 15 U.S.C. § 22 (1970) (applicable to corporations only).

180. 15 U.S.C. §§ 77v (a), 78aa (1970).

181. 7 Ill. App. 3d 338, 287 N.E.2d 519 (1972); *see* text accompanying note 35 *supra*.

182. *See Developments in the Law—Multiparty Litigation in The Federal Courts*, 71 HARV. L. REV. 874, 940 (1958).

183. 357 U.S. 235 (1958).

which jurisdiction over a nonresident trustee based on the economic impact of disposition of the funds on primarily resident beneficiaries was held insufficient, suggest that connections sufficient for choice-of-law purposes may not be enough to support personal jurisdiction.

It has been suggested that individual notice to a nonresident, pursuant to subdivision (c)(2), giving him the option to remove himself from the class, might obviate territorial jurisdictional objections.[184] This misses the point. Notice is a prerequisite to the *exercise* of jurisdiction already inherent in the relationship of the subject matter or the parties to the forum, not a substitute for such a relationship. Despite the recent expansion of territorial jurisdiction under the long-arm statutes, a state still almost certainly lacks power to adjudicate the rights of persons with whom "the state has no contacts, ties, or relations."[185] To impose on a nonresident, over whom the state otherwise has no jurisdiction, a duty affirmatively to remove himself from the class or waive any objection to adverse judgment would itself constitute an exercise of non-existent power.[186]

2. Inadequate Notice

As we have seen,[187] the authorities are unclear on the question of notice as a due process requirement. It appears, however, that in the ordinary class action there is no constitutional requirement that all absent members receive notice. If the mandate of subdivision (c)(2) is met, with individual notice going to all members who can be identified through reasonable effort, the judgment should be binding on absentees even if they did not receive actual notice, if the forum has a sufficiently strong interest in unitary adjudication of the claims or defenses of the class.

The difficulty, however, is that in the case of the common-question class action the rule gives the absentee the privilege of frustrating the state's interest in unitary adjudication. His right to remove himself from the class, although subject to reasonable time limitation, is arbitrary and unconditional. Even the most formal and effective notice, therefore, cannot serve to force the unwilling absentee to submit to adjudication as a class member; the privilege can be evaded only by withholding notice so that the absentee never knows his interests are the subject of litigation. This is, to say the least, an anomalous situation, and it is difficult to square with fundamental fairness. The anomaly is all the greater, of course, where (as in *Eisen*) the court deliberately refrains from notifying readily locatable members of the class, in order to save costs.[188] Then it

184. School Dist. v. Harper & Row Publishers, Inc., 267 F. Supp. 1001, 1005 (E.D. Pa. 1967).

185. International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

186. Clearly, an ordinary defendant cannot be required to present his jurisdictional objection to the court on pain of waiver on collateral attack, *See Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909, 991 (1960).

187. *See* pt. III, § A of this article.

188. *See* text accompanying notes 131-139 *supra*.

cannot be said that the court and the parties have done all that could be done to protect the absentees' interests as defined by the rule. Having given the absentee an unconditional right to insist on separate litigation, the court can scarcely say that the state's interest in unitary adjudication forecloses exercise of that right by an unnotified absentee in a subsequent proceeding.

It is arguable, then, that even the best notice practicable in a common-question class action will not suffice to prevent unnotified members of the class from relitigating issues decided against the class. There is no doubt that the draftsmen of the rule intended otherwise; but the result—a judgment binding only upon members who receive actual notice and fail to withdraw—would be one quite comparable to the "permissive joinder device" with which the federal courts lived (however uncomfortably) for 28 years under the former rule. That the result is unnecessary, in that the privilege to opt out does not appear to be required by due process,[189] might be expected to lead the court in the subsequent proceeding to give res judicata effect to the prior judgment at least where the "best notice practicable" has been given, reading that clause as qualifying the clause giving the right to opt out. It is difficult to see, however, how a deliberate failure to notify can be overlooked.

3. Inadequate Representation

Nothing has happened since 1940 to qualify the holding of *Hansberry v. Lee*[190] that an absent member of a purported class cannot be bound by a judgment against the class if the absentee's interests were inadequately represented. Just as a lack of personal jurisdiction over a formal party defendant forms a basis for collateral attack, so must inadequate representation invalidate a judgment against an absentee class member.[191]

It may be open to question, on the other hand, whether an absentee who receives notice in a common-question class action, but fails to exercise his right to make an appearance or to object to the representation, thereby waives his right to attack the judgment collaterally on that basis. No reported decision on point appears, but the few commentators assume that a finding of waiver would be inappropriate.[192] The waiver would apparently consist of neglect of a duty to speak up if the procedures adopted are unfair, so that they may be corrected before judgment is rendered. That could justify at most a waiver of grounds for attack known to the absentee prior to judgment; it is unlikely that most grounds for asserting inadequate representation would be known to the absentee who does not intervene.

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189. *See* text accompanying notes 119-128 *supra*.
190. 311 U.S. 32 (1940).
191. *See* authorities cited note 72 *supra*.
192. Homburger, *supra* note 170, at 646; Comment, *Can Due Process be Satisfied by Discretionary Notice in Federal Class Actions?*, 4 CREIGHTON L. REV. 268, 299 (1971).

B. *Judgment Favorable to the Class*

1. The Doctrine of Mutality

According to the traditional doctrine of mutuality of estoppel, one who would not have been bound by an unfavorable judgment in a prior proceeding may not in a subsequent litigation invoke a favorable judgment, even against a party to that first proceeding who was otherwise bound by it.[193] Under that principle, an absent member of a class who did not receive adequate notice or who was not adequately represented, and who therefore would not have been bound by a judgment unfavorable to the class, may not in a subsequent lawsuit rely on a favorable judgment against the opponent of the class. In view of the substantial uncertainties regarding the res judicata effect of unfavorable judgments under the new class action rule, the doctrine of mutuality poses a potential threat to the general usefulness of the device.

The only decided cases in the federal courts under the new rule are those in the *Gregory* sequence,[194] in which two circuits held that in a class action in which no notice was given to absentees, a judgment favorable to the class had no class action effect.[195] In addition, two district courts denied res judicata effect expressly on the mutuality ground, although their decisions were affirmed on purely jurisdictional grounds.[196] The extent to which the doctrine of mutuality survives in the federal courts is open to question, however, in view of a substantial trend in state and lower federal decisions away from the doctrine, and the Supreme Court's rejection of mutuality (at least for patent cases) in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation.*[197]

The status of the mutuality doctrine in Missouri state courts is not entirely clear, despite very recent dicta to the effect that mutuality is the law of the state.[198] Recent holdings of the state supreme court to that effect appear not to have been fully argued,[199] while a more exten-

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193. Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 127 (1912); RESTATEMENT OF JUDGMENTS § 93, comment d at 463 (1942); F. JAMES, CIVIL PROCEDURE § 11.31 (1965); M. GREEN, BASIC CIVIL PROCEDURE 215-224 (1972).

194. *See* notes 84-97 and accompanying text *supra.*

195. Schrader v. Selective Serv. Sys. Local Bd. #76, 470 F.2d 73 (7th Cir.), *cert. denied,* 93 S. Ct. 689 (1972); Zeilstra v. Tarr, 466 F.2d 111 (6th Cir. 1972).

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

197. 402 U.S. 313 (1971). *See* Comment, *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation: Mutuality of Estoppel—A Final Eulogy,* 5 IND. LEGAL F. 208 (1971); lower federal court decisions cited in the *Blonder* opinion, 402 U.S. at 325 n.13.

198. *See* Feinstein v. Edward Livingston & Sons, Inc., 457 S.W.2d 789, 794 (Mo. 1970): "[I]t is settled law in Missouri that '. . . estoppel by judgment must be mutual and bind both parties. If the judgment is not binding on both, it binds neither.' "

199. In Marusic v. Union Elec. Co., 377 S.W.2d 454 (Mo. 1964), a husband sued for loss of services and expenses resulting from his wife's injury allegedly

sively reasoned opinion of the Kansas City Court of Appeals in 1966[200] indicates agreement with the trend away from mutuality noted below. In any event the issue has never arisen in a class action context, largely because of the effect of former rule 52.09(d). It is clear that it would require some departure from the traditional doctrine to allow the absent member of a victorious class to enforce the judgment against the opponent despite the absence of procedural safeguards intended for the protection of absentees.

2. Recent Trends

Since 1942, when Judge Traynor wrote the opinion in *Bernhard v. Bank of America National Trust & Savings Association*,[201] there has been a growing trend toward abolishing the doctrine of mutuality. The argument is that so long as the party against whom the prior judgment is invoked has had his day in court on the relevant issues, it should not matter that the person *invoking* the judgment was not a party and was not bound.[202] The class action situation would be a good place to begin relaxing the rule, at least where the grounds upon which the absentee could have challenged an unfavorable judgment were technical and peculiar to class members (*e.g.*, lack of notice and inadequate representation) and could not be said to affect the full trial of the issues. The policy of eliminating unnecessary repetition of litigation, which lies behind the principle of res judicata and which justifies relaxation of mutuality, is surely as important in the class action situation as in any other.

V. Some Proposals for Reform

A number of proposals for further modification of the federal class action rule, and a few aimed at state court adoption of modernized rules on the federal pattern, have appeared in the literature. Those with which we are concerned here have focused on two trouble spots: (1) The differential treatment called for in the current rule in view of the difficulty of distinguishing between the categories; and (2) the special privileges of option out or appearance accorded to absentees in common-question cases.

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caused by the defendant, after his wife had recovered a judgment from the defendant for her own damages. The supreme court in the husband's case, after holding that the husband had failed to make a submissible case and therefore could not complain of a verdict and judgment for the defendant, dismissed the finding of negligence in the wife's case in a concluding paragraph as simply "not res judicata of the issues in this case." *Id.* at 459.

200. *In re* Estate of Laspy, 409 S.W.2d 725, 736-37 (K.C. Mo. App. 1966). *See also* Arata v. Monsanto Chemical Co., 351 S.W.2d 717 (Mo. 1961).

201. 19 Cal. 2d 807, 122 P.2d 892 (1942).

202. *See, e.g.*, DeWitt v. Hall, 19 N.Y.2d 141, 278 N.Y.S. 2d 596, 225 N.E.2d 195 (1967); F. James, Civil Procedure § 11.34 (1965); Annot., 31 A.L.R.3d 1044, 1067 (1970); Currie, *Civil Procedure: The Tempest Brews*, 53 Calif. L. Rev. 25 (1965).

A. *Reforming the Categories*

There are essentially two directions that a reform of the categories can take: Adoption of a single definition of the proper class action; and elimination of the differences in treatment. Because it has been said that every case that satisfies the requirements of subdivisions (b)(1) or (b)(2) will almost certainly satisfy the requirements of subdivision (b)(3), the most comprehensive proposal for a state-court class action rule, that of Professor Homburger,[203] adopts the (b)(3) definition as the universal one. The extension of the "predominance" and "superiority" criteria of subdivision (b)(3) to all class actions is only an apparent alteration of requirements, because they will be met in any case in which the relief sought will be unitary and affect the entire class, or in which separate litigation may produce results that either are anomalous or affect unrepresented persons.

The main argument in favor of retaining the present rule's categories but eliminating the differentiation in treatment is that by providing functional definitions of typical cases the rule makes it easier to identify the proper class action. Professor Homburger thinks that is illusory,[204] but other commentators disagree.[205] Probably even the functional definitions of the new rule are too abstract for precedential use; in applying the rule, courts and lawyers are likely to rely more on secondary works that list the proper cases in more detailed and descriptive terms ("common funds," "cases involving the validity of bond issues," "numerous similar claims for damages").[206] Nonetheless, if all proper class actions are subject to the same rules, retaining the present categories would do no harm.

B. *Reforming Subdivision (c)(2)*

1. Exclusion

The heart of the difficulty in the rule, the feature that justifies the more rigorous notice requirement for common-question class actions, is the arbitrary right of exclusion, the right to "opt out." Various ways of modifying the right have been proposed; one might reasonably eliminate altogether the possibility of exclusion,[207] but most commentators would retain it in the discretion of the court.[208] It seems likely that the power to define the class under subdivisions (c)(1), (c)(3), and (c)(4) inevitably

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203. Homburger, *supra* note 170, at 655-57.
204. *Id.* at 653-54.
205. Note, *Revised Federal Rule 23, Class Actions: Surviving Difficulties and New Problems Require Further Amendment,* 52 MINN. L. REV. 509, 530 (1967); Note, *Proposed Rule 23: Class Actions Reclassified,* 51 VA. L. REV. 629, 650 (1965).
206. *See, e.g.,* PROP. FED. R. CIV. P. 23, Advisory Committee's Note, 39 F.R.D. 69, 98 (1966).
207. *See* text accompanying notes 119-128 *supra.*
208. *See* authorities cited notes 203 & 205 *supra.*

includes the power to exclude individuals for proper reasons;[209] therefore, the latter view is the more realistic. The 1964 preliminary draft of the federal rules by the federal advisory committee called for exclusion upon request unless the court found inclusion essential; the better approach, however, would be to leave to the court's discretion whether to allow exclusion at all.[210] Exclusion would likely be appropriate only in the case of a legitimate interest in separate litigation by a member of a plaintiff class, and then only when the interest is particularly strong and peculiar to one member or at most a small portion of the class. In any case there is no reason to limit the possibility of exclusion to any one category of class actions.

2. Notice

Eliminating the arbitrary right of exclusion eliminates any reason for the rule to require full *Mullane*-type notice for all common-question class actions. The best approach is to adopt a flexible provision, with no differentiation between categories, that will enable the court to adapt the coverage of the notice to the particular needs of the case. Professor Homburger would require "reasonable notice" unless the court dispenses with it;[211] it seems preferable to make it clear that notice can be dispensed with altogether only under highly unusual circumstances. Probably the general standard of current subdivision (c)(2) ("the best notice practicable under the circumstances") would be too strong; in any case, the attempt to define when "individual notice" must be given should be eliminated, and a non-exclusive list of items should be included that the notice *may* contain *when appropriate,* such as a right to appearance or a request for an informational statement of claim.

VI. Conclusion

This article has argued that the federal class action rule and the new Missouri rule patterned after it are likely to prove unsatisfactory as formulated. The argument focused on the differential treatment given

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209. *Cf.* Note, *Revised Federal Rule 23 Class Actions: Surviving Difficulties and New Problems Require Further Amendment,* 52 Minn. L. Rev. 509, 525 n.68 (1967).

210. *Cf.* Homburger, *supra* note 170, at 656: "When appropriate the court may limit the class to those members who do not request exclusion from the class within a specified time after notice."

The American College of Trial Lawyers, Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure 31-33 (1972) [hereinafter cited as Report], would restrict the court to two options: Either exclusion unless inclusion is requested; or inclusion unless exclusion is requested. As now, the options would be available only under (b)(3). The difficulty is that both options leave the wholly arbitrary decision in the hands of the absentee, without regard to the possibility that even in common-question class actions the court or the parties may have a legitimate interest in unitary adjudication.

211. Homburger, *supra* note 170, at 656.

to common-question cases in subdivision (c)(2); that provision requires, in many cases, more burdensome notice than is constitutionally necessary, and allows the absentee to frustrate the purpose of the class action by "opting out." Much of the published criticism of the federal rule, of course, is aimed at a more general problem that would by no means be cured merely by amending subdivision (c)(2): *i.e.*, the increasing administrative burden imposed on the courts by painfully slow-gaited class actions. The number of claims involved, the size of the opponent's potential exposure, and perhaps also the dilatory ingenuity of lawyers create the burden.[212] It may well be that further experience with the class action rule, at the state level as well as at the federal level, will dictate the use of some other device for serving the same need that will substantially restrict the availability of the courts for the handling of mass disputes. Certainly there has not been enough testing of the courts' performance to allow for confident reformation of the rule on that scale.[213]

A class action rule free of unnecessary self-contradictions and needlessly burdensome requirements would be of great benefit. It is suggested, therefore, as a step in that direction, that subdivision (c)(2) of the new class action rule be amended in the following manner:

> (2) *Notice.* As soon as practicable after the court has determined pursuant to subdivision (c)(1) that the action is to be maintained as a class action, appropriate notice shall be directed to the members of the class, with such form, content and manner of distribution as the court shall approve. The notice shall issue in the name of the court. The expenses of preparing and distributing such notice shall be borne by the party requesting class action treatment, unless the court in the interest of justice directs otherwise, subject in any case to taxation as costs. If appropriate, the notice may (1) provide an opportunity for members to request exclusion from the class, (2) provide an opportunity for members to make an appearance through counsel, (3) include a request that members of the class inform the court of the nature and extent of their claims.

212. *See, e.g.*, REPORT, *supra* note 210, *passim;* Katarincic & McClain, *Federal Class Actions under Rule 23: How to Improve the Merits of Your Action Without Improving the Merits of Your Claim,* 33 U. PITT. L. REV. 429 (1972); Simon, *Class Actions—Useful Tool or Engine of Destruction,* 55 F.R.D. 375 (1972); Note, *Eisen v. Carlisle & Jacquelin: Frankenstein Monster Posing as a Class Action?,* 33 U. PITT. L. REV. 868 (1972).

213. Virtually no class action brought under FED. R. CIV. P. 23(b)(3) since 1966 has yet been tried to a fully litigated judgment, REPORT, *supra* note 210, at 15-16; Simon, *supra* note 212, at 378. It is of course a point of criticism, but it also indicates that the experiment cannot yet be evaluated.