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Parallel State and Federal Court Class Actions

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INTRODUCTION

It is generally accepted that one of the fundamental purposes of the class action device is to provide small claimants with a method of obtaining redress for claims that would not warrant individual litigation.[1] These claimants are often unknown to one another and may be geographically dispersed. It is not uncommon, therefore, for parallel[2] class actions to be brought in more than one forum by different attorneys representing different individual plaintiffs.[3] This presents the court in the later filed action with the difficult question of whether to certify the case as a class action. Federal courts, when confronted with a prior pending state court suit already certified as a class action, have generally denied class certification to the federal suit.[4]

The problem of parallel state and federal class actions most often arises in the context of class actions sought to be maintained under Federal Rule of Civil Procedure 23(b)(3).[5] Rule 23(b)(3) di-

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1. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 563 (2d Cir. 1968); Escott v. Barchris Constr. Corp., 340 F.2d 731, 733 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1966). *See* J. M. Woodhull, Inc. v. Addressograph-Multigraph Corp., 62 F.R.D. 58, 61 (S.D. Ohio 1974); Minnesota v. United States Steel Corp., 44 F.R.D. 559, 572 (D. Minn. 1968); Dolgow v. Anderson, 43 F.R.D. 472, 485 (E.D.N.Y. 1968); Advisory Committee Notes to Rule 23, 39 F.R.D. 69, 104.

2. "A suit is 'parallel' when substantially the same parties are contemporaneously litigating substantially the same issues in another forum, thus making it likely that the judgment in one suit will have a res judicata effect in the other suit." Calvert Fire Ins. Co. v. American Mut. Reins. Co., 600 F.2d 1228, 1229 n.1 (7th Cir. 1979).

3. *See* Comment, *Federal Court Stays and Dismissals in Deference to Parallel State Court Proceedings: The Impact of Colorado River*, 44 U. CHI. L. REV. 641, 644 (1977) [hereinafter cited as Comment, *Colorado River*]; *Developments in the Law-Class Actions*, 89 HARV. L. REV. 1318, 1604-1618 (1976).

4. *See* Clark v. Watchie, 513 F.2d 994 (9th Cir.), *cert. denied*, 423 U.S. 841 (1975); Kamm v. California City Dev. Co., 509 F.2d 205 (9th Cir. 1975); Clayton v. Skelly Oil Co., 26 F.R.Serv.2d 317 (S.D.N.Y. 1978). *But see* Kronenberg v. Hotel Governor Clinton, Inc., 41 F.R.D. 42 (S.D.N.Y. 1966); *In re* Transocean Tender Offer Sec. Litigation, 427 F. Supp. 1211 (N.D. Ill. 1977), *on reconsideration*, 455 F. Supp. 999 (N.D. Ill. 1978).

5. Class actions are governed by FED. R. CIV. P. 23. In order to be maintained as a class action, the suit must meet all four prerequisites of Rule 23(a) and fall within one of the subdivisions of Rule 23(b). The class determination is to be made "[a]s soon as practicable after the commencement of an action brought as a class action. . . ." FED. R. CIV. P. 23(c)(1). *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974); Abrams v. Occidental Petroleum Corp., 20 F.R.Serv.2d 170, 177-178 (S.D.N.Y. 1975) (certification denied where

rects the court to consider "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class. . . ."[6] It has been suggested that the extent of litigation already commenced is the most critical of the factors enumerated in Rule 23(b)(3).[7] This factor is particularly important

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consolidated actions pending for nearly eight years); Taub v. Glickman, 14 F.R.Serv.2d 847 (S.D.N.Y. 1970) (certification denied where motion not made until three years after filing of suit). It is difficult to overstate the importance of the motion for class certification to the named plaintiffs, absent class members, defendants, and the court. *See* Miller, *An Overview of Federal Class Actions: Past, Present and Future*, 12-13 (1977) [hereinafter cited as Miller, *Federal Class Actions*]. For an interesting examination of judicial attitudes toward class actions, *see* Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 HARV. L. REV. 664 (1979).

Class actions seeking primarily money damages are usually certified under Rule 23(b)(3). Examples include cases alleging violations of federal securities or antitrust laws, where economies of time, effort, and expense will be achieved by use of the class action device. Advisory Committee Notes to Rule 23, 39 F.R.D. 69, 102-103; J. M. Woodhull, Inc. v. Addressograph-Multigraph Corp., 62 F.R.D. 58, 61 (S.D. Ohio 1974); Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484, 490 (N.D. Ill. 1969). Class actions certified under Rule 23(b)(3) are sometimes referred to as "damage" class actions. *See* Miller, *Federal Class Actions, supra* this note, at 12-13; Bernstein, *Judicial Economy and Class Actions*, 7 J. Legal Studies 349 (1978) (This article is a statistical study of "damage" class actions in the Southern District of New York and the Eastern District of Pennsylvania. The author concludes that class actions are at least as efficient as nonclass actions in terms of judicial time expended per dollar of recovery effected and per dollar's worth of injury recompensed).

Before a class action is certified under Rule 23(b)(3) the court must make two findings. First, it must find that common questions of law or fact predominate over any questions affecting only individual members. Second, it must find that a class action is "superior" to other alternative methods of adjudication. "The superiority requirement is unique to those class actions maintained under Rule 23(b)(3)." Kamm v. California City Dev. Co., 509 F.2d 205, 211 (9th Cir. 1975). It has been suggested that the superiority requirement is the most important one under Rule 23(b)(3). If the superiority requirement is met the other requirements of Rule 23 should be broadly construed in the early stages of the case. Green v. Wolf Corp., 406 F.2d 291, 301 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969). Rule 23(b)(3)(A-D) lists four factors that are pertinent to the findings of predominance and superiority. These four factors are nonexhaustive and do not preclude the court from considering other factors relevant to a determination of predominance and superiority. Advisory Committee Notes to Rule 23, 39 F.R.D. 69, 104; Kamm v. California City Dev. Co., 509 F.2d 205, 212 (9th Cir. 1975); Mitchell v. Texas Gulf Sulphur Co., 446 F.2d 90, 107 (10th Cir. 1971); Clayton v. Skelly Oil Co., 26 F.R.Serv.2d 317, 320 (S.D.N.Y. 1978); Fischer v. Kletz, 41 F.R.D. 377, 385 (S.D.N.Y. 1966). *Cf.* Katz v. Carte Blanche Corp., 496 F.2d 747, 760 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974)(listing points of view from which superiority must be scrutinized); Green v. Wolf Corp., 406 F.2d 291, 301 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969) (relevant question is number of members in proposed class).

6. FED. R. CIV. P. 23(b)(3)(B). This factor is relevant to the issue of whether a class action is superior to other methods of adjudication. *See* 7A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1780 at 69-70 (1972); 3B MOORE'S FEDERAL PRACTICE, ¶ 23.45 at 364 (2d ed. 1980). It is a prominent factor in securities fraud cases. *See* Note, *Class Action Treatment of Securities Fraud Suits Under the Revised Rule 23*, 36 GEO. WASH. L. REV. 1150, 1163 (1968) [hereinafter cited as Note, *Securities Fraud Class Action*].

7. Doninger v. Pac. Northwest Bell, Inc., 564 F.2d 1304, 1314 (9th Cir. 1977) (denial of

where parallel suits sought to be maintained as class actions are pending. A federal court may, for example, be faced with a parallel certified class action, either in another federal court[8] or in a state court.[9] Whatever the stage of the parallel class action, the federal

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class certification held proper where a consent decree had been entered into by defendant in a prior class action); Clayton v. Skelly Oil Co., 26 F.R.Serv.2d 317, 320 (S.D.N.Y. 1978) (class certification denied due to pendency of a parallel class action in a Delaware state court). *See* text accompanying notes 26-34 *infra*.

One of the purposes of the class action device is to avoid multiplicity of litigation, and the absence of other suits is often an important factor in determining that class action treatment is appropriate. *See, e.g.*, Hohmann v. Packard Instrument Co., 399 F.2d 711, 714 n.6 (7th Cir. 1968) (denial of class certification in securities action error where no parallel litigation pending); American Trading & Prod. Corp. v. Fischbach & Moore, Inc., 47 F.R.D. 155, 157 (N.D. Ill. 1969) (class of 1,200 exhibitors at convention certified in action for negligence allegedly causing fire in convention center where no other suits in progress); 7A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1780 at 70 (1972); 3B MOORE'S FEDERAL PRACTICE, ¶ 23.45 at 364-65 (2d ed. 1980).

In general, where other actions have not been commenced, class action treatment is deemed proper. *See, e.g.*, Hohmann v. Packard Instrument Co., 399 F.2d 711 (7th Cir. 1968); American Trading & Prod. Corp. v. Fischbach & Moore, Inc., 47 F.R.D. 15 (N.D. Ill. 1969); Fidelis Corp. v. Litton Indus., Inc., 293 F. Supp. 164, 171 (S.D.N.Y. 1968) (securities class action certified where no other actions had been commenced by members of shareholder class); Siegal v. Chicken Delight, Inc., 271 F. Supp. 722, 725 (N.D. Cal. 1967) (treble damage antitrust action certified where no indication any related litigation had been commenced); Zeigler v. Gibralter Life Ins. Co., 43 F.R.D. 169, 173 (D.S.D. 1967) (securities class action certified where individual claims so small that separate suits would be impracticable). *Cf.* Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 458 (E.D. Pa. 1968) (class action certified where other pending cases all in same district); Fischer v. Kletz, 41 F.R.D. 377, 385 (S.D.N.Y. 1966) (class action certified where actions consolidated in single district). *But cf.* Berley v. Dreyfus & Co., 43 F.R.D. 397, 398-399 (S.D.N.Y. 1967) (if a class of interested litigants is not already in existence the court should not go out of its way to create one).

In contrast, where individual cases have been commenced, class action treatment may be denied. 7A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1780 at 70 (1972); 3B MOORE'S FEDERAL PRACTICE, ¶ 23.45 at 364-65 (2d ed. 1980). *Contra,* Kronenberg v. Hotel Governor Clinton, Inc., 41 F.R.D. 42, 45-46 (S.D.N.Y. 1966). The filing of individual cases indicates a willingness and desire on the part of other class members to bring and control their own actions. Clayton v. Skelly Oil Co., 26 F.R.Serv.2d 317, 321 (S.D.N.Y. 1978); 7A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1780 at 70 (1972); 3B MOORE'S FEDERAL PRACTICE, ¶ 23.45 at 364-65 (2d ed. 1980). *See* Note, *Securities Fraud Class Action, supra* note 6, at 1163. *But see* Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484, 495 (N.D. Ill. 1969) (extensive litigation already commenced indicates need for class action).

8. *See* Doninger v. Pac. Northwest Bell, Inc., 564 F.2d 1304 (9th Cir. 1977); Becker v. Schenley Indus., Inc., 557 F.2d 346 (2d Cir. 1977); Mitchell v. Texas Gulf Sulphur Co., 446 F.2d 90 (10th Cir. 1971); Barkal v. Chas. Pfizer & Co., 51 F.R.D. 504 (S.D.N.Y. 1970); Rosenfield v. Integrated Container Serv. Indus. Corp., 50 F.R.D. 237 (S.D.N.Y. 1970); Utah v. American Pipe & Constr. Co., 49 F.R.D. 17 (C.D. Cal. 1969).

9. *See* Clark v. Watchie, 513 F.2d 994 (9th Cir.), *cert. denied,* 423 U.S. 841 (1975); Kamm v. California City Dev. Co., 509 F.2d 205 (9th Cir. 1975); Clayton v. Skelly Oil Co., 26 F.R.Serv.2d 317 (S.D.N.Y. 1978); *In re* Transocean Tender Offer Sec. Litigation, 427 F. Supp. 1211 (N.D. Ill. 1977). *See* notes 16-34 and accompanying text *infra*.

court must consider its existence when deciding whether to certify the later suit as a class action.

This article will examine the criteria used by federal courts to determine the propriety of granting class action status when a class has been certified in a parallel state suit. It will evaluate these criteria in light of the rules governing the relationship between federal and state courts. Relevant factors that a federal court should consider on a motion for class certification where a state court has already granted class action status to a parallel suit will be examined. This article will suggest that a federal court should not defer to the determination of the state court, but rather should certify a second class action where the claims in the federal suit are within the exclusive jurisdiction of the federal court.

JUDICIAL CONSIDERATION OF PARALLEL CLASS ACTIONS

Parallel Federal Class Actions

Parallel federal class actions are examples of the type of duplicative litigation that the class action device is designed to avoid. Federal courts have discretion to determine whether class action treatment is appropriate,[10] and such determination will not be disturbed unless an abuse of discretion is shown.[11] The burden of proof is on the party seeking class certification to show that a class action may properly be maintained.[12] Where a class action has previously been certified in a parallel federal suit, federal courts in later suits have uniformly exercised their discretion by denying class certification to the later suits.[13]

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10. Califano v. Yamasaki, 422 U.S. 682, 703 (1979); Roman v. ESB, Inc., 550 F.2d 1343, 1348 (4th Cir. 1976); Kamm v. California City Dev. Co., 509 F.2d 205, 210 (9th Cir. 1975); Clark v. South Cent. Bell Tel. Co., 419 F. Supp. 697, 700 (W.D. La. 1976).

11. Doninger v. Pac. Northwest Bell, Inc., 564 F.2d 1304, 1309 (9th Cir. 1977); Clark v. Watchie, 513 F. 2d 994, 1000 (9th Cir.), *cert. denied*, 423 U.S. 841 (1975); Price v. Lucky Stores, Inc., 501 F.2d 1177, 1179 (9th Cir. 1974).

12. *E.g.*, Doninger v. Pac. Northwest Bell, Inc., 564 F.2d 1304, 1308 (9th Cir. 1977); Clayton v. Skelly Oil Co., 26 F.R.Serv.2d 317, 320 (S.D.N.Y. 1978); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 457 (E.D. Pa. 1968). *See generally*, Comment, *Making the Class Determination in Rule 23(b)(3) Class Actions*, 42 FORDHAM L. REV. 791, 798-801 (1974).

13. In Barkal v. Chas. Pfizer & Co., 51 F.R.D. 504 (S.D.N.Y. 1970), 140 treble damage antitrust actions had already been commenced against the same defendants for substantially the same violations of the antitrust laws. Forty-eight of the actions had been brought by states, and 41 of the states accepted a settlement offer, including the state in which the named plaintiff resided. The court, deciding that the plaintiff states would provide more adequate representation for the nonsettling class members, denied plaintiff's motion for class certification.

Denial of class certification is appropriate to avoid duplicative litigation in a number of circumstances. Where the plaintiffs in the later suit do not seek different relief or proceed on theories different from those raised in the earlier suit, class status is typically denied.[14] The denial of class status is also appropriate where the

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In another antitrust suit, Utah v. American Pipe & Constr. Co., 49 F.R.D. 17 (C.D. Cal. 1969), the State of Utah moved to represent a class composed of "every incorporated whistle-stop, hamlet, village, town, city, county, and water and sewer improvement district in Utah, Nevada, Wyoming, and Idaho." *Id.* at 18. Five years before the suit was filed, treble damage actions had been begun by other states "charging exactly the same general antitrust conspiracies. . . ." *Id.* These cases had been certified as class actions and other states, including Utah, were given an invitation to join as plaintiffs. All of the parties to that class action settled, and the cases were dismissed. The court held that the five years of prior litigation on the same facts and the same law was fatal to Utah's class action allegations, and therefore denied certification. *Id.* at 20.

Another case involving the settlement of a prior federal class action is Doninger v. Pac. Northwest Bell, Inc., 564 F.2d 1304 (9th Cir. 1977). This was a sex discrimination suit by female employees who had not accepted a settlement and consent decree in a prior federal class action. The Ninth Circuit affirmed the denial of class certification, reasoning that since prior litigation is often the most critical factor in denying certification under Rule 23(b)(3), the existence of the consent decree was grounds for denial of class certification. *Id.* at 1314.

A prior federal class action may also have reached verdict when a motion for class certification is presented in a subsequent federal suit. Becker v. Schenley Indus., Inc., 557 F.2d 346 (2d Cir. 1977) was an action by minority shareholders of a corporation claiming that a merger proxy statement was false and misleading under federal securities laws. A suit had been previously certified as a class action in the same federal district court whose claim "was virtually identical to the basic claim made in the present case. . . ." *Id.* at 347. Plaintiffs in *Becker* had refused an invitation to intervene in the earlier suit. After trial in the earlier action a verdict was rendered in favor of the defendants. The Second Circuit affirmed the denial of class action status. Since the plaintiffs could have intervened in the earlier suit, the court held that a class action was not a superior method of adjudication. *Id.* at 348-49.

In Mitchell v. Texas Gulf Sulphur Co., 446 F.2d 90 (10th Cir. 1971), plaintiffs brought an action in the District Court for the District of Utah, alleging violations of § 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)) and Rule 10b-5 (17 C.F.R. § 240.10b-5). Ninety-four actions had previously been brought against the same defendants in the Southern District of New York. Two of these actions had been certified as class actions and discovery was well advanced. Further, as the district court's opinion shows, plaintiffs waited to renew two previously denied motions for class certification until after a judgment had been rendered in their favor. Reynolds v. Texas Gulf Sulphur Co., 309 F. Supp. 566, 568 (D. Utah 1970). The denial of class certification was affirmed by the Tenth Circuit. 446 F.2d 90 (10th Cir. 1971).

But see Rosenfield v. Integrated Container Serv. Indus. Corp., 50 F.R.D. 237 (S.D.N.Y. 1970), discussed at note 14 *infra*.

14. *See* cases discussed at note 13 *supra*. *But see* Rosenfield v. Integrated Container Serv. Indus. Corp., 50 F.R.D. 237 (S.D.N.Y. 1970). This case was an action for damages from alleged misrepresentations in a prospectus. Plaintiffs claimed violations of the Securities Act of 1933, § 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5. Defendants opposed class certification on the ground that a parallel suit had already been certified as a class action in the same federal district court. The court, however, did not consider the pendency of a parallel case to be dispositive. The plaintiffs in *Rosenfield* alleged representa-

only benefit of certification of a second class action is attorneys' fees for counsel in the second suit.[15] Finally, where the class would gain no additional benefits if a second class action were certified and the defendants would be forced to bear the burden of defending a second suit and risking inconsistent adjudications, class certification should be denied.

Parallel State and Federal Class Actions

The problems faced by courts where parallel state and federal class actions exist are more complex. Where only parallel federal class actions are involved, consolidation and transfer of actions to a single district are alternative procedures to class certification. These procedures are not available, however, where parallel actions are pending in a federal and state court. In three cases, federal courts have denied class certification in deference to a parallel state court class action.

In *Kamm v. California City Development Co.*,[16] investors sued promoters of a desert land promotion scheme, alleging violations of § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, violations of certain California statutes, and asserted common law claims of fraud and breach of trust. The Ninth Circuit affirmed the district court's order dismissing the class action and struck the class allegations from the complaint. The basis of the dismissal was a prior state court action instituted by the California Attorney General and Real Estate Commissioner. This suit was brought against certain of the same defendants for deceptive trade practices arising out of the same desert land scheme. A judgment was entered on a settlement agreement, and the state court expressly retained continuing jurisdiction over the action. Plaintiffs in the federal suit were individuals who had not accepted the settlement

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tions not alleged in the parallel suit. "The class should have the benefit of all alleged misrepresentations." *Id.* at 238. The *Rosenfield* class also included more purchasers than did the parallel suit. Further, the court questioned the adequacy of the representation in the parallel suit. The court concluded that the burdens of "double discovery, double preparation, and duplicate trials" could be avoided by consolidation of the two class actions. *Id.* at 239.

15. *See* Comment, *Colorado River*, *supra* note 3, at 673. For a discussion of the incentive the prospect of substantial attorneys' fees plays in encouraging the bringing of class actions, *see* Katz v. Carte Blanche Corp., 496 F.2d 747, 761 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974); Dolgow v. Anderson, 43 F.R.D. 472, 494 (E.D.N.Y. 1968). *See generally*, Mowrey, *Attorney Fees in Securities Class Action and Derivative Suits*, 34 J. CORP. LAW 267, 269-70 (1977).

16. 509 F.2d 205 (9th Cir. 1975).

offer. They sought to represent more investors than were covered by the settlement agreement and also sought a greater measure of damages.[17]

The Ninth Circuit articulated several factors other than those found in Rule 23(b)(3) to support the district court's denial of class certification.[18] These factors included: duplication of judicial time; significant relief had been realized in the state court; the state court retained continuing jurisdiction; no member of the class was barred from instituting an individual action; the individual claims of the federal plaintiffs were still viable; and a class action would prove costly to the defendants.[19] Although the federal suit alleged violations of state and federal statutes not relied upon in the state suit, the court did not consider this significant. Instead, the Ninth Circuit stressed that both actions involved the same fraudulent conduct of the defendants.[20]

In *Clark v. Watchie*,[21] the Ninth Circuit was once again confronted with parallel state and federal class actions. The state and federal actions were filed on the same day by the same plaintiffs against the same defendants. Both suits arose out of the sale to the public of limited partnerships in a land syndicate. The state suit alleged breach of fiduciary duty by mismanagement of partnership affairs. The federal complaint alleged violation of section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. The state suit was the first to reach trial and resulted in a finding that defendants had acted in good faith, but were still guilty of mismanagement. Judgment was entered for the plaintiffs. Thereafter, the federal district court granted defendants' motion for summary judgment, holding that the state court findings of fact collaterally estopped the plaintiffs from litigating their federal claims. The court also refused to allow the suit to be maintained as a class action.[22]

On appeal, the Ninth Circuit held that res judicata would not bar the 10b-5 claim for two reasons. The court maintained that federal jurisdiction over the claim was exclusive, and a 10b-5 action is a different cause of action from a claim for breach of fiduci-

17. Nothing in the settlement agreement precluded anyone who did not accept the settlement offer from bringing an individual action. *Id.* at 208.

18. *Id.* at 212. *See* note 5 *supra*.

19. *Id.*

20. *Id.* at 213.

21. 513 F. 2d 994 (9th Cir.), *cert. denied*, 423 U.S. 841 (1975).

22. *Id.* at 1000.

ary duty.[23] The district court's application of collateral estoppel was also rejected, since both the factual settings of the two suits and the applicable legal standards were different.[24] Nevertheless, the Ninth Circuit did affirm the denial of class status. In doing so, however, the court did not discuss the appropriate standard to be applied by a federal court where a parallel state class action is pending. The court merely deferred to the district court's determination of the class status question, ruling that the district court had not abused its discretion.[25]

The propriety of granting class certification to a federal suit where a state court class action had previously been certified arose for a third time in *Clayton v. Skelly Oil Co.*[26] Plaintiffs were shareholders of Skelly Oil Co. prior to its merger with its controlling affiliate, Getty Oil Co. Two suits involving the same transaction and the same defendants had previously been filed, one in a federal and one in a state court. The federal suit charged violations of federal securities laws and sought rescission of the merger, or in the alternative, money damages.[27] The state court complainants alleged fraud and breach of fiduciary duties and sought money damages.[28] The plaintiffs in the *Clayton* case also alleged federal securities law violations. It had not progressed beyond the pleadings stage when plaintiffs made a motion for class certification. Class certification was denied on the basis of the pendency of the parallel state and federal actions.[29]

In denying class certification, the *Clayton* court held that a multiplicity of class actions would compromise their function in pro-

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23. *Id.* at 997. Exclusive jurisdiction for claims alleging violations of the Securities Exchange Act of 1934 is vested in the federal courts by 15 U.S.C. § 78aa. Res judicata will only preclude a second suit where the causes of action in the two suits are identical. *See* notes 47-50 *infra* and accompanying text.

24. *Id.* at 998-99. *See* notes 51-57 *infra* and accompanying text.

25. *Id.* at 999-1000.

26. 26 F.R.Serv.2d 317 (S.D.N.Y. 1978). The court stated the issue to be "whether the existence of an antecedent state court litigation based upon the same facts and seeking similar relief therefore, and previously designated as a class action, renders that procedural device inappropriate in the case at bar." *Id.* at 318.

27. This suit was entitled Evmar v. Skelly Oil Co. It was pending in the United States District Court for the Central District of California. Extensive discovery had already taken place in *Evmar* by the time plaintiffs in *Clayton* moved for class certification. *Evmar* was brought as a class action, but class certification was denied due to the pendency of the state court action.

28. This suit, Rosenblatt v. Getty Oil Co., was brought in the Delaware Court of Chancery. Although it was filed after *Evmar, Rosenblatt* was first to be certified as a class action.

29. 26 F.R.Serv.2d 317, 322 (S.D.N.Y. 1978).

moting economy of judicial time and avoiding inconsistent judgments. Formation of a second class would cause repetitious discovery and pose the danger of double recovery.[30] The pendency of related cases indicated the desire of individual members to control their own suits.[31]

The court found it to be immaterial that, unlike the state class action, *Clayton* involved alleged violations of federal securities laws. It reasoned that the allegations of both complaints arose from the same activities of the defendants,[32] and also noted the possibility that certification of the federal action might interfere with the state court proceedings.[33] The court concluded that the two actions were virtually interchangeable, and since class action status had already been granted in the state proceeding, a class procedure was not warranted in the federal action.[34]

Although the courts in *Kamm, Clark,* and *Clayton* articulated different rationales for the denial of class certification, each deferred to the state court's prior grant of class action status in the parallel action. The courts in *Kamm* and *Clayton* focused on the virtual identity of the conduct alleged to have been engaged in by the defendants and the similarity of relief sought in the state and federal courts. The Ninth Circuit in both *Kamm* and *Clark* deferred to the district court's denial of certification. In *Kamm,* the court cited a number of factors justifying the district court's decision.[35] In *Clark,* the court merely held that the district court had not abused its discretion.[36]

In none of these decisions, however, did the courts articulate factors that a district court should consider in determining the propriety of certifying a second class action. Thus, these opinions af-

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30. *Id.* at 321.

31. *Id. But cf.* Kronenberg v. Hotel Governor Clinton, Inc., 41 F.R.D. 42 (S.D.N.Y. 1966). This was an action brought on behalf of holders of securities in the defendant corporation seeking rescission of purchases of the securities and money damages. The complaint alleged violations of § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. Defendants opposed class certification on the ground of three parallel state court actions involving the same issuance of securities. The court certified the class action, stating "the fact that other suits have been begun in the state courts and the desire to protect the interests of members of the class in individually controlling the prosecution of separate actions do not militate against permitting this action to continue as a class action." *Id.* at 45-46 (footnote omitted).

32. 26 F.R.Serv.2d at 321.

33. *Id.*

34. *Id.*

35. 509 F.2d 205, 212 (9th Cir. 1975).

36. 513 F.2d 994, 999-1000 (9th Cir.), *cert. denied,* 423 U.S. 841 (1975).

ford little guidance to future courts that are faced with a similar situation.

PERTINENT FACTORS IN DETERMINING PROPRIETY OF CERTIFYING A SECOND CLASS ACTION

The denial of certification for a class action does not result in the dismissal of the individual claims of the named plaintiffs.[37] Nevertheless, where the claims of individual class members are small, it is highly unlikely that the case will proceed.[38] Where the claims raised in the federal court class action are within the exclusive jurisdiction of the federal court, the absent class members have been left without a forum in which to litigate their federal claims. Therefore, the court's analysis must not be limited to a consideration of the extent of litigation already commenced.

Exclusive Federal Jurisdiction

The complaints in *Kamm, Clark,* and *Clayton* all alleged violations of the Securities Exchange Act of 1934. The Act gives federal district courts exclusive jurisdiction of actions alleging violations thereof.[39] Furthermore, the Act provides that the rights and remedies thereunder are in addition to any others that may exist.[40] This

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37. Kamm v. California City Dev. Co., 509 F.2d 205, 212 (9th Cir. 1975).

38. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974); Dolgow v. Anderson, 43 F.R.D. 472, 485 (E.D.N.Y. 1968). *See* Hohmann v. Packard Instrument Co., 399 F.2d 711, 715 (7th Cir. 1968). *See generally,* Cohen, *"Not Dead But Only Sleeping": The Rejection of the Death Knell Doctrine and The Survival of Class Actions Denied Certification,* 59 B.U.L. REV., 257, 259-60, 291-96 (1979).

If the case does not proceed to judgment as an individual action, however, the plaintiff will not be able to appeal the denial of class certification. In Coopers v. Lybrand & Livesay, 437 U.S. 463 (1978), the Supreme Court held that orders denying class certification were not appealable either as final orders under 28 U.S.C. § 1291 or under the "collateral order doctrine" of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). The court rejected the approach followed in cases such as Eisen v. Carlisle & Jacquelin, 370 F.2d 119, 121 (2d Cir. 1966), *cert. denied,* 386 U.S. 1035 (1967), which had held an order denying class certification appealable because it amounted to a "death knell" for the entire case. *See generally,* Cohen, *supra* this note; Black and Warren, *New Battles in the "Class Struggle" - The Federal Courts Re-examine the Securities Class Action,* 34 BUS. LAW., 455, 466-69 (1979).

39. 15 U.S.C. § 78aa. *See* Will v. Calvert Fire Ins. Co., 437 U.S. 655, 658 (1978); Cotler v. Inter-County Orthopaedic Ass'n, 526 F.2d 537, 540 (3d Cir. 1975); McGough v. First Arlington Nat'l Bank, 519 F.2d 552, 554 (7th Cir. 1975).

40. 15 U.S.C. § 78bb provides, in pertinent part:

> (a) The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of.

raises a serious question as to the propriety of denying class treatment in deference to a parallel state court class action when the plaintiffs in the federal suit bring claims under the Securities Exchange Act of 1934.

This factor was virtually ignored by the courts in *Kamm*[41] and *Clayton*.[42] By focusing only on the conduct of the defendants and the relief sought, the courts concluded that the state and federal actions were the same. The courts considered it unimportant that relief was sought on different theories since both suits arose out of the same set of operative facts.[43]

In contrast, the court in *Clark*[44] was obliged to discuss the relation between the state and federal law claims. There, the defendants contended that the state court judgment barred plaintiffs' federal claims under the doctrines of res judicata and collateral estoppel. The court concluded that res judicata could not apply since a 10b-5 claim is one over which federal courts have exclusive jurisdiction.[45] Collateral estoppel did not apply because the two suits involved different factual and legal issues.[46] In effect, then, although the state law judgment did not bar the federal claims of the individual plaintiffs on res judicata or collateral estoppel grounds it did act as a bar to the federal claims of the absent class members, unless they chose to bring individual suits. Thus, the courts in *Kamm, Clark,* and *Clayton* failed to give proper attention to the fundamental differences between the state and federal claims in denying class certification in the federal action.

Res Judicata and Collateral Estoppel

The dual purpose of res judicata and collateral estoppel is to protect litigants from the burden of relitigating identical issues with the same party or his privies and to promote judicial economy by preventing needless litigation.[47] Res judicata bars a second suit

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See Lincoln Nat'l Bank v. Lampe, 414 F. Supp. 1270, 1279 (N.D. Ill. 1976); Moran v. Paine, Webber, Jackson & Curtis, 279 F. Supp. 573, 577 (W.D. Pa. 1966), *aff'd*, 389 F.2d 242 (3d Cir. 1968).

41. 509 F.2d 205 (9th Cir. 1975).

42. 26 F.R.Serv.2d 317 (S.D.N.Y. 1978).

43. *See* text accompanying notes 18-20, 32-34 *infra*.

44. 513 F.2d 994 (9th Cir.), *cert. denied*, 423 U.S. 841 (1975).

45. *Id.* at 997.

46. *Id.* at 998-99.

47. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979). *See generally*, Einhorn and Gray, *The Preclusive Effect of State Court Determinations in Federal Actions Under the Securities Exchange Act of 1934*, 3 J. CORP. LAW 235 (1978) [hereinafter cited as Einhorn

where a judgment on the merits has been rendered in the first suit involving the same parties or their privies and the same cause of action.[48] The same set of operative facts may, however, give rise to separate causes of action.[49] For example, violation of the Securities Exchange Act of 1934 is a different cause of action from a common law claim of fraud or breach of fiduciary duty, even though they are based on the same set of operative facts.[50] Therefore, res judicata is not available to defendants as a defense to a claim under the Securities Exchange Act of 1934 where the prior suit was based on a state law cause of action.

In contrast, collateral estoppel is applicable where the second case is based on a different cause of action.[51] The judgment in the first suit acts as a bar to relitigating those issues that were actually litigated in the first suit and necessary to its outcome.[52] Collateral estoppel will be applied in a federal court where three conditions

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and Gray]; Vestal, *Tactical Considerations in Securities Litigation: Recent Developments*, 3 J. CORP. LAW 1, 16 (1977) [hereinafter cited as Vestal]; Jacobs, *Affirmative Defenses to Securities Exchange Act Rule 10b-5 Actions*, 61 CORNELL L. REV. 857, 905-08 (1976); Vestal, *Res Judicata/Preclusion By Judgment: The Law Applied in Federal Courts*, 66 MICH. L. REV. 1723 (1968); Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 Stan. L. Rev. 281 (1957) [hereinafter cited as Currie]; Note, *The Collateral Estoppel Effect of Prior State Court Findings in Cases Within Exclusive Federal Jurisdiction*, 91 HARV. L. REV. 1281 (1978) [hereinafter cited as Note, *Collateral Estoppel and Exclusive Federal Jurisdiction*]; Note, *Collateral Estoppel: The Changing Role of the Rule of Mutuality*, 41 MO. L. REV. 521 (1976); Note, *Class Action Judgments and Mutuality of Estoppel*, 43 GEO. WASH. L. REV. 814 (1975) [hereinafter cited as Note, *Mutuality of Estoppel*]; Note, *The Effect of Prior Nonfederal Proceedings on Exclusive Federal Jurisdiction Over Section 10(b) of the Securities Exchange Act of 1934*, 46 N.Y.U. L. REV. 936 (1971) [hereinafter cited as Note, *Effect of Prior Nonfederal Proceedings*]; Note, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determination*, 52 VA. L. REV. 1360 (1967) [hereinafter cited as Note, *Res Judicata and Exclusive Federal Jurisdiction*].

48. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979); Cromwell v. County of Sac, 94 U.S. 351, 352-53 (1876).

49. Kernel Kutter' Inc. v. Fawcett Publications, Inc., 284 F.2d 675, 676 (7th Cir. 1960); Moran v. Paine, Webber, Jackson & Curtis, 279 F. Supp. 573 (W.D. Pa. 1967), *aff'd*, 389 F.2d 242 (3d Cir. 1968).

50. Clark v. Watchie, 513 F.2d 994, 997 (9th Cir.), *cert. denied*, 423 U.S. 841 (1975); Abramson v. Penwood Inv. Corp., 392 F.2d 759, 762 (2d Cir. 1969); Wellington Computer Graphics, Inc. v. Modell, 315 F. Supp. 24, 26 (S.D.N.Y. 1970). *Contra*, Connelly v. Balkwill, 174 F. Supp. 49, 60 (N.D. Ohio 1959), *aff'd*, 279 F.2d 685 (6th Cir. 1960). *See* Note, *Collateral Estoppel and Exclusive Federal Jurisdiction*, *supra* note 47, at 1291-92; Note, *Effect of Prior Nonfederal Proceedings*, *supra* note 47, at 940-47; Note, *Federal-State Relations Under Rule 10b-5 - Procedural Relations*, 23 Sw. L. J. 526, 551 (1969).

51. *E.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979); Cromwell v. County of Sac, 94 U.S. 351, 352-53 (1876). *See* articles cited at note 47 *supra*.

52. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979); Cromwell v. County of Sac, 94 U.S. 351, 352-53 (1876); Clark v. Watchie, 513 F.2d 994, 998 (9th Cir.), *cert. denied*, 423 U.S. 841 (1975).

are met: first, the issue in the prior and present suit are the same; second, the prior suit resulted in a final judgment on the merits; and third, the party against whom the plea of collateral estoppel is being raised was a party or in privity with a party in the prior suit.[53]

Nevertheless, where the second cause of action is based upon a claim within the exclusive jurisdiction of the federal court, it is unclear to what extent collateral estoppel will preclude issues within the federal claim.[54] Initially, it was held that the grant of exclusive jurisdiction implied a total immunity from any prejudgment in a state court.[55] Later cases, however, have not uniformly held to this position. In cases brought under the Securities Exchange Act of 1934, for example, some courts have given collateral estoppel effect to state court findings of fact on state causes of action paralleling the federal claims.[56] Such cases should not be taken, however, to indicate that the older rule is no longer viable. Whether state court findings should have collateral estoppel effect on a claim over which federal courts have exclusive jurisdiction is recognized by a

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53. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971). This was a suit for patent infringement wherein the Court held that a patentee was estopped to assert the validity of a patent that had been declared invalid in a prior federal suit against a different defendant, unless the patentee could show that he did not have full and fair opportunity to litigate the validity of the patent in the prior suit. The Court overruled Triplett v. Lowell, 297 U.S. 638 (1935), which held that a party in a second action could raise the defense of estoppel only if both parties to the second action were bound by the judgment in the first case. Rejecting the mutuality of estoppel doctrine exemplified by Triplett v. Lowell, the court adopted the three part test announced by Justice Traynor in Bernhard v. Bank of America Nat'l Trust & Savings Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942):

> In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?

402 U.S. at 323-24, *quoting* 19 Cal. 2d at 813, 122 P.2d at 895. *See generally*, Currie, *supra* note 47; Note, *Mutuality of Estoppel*, *supra* note 47, at 817-20.

54. *See generally*, Einhorn and Gray, *supra* note 47; Vestal, *supra* note 47, at 1749-50; Block, *Current Critical Points in Stockholder Litigation*, 62 Nw. L. Rev. 181, 197-201 (1967) [hereinafter cited as Block]; Note, *Collateral Estoppel and Exclusive Federal Jurisdiction*, *supra* note 47; Note, *Effect of Prior Nonfederal Proceedings*, *supra* note 47; Note, *Res Judicata and Exclusive Federal Jurisdiction*, *supra* note 47, at 1363-86.

55. *See* Lyons v. Westinghouse Elec. Corp., 222 F.2d 184 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955). *See also* Note, *Collateral Estoppel and Exclusive Federal Jurisdiction*, *supra* note 47, at 1283-85; Note, *Effect of Prior Nonfederal Proceedings*, *supra* note 47, at 955; Note, *Res Judicata and Exclusive Federal Jurisdiction*, *supra* note 47, at 1364-69.

56. *See, e.g.*, Green v. Ancora-Citronelle Corp., 577 F.2d 1380, 1383 (9th Cir. 1978); *In re* Transocean Tender Offer Sec. Litigation, 427 F. Supp. 1211 (N.D. Ill. 1977).

number of courts to be a very difficult question.[57] The issue must be faced, however, when a federal court is confronted with the question of whether to certify a class action where a parallel state class action is pending.

Stay of a Federal Action in Deference to a Parallel State Action

The general rule when parallel in personam actions are pending in state and federal courts is that each court may proceed without reference to the proceedings in the other court.[58] A judgment in one court will be given res judicata effect in the other.[59] The mere potential for conflicting adjudication does not warrant staying the federal action.[60] Courts have, however, exercised their discretion-

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57. *See* Will v. Calvert Fire Ins. Co., 437 U.S. 655, 674 (1978) (Brennan, J. dissenting), *on remand sub. nom.*, Calvert Fire Ins. Co. v. American Mut. Reins. Co., 600 F.2d 1228, 1236 n.18 (7th Cir. 1979); Mach-Tronics, Inc. v. Zirpoli, 316 F.2d 820, 831-33 (9th Cir. 1963); Simon & Schuster, Inc. v. Cove Vitamin & Pharmaceutical, Inc., 211 F. Supp. 72, 74 (S.D.N.Y. 1962).

A good deal of discussion has focused on the purpose of the grant of exclusive jurisdiction to federal courts over claims of violation of the Securities Exchange Act of 1934. In Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978), Justice Brennan argued in his dissent that the grant of exclusive jurisdiction indicates "a legislative desire for the uniform determination of such claims by tribunals expert in the administration of federal laws and sensitive to the national concerns underlying them." *Id.* at 670. He further argued that Congress may have assumed "that the claim would be litigated only in the context of federal-court procedure-a fair assumption when the claim is within exclusive federal jurisdiction. For example, Congress may have thought the liberal federal discovery procedures crucial to the proper determination of the factual disputes underlying the federal claims." *Id.* at 675. *But cf.* Calvert Fire Ins. Co. v. American Mut. Reins. Co., 600 F.2d 1228, 1235-36 n.16 (7th Cir. 1979) ("There was no legislative discussion of sec. 27 prior to its enactment."); *In re* Transocean Tender Offer Sec. Litigation, 427 F. Supp. 1211, 1221 (N.D. Ill. 1977) ("[T]here is nothing in the legislative history of the 1934 Act which indicates a purpose for vesting exclusive jurisdiction in a federal court.)" *See generally,* Einhorn and Gray, *supra* note 47, at 241; Vestal, *supra* note 47, at 4; Block, *supra* note 54, at 198, 201; Note, *Collateral Estoppel and Exclusive Federal Jurisdiction, supra* note 47, at 1281-82; Note, *Effect of Prior Nonfederal Proceedings, supra* note 47, at 936-69.

58. Kline v. Burke Constr. Co., 260 U.S. 226, 230 (1922); *In re* Glenn W. Turner Enterprises Litigation, 521 F. 2d 775, 780 (3d Cir. 1975); Jennings v. Boenning & Co., 482 F.2d 1128, 1132 (3d Cir.), *cert. denied,* 414 U.S. 1025 (1973); PPG Indus., Inc. v. Continental Oil Co., 478 F.2d 674, 677 (5th Cir. 1973); Graziano v. Pennell, 371 F.2d 761, 764 (2d Cir. 1967).

The contrasting rule for in rem actions is that the court whose jurisdiction first attaches retains jurisdiction to the exclusion of all other courts. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 818 (1976); Jennings v. Boenning & Co., 482 F.2d 1128, 1132 (3d Cir.), *cert. denied,* 414 U.S. 1025 (1973); PPG Indus., Inc. v. Continental Oil Co., 478 F.2d 674, 677 (5th Cir. 1973); Mach-Tronics, Inc. v. Zirpoli, 316 F.2d 820, 833 (9th Cir. 1963).

59. PPG Indus., Inc. v. Continental Oil Co., 478 F.2d 674, 682 (5th Cir. 1973).

60. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 816 (1976).

ary power to stay the federal action until termination of the parallel state suit where the jurisdiction of the state and federal courts over the subject matter of the action is concurrent.[61] This limited power to stay the federal suit offers a compromise in the conflict between the obligation of the federal courts to exercise their jurisdiction and the needs of efficient judicial administration.[62]

Factors that courts have considered relevant in deciding whether to stay the federal action include: crowded dockets;[63] the chronological order in which the actions were filed;[64] whether the federal suit was interposed for the purpose of vexatious delay;[65] whether the state action will be dispositive of controlling issues in the federal action;[66] and whether the entire controversy can be resolved in the state forum.[67]

If the remedy sought in the federal proceeding is one over which the federal court has exclusive jurisdiction, federal courts have generally declined to stay proceedings pending resolution of the earlier state action.[68] Many cases have emphasized the obligation

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61. *See* Will v. Calvert Fire Ins. Co., 437 U.S. 655, 663 (1978); Cotler v. Inter-County Orthopaedic Ass'n, 526 F.2d 537, 541 (3d Cir. 1975). *See generally* Note, *Power to Stay Federal Proceedings Pending Termination of Concurrent State Litigation*, 59 YALE L. J. 978, 980-81 (1950) [hereinafter cited as Note, *Power to Stay*].

62. Calvert Fire Ins. Co. v. American Mut. Reins. Co., 600 F.2d 1228, 1236 (7th Cir. 1979).

63. *See* Will v. Calvert Fire Ins. Co., 437 U.S. 655, 665 (1978); Aetna State Bank v. Altheimer, 430 F.2d 750, 755 (7th Cir. 1970); Schiff v. Metzner, 331 F.2d 963, 965 (2d Cir.), *cert. denied*, 379 U.S. 881 (1964). *See also* PPG Indus., Inc. v. Continental Oil Co., 478 F.2d 674, 680 (5th Cir. 1973); Klein v. Walston & Co., 432 F.2d 936, 937 (2d Cir. 1970); Mottolese v. Kaufman, 176 F.2d 301, 303 (2d Cir. 1949).

Aetna was overruled in Calvert Fire Ins. Co. v. Will, 560 F.2d 792 (7th Cir. 1977), *rev'd*, 437 U.S. 655 (1978). For the current status of *Aetna* as law in the Seventh Circuit, *see* Calvert Fire Ins. Co. v. American Mut. Reins. Co., 600 F.2d 1228, 1231 (7th Cir. 1979).

64. *See* PPG Indus., Inc. v. Continental Oil Co., 478 F.2d 674, 683 (5th Cir. 1973); Aetna State Bank v. Altheimer, 430 F.2d 750, 758 (7th Cir. 1970); Mottolese v. Kaufman, 176 F.2d 301, 303 (2d Cir. 1949).

65. *See* Calvert Fire Ins. Co. v. American Mut. Reins. Co., 600 F.2d 1228 (7th Cir. 1979).

66. *See* Klein v. Walston & Co., 432 F.2d 936, 937 (2d Cir. 1970); Mottolese v. Kaufman, 176 F.2d 301, 302 (2d Cir. 1949); Simon & Schuster, Inc. v. Cove Vitamin & Pharmaceutical, Inc., 211 F. Supp. 72, 73 (S.D.N.Y. 1962).

67. *See* McGough v. First Arlington Nat'l Bank, 519 F.2d 552, 556 (7th Cir. 1975); Movielab, Inc. v. Berkey Photo, Inc., 321 F. Supp. 806, 810 (S.D.N.Y. 1970), *aff'd*, 542 F.2d 662 (2d Cir. 1971).

68. *See* Cotler v. Inter-County Orthopaedic Ass'n, 526 F.2d 537, 542 (3d Cir. 1975); Mach-Tronics, Inc. v. Zirpoli, 316 F.2d 820, 823 (9th Cir. 1963); Simon & Schuster, Inc. v. Cove Vitamin & Pharmaceutical, Inc., 211 F. Supp. 72, 74 (S.D.N.Y. 1962). *See generally* Cherner, *Considering the State Court as a Forum for Securities Actions*, 9 CUMBERLAND L. REV. 663, 680-83 (1979) [hereinafter cited as Cherner]; Comment, *Colorado River*, *supra* note 3, at 657. *But see* Klein v. Walston & Co., 432 F.2d 936, 937 (2d Cir. 1970); Aetna State

of federal courts to take jurisdiction of cases properly before them.[69] More than crowded dockets are necessary to justify a federal court's stay of an action over which it has exclusive jurisdiction.[70] Nor is the desire to avoid piecemeal litigation a valid basis for issuing a stay, since only a federal court can decide a matter over which it has exclusive jurisdiction.[71] For this same reason, a stay of the federal action cannot be justified on the ground that state court findings of fact might act as an estoppel in the federal action.[72] The effect of a stay in such a case is to relegate the plaintiff to a state court fact finding and then to return to federal court to litigate both the federal legal issues and the application of federal law to facts found in the state court.[73]

The opinion of the United States Supreme Court in *Colorado*

Bank v. Altheimer, 430 F.2d 750 (7th Cir. 1970).

69. *E.g.*, Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976); Lecor, Inc. v. United States Dist. Court, 502 F.2d 104, 106 (9th Cir. 1974); Mach-Tronics, Inc. v. Zirpoli, 316 F.2d 820, 824 (9th Cir. 1963); Movielab, Inc. v. Berkey Photo, Inc., 321 F. Supp. 806, 811 (S.D.N.Y. 1970), *aff'd*, 452 F.2d 662 (2d Cir. 1971). *See* Comment, *Colorado River*, *supra* note 3, at 646-47.

70. Mach-Tronics, Inc. v. Zirpoli, 316 F.2d 820, 823 (9th Cir. 1963).

71. *See* Calvert Fire Ins. Co. v. Will, 560 F.2d 792, 796 (7th Cir. 1977), *rev'd*, 437 U.S. 655 (1978); Cotler v. Inter-County Orthopaedic Ass'n, 526 F.2d 537, 542 (3d Cir. 1975).

72. Lecor, Inc. v. United States Dist. Court, 502 F.2d 104, 106 (9th Cir. 1974). *See* Mach-Tronics, Inc. v. Zirpoli, 316 F.2d 820, 833 (9th Cir. 1963):

> It would seem to us unthinkable that a federal court having exclusive jurisdiction of a treble damage antitrust suit would tie its own hands by a stay of this kind in order to permit a judge of a state court, without a jury, to make a determination which would rob the federal court of full power to determine all of the fact issues before it.

An even more consequential effect of a stay is that it could, as a practical matter, operate as a dismissal, since a judgment in the state court will be pleaded as res judicata in the federal suit. PPG Indus., Inc. v. Continental Oil Co., 478 F.2d 674, 682 (5th Cir. 1973); *see* Mottolese v. Kaufman, 176 F.2d 301, 302 (2d Cir. 1949). *But see* Will v. Calvert Fire Ins. Co., 437 U.S. 655, 664-65 (1978) (stay not equivalent to dismissal since suit not dismissed and party can urge reconsideration of stay order); Calvert Fire Ins. Co. v. American Mut. Reins. Co., 600 F.2d 1228, 1235 (7th Cir. 1979) (stay not equivalent to dismissal where stay issued after state court had already decided issue that would be pleaded as estoppel in federal suit).

In the class action context, it is likely that a denial of class certification will have the same practical effect as a dismissal. The ability to urge reconsideration of the denial of class status may be more theoretic than real. It is unlikely that, in a class action involving small claimants, the named plaintiffs will continue to litigate their individual claims in the hope that at some later date they may be able to persuade the court to reconsider its determination of the class action question. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974); Dolgow v. Anderson, 43 F.R.D. 472, 485 (E.D.N.Y. 1968).

73. Cotler v. Inter-County Orthopaedic Ass'n, 526 F.2d 537, 542 (3d Cir. 1975). *Cf.* McGough v. First Arlington Nat'l Bank, 519 F.2d 552, 555 (7th Cir. 1975).

River Water Conservation District v. United States[74] is helpful in considering the appropriateness of a stay.[75] In that opinion, the Court discussed the traditional factors justifying abstention[76] and enumerated certain "exceptional circumstances" in which dismissal of the federal suit is appropriate.[77] These factors include: assumption of jurisdiction over a res by the state; avoidance of piecemeal litigation; inconvenience of the federal forum; and the order of initiation of the actions.[78] Of course, no single factor is determinative. A court should weigh the obligation to exercise jurisdiction against the combination of factors counselling against that exercise.[79] A careful study of these considerations is also appropriate when a federal court must decide whether to deny class certification in deference to a parallel state court class action.

Adequacy of Representation in the State Class Action

One of the prerequisites to the maintenance of a class action is that "the representative parties will fairly and adequately protect the interests of the class."[80] Whatever collateral estoppel effect a judgment in a state court class action will have upon a parallel federal court class action will depend, to a large degree, on whether the state court plaintiffs adequately represented the interests of the class.[81] Where the possibility of parallel federal and state court actions exists, the federal court, in deciding the certification issue, must not only ask whether the federal plaintiffs will fairly and adequately represent the class, but whether the state court plaintiffs are fairly and adequately representing the class.

The adequacy question is crucial in determining whether the ab-

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74. 424 U.S. 800 (1976).

75. *See* Comment, *Colorado River, supra* note 3, at 662.

76. 424 U.S. at 813-16.

77. *Id.* at 818.

78. *Id. See* Calvert Fire Ins. Co. v. American Mut. Reins. Co., 600 F.2d 1228, 1234 (7th Cir. 1979); Bio-Analytical Serv., Inc. v. Edgewater Hosp., Inc., 565 F.2d 450, 454 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978).

79. 424 U.S. at 818-19.

80. FED. R. CIV. P. 23(a)(4). Adequacy of representation is a question of fact to be decided on the circumstances of each case. Harris v. Palm Springs Alpine Estates, 329 F.2d 909, 914 (9th Cir. 1964); Clark v. South Cent. Bell Tel. Co., 419 F. Supp. 697, 701 (W.D. La. 1976); Zeigler v. Gibralter Life Ins. Co., 43 F.R.D. 169, 174 (D.S.D. 1967).

81. *See* Hansberry v. Lee, 311 U.S. 32, 41-43 (1940); Roman v. ESB, Inc., 550 F.2d 1343, 1356 (4th Cir. 1976); Gonzales v. Cassidy, 474 F.2d 67, 74 (5th Cir. 1973); Clark v. South Cent. Bell Tel. Co., 419 F. Supp. 697, 701 (W.D. La. 1976); Dolgow v. Anderson, 43 F.R.D. 472, 496 (E.D.N.Y. 1968).

sent class members' due process rights are violated.[82] A class action is an exception to the general rule that a person is not bound by a suit to which he is not a party.[83] Members of the class who are not present may be bound by the judgment where they were in fact adequately represented.[84] Where there is a lack of adequate representation, however, due process is violated if absent parties are bound by the judgment.[85]

The adequacy requirement must be applied not only at the time of the initial determination as to whether a class action may be maintained, but throughout the proceedings.[86] For purposes of res judicata, the primary criterion is whether the class representative, through qualified counsel, vigorously and tenaciously protects the interests of the absent class members.[87] If it becomes apparent at any stage, even after trial, that the representation is not adequate, class status must be withdrawn.[88] Piecemeal litigation will not be avoided by denying class certification in the federal action if a judgment in the state court class action can be collaterally attacked on grounds of inadequate representation.

ANALYSIS

The pertinent factors analyzed in the foregoing sections are not discrete and unrelated. Rather, they can be combined into a model for analyzing the propriety of certifying a federal class action in which claims within the exclusive jurisdiction of the federal court are raised, when a parallel class action has previously been certified in a state court.

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82. Gonzales v. Cassidy, 474 F.2d 67, 73 (5th Cir. 1973). *See* Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 46 [hereinafter cited as Frankel].

83. Hansberry v. Lee, 311 U.S. 32, 41 (1940); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 568 (2d Cir. 1968); Pasquier v. Tarr, 318 F. Supp. 1350, 1353 (E.D. La. 1970). It is only in a subsequent action, however, that the res judicata effect of the judgment can be tested. Gonzales v. Cassidy, 474 F.2d 67, 74 (5th Cir. 1973); Frankel, *supra* note 82, at 45; Advisory Committee Notes to Rule 23, 39 F.R.D. 69, 106; 3B MOORE'S FEDERAL PRACTICE, ¶ 23.60 at 469-70 (2d ed. 1980). *But see* Walsh v. Butcher & Sherrerd, 452 F. Supp. 80, 82 (E.D. Pa. 1978).

84. *See* cases cited at note 81 *supra*.

85. *See* cases cited at note 81 *supra*.

86. Guerine v. J & W Inv., Inc., 544 F.2d 863, 864 (5th Cir. 1977). *See* Gonzales v. Cassidy, 474 F.2d 67, 72 (5th Cir. 1973).

87. *Id.* at 75; Clark v. South Cent. Bell Tel. Co., 419 F. Supp. 697, 702 (W.D. La. 1976); Rivera v. Chicken Delight, Inc., 17 F.R.Serv.2d 473, 475 (S.D. Tex. 1973).

88. Guerine v. J & W Inv., Inc., 544 F.2d 863, 864 (5th Cir. 1977); Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973) (failure to prosecute appeal rendered representation inadequate). *See* Zeigler v. Gibralter Life Ins. Co., 43 F.R.D. 169, 174 (D.S.D. 1967).

The first question the court should ask is whether the federal claims will be precluded by a determination in the state court action. Examination of the relevant authorities has shown that no definite answer can be given to this question. Nevertheless, considerable weight should be given to this factor before a decision to grant or deny certification is made.

Defendants will typically counter federal class certification by claiming that an action properly belongs in the state court because the plaintiffs have no viable federal claims. It would be improper for the federal court to conduct a preliminary hearing on the merits of the federal claims.[89] A better approach would be for the defendant to bear the burden of proving that the federal claims are nonexistent, frivolous, or interposed solely for purposes of delay. This could be done by means of a motion to dismiss,[90] motion for judgment on the pleadings,[91] or a motion for summary judgment.[92]

The avoidance of piecemeal litigation is certainly a concern and will seemingly be accomplished by denial of class certification in the federal suit. Since the federal action is the only one in which the class may raise its federal claims, however, piecemeal litigation can only be avoided if the state court action is stayed, abandoned, or enjoined, none of which are likely to occur. In this situation, piecemeal litigation may be avoided by denying class certification in the federal court action, but only at the expense of denying the plaintiff class relief under the federal statutes.[93] It is submitted

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89. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974). "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Id.*

90. FED. R. CIV. P. 12(b)(6).

91. FED. R. CIV. P. 12(c).

92. FED. R. CIV. P. 56.

93. Piecemeal litigation will not be avoided if the judgment in a state class action can be collaterally attacked on the grounds of denial of due process. This could result from either failure to give proper notice or inadequate representation. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176-77 (1974); Hansberry v. Lee, 311 U.S. 32, 41-43 (1940).

The state class action, for example, may be certified under rules similar to FED. R. CIV. P. 23(b)(1) or (2) which do not require mandatory notice to individual class members or permit class members to opt out. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173 (1974); Gonzales v. Cassidy, 474 F.2d 67, 74 (5th Cir. 1973). If the suit is one which a federal court would only certify under Rule 23(b)(3), which requires that absent class members receive notice and be given an opportunity to exclude themselves, any judgment may be subject to collateral attack. When a federal court is faced with a parallel state class action in which there is a very real possibility that a judgment in the state action may be subject to collateral attack, denial of class certification in deference to the state action would appear to be improper. *See* Comment, *Colorado River*, supra note 3, at 673-74.

that this is too high a price to pay.

The next factor to assess are those considerations surrounding the res judicata and collateral estoppel effect of a state court judgment. There is certainly a difference between giving a state court judgment collateral estoppel effect in a federal class action and deferring proceeding with the federal class action to allow the state court class action to reach judgment first. In the first instance, the state court judgment is already an accomplished fact when the federal court is confronted with the issue of class certification. In the second instance, the federal court has created the res judicata/collateral estoppel problem for itself by not proceeding with the federal class action.[94] It is also important to keep in mind that the state court judgment may be reversed on appeal.[95] Since a determination of whether a suit may proceed as a class action is conditional and may be amended,[96] and the claims of the named plain-

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In addition, multiplicity may not be avoided if the state court class encompasses only residents of that state, or if the state court certifies a nationwide class and the judgment is collaterally attacked by nonresident class members claiming the state court had no jurisdiction over them. Commentators disagree as to whether the state court has in personam jurisdiction over the nonresident plaintiffs. *See* Forde, *Class Actions in Illinois: Toward a More Attractive Forum For This Essential Remedy*, 26 DEPAUL L. REV. 211, 227 (1977); Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 HARV. L. REV. 718 (1979); Note, *Finding a Forum For the Class Action: Issues of Federalism Posed by Recent Limitations on Use of Federal Courts*, 28 SYRACUSE L. REV. 1009, 1045-48 (1977); Note, *Consumer Class Actions With a Multistate Class: A Problem of Jurisdiction*, 25 HASTINGS L. J. 1411, 1423-38 (1974).

94. *Cf.* Calvert Fire Ins. Co. v. American Mut. Reins. Co., 600 F.2d 1228 (7th Cir. 1979). Upon remand from the Supreme Court, the Seventh Circuit determined that the district court should re-evaluate its decision to stay in light of Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). Upon reconsideration, the lower court ruled the stay to be proper. Calvert had admitted in oral argument before the Supreme Court that it had no claim for damages under Rule 10b-5, since it had paid no money into the reinsurance pool. Therefore, it had no claim under the exclusive jurisdiction of the federal court, since the state court had jurisdiction to grant rescission. 600 F.2d at 1232.

The Seventh Circuit affirmed, holding that the district court had discretion to stay a federal suit interposed for the purpose of delaying a state court proceeding. *Id.* The court noted that no res judicata problem had been created by the stay, since the state court had already ruled that the reinsurance pool did not constitute a security before the stay order was entered. *Id.* at 1235.

95. An interesting example of res judicata problems involving parallel state and federal class actions is presented by *In re* Transocean Tender Offer Sec. Litigation, 455 F. Supp. 999 (N.D. Ill. 1978). This case does raise a question as to whether the application of res judicata and collateral estoppel actually result in judicial economy.

96. FED. R. CIV. P. 23(c)(1): "An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." *See* Green v. Wolf Corp., 406 F.2d 291, 298 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 461 (E.D. Pa. 1968); Seigel v. Chicken Delight, Inc., 271 F. Supp. 722, 725 (N.D. Cal. 1967); Fischer v. Kletz, 41 F.R.D. 377, 386 (S.D.N.Y. 1966);

tiffs remain even if a class is not certified,[97] denial of class certification in deference to the state court class action is the functional equivalent of a stay of the federal class action.

If the court concludes that the representation in the state court class action is possibly inadequate, then the argument that the state court suit will have res judicata or collateral estoppel effect on the federal court class action loses its validity. It would appear, then, that the better procedure is to certify the federal action as a class action and to face the difficult question of the res judicata effect of the state court action when and if it is properly raised after a judgment on the merits in the state court action.[98]

Thirdly, the court should consider whether the representation in the state class action is adequate. This is a difficult task, as the attorneys and parties in the state action are not before the federal court. Perhaps this problem can best be solved by means of a presumption that representation in the state court class action is adequate. Since the party seeking class certification has the burden of showing that the prerequisites of Rule 23(a) have been met,[99] it would not be unfair to require this party to bear the burden of proving that representation in the state suit is inadequate. In the absence of proof of inadequacy, the court can presume that representation in the state court is adequte.

This presumption, however, may not be appropriate where the federal class action seeks relief on claims under the exclusive jurisdiction of the federal court. In *Clark v. Watchie*,[100] *Kamm v. California City Development Co.*,[101] and *Clayton v. Skelly Oil Co.*,[102] the federal plaintiffs all raised claims that could not have been raised in the state court class action, together with pendent common law claims that were raised by the plaintiffs in the state court. This would immediately lead one to question the adequacy of the representation in the state court class action. Why did the plaintiffs bring the action in a state court when the class has additional

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Kronenberg v. Hotel Governor Clinton, Inc., 41 F.R.D. 42, 45 (S.D.N.Y. 1966).

97. Kamm v. California City Dev. Co., 509 F.2d 205, 212 (9th Cir. 1975).

98. Under FED. R. CIV. P. 8(c), res judicata is an affirmative defense that must be pleaded. *See* Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 350 (1971).

99. Doninger v. Pac. Northwest Bell, Inc., 564 F.2d 1304, 1308 (9th Cir. 1977); Clayton v. Skelly Oil Co., 26 F.R.Serv.2d 317, 320 (S.D.N.Y. 1978).

100. 513 F.2d 994 (9th Cir.), *cert. denied*, 423 U.S. 841 (1975).

101. 509 F.2d 205 (9th Cir. 1975).

102. 26 F.R.Serv.2d 317 (S.D.N.Y. 1978).

claims for relief under federal statutes that could only be sued upon in a federal court, thereby limiting the relief available to the class?[103] Further, the class may bear a more difficult burden of proof on their state law claims than they do on the federal claims. Inadequacy of representation, and perhaps even collusion, would be suspect if the defendant who is opposing class certification in the federal action did not oppose certification in the state court action.

Other, minor factors should also be considered. The inconvenience of the federal forum in unlikely to be a practical problem. A particular federal forum may be inconvenient, but this inconvenience can be remedied by means of a motion to transfer.[104] The order of initiation of the two suits is a factor that has a practical appeal, for it can be mechanically applied. This factor should not, however, be given undue weight. The result could be a race to the courthouse[105] and possibly collusive suits.[106] A more important consideration is the stage to which the state action has proceeded. If the state action is near trial or a decision on appeal is imminent, denial of class certification, or perhaps a postponement of the determination of the certification issue, would not work undue hardship on any party.[107]

CONCLUSION

Federal courts have generally denied class certification to a federal suit when a parallel state court action has previously been certified as a class action. The reason most often advanced is the avoidance of duplicative litigation. Where, however, the federal action is one over which federal courts have exclusive jurisdiction,

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103. Plaintiffs in all three cases sought relief under the Securities Exchange Act of 1934. One commentator has suggested that the only possible advantage to bringing a securities action in a state court is if the state action could be prosecuted more speedily than a federal action. Cherner, *supra* note 68, at 682. With respect to the importance of class actions as a means of enforcing federal securities laws, *see* 3 LOSS, SECURITIES REGULATION 1819 (2d ed. 1961) ("The ultimate effectiveness of the federal remedies, when the defendants are not prone to settle, may depend in large measure on the applicability of the class action device."). *Accord,* Green v. Wolf Corp., 406 F.2d 291, 295 (2d Cir. 1968), *cert. denied,* 395 U.S. 977 (1969); Kronenberg v. Hotel Governor Clinton, Inc., 41 F.R.D. 42 (S.D.N.Y. 1966). *See also* Dolgow v. Anderson, 43 F.R.D. 472, 482, 487 (E.D.N.Y. 1968).

104. 28 U.S.C. § 1404.

105. *See* Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484, 495 (N.D. Ill. 1969).

106. *See* Note, *Power to Stay, supra* note 61, at 985; Comment, *Colorado River, supra* note 3, at 673.

107. *See* Mitchell v. Texas Gulf Sulphur Co., 446 F.2d 90, 107 (10th Cir. 1971); 3B MOORE'S FEDERAL PRACTICE, ¶ 23.45 at 365 (2d ed. 1980).

the desire to avoid duplicative litigation is not a sufficient reason for denying class certification. Neither is it appropriate to deny class certification because of the possible res judicata/collateral estoppel effect the judgment in the state suit may have on the federal action. It is far from clear what preclusive effect a state court judgment or state court findings of fact may have on a claim over which federal courts have exclusive jurisdiction. The same policy considerations that caution against the application of res judicata/collateral estoppel to bar the federal claim, and that also caution against a stay of the federal suit in deference to a parallel state proceeding, likewise caution against denial of class certification in the federal action.

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