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ORDERS IN THE CONDUCT OF CLASS ACTIONS: A CONSIDERATION OF SUBDIVISION (d)

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Mr. Newberg discusses actions maintainable under amended Rule 23(b)(3) and the court's powers to issue orders under subsection (d). He examines the necessity, desirability and practicability of a member's intervention or appearance through counsel. With regard to settlements, the argument is made that the possibility of immediate settlement among the original parties should properly influence the determination whether the class action is the superior method of resolving the controversy. Similarly, the relationship of settlement to notice requirements is examined. A persistent theme of the discussion is the tension underlying the judicial effort to keep the class action manageable but not exclusive of members properly party to the litigation.

I. INTRODUCTION

Once the court has upheld the validity of a Rule 23 class action, a full arsenal of adaptable methods is available to assure the fair and efficient conduct of the action.[1] Rule 23(d), which sets forth various provisions for the making of appropriate orders in the course of a class action, restates the traditional powers of the court under prior law, although they were not spelled out in Rule 23 prior to the 1966 amendments. The catalogue of possible orders contained in Rule 23(d) is not exhaustive, as Rule 23(d)(5) leaves open the opportunity for orders "dealing with similar procedural matters." Further, the last sentence of Rule 23(d) provides that such orders may be combined with pretrial orders under Rule 16.

Radical departures were inaugurated by the 1966 amendments to Rule 23. Time-honored concepts of true, hybrid and spurious types of class actions were discarded. Gone also are the similarities which existed between a spurious class action under former Rule 23(a)(3) and the permissive joinder devices under Rule 24(b).[2] No longer may a party interested in a class action abstain from binding membership in the class until he learns of the final judgment and then intervene

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1 Fed. R. Civ. P. 23(d).

2 Lipsett v. United States, 359 F.2d 956 (2d Cir. 1966); Nagler v. Admiral Corp., 248 F.2d 319, 327 (2d Cir. 1957).

only in the event that the judgment is in his favor. Such "one way intervention" has been virtually eliminated under the new Rule.[3]

Today, Rule 23 is a practically oriented procedure prescribing the occasions for maintaining class actions and directing their course.[4] New Rule 23(b)(3)[5] represents a high-water mark in the ability of the courts, in appropriate cases, to dispense justice to large numbers of claimants and to reduce the multiplicity of actions which otherwise might confront the same defendants and confound solutions to court backlog problems. Amended Rule 23(c)(2)[6] provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class. This provision represents a complete procedural about-face from former Rule 23 provisions and precedents thereunder.[7] The opportunities provided by a class action, both for judicial economy and for affording large numbers of small claimants a day in court, has led the Tenth Circuit to rule that in a doubtful case any error should be committed in favor of allowing the class action, since it is within the power of the court at a later time to limit either the issues or the parties.[8]

In the context of these sweeping innovations, the application of traditional judicial powers to control litigation of greatly increased dimensions poses many difficult and novel questions. For example, the court must consider the best method of coping with the potentially vast pretrial and trial aspects of a class action which may involve thousands of claimants spread throughout the United States. Questions such as the roles and obligations of counsel to represent parties as compared to the members of the class must be determined. Under the new Rule, the courts will face novel issues: Are interventions necessary or even desirable in class actions? How and when can the scope of the class litigation be best determined? When, how often, and to whom should

[3] For examples of "one way intervention" under prior law, see Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961), petition for cert. dismissed, 371 U.S. 801 (1962); York v. Guaranty Trust Co., 143 F.2d 503, 529 (2d Cir. 1944), rev'd on other grounds, 326 U.S. 99 (1945). Cf. Pentland v. Dravo Corp., 152 F.2d 851, 856 (3d Cir. 1945).

[4] This pragmatic approach to Rule 23 is indicative of more practical considerations which were introduced by the 1966 amendments to Rules 19 and 24. For example, the language of Rule 23(b)(1)(B) is very similar to that used in new Rule 19(a)(2)(i), relating to parties who should be joined in an action, and also to that used in Rule 24(a)(2), pertaining to intervention as of right. The parallel of language reflects the fact that comparable considerations are involved under all of these rules.

[5] Fed. R. Civ. P. 23(b)(3).

[6] Fed. R. Civ. P. 23(c)(2).

[7] See cases cited at notes 2, 3 supra. For a discussion of the extent of judgments in class actions under former Rule 23, see Advisory Committee's Note to Rule 23, 39 F.R.D. 98 (1966) [hereinafter cited as Advisory Note].

[8] Esplin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968), cert. denied, 89 S. Ct. 1194 (1969).

notice of aspects of the class action be sent? How can settlement of class actions best be accomplished when agreements among the parties on the dollar amounts are reached? Can the courts concentrate in one forum, through the use of new transfer statutes, actions instituted by class members who have specifically excluded themselves from the class?

Courts will look to subdivision (d) for illustrative and suggested means already within their power to meet the challenges of the many unique problems presented by amended Rule 23. Consequently, these customary powers take on a far greater significance.

Subdivision (b) sets forth three categories of class actions maintainable under revised Rule 23. A 23(b)(1) class action exists where the prosecution of individual actions by or against class members (A) would create inconsistent adjudications with respect to different class members such that a person opposing the class might find himself obligated to follow incompatible standards of conduct under different court orders, or conversely (B) would create a risk of adjudications with respect to individuals which would practically foreclose the interests of other class members from separate adjudication or, at least, substantially impede the ability of other class members to protect their interests.

A 23(b)(2) class action may be maintained when the party opposing the class has acted or refused to act on grounds applicable to the entire class, making injunctive or declaratory relief applicable to the class as a whole appropriate. Finally, a 23(b)(3) class will be upheld where the court finds that questions of law or fact common to the class members predominate over questions peculiar to individual class members, and that a class action is superior to other possible methods of fair adjudication of the controversy. Since class actions brought under Rule 23(b)(3) are more common than, and raise most of the complicated problems posed by, classes instituted under Rule 23(b)(1) or (2), the discussion here will focus on aspects of 23(b)(3) unless otherwise specified.

II. Judicial Control Over the Course of Proceedings

Subdivision (d)(1) provides that the court may make appropriate orders "determining the course of the proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument."

Many devices are available to the courts to control the administration of pretrial issues and discovery matters connected with either multidistrict or multiparty litigation. The versatility of pretrial conferences provided for in Rule 16 has now been universally recognized by courts as the framework within which housekeeping and other procedural orders for complex litigation are determined or scheduled for

subsequent briefing and argument. The court may order additional parties to be joined in the action under Rule 19 or may sever parties under Rule 21. Under the liberal provisions of Rule 20 relating to permissive joinder of parties, subsection (b) thereof expressly recognizes that the court "may order separate trials or make other orders to prevent delay or prejudice." Under Rule 54(b) the court has the power to prevent disruption of the orderly progress of a case involving multiple parties, where some but not all of the parties have disposed of the litigation concerning them and the losing party seeks to appeal therefrom on a piecemeal basis.

In connection with discovery proceedings in complex cases and in general, the court under Rule 30(b) "may make any . . . order which justice requires to protect the party or witness from annoyance, embarrassment or oppression." Although Rule 30 deals with oral depositions, the court still has plenary power to deal likewise with other discovery methods since the various rules concerning depositions of witnesses upon written interrogatories,[9] interrogatories to parties[10] and production of documents[11] are expressly made subject to the provisions of Rule 30(b).

In the wake of the electrical antitrust cases, the Judicial Coordinating Committee on Multiple Litigation in the United States District Courts (a subcommittee of the Committee on Trial Practice and Techniques of the Judicial Conference of the United States) was formed to set up guidelines for the coordination of all such pending litigation. In those and in several other subsequent cases, this Coordinating Committee frequently recommended the adoption by the local districts, where related actions were pending, of standard forms of interrogatories, of identical Rule 34 production-of-documents requirements with the creation of central document depositories, of coordinated deposition schedules and of other similar measures.[12]

Subsequently, several of these general recommendations were incorporated in an unpublished Outline of Suggested Procedures and Materials for Pre-trial and Trial of Complex and Multiple Litigation, which stresses, inter alia, the importance of the early exercise of court powers to control the course of the litigation.[13]

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[9] Fed. R. Civ. P. 31.

[10] Fed. R. Civ. P. 33.

[11] Fed. R. Civ. P. 34.

[12] See, e.g., Transcript of Proceedings Before the Coordinating Committee conducted on March 15, 1968, in connection with certain antitrust actions, Metropolitan Sanitary Dist. v. Martin Marietta Corp., No. 67 C 684 (N.D. Ill., filed Apr. 26, 1967), and related cases. On record with Judicial Coordinating Committee on Multidistrict Litigation in the United States District Courts.

[13] See Outline of Suggested Procedures and Materials for Pre-trial and Trial of Complex and Multiple Litigation 16, 17; see also Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968).

In addition, recently enacted Section 1407 of Title 28 of the United States Code now permits a Judicial Panel for Multidistrict Litigation to transfer temporarily to one forum, for pretrial discovery purposes, related cases pending in several districts in order to promote the convenience of the parties and to accomplish judicial economies. Other devices for concentrating responsibility for the conduct of plaintiff's discovery and other pretrial matters include the designation of counsel for the class representatives as "lead counsel" and the use of "steering committees" comprised of counsel for selected parties.

A. *Attorneys for Original Parties as Lead Counsel*

To avoid conflicting or overlapping and duplicate discovery, the court should maintain strict control over discovery in a class action and the class, except upon good cause shown, should have one overall opportunity for such discovery just as if it were a single plaintiff. Similarly, if orderliness of the litigation is to be maintained and the burdens on the judiciary kept within reasonable bounds, briefs of the adversaries should be consolidated wherever practicable and arguments for each side should be advanced initially by a group spokesman or lead counsel.

The class plaintiffs and their counsel are the champions of the common class interests. As stated in *Dolgow v. Anderson*,[14] "[t]he court must be assured that 'the representatives [will] put up a real fight' [citing Chafee, Some Problems of Equity 231 (1950)]." In *Mersay v. First Republic Corp. of America*,[15] the court stated: "The proper inquiry is not merely whether plaintiff is a suitable representative, in that his background and relationships might defeat his recovery, but whether he will in fact adequately protect class interests."

Since the determination that the "representative parties will fairly and adequately protect the interests of the class" is a prerequisite for the validity of a class action,[16] the duty of diligently prosecuting the action falls squarely on the shoulders of counsel for the class plaintiffs. It is significant that former Rule 23(a) spoke in terms of permitting persons "as will *fairly insure the adequate representation of all.*"[17] (Emphasis added.) In contrast, the more stringent current Rule 23, which provides for judgments binding on absent members of the class, speaks in terms of the plaintiff "*fairly and adequately protecting the interests of the class.*" (Emphasis added.) This deliberate shift in language, reflecting due process considerations, affirmatively places obligations of pressing the class litigation on attorneys for the repre-

[14] 43 F.R.D. 472, 494 (E.D.N.Y. 1968).

[15] 43 F.R.D. 465, 469-70 (S.D.N.Y. 1968). See also Hohmann v. Packard Instruments Co., 399 F.2d 711, 713-14 (7th Cir. 1968).

[16] Fed. R. Civ. P. 23(a)(4).

[17] Fed. R. Civ. P. 23(a), 28 U.S.C. App., at 6101 (1964).

sentative parties acting as lead counsel. Obviously, this procedure would have to be the rule if no other member of the class expressed an interest to participate actively in such prosecution.

Thus, there is a sort of natural selection process which points to original plaintiff's lawyers as lead counsel. There is nothing to prevent original plaintiff's counsel from sharing or relinquishing most of the burdens of lead counsel to volunteer counsel for other members of the class. Indeed, steering and other joint committees and co-liaison counsel are frequently set up among plaintiffs' and defendants' counsel respectively in multiparty litigation. On the other hand, it seems clear that since amended Rule 23 places a greater burden on original plaintiff's lawyers as lead counsel, it impliedly gives him greater discretion than counsel for his fellow class members in conducting the suit and in otherwise carrying out his legal responsibilities. Such greater discretion is, of course, tempered by correlative obligations to consult with and obtain the views of interested counsel for other class members on all significant decisions.

The selection of lead counsel, with due regard to the obligations of original counsel to protect the interests of the class, is in the province of counsel for the parties rather than in the province of the judiciary. The court could permit a change in lead counsel in situations, for example, where the original lead counsel finds it necessary to withdraw, of where he has settled his case. But even under those circumstances, the parties themselves in a class action should have the initial right to try to agree on successor lead counsel. In the event of disagreement, the court should make an appropriate order resolving the matter.

Recognizing the need for such lead counsel as a litigation management device in a class action, the court in *Fischer v. Kletz*[18] found that "since June 22, 1965, 'lead counsel' have been in charge of the pending actions. Despite inevitable minor disagreements along the way, it is my judgment that this management device has worked satisfactorily and will continue to do so."

The principle governing control of class litigation by the original plaintiffs in the face of opposition by one of the intervenor plaintiffs, was stated by the Ninth Circuit in *Schatte v. International Alliance of Theatrical Stage Employees*[19] as follows:

> The general rule in class suits is that the member of the class who is the original plaintiff retains control over the action as opposed to other members of the class who may later seek to intervene. Annotation, 91 A.L.R. 587, 3 Moore's Federal Practice § 23.07 n.7. This rule, while not directly applicable

[18] 41 F.R.D. 377, 385 (S.D.N.Y. 1966).

[19] 183 F.2d 685, 687 (9th Cir.), cert. denied, 340 U.S. 827 (1950).

> here, is based on an underlying principle that where several parties are joined on the same side of a single case, orderly procedure requires that decisions be made as to how that side shall conduct the case even though such decisions may not accord with the individual desires and opinions of each member of the side. Such is the situation here. There being a difference of opinion concerning the advisability of filing a petition for rehearing, the opinion of twenty-five plaintiffs, acting through their attorney, must prevail over the opinion of one other plaintiff, acting through another attorney.

This rule is certainly a salutary one and probably should be followed in the absence of any claim of inadequacy of representation, or unless a matter peculiar to certain individual class members is involved. A contrary rule would not only burden the court with duplication of effort, but might subject the entire class to the hazard of uninformed action on the part of an intervenor not represented by counsel for the class plaintiffs.

An adjustment to this rule would seem appropriate in circumstances where multidistrict litigation, including one or more class actions, is transferred to a single district pursuant to Section 1407 of Title 28 of the United States Code for pretrial discovery purposes. In such instances, the several sets of counsel for the plaintiffs and defendants respectively should be required to act through steering committees or through some other agreed upon coordinating procedures pursuant to a stipulation or a housekeeping order.

B. *Effect of Member's Entry of Appearance Through Counsel: Intervention Compared*

Subdivision (c)(2)(C) of Rule 23 provides that "any member who does not request exclusion may, if he desires, enter an appearance through his counsel." Since an entry of appearance does not constitute an intervention which is expressly referred to in Rule 23(d), the question arises as to how a Rule 23 appearance by counsel differs, if at all, from a Rule 24 intervention. Questions also arise as to whether such intervensions are necessary or contemplated by Rule 23 for members of the class, and as to the role which must or can be played in the litigation by a member whose appearance has been entered.

Upon examination, there is no such concept as a "Rule 23 intervenor." There is nothing in Rule 23 which creates or was intended to create a status of an "intervenor" any different from that accorded to an intervenor under Rule 24. Anyone seeking to intervene formally in a class action litigation is presumably required to file a motion under Rule 24. In lieu of intervention, Rule 23(c)(2) provides for an entry of an appearance through counsel by a party desiring to do so.

It seems clear from the Rule itself that members of a valid class need not formally intervene. Otherwise the provisions of Rule 23 would be merely duplicative of Rule 24. If there are motions to intervene filed by potential class members in a class action, prior to an adjudication as to whether such action may be maintained as a class action, such motions probably become moot upon an order of court upholding the validity of a class encompassing the moving parties.[20] A different case arises, however, if it is ultimately decided that the action may not be maintained as a class action.

It is possible for a potential intervenor in a class action, who files his motion for intervention prior to the running of the statute of limitations and prior to the upholding of the class itself, to find that the statute of limitations period expired during the course of the litigation and that his intervention motion had not been ruled upon. In the event that the class action decision is reversed on appeal, the potential intervenor who was also a class member will certainly wish to rely on the filing of his motion to intervene at a point at which the statute of limitations should be tolled for him. Although several lower courts have ruled that the statute of limitations is tolled by the commencement of a class suit,[21] this point has not yet been decided by the United States Supreme Court. Therefore, it would seem that this person would have strong equitable and perhaps constitutional grounds for requesting relief from the bar of the statute of limitations by virtue of his reliance, notwithstanding the fact of the ultimate reversal of the decision which permitted the class action to be maintained as such in the first instance. In *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*[22] the court stated:

> But where the determination is negative, and a class action is, in the words of the Committee, "stripped of its character as a class action" (39 F.R.D. at p. 104), it does not necessarily follow that the case must be treated as if there never was an action brought on behalf of absent class members.
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> . . . But if the reason for the negative determination stems from a weighing of various considerations of judicial housekeeping, it may well be that the decision should not relate back to the commencement of the action, and that, at the very least, an opportunity should be presented for proof of

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20 Although certain interventions were permitted earlier, the court in Philadelphia Elec. Co. v. Anaconda Am. Brass Co., Civil No. 41827 (E.D. Pa., filed Dec. 30, 1966), determined at a pretrial conference, on May 4, 1967, to hold in abeyance all subsequent interventions pending decision on the class action.

21 See, e.g., Minnesota v. United States Steel Corp., 44 F.R.D. 559, 573-74 (D. Minn. 1968); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 460-61 (E.D. Pa. 1968).

22 43 F.R.D. 452, 461 (E.D. Pa. 1968).

> reliance upon the pendency of the purported class action sufficient to toll the statute of limitations. Any other approach would make it virtually mandatory for every class member to file a cautionary separate action within the limitations period.

The purpose of Rule 23 is to have the common issues of law and fact litigated on behalf of the class by the class representatives. Interventions are not necessary to protect the rights of any class member in matters which are common to the whole class or to the sub-class to which such party may belong. As the Second Circuit said in *Eisen v. Carlisle & Jacquelin*,[23]

> [w]e are not persuaded that it is essential that any other members of the class seek to intervene. . . . If we have to rely on one litigant to assert the rights of a large class then rely we must. . . .
> . . . [T]he representative party cannot be said to have an affirmative duty to demonstrate that the whole or a majority of the class considers his representation adequate.

What is the signficance, then, of the fact that subdivisions (d)(2) and (3) expressly give the court discretionary power to permit some or all of the members "to intervene and present claims or defenses," or to place conditions on intervenors, whether they be class members or not? Upon analysis, such provisions do not require or contemplate that members fully included in a validly declared class should intervene to present claims or defenses which are common to the class. Interventions for that purpose are unnecessary in class actions since Rule 23 actions can be maintained only as class suits if the representation of class members is adequate.

There are numerous circumstances when interventions might be appropriate under amended Rule 23. If the court limits the scope of the class action because of the necessities of manageability and judicial housekeeping, it may permit intervention of parties who specifically seek intervention and who would have been included in the class except for the limitations imposed by the court.[24] If the court's determination under Rule 23(c)(1) is that representation is not adequate, interventions may be permitted as a means of satisfying a condition to maintaining the action as a class action.[25] Where non-class members have claims similar to the class, they might be permitted to intervene to present such claims in order to avoid a multiplicity of law-

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[23] 391 F.2d 555, 563 (2d Cir. 1968).

[24] See Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968).

[25] Cf. Knuth v. Erie-Crawford Dairy Coop. Ass'n, 395 F.2d 420, 428-29 (10th Cir. 1968); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562-64 (2d Cir. 1968).

suits with potentially conflicting discovery schedules, and to enable such parties to share the benefits and obligations of the litigation with counsel for the class members.[26] At the conclusion of the trial on the liability issues, and subject to due process safeguards for protection of class members (for example, where the statute of limitations period may have expired during the course of the trial), the court may disband the class and permit the separate class members to intervene to present their individual claims for damages, and their proof as to claims of fraudulent concealment, tolling of the statute of limitations, and other individualized issues. There are undoubtedly many other circumstances not illustrated here, where persons may appropriately move under Rule 24 to intervene in class actions.

Rule 23(d)(3) provides that the court may impose conditions on intervenors in a class action. "Intervenors" as used in this subdivision is not limited to class members but applies equally to non-class members. It is likely that the conditions imposed would be the same as are imposed on the participation of class members in the lawsuit. Such conditions are authorized by the customary powers of the court to make all orders deemed appropriate for the orderly conduct of a multiparty litigation. Undoubtedly these same conditions could be imposed on an intervenor coming in under Rule 24, or on one who joins in an action under Rule 19 in a complex case, regardless of whether a class action also was involved. Rule 23(d)(3), therefore, further recognizes that the court may treat a non-class or pre-class intervenor in the same manner as it treats a class member who has not excluded himself from a valid class action. Since the courts may prescribe the limitations of proof of damages required by intervenors after a decision on the merits has been reached in a class action which is no longer operative, this subdivision also encompasses the right of the court to impose conditions on "post-class" intervenors.

Under Rule 23, it is clear that class members are permitted, without intervention or appearance, simply to rely on counsel for the original plaintiffs to protect their interests, subject to an obligation to pay such counsel reasonable expenses and fees in event of a recovery for their benefit.[27] This arrangement raises the question whether non-intervening or nonappearing class members are to be considered as "parties" to the litigation. Rule 23(c)(2)(B) makes a judgment involving the class, whether favorable or not, binding on all class members who do not "opt out." Unless concepts of res judicata and col-

[26] Tranfers to one forum under Section 1407 of Title 28 serve similar purposes. 28 U.S.C.A. § 1407 (Cum. Pocket Part 1968).

[27] See, e.g., Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939); Powell v. Pennsylvania R.R., 267 F.2d 241 (3d Cir. 1959). In the event of no recovery, inactive class members should not be liable to pay any part of the costs of the litigation which was not commenced by them.

lateral estoppel are to be rewritten, it is clear that these members are parties to the action for the purpose, at least, of being directly includable in a class judgment. Furthermore, since class members who have not opted out share certain litigation benefits (for example, freedom from the requirement of independent compliance with venue requirements, and the tolling of the statute of limitations as of the date of the filing of the class action by the original plaintiffs[28]), members must also be considered parties for these purposes. Under Rule 23(e) class members, whether they make an appearance or not, must be given notice of any dismissal or compromise of the action. Further, apart from the rules which may be applicable to the original parties, there seems to be no rule which limits the right to appeal court rulings and decisions to only those members who enter an appearance. The fact that the court is administering and supervising the management of a class action will likely be a factor in court rulings and decisions on motions and requests of individual members, and properly so, but this would be the case in any multiparty litigation whether in the class action form or not. Accordingly, class members who have not excluded themselves may appropriately be deemed parties for all purposes in the litigation even though they do not enter an appearance. What advantage or effect is there, then, in entering an appearance through counsel in a Rule 23 action?

If a party enters such an appearance, an immediate effect is that court notices, which are otherwise sent to all members directly, will be sent to counsel appearing for such party. Likewise, subject to local court rules which may require an appearance through local counsel, communications from counsel for the class representative to members of the class would be channelled through members' counsel appearing of record. This result has the advantage of expediting communications and decision-making where a class member receiving such communication would otherwise routinely turn it over to his local attorney for review. A party may desire to enter an appearance to acknowledge affirmatively, though he is not required to do so under Rule 23, that he has received notice of the class action and that he wishes to participate in the fruits of the litigation. This opportunity may be of particular significance if notice to the class were made through publication, rather than individually. Counsel entering an appearance for a class member may request that his name be placed on the official court mailing or "service" list of attorneys entitled to receive copies of all papers and orders issued

28 Members, as parties, do not have to satisfy venue requirements independently. Philadelphia v. Morton Salt Co., 248 F. Supp. 506, 509 (E.D. Pa. 1965). The running of the statute of limitations is tolled in favor of class members by the commencement of the class suit. See, e.g., Minnesota v. United States Steel Corp., 44 F.R.D. 559, 573-74 (D. Minn. 1968); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 460-61 (E.D. Pa. 1968).

by or filed with the court. Probably the entry of an appearance through counsel does not diminish the basic obligation of counsel for the class representatives to protect the interests of that member, but such an appearance may give rise to laches or estoppel principles if there are any subsequent challenges to the adequacy of such representation. Moreover, timely entry of appearance would not only foreclose any subsequent assertion of lack of receipt of notice of the class action, but also would probably bar any later attack on the proceedings or judgment on the ground that that member misconceived the legal significance of any of those proceedings or of the judgment, whether favorable or adverse.

The provisions of Rule 23(c)(2)(C), which permit a member to enter an appearance if desired, reflect a recognition of basic rights of parties, for reasons of tactics or preference, to be represented formally through individual counsel in legal proceedings. Thus viewed, the right of any class member to enter an appearance through counsel should remain unrestricted, even though members who do not enter an appearance are entitled to the same safeguards and due process considerations as those who do enter an appearance. On the other hand, class members by virtue of an entered appearance should not be permitted to disrupt the proceedings or to gain special rights not available to other members who do not so appear. By not excluding themselves from the class action after notice has been received, class members must be deemed to recognize and yield to the need for a unified representative effort in behalf of all members of the class so that the litigation may proceed in an orderly fashion. The interests of members of the class in individual control of the prosecution or defense of separate actions, such as the extent and nature of any litigation concerning the controversy already commenced by members of the class, the desirability of concentration of the litigation of the claims in the particular forum, and the difficulties likely in the management of a class action, will already have been examined by the court and resolved in favor of the validity of a Rule 23(b)(3) class action.

In light of the foregoing, a court should properly assume firm control over pretrial discovery and other class action procedures, and restrict the role of counsel for individual members or for intervenors who seek to conduct such proceedings separately for their individual clients. Otherwise the evil foreseen by the Second Circuit in *Fox v. Glickman Corp.*,[20] affirming an order of the district court denying a stockholder's application for leave to intervene in a class action against his corporation and its directors, would result. The court observed:

> Allowing intervention in a case like this with respect to the merits, as distinguished from the limited purpose of proving

[20] 355 F.2d 161 (2d Cir. 1965).

> damages, may well result in "accumulating proofs and arguments without assisting the court." [Citing Allen Calculators, Inc. v. National Cash Register Co., 322 U.S. 137, 141-42 (1944).][30]

As a practical matter, this method of controlling discovery and other pretrial procedures will not preclude any member from having counsel of his choice, actively participating in the litigation and supplementing discovery undertaken by counsel for the representative parties, provided that such member does not engage in undue repetition or otherwise disrupt the orderly course of the litigation. There is rarely any problem of this sort that is not resolved by voluntary cooperation and accommodation among counsel.[31]

C. *Mandatory Response to Notice by Class Members*

In determining the course of class proceedings, the court may find it desirable for a variety of reasons to require each class member to file a statement of intention to prove claims or otherwise to respond affirmatively on or before a certain date. Such a procedure may be necessary for ascertaining the identity and addresses of those class members who will share in any judgment or settlement and for the "processing [of] the claims of class members prior to the trial for the purposes of further identification, the designation of sub-classes, if any, the consideration of all individual problems not reasonably subject to resolution after verdict and for other purposes."[32] Early determination of the scope of the claims of class members also permits the parties and the court to assess intelligently settlement values for the action. Courts employing this device have set penalties for a non-responding member by forever barring its claims,[33] by dismissing its claims with prejudice,[34] and by excluding such member from the class action.[35]

The first two sanctions appear extremely harsh when applied to a class member who did not commence the action, and who, as a result of

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[30] Id. at 164.

[31] Potential rivalry between class members after an initial finding of liability can be adequately handled since the rule gives a court the power to divide the class into appropriate sub-classes or to require the members to bring individual suits for damages. . . . Even if individual questions arise during the course of litigation which render the action "unmanageable," the court still has the power at that time to dismiss the class action and permit the plaintiff to proceed only on behalf of himself.

Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 556 (2d Cir. 1968). In so doing, the court would necessarily have to consider questions of the effect of such an order on the court's jurisdiction to hear and determine the plaintiff's action standing alone.

[32] Harris v. Jones, 41 F.R.D. 70, 74 (D. Utah 1966).

[33] Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 459, 462 (E.D. Pa. 1968).

[34] Harris v. Jones, 41 F.R.D. 70, 74-75 (D. Utah 1966).

[35] Minnesota v. United States Steel Corp., 44 F.R.D. 559, 577-78 (D. Minn. 1968).

continued inaction within a court-imposed period of time after notice of the motion, may be forever barred from suing on claims which otherwise may still be timely filed. Forever barring, or dismissing with prejudice, the claims of a non-responding member after a certain date has the effect of locking a member into a class but closing the door to any benefits he might derive therefrom. Justification perhaps lies in the fact that it is simple enough to exclude oneself from the class, after receipt of the first notice thereof, in order to preserve such rights. A member who does not so exclude himself must recognize that he becomes subject to the jurisdiction of the court, which, subject to due process limitations, has the traditional powers of imposing sanctions for failure of any party to comply with the orders or rules of court.[36] On the other hand, if these sanctions for failure of class members to make some affirmative response are imposed at a very early stage in the litigation, they may be challenged as conflicting with the new Rule's concept that a member is a party to a class action unless he excludes himself. The chances for success in such a challenge would diminish greatly if the mandatory response dates were clearly divorced from the initial period in which class members would be given the opportunity to exclude themselves. Conceivably such penalties are also subject, however, to challenges on due process and abuse-of-discretion grounds under certain circumstances.

The third sanction sometimes used by the courts is exclusion from the class for failure to respond. It seems, at first blush, to conflict directly with new Rule 23. Actually, this sanction is more properly described as an expulsion from the class, since ordinarily the member being penalized has already been deemed a part of the class earlier in the litigation. Such an exclusion or expulsion is similar in effect to the situation under former Rule 23 where a court set a cut-off date beyond which the class (commenced under former Rule 23(a)(3)) would be closed and no new interventions would be permitted.[37] Such closing, like the exclusion from the class here, would effectively bar participation in the class but would not preclude the excluded member from starting an independent action.

The closing of the class under the former Rule was usually based on practical considerations facilitating orderliness and manageability of the litigation. New Rule 23 is no less effective in providing the court with the power to set a cut-off date for similar reasons. Subdivision (b)(3)(D) requires a court ruling on a class action to consider, *inter alia*, "the difficulties likely to be encountered in the management of

[36] See, e.g., Fed. R. Civ. P. 37 pertaining to consequences for refusal to make discovery, and Fed. R. Civ. P. 41(b) relating to involuntary dismissal.

[37] See Philadelphia v. Morton Salt Co., 385 F.2d 122 (3d Cir. 1967), cert. denied, 390 U.S. 995 (1968).

a class action." As discussed earlier, the court may uphold only part of a class action on grounds of manageability and judicial housekeeping.[38] Under the provisions of Rule 23(c)(1), such decision may be made conditional at the outset or may be altered or amended before the decision on the merits. In addition, the court under subdivision (c)(4) may divide the class, initially or later, into subclasses. Since the court has expressly broad powers to remold the class, recast its scope, or even terminate it if deemed desirable at later stages of the litigation, there is ample authority for the court to exclude or expel non-responding members as of a certain date, by redefinition of the class in terms of those who have responded. In cases of large classes, this procedure may afford the court an eminently practical tool for management of the class. And since it is much less harsh a penalty than permanently barring a non-responding member, this sanction would appear to be the preferable one under comparable circumstances.

However desirable this procedure is, care must be taken not to abuse due process protections. In order to meet due process standards, it seems that the consequences resulting from a member's failure to respond affirmatively must be substantial enough to require a timely response, but not to create a forfeiture of the rights of members who may have good cause for failure to respond.[39] Excuses for noncompliance may be minimized and due process protections may be more fully assured by use of "second notices" warning of the approaching cut-off date,[40] and by the encouragement of communications by counsel for original plaintiffs with absent members, prior to such date.

D. *Amendment to Pleadings to Eliminate Class Action Allegations Compared With Dismissal or Compromise of the Action*

Subdivision (d)(4) permits an order by the court at any stage of an action "requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent members and that the action proceed accordingly." This provision is a specific application of the general power of the court under Rule 16 relating to pretrial procedures, wherein the court may make orders implementing its decisions with respect to the "necessity or desirability of amendments to the pleadings." An order amending the pleadings to eliminate class action allegations may be issued by the court, sua sponte, or may result from a motion by a party under Rule 23, or generally under Rule 15 which pertains to amended and supplemental pleadings.

Occasions for such an amendment to the pleadings are varied.

[38] See Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968).

[39] See Harris v. Jones, 41 F.R.D. 70, 73-75 (D. Utah 1966).

[40] See Philadelphia Elec. Co. v. Anaconda Am. Brass Co., Civil No. 41734 (E.D. Pa., filed Dec. 16, 1966), Class Action Order No. 7, dated Nov. 13, 1968.

Rule 23 specifically contemplates that a negative determination as to the class action "means that the action should be stripped of its character as a class action."[41] This negative determination requiring an amendment of the pleadings may be made by the court in its initial deliberation on whether the class action may be maintained as such. It may also be made after a class has once been sustained, by virtue of the court's power under Rule 23(c)(1), which provides that "[a]n order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

Even after a determination on the merits, subdivision (d)(4) would permit an amendment striking the class pleadings or dismissing the class action and requiring each member to come forward individually and prove damages. Still another occasion for an order eliminating class action allegations from the pleadings arises when the original parties have agreed on a settlement which they wish to consummate without the participation of absent class members originally contemplated by the complaint.

In all the situations illustrated above, and especially in connection with a proposed settlement among the original parties, the difficult and very practical question arises whether such an amendment to the pleadings constitutes a dismissal or compromise of a class action within the meaning of Rule 23(e), which requires both the approval of the court and notice of the proposed dismissal or compromise to be given to all members of the class in such manner as the court directs.

Basic to the entire procedure of new Rule 23, as set forth in subdivision (c)(1), is the requirement that "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." When read in connection with the Note of the Advisory Committee on Rules pertaining to subdivision (d)(4), requiring that the pleadings be stripped of their class action allegations upon a negative determination as to the class, it seems to be the clear intention of the Rule that any such original negative determination does not constitute a dismissal of the class action within the meaning of Rule 23(e) so as to require notice to the alleged members.[42] It is significant in this regard that the power of the court to amend the pleadings to eliminate class allegations under Rule 23(d)(4) is not made subject to the provisions of subdivision (e).

On the other hand, once a class action has been upheld and initial notices to class members have been sent out, the question becomes largely academic whether a subsequent order amending the pleadings

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41 Advisory Note, 39 F.R.D. at 104.

42 Id. See Daugherty v. Ball, 43 F.R.D. 329, 334-36 (C.D. Cal. 1967).

to delete class action allegations, either before or after a decision on the merits, is deemed to be a dismissal under Rule 23(e) requiring notice to all members. Regardless of the applicability of subdivision (e) in this situation, due process considerations would dictate that class members under Rule 23(b)(3) who received prior notice of the class action are entitled to receive notice of the elimination of such class under Rule 23(d) provisions generally. Similarly, even though notice is not required to be sent out to absent members in a Rule 23(b)(1) or (2) class, the same due process considerations may apply if a class were sustained under those subdivisions and subsequently eliminated.

A more difficult question of notice requirements arises in connection with a settlement among the orginal parties only, which is reached before any class action decision or notice has been given to class members. Notice requirements under these circumstances might raise so serious an obstacle as to destroy the opportunity for a settlement desired by the parties and encouraged by the court in connection with potentially protracted, complex litigation.[43]

Because the facilitation of the voluntary settlement of disputes not only is a primary objective of the entire judicial system, but also involves very practical considerations making settlements highly desirable as a general premise, the result should be reached which furthers this goal with due regard for the constitutional rights of absent members. It must be remembered that notice to class members of a dismissal under Rule 23(e) was principally designed to protect due process rights of such members. Although not among the illustrative factors enumerated in Rule 23(b)(3) as criteria in the determination of the class action issue, the existence of an immediate settlement offer among the original parties represents an important and proper consideration for the court as to whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Since no notice has yet been sent to class members at this stage, absent members for the most part are not relying on the class and thus would not be entitled to notice of the disposition of that action at such a preliminary stage.[44] Therefore a court could properly conclude that a class action was not superior to other means for adjudicating the rights of absent parties, and permit an amendment of the pleadings to eliminate class allegations. The controversy could

[43] This same issue may arise where representative plaintiffs have negotiated a settlement with defendants before defendants have responded to the complaint. In these circumstances it is theoretically possible for the plaintiff to amend the complaint as of right under Rule 15(a) to eliminate the class action allegations. Then court approval of the settlement is not required under Rule 23(e) since a class action no longer exists, and the action may be voluntarily dismissed under Rule 41(a). Rule 41(a) otherwise is expressly made subject to present Rule 23(e), while Rule 15 is not.

[44] Cf. Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 41 F.R.D. 518 (E.D. Pa. 1967).

then be settled and dismissed without notice to any absent parties. This procedure fits within the basic outline of Rule 23 procedures, which, as concluded earlier, permits a court to reach a negative determination on the maintenance of the class action without deeming that determination a dismissal of the action under subdivision (e).

III. Notice Procedures for Assuring Due Process Protections for Class Members

Class members who will be bound by a judgment are entitled to all the safeguards of due process.[45] Notice to class members of the pendency of and significant developments in a class action is the primary means for affording them due process protection. The Advisory Committee has commented:

> Subdivision (d)(2) does not require notice at any stage, but rather calls attention to its availability and invokes the court's discretion. In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum. These indicators suggest that notice under subdivision (d)(2) may be particularly useful and advisable in certain class actions maintained under subdivision (b)(3), for example, to permit members of the class to object to the representation. Indeed, under subdivision (c)(2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class. This mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject. See *Hansberry v. Lee,* 311 U.S. 32 (1940); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950). . . .[46]

In addition to subdivision (c)(2), mandatory notice is required under subdivision (e) upon dismissal or compromise of class actions maintained under any section of Rule 23.

Since occasions for sending notice to the class vary, the contents of each notice should be drafted to meet the demands of the particular situation. Such notice need not comply with the formalities of service of process.[47] Notice given at one stage in the proceedings does not mean that it must be given at subsequent stages; nor does it neces-

[45] See Hansberry v. Lee, 311 U.S. 32 (1940).

[46] Advisory Note, 39 F.R.D. at 106-07.

[47] Z. Chafee, Some Problems of Equity 230-31 (1950); See Brendle v. Smith, 7 F.R.D. 119 (S.D.N.Y. 1946).

sarily mean that notice can be avoided at later stages.[48] As set forth in subdivision (d)(2), it should be used whenever necessary "for the protection of the members of the class or otherwise for the fair conduct of the action."

Although not mandatory, notice to class members of the pendency of a Rule 23(b)(1) or (2) class action may be given under the provisions of subdivision (d)(2). Occasions for sending notice expressly suggested under Rule 23(d)(2) include notice "to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action." Other occasions for sending such notice may be to encourage interventions to improve the representation of the class;[49] to poll members on a proposed modification of a consent decree;[50] to present claims after the basic class decision;[51] to file by a certain date statements of intention to present claims or be "forever barred";[52] to remind class members by a "second notice" of the proximity of a cut-off date for filing statements of claims;[53] to identify or make available the identity of counsel for the class plaintiffs to whom inquiries about the action may be made by class members;[54] and in appropriate cases, to notify interested governmental agencies of the pendency of the action or of particular steps therein.[55] Even communications with non-members who might have been excluded from the class definition by virtue of judicial housekeeping or manageability considerations are comprehended under subdivision (d)(2), which provides that notice may be given for the protection of the members of the class "or otherwise."[56]

Subdivision (d)(2) provides that any notice shall be given "in

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48 See Class Action Order No. 7, dated Nov. 13, 1968, in Philadelphia Elec. Co. v. Anaconda Am. Brass Co., Civil No. 41734 (E.D. Pa., filed Dec. 16, 1966), where the court ordered the sending of a "second notice" to members of the class to remind them that a cut-off date for filing a Statement of Intention to Prove Claims was fast approaching, after which the claims of non-responding members would be forever barred.

49 See Knuth v. Erie-Crawford Dairy Coop. Ass'n, 395 F.2d 420, 427-29 (3d Cir. 1968).

50 See Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961).

51 See Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 589 (10th Cir. 1961), petition for cert. dismissed, 371 U.S. 801 (1962); Pentland v. Dravo Corp., 152 F.2d 851, 856 (3d Cir. 1945); cf. New York v. Morton Salt Co., 385 F.2d 122 (3d Cir. 1967), cert. denied, 390 U.S. 995 (1968).

52 See, e.g., Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 462 (E.D. Pa. 1968); Harris v. Jones, 41 F.R.D. 70, 74-75 (D. Utah 1966).

53 Philadelphia Elec. Co. v. Anaconda Am. Brass Co., Civil No. 41734 (E.D. Pa., filed Dec. 16, 1966), Class Action Order No. 7, dated Nov. 13, 1968.

54 Id.

55 Advisory Note, 39 F.R.D. at 107.

56 See Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 459-60, 462-63 (E.D. Pa. 1968).

such manner as the court may direct." Considerations of the mechanics of sending such notices, who should send it, to whom it should be sent, at whose expense and what should be included therein, have been generally covered elsewhere in this article with respect to mandatory notices, and will not be discussed here. Second and later notices will be governed in large part by similar considerations viewed in the light of the particular purposes for sending such additional notices.

A. *Client Solicitation Considerations*

Motions for upholding a class action and giving notice to all class members are often attacked by parties opposing the class on the ground that this procedure affords an opportunity for counsel for original plaintiffs to solicit clients, contrary to the Canons of Professional Ethics.[57] Since the court has full powers to issue orders restricting plaintiffs' counsel from initiating any communications with potential class members, pending a decision on the class action, this contention should never be a material consideration in the ultimate determination of the validity of a class action under the criteria set forth in Rule 23.[58]

Moreover, under the guise of attacks on possible client solicitation, defendants should not be permitted to interfere with proper communications between counsel for original plaintiffs and class members in an action where the court has sustained the class. Once notice has been sent to members of a Rule 23(b)(3) class, and especially after the time for opting out of the litigation has expired, the class plaintiffs and their counsel are charged with being their brothers' keepers.[59] As shown earlier, counsel for such class plaintiffs must vigorously prosecute the action and protect the interests of the class. Class members, who will be bound by the results of the efforts of class plaintiffs, have the right under due process protection to have their interests adequately represented.[60] Conversely, as fiduciaries for the class, counsel for the representative parties should be given the opportunity to assure that proper notices have been timely received and adequately understood, since they may be called upon to defend claims of inadequate representation or of improper settlements.[61]

In addition to the principles underlying class representation, strong public policy considerations in the areas of shareholder suits and antitrust actions, the most numerous types of class actions insti-

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[57] ABA Canons of Professional Ethics Nos. 27, 28.

[58] See Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 462 (E.D. Pa. 1968).

[59] Contra, Cherner v. Transitron Electronic Corp., 201 F. Supp. 934, 936 (D. Mass. 1962).

[60] See Hansberry v. Lee, 311 U.S. 32 (1940).

[61] See Sonnenschein v. Evans, 21 N.Y.2d 563, 236 N.E.2d 846, 289 N.Y.S.2d 609 (1968).

tuted, encourage lawyers to bring such suits. Lawyers who serve such interests are to be commended, rather than condemned with insinuations of improper solicitation. As stated in *Dolgow v. Anderson:*[62]

> In some areas of the law, society is dependent upon "the initiative of lawyers for the assertion of rights" (Escott v. Barchris Construction Corp., 340 F.2d 731, 733 (2d Cir.), cert. denied sub nom. Drexel & Co. v. Hall, 382 U.S. 816, 86 S. Ct. 37, 15 L. Ed. 2d 63 (1965)) and the maintenance of desired standards of conduct. The prospect of handsome compensation is held out as an inducement to encourage lawyers to bring such suits. See Murphy v. North American Light & Power Co., 33 F. Supp. 567, 571 (S.D.N.Y. 1940). . . ; Hornstein, Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards, 69 Harv. L. Rev. 658, 662-63 (1956) ("The value of class actions, albeit reward-inspired, has been repeatedly established in recent decades by shareholder's suits"); cf. Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 29 F. Supp. 540 (E.D. Pa. 1967) (antitrust treble damage action—"The strong incentive of triple recovery encourages private litigants to vigorously enforce the antitrust laws"). The instant case presents a classic example of such a lawsuit. Quite obviously, a major incentive to forceful presentation is the substantial counsel fee plaintiffs' attorney believes he may be awarded if he is successful.

Accordingly, the court should be especially sensitive to the protection of the rights of those claimants who are to be affected by the judgment, once a class action has been sustained. In order to achieve the objectives of amended Rule 23 and to prevent the revival of one-way intervention, that is, intervention only when it is to the advantage of the intervenor, effective notice must be given before any substantive right has been considered or curtailed by the court. In such circumstances, serious consideration should be given to sending out notices under the signature of counsel for the class plaintiffs, or at least to identifying such counsel in the notice.[63] If the court has established cut-off dates for filing statements of claims or of intention to assert claims by class members who have not excluded themselves, there may exist numerous absent members in a large class who never received or who misunderstood the earlier notice, or who were relying on counsel for the class representatives to protect their interests. In

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[62] 43 F.R.D. 472, 494-95 (E.D.N.Y. 1968).

[63] See Minnesota v. United States Steel Corp., 44 F.R.D. 559, 577-78 (D. Minn. 1968).

these or similar circumstances, the court should consider permitting counsel for the representative parties to initiate communications with members who have not yet responded. In *Hormel v. United States*,[64] the court stated, "While the Government makes an assertion to the contrary, I can see nothing wrong about the plaintiffs' circularizing all others who have similar claims against the government."[65] To prevent communication of this kind with such absent members, after the time for opting out has passed, might well convert the class action into a "trap" for the unwary,[66] and raises serious first amendment questions.[67] Constitutionally defective notice or undue prohibition against communications with class members carries with it other major vices. For example, settlement under such circumstances will be made very difficult since defendants will be concerned about further liability. In addition, it would cause genuine hardship to all since these questions probably cannot be raised until after a determination of the action on the merits.

In light of these considerations, Canon 27 of Professional Ethics, which prohibits client solicitations, could hardly have been intended to apply in situations created by class actions which are sustained under new Rule 23. Accordingly, courts should consider the desirability of liberal communications with absent class members in order to assure due process rights as well as the "efficient adjudication of the controversy."

IV. Use of Transfers Under 28 U.S.C. § 1407 Together With Rule 23 Powers to Control Multiple Litigation

Experience under new Rule 23 and Section 1407 of Title 28 of the United States Code has shown that these two procedures are not alternative but are in fact supplementary devices for administration of multiple

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64 17 F.R.D. 303 (S.D.N.Y. 1955).

65 Id. at 304. In stockholder derivative suits, where defendants move to have plaintiff post security for costs, it has been standard practice in certain state courts to permit the plaintiffs, on cross motion, to obtain an order for the production of a shareholders list in order to enable the plaintiff to solicit other shareholders to join him as parties plaintiff, and thereby possibly to obtain the additional amount of stock that would obviate the necessity of giving security. See, e.g., Auerbach v. Shafstor, Inc., 34 Misc. 2d 658, 229 N.Y.S.2d 927 (Sup. Ct. 1962), aff'd, 19 App. Div. 2d 531, 240 N.Y.S.2d 146, appeal dismissed, 13 N.Y.2d 891, 193 N.E.2d 501, 243 N.Y.S.2d 673 (1963). Although some doubt has been expressed whether a federal court would have jurisdiction in a diversity case to order such production of the shareholders list, e.g., Neuwirth v. Merin, 267 F. Supp. 333 (S.D.N.Y. 1967), the United States Supreme Court has now expressly upheld such federal court jurisdiction. Stern v. South Chester Tube Co., 390 U.S. 606, 609-10 (1968). Accord, unreported opinion in White v. Driscoll, Civil No. 67-98 (S.D.N.Y. April 25, 1968).

66 Escott v. BarChris Constr. Corp., 240 F.2d 731, 734 (2d Cir. 1965).

67 See United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Virginia State Bar, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963).

litigation. In the short time since April 29, 1968, when section 1407 became effective, the Judicial Panel on Multidistrict Litigation has on several occasions transferred to a single district for discovery purposes various related, independent and representative actions, particularly antitrust actions.[68] For uniformity of administration, the forum selected as the transferee district has full power to render orders relating to the validity and administration of class actions which have been transferred. This power to declare and administer classes in the transferee district will probably withstand challenge, since a class action is a procedural rather than a jurisdictional device, and since under the express terms of Rule 23 any order relating thereto may be altered or amended before the decision on the merits in the transferor district.[69]

When numerous related cases are transferred under section 1407, it is incumbent upon the transferee court to issue promptly detailed housekeeping orders to manage the cases transferred.[70] Where such cases are transferred, the "manageability" factor considered under Rule 23(b)(3)(D) takes on an entirely new perspective. Since transferee courts are already confronted with the necessity of managing enlarged litigation under section 1407, there is little additional difficulty encountered in administration of transferred class actions. This is especially so where the transferee forum has the first opportunity to set the ground rules for such class actions.[71] Upholding and managing class actions in connection with section 1407 transfers further avoids a multiplicity of actions[72] and automatically results in coordination of discovery where certain members "opt out" of the class action. The need for additional transfer orders whenever new actions are filed would likewise be minimized if potential plaintiffs are encompassed within valid class actions. Finally, section 1407 affords an important

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[68] Reference should be made to the Panel's action regarding antibiotic drugs, protection devices and equipment, children's books and plumbing fixtures. 5 Trade Reg. Rep. ¶¶ 50,215-18 (1968).

[69] The Advisory Committee has declared that one of the main changes wrought by amended Rule 23 was to provide "that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class. . . ." Advisory Note, 39 F.R.D. at 99. This scheme discourages a multiplicity of actions and eliminates "one way intervention" for class members.

[70] For a good illustration of such a housekeeping order, see Philadelphia Housing Authority v. American Radiator & Standard Co., Civil No. 41773 (E.D. Pa., filed Dec. 21, 1966), order dated Nov. 14, 1968.

[71] See Philadelphia v. Charles Pfizer & Co., Civil No. 68-144 (E.D. Pa., filed Jan. 18, 1968), order dated Jan. 22, 1968, where on the court's own motion, Chief Judge Clary, in anticipation of multidistrict coordination of antibiotics antitrust litigation, entered a general stay of all proceedings including class determinations, but excluded from the stay the filing of responsive pleadings. This and other related antibiotics antitrust actions pending in the Eastern District of Pennsylvania were ordered transferred to the Southern District of New York on October 21, 1968. See note 68 supra.

[72] Hohmann v. Packard Instruments Co., 399 F.2d 711, 714 (7th Cir. 1968).

means for reconciling the scope of overlapping class actions commenced in different districts.[73]

Rule 23(c)(1) as originally proposed would have permitted the court in certain circumstances upon its own initiative to convert an action into a class suit, even where the plaintiff did not choose to bring a class action. Further, as originally drafted, Rule 23(c)(2) authorized the court to retain in a 23(b)(3) class even members who requested exclusion from the suit, if the court found that their inclusion was essential to the fair and efficient adjudication of the controversy.[74] Because both of these proposals provoked strong controversy, they were dropped from the final revisions of these subdivisions. These gaps in court powers to cope with multiple litigation are largely filled by a judicious combination of section 1407 and Rule 23 powers. Using these powers in supplementary fashion, a court can sustain a class action, while at the same time the Judicial Panel could return to the class forum for pretrial purposes all those who excluded themselves from the class for one reason or another.

V. Conclusion

Essentially, Rule 23(d), providing for orders in the conduct of class actions, custom tailors to class actions the traditional general powers of the court under Rule 16 relating to pretrial procedures. Subdivision (d) also reminds the court that concepts under new Rule 23 give rise to the need for a careful consideration, at all stages of the action, for the due process rights of absent class members. Pretrial discovery and other pretrial matters must be brought under the control and direction of the court at an early stage in order to avoid predictable chaos in overlapping and conflicting motions and interrogatories which would ordinarily ensue if the parties were left to their own devices. Orders under Rule 23(d) which channel the discovery and pretrial matters through lead counsel or steering committees consisting of counsel from each side, and which provide for uniform sets of interrogatories and documents production requirements, go far to promote a fair and efficient adjudication of the controversy.

New Rule 23 is still in its infancy. It should not be expected to solve old problems without creating novel ones. Subsection (d) gives viability to the Rule and affords to the courts a tool for grappling with the entire range of these unique problems. Subject to constitutional safeguards, the use of the Rule is limited only by the imagination and creativity of the judge who adjudicates a class action.

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[73] See Minnesota v. United States Steel Corp., 44 F.R.D. 559 (D. Minn. 1968).

[74] See Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts, 34 F.R.D. 325, 386 (1964).