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I. INTRODUCTION

The certification of defendant class actions pursuant to Rule 23 of the Federal Rules of Civil Procedure raises a number of concerns regarding fairness to the absent members of the defendant class and the extent to which the Federal Rules of Civil Procedure authorize such litigation. These concerns are so significant that Rule 23 should be revised.

Rule 23 of the Federal Rules of Civil Procedure recognizes defendant class actions, which were historically permitted at equity.[1] Defendant class actions have been rationalized on the basis that they serve the broad policy interests underlying Rule 23; they promote judicial efficiency by bringing many small parallel actions together into one action[2] and facilitate the "enforcement of legislative and constitutional norms" by allowing a uniform class-wide remedy.[3] Despite the long history of defendant class

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1. Rule 23 provides: "One or more members of a class may sue *or be sued* as representative parties on behalf of all . . . ." FED. R. CIV. P. 23(a) (emphasis added). Former Equity Rule 38 provided: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring all before the court, one or more may sue *or defend* for the whole." Equity Rule 38, *reprinted in*, 4 R. FOSTER, FEDERAL PRACTICE, CIVIL AND CRIMINAL 4617 (6th ed. 1922) (emphasis added); *see also* Christopher v. Brusselback, 302 U.S. 500 (1938); Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921).

2. Efficiency is one of the fundamental goals of class actions. *See* FED. R. CIV. P. 23(b)(3) (mandating "the fair and efficient adjudication" of cases); *see also* Marcera v. Chinlund, 595 F.2d 1231 (2d Cir.), *vacated on other grounds sub nom.* Lombard v. Marcera, 442 U.S. 915 (1979). In *Marcera*, a defendant class action was brought by a plaintiff who sought reform of jail policies after various individual actions proved ineffective. Despite numerous successful suits against individual counties in New York, the majority of counties had persisted in unlawful jail visitation policies. Pursuing a class action obviated the need to sue each county individually.

3. Comment, *Certification of Defendant Classes Under Rule 23(b)(2)*, 84 COLUM. L. REV. 1371, 1378 (1984); *see also* Weinstein, *Some Reflections on the "Abusiveness" of Class Actions*, 58 F.R.D. 299 (1973) ("The [class action] procedure is merely one means of transforming legal rights into effective remedies."); *Developments in the Law—Class*

actions, until recently little consideration has been given to Rule 23's protection of the absent members of a defendant class.[4]

Rule 23 authorizes three general types of class actions,[5] and defendant class actions have been certified under each type.[6] Rule 23(b)(1) authorizes class actions when "separate actions

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Actions, 89 HARV. L. REV. 1318, 1353 (1976) ("Class action procedures assist courts in giving full realization to substantive policies . . . .").

4. The advisory committee notes to the Federal Rules of Civil Procedure do not directly address the application of Rule 23 to defendant class actions. Although the question of fairness has been treated by several commentators, they have written from a perspective advocating the use of defendant actions. *See, e.g.*, Parsons & Starr, *Environmental Litigation and Defendant Class Actions: The Unrealized Viability of Rule 23*, 4 ECOLOGY L.Q. 881, 888-97 (1975); Comment, *Defendant Class Actions and Federal Civil Rights Litigation*, 33 UCLA L. REV. 283, 287 (1985); Note, *Defendant Class Actions*, 91 HARV. L. REV. 630 (1978). While no quantitative information is available on the number of defendant class actions, most commentators sense that the device is being used with increasing frequency. *See, e.g.*, Comment, *supra* note 3, at 1371; Comment, *Personal Jurisdiction and Rule 23 Defendant Class Actions*, 53 IND. L.J. 841, 841 & n.6 (1978).

5. Rule 23(b) provides in pertinent part:

> 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 the 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 available methods for the fair and efficient adjudication of the controversy.

FED. R. CIV. P. 23(b).

6. *See, e.g.*, *In re* Itel Sec. Litig., 89 F.R.D. 104 (N.D. Cal. 1981) (defendant class certified under 23(b)(1)); Technograph Printed Circuits v. Methode Elecs., 285 F. Supp. 714 (N.D. Ill. 1968) (certified under 23(b)(1) and (2)); Marcera v. Chinlund, 595 F.2d 1231 (2d Cir.) (defendant class certified under 23(b)(2)), *vacated on other grounds sub nom.* Lombard v. Marcera, 442 U.S. 915 (1979); Appleton Elec. Co. v. Advance-United Expressways, 494 F.2d 126 (7th Cir. 1974) (certified under 23(b)(3)); *In re* Gap Stores Sec. Litig., 79 F.R.D. 283 (N.D. Cal. 1978) (defendant class certified under 23(b)(3)).

However, recently some dispute has arisen concerning whether Rule 23(b)(2) applies to defendant class actions. *See, e.g.*, Henson v. East Lincoln Township, 814 F.2d 410 (7th Cir.), *cert. granted*, 484 U.S. 923 (1987), *further proceedings deferred*, 484 U.S. 1057 (1988); Comment, *supra* note 3, at 1376-78. *See also infra* notes 160-75 and accompanying text.

. . . would establish incompatible standards of conduct"[7] or when separate adjudications would, as a practical matter, determine the rights of absent parties or impair or impede the ability of absent parties to protect their rights.[8] Rule 23(b)(2) authorizes class actions in which "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."[9] Rule 23(b)(3) authorizes a third type of class action when "the court finds that the questions of law or fact common to the class predominate over individual questions" and a class action is the superior means of litigating the law suit.[10]

In some situations, particularly under the current language of Rules 23(b)(1) and 23(b)(2), judgment could be entered against an absent defendant without sufficient representation,[11] actual notice,[12] the ability to "opt out" of the class,[13] the ability to intervene,[14] personal jurisdiction,[15] proper venue,[16] or the ability to raise choice of law questions.[17] Each of these concerns implicates basic notions of fairness, another value inherent in rule 23.[18]

In addition to these fairness concerns, a judgment rendered under the above circumstances may violate Federal Rule of Civil Procedure 82, which limits the ability of federal courts to expand their jurisdiction through the Federal Rules of Civil Procedure.[19] If jurisdiction or venue limitations prevent the plaintiff from suing certain defendants individually, a straightforward application of Rule 82 prevents the plaintiff from seeking judg-

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7. FED. R. CIV. P. 23(b)(1)(A).
8. FED. R. CIV. P. 23(b)(1)(B).
9. FED. R. CIV. P. 23(b)(2).
10. FED. R. CIV. P. 23(b)(3).
11. *See infra* notes 41-66 and accompanying text.
12. *See infra* notes 67-100 and accompanying text.
13. *See infra* notes 101-04 and accompanying text.
14. *See infra* notes 105-16 and accompanying text.
15. *See infra* notes 117-32 and accompanying text.
16. *See infra* notes 133-36 and accompanying text.
17. *See infra* notes 137-42 and accompanying text.
18. "[T]he representative party [must] *fairly* and adequately protect the interests of the class." FED. R. CIV. P. 23(a) (emphasis added); *see* FED. R. CIV. P. 23(b)(3) (A class action must be "superior to other available methods for the fair and efficient adjudication of the controversy.").
19. Rule 82 provides: "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein." FED. R. CIV. P. 82.

ment against those same defendants by simply using a defendant class action.[20]

Finally, the problem is compounded because, although Rule 23 explicitly authorizes defendant classes, it is drafted from the perspective of a plaintiff class action.[21] Thus, many courts have restricted the use of Rule 23 against defendant classes.[22]

II. Due Process Concerns in Rule 23 Defendant Class Actions

All three types of class actions that may be certified under Rule 23(b) must meet the four prerequisites of Rule 23(a): 1) the class must be "so numerous that joinder of all members is impracticable"; 2) the claims or defenses must include "questions of law or fact common to the class"; 3) the claims or defenses of the representative party must be "typical of the claims or defenses of the class"; and 4) the representative party must "fairly and adequately protect the interests of the class."[23] Thus, adequate class representation of the typical claims and defenses of the class is a fundamental due process protection expressly guaranteed under Rule 23(a).[24]

Actual notice of the pendency of the action is not expressly required to be given to absent class members for actions maintained under either 23(b)(1) or 23(b)(2); Rule 23(c)(2) explicitly requires notice only in actions maintained under Rule 23(b)(3).[25] This notice provision has not been interpreted to extend beyond its express language.[26] Furthermore, absent members of 23(b)(1) and (2) classes are not afforded the right to "opt out" of the class. Rule 23(c)(3) expressly provides that all members of a class certified pursuant to Rules 23(b)(1) or (2) are bound by any judgment entered in the action while members of 23(b)(3) classes are bound only if they received the requisite notice and

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20. *See infra* notes 143-59 and accompanying text.

21. Comment, *supra* note 4, 33 UCLA L. Rev. at 287; *see also infra* note 163 and accompanying text.

22. *See infra* notes 160-75 and accompanying text.

23. Fed. R. Civ. P. 23(a).

24. *See infra* text accompanying notes 42-44. In practice, however, purported "adequate" representation may fall short of protecting the interests of absent class defendants. *See infra* notes 45-66 and accompanying text.

25. Fed. R. Civ. P. 23(c)(2). Rule 23(c)(2) provides in relevant part: "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 . . . ." *Id.*

26. *See infra* notes 67-79 and accompanying text.

did not request exclusion.[27] Finally, litigants are not guaranteed a right of intervention under any of the three types of actions should they desire to personally protect their interests in the litigation.[28] Instead, Rule 23(d)(2) gives the court discretion to require notice in 23(b)(1) or (2) class actions or to permit intervention in any class action "for the protection of the class or otherwise for the fair conduct of the action."[29]

The requirements of adequate class representation and notice, as well as the ability to "opt out" of the class or intervene, are generally relied on in 23(b)(3) actions to protect the due process interests of absent class members.[30] While adequate class representation applies, the other three of these safeguards are not guaranteed to absent class members in Rule 23(b)(1) and (2) class actions. The absence of actual notice and the ability to opt out of the class or intervene imposes a severe burden on absent defendant class members. Even without such burdens, the Supreme Court recently pointed out that the burdens placed on absent defendants are significantly more onerous than those placed on absent plaintiffs.[31] Absent members of a defendant class are subject to the full power of the forum to enter a judgment against them.[32] Even though the absent class action defendants are not required to appear and defend on pain of a de-

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27. FED. R. CIV. P. 23(c)(3). Rule 23(c)(3) provides in relevant part:

> 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.

Id.

28. *See infra* notes 105-16 and accompanying text.

29. FED. R. CIV. P. 23(d)(2). Rule 23(d) provides in relevant part:

> In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims and defenses, or otherwise to come into the action . . . .

Id.

30. *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 808-12 (1985); Hansberry v. Lee, 311 U.S. 32, 42-43 (1940).

31. *Shutts*, 472 U.S. at 808.

32. *Id.*

fault judgment, they may be required to appear and participate in discovery,[33] subjected to the law of a forum with which the defendant has had no contact,[34] and subjected to the full remedial powers of the court and compelled to respond affirmatively to a judgment.[35]

Without the protection of notice, an absent defendant class member is foreclosed from participation in the lawsuit and yet is bound by the judgment.[36] Even when notice is effectively given, active participation in the litigation is still denied. Absent members of a 23(b)(1) or (2) class action cannot defend individually with their own choice of counsel because no "opt out" opportunity is provided.[37] However, active participation in the class litigation is also thwarted because no absolute right of intervention is available.[38] Moreover, even if intervention were a viable option, the cost would be the loss of traditional jurisdiction, venue and choice of law related defenses.[39] Thus, the two avenues for

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33. *See infra* note 131.

34. *See infra* notes 117-32 and accompanying text.

35. *Shutts*, 472 U.S. at 808. Some commentators have minimized the adverse impact of defendant class actions by implying that at some point in the litigation each defendant must appear before the court and will be permitted to litigate individual issues at that time. *E.g.*, Note, *supra* note 4, at 637 n.40 ("[A] loss by the defendant class will not, without more, lead to a final determination that particular individuals owe anything to the plaintiff; each person asserted to be a member of the class must be given an opportunity at some point to present any individual defenses he may have."). This assertion is based merely on the fact that some defendant class actions have allowed such mini-trials. However, these same commentators argue that personal jurisdiction and venue need only be obtained over the named representatives, *id.* at 638, implying that at least individual defenses of lack of jurisdiction and venue would not be available to absent class members even at a later mini-trial. Moreover, the mini-trials, to the extent they occur at all, are usually for the purpose of determining the extent of damages after a binding class liability judgment is entered. *See, e.g.*, Guy v. Abdulla, 57 F.R.D. 14, 16 (N.D. Ohio 1972).

36. Hansberry v. Lee, 311 U.S. 32 (1940); Christopher v. Brusselback, 302 U.S. 500 (1938); Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); Northern Natural Gas v. Grounds, 292 F. Supp. 619 (D. Kan. 1968), *cert. denied*, 404 U.S. 951 (1971).

37. *See* FED. R. CIV. P. 23(c)(3). In fact, in a true "catch-22" reasoning process, the inability of the absent class member to opt out has been used as a justification for not providing notice. *See* Bertozzi v. King Louie Int'l Inc., 420 F. Supp. 1166, 1181 (D.R.I. 1976) ("At the present stage of these proceedings and in view of the class members' inability to opt out, the court does not believe that notice is necessary or expeditious to resolution of the plaintiffs' request for a preliminary injunction."); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 255 (3d Cir.) ("[M]andatory notice is required in (b)(3) actions for the effective operation of the 'opt out' provision . . . . The 'opt out' procedure, however, is not necessary for the protection of . . . [the] (b)(2) class. . . . In this proceeding, the claims of each member of the class rest squarely on the same issue and the need for individual notice is superfluous."), *cert. denied*, 421 U.S. 1011 (1975).

38. *See infra* notes 105-16 and accompanying text.

39. *See infra* notes 117-42 and accompanying text.

increased representation and participation in the litigation, opting out and intervention, are unavailable to most absent class action defendants.

While the chance of all these problems arising in the same case may be small, the current version of Rule 23 provides no guidance on how to deal with these questions when they do arise. The treatment by courts has been uneven and inconsistent, jeopardizing both the defendant's rights and the eventual enforceability of defendant class action judgments. This article proposes that Rule 23 be revised so that absent members of a defendant class are always afforded actual notice and the ability to raise individual jurisdiction, venue and choice of law related defenses.[40]

A. Adequate Representation

The burdens placed on absent defendants have been justified on two grounds: 1) the representative adequately protects the absent party's interests, and 2) because the relief requested is generally injunctive or declaratory in nature and directed against members of unincorporated associations or groups of public officials, the burden on the absent defendant is not as onerous as damages.[41] On close examination neither of these justifications truly protects the absent party's interest in the litigation.

The emphasis on adequate representation as protection for the due process interests of absent defendants is rooted in the

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40. *See infra* notes 176-80 and accompanying text.

41. *See* Hansberry v. Lee, 311 U.S. 32 (1940); United States v. Trucking Employers, Inc., 72 F.R.D. 98, 99 (D.D.C. 1976) ("[M]embers of the class need not be brought personally before the Court as long as the requirements of due process—in this context, primarily notice and representativeness of named class members—are afforded them."); United States v. Trucking Employers, Inc., 72 F.R.D. 101, 105 (D.D.C. 1976) ("Rule 23 recognizes . . . [the due process problems of a defendant class action] and mandates that the interests of such involuntary absent defendants be protected by a determination by the court that the interests of named and non-party defendants coincide sufficiently that the substantive positions taken by the named defendants will protect the interests of the nonparty defendants."); Guy v. Abdulla, 57 F.R.D. 14, 16 (N.D. Ohio 1972) (citing *Hansberry* for the proposition that the safeguards of Rule 23 protect against due process problems); Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619, 636 (D. Kan. 1968) ("We think that the essential requisite of due process as to absent members of the class is not notice, but the adequacy of representation of their interests by named parties."), *cert. denied*, 404 U.S. 951 (1971); Note, *supra* note 4, at 637-45 (arguing that suits against members of unincorporated associations or unions and suits seeking injunctions or declaratory judgments against local public officials rarely raise problems of adequate representation).

Supreme Court's decision in *Hansberry v. Lee*.[42] The *Hansberry* Court reasoned that "a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires."[43]

The *Hansberry* decision has been relied on as the primary due process protection for absent class members. Consequently, adequate representation has been held out as the most important, and sometimes exclusive, element necessary to protect absent class members' due process interests.[44] The result is that "adequate representation" has come to mean either a lack of conflicts between the class representatives and the absent class members or a generalized inquiry into whether the action will be fair.[45] In fact, the gist of the *Hansberry* decision is that collusion

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42. 311 U.S. at 32. In *Hansberry*, the Court addressed the issue of whether a judgment entered in a class action was res judicata as to absent members of the class. The plaintiffs in *Hansberry* brought an action for an injunction to enforce a restrictive covenant in a series of deeds which prohibited the sale of property to blacks. Several years earlier a class action had been brought in state court by some of the property owners on behalf of all the owners in which the state court declared the enforceability of the covenants. Burke v. Kleinman, 277 Ill. App. 519 (1934). The defendants in *Hansberry* were blacks who purchased property from the absent members of the original class. The plaintiffs argued that the sales to the defendants were void, in violation of the racially restrictive covenant and the earlier court order. They argued that the earlier class action declaring the validity of the covenants was res judicata in the present action because the property owners who sold to the defendants were bound as members of the class.

The Supreme Court held that a class judgment rendered in a class action suit can be res judicata as to absent members of the class only where the class was adequately represented. The Court concluded that the earlier decision was not binding because the class had not been adequately represented; not all members of the class had an interest in seeing the restrictive covenant enforced.

43. 311 U.S. at 45.

44. *See infra* notes 82-85 and accompanying text.

45. *See, e.g.*, Cross v. National Trust Life Ins. Co., 553 F.2d 1026, 1031 (6th Cir. 1977) ("In making the determination of adequacy of representation the district court should consider the experience and ability of counsel for the plaintiffs and whether there is any antagonism between the interests of plaintiffs and other members of the class they seek to represent."); Harris v. Graddick, 593 F. Supp. 128, 137 (M.D. Ala. 1984) (court found representation was adequate because, "there [was] no apparent antagonism between the interests of the class and . . . [the named defendants]" and because the named defendants "have vigorously and conscientiously pursued all necessary and appropriate defenses applicable to all members of the class"); *In re* Itel Sec. Litig., 89 F.R.D. 104, 113 (N.D. Cal. 1981) ("The prerequisite of adequacy of representation will be satisfied where the court is assured of vigorous prosecution (or defense), and where there is no conflict between the representative of the class and the other class members."); Krehl v. Baskin-Robbins Ice Cream Co., 78 F.R.D. 108, 116 (C.D. Cal. 1978) ("There are two aspects to the prerequisite of adequate representation: first, the legal representation of the named plaintiff must be competent and, second, the interests of the representa-

between the class representatives to the detriment of the class members violates the latter group's due process rights. The Court, however, did not purport to deal with every circumstance that could lead to inadequate representation. Nor did it purport to formulate the definitive test for adequacy of representation. Even if *Hansberry* provides the definitive analysis as to absent plaintiffs, the question of absent defendants was not before the Court and the opinion cannot be read as the final resolution of their interests.

The conditions surrounding representation in a defendant class are very different than the "parallel" conditions of a plaintiff class. In a defendant class action, the plaintiff, under scrutiny of the court, designates the representative defendant. This defendant is often an unwilling representative that did not want to undertake class representation.

The plaintiff's designation of a representative may enhance the chances of inadequate representation because the designated defendant may have a relatively small stake in the outcome of the litigation or may lack the necessary financial and legal resources to adequately conduct the litigation. *Richardson v. Kelly*[46] provides an example of what can happen when a plaintiff selects the defendant class representative. In *Richardson*, absent members of a defendant class attempted to collaterally attack a judgment which imposed individual assessments on them and required them to participate in the receivership of an insurance association of which they were members.

The facts of *Richardson* deserve special attention. An earlier suit on a similar cause of action had been filed by the receiver against a class consisting of all the members of the insurance association (over 3000), naming 190 representative defendants.[47] That suit, however, was voluntarily dismissed by the receiver after some of the named defendants indicated they would vigorously contest liability. Later, the receiver refiled the suit against the same class listing only twenty-eight named defendants. The receiver testified that he purposefully omitted naming any of the defendants who had shown interest in contesting the earlier suit since they would interfere with his ability to obtain a favorable outcome.[48] Of the twenty-eight named de-

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tives and the class must be free from conflicts.").

46. 144 Tex. 497, 191 S.W.2d 857 (1945).

47. *Id.* at 500, 191 S.W.2d at 859.

48. *Id.* at 516-17, 191 S.W.2d at 868 (Alexander, C.J., dissenting).

fendants in the second suit, six defaulted, two were dismissed, and fifteen settled small claims prior to trial. Of the five defendants who appeared at trial, two did not object at trial and two settled after trial. The only remaining named defendant had only an $18 liability and did not appeal the adverse class judgment.[49] None of the twenty-eight named defendants had potential liability exceeding $850, although some of the unnamed defendants had liability exceeding $16,000.[50]

The absent class members in *Richardson* did not receive notice of the pending action.[51] In addition, the absent class action defendants argued that the plaintiffs selected defendant representatives "who would have neither incentive or ability to defend the suit and who could be dissuaded from appealing."[52] As the dissent concluded, "[t]he Receiver had by negotiations or otherwise eliminated from the case everyone who had the necessary interest and the inclination to make a vigorous defense of the suit."[53] The Texas Supreme Court disallowed the collateral attack, deferring to the trial court's unexplained finding that the parties "constitute a class whose rights . . . are *fairly and truly represented herein by the named defendants appearing and answering.*"[54] Although *Richardson* may be passed over as an aberration, it illustrates the potential for abuse where the class action rule does not provide adequate guidance on the conduct of defendant class actions.

Courts and commentators have tended to minimize the impact of the plaintiff's designation of the defendant representative.[55] The primary argument is that the self-selected plaintiff representative is just as likely to be an inadequate representative as the plaintiff-designated defendant representative. These commentators rely on the potential liability of the defendant and the supervisory power of the court as mechanisms to insure the selection of an adequate defendant representative.[56] As one commentator noted, "[s]o long as the defendant class represen-

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49. *Id.* at 502, 191 S.W.2d at 860.

50. *Id.* at 516-17, 191 S.W.2d at 868 (Alexander, C.J., dissenting).

51. *Id.* at 514, 191 S.W.2d at 867 (Alexander, C.J., dissenting).

52. *Id.* at 512, 191 S.W.2d at 865.

53. *Id.* at 517, 191 S.W.2d at 868 (Alexander, C.J., dissenting).

54. *Id.* (quoting trial court opinion) (emphasis in original).

55. *In re* Itel Sec. Litig., 89 F.R.D. 104 (N.D. Cal. 1981); Parsons & Starr, *supra* note 4, at 896-97; Williams, *Some Defendants Have Class: Reflections on the Gap Securities Litigation*, 89 F.R.D. 287, 291-92 (1981); Note, *supra* note 4, at 641-42.

56. Williams, *supra* note 55, at 291; Note, *supra* note 4, at 641-42, 646-47.

tative has some kind of personal interest in the issue to be decided by the class action, and so long as that issue is common to the other class members as well, the representative in vigorously defending himself will more or less automatically defend everyone else in the class."[57] This argument ignores the reality of current litigation practice. As *Richardson* demonstrates, a mere theoretical opposition to the plaintiff's position is insufficient. An adequate representative must have identical interests with those class members who have the most to lose and would fiercely contest the plaintiff's position.

Furthermore, other factors beyond vehement opposition to the opposing party's position and identical interests with other class members are necessary for a class representative to be adequate. An adequate representative must have the resources necessary to represent the class. These concerns are magnified in a defendant class action. In a plaintiff class action, the representative plaintiff, a volunteer, presumably would not undertake the financial burden of representing a class in the absence of adequate resources or the prospect of a large verdict. Moreover, in many plaintiff class actions, the case is handled on a contingent fee basis whereby counsel is provided incentive to take the case by the possibility of recovering large awards and court ordered fees.[58] Absent such economic incentives, a plaintiff would not likely volunteer to represent a class.

In comparison, a defendant class representative will seldom be able to take advantage of the same fee incentives as a plaintiff representative.[59] Although some commentators have suggested that the fees of the representative defendant be appor-

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57. Note, *supra* note 4, at 639-40.

58. Contingent fees are, by definition, only available to plaintiffs.

> Contingent fee arrangements in civil cases have long been commonly accepted in the United States *in proceedings to enforce claims*. The historical bases of their acceptance are that (1) they often . . . provide the only practical means [for obtaining competent counsel], and (2) *a successful prosecution of the claim produces a* res *out of which the fee can be paid.*

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20 (1980) (emphasis added) (citations omitted). *See* Comment, *supra* note 3, at 1385 n.103 ("In contrast [to representative defendants], representative plaintiffs may be reimbursed . . . by contingent fee arrangements . . . or by statutes authorizing attorney's fees in successful public rights litigation."); Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 390-92 (1972) (pointing out that attorneys representing plaintiffs in class actions have frequently recovered very high fee awards).

59. Comment, *supra* note 3, at 1385 ("The defendant class representative cannot expect to recoup these additional costs since a successful defense will merely exculpate the representative along with the entire class.").

tioned among the class members or be assessed to the plaintiff, no definitive rule as to the disposition of attorney's fees exists for defendant class actions.[60] Consequently, the defendant representative must be prepared to assume some, if not all, of the economic burden of the litigation.

Neither is court scrutiny of the adequacy of representation necessarily a sufficient protection of the absent defendant's interests. The motion for class certification is generally considered early in the litigation, before the merits of the action have been thoroughly reviewed.[61] The inadequacy of the defendant's representation may not be apparent at such an early stage in the litigation. Furthermore, the court is not usually in a position to conduct its own investigation into the relative strengths and weaknesses of the various potential defendant representatives. Rule 23 does provide discretionary methods for the judge to enhance the adequacy of representation, such as providing notice to absent class members.[62] However, if the reasons for inadequacy are not apparent from the face of the litigation, no rationale for optional notice or other discretionary protections would exist. While these concerns are present in any class action they are heightened in a defendant class because of the onerous impact of inadequate representation.

Moreover, relying on collateral attack to protect absent defendants from inadequate representation is problematic. First, the collateral attack method of correcting inadequate representation is inefficient and unnecessarily implicates extra judicial resources. Second, it imposes a heavier burden on the defendant than a defense in the original action would impose. Most courts are likely to require a higher standard of proof on collateral attack as a result of strong policies in favor of finality.[63] Thus, collateral attack holds little chance of success.

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60. Kline v. Coldwell Banker & Co., 508 F.2d 226, 235 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); M. OLSEN, THE LOGIC OF COLLECTIVE ACTION 65 (2d ed. 1971); Williams, *supra* note 55, at 293.

61. Rule 23(c)(1) provides that the motion to certify a class should be considered "as soon as practicable after the commencement of an action." FED. R. CIV. P. 23(c)(1). In Gonzales v. Cassidy, 474 F.2d 67, 75 (5th Cir. 1973), the court pointed out that whether representation was, in fact, adequate can only be tested in hindsight.

62. FED. R. CIV. P. 23(d)(2), *supra* note 29; *see, e.g.*, Alexander v. Aero Lodge No. 735, 565 F.2d 1364, 1374 (6th Cir. 1977), (court ordered discretionary notice under 23(d)(2) so that absent class members could object to the class representative), *cert. denied*, 436 U.S. 946 (1978); Sperry Rand Corp. v. Larson, 554 F.2d 868, 876 (8th Cir. 1977).

63. *See generally* Moore, *Collateral Attack of Subject Matter Jurisdiction: A Cri-*

The nature of the adversary process also fails to guarantee adequate representation. The plaintiff certainly has little interest in informing the court of potential weaknesses in the defendant's representation. And although the named defendant may be motivated to dispute the adequacy of representation, self interest would decrease the credibility of the defendant's inadequacy arguments. Thus, none of the named parties are in a position to contest the adequacy of defendants' representation.

The motives of a named defendant are also suspect when the named defendant willingly accepts the burden of class representation. Herbert Newberg suggests that the willingness of a defendant to serve as the class representative, or at least the agreement of the defendant with the plaintiff's selection, may render the defendant an inadequate representative.[64] The dilemma posed by this analysis is troubling. If a defendant truly believes he or she is not an adequate representative of the class, his or her vigorous opposition to the class certification may well be considered "a positive factor" militating toward certification.[65] Yet, a defendant who believes that class litigation will be advantageous and agrees to serve as representative after selection by the plaintiff may, by mere willingness, be considered an inadequate representative. Because the motives of the named parties are suspect whether they select, contest, or approve of the defendant representative, the adversary system fails to ensure adequate representation in defendant class actions.

Moreover, the adequacy of representation in a defendant class action may also be threatened by the named defendant's unwillingness to serve in a representational capacity. Class representation is clearly inadequate if the named defendant simply refuses to defend the action. In addition, by failing or refusing to consider how defense strategy affects absent class members, the unwilling defendant's representation could be inadequate. The strategy for conduct of litigation is significantly altered by the representational qualities of the suit. Thus, even when they represent their own interests and do not refuse to defend, unwilling defendants may be inadequate.

Finally, the adversary process is not easily corrected once a defendant representative is selected. Although the decision to

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tique of the Restatement (Second) of Judgments, 66 CORNELL L. REV. 534 (1981).

64. 1 H. NEWBERG, NEWBERG ON CLASS ACTIONS § 4.58, at 398 (2d ed. 1985) (citing Marcera v. Chinlund, 91 F.R.D. 579 (W.D.N.Y. 1981)).

65. *Id.* at 397; *see supra* note 57 and accompanying text.

certify may be reconsidered at some later point in the litigation, the additional burden of such reconsideration and the potential for a reversal of the litigation strategy make such reconsideration unusual and generally unsuccessful in the absence of "materially changed or clarified circumstances or the occurrence of a condition on which the original class ruling was expressly contingent."[66]

The adequacy of representation in a defendant class action is not insufficient by definition. However, the foregoing discussion shows that the adequacy of representation doctrine has severe limitations and will not always protect the due process interests of absent defendants.

B. Notice

Much effort has been expended in the debate over whether and what type of notice to the absent members of a class action is required by Rule 23 and the Constitution.[67] Rule 23(c)(2) requires that the "best notice practicable" be provided to class members "who can be identified through reasonable effort" in a 23(b)(3) action.[68] In *Eisen v. Carlisle & Jacquelin*, the Supreme Court reasoned that the drafters of Rule 23(c)(2) intended to "fulfill requirements of due process to which the class action procedure is of course subject."[69] The Court held that notice by publication did not satisfy this requirement where names and addresses of over two million class members were available.[70]

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66. 2 H. NEWBERG, *supra* note 64, § 7.47, at 86 ("[C]ourts should not condone a series of rearguments on the class issues by either the proponent or the opponent of the class, in the guise of motions to reconsider the class motion.").

67. *See* Rutherglen, *Notice, Scope and Preclusion in Title VII Class Actions*, 69 VA. L. REV. 11 (1983); Wolfsohn, *Sending Notice to Potential Plaintiffs in Class Actions Under the Age Discrimination in Employment Act: The Trial Court's Role*, 54 FORDHAM L. REV. 631 (1986); Comment, *Jurisdiction and Notice in Class Actions: "Playing Fair" with National Classes*, 132 U. PA. L. REV. 1487 (1984); Note, *Notice to Class Members Under the Fair Labor Standards Act Representative Action Provision*, 17 U. MICH. J.L. REF. 25 (1983); *see also* Johnson v. General Motors Corp., 598 F.2d 432 (5th Cir. 1979); Appleton Elec. Co. v. Advance-United Expressways, 494 F.2d 126 (7th Cir. 1974); Lynch v. Sperry Rand Corp., 62 F.R.D. 78 (S.D.N.Y. 1973).

68. FED. R. CIV. P. 23(c)(2); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 175-77 (1974).

69. 417 U.S. at 173 (citing FED. R. CIV. P. 23 notes of advisory committee on rules—1966 amendment).

70. *Id.* at 175.

However, courts have continued to hold that notice by publication satisfies due process in 23(b)(1) and (2) actions.[71]

Because Rule 23(c)(2) only expressly applies to actions certified under 23(b)(3), courts have deliberated whether the notice requirement applies in 23(b)(1) and (2) class actions. The Second Circuit, in *Eisen v. Carlisle & Jacquelin*,[72] implied that a strict notice requirement similar to that imposed in 23(b)(3) actions is mandated by the Constitution and should be applied to all class actions.[73] In affirming the Second Circuit, the Supreme Court did not consider whether strict notice standards applied to 23(b)(1) and (2) actions.[74] However, a year later in *Sosna v. Iowa*,[75] the Supreme Court cryptically established that the notice requirements of Rule 23(c)(2) and *Eisen* did not apply to (b)(1) and (2) actions.[76] Since then, the majority of courts have rejected the suggestion that notice is required in 23(b)(1) and (2) actions.[77] While some courts have implied that notice is consti-

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71. *See, e.g.*, Fowler v. Birmingham News Co., 608 F.2d 1055, 1059 (5th Cir. 1979) (court approved notice posted on an employee bulletin board in 23(b)(2) action even where the names and addresses of the class members were available).

72. 391 F.2d 555 (2d Cir. 1968), *aff'd*, 417 U.S. 156 (1974).

73. In *Eisen*, the plaintiff attempted to certify the class under all three provisions of Rule 23. 391 F.2d at 564. Consequently, the issue of notice arose not only under 23(c)(2) but also under the provisions of 23(d)(2). The Second Circuit implied that the discretionary language of 23(d)(2) was intended by the drafters of the rules to ensure the best practicable notice would be provided in 23(b)(1) and (2) actions. "The Advisory Committee in its note has suggested that the mandatory notice pursuant to 23(c)(2) and the discretionary notice under 23(d)(2) were intended to fulfill the requirements of due process established by *Hansberry* and *Mullane*." *Id.* at 568 (footnotes and citations omitted).

74. *Eisen*, 417 U.S. at 175-77. By the time *Eisen* was reviewed by the Supreme Court, the 23(b)(1) and (2) claims had been dismissed from the action. Thus, the Court was only required to address the notice required by 23(c)(2) for 23(b)(3) actions. The Court specifically limited its holding to 23(c)(2). *Id.* at 177 n.14.

75. 419 U.S. 393 (1975).

76. *Id.* at 397 n.4 ("the [notice] problems associated with a Rule 23(b)(3) class action, which were considered by the Court last Term in [*Eisen*], are not present in this case [filed under 23(b)(2)]").

77. *See, e.g.*, Payne v. Travenol Laboratories, 673 F.2d 798, 812 (5th Cir.) (court ordered notice in 23(b)(2) action was discretionary and not required), *cert. denied*, 459 U.S. 1038 (1982); Gurule v. Wilson, 635 F.2d 782, 790 (10th Cir. 1980) ("the class sought only injunctive relief and was certified under Rule 23(b)(2), which does not require that notice be given to class members"); Jones v. Diamond, 594 F.2d 997, 1022 (5th Cir. 1979) ("If the class is only a 23(b)(2) class, it was not absolutely necessary to notify every member of the class who could be identified through reasonable effort."); Alexander v. Aero Lodge No. 735, 565 F.2d 1364, 1374 (6th Cir. 1977) ("We agree with the Advisory Committee that prejudgment notice of a (b)(2) class suit need not in all cases be sent to absent class members to comply with the requirements of due process."); Elliott v. Weinberger, 564 F.2d 1219, 1229 n.14 (9th Cir. 1977) ("in (b)(2) actions absent members, re-

tutionally required under (b)(1) and (2) where monetary relief is requested,[78] even this position has been modified.[79]

The rationale for the different notice requirements under the various types of class actions is rooted in the theories behind these actions and is based on several assumptions about the relationship that exists between class members under the various types of actions. The first assumption is that actions pursuant to 23(b)(1) and (2) involve close relationships among the class members because of the nature of the relief usually sought. Class members in a (b)(1) action are assumed to have a close relationship to one another because of the requirement of some juridical tie existing between them before the action is filed or because they are claiming from a common fund.[80] Likewise, as a result of

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gardless whether they receive notice or not, cannot excuse themselves from the litigation or avoid res judicata effects of the judgment entered therein"), *modified*, 442 U.S. 682 (1979); Larionoff v. United States, 533 F.2d 1167, 1185-87 (D.C. Cir. 1976) ("the factors that have prompted courts and commentators to conclude that due process does not require notice in Rule 23(b)(2) class actions are equally applicable to actions certified under Rule 23(b)(1)"), *aff'd*, 431 U.S. 864 (1977); Ives v. W. T. Grant Co., 522 F.2d 749, 764 (2d Cir. 1975) ("notice is not required in a Fed. R. Civ. P. 23(b)(2) 'injunctive relief' class action").

78. King v. South Cent. Bell Tel. & Tel. Co., 790 F.2d 524, 529-30 (6th Cir. 1986); Ives v. W. T. Grant Co., 522 F.2d 749 (2d Cir. 1975).

79. *See* Johnson v. General Motors Corp., 598 F.2d 432, 437-38 (5th Cir. 1979). The court in *Johnson* implied that individual notice to identified class members may not be necessary even when monetary relief is sought but held that "some form of notice" is necessary before individual damages actions are barred by res judicata. *Id.*

> [When] individual monetary claims are at stake, the balance swings in favor of the provision of some form of notice. It will not always be necessary for the notice in such cases to be equivalent to that required in (b)(3) actions. . . . Before an absent class member may be barred from pursuing an individual damage claim, however, due process requires that he receive some form of notice that the class action is pending and that his damage claims may be adjudicated as part of it.

Id. at 438 (citations omitted).

80. Rule 23(b)(1) class actions are appropriate when separate actions "would establish incompatible standards of conduct" or "would as a practical matter be dispositive of the interests of [absent class members] or substantially impair or impede their ability to protect their interests." FED. R. CIV. P. 23(b)(1). Although the stare decisis effects of separate actions arguably meet these requirements, courts have refused to certify a 23(b)(1) class on the basis of the stare decisis effects alone. Because all actions could be certifiable under Rule 23(b)(1) if an adverse stare decisis impact were enough to satisfy 23(b)(1)'s requirements, courts have required more than possible stare decisis effects. *See, e.g., In re* Dennis Greenman Sec. Litig., 829 F.2d 1539, 1545-46 (11th Cir. 1987); Larionoff v. United States, 533 F.2d 1167, 1181 n.36 (D.C. Cir. 1976), *aff'd*, 431 U.S. 864 (1977); United States v. Truckee-Carson Irrigation Dist., 71 F.R.D. 10, 17 n.5 (D. Nev. 1975).

However, actions have been certified under Rule 23(b)(1)(A) when stare decisis "would establish incompatible standards of conduct" and the court also finds a "juridical

the injunctive nature of (b)(2) actions, the assumption is that very little expected divergence exists between the interests of the various class members.[81] Because of the assumed homogeneous interests of the class members in (b)(1) and (2) actions, notice has been held unnecessary to protect the due process rights of absent members so long as representation is adequate.[82] Even in Rule 23(b)(3) actions, courts have interpreted the notice function as merely supportive of the "opt out" provisions—the latter being the primary due process protection.[83]

The approach in *Wetzel v. Liberty Mutual Insurance Co.*[84] is typical of the notice analysis. *Wetzel* involved a Title VII action certified under Rule 23(b)(2). The court held that notice to absent members of the plaintiff class was not required.

The very nature of a (b)(2) class is that it is homogenous with-

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link"—a legal relationship between class members that existed before the litigation arose. *See In re* Itel Sec. Litig., 89 F.R.D. 104, 120-21, 125 (N.D. Cal. 1981) (juridical tie existed because the class of defendant underwriters were already codefendants in a similar class action, and class certified under 23(b)(1)(A)); *Truckee-Carson Irrigation Dist.*, 71 F.R.D. at 15, 17 (class certified under 23(b)(1)(A) when "all of the [water] certificate holders derive[d] their rights from a common source of supply"); *see also* Comment, *supra* note 3, at 1394-95 & nn.170-74 (providing examples of juridical ties); *cf.* Research Corp. v. Pfister Assoc'd Growers Inc., 301 F. Supp. 497 (N.D. Ill. 1969) (juridical tie existed between class of defendants who used the same process to produce hybrid seed corn), *appeal dismissed sub nom.* Research Corp. v. Asgrow Seed Co., 425 F.2d 1059 (7th Cir. 1970); *In re* N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887, 901 (N.D. Cal. 1981) ("[A]n important legal relationship [juridical link] justifying class treatment in this case is that each defendant is united in a chain of privity that has allowed them to introduce the Dalkon Shield into the stream of commerce."), *modified*, 693 F.2d 847 (9th Cir. 1982).

Class actions are certified under Rule 23(b)(1)(B) when a limited fund for recovery would cause separate actions to "be dispositive of the interests of [absent class members] or substantially impair or impede their ability to protect their interests." *See In re* Bendectin Prods. Liab. Litig., 749 F.2d 300, 305-06 (6th Cir. 1984) (certification under 23(b)(1)(B) is proper when plaintiffs will be compensated from a limited fund); Alexander Grant & Co. v. McAlister, 116 F.R.D. 583, 590 (S.D. Ohio 1987) (certification under 23(b)(1)(B) because the common insurance fund was inadequate to fully protect all members of the defendant class).

81. *See* Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 255-57 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); FED. R. CIV. P. 23 notes of advisory committee on rules—1966 amendment.

82. Kincade v. General Tire & Rubber Co., 635 F.2d 501, 506-07 (5th Cir. 1981); Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619, 636 (D. Kan. 1968), *cert. denied*, 404 U.S. 951 (1971).

83. Appleton Elec. Co. v. Advance-United Expressways, 494 F.2d 126 (7th Cir. 1974); Minnesota v. U.S. Steel Corp., 44 F.R.D. 559 (D. Minn. 1968); Korn v. Franchard Corp., 50 F.R.D. 57 (S.D.N.Y. 1970), *app. dismissed*, 443 F. 2d 1301 (2d Cir. 1971), *rev'd on other grounds*, 456 F.2d 1206 (2d Cir. 1972).

84. 508 F.2d at 239.

> out any conflicting interests between the members of the class. Since the class is cohesive, its members would be bound either by the collateral estoppel or the stare decisis effect of a suit brought by an individual plaintiff. Thus, as long as the representation is adequate and faithful, there is no unfairness in giving res judicata effect to a judgment against all members of the class even if they have not received notice. Adequacy of representation of the class is a mandatory requirement for the maintenance of a class action under Rule 23(a). If the representation proves inadequate, members of the class would not be bound.[85]

Although the rules governing notice in 23(b)(1) and (2) class actions have developed largely in the context of plaintiff class actions, little divergence from the standard analysis has occurred when the rules are applied to defendant class actions.[86] Some courts have recognized fairness requires that defendant class members receive notice of a pending (b)(1) or (2) action and have exercised their discretion to require such notice.[87] Other courts have held that expediency in vindicating the plaintiffs' rights outweighs any interest an absent defendant might have in receiving notice.[88]

Two assumptions are implicit in the homogeneity argument against notice: 1) an adequate representative can be expected to raise and litigate all defenses in a manner substantially similar to every other defendant in the suit; and 2) because of the nature of the action, each defendant has the same stake in the outcome of the controversy. If these assumptions are valid the additional participation of absent defendants would be redundant. The validity of the assumptions is questionable, however, in the context of a defendant class action.

First, a plaintiff class member's interest in enjoining someone else and limiting their actions is very different from the interest of a defendant whose actions stand to be limited.[89] Courts

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85. *Id.* at 256.

86. Redhail v. Zablocki, 418 F. Supp. 1061, 1065-68 (E.D. Wis. 1976) (three-judge court) (certifying a defendant class and holding that prejudgment notice was not required), *aff'd*, 434 U.S. 374 (1978) (declining to reach notice issue); Lake v. Speziale, 580 F. Supp. 1318, 1334 (D. Conn. 1984); Leist v. Shawano County, 91 F.R.D. 64, 69 (E.D. Wis. 1981); Lynch v. Household Fin. Corp., 360 F. Supp. 720, 722 n.3 (D. Conn. 1973) (three-judge court).

87. *See, e.g.*, Lynch Corp. v. MII Liquidating Co., 82 F.R.D. 478 (D.S.D. 1979).

88. *See, e.g., Leist*, 91 F.R.D. at 64.

89. Follette v. Vitanza, 658 F. Supp. 492 (N.D.N.Y. 1987).

An unnamed member of a plaintiff class generally stands to gain from the liti-

have consistently recognized and protected the peculiar right of a defendant to control the course of litigation that may bind that defendant.[90] As recently as the decision in *Phillips Petroleum Co. v. Shutts*, the Supreme Court has recognized the inherent difference between plaintiff class members losing a chose in action upon which they may never have acted and defendant class members being affirmatively bound by a judgment.[91] Absent defendants bound by a class action judgment have been held directly liable and forced to pay compensation or respond to an injunction without ever participating in the litigation. Although absent plaintiffs may lose a chose in action as a result of an adverse class action judgment, they do not suffer direct liability. An absent plaintiff does not incur an out of pocket loss and is not required to undertake or desist from particular action. The homogeneity argument does not account for this defense interest.

Second, the assumption that the interests of class members will be homogeneous does not account for the varying stake each defendant may have in the outcome of the litigation or in the conduct or management of the litigation. For example, in *In re Gap Stores Securities Litigation*[92] the potential individual liability of the class members ranged from $42,000 to over $1 mil-

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> gation in which a plaintiff class is certified; all that is risked is the right to later bring a cause of action in his own name. An unnamed member of a defendant class, however, 'stands to lose' without having had the opportunity to personally defend against the lawsuit.

Id. at 507 (quoting Thillens, Inc. v. Community Currency Exch. Ass'n, 97 F.R.D. 668, 674 (N.D. Ill. 1983); *see also*, Marchwinski v. Oliver Tyrone Corp., 81 F.R.D. 487, 489 (W.D. Pa. 1979) ("[W]hen one is an unnamed member of a plaintiff class one generally stands to gain from the litigation. . . . However, when one is an unnamed member of a defendant class, one may be required to pay a judgment without having had the opportunity to personally defend the suit.").

90. The fundamental policy concerns underlying personal jurisdiction and choice of law rules revolve, in part, around fairness to defendants. The limits on choice of law are generally imposed for the purpose of preventing "forum shopping, *unfairness to defendants*, and interference with other states' sovereignty." Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1, 57 (1986) (emphasis added); *see infra* notes 117-42 and accompanying text. Moreover, most formulations of the standards for the exercise of personal jurisdiction focus on the fairness of forcing a defendant to defend a lawsuit in a given jurisdiction. *See infra* notes 120-28 and accompanying text. Other procedural devices also serve in part to protect this defense right such as venue limitations and the doctrine of *forum non conveniens*.

91. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 805-06 (1985).

92. 79 F.R.D. 283 (N.D. Cal. 1978).

lion.[93] In *Richardson v. Kelly*,[94] the financial stake of the defendants ranged from $18 to over $16,000.[95] Moreover, the absent defendant may have procedural or jurisdictional defenses such as improper venue or lack of personal jurisdiction not available to the representative defendant. Choice of law problems may vary depending on which class member is the named representative.[96] Such basic defenses may vary from defendant to defendant no matter whether the representative is diligent or substantively adequate and regardless of the type of action.

Third, a defendant will not be affected by the stare decisis or res judicata effect of a non-class judgment in the same way a plaintiff would be affected. The potential stare decisis effect of a judgment alone rarely forms the justification for class treatment.[97] More importantly, stare decisis only governs the outcome of cases within the limits of a jurisdiction. Courts outside the jurisdiction where the original judgment was obtained, in litigation involving different parties, are not bound by the disposition of the original case. Although courts may find precedent from other jurisdictions persuasive, potential defendants outside the jurisdictional boundaries of a court are simply not bound by stare decisis, while those potential defendants inside the jurisdiction are bound. Furthermore, the ability of a plaintiff to affirmatively assert the collateral estoppel effect of a judgment against a defendant who was not a party to the action in which the original judgment was obtained is limited. Offensive, nonmutual assertions of collateral estoppel are strictly limited to the issues fully and fairly litigated in the first action.[98] To the extent the new defendant has unique defenses of venue, jurisdiction and choice of law, litigation could not be estopped. Thus, the homogeneity assumptions justifying the lack of notice in 23(b)(1) and (2) plaintiff class actions simply do not hold up in defendant class actions.

The major notice protection afforded absent (b)(1) and (2) defendants under the Federal Rules is found in Rule 23(d), which gives courts discretion to issue orders to protect absent

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93. *Id.* at 303.

94. 144 Tex. 497, 191 S.W.2d 857 (1945).

95. *Id.* at 516-17, 191 S.W.2d at 868 (Alexander, C.J., dissenting).

96. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 823 (1985); Miller & Crump, *supra* note 90, at 64-66.

97. *See supra* note 80.

98. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-27 (1979).

members of the class.[99] However, because of the discretionary nature of the provision, notice is not guaranteed as a prerequisite to judgment. Courts have exercised their discretion under 23(d) for varying reasons. The provision has been used most often as a check that other class action requirements such as adequate representation and numerousity have been met; notice is sent to provide absent members the opportunity to appear and provide input regarding the requirements of the rule.[100]

C. *Intervention and Opting Out*

Even if an absent member of a defendant class under 23(b)(1) or (2) receives notice of the pending action, such a defendant has few available options. Rule 23(c)(2) does not allow absent defendants in 23(b)(1) or (2) actions to opt out of the class.[101] Thus, assuming that the other requirements of Rule 23 have been met, the judgment in a (b)(1) or (2) action will be res judicata as to any person falling within the defined class.[102] The rationale for prohibiting a class member from opting out of a (b)(1) or (2) class action apparently is that such an occurrence would destroy the utility of such actions.[103] With respect to a defendant class action, an additional concern exists which is summarized by one judge's observation: "What member of a class of defendants who is in his right mind, and who is told

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99. *See supra* note 29 and accompanying text.

100. Lynch Corp. v. MII Liquidating Co., 82 F.R.D. 478 (D.S.D. 1979). In Wetzel V. Liberty Mut. Ins. Co., 508 F.2d 239, 254 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975), the court declined to exercise its supervisory powers to require notice in a (b)(2) action stating: "We will not presume to exercise supervisory powers . . . to mandate notice which the Federal Rules of Civil Procedure, promulgated by the Supreme Court under authority from Congress, 28 U.S.C. § 2072, specifically do not require." *Id.*

101. Rule 23(c)(2) states:

> In any class action maintained *under subdivision (b)(3)*, the court shall direct to the members of the class the best notice practicable under the circumstances . . . . The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date . . . .

FED. R. CIV. P. 23(c)(2) (emphasis added). Thus, the right to opt out of the class is limited to 23(b)(3) class actions.

102. Rule 23(c)(3) states: "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." FED. R. CIV. P. 23(c)(3).

103. *See* FED. R. CIV. P. 23 notes of advisory committee on rules--1966 amendments.

that, if he does not elect to be excluded he may be liable . . . , will fail to opt out?"[104]

Despite the inability of an absent 23(b)(1) or (2) defendant to escape the web of the class action judgment, such a defendant is not guaranteed the ability to intervene actively in the conduct of the litigation. Rule 23(d)(2) gives the court discretion to permit intervention "for the protection of the members of the class or otherwise for the fair conduct of the action."[105] Most courts interpreting the intervention language in Rule 23 have held that the language must be applied consistently with the Rule 24 intervention requirements.[106] Rule 24 intervention of right is only available where the would-be intervenor meets the requirements of Rule 24(a). The problem occurs because Rule 24(a) provides a caveat to intervention of right when the "applicant's interest is adequately represented by interested parties."[107] Thus, to the extent that the court has certified the class and explicitly found the named representatives adequately represent the absent parties, intervention of right would seem to be precluded. This result was reached in *Illinois v. Bristol-Myers Co.*,[108] a plaintiff class action where absent parties sought to intervene under Rule 24(a). The court refused to permit intervention of right, stating: "Assuming, without deciding, that appellants fulfill all other requirements of Rule 24(a), we find that they are not entitled to intervene as a matter of right since their interests are adequately represented by the state."[109] Thus, under Rule 24, a court must

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104. Kline v. Coldwell Banker & Co., 508 F.2d 226, 238 (9th Cir. 1974) (Duniway, J., concurring), *cert. denied*, 421 U.S. 963 (1975).

105. FED. R. CIV. P. 23(d)(2).

106. Rule 24 provides in relevant part:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
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> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common.

FED. R. CIV. P. 24. *See, e.g.*, Ramsey v. Arata, 406 F. Supp. 435 (N.D. Tex. 1975).

107. FED. R. CIV. P. 24; *see supra* note 106.

108. 470 F.2d 1276 (D.C. Cir. 1972).

109. *Id.* at 1278; *see also* Gabriel v. Standard Fruit & Steamship Co., 448 F.2d 724 (5th Cir. 1971).

deny intervention once it has made a finding that representation is adequate. No other result is permitted.

As a general rule, permissive intervention may be allowed when the court finds intervention would enhance the representation of the class. Some courts have held that permissive intervention of an absent class action plaintiff is available where the representation of the absent class member seeking intervention is "inherently inadequate" or where the absent class member's interests would not be fully represented by the class representatives.[110] Such holdings are inexplicable given the requirements of Rules 23 and 24. To the extent the named representative is "inherently inadequate" or does not fully represent the class, two conclusions can be reached under the current rules, neither of which justify intervention. Either the class should not have been certified because the requirement of Rule 23(a)(4) that the representative be adequate was not met, or the potential intervenor is not a member of the certified class because the intervenor's interests are not common and he or she will not be bound by the judgment. Courts recognizing this anomaly have denied permissive intervention by absent class members because the presence of additional parties whose interests are common with the class representative would unnecessarily delay the litigation. For example, in *Stenson v. Blum*,[111] the court emphasized:

> where a suit has been designated a class action, admitting intervenors who raise no new issues and who fall within the class merely clutters the action unnecessarily." . . . [G]ranting such a motion "would mean that any member of the class, *ipso facto*, has a right to intervene and litigate the action fully. Such a construction would render class actions just as unmanageable as some are wont to fear them.[112]

Although the issue has never been litigated in a reported case, presumably the same general approach would be applied to intervention in defendant class actions.[113] In any event, interven-

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110. Vuyanich v. Republic Nat'l Bank, 82 F.R.D. 420 (N.D. Tex. 1979).

111. 476 F. Supp. 1331 (S.D.N.Y. 1979), *aff'd*, 628 F.2d 1345 (2d Cir.), *cert. denied*, 449 U.S. 885 (1980).

112. *Id.* at 1336 (emphasis omitted) (quoting Hurley v. Van Lare, 365 F. Supp. 186, 196 (S.D.N.Y. 1973)). The court did note, however, that "[s]ome courts have permitted intervention in class actions when applicants raised the same issues as the named plaintiffs on the ground that it makes little difference whether intervention is permitted or denied." *Id.* at n.10 (citing Groves v. Insurance Co. of N. Am., 433 F. Supp. 877, 888 (E.D. Pa. 1977); Epstein v. Weiss, 50 F.R.D. 387 (E.D. La. 1970)).

113. *See* 7B C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE §

tion has not been permitted solely for the purpose of allowing participation by absent defendants in the litigation.

Moreover, when permissive intervention is allowed, it is only at the expense of such defenses as personal jurisdiction and venue.[114] The intervening class member is held to the court's exercise of jurisdiction even though, but for the class action, such defenses would be available. This situation is distinguishable from permissive intervention in a non-class setting where the would-be intervenor will not necessarily be bound by the judgment if the attempt at intervention is unsuccessful.[115] The class action defendant must either attempt to intervene (waiving jurisdiction and venue) or risk a binding judgment anyway without participating in the litigation.

In summary, if consistently applied as currently formulated, intervention does not provide a feasible procedure for protecting the interests of absent defendant class members. Absent defendants must look to other methods of assuring due process.[116]

D. Jurisdiction, Venue, and Choice of Law

In addition to the possibility that judgment could be entered against absent class action defendants without sufficient representation, without notice of the pendency of the action, and without an opportunity to intervene, absent members of a defendant class may be subjected to the incorrect law by a court which lacks personal jurisdiction and venue over the absent defendants.

1799 (1986). Certainly if a class is certified as to some issues and not as to others, the class members will be able to appear and defend as to non-class issues.

114. *See* 7A *Id.* § 1757 ("Of course, if a non-party defendant class member intervened under Rule 12(h)(1) [of the Federal Rules of Civil Procedure] he waived any objections he might have had to the court's exercise of complete personal jurisdiction over him."); *cf.* Commonwealth Edison Co. v. Train, 71 F.R.D. 391 (N.D. Ill. 1976) (intervenor waives privilege of challenging venue); TWA v. Civil Aeronautics Bd., 339 F.2d 56 (2d Cir. 1964) (intervenor may not object to venue), *cert. denied*, 382 U.S. 842 (1965). In fact, in United States v. Trucking Employers, Inc., 72 F.R.D. 98 (D.D.C. 1976), the court refused to excuse absent members of a defendant class action from the class even though venue was improper as to those class members. The court reasoned that "the relevant venue question [in a defendant class action] is whether venue is proper as among the parties who have in fact been brought personally before the court as named parties to the action . . . ." *Id.* at 100.

115. The unsuccessful intervenor may be affected by an adverse judgment as a result of stare decisis.

116. Permitting intervention by absent defendants while protecting the interests of those defendants would not constitute an adequate resolution of the problem. *See infra* text accompanying note 180.

1. *In personam jurisdiction*

The class action device has been held out as the major exception to the requirement that a court obtain personal jurisdiction over the parties before it.[117] Whether and to what extent personal jurisdiction applies, or has constitutional content in the federal system, is the subject of considerable debate.[118] In state court litigation, the requirements of personal jurisdiction usually ensure that before a court exercises its power over a defendant,

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117. United States v. Trucking Employers, Inc., 72 F.R.D. 98, 99 (D.D.C. 1976).

118. For differing views of commentators, see Abraham, *Constitutional Limitation Upon the Territorial Reach of Federal Process*, 8 VILL. L. REV. 520, 536 (1963) ("There is no clear reason why the 'traditional notions of fair play and substantial justice' embodied in the Fifth Amendment should not also encompass some measure of protection against inconvenient litigation, even though the protection is not identical to that afforded by the Fourteenth Amendment."); Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 427-28 (1981) (arguing that personal jurisdiction in the form of reasonableness and fairness requirements is applied in the federal system as a doctrine of self restraint that may not have constitutional content); Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U.L. REV. 1, 14-16 (1984) ("Although the fourteenth amendment is inapplicable to the federal government, a litigant in federal court defending a federal question claim should be able to assert the same constitutional protection against litigation in an inconvenient forum as he can in state court."); Stephens, *The Federal Court Across the Street: Constitutional Limits on Federal Court Assertions of Personal Jurisdiction*, 18 U. RICH. L. REV. 697, 719-22 (1984) (advocating the adoption of a forum reasonableness test in the federal system that would consider forum contacts and efficiency concerns as well as fairness to the defendant).

The courts are divided as well. *Compare* Driver v. Helms, 577 F.2d 147, 156-57 (1st Cir. 1978) (limits of territorial jurisdiction are within congressional discretion), *rev'd on other grounds sub. nom.* Stafford v. Briggs, 444 U.S. 527 (1980), *with* Oxford First Corp. v. PNC Liquidating Corp., 372 F. Supp. 191, 198-204 (E.D. Pa. 1974) (a fifth amendment fairness standard limits service of process under federal statutes such as the Securities Act).

Federal courts have recognized nationwide jurisdiction in federal question cases where Congress has provided for such jurisdiction. *See, e.g.*, Mariash v. Morrill, 496 F.2d 1138 (2d Cir. 1974). However, no general standard of nationwide jurisdiction has been recognized. Some rationale exists for a different federal approach to personal jurisdiction. Certainly concerns of state sovereignty are not at issue when a federal court exercises federal question jurisdiction over private parties. Sovereignty concerns which have played a role in the analysis of state court exercise of jurisdiction might not affect the question of a federal court's exercise of in personam jurisdiction. *See* World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286, 292 (1980) ("[The concept of minimum contacts] acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system."). In addition, as a national court system, the federal courts may have some duty to provide a forum for litigation which might not exist because of personal jurisdictional concerns of state courts. However, the fairness concerns do not appreciably change when the forum is federal rather than state. One commentator has even suggested that some federal statutes conferring nationwide jurisdiction are unconstitutional because of the fairness concerns. Fullerton, *supra*, at 5-6.

that defendant must have had minimum contacts with the forum.[119]

As the doctrine has developed, personal jurisdiction has come to involve not only an inquiry into the territorial power of the sovereign, but also the protection of the defendant's individual due process interests in avoiding unduly burdensome litigation in a distant forum.[120] The concept of minimum contacts was formulated, in part, to protect the due process rights of defendants and refers to "the quality and nature of the [defendant's] activity [in the forum jurisdiction] in relation to the fair and orderly administration of the laws."[121] Recently, the Supreme Court, in *Phillips Petroleum Co. v. Shutts*,[122] considered whether a court must obtain personal jurisdiction over absent members of a plaintiff class action. In reaching its decision that personal jurisdiction was not necessary, the Court explained that the purpose of the minimum contacts test is "to protect a defendant from the travail of defending in a distant forum unless the defendant's contacts with the forum make it just to force him to defend there."[123] The Court in *Shutts* and in its other personal jurisdiction decisions has emphasized that the question is whether the defendant purposefully availed himself of the privileges of the forum state such that he could reasonably anticipate the possibility of being sued there.[124] In *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,[125] the Court underscored the individual rights aspect of personal jurisdiction when it explained: "The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."[126] Furthermore, the Court

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119. This concept has been developed in International Shoe Co. v. Washington, 326 U.S. 310 (1945), and its progeny. *International Shoe* dealt with the power of a state court to exercise jurisdiction over non-resident defendants.

120. *See* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1067 (2d ed. 1985).

121. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 806-07 (1985) (quoting *International Shoe*, 326 U.S. at 319).

122. 472 U.S. at 797.

123. *Id.* at 807.

124. *Id;* Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Hanson v. Denckla, 357 U.S. 235 (1958).

125. 456 U.S. 694 (1982).

126. *Id.* at 702. In the footnote accompanying this text, the Court explained: "The restriction on state sovereign power described in *World-Wide Volkswagon Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by

concluded that the contacts which give rise to jurisdiction must be the result of the defendant's conduct and not the unilateral acts of the plaintiff.[127] These concerns with the fairness to defendants, so pervasive in the law of personal jurisdiction, do not disappear when the forum is federal court rather than state court.[128]

On the surface, the commonly stated policies of personal jurisdiction appear to be served if a court in a defendant class action obtains jurisdiction over only the named defendants. Since only the named parties are actually required to appear and defend, no due process burden is placed on the absent parties. Thus, arguably, the plaintiff's interest in effective relief and the judicial system's interest in efficient resolution of controversy should prevail and personal jurisdiction and venue should be required only for the named defendants.[129]

Closer analysis indicates the fallacies of this reasoning. The absent defendant may eventually be subjected to the remedial power of the court if judgment is entered against the class. That judgment could consist of onerous injunctive relief or monetary relief in the form of damages or restitution.[130] Although the class representative may litigate the substantive issues for the absent parties, the class representative cannot respond to the judgment on behalf of those parties. Even before judgment, an absent defendant could be forced to respond to discovery in the distant forum.[131] The only ways for defendants to protect themselves

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the Due Process Clause." *Id.* at 702-03 n.10 (citing World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286, 291-92 (1980)).

127. *Burger King Corp.*, 471 U.S. at 474-75; *World-Wide Volkswagon*, 444 U.S. at 297; Hanson v. Denckla, 357 U.S. at 253.

128. *See* Miller & Crump, *supra* note 90, at 29-31 and materials cited therein. Professors Miller and Crump conclude that "[t]he disadvantages of distant forum abuse are not mitigated by the forum's federal rather than state character." *Id.* at 31.

129. Although few courts have addressed the issue, this seems to be the common resolution of the problem. *See, e.g.*, United States v. Trucking Employers, Inc., 72 F.R.D. 98, 99-100 (D.D.C. 1976) ("The class action thus stands as the outstanding exception to the general rule that one is not bound by a judgment *in personam* in litigation to which he/she has not been made a party by service of process."); Richardson v. Kelly, 144 Tex. 497, 191 S.W.2d 857 (1945) (majority bound defendants to personal liability without in personam jurisdiction); Parsons & Starr, *supra* note 4, at 889 ("in personam jurisdiction over all class members is not mandatory").

130. Ives v. W. T. Grant Co., 522 F.2d 749 (2d Cir. 1975).

131. *See* Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978):

> While it is true that discovery against absentee class members under Rules 33 and 34 cannot be had as a matter of course, the overwhelming majority of courts which have considered the scope of discovery against absentees have

against such actions are by either opting out of the class (which is not available in (b)(1) and (2) actions) or intervening. The price of intervention, when permitted, is the waiver of lack of personal jurisdiction.[132] Such hapless defendants must travel to a distant forum, where they did not either reasonably anticipate litigating or purposefully avail themselves of privileges. A unilateral act of the plaintiff in bringing the action should not be permitted to subject such defendants to jurisdiction.

2. Venue

In addition to the fairness concerns raised by the failure to obtain personal jurisdiction over absent members of a defendant class, the failure to obtain complete venue over absent defendant class members may also raise constitutional concerns.[133] Although venue is most commonly viewed as an administrative vehicle to allocate the business of the federal courts, both courts and commentators have recognized that venue also acts to protect individual liberty interests of defendants.[134] Some of the concerns behind venue are the same as those behind personal jurisdiction, that is, protecting parties from unreasonable or fundamentally unfair exercises of judicial power.[135] Professor Clermont has characterized this requirement, comprised of both traditional venue and personal jurisdiction concerns, as "forum reasonableness."[136]

3. Choice of law

Choice of law questions also raise due process concerns in the context of defendant class actions. The unique constitutional

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concluded that such discovery is available, at least when the information requested is relevant to the decision of common questions, when the interrogatories or document requests are tendered in good faith and are not unduly burdensome, and when the information is not available from the representative parties.

Id. at 187; *see also* Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999 (7th Cir.), *cert. denied*, 405 U.S. 921 (1971); M. Berenson Co. v. Faneuil Hall Marketplace, Inc., 103 F.R.D. 635 (D. Mass. 1984).

132. *See supra* note 115 and accompanying text.

133. United States v. Trucking Employers, Inc., 72 F.R.D. 98, 100 (D.D.C. 1976).

134. *See, e.g.*, Adams v. Bell, 711 F.2d 161, 167 n.34 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1021 (1984); Clermont, *supra* note 118, at 411.

135. This comparison has led some scholars to suggest that personal jurisdiction concerns should be subsumed into a venue inquiry in federal litigation. *See* Clermont, *supra* note 118, at 435 n.117, 437-41.

136. *Id.* at 437.

problems with choice of law in defendant class actions arise because, in some instances, no party to the class litigation will be in a position to raise and litigate the choice of law issues available to absent class members.

In *Allstate Insurance Co. v. Hague*,[137] the Court reasoned that, "for a state's substantive law to be selected in a constitutionally permissible manner, that state must have a significant contact or aggregation of contacts, creating state interests, such that the choice of law is neither arbitrary or unfair."[138] Later in *Phillips Petroleum Co. v. Shutts*, a plaintiff class action, the Court relied on *Allstate* and held that the Kansas court impermissibly applied Kansas law to the disposition of claims of absent plaintiff class members who had no connection with Kansas.[139] The Court reasoned:

> When considering fairness in this context, an important element is the expectation of the parties . . . . There is no indication that . . . the parties had any idea that Kansas law would control. Neither the Due Process Clause nor the Full Faith and Credit Clause requires Kansas "to substitute for its own [laws], applicable to persons and events within it, the conflicting statute of another state," . . . but Kansas "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them."[140]

In *Shutts*, the party opposing the class, the defendant, was allowed to raise and litigate the choice of law question.[141] Since the different law which could have applied in *Shutts* significantly reduced the defendant's liability, it had a strong motive to press the issue. Usually, such a motive will be lacking in a defendant class action. For example, when federal courts must borrow state statutes of limitations, individual choice of law questions arise.[142] In such cases, the plaintiffs have presumably

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137. 449 U.S. 302 (1981). For general discussions of the constitutional ramifications of choice of law questions, see Shreve, *Interest Analysis as Constitutional Law*, 48 OHIO ST. L.J. 51 (1987); Hay, *Judicial Jurisdiction and Choice of Law: Constitutional Limitations*, 59 COLO. L. REV. 9 (1988).

138. *Allstate*, 449 U. S. at 312-13.

139. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 823 (1985).

140. *Id.* at 822 (quoting Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 502 (1939) and Home Ins. Co. v. Dick, 281 U.S. 397, 410 (1930)).

141. *Shutts*, 472 U.S. at 803-06.

142. For example, courts regularly borrow a state statute of limitations under the Civil Rights Act of 1871, 42 U.S.C. §§ 1981, 1983, 1985 (1988). For a general discussion of the inconsistencies that result from federal borrowing of state statute of limitations, see Comment, *A Functional Approach to Borrowing Limitations Periods for Federal Stat-*

selected a forum favorable to pursuing their claims and defendant class representatives who cannot raise (or will not benefit from raising) adverse choice of law issues. Unlike the defendant in *Shutts*, who had a motive to argue the choice of law issue because its liability to individual members of the plaintiff class depended on which state law applied, the named defendant would not typically have this same motive in the example above. The same statute of limitations will apply to the named defendant in the example no matter which state's law applies to the claims of the absent members of the defendant class. Consequently, the possibility of applying a forum law in violation of the due process interests of the absent members of the defendant class arises.

III. RULE 82

The certification of defendant class actions against absent defendants who could not be brought within the jurisdiction and venue of the federal court violates Rule 82 of the Federal Rules of Civil Procedure. Although the scope and application of Rule 82 have not been well defined, Rule 82 was intended to address and resolve the type of jurisdictional problems that arise in defendant class actions.

Rule 82 states: "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."[143] The Advisory Committee for the original draft of the rule recognized that the broadened procedural devices for pursuing multiple party actions were not intended to extend federal jurisdiction. The Notes of the Advisory Committee provide: "These rules grant extensive power of joining claims and counterclaims in one action, but, as this rule [82] states, such grant does not extend federal jurisdiction."[144]

Rule 82 does not appear to express limitations required by the Rules Enabling Act[145] or place any limit on the court's abil-

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utes, 77 CALIF. L. REV. 133 (1989).

143. FED. R. CIV. P. 82.

144. FED. R. CIV. P. 82 notes of advisory committee on rules.

145. 28 U.S.C. § 2072 (1988). The Rules Enabling Act authorized the Supreme Court to "prescribe by general rules, the forms of process, writs, pleadings and motions, and the practice and procedure [of the Federal Courts]." This grant of rule-making power is subject to Congressional veto. In addition, section 2072 provides: "Such rules shall not abridge, enlarge or modify any substantive right . . . ."

See generally Goldberg, *The Influence of Procedural Rules on Federal Jurisdiction*, 28 STAN. L. REV. 395, 431-43 (1976). Professor Goldberg, in discussing whether Rule 82

ity to interpret, reconsider, and expand jurisdictional tests such a minimum contacts. Rather, Rule 82 is a limitation on the courts' ability to indirectly expand jurisdiction by inferring such jurisdictional expansion from a particular interpretation of the Federal Rules of Civil Procedure.[146] Rule 82 does express a policy that expansion of jurisdiction take place with direct reference to jurisdictional tests and policies rather than through the indirect method of interpreting the Federal Rules of Civil Procedure.

The most direct applications of Rule 82 have arisen in the class action area, in *Snyder v. Harris*[147] and *Zahn v. International Paper Co.*[148] *Snyder* and *Zahn* both involved the interaction between Rule 23 and the then existing jurisdictional amount requirement for diversity jurisdiction. In *Snyder*, the Court refused to permit aggregation of the class members' claims to obtain jurisdiction. The Court suggested that such a change in the interpretation of the "matter in controversy"[149] could not be inferred from Rule 23 because of the limits of Rule 82.[150] The class action rule was not intended to directly expand subject matter jurisdiction, and, pursuant to Rule 82, the Court was proscribed from interpreting the class action rule to have the effect of expanding subject matter jurisdiction. Likewise, in *Zahn* the Court relied on the same reasoning as *Snyder* to hold that every class member must have claims totalling more than the jurisdictional amount.[151]

In contrast, Professor Moore asserts that the word "jurisdiction" in Rule 82 refers to subject matter jurisdiction but not to

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constitutes a limitation on the rule-making authority of the courts, points out that the Supreme Court has held that rules affecting jurisdiction are permissible under the Rules Enabling Act. *See, e.g.*, Mississippi Publishing Corp. v. Murphree, 326 U.S. 438 (1946).

146. *Cf.* Goldberg, *supra* note 145, at 441-43. Goldberg suggests that Rule 82 should be interpreted as a rule of judicial self-restraint which should only be applied when the effect on jurisdiction of the federal rules does not have an independent procedural justification. In contrast to the position expressed in this article, Goldberg would therefore permit indirect expansions of jurisdiction through the federal rules except where there is no procedural justification for the rule and it is a mere pretext for jurisdictional change.

147. 394 U.S. 332 (1969).

148. 414 U.S. 291 (1973).

149. 28 U.S.C. § 1332 (1988). A court may exercise diversity jurisdiction only "where the matter in controversy exceeds the sum or value of $50,000." *Id.*

150. 394 U.S. at 341 ("Nor can we overlook the fact that the Congress that permitted the Federal Rules to go into effect was assured before doing so that none of the Rules would either expand or contract the jurisdiction of federal courts.").

151. 414 U.S. at 296-301.

personal jurisdiction.[152] His argument is based on the Supreme Court's decision in *Mississippi Publishing Corp. v. Murphree*.[153] In *Murphree*, the Court held that the provisions of Rule 4(f) which extended the territorial limits for service of process did not violate the Rules Enabling Act's limitation that the Federal Rules of Civil Procedure could not "abridge, enlarge or modify any substantive right."[154] In reaching this conclusion, the Court reasoned that Rule 82 applied to subject matter jurisdiction and venue, and that Rule 4 and Rule 82 must be construed together with respect to personal jurisdiction. In the context of its consideration, the Court stated that "the Advisory Committee . . . has treated Rule 82 as referring to . . . [subject matter jurisdiction and venue] rather than the means of bringing the defendant before the court . . . ."[155]

This reasoning, that Rule 82 does not apply to personal jurisdiction, seems flawed. First, it is possible to read Rule 4 and Rule 82 together and still hold that Rule 82 refers to personal jurisdiction. Rule 82 is not a limitation on the rule-making power of the court.[156] Its language does not track the substance/procedure distinction set forth in the Rules Enabling Act. Thus, Rule 82 is not a limit on the court's ability to interpret and modify its own approach to jurisdiction.[157] Instead, Rule 82 seems to express a preference that such interpretations and modifications of jurisdiction be accomplished with direct reference to jurisdictional policies and doctrines and not through inference from the existence of certain non-jurisdictional provisions in the Federal Rules of Civil Procedure.

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152. 7 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 82.02 (2d ed. 1990).

153. 326 U.S. 438 (1946).

154. 28 U.S.C. § 2072 (1988).

155. 326 U.S. at 445.

156. The question of whether Rule 82 is required by the Rules Enabling Act is still open. The most thorough and thoughtful treatment of the subject is Professor Goldberg's article. *See* Goldberg, *supra* note 145, at 432-37. She reviews the inconclusive history of both Rule 82 and the Enabling Act. Finding little help there, she reasons that, if the question of subject matter jurisdiction is procedural in nature, Rule 82 is not required by the Enabling Act since the Act only precludes the Court from adopting rules that are substantive. Goldberg analyzes all the tests for distinguishing substance from procedure and concludes that under each of them the question of subject matter jurisdiction is procedural in nature. Consequently, she concludes that Rule 82 is not required by the Enabling Act.

157. For example, the Court's activity in the areas of ancillary and pendant jurisdiction stands as evidence that the Rules do not constitute an affirmative limitation on the Court's ability to reinterpret jurisdictional tests. *See, e.g.*, United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

These policies of restraint and direct consideration of jurisdictional tests have influence in the area of defendant class actions. They mean either that a class action can be maintained only against defendants over whom the court could exercise jurisdiction and venue in a non-class action suit or that, in order to maintain such a class action, consideration must be given directly to the jurisdictional and venue tests and the tests must be evaluated on their own merits. Jurisdictional expansion cannot be an indirect side effect of class certification. This is especially true when the troubling aspects of defendant class actions are considered. As defendant class actions are presently being certified, plaintiffs are able to sue absent members of a defendant class whom they could not sue outside the class action context because either personal jurisdiction or venue would be improper.[158] Permitting an action to be maintained under the class action rule when an individual action could not be maintained results in a broadening of the tests for jurisdiction and venue.[159] Actions are maintained against defendants who did not have minimum contacts with the jurisdiction, and they are maintained in jurisdictions where neither all plaintiffs nor all defendants reside. These actions are being maintained without any reference to the underlying policies behind the jurisdiction and venue limitations that are being broadened, but instead are certified with sole reference to the provisions of the class action rule. The actions are supported by policies and doctrine regarding the utility of class actions rather than by consideration of the policies and doctrine which govern expansion of jurisdiction. This result seems exactly the situation that Rule 82 was intended to prohibit.

IV. Judicial Limitation of Defendant Class Actions

The difficulties in protecting the rights of absent class de-

158. One court has held that Rule 82 precludes maintenance of a class action where venue was improper as to absent members of the class. *See* Sperberg v. Firestone Tire & Rubber Co., 61 F.R.D. 70 (N.D. Ohio 1973). However, most courts have concluded that neither venue nor personal jurisdiction need be obtained over absent members of a defendant class. *See* United States v. Trucking Employers, Inc., 72 F.R.D. 98, 100 (D.D.C. 1976) (venue not required for absent defendant class members) and cases cited therein; *supra* note 129 (cases and commentators suggesting that personal jurisdiction is not required over absent defendant class members).

159. *Contra Trucking Employers*, 72 F.R.D. at 100 (failing to obtain venue over absent members of a defendant class does not violate Rule 82 because the issue was settled prior to the adoption of the federal rules).

fendants have not gone unnoticed by the courts. Recently, the Third, Fourth, Fifth, Sixth and Seventh Circuits have severely limited the applicability of Rule 23(b)(2) to defendant classes.[160] These circuits have effectively restricted the number of defendant actions being certified since most defendant classes are certified under Rule 23(b)(2) because of the limited applicability of Rule 23(b)(1)[161] and the problems with the "opt out" provisions accompanying Rule 23(b)(3).[162]

The courts limiting the applicability of Rule 23(b)(2) have focused on the awkwardness of applying the language of the rule to defendant classes. This reasoning is summarized by the Fourth Circuit in *Paxman v. Campbell*:

> As is clear from the language of the rule, it is applicable to situations in which a class of plaintiffs seeks injunctive relief against a single defendant—the *party* opposing the class—who has acted on grounds generally applicable to the plaintiff class. To proceed under 23 (b)(2) against a class of defendants would constitute the plaintiffs as "the party opposing the class," and would create the anomalous situation in which the plaintiffs' own actions or inactions could make injunctive relief against the defendants appropriate.[163]

Courts adopting this position ignore several important arguments. First, although the language of 23(b)(2) is admittedly awkward when applied to defendant class actions, support for the maintenance of defendant class actions exists in the language of Rule 23 itself, which provides that a party may "sue or

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160. Henson v. East Lincoln Township, 814 F.2d 410 (7th Cir.), *cert. granted*, 484 U.S. 923 (1987), *further proceedings deferred*, 484 U.S. 1057 (1988); Thompson v. Board of Educ., 709 F.2d 1200 (6th Cir. 1983); Paxman v. Campbell, 612 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1129 (1981); Coleman v. McLaren, 98 F.R.D. 638, 652 (N.D. Ill. 1983); Stewart v. Winter, 87 F.R.D. 760, 770 (N.D. Miss. 1980), *aff'd*, 669 F.2d 328 (5th Cir. 1982); Gibbs v. Titelman, 369 F. Supp. 38, 53 (E.D. Pa. 1973), *rev'd on other grounds*, 502 F.2d 1107 (3d Cir. 1974). *But see* Bazemore v. Friday, 751 F.2d 662, 669-70 (4th Cir. 1984), *aff'd in part vacated in part on other grounds*, 478 U.S. 385 (1986); Marcera v. Chinlund, 595 F.2d 1231, 1238 (2d Cir.), *vacated on other grounds, sub. nom.* Lombard v. Marcera, 442 U.S. 915 (1979); *Henson*, 814 F.2d at 417-21 (Campbell, J., dissenting). Even Courts limiting the applicability of 23(b)(2) to defendant classes have noted that certain types of (b)(2) defendant actions should be maintainable, such as a declaratory judgment where the real plaintiffs are in the position of defendants, *Henson*, 814 F.2d at 414, or where a class of defendants acts in concert, *Thompson*, 709 F.2d at 1204; *Paxman*, 612 F.2d at 854, n.9.

161. *See supra* note 80.

162. *Henson*, 814 F.2d at 412-13; Comment, *supra* note 4, 33 UCLA L. REV. at 306-17.

163. 612 F.2d at 854 (citations omitted).

be sued."[164] Nevertheless, in *Henson v. East Lincoln Township*, Judge Posner suggests that the language, "sue or be sued as representative parties", found in Rule 23(a) does not authorize defendant classes in all types of Rule 23 actions.[165] This conclusion is inconsistent with the bulk of class action authority which requires that all the prerequisites of Rule 23(a) be met for each of the 23(b) actions.[166] Like the four prerequisites enumerated in Rule 23(a), the language "sue or be sued" is obligatory, descriptive language that applies equally to all three types of 23(b) actions. Strictly applying some of the language of Rule 23(a) to all sections of 23(b) and selectively applying other language would be anomalous absent some express authority to do so.[167]

However, even if the language of Rule 23(a) is not interpreted as requiring defendant classes, the particular language of Rule 23(b)(2) permits such actions. If defendant class actions were not intended by Rule 23's drafters to be within the purview of 23(b)(2), the use of the circuitous phrase "party opposing the class" cannot be explained since the single word "defendant" would have best expressed the intention of the drafters.[168]

In addition to the express language of the Rule, defendant class actions historically have been permitted under the Equity Rules and then more recently under the Federal Rules of Civil Procedure.[169] Finally, defendant class actions serve policy goals of judicial efficiency and the enforcement of legislative and constitutional norms.[170]

The emerging conflict over the interpretation of Rule 23(b)(2) is illustrative of a deeper problem than simply the lan-

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164. *See supra* note 1.

165. 814 F.2d at 412.

166. *See, e.g.*, Lawson v. Wainwright, 108 F.R.D. 450, 453 (S.D. Fla. 1986) ("Under 23(b)(2), Plaintiff is required to demonstrate the fulfillment of the prerequisites enumerated in Fed. R. Civ. P. 23(a).").

167. With the exception of *Henson* and its progeny, no reported class action case under any of the three 23(b) provisions even suggests that 23(a) does not apply equally to each type of class action.

168. This argument is advanced thoroughly in Comment, *supra* note 3, at 1377.

169. *Id.* at 1380-83. The writer points out that under English chancery practice and later in America, defendant class actions were permitted. The rationales supporting this early group litigation were rooted in the desire to obtain efficient resolution of controversies and the need to provide a forum for the redress of certain types of claims. *Contra* Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 869-70 (1977) (arguing that the early representational suits were more like consensual settlement processes than the modern class action and were not a method of controlling transaction costs).

170. Comment, *supra* note 3, at 1378-80.

guage of Rule 23(b)(2). The cases questioning the rule did not emerge until the late 1970's, over ten years after its adoption and, according to *Henson*, after litigation in at least 45 cases.[171] Instead, the courts that have refused to certify (b)(2) defendant class actions have expressed a deeper conviction that such actions are inherently unfair to the absent defendants. The lower court in *Henson*, denying defendant class certification under Rule 23(b)(2), concluded: "In addition to going beyond the express language of the rule, defendant classes present a greater potential for violating the due process rights of absent class members than a plaintiff class action. Because of this, it would be improper to expand (b)(2) beyond its express provisions."[172]

Although clarification of the language of 23(b)(2) is certainly called for, clarification would not resolve the more troublesome aspects of defendant class actions raised in this article. Indeed, even if 23(b)(2) is held conclusively not to apply to defendant classes, the due process concerns will continue to exist, albeit to a lesser extent, in 23(b)(1)[173] actions and in 23(b)(3)[174] actions where actual notice is not provided each absent member of the defendant class.[175]

V. SOLUTION

In order to protect the due process rights of absent defendant class members, Rule 23 should be revised in two respects. First Rule 23 should ensure that absent defendants will not be bound by a class judgment unless they receive actual notice of

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171. Henson v. East Lincoln Township, 814 F.2d 410, 413 (7th Cir.), *cert. granted*, 484 U.S. 923 (1987), *further proceedings deferred*, 484 U.S. 1057 (1988). Although the opinion does not say so, these 45 cases appear to include only those that resulted in reported opinions.

172. Henson v. East Lincoln Township, 108 F.R.D. 107, 111 (C.D. Ill. 1985), *aff'd*, 814 F.2d 410 (7th Cir.), *cert. granted*, 484 U.S. 923 (1987), *further proceedings deferred*, 484 U.S. 1057 (1988).

173. Despite its limitations, defendant class actions have been certified under Rule 23(b)(1). *See, e.g., In re* Itel Sec. Litig., 89 F.R.D. 104, 126 (N.D. Cal. 1981); Technograph Printed Circuits v. Methode Elecs., 285 F. Supp. 714 (N.D. Ill. 1968).

174. Although the "opt out" provisions accompanying 23(b)(3) actions may reduce the utility of such a defendant class action, several defendant class actions have been certified under Rule 23(b)(3). *See, e.g.*, Appleton Elec. Co. v. Advance-United Expressways, 494 F.2d 126 (7th Cir. 1974); *In re* Activision Sec. Litig., 621 F. Supp. 415 (N.D. Cal. 1985); Thillens, Inc. v. Community Currency Exch. Ass'n, 97 F.R.D. 668 (N.D. Ill. 1983); *In re* Gap Store Sec. Litig., 79 F.R.D. 283 (N.D. Cal. 1978).

175. *See supra* notes 67-100 and accompanying text. Because FED. R. CIV. P. 23(c)(2) requires only the "best notice practicable under the circumstances," individual or actual notice is not always guaranteed even in 23(b)(3) actions.

the pendency of the action. This protection should be extended so that it applies not only to actions under 23(b)(3) but also to defendant class actions maintained under 23(b)(1) and 23(b)(2). To accomplish this change, Rule 23(c)(2) should be revised as follows:

> (2) In any action maintained under Subdivision (b)(3), *and in any defendant class action regardless of the subdivision under which it is maintained,* the court shall direct to the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. *An absent member of a defendant class shall not be bound by a class action judgment if that member did not receive actual notice of the pendency of the action. In all actions maintained under Subdivision (b)(3)* the notice shall advise each member that (A) . . . .[176]

In addition to providing for actual notice, Rule 23 should also provide members of a defendant class the opportunity to raise and litigate individual defenses which could not be litigated by the class representative; such as lack of personal jurisdiction, improper venue, and choice of law. To accomplish this revision, a new subdivision should be added to Rule 23(c). This new subdivision—Rule 23(c)(5)—should provide:

> (5) *When an action is maintained against a class of defendants, individual members of the class shall be given the opportunity to appear and litigate individual defenses which could not have been raised or litigated by the class representative.*

The effect of these revisions is two-fold. First, they insure that, in order to be bound by a later judgment, the members of a defendant class must receive the same notice of the pending class action against them that they would have received if they had been sued individually. In addition, by preserving unique individual defenses, the revisions ensure that a defendant cannot be bound by a class action judgment under circumstances in which that defendant could not have been individually bound. Thus, the revisions essentially provide a de facto right to opt out of the class for those potential class members whose due process rights would be violated by enforced class litigation. At the same time, the revisions protect the due process interests of absent

176. FED. R. CIV. P. 23(c)(2) (with proposed revisions in italics).

members of a defendant class and preserve the utility of the defendant class action as a potential method of obtaining efficiencies and enforcing judicial and legislative norms.

Two alternative revisions were considered and rejected. The first alternative provided defendants in any of the three types of class actions an unconditional right to opt out of the class. This right to opt out would insure that the interests of the absent defendants are protected because it would render defendant participation in group litigation completely voluntary. However, an unconditional opt out provision would likely defeat the utility of defendant class actions unless there were a reason to expect that defendants would not opt out of the class. Theoretically, the argument can be made that, because substantial benefits may inure from defendant class litigation, absent defendants would have an incentive to voluntarily participate in the class litigation. Particularly in situations where the risk of individual liability is substantial and where the potential liability is significant, the incentive for pooling defense resources might logically lead rational defendants to participate in group litigation.[177] However, defendants have opted out of 23(b)(3) classes in large numbers even in situations where plaintiffs have expressed their intent to individually sue any defendant who opts out of the class.[178] Mass desertion of class litigation has been avoided in situations where the trial judge has resorted to drastic management techniques such as appointing lead counsel and requiring defendants appearing individually to pay lead counsel's fees and appear only through lead counsel.[179] However, these techniques essentially enforce class litigation under the guise of joinder

177. *See, e.g.*, Northwestern Nat'l Bank v. Fox and Co., 102 F.R.D. 507, 515 (S.D.N.Y. 1984) ("Plaintiffs respond that class members have substantial incentives to remain in this litigation and that there is, therefore, no strong likelihood that most class members will choose to opt out. The Court agrees with plaintiffs that under the circumstances of this case, the chances of a substantial number of class members choosing to "opt out" are not sufficiently great to justify denial of class certification.").

178. For example, counsel for the parties in both Thillens, Inc. v. Community Currency Exch. Ass'n, 97 F.R.D. 668 (N.D. Ill. 1983), and *In re* Activision Sec. Litig., 621 F. Supp. 415 (N.D. Cal. 1985), reported to the author in phone conversations that significant numbers of defendant class members opted out of the class. In both cases, counsel for plaintiffs had expressed their intent to join any "opting out" defendant individually and, in fact, did so.

179. Plaintiff's counsel in *Thillens*, 97 F.R.D. at 668, reported that the court minimized the number of defendants opting out of the class by appointing lead counsel for the opting out group, requiring them to pay lead counsel's fees and permitting appearance only through lead counsel.

without even the protections of the present Rule 23. Thus, the experience in 23(b)(3) actions is that defendants have opted out when they have been permitted to do so, and massive joinder of individual defendants has been necessary in order to preserve the utility of the action.

The second alternative considered and rejected was to provide absent members of a defendant class a guaranteed right of intervention. This proposal would permit defense participation in the litigation and would preserve, at least in theory, the utility of a defendant class action. However, traditional intervention would not adequately address the concerns raised earlier in this article. Traditional notions of intervention require that the intervening defendant waive individual defenses such as lack of personal jurisdiction and improper venue by voluntarily appearing and defending in the action.[180] Thus, the intervention approach does not address the Rule 82 problems of the current rule since a plaintiff could still compel a defendant to litigate under circumstances in which, but for the class action device, the defendant could not be forced to litigate. Perhaps more seriously, the intervention proposal would not address the individual due process problems presented by forcing defendants to litigate in a forum where personal jurisdiction cannot be obtained over them, where venue is improper and where they have had no contact with the law applied. To the extent this article has shown that such litigation violates the defendant's due process rights, then the intervention alternative, by failing to address these concerns, is fundamentally inadequate. Finally, permitting wholesale intervention by absent defendants could destroy any efficiencies obtained by class litigation by creating potentially insurmountable manageability problems.

The proposed revisions address the problems raised by the two rejected alternatives by providing only those defendants with a demonstrable due process interest with a right to appear individually and litigate unique individual defenses. Because the proposed revisions limit the appearance of absent defendant class members to defenses that "could not have been" raised by the named defendants, only class members with clearly distinct interests will be able to take advantage of the provision.

The proposed revisions do not change the position of an absent defendant who raises a collateral attack to the enforcement

180. *See supra* note 115 and accompanying text.

of a class action judgment. In fact, by forcing the class action court to provide an opportunity for absent defendants to raise and litigate individual defenses, proposed Rule 23(c)(5) makes it clear that the class action court must have personal jurisdiction over the members of a defendant class and that venue in the class action court must be appropriate as to all members of the defendant class. The clarification places collaterally attacking defendants in the same position as they would have occupied had a default judgment been entered against them in an individual suit. To the extent such a default could be collaterally attacked, so could the class action judgment.

A potential concern raised by proposed Rule 23(c)(5) is that this revision may unreasonably delay disposition of the class issues pending the resolution of individual defenses. The proposed revision purposefully avoids delineating the point in the litigation at which the opportunity to appear and defend must be provided. If postponing the litigation of personal defenses would cause significant harm to absent class members, the court could delay the disposition of class issues pending the appearance of objecting class members. Such a delay, however, would not be required. When substantial damage would not occur if class issues are litigated first, the court could hold hearings on individual class objections after the disposition of class issues.

Rule 23 should clearly provide for the handling of defendant class actions and should address the potential fairness concerns presented by them. The above revision of the rule would accomplish these goals.