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# APPLICATION OF PRECLUSION PRINCIPLES TO § 1983 DAMAGE ACTIONS AFTER A SUCCESSFUL CLASS ACTION FOR EQUITABLE RELIEF

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## A. INTRODUCTION

In recent years the judge-made doctrines of res judicata and collateral estoppel[1] have become of increasing concern in civil rights litigation. The current trend in federal courts is toward a more harsh, strict application of preclusion principles to § 1983 actions.[2] This further increases the difficulty of securing a federal forum for federal civil rights issues, an already substantial problem because of the continuing expansion of doctrines relating to abstention, comity and federalism.[3] Recently the Supreme Court decided that § 1983 actions are not generally exempted from normal preclusion principles.[4] This made it

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1. Today some courts and authors are using different terminology, *i.e.*, claim preclusion (res judicata) and issue preclusion (collateral estoppel). *See, e.g.*, Miller v. Hartwood Apartments, Ltd., 689 F.2d 1239, 1241 n.2 (5th Cir. 1982). Because there is a lack of uniformity, the terms will be used interchangeably here.

2. In Allen v. McCurry, 449 U.S. 90, 97 (1980), the Court stated that "the virtually unanimous view of the courts of appeals has been that § 1983 presents no categorical bar to the application of res judicata and collateral estoppel concepts." Several cases are cited in a footnote in support of this statement. *Id.* at n.10. *See also* Rios v. Cessna, Fin. Corp., 488 F.2d 25 (10th Cir. 1973); Roy v. Jones, 484 F.2d 96 (3d Cir. 1973); Francisco Enterprise Inc. v. Kirby, 482 F.2d 481 (9th Cir. 1973), *cert. denied*, 415 U.S. 916 (1974); Coogan v. Cincinnati Bar Ass'n, 431 F.2d 1209 (6th Cir. 1970); Howe v. Brouse, 422 F.2d 347 (8th Cir. 1970). Evidence of a strict application of preclusion principles to civil rights cases is found in two recent Supreme Court decisions. Kremer v. Chemical Construction Corp., 102 S. Ct. 1883 (1982); Allen v. McCurry, 449 U.S. 90 (1980). The general trend toward a broader application of res judicata can be seen in Federated Dep't. Stores, Inc. v. Moitie, ___ U.S. ___, 101 S. Ct. 2424 (1981).

3. *See generally*, Middlesex County Ethics Committee v. Garden State Bar Association, ___ U.S. ___, 102 S. Ct. 2515 (1982), and the cases cited therein. Principles of comity and federalism have been used to support application of res judicata, Castorr v. Brundage, 674 F.2d 531, 536-37 (6th Cir.), *cert. denied*, 103 S. Ct. 240 (1982), and a limitation on the use of federal habeas corpus. Lehman v. Lycoming County Children's Services Agency, 102 S. Ct. 3231, (1982).

4. Allen v. McCurry, 449 U.S. 90 (1980).

critical for civil rights litigants to be familiar with res judicata law, including the general purposes of the doctrine, the conditions for its application and exceptions to the general rules. Much has been written on res judicata in general[5] and there are a substantial number of articles on its role in civil rights cases.[6] This article concentrates on the role of preclusion in a civil rights action for damages which is brought subsequent to a class action for equitable relief and based on the same legal right or claim.

While it is clear that class members can be bound, if adequately represented, by the decision on issues raised and actually litigated in a properly certified class action,[7] there is uncertainty about the application of preclusion principles to bar claims not raised in a class action. More specifically, the expanded application of that aspect of the res judicata doctrine which precludes splitting a cause of action[8] is questionable in the context of class actions. The question can arise in several situations. For example, named plaintiffs suing on behalf of a class for declaratory and injunctive relief might want to reserve

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5. *See, e.g.*, *Symposium on the Restatement (Second) of Judgments*, 66 CORNELL L. REV. 401 (1981); Holland, *Modernizing Res Judicata: Reflections on the Parklane Doctrine*, 55 IND. L.J. 615 (1980); Note, *The Collateral Estoppel Effect of Prior State Court Findings in Cases Within Exclusive Federal Jurisdiction*, 91 HARV. L. REV. 1281 (1978); Degnan, *Federalized Res Judicata* 85 YALE L.J. 741 (1976); Vestal, *Rationale of Preclusion*, 9 ST. LOUIS U.L.J. 29 (1964); *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818 (1952); Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339 (1948).

6. *See, e.g.*, Comment, *The Collateral Estoppel Effect to be Given State Court Judgments in Federal Section 1983 Damage Suits*, 128 U. PA. L. REV. 1471 (1980); Levenson, *Res Judicata and Section 1983: The Effect of State Court Judgments on Federal Civil Rights Actions*, 27 U.C.L.A. L. REV. 177 (1979); Note, *The Preclusive Effect of State Judgments on Subsequent 1983 Actions*, 78 COLUM. L. REV. 610 (1978); Torke, *Res Judicata in Federal Civil Rights Actions Following State Litigation*, 9 IND. L. REV. 543 (1976); Vestal, *State Court Judgment as Preclusive in Section 1983 Litigation in a Federal Court*, 27 OKLA. L. REV. 185 (1974).

7. Hansberry v. Lee, 311 U.S. 32, 42 (1940); Sam Fox Publishing Co. v. United States, 366 U.S. 683, 691 (1961). As stated in *Hansberry*, "[t]here has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it." 311 U.S. at 42. A properly settled class action can also be binding on class members. Simer v. Rios, 661 F.2d 655, 664 (7th Cir. 1981). *See also*, Note, *Preclusion of Nonparties: A Due Process Violation?*, 13 SW. L. REV. 169 (1982); Annot., 48 A.L.R. FED. 675 (1980).

8. *See, e.g.*, United States v. California & Ore. Land Co., 192 U.S. 355, 358 (1904); Southern Jam, Inc. v. Robinson, 675 F.2d 94 (5th Cir. 1982); Harper Plastics v. Amoco Chemicals Corp., 657 F.2d 939, 945 (7th Cir. 1981); Clarke v. Redecker, 406 F.2d 883 (8th Cir. 1969); Hennepin Paper Co. v. Ft. Wayne Corregated Paper Co., 153 F.2d 822 (7th Cir. 1946); 1B MOORE'S FEDERAL PRACTICE 0.410(1) (2d ed. 1974); RESTATEMENT (SECOND) OF JUDGMENTS §§ 61-61.2 (Tent. Draft No. 5, 1978).

their damage claims for subsequent individual actions. Or, members of the class in the same case might want to bring subsequent suits for damages based on the same facts and legal theory.[9]

Assuming the subsequent actions for damages can be brought in the situations referred to above, another question relates to the availability of collateral estoppel or issue preclusion. Plaintiffs in the subsequent suits, whether named plaintiffs or members of the class in the successful action for equitable relief, should usually argue that the liability[10] issue has been determined in the former action and is not subject to relitigation. If relitigation of liability is precluded, the only issue in the subsequent suits will be whether the plaintiff is entitled to damages and, if yes, the amount.[11] Such offensive use of collateral estoppel has been questioned on the grounds that it infringes upon the defendant's right to a jury trial under the seventh amendment; however, this issue was recently resolved in favor of the application of collateral estoppel.[12]

After an abbreviated review of general preclusion principles, the remainder of this article addresses the application to the principles in an action for damages brought subsequent to a successful class suit for only equitable relief. It will be demonstrated that policy considerations argue not only in favor of allowing the second action, but also against relitigation of the liability issue.

### B. Summary Of Preclusion Principles

Before discussing the application of the related doctrines of res judicata and collateral estoppel, it is worth summarazing the basic concepts. As recently stated by the Supreme Court, "[u]nder res judicata, a final judgment on the merits of an action precludes the

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9. There are a variety of reasons why the class representatives might not want to seek damages, either for themselves or class members, in the initial action. *See infra* notes 59-66 and accompanying text.

10. Liability as used here simply refers to the determination of whether or not there has been a violation of one or more legal rights relied upon by the plaintiff. In other words, it reflects a determination of the merits of the plaintiff's claims, excluding the question of what, if any, relief is appropriate.

11. Of course, a determination of liability does not automatically mean the plaintiff is entitled to damages. Assuming the plaintiff is seeking compensatory damages, there must be proof of actual loss. In some cases, only nominal damages will be appropriate. Carey v. Piphus, 435 U.S. 247 (1978). A valid immunity defense could defeat an otherwise appropriate claim for damages. *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232 (1974); Wood v. Strickland, 420 U.S. 308 (1975).

12. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 338 (1979); *see infra* section D; Note, *Collateral Estoppel*, 16 U. RICH. L. REV. 341 (1982).

parties or their privies from relitigating issues that *were or could have been raised* in that action."[13] Therefore, the elements required for application of claim preclusion appear to be: a) a final judgment on the merits in the first action, b) the same parties or their privies, and c) the same cause of action or issues which could have been raised in the original cause of action.[14] Extending the bar to matters which could have been raised in the first case certainly encourages plaintiffs to raise all possible legal claims and remedies, or risk forever losing them.[15]

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13. Allen v. McCurry, 449 U.S. at 94 (emphasis added).

14. The use of "cause of action" in describing the prohibition on splitting is the source of much confusion. *See, e.g.*, Lee v. City of Peoria, 685 F.2d 196, 199-200 (7th Cir. 1982); Harper Plastics v. Amoco Chemicals Corp., 657 F.2d 939, 944-46 (7th Cir. 1981). Professor Moore argues that a "broad and practical concept of 'cause of action' will best promote that interest [in the stability of final judgments and the avoidance of repetitive litigation], at least whenever the forum, such as the federal, has a procedure which enables a claimant to put forward all grounds, and a defendant all defenses, whether these grounds or defenses be legal and/or equitable and whether they be consistent or inconsistent." 1B MOORE'S FEDERAL PRACTICE 0.410(1) (2d ed. 1974). The RESTATEMENT (SECOND) OF JUDGMENTS § 61 (Tent. Draft No. 5, 1978) abandons the reference to cause of action and defines the general prohibition on splitting in terms of transactions. It states:

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the Rules of merger or bar . . . , the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a "transaction," and what groupings constitute a "series," are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Comment a to this section states: "In defining claim to embrace all the remedial rights of the plaintiff against the defendant growing out of the relevant transaction (or series of connected transactions), this Section responds to modern procedural ideas which have found expression in the Federal Rules of Civil Procedure and other procedural systems." *Id.*

15. Section 61.1 of the RESTATEMENT demonstrates the extent of the prohibition on splitting. It states:

> The rule of § 61 applies to extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action
>
> (a) to present evidence on grounds or theories of the case not presented in the first action, or
>
> (b) to seek remedies or forms of relief not demanded in the first action.

RESTATEMENT (SECOND) OF JUDGMENTS § 61.1 (Tent. Draft No. 5, 1978). The justifications for the prohibition on splitting by a plaintiff include (1) the danger of double recovery, (2) the need for stability of judicial determinations, (3) a desire to protect

Under the related doctrine of collateral estoppel, "once a court has decided an issue of fact or law necessary to its judgment, that

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the defendant from the cost and vexation of repeated litigation and (4) concern for judicial economy. Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339, 343 (1948).

In contrast, a defendant should normally be allowed to defend a second action on the basis of an issue not raised in the first. This is governed by issue preclusion.

> A judgment for the plaintiff in the first action may have the effect of enabling him to recover in the second action without proving his claim, provided that the controlling issues were litigated and determined in the prior action; but the defendant is not precluded from defending the second action on the basis of an issue not litigated and determined in the first action.

RESTATEMENT (SECOND) OF JUDGMENTS § 68, comment a (Tent. Draft No. 1, 1973). *See, e.g.*, Jacobson v. Miller, 41 Mich. 90, 1 N.W. 1013 (1879). This situation should not arise too often because a plaintiff would normally be barred, by the prohibition on splitting a claim, from bringing a second action against the same defendant.

While this result may in fact encourage "splitting" of defenses by a defendant, it is important to keep in mind that the policy considerations are different than when a plaintiff splits. For example, the primary policy justification for preclusion is to protect defendants, not plaintiffs; the defendant normally doesn't control the bringing of the second action; any other rule would force defendants to raise and litigate every possible defense, no matter how small the stakes, for fear that the failure to raise all defenses might bar their use in subsequent actions where the stakes are higher.

A more common situation is where a defendant in the first action chooses not to raise an issue as a defense but brings a second action as plaintiff raising the same issue.

> The same basic set of facts, of course, may constitute both a defense to a claim by an opposing party and the basis of a lawsuit against that party. In such cases, it is generally held that the failure of a defendant to raise the particular facts as a defense in a lawsuit brought against him does not preclude that defendant from thereafter suing for relief on the basis of these facts, regardless of who prevailed in the earlier suit.

Circle v. Jim Walter Homes, Inc., 654 F.2d 686, 691 (10th Cir. 1981). *See also*, RESTATEMENT (SECOND) OF JUDGMENTS § 56.1(1) (Tent. Draft No. 1, 1953). This issue is likely to arise when a § 1983 action is filed subsequent to a criminal proceeding against the § 1983 plaintiff, Whitley v. Seibel, 676 F.2d 245, 247-50 (7th Cir. 1982), or subsequent to a civil enforcement action in a state court against the § 1983 plaintiff. Lee v. City of Peoria, 685 F.2d 196, 201 (7th Cir. 1982); Southern Jam, Inc. v. Robinson, 675 F.2d 94 (5th Cir. 1982). As noted by the court in *Circle*, there are two exceptions to this rule—where the subsequent suit is barred by a compulsory counterclaim rule or where allowing the subsequent action would operate to undermine the initial judgment. 654 F.2d at 691. *See also*, Lee v. City of Peoria, 685 F.2d 196, 201 (7th Cir. 1982); RESTATEMENT (SECOND) OF JUDGMENTS § 65.1(2) (Tent. Draft No. 1, 1953).

The Supreme Court seemed to recognize in Allen v. McCurry, that a defendant in state criminal proceedings could choose not to raise fourth amendment defenses in order to avoid application of collateral estoppel in a subsequent federal court action for damages. 449 U.S. at 104 n.23. This was also recognized in the dissent where it is stated: "To force him to a choice between foregoing either a potential defense or a federal forum for hearing his constitutional civil claim is fundamentally unfair." *Id.* at 116. *See also*, RESTATEMENT (SECOND) OF JUDGMENTS § 68, comment e (Tent. Draft No. 1, 1973).

decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case."[16] This requires a) that the issues be the same in both cases, b) that it be litigated and decided in the first case, and c) that it be essential to the judgment in the first case. The Court has stated that application of both res judicata and collateral estoppel is central to the conclusive resolution of disputes by the courts.

> To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple law-suits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.[17]

When the second suit is in federal court and follows state court litigation, the Supreme Court has identified another policy consideration, *i.e.*, comity.[18] This notion of comity is contained in a federal statute which requires that state judicial proceedings "shall have the same full faith and credit in [federal courts] as they have by law or usage in the courts of such State, . . . from which they are taken."[19]

Because res judicata and collateral estoppel are judge-made doctrines based on policy considerations, exceptions are recognized when their application would result in injustice or overriding public policies exist.[20] As recognized by the Court in *Allen v. McCurry*, its prior decisions did not preclude an argument that traditional res judicata and collateral estoppel principles do not apply to § 1983 actions brought in federal court after related litigation in a state court.[21]

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16. Allen v. McCurry, 449 U.S. at 94.

17. United States v. Montana, 440 U.S. 147, 153-54 (1979).

18. Allen v. McCurry, 449 U.S. at 95-96.

19. 28 U.S.C. § 1738 (1976). *See*, Southern Jam, 675 F.2d at 97-98.

20. *See generally*, 1B J. MOORE & T. CURRIER, MOORE'S FEDERAL PRACTICE 0.405[11] and [12] (2d ed. 1982). The decision in Federated Dept. Stores, Inc. v. Moitie, 101 S. Ct. 2424, 2429 (1981), may suggest less flexibility in the doctrines. Nevertheless, lower courts continue to balance conflicting policy considerations. *See, e.g.*, Castorr v. Brundage, 674 F.2d 531, 536 (1982); Howell v. State Bar of Texas, 674 F.2d 1027, 1031 (5th Cir. 1982).

21. 449 U.S. 90, 96 (1980). The approaches in the circuits vary and are not necessarily consistent within a circuit. *See, e.g.*, Lovely v. Laliberte, 498 F.2d 1261, 1263-64 (1st Cir. 1974), *cert. denied*, 419 U.S. 1038 (1974); Friarton Estates Corp. v. City of New York, 681 F.2d 150 (2d Cir. 1982); Leigh v. McGuire, 613 F.2d 380, 381-82 (2d Cir. 1979); Winters v. Lavine, 574 F.2d 46 (2d Cir. 1978); Graves v. Olgiati, 550 F.2d 1327 (2d Cir. 1977); Lombard v. Board of Educ., 502 F.2d 631 (2d Cir. 1974), *cert. denied*, 420 U.S. 976 (1975); New Jersey-Philadelphia, Etc. v. N.J. State Board, 654 F.2d 868, 876 (3d Cir. 1981); New Jersey Education Association v. Burke, 579 F.2d

This argument was based, at least in part, on an earlier determination that the § 1983 remedy was intended to be "supplementary to the state remedy."[22] There had been "implicit approval [of] the view of other federal courts that res judicata principles fully apply to civil rights suits brought under [§ 1983]."[23] However, it was not until *Allen v. McCurry*[24] that the Court directly held that the rules of res judicata and collateral estoppel generally apply to § 1983 actions. The Court stated:

> [N]othing in the language or legislative history of § 1983 proves any congressional intent to deny binding effect to a state court judgment or decision when the state court, acting within its proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims, and thereby has shown itself willing and able to protect federal rights. . . . There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all.[25]

Actual application of the collateral estoppel defense was left for the lower court on remand as was the question of whether any exceptions or qualifications would apply.[26] Also, the Court explicitly noted

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764, 774 (3d Cir. 1978), *cert. denied*, 439 U.S. 894 (1978); Maher v. City of New Orleans, 516 F.2d 1051, 1055-56 (5th Cir. 1975); Mack v. Fla. Bd. of Dentistry, 430 F.2d 862 (5th Cir. 1970); Frazier v. East Baton Rouge Parish School Bd., 363 F.2d 861, 862 (5th Cir. 1966); Coogan v. Cincinnati Bar Ass'n., 431 F.2d 1209, 1211 (6th Cir. 1970); Kurek v. Pleasure Driveway and Park District, 557 F.2d 580, 594-95 (7th Cir. 1977); Brubaker v. King, 505 F.2d 534 (7th Cir. 1974); Robbins v. District Court, 592 F.2d 1015 (8th Cir. 1979); Rhodes v. Meyer, 334 F.2d 709, 716 (8th Cir. 1964), *cert. denied*, 379 U.S. 915 (1964); Scoggin v. Schrunk 522 F.2d 436, 437 (9th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976); Ney v. California, 439 F.2d 1285, 1288 (9th Cir. 1971) (dictum); Spence v. Latting, 512 F.2d 93, 97-99 (10th Cir.), *cert. denied*, 423 U.S. 896 (1975). *See also*, Comment, *The Collateral Estoppel Effect to be Given State Court Judgments in Federal Section 1983 Damage Suits*, 128 U. PA. L. REV. 1471 (1980); Vestal, *State Court Judgment as Preclusive in Section 1983 Litigation in a Federal Court*, 27 OKLA. L. REV. 185, 191-92, 195-97 (1974); RESTATEMENT (SECOND) OF JUDGMENTS § 134 (Tent. Draft No. 7, 1980). The Third Circuit recently held that a finding of no discrimination in state proceedings is binding in a subsequent federal action under 42 U.S.C. § 1981. Davis v. United States Steel Supply, Etc., 688 F.2d 166 (3d Cir. 1982).

22. Monroe v. Pape, 365 U.S. 167, 183 (1961).
23. Allen v. McCurry, 449 U.S. 90, 96 (1980).
24. 449 U.S. 90 (1980).
25. *Id.* at 104.
26. *Id.* at 95 n.7.

that the case "does not involve the question whether a § 1983 claimant can litigate in federal court an issue he might have raised but did not raise in previous litigation."[27]

It is a variation of this latter question, postured in the context of class litigation, which will be discussed here. Even if res judicata applies generally to § 1983 actions, both policy and constitutional considerations dictate that it not be applied to bar a subsequent individual action for damages after a successful action for equitable relief on behalf of a class.

### C. RES JUDICATA AND THE SUBSEQUENT DAMAGE ACTION

In order to better focus the issues to be addressed in the remainder of this article, a specific situation will be given. While there can be a number of variations from this, the basic characteristics are a) a Rule 23(b)(2) class action brought pursuant to § 1983, usually against public officials, which seeks only declaratory and injunctive relief, b) a subsequent individual action in the same court, brought by either a named plaintiff or a class member in the first case, against the same defendants seeking damages based on the same facts and legal theories involved in the prior class action, c) a defense[28] in the second action based on res judicata, and d) an attempt by the plaintiff in the second action to use collateral estoppel offensively. Litigation challenging institutional—jail, prison or mental hospital—conditions and practices demonstrates these characteristics very well.

On or more residents of an institution, seeking broad declaratory and injunctive relief on behalf of a class consisting of all residents, bring a § 1983 action challenging certain conditions and practices on federal statutory and constitutional grounds.[29] A request for a

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27. *Id.* at 94 n.5. Presumably "previous litigation" refers to litigation conducted in a state court. Since *McCurry*, one court has held that res judicata does bar such issues. Castorr v. Brundage, 674 F.2d 531, 536 (6th Cir. 1982). *See also*, Miller v. Hartwood Apartments, Ltd., 689 F.2d 1239, 1241-42 (5th Cir. 1982); Lee v. City of Peoria, 685 F.2d 196, 198-99 (7th Cir. 1982).

28. Under the FED. R. CIV. P., 8(c), res judicata is an affirmative defense which must be raised or it is waived. *See, e.g.*, Huffman v. Pursue, Ltd., 420 U.S. 592, 607-08 n.19 (1975); Blonder-Tongue Laboratories, Inc. v. Univ. of Ill., 402 U.S. 313, 350 (1971); Crowder v. Lash, 687 F.2d 996, 1008 (7th Cir. 1982).

29. In the federal court action, it is also possible to raise pendent state law claims. United Mine Workers v. Gibbs, 383 U.S. 715 (1966). This has obvious preclusion implications. *See*, Note, *The Res Judicata Implications of Pendent Jurisdiction*, 66 CORNELL L. REV. 608 (1981); RESTATEMENT (SECOND) OF JUDGMENTS § 61.1, comment e (Tent. Draft No. 5, 1978).

temporary restraining order and preliminary injunction is usually included, at least with respect to some of the issues. Named as defendants are the head of the institution and other officials with responsibility for the operation of the institution. Assuming the court certifies a class under Rule 23(b)(2) and rules in favor of the plaintiffs,[30] either a named plaintiff or member of the class brings an individual action for damages. The same persons are named as defendants, but in both their official and personal capacities.[31] Defendants ask for a jury trial and raise two affirmative defenses—immunity from damages[32] and res judicata. The plaintiff moves for partial summary judgment on the liability[33] issue arguing the defendants are collaterally estopped from relitigating this aspect of the case.[34]

Obviously, the preclusion issue discussed here can be avoided by seeking all relief in the first case, but there are often good reasons not to do so.[35] Thus, the question is whether named plaintiffs in a class action can exclude a request for damages without waiving both their own and class members' claims for damages. The first section below will discuss steps to be taken by the plaintiffs' counsel to guard against waiver of class members' claims; the following two sections will address the policy considerations supporting an argument against preclusion.

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30. Of course, it is possible that subsequent damage actions would be filed even after the plaintiffs had lost the class action. Assuming adequate representation in the class action and a determination on the liability issue favorable to the defendants, such actions would be disposed of summarily on the basis of collateral estoppel or issue preclusion.

31. When suing only for equitable relief, it is not necessary to name public officials in their individual or personal capacities. While this is sometimes done in federal court as a hold-over of the fiction in *Ex parte Young*, 209 U.S. 123 (1908), to circumvent the eleventh amendment, clearly it is not necessary because the equitable relief is effective against the defendants only so long as they remain in office. If officials change while an action against them in their official capacities is pending, substitution is routine. *See* Rule 25(d), FED. R. CIV. P.

32. In Gomez v. Toledo, 446 U.S. 635 (1980), the Supreme Court held that a claim of qualified immunity is an affirmative defense which must be pleaded by the defendants. The question of burden of proof was left open but there is no reason why it should not follow the burden of pleading. *See* Chavis v. Rowe, 643 F.2d 1281, 1288 (7th Cir.), *cert. denied*, 102 S. Ct. 415 (1981).

33. *See supra* note 10.

34. This assumes, of course, that the claim for damages is based on a right actually determined in the first case. For example, it may be that the court in the first action decided only that there had been statutory violations without reaching the constitutional issue. If the claim for damages is based solely on constitutional violations, then, of course, liability would not have been determined.

35. *See infra* notes 59-66 and accompanying text.

1. *Methods of Protecting Absent Class Members*

While named plaintiffs have an obvious interest in avoiding waiver of their own claims for damages, their primary concern must be with the potential waiver of claims of absent, often unknown, class members. This is true because, in all likelihood, the class members do not even know of the litigation when it is filed and therefore cannot make their own informed decision as to the scope of relief. Until the law is settled, there is no guarantee that the named plaintiffs can exclude damage claims from the class action without a substantial risk of waiver. However, steps can be taken to minimize this risk.

First, the representative parties in the class action can present the problem to the court and ask that their representation be limited to the equitable issues, with an express reservation of the rights of absent class members to bring subsequent suits for damages.[36] This could be part of the adequacy of representation determination, *i.e.*, the named plaintiffs would be certified to represent a defined class for the limited purpose of pursuing equitable relief.

Another option would be to require actual notice to all class members 1) advising them that damage claims have not been included on their behalf and 2) informing them how they can seek to intervene in the action as parties to raise their damage claims or opt out.[37] There are some obvious problems with this. Assuming a substantial number of the class members are interested in pursuing damages, their intervention as named plaintiffs with different attorneys could make the litigation difficult to manage or at least change the nature of what started out to be a (b)(2) class action for equitable relief. Rather than allowing unlimited intervention, it might be better for the court to designate one or more of those who want to intervene as represen-

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36. The Advisory Committee notes to the 1966 amendments to Rule 23 state:

> Although thus declaring that the judgment in a class action includes the class, as defined, subdivision (c)(3) does not disturb the recognized principle that the court conducting the action cannot predetermine the res judicata effect of the judgment; this can be tested only in a subsequent action. See Restatement, Judgments § 86, Comment (h) § 116 (1942). The court, however, in framing the judgment in any suit brought as a class action must decide what its extent or coverage shall be, and if the matter is carefully considered, questions of res judicata are less likely to be raised at a later time and if raised will be more satisfactorily answered. See Chaffrey, supra, at 294; Weinstein, *supra*, 9 Buffalo L. Rev. at 460.

39 F.R.D. 69, 106 (1966).

37. Such notice could be required under Rule 23(d)(2) and should inform class members of the potential waiver of their damages claims unless action is taken in accordance with the notice. Crowder v. Lash, 687 F.2d 996, 1008 (7th Cir. 1982).

tative(s) of a Rule 23(b)(3) subclass seeking damages.[38] If class members choose instead to opt out and thereby retain the right to bring their own action, then most of the benefits of class litigation have been lost. Since the case started out as a (b)(2) class it is not even clear they have a right to opt out, although the intent of Rule 23 seems to be to provide this option whenever damages are sought.[39] Neither intervention nor opting out may be very attractive, particularly in light of the fact that it might require the class members to obtain their own counsel. Opting out also deprives them of the benefits of a successful judgment on the equitable claims and maybe the opportunity to use the liability determination in their separate suits.[40]

These alternatives protect the class members because their rights are not lost without representation or notice of the possible adverse consequences. The former, limited certification, seems most consistent with the spirit of both Rule 23 and res judicata. It is also generally consistent with the approach taken in the Restatement (Second) of Judgments.[41] Section 61 of the Restatement defines the dimensions of a "claim" in transactional terms and bars the splitting of claims. In the following section it is made clear that section 61 "extinguish[es] a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action . . . (b) to seek remedies or forms of relief not demanded in the first action."[42] Then the Restatement lists seven exceptions to the general rule concerning splitting. Those most relevant for our purposes are the following:

* * *

(b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action; or

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38. *See* FED. R. CIV. P. 23(c)(4).

39. FED. R. CIV. P. 23(c)(2)(A). Pension v. Terminal Transport Co., 634 F.2d 989, 994 (5th Cir. 1981) (no absolute right to opt out of a (b)(2) class but the district court has the discretionary power under Rule 23(d)(2) to allow it).

40. It is not clear whether a class member who opts out can assert offensive collateral estoppel in their own action. *See generally*, Furman, *Offensive Assertion of Collateral Estoppel by Persons Opting Out of a Class Action*, 31 HASTINGS L.J. 1189 (1980); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331-32 (1979). It is also possible that the applicable statute of limitations, tolled by the filing of the class action, *see* American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974), will quickly expire on a person who opts out. *But see*, Pavlak v. Church, 681 F.2d 617 (9th Cir. 1982) (after class certification is denied, a member of putative class cannot claim the statute of limitations was tolled pending the ruling on certification).

41. RESTATEMENT (SECOND) OF JUDGMENTS §§ 61-61.2 (Tent. Draft No. 5, 1978).

42. *Id.* at § 61.1.

> (c) The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief; or
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> * * *
>
> (f) It is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disposition of the controversy. . . .[43]

Application of subsection (b) would require recognition of the problem by the original plaintiffs and a request to the court to expressly limit the class representaton to the claim for equitable relief. The court would in effect be making a prior determination that subsequent actions for damages would be appropriate.[44] Subsection (c) would be most applicable in a situation where the claim for damages is barred by the eleventh amendement.[45] Also, it would seem to apply in situations where a claim for damages on behalf of the class members would make the class action unmanageable. The exception found in subsection (f) allows for a general balancing of the policy considerations, both those supporting the res judicata doctrine in general and those arguing against the application of preclusion principles to this situation.[46]

Another approach to the situation is suggested by Professor Cleary in his much cited article on res judicata:

> If the subject matter of the second action is so inextricably involved with that of the first case that it must have entered into the composition of the first judgment then further consideration should be barred by res judicata. If the matter might

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43. *Id.* at § 61.2.

44. *See supra* note 36 and accompanying text.

45. *See infra* note 95. *Compare*, Marrese v. American Academy of Orthopaedic Surgeons, 692 F.2d 1083 (7th Cir. 1982) (federal antitrust suit barred after a state court suit based on state law even though state law did not provide for treble damages); Nash County Bd. of Education v. Biltmore Co., 640 F.2d 484 (4th Cir. 1981).

46. *See supra* note 20 and *infra* note 97 and accompanying text.

> more economically and conveniently have been litigated in the first action but in fact was not, then costs and expenses should be assessed against the offending party. This would seem to let the punishment fit the crime.[47]

The Cleary approach is certainly preferable to a rigid application of res judicata. However, the assessment of costs and expenses should be limited to the situations where it can be demonstrated that the "splitting" actually increased the defendants' costs and expenses. It will be suggested that in most situations the reduction in discovery and trial time in the first case will be such that the second case will not result in any duplication nor an increase in the total expenditure of time and resources.[48]

Fortunately, a number of courts have rejected the res judicata defense in situations similar to the example used here. They have done so on the basis of inadequate notice to class members[49] as well as a concern about the appropriateness of a class action for litigating the damage claims.[50] Several courts have discussed the adequacy of representation issue, but based their decisions on other factors.[51] A full consideration of all the relevant policy concerns outlined below should normally lead to rejection of the res judicata defense in a subsequent damage action brought by a class member. Many of these same concerns argue in favor of allowing even a named plaintiff in the class action to bring a subsequent damage action. The two situations will be discussed separately.

2. *Subsequent Damage Action by a Named Plaintiff in the First Suit*

As indicated, res judicata has been extended to bar the litigation of issues or claims whch could have been, but were not, raised in a prior action.[52] Particularly in light of liberal joinder rules, it is

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47. Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339, 349-50 (1948).

48. *See infra* notes 84-88 and accompanying text.

49. *See* cases cited *infra* note 121.

50. Crowder v. Lash, 687 F.2d 996, 1008-09 (7th Cir. 1982); Sullivan v. Chase Inv. Serv. of Boston, Inc., 79 F.R.D. 246, 265 (N.D. Ga. 1978); Bogard v. Cook, 586 F.2d 399, 409 (5th Cir. 1978); Dore v. Kleppe, 522 F.2d 1369, 1375 (5th Cir. 1975).

51. Jones-Bey v. Caso, 535 F.2d 1360, 1362 (2d Cir. 1976); Lewis v. Phillip Morris, Inc., 419 F. Supp. 345, 353 (E.D. Va. 1976); Johnson v. General Motor Corp., 598 F.2d 432, 434 (5th Cir. 1979); Sagers v. Yellow Freight Sys., Inc., 68 F.R.D. 686, 689 (N.D. Ga. 1975).

52. According to Cleary, a cause of action may be split in one of three ways: 1) as to theories of recovery, *e.g.*, Green v. American Broadcasting Co., Inc., 572 F.2d 628, 632 (8th Cir. 1978); Williamson v. Columbia Gas & Elec. Corp., 186 F.2d 464 (3d Cir. 1950), *cert. denied*, 341 U.S. 921 (1951); 2) types of relief sought, *e.g.*, Clark v.

generally wise to require that all claims arising out of one transaction[53] be litigated in same lawsuit. This requirement serves at least some of the policies and purposes behind the res judicata doctrine.[54] It is important to note that the prohibition on splitting claims does not deal with the joinder of unrelated claims; rather, it is limited to cases where one fact situation or set of circumstances gives rise to more than one legal basis for recovery or type or relief.[55]

After the Supreme Court decision in *McCurry* holding that the usual preclusion principles are generally applicable to § 1983 action, a § 1983 plaintiff should not attempt to bring successive individual actions in federal court for equitable relief and then damages.[56] If such

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Redecker, 406 F.2d 883 (8th Cir. 1969); Hennepin Paper Co. v. Ft. Wayne Corregated Paper Co., 153 F.2d 822 (7th Cir. 1946); or 3) arithmetically, that is, one claim divided more or less arbitrarily to include certain elements of damages in one action and others in a second action, *e.g.*, Sutcliffe Storage & Warehouse Co. v. United States, 162 F.2d 849 (1st Cir. 1947). Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339, 343 (1948).

53. The transactional analysis is based on the RESTATEMENT (SECOND) OF JUDGMENTS § 61 (Tent. Draft No. 5, 1978). *See supra* note 13.

54. According to Cleary, there are four justifications for the prohibition on claim slitting. *See supra* note 15.

55. *See generally*, RESTATEMENT (SECOND) OF JUDGMENTS, § 61 (Tent. Draft No. 5, 1978).

56. Keep in mind that we are not considering the question left open in *McCurry*, "whether a § 1983 claimant can litigate in federal court an issue he might have raised but did not raise in previous [state court] litigation." 449 U.S. at 94 n. 5. Several appellate courts have held that a § 1983 plaintiff is not barred from litigating in federal court a federal issue which could have been raised in an earlier state court proceeding against the same party. *See generally supra* note 24. This result seems both correct and desirable primarily because it is consistent with the holding in *Monroe v. Pape*, 365 U.S. 167 (1961), to the effect that the § 1983 remedy was intended to be supplementary to what was available in state court. If a plaintiff does not have to first go to state court, and in fact did not raise the federal claim in state court, application of res judicata to bar the federal claim in federal court would seem to overrule *Monroe*. Lombard v. Board of Education, 502 F.2d 631, 635 (2d Cir. 1974) *Compare*, Marrese v. American Academy of Orthopaedic Surgeons 692 F.2d 1083 (7th Cir. 1982). There is, however, an even stronger policy argument against the application of res judicata in this situation, *i.e.*, it would discourage plaintiffs from filing state claims in state court. For example, a plaintiff with both a federal constitutional claim and a state law claim generally has an option of filing both claims in either state court or federal court. If the plaintiff chooses federal court, pendent jurisdiction can be asserted over the state law claim. United Mine Workers v. Gibbs, 383 U.S. 715 (1966). Because of the general policy of avoiding constitutional questions whenever possible, Hagans v. Lavine, 415 U.S. 528 (1974), the federal court would in all likelihood decide to litigate the state claim first. Siler v. Louisville & Nashville R. Co., 213 U.S. 175 (1909). *See also*, Schmidt v. Oakland Unified School District, 102 S. Ct. 2612 (1982). Of course, abstention is another possibility. If the state law is unclear and a definitive state court ruling would eliminate or substantially modify the federal constitutional question, then

successive individual actions are barred, why should the result be different where the first suit, for equitable relief, was on behalf of a class? This is a situation where countervailing policy considerations justify an exception[57] to the usual prohibittion on splitting cliams for relief.

a. *Rule 23 Considerations*

Plaintiffs considering litigation to reform an institution are faced with an immediate dilemma, *i.e.*, whether to bring an individual or class action and, if the latter, whether to seek damages on behalf of the class, only themselves, or not at all. The individual action, seeking both equitable relief and damages, is usually the most simple. However, for a variety of reasons, this is not always the best resolution. Because all residents of the institution are generally subject to the same practices and conditions, a class action fulfills one of the primary purposes of Rule 23—*i.e.*, to prevent multiple lawsuits on the same issue.[58] A series of lawsuits not only affects the caseload of the courts, but also subjects the defendants to the possibility of inconsistent results. Also, it is an extremely inefficient way to deal with a problem, particularly since most institutionalized persons do not have funds to hire counsel and because there are only a limited number of "public interest" attorneys who have the expertise to bring such cases.

Bringing a class action for damages raises other problems. A request for class damages would normally require the plaintiffs to pro-

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abstention may be appropriate. Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941). However, it is clear that the federal plaintiff, forced to file an action in state court to clarify state law, can return to federal court for resolution of the constitutional issue as long as it was reserved and not submitted to the state court. England v. Louisiana Medical Examiners, 375 U.S. 411 (1964).

This would suggest that a plaintiff who wants to litigate the state law claim in state court and the federal constitutional issue in federal court should first file both in federal court, invite abstention and then litigate in state court while reserving the federal issue. Surely it would be preferable to encourage plaintiffs to litigate state claims in state court without first filing in federal court to take advantage of *England*. Application of res judicata to bar a second action in federal court on the federal issue would actually discourage plaintiffs from using the state courts. Frequently, if the plaintiff prevails in state court on the state claim, there is no need for a second case raising the federal constitutional issue. Therefore, as a matter of policy, claim splitting should be allowed in this situation.

57. *See supra* note 20. An example of this situation is found in *Crowder v. Lash*, 687 F.2d 996 (7th Cir. 1982), where a prison inmate who intervened as a plaintiff in the class suit was allowed to bring a subsequent suit for damages.

58. *See, e.g.*, Califano v. Yamasaki, 442 U.S. 682, 700-01 (1979).

ceed under Rule 23(b)(3) rather than (b)(2).[59] Because Rule 23 provides for mandatory notice and the right to opt out of a (b)(3) class,[60] and because of the need for individualized proof regarding damages, class actions seeking damages are generally less manageable. The request for class damages might, therefore, jeopardize class certification.[61]

These problems can be avoided by bringing a Rule 23(b)(2) class action and limiting the request for damages to the named plaintiffs. However, this raises different problems, including questions concerning the adequacy of representation. For example, if failure to seek class damages results in a waiver of all class members' rights to damages, such class members have not been adequately represented by the named parties.[62] This is particularly true if the class members have not been notified that damages were not sought and, therefore, waived.[63] The inclusion of damage claims for the named plaintiffs gives the defendants a right to a jury trial. This may not be in the best interest of the class members and could lead to a conflict among class members and their representatives. Particularly where the representatives' claims for damages are substantial, there is a real danger that strategical decisions throughout the litigation will be dictated by the damage claims rather than the equitable claims of the class.[64] Finally, named plaintiffs with damage claims are more susceptible to pressure from the defendants to accept individual relief and abandon the class. Recent cases[65] make it clear that resolution of the class representatives' claims does not preclude pursuit of the class claims. However,

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59. Suits seeking predominantly monetary damages generally do not qualify under Rule 23(b)(2); however, courts have certified (b)(2) classes in cases which seek money, particularly retroactive benefits or wages, when the primary relief sought was injunctive. *See* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1775 n. 31 (1972), and the cases cited therein.

60. Rule 23(c)(2), FED. R. CIV. P. *See also*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

61. *See infra* notes 101-12 and accompanying text.

62. *See infra* section C-3-a.

63. *Id.* Crowder v. Lash, 687 F.2d 996, 1008 (7th Cir. 1982). Even if notice is given, it is not clear what the class members can do since there is no right to opt out of a (b)(2) class. *See supra* note 39. They might seek to intervene under Rule 24, FED. R. CIV. P.

64. For example, discovery decisions may be dictated by the need to prepare the damage claim for trial rather than the desirability of preparing the equitable claim for summary judgment. In fact, the majority of the discovery may be directed at proof of damages or an immunity defense rather than equitable issues. *See infra* note 70 and accompanying text.

65. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980); United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980).

it may be necessary to find new class representatives[66] and this can result in delay and disruption.

Including damage claims on behalf of the named plaintiffs will normally interject one or more additional issues into the case which are not relevant to the class claim for equitable relief. Most § 1983 litigation is brought against public officials who are likely to raise, as an affirmative defense,[67] either a qualified[68] or absolute[69] immunity from damages. Rule 23 requires that the "claims or defenses of the representative parties [be] typical of the claims or defenses of the class."[70] While the liability issue still remains the same for both equitable relief and damages, the immunity defense can easily become the dominating issue because of the potential for personal liability on the part of the defendants. Often a liability insurer will provide the defense for public officials in their individual capacities and essentially control the defense but have no interest in the equitable claims. Discovery can be significantly prolonged by the immunity defense, all to the detriment and delay of the class claims. Very simply, a non-typical claim or defense can dominate the litigation.[71]

The easiest way to resolve the plaintiffs' dilemma is to allow them to bring a (b)(2) class action for only equitable relief and then a subsequent, individual action for damages. This best serves the purposes of Rule 23 and, as we will see below, does not interfere with efficient judicial administration nor prejudice the defendants.

b. *Judicial Administration Considerations*

Assuming the primary judicial interests served by preclusion principles are efficiency and finality, neither is necessarily undermined by allowing subsequent damage actions in the situation discussed here. Concerning the conservation of judicial resources, it is quite apparent that forcing named plaintiffs to seek both individual damages and class

66. United States Parole Comm'n., 445 U.S. at 407.

67. Gomez v. Toledo, 446 U.S. 635 (1980).

68. *See, e.g.*, Harlow v. Fitzgerald, 102 S. Ct. 2727 (1982); Supreme Court of Virginia v. Consumers Union of United States, Inc., 446 U.S. 71 (1980); Procunier v. Navarette, 434 U.S. 555 (1978); Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974).

69. Supreme Court of Virginia, 446 U.S. 71 (1980); Stump v. Sparkman, 435 U.S. 349 (1978); Imbler v. Pachtman, 424 U.S. 409 (1976).

70. FED. R. CIV. P. 23(a)(3).

71. In *Crowder v. Lash*, 687 F.2d 996, 1008 (7th Cir. 1982), the court indicated "[i]t seems unlikely that [the plaintiff in a subsequent damage action] would have been allowed to join the pending class litigation if he had insisted on including his individual damage claims."

equitable relief in the same case does not necessarily result in the expenditure of fewer judicial resources than allowing two cases.[72] Because collateral estoppel normally precludes more than one determination of the liability issue, allowing the second suit will not result in relitigation. It is entirely possible that there will be an even greater savings of judicial resources because defendants will be more inclined to settle subsequent suits for damages after an adverse ruling on liability. When both claims are tried together in the same lawsuit, neither party has the benefit of the liability determination to inform settlement decisions.

Where a complaint seeks both equitable and legal relief, it is frequently necessary for the court to expedite consideration of the request for an injunction in order to prevent irreparable harm. The grant or denial of a preliminary injunction is appealable as a matter of right.[73] Thus the equitable aspect of a case can be before the court of appeals, within a very short time of filing, while the trial court retains jurisdiction to proceed with the damage aspect of the case.[74] Absent a request for a jury, it is frequently appropriate to separate issues for trial in this type of case. Such bifurcation could either separate liability from remedy[75] or legal from equitable issues.[76]

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72. *See infra* notes 81-88 and accompanying text. This was recognized by the Supreme Court in General Telephone Co. v. Falcon, 102 S. Ct. 2364, 2372 (1982).

73. 28 U.S.C. § 1292(a)(1) (1966).

74. As suggested in 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE § 3921 n.52 (1977 & Supp. 1982), and the cases cited therein, it is generally agreed that the trial court can continue to act on issues beyond the scope of the interlocutory appeal.

75. FED. R. CIV. P. 42(b). *See generally*, 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2390 (1971). Concerning the effect of splitting a trial, it has been stated:

> In the last few years some courts have adopted rules providing that the issue of liability may be tried first in a negligence case, and a second trial on damages is held only if plaintiff prevails on liability. This has had marvelous results in terms of saving court time. A competent study has been made of experience with such a procedure. That study concludes that cases handled in this fashion take twenty percent less time than do cases tried routinely, with the liability and damage issues submitted simultaneously to the jury. A saving of twenty percent in trial time of negligence cases would be an important gain for the courts. The same data show, however, that while defendants win in forty-two percent of the cases tried routinely, they win in seventy-nine percent of the cases in which the liability issue is submitted alone. This certainly suggests that juries are moved by sympathy when they have heard evidence as to the extent of plaintiffs' injuries, and that this influences their decision on the liability issue. Quite possibly this is a bad thing—certainly orthodox theory supposes that it is. But when it is seen that the split trial reduces

While it is possible for the trial court to go ahead and consider a request for a preliminary injunction without infringing upon the defendant's right to a jury trial, this can result in the equivalent of two trials on the same factual issues. Many trial courts are reluctant to grant a preliminary injunction, which might benefit the entire class and remain in effect for a lengthy period of time, without a substantial evidentiary basis. Since the court's factual determinations cannot be binding upon the jury, it then becomes necessary to present the same evidence to the jury at the trial on the merits.[77] Absent a bifurcation referred to above or an express determination that none of the court's findings would bind the jury, final equitable relief could not be granted to the class until such time as the jury decides the damage claims. Meanwhile, members of the class could continue to suffer harm and be deprived of final relief solely because of their representatives' request for damages.

Another policy consideration advanced in support of the doctrine of res judicata—minimizing the potential for inconsistent decisions—is simply not relevant here. Because there should be only one liability determination, a finding of no liability would preclude both legal and equitable relief. However, after a finding of liability, it would not be unusual or in any way inconsistent to deny equitable relief and award damages.[78] In other words, the decision to deny an injunction after a finding of liability does not substantially affect the decision regarding damages. Since the relief sought in each case is different, there is no chance of double recovery..

It thus becomes more and more apparent that judicial economy is not necessarily achieved by forcing the named plaintiffs to litigate

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> by more than half the cases in which personal injury plaintiffs are successful, it is apparent that the new procedure has made a substantial change in the nature of the jury trial itself.

Wright, *Procedural Reform: Its Limitations and Its Future*, 1 GA. L. REV. 563, 569-70 (1967).

76. *See generally*, 9 C WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2391 (1971).

77. *See, e.g.*, Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510-11 (1959); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 479 n.20 (1962). Presumably these cases still require the trial court, in cases seeking both equitable and legal relief, to preserve the right to a jury trial on legal issues even though the Court has subsequently held that "an equitable determination [in one case] can have collateral estoppel effect in a subsequent legal action." Parklane, 439 U.S. 322, 335 (1979).

78. Even after a finding of liability, an injunction could be denied on a variety of grounds. For example, it may be determined that there is an adequate remedy at law, or that an injunction is not necessary to bring about the necessary changes.

both equitable and damage claims for relief in the class action. Similarly, finality is not necessarily expedited. Because it is highly unlikely that a class action seeking damages for the representative parties and equitable relief for the class members will be tried and decided at a single hearing or trial, allowing two separate actions does not necessarily increase the amount of court time required.[79] This is particularly true when a jury has been demanded. At a minimum it is safe to say that the judicial concerns supporting preclusion principles—efficiency and finality—are not compelling in these circumstances and can be easily outweighed by the countervailing concerns which favor allowing subsequent damage actions.

c. *Defendants' Considerations*

One of the policy reasons supporting the prohibition on claim splitting relates to the concern for defendants who would otherwise incur the added costs of having to defend multiple cases instead of just one.[80] This is certainly sound where multiple suits actually result in additional expenses. However, it is not so clear that two suits increase the costs in the situation posed here.[81] The claim for equitable relief could proceed more expeditiously without an accompanying damage claim which often results in an immunity defense, additional motions and discovery, and a right to a jury. Such issues, which relate to the damage claim only, take a certain amount of additional time and resources whether raised in the context of the class action or the subsequent damage suit. However, these additional issues and the common issues have to litigated only once. If the liability issue is decided favorable to the plaintiffs in the first, collateral estoppel would normally preclude its relitigation in the second.[82] If liability is decided favorable to the defendants in the first case, the ruling would effectively end the damage action.[83]

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79. Certain economies can be realized where the damage actions are filed before completion of the class action through utilization of the consolidation provision of FED. R. CIV. P. 42(a) and/or assignment of the cases to the same judge pursuant to local rules. *See, e.g.*, Rule A-4. *Rules of the U.S. District Court for the Southern District of Indiana. See also infra* notes 89-92 and accompanying text.

80. Cleary, *supra* note 15.

81. *See supra* section C 2-b. Also, note that a liability insurance company may very well be obligated to provide the defense in the second action which seeks damages from the defendants in their personal or individual capacities.

82. *See generally*, Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), and *infra* section D.

83. Assuming adequacy of representation in the first action, all class members would be bound by the ruling on the liability issue. Hansberry v. Lee, 311 U.S. 32 (1940).

Because all issues common to the two cases will be litigated only once and the separate issues take the same amount of effort whether litigated in the class action or the subsequent damage action, duplication is minimized. In fact, the defendants might totally avoid litigation of issues peculiar to damage claims if they prevail on the liability issue. Therefore, defendants' resources are amply protected. Viewed in practical terms, the earlier discussion makes it clear that allowing the second suit under these circumstances does not necessarily require defendants to spend additional time and resources; instead, it might conserve time and resources. This is true for a number of reasons.

First, while the position advocated here does subject defendants to a second suit, it must be recognized that any policies which discourage class actions have the potential effect of subjecting defendants to numerous suits for equitable relief.[84] Requiring named plaintiffs to include their damage claims with a class claim for equitable relief could in fact make class actions less frequent for the reasons indicated above.[85] Second, even though the defendants may be subjected to additional litigation, under these circumstances the subsequent suits do not seek to relitigate what was decided in the first. Instead, the plaintiffs are seeking different relief not requested in the first suit and therefore we do not have the abusive situation of plaintiffs seeking a better result from a second forum. Third, because the first suit for equitable relief was substantially shortened and simplified by excluding the damage claims and because the losing parties may very well be collaterally estopped from relitigating the common issues,[86] it is unlikely that there would be a substantial increase in the total amount of resources invested in the litigation. In other words, litigating one case with multiple claims can take just as long as litigating two simplified cases. Fourth, if the defendants win the class action requesting equitable relief, they will have saved a substantial amount of time because it is extremely unlikely that there will be any subsequent lawsuits for damages. If such suits are filed, presumably they would be disposed of summarily in favor of the defendants based on collateral estoppel.[87] Instead of prevailing after lengthy

84. One of the primary purposes of Rule 23, particularly (b)(1) and (b)(2) which do not include a right to opt out, is to avoid a multiplicity of suits on the same issue. 7 C WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1751 (1972).

85. *See supra* notes 58-70 and accompanying text.

86. *See infra* section D.

87. This would represent a defensive use of collateral estoppel; *See*, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.4 (1979).

discovery and a trial, involving additional issues such as the immunity defense, the defendants will have prevailed after litigating only the liability issue in the context of the class action.[88]

Assuming multiple suits are allowed, the parties can take steps to minimize the potential for unfairness to the defendants. If the named plaintiffs file their class and individual cases simultaneously or within a short period of time,[89] the defendants might request a stay of the damage action, seek to have the cases assigned to the same judge as related cases,[90] seek to make discovery usable in either case, or even ask the court to consolidate the cases for trial on the common issues. A motion to consolidate under Rule 42(a)[91] gives the defendants a procedural device for questioning the plaintiffs' choice to split the claims. For example, the plaintiffs could oppose consolidation on the grounds that issues relevant only to their damage claims will predominate over issues common to the class. The defendants could also seek dismissal or a stay of the subsequent suit on the ground that there is another action pending.[92]

In addition to avoiding statute of limitations problems, by bringing their actions simultaneously or within close proximity plaintiffs alert everyone involved in the litigation, including the court, to the fact that there are two related cases pending. Not only can all possible steps be taken to minimize the potential evils of this situation,

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88. Certainly there is no guarantee that the determination of the liability issue in a class action will take less time than determining the same issue in a damage action. It is quite likely, however, that the resolution of both issues, liability and relief, will take less time because immunity defenses will not be present and it is not necessary to prove the amount of damages.

89. The applicable statute of limitations would normally prevent the plaintiffs from waiting indefinitely with the second action. In § 1983 actions, the federal courts generally apply the appropriate state statute of limitations. *See, e.g.*, Board of Regents v. Tomanio, 446 U.S. 478 (1980).

90. Some district courts have local rules requiring the parties to notify the clerk when a newly-filed case is related to a pending case. *See, e.g., supra* note 79.

91. FED. R. CIV. P. 42(a) provides:

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

92. The Supreme Court has indicated that wise judicial administration counsels against a rigid mechanical solution to problems raised by multiple suits. Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180, 183 (1952). *See also*, P. BATOR, P. MISKIN, D. SHAPIRO & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1232-34 (2d ed. 1973).

but everyone can litigate with complete knowledge of the scope of the dispute. For example, the defendants cannot claim the first suit was not fully litigated because of their inability to foresee the damage actions.[93] In short, allowing subsequent damage actions does not abuse defendants.

d. *Jurisdictional Limitations on Federal Courts*

Where plaintiffs seek damages from state officials in their official capacities, there is an additional problem. Because of the eleventh amendment[94] which prevents the federal courts from awarding damages from a state treasury,[95] it may be necessary for the named plaintiffs to file their damage claims in state court. To require the named plaintiffs to join the class claims for equitable relief and the individual claims for damages in one case would require them to waive their right to litigate federal questions in a federal forum because only in a state court could both claims be joined. Policy dictates that the class should not be deprived of a federal forum for their equitable claim because of their representatives' request for damages.[96]

e. *Summary*

It is readily apparent that there are compelling reasons for allowing splitting of claims for relief under these circumstances and that such splitting does no violence to any of the policies or purposes behind the prohibition on splitting. Furthermore, none of the policy justifications for the res judicata doctrine is substantially furthered by application of the doctrine to prevent a subsequent suit by named plaintiffs for damages after a class action for equitable relief. In fact, the opposite is true; splitting equitable claims for relief from damages in the situation discussed here promotes some of the goals which

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93. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330 (1979). *See also*, RESTATEMENT (SECOND) OF JUDGMENTS § 68.1(e) (Tent. Draft No. 1, 1973).

94. The eleventh amendment states:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

95. *See, e.g., Ex parte* Young, 209 U.S. 123 (1908); Edelman v. Jordan, 415 U.S. 651 (1974); Quern v. Jordan, 440 U.S. 332 (1979). The eleventh amendment is not, of course, a problem if damages are sought from the defendants in their individual or personal capacities. The ruling in *Edelman*, to the effect that a federal court cannot order the payment of retroactive benefits incident to the issuance of a class injunction, can lead to a second action in state court to recover the retroactive benefits. *See, e.g.*, Stanton v. Godfrey, ____ Ind. App. ____, 415 N.E.2d 103, 107 (1981).

96. RESTATEMENT (SECOND) OF JUDGMENTS § 61.2(1)(c) (Tent. Draft No. 5, 1968).

underlie the doctrine of res judicata. At a minimum, it is quite apparent that courts should not blindly apply rigid notions of res judicata to "relief splitting" when one of the suits is on behalf of a class for equitable relief. Because of the countervailing policy considerations, it is necessary for courts and litigants to examine each situation carefully in order to properly balance the competing concerns. Once this case-by-case analysis becomes imperative, then the utility of the res judicata doctrine, as applied to this particular situation, becomes questionable. Any doctrine justified primarily by finality and resource-saving concerns becomes suspect when in a given situation its applicability is so uncertain that this determination takes considerable time and resources.[97] When this happens, it is generally preferable to simply recognize an exception. This is the case both in the situation discussed above and in the even more compelling variation discussed below.

3. *Subsequent Action by a Member of the Class in the First Suit*

Application of res judicata to bar subsequent suits for damages is even more troublesome when such suits are brought by members of the class, rather than the named plaintiffs, in the first suit. Several courts have precluded a subsequent damage action by a member of the class in a prior action.[98] The most noticeable characteristic of these opinions is the blind adherence to rigid res judicata principles without any consideration or analysis of the policy and purposes justifying the doctrine and without an appropriate recognition of Rule 23 concerns. It is generally accepted that due process is not violated by making judgments in class actions binding on absent class members who were adequately represented, as to matters raised and decided.[99] However, it is particularly offensive to notions of due process to suggest that absent class members can also be bound by the class representatives' decision not to request certain relief—damages. In considering this, it is important to keep in mind that notice is not required in actions for equitable relief under Rule 23.[100] Therefore,

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97. There is definitely a point at which the determination of the applicability of res judicata or collateral estoppel takes so much time that it is more economical, both to the court and the defendant, to proceed to the merits of the underlying litigation. *See, e.g.*, Federated Dep't Stores, Inc. v. Moitie, 101 S. Ct. 2424, 2429 (1981).

98. Jackson v. Hayakawa, 605 F.2d 1121, 1125 (9th Cir. 1979); International Prisoners' Union v. Rizzo, 356 F. Supp. 806, 809 (E.D. Pa. 1973); Chmieleski v. City Products Corp., 71 F.R.D. 118, 148-49, n.25 (W.D. Mo. 1976); Walls v. Indianola Bank, 445 F. Supp. 528, 534 (N.D. Miss. 1977).

99. Hansberry v. Lee, 311 U.S. 32 (1940). *See generally*, 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1765 (1972).

100. FED. R. CIV. P. 23(c)(2) makes notice mandatory only in actions maintained under subdivision (b)(3). *See* Eisen v. Carlisle & Jacqueline, 417 U.S. 156 (1974).

application of res judicata to this situation can result in the waiver of class members' claims for damages without their knowing about it and without their interest in damages having been represented before the court.

All of the policy considerations discussed above in the preceeding section are relevant here too. In addition, there are even more compelling Rule 23 considerations and due process concerns not present in the former situation.

a. *Rule 23 Considerations*

There are several additional policy reasons, relating to Rule 23, why named plaintiffs should not be required to raise damage claims on behalf of the class at the risk of having individual actions by class members barred. First, application of res judicata to a subsequent damage action by a class member forces the named plaintiffs to either ask for damages for all class members or waive those claims at a time when the named plaintiffs know little if anything about the merits of the class members' claims for damages. In other words, the likelihood that a group of people meeting the requirements of Rule 23(a) will all be entitled to injunctive relief is much greater than the likelihood that all will be entitled to damages because of the additional, more individualized elements of proof in a damage action. In the example presented earlier,[101] at the time of filng the named plaintiffs will normally not know whether class members have suffered compensable harm, the amount of such loss, or their interest in presenting the individualized proof required to recover damages. In contrast, proof of a general policy or practice on the part of the defendants is usually sufficient to entitle a class to declaratory and injunctive relief. It is, therefore, more desirable to allow named plaintiffs to seek only equitable relief for the class and not force them to routinely include an unsubstantiated damage claim on behalf of the class solely out of fear that the failure to do so might result in waiver.

Second, there are serious due process implications when class members' claims for damages are barred even though such claims were never raised and litigated. At a minimum, "before a class member may be barred from pursuing an individual claim for damages, he must have been notified that he was required to adjudicate his damage claims as part of a prior class action suit."[102] Representative litigation has been held not to violate due process because the claims or defenses of the absent class members, typical of the claims or defenses of the

101. *See supra* notes 28-34 and accompanying text.
102. Crowder v. Lash, 687 F.2d 996, 1008 (7th Cir. 1982).

named parties, are adequately presented to the court by the representative parties. The serious consequences of class litigation put a heavy burden on the representative parties and the court to look out for the interests of the absent class members.[103] When named plaintiffs omit claims for damages on behalf of the class, this decision usually does not represent an informed judgment concerning the merits of such claims. Rather, it is more likely a decision based primarily on expediency and the recognition that a class action for damages may very well be unmanageable and result in a series of individual trials to establish damage claims.[104] The named plaintiffs may simply be unwilling to represent a class in a damage action.[105] This additional responsibility should not be thrust upon unwilling named plaintiffs and their counsel. The very essence of class litigation is adequate representation and it is difficult to assure adequacy when the representation is not undertaken voluntarily.

Where named plaintiffs define a class too broadly, both the defendants and the court are likely to challenge the definition in the certification process. However, the judgment of the named plaintiffs to exclude class members' claims for damages would rarely, if ever, be reviewed by the court. This is particularly true where the plaintiffs do not seek damages for themselves.[106] Normally the defendants would have no incentive to raise the issue and the named plaintiffs would not need permission of the court to limit the scope of relief. Because notice is not required in a (b)(2) class action, members of the class normally would not even know that a suit was filed and, therefore, could not be expected to raise the issue. Most courts are simply not interested in inviting the additional burden of a class claim for damages. Therefore, in contrast to the situation where named plaintiffs attempt to define a class or the scope of relief too broadly, there is no one to present the question of whether the scope of relief is too narrow—*i.e.*, should damages be sought for the entire class.[107]

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103. *See supra* note 99; *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1391-1416 (1976).

104. *See supra* notes 59-66 and accompanying text.

105. This unwillingness is certainly understandable in light of the general lack of information concerning the merits of class members' claims for damages, the additional time and expense of proving damage claims and the fact that including damage claims may very well make the entire case inappropriate for class consideration under Rule 23.

106. Where the named plaintiffs seek damages for themselves, but not the class members, it is more likely that the court will question the omission because it might become a concern in determining adequacy of representation. However, because of manageability concerns, courts rarely seek to expand class relief to include damages.

107. This raises obvious due process concerns because class members'

Third, requiring the named plaintiffs to include damage claims on behalf of the class members would make most class actions much less manageable.[108] In many cases, it would force the court to conduct a series of mini-trials in order to determine the actual amount of damages. Such mini-trials are more likely to be required in the institutional litigation used as an example here than in the normal (b)(3) class because the entitlement to damages is much less likely to follow automatically from a finding of liability.[109] It is also very possible that a substantial number of such trials will be required on claims with little merit because it is highly unlikely that class members will waive their damage claims after they are notified of the potential for recovery and the method of submitting a claim. In contrast, if class members have to initiate their own litigation in order to recover damages, far fewer claims will be pursued because of the additional cost and effort.[110] Thus defendants' exposure to liability, or at least their exposure to the costs of defending numerous damage claims,

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meritorious claims for damages could be waived without either the court or the class representatives even considering the possibility of waiver. Representative litigation certainly requires more if it is to satisfy due process.

108. Including a damage claim on behalf of class members could very well convert the class action into a (b)(3) class rather than (b)(1) or (b)(2). Normally actions for damages, if appropriate for class consideration, must be brought under (b)(3). Because of the individualized proof required to establish a claim for damages, manageability can definitely be a problem and the time savings normally accompanying class litigation are much more speculative. Crowder v. Lash, 687 F.2d 996, 1008 (7th Cir. 1982).

109. Cases most appropriate for class treatment under Rule 23(b)(3) are those in which a large number of people have suffered easily ascertainable damages with the primary issue being whether the defendants' practice or policy is illegal. In such cases the computation of amount of damages for each class member can be reduced to a mathematical or mechanical formula. A good discussion of this is found in Windham v American Brands, Inc., 565 F.2d 59, 68 (4th Cir. 1977). The need for individual mini-trials, rather than application of a formula, obviously raises a question of whether individual or common questions predominate. *Crowder*, 687 F.2d at 1008. *See generally*, 3 B. J. MOORE & J. KENNEDY, MOORE'S FEDERAL PRACTICE 23.45[2] (2d ed. 1982). In the situation where plaintiffs challenge institutional conditions and practices it will be much more difficult to assess individual damages because the determination is governed by general tort law to the effect that damages flow from proof of harm caused by the defendant. Carey v Piphus, 435 U.S. 247, 257-58 (1978). Individualized proof of harm and causation is required.

110. If a person receives a notice indicating a class action is proceeding, they are a member of the class, a claim for damages has been asserted and they might be entitled to damages, the normal inclination is to indicate a willingness to participate because there is really nothing to lose. It is not necessary to obtain counsel and incur the costs of litigation. Even though a successful § 1983 plaintiff may ultimately recover attorney fees, *see* 42 U.S.C. § 1988, it will normally require a retainer fee in order to secure the services of an attorney to investigate the possibility of an individual action for damages.

is actually reduced by not forcing named plaintiffs to include damage claims on behalf of class members. While this may seem contrary to at least one of the purposes of Rule 23—to allow claimants with small claims to spread and share the cost of litigating—[111] this is not the primary justification for allowing class actions seeking primarily equitable relief. Such cases normally do not create a fund from which costs and attorney fees can be assessed before distribution.[112]

To summarize, Rule 23 concerns argue in favor of allowing named plaintiffs to seek only equitable relief on behalf of class members without the fear or risk of forever foreclosing subsequent damage actions by class members. Even though this conclusion could lead to a greater number of lawsuits, the opposite result would substantially undermine the function of Rule 23(b)(2).

b. *Broader Policy Considerations*

Beyond the potential for undermining Rule 23, there are broader policy considerations, some related to those already discussed, which make the argument advanced here even more compelling. The absence of a "full and fair opportunity to litigate" in the first case is always a basis for avoiding the application of res judicata.[113] This exception is, of course, based on due process concerns. Whether it is viewed as a requirement of representative litigation under Rule 23 or a limitation on res judicata, the concern is the same—*i.e.*, is it fair to a class member to preclude a damage claim based on the decision, of often unknown persons, to exclude the claim? By its very nature the prohibition on claim splitting bars claims never presented to a court.

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111. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 338-39 (1980).

112. This should be contrasted with the situation in *Roper*, where the primary incentive for the class litigation may be the fact that success in establishing liability guarantees a rather substantial fund from which fees and costs can be assessed before distribution to members of the class. The plaintiffs in *Roper* alleged that usurious finance charges had been made against the accounts of some 90,000 BankAmericard holders in Mississippi. In class actions seeking primarily injunctive relief, the plaintiff is either prepared to bear the costs of the litigation or rely on recovering fees and costs from the defendants under 42 U.S.C. § 1988 or some other statutory authorization for fees.

113. The Supreme Court recently recognized this, stating:

> [O]ne general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate that issue in the earlier case.

Allen v. McCurry, 449 U.S. 90, 95 (1980). *See also*, Pinto Trucking Serv., Inc. v. Motor Dispatch, Inc., 649 F.2d 530, 533 (7th Cir. 1981); General Foods v. Mass. Dept. of Public Health, 648 F.2d 784, 787 (1st Cir. 1981); Bickham v. Lashof 620 F.2d 1238, 1246 (7th Cir. 1980); Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973).

However, in the usual situation the person barred will have had the opportunity to make a knowing, intelligent decision to exclude or split claims. While notice is mandatory in class actions brought under (b)(3), it is discretionary in (b)(1) and (2) actions.[114] Absent notice, it is impossible for class members to make an intelligent decision regarding claim splitting.[115]

Notice is "an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality."[116] However, assuming adequate representation, due process permits judgments to be binding on absent class members even without notice.[117] The adequacy of the representation must be determined by the first court in certifying a class[118] and can be examined again when res judicata is raised as a defense to a second action by a class member.[119] If the second court, after viewing the entire proceedings in the first court, determines the representation was not adequate, then the defense must be rejected.[120] In the usual situation the second court is, of course, looking at the adequacy of representation with respect to issues raised and litigated. Where, as in the situation posed here, the class claim for damages has not been raised and the representatives make no pretense to represent the interests of class members in damages, it is inconceivable how a court could find that the named plaintiffs adequately representated the interests of the class members as to the damage claims.[121]

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114. *See* FED. R. CIV. P. 23(c)(2); Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 177 n.14 (1974); Sosna v. Iowa, 419 U.S. 393, 397 n.4 (1975); Watson v. Branch County Bank, 380 F. Supp. 945, 956-60 (W.D. Mich. 1974); Hopson v. Schilling, 418 F. Supp. 1223, 1241 n.22 (N.D. Ind. 1976); Redhail v. Zablocki, 418 F. Supp. 1061, 1066-68 (E.D. Wis. 1976); *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1402-16 (1976). FED. R. CIV. P. 23(d)(2) certainly allows the court to require notice in actions under either (b)(1) or (b)(2).

115. Crowder v. Lash, 687 F.2d 996, 1008-09 (7th Cir. 1982); Bogard v. Cook, 586 F.2d 399, 408-09 (5th Cir. 1978).

116. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). *See also*, Greene v. Lindsey, 102 S. Ct. 1874 (1982); Simer v. Rios, 661 F.2d 655, 664-67 (7th Cir. 1981).

117. Hansberry v. Lee, 311 U.S. 32 (1940); Blonder-Tongue, 402 U.S. 313, 329-30 (1971); Simer v. Rios, 661 F.2d at 664. *See also*, Note, *Due Process and the Putative Class: The Importance of Pre-Merits Certification under Federal Rule 23, Class Actions*, 15 VAL. U.L. REV. 497, 514-22 (1981).

118. This is, of course, required by FED. R. CIV. P. 23(a)(4). *See also*, Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973); Johnson v. Shreveport Garment Co., 422 F. Supp. 526 (W.D. La. 1976), *aff'd*, 557 F.2d 1132 (5th Cir. 1978).

119. Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973).

120. *Id.*

121. Crowder v. Lash, 687 F.2d 966, 1008-09 (7th Cir. 1982); Johnson v. General Motor Corp., 598 F.2d 432, 438 (5th Cir. 1979); Jones-Bey v. Caso, 535 F.2d 1360, 1361

The court in *International Prisoners Union v. Rizzo*[122] did exactly that, however, on the grounds that the failure to raise the damage claims of class members had "a de minimus impact on the representation."[123] It may be true that the failure to raise damage claims did have little or even no adverse impact on the representation as to issues raised and litigated. Allowing the subsequent damage claims would in no way suggest that what was litigated and decided, *e.g.*, liability, is not binding or could be relitigated by class members. In fact if the defendants prevailed in the class action on the liability issue, they would be entitled to summary judgment in the subsequent damage actions based on collateral estoppel, not res judicata. The rationale of the *Rizzo* court is particularly suspect where the class members have no notice of the representatives' decision not to include a class claim for damages.

On the other hand, if class members are given actual notice that their claims for damages have not been raised, then it becomes a more difficult question. In a case where the named plaintiffs sought damages for themselves only and the class members were notified of this fact, subsequent actions for damages by class members were barrred by res judicata even though the notice did not inform them that such actions would be barred and that their claims for damages would be waived if not presented in the class action.[124] This result seems incorrect because in most situations such notice is not "reasonably calculated"[125] to give absent class members, presumably without counsel, sufficient information to make an intelligent decision concerning their claims for damages. An obvious question is whether a notice can ever be sufficiently clear to avoid unknowing, unintelligent waivers of damage claims; certainly the notice must specifically address the waiver issue if it is to be found adequate. Another court has held that while the failure to raise class members' damage claims was not inadequate representation *per se*, when combined with the lack of notice it violated due process.[126] This approach properly emphasizes the role of notice.

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(2d Cir. 1976); Lewis v. Phillip Morris, Inc., 419 F. Supp. 345, 352 (E.D. Va. 1976); Marshall v. Kirkland, 602 F.2d 1282, 1298 (8th Cir. 1979); Bogard v. Cook, 586 F.2d 399, 408 (5th Cir. 1978); McCarthy v. Director of Selective Service System, 322 F. Supp. 1032, 1034 (E.D. Wis. 1970), *aff'd on other grounds*, 460 F.2d 1089 (7th Cir. 1972); Pasquier v. Tarr, 318 F. Supp. 1350, 1352 (E.D. La. 1970), *aff'd*, 444 F.2d 116 (5th Cir. 1971).

122. 356 F. Supp. 806, 809 (E.D. Pa. 1973).

123. *Id.* at 809.

124. Walls v. Indianola Bank, 455 F. Supp. 528, 534 (N.D. Miss. 1977). *Compare* Crowder, 687 F.2d 996 (7th Cir. 1982), *and* Bogard, 586 F.2d 399 (5th Cir. 1978).

125. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

126. Sagers v. Yellow Freight Systems, Inc., 68 F.R.D. 686, 689 (N.D. Ga. 1975).

Due process mandates that the binding effect of representative litigation be limited to issues which were actually litigated by the representative parties.[127] It is therefore incumbent upon both the court and the representative parties to clearly define the scope of the class action and notify class members if there is any chance that claims not raised by the representative parties might be waived. Several methods of protecting the class members were discussed above in section C-1.

### D. The Effect Of Collateral Estoppel On Subsequent Suits For Damages

Earlier it was suggested that allowing a second suit in this siutation does not substantially increase the burden of litigation.[128] This is true, in part, because there should not be relitigation of the common issue, *i.e.*, liability. Certainly if the defendants prevail on the liability issue in the class suit for equitable relief, defensive collateral estoppel[129] would prohibit any named plaintiff from relitigating the liability issue in a damage suit. Similarly, assuming adequate representation, any member of the class would be bound by the adverse liability determination in a subsequent suit for damages.

When the plaintiffs have prevailed on the liability issue in the class action, there is still no reason to relitigate that issue in a subsequent suit for damages against the same defendants. Both the original named plaintiffs and class members should be allowed to use collateral estoppel offensively to preclude a second trial on the common issues.[130] In this situation it seems quite apparent that all of the requirements for application of collateral estoppel have been met.[131] There would not even be a question of mutuality[132] because the plaintiffs in the subsequent suits, whether the original named plaintiffs or class

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127. In Simer v. Rios, 661 F.2d 655, 664 (7th Cir. 1981), the court noted that "an individual's claim cannot be extinguished without notice and an opportunity to be heard."

128. *See supra* notes 81-83 and accompanying text.

129. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.4 (1979).

130. *Id.* at 329-33. For an argument favoring a very limited use of offensive collateral estoppel, *see* Flanagan, *Offensive Collateral Estoppel: Inefficiency and Foolish Consistency*, ARIZ. ST. L.J. 45 (1982).

131. Crowder v. Lash, 687 F.2d 996, 1011 (7th Cir. 1982). Where the defendant has prevailed there might be some questions because it would be possible for the court to deny the injunction for reasons other than lack of liability. *See supra* note 78. On the other hand, an injunction could not be granted without a determination of liability.

132. *Crowder*, 687 F.2d at 1010 n.13. The doctrine of mutuality simply provides that "unless both parties (or their privies) in a second action are bound by a judgment in a previous case, neither party (or his privy) in the second action may use the judg-

members, are subject to an application of collateral estoppel where the defendants prevail in the suit for equitable relief.[133]

In the past, one of the major concerns was whether allowing the use of offensive collateral estoppel infringes upon the defendants' rights to a jury trial under the seventh amendment to the United States Constitution. In all likelihood the defendants have a right to a jury trial in civil rights actions for damages.[134] It is also clear that the defendants would not be entitled to a jury in the class action for equitable relief only.[135] Therefore, defendants might argue that allowing the subsequent actions for damages, when combined with the offensive use of collateral estoppel on the liability issue, has the net effect of denying their seventh amendment right to a jury trial on legal claims.

Resolution of this issue is governed by the decision of the Supreme Court in *Parklane Hosiery Co. v. Shore*.[136] *Parklane* involved two actions under the Securities Exchange Act, one by the Securities Exchange Commission (SEC) for injunctive relief against the company and the other a class action by stockholders of the company for damages. The case by the government proceeded to trial first. After four days of trial, the district court found in favor of the government on the issue of liability and entered a declaratory judgment to that effect. Subsequently the plaintiffs in the class action moved for partial summary judgment claiming the company and its officers were collaterally estopped from relitigating the liability issue resolved against them in the SEC action. The Court concluded in the first part of its opinion that the application of collateral estoppel was appropriate. It then held that its application did not infringe upon rights under the seventh amendment because earlier cases established that "an equitable determination can have collateral estoppel effect in a subsequent legal action."[137] This is true even though, because of the lack of mutuality, collateral estoppel would not have been applied to the case in 1791.[138]

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ment as determinative of an issue in the second action." Blonder-Tongue Laboratories Inc. v. Univ. of Ill., 402 U.S. 313, 320-21 (1971).

133. Hansberry v. Lee, 311 U.S. 32 (1940).

134. *See, e.g.*, Curtis v. Loether, 415 U.S. 189 (1974).

135. *Id.*

136. 439 U.S. 322 (1979).

137. *Id.* at 333. The earlier cases cited are *Katchen v. Landy*, 382 U.S. 323 (1966), and *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

138. This is relevant because of the Court's continuing use of the "historical test" in determining the present application and interpretation of the seventh amendment. *See generally*, Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); Dairy Queen,

Concerning the offensive use of collateral estoppel, there are several points about the *Parklane* decision which must be noted. It really holds only that the federal courts should not "preclude the use of offensive collateral estoppel," and gives the trial courts "broad discretion to determine when it should be applied."[139] In approving the use of offensive collateral estoppel, the Court recognized some problems with it. First, the Court noted that its use "does not promote judicial economy in the same manner as defensive use does."[140] In contrast to the defensive use of collateral estoppel, it was recognized that offensive collateral estoppel might actually increase litigation "since potential plaintiffs will have everything to gain and nothing to lose by not intervening in the first action."[141]

A second concern expressed by the Court relates to the fact that the offensive use of collateral estoppel may be unfair to a defendant in at least a couple of situations. One is where the defendant is sued in the first action "for small or nominal damages, [and has] little incentive to defend vigorously, particularly if future suits are not foreseeable."[142] It might also be unfair to the defendant where the judgment relied upon by the plaintiff is "inconsistent with one or more previous judgments in favor of the defendant."[143] Finally, it could be unfair where "the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result."[144] These concerns will have to be taken into account by district courts when considering the application of offensive collateral estoppel in the situation being discussed here. However, none of them is very compelling.

While the use of offensive collateral estoppel might in some circumstances tend to increase the total amount of litigation, the situa-

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Inc. v. Wood, 369 U.S. 469 (1962); Katchen v. Landy, 382 U.S. 323 (1966); Ross v. Bernhard, 396 U.S. 531 (1970); *Parklane*, 439 U.S. at 345. The Court recognized in *Parklane* that "an equitable determination can have collateral estoppel effect and that this estoppel does not violate the Seventh Amendment." *Id.* at 335.

139. *Parklane*, 439 U.S. at 332. In *Crowder*, even after indicating there was "no reason why plaintiff should be prevented from using collateral estoppel," the court left it to the district court on remand to determine "whether and to what extent collateral estoppel should preclude relitigation of issues . . . ." 687 F.2d at 1011. An abuse of discretion by the trial court is demonstrated by Chemetron Corp. v. Business Funds, Inc., 682 F.2d 1149, 1187-92 (5th Cir. 1982).

140. *Id.* at 329.

141. *Id.* at 330.

142. *Id.*

143. *Id.*

144. *Id.* at 331.

tion here is different in the sense that prospective plaintiffs in subsequent damage actions will not be able to "wait and see" without running the risk of an adverse ruling which will be binding upon them. In other words, the plaintiffs in the class action against the company in *Parklane* had every reason to stay away from the SEC case because as long as they were not involved they could only benefit from it.[145] If the company had won, due process would have prevented it from asserting collateral estoppel in subsequent actions since the class action plaintiffs were neither parties nor represented in the SEC case.[146] Here there is no opportunity to stay away from the first suit because plaintiffs in subsequent actions for damages, whether they were the named plaintiffs in the class suit or class members, will be bound by an adverse ruling on the liability issue in the suit for equitable relief. If the defendants prevail on the liability issue in the first case, subsequent actions for damages will be effectively barred through the defensive use of collateral estoppel which will preclude relitigation of the liability issue.

The potential for unfairness to defendants is also less of a factor in this situation. Since we are assuming the first suit for equitable relief was a class action, it is very likely that the defendants had every incentive to defend it vigorously. Because of the potential for broad relief, it would be extremely difficult for defendants to argue that the class action was not taken seriously. Also, it should be noted that subsequent suits for damages are foreseeable, particularly if the position advanced in this article is followed by the courts.[147] The second fairness concern, the possibility of inconsistency with a previous judgment in favor of defendants, is also unlikely to arise in this situation. In all likelihood, the prior class action will have been the only suit on the subject. Since it was a class action, it substantially decreases the possibility of other suits which could result in inconsistent rulings.[148] The final fairness consideration, whether the second action

145. As noted by the court in *Parklane*, the plaintiffs in the shareholder's action could not have become involved in the SEC case even if they had so desired because of a provision in the statute under which the SEC was litigating. 439 U.S. at 332. After *Parklane*, defendants who can foresee future cases by persons who want to "wait and see" how the first case turns out might consider moving to certify a plaintiff class in the first case. Class certification assures that a judgment favorable to the defendants would be binding in future litigation by "wait and see" plaintiffs.

146. Blonder Tongue, 402 U.S. at 329-30.

147. Certainly, if either of the alternatives suggested above is followed, *see supra* notes 36-40 and accompanying text, the defendant will be on notice of the possibility of subsequent damage actions.

148. All members of the class in the first suit would be bound by the liability determination if they chose to bring a second action for equitable relief only.

presents the defendants with procedural opportunities which were unavailable in the first action, is also very unlikely to be a determining factor in this type of situation. Normally courts which allow for class actions will provide the maximum in other procedural opportunities as well. Because of venue requirements,[149] it is very likely that the subsequent suits for damages will proceed in the same court as the class action.[150]

Therefore, it is apparent that a stronger case for the offensive use of collateral estoppel can be made in this situation than in the leading case on the topic, *Parklane*. The subsequent suits for damages may still require jury trials, if either party requests. However, the trials will be shortened because liability will already have been determined. Only the plaintiffs' entitlement to damages[151] and, if raised, defendants' immunity from damages, will have to be submitted to the juries. Once the need to relitigate any issues is removed, then the most significant justifications for barring relief splitting are either removed or substantially negated. The balance then weighs heavily in favor of allowing separate suits for damages.

### E. CONCLUSION

Plaintiffs and their attorneys representing classes must be aware of the potential for waiving claims of class members if not raised in the class action. Adequate representation requires more than competent presentation of the claims raised; in addition, it requires that steps be taken to preserve the claims and remedies of class members which are not raised in the class action. Certainly, if a waiver of claims or remedies is a possibility, due process requires that class members be fully informed and advised as to how they can avoid the waiver. The most practical resolution of this problem is to allow class actions for equitable relief and subsequent suits for damages, brought by either the named plaintiffs in the first case or class members. When the realities of litigation are examined closely, it becomes apparent that multiple suits are not necessarily more expensive, in terms of time or resources, than one class suit for both equitable and monetary relief. This is particularly true in light of the expanded availability

149. 28 U.S.C. § 1391(b) (1976).

150. Even if not in the same court, it is unlikely that the second actions would be out of state since the defendants are usually public officials.

151. The jury would also have to determine the amount of damages in accordance with the guidelines set out in *Carey v. Piphus*, 435 U.S. 247 (1978). In this case the Court held that the plaintiffs could be awarded only nominal damages ($1.00) for due process violations absent proof of *actual* injury flowing from the violation of the constitution.

of offensive collateral estoppel which makes it possible to avoid relitigation of any issue. All of the policy considerations which justify res judicata principles and class actions can be accommodated even though multiple suits are permitted. Most importantly, the due process rights of class members are best protected by avoiding a rigid application of the doctrine which generally prohibits claim or relief splitting.