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Federal Rules of Civil Procedure 23: A Defendant Class Action with a Public Official as the Named Representative

NOTES

FEDERAL RULES OF CIVIL PROCEDURE 23: A DEFENDANT CLASS ACTION WITH A PUBLIC OFFICIAL AS THE NAMED REPRESENTATIVE

INTRODUCTION

A basic tenet of the Anglo-American jurisprudential tradition has been that an adjudication on a particular issue affects and binds only those individuals actually designated as parties to an action in personam.[1] For example, a decision of a particular court may determine the law or set the policy on a specific issue within its jurisdiction. It does not, however, legally bind individuals within that jurisdiction who were not parties to or served with process in the original adjudication. Nor does it have any effect on courts and individuals in other jurisdictions except for possible precedential value.[2] Although this system may be defended as one of the fundamental concepts underpinning "due process,"[3] it can present serious practical defects by creating divergent standards of conduct for the same class of people. The incongruity of this system is most dramatically illustrated when a statute or practice thereunder is challenged on constitutional grounds. A finding by a federal district court that a state statute is unconstitutional is not necessarily determinative of

1. Pennoyer v. Neff, 95 U.S. 714 (1877). *See* E. B. Elliott Adv. Co. v. Metropolitan Dade County, 425 F.2d 1141 (5th Cir. 1970); United States v. Harrison County, 399 F.2d 485 (5th Cir. 1968); Mid-Continent Casualty Co. v. Everett, 340 F.2d 65 (10th Cir. 1965); Hartford Accident & Indemnity Co. v. Jasper, 144 F.2d 266 (9th Cir. 1944).

2.

> Admittedly, the decisions of the courts of one system are not binding upon the courts of another system, except insofar as the Constitution compels obedience, as it does to the decisions of the United States Supreme Court on federal matters, and except to the extent that *Erie-Thompkins* requires the federal courts to follow state law in non-federal matters. Thus while the decisions of one state may be persuasive in another state, they are not binding precedents in the latter. But even in the same court system, as in the federal, a decision is not binding upon a court of equal rank, nor indeed upon a court of lower rank, unless the latter owes obedience to the higher court. The duty of obedience, rather than rank, is the key.

1B J. MOORE, FEDERAL PRACTICE ¶ 0.402[1], at 61 (2d ed. 1974).

3. Hansberry v. Lee, 311 U.S. 32 (1940); Pennoyer v. Neff, 95 U.S. 714 (1877). *See* 1B J. Moore, Federal Practice ¶ 0.411 (2d ed. 1974).

its status as applied to other courts or parties within that state.[4] A defendant class designating a public official as the named representative offers an appropriate procedural device to alleviate many of these defects. How this operates will be shown by the following example.

There are approximately 1000 township trustees in Indiana.[5] One of their duties is to distribute poor-relief assistance to indigents within their townships.[6] Ms. *M.* was denied such relief on the sole basis that she did not meet the legal settlement requirement, a three year residency in the state and a one year continuous residency in the county.[7] Ms. *M.* instituted an action in federal district court attacking the constitutionality of this state durational residency statute. She also requested a permanent injunction to prevent the trustee from denying her relief. A three judge court granted the

4. A decision of one federal district court is not binding upon a different district court. United States v. Mathis, 350 F.2d 963 (3d Cir. 1965); In re Bender Body Co., 47 F. Supp. 224 (N.D. Ohio 1942), *aff'd on other grounds*, 139 F.2d 128 (6th Cir. 1943) (S.D. Ohio decision was not held to be binding in N.D. Ohio).

A decision from the same district *may* not even be later precedent for that district. In Jackson v. Northwest Airlines, 75 F. Supp. 32 (D. Minn. 1947), *modified on the merits*, 185 F.2d 74 (8th Cir. 1950), *cert. denied*, 342 U.S. 812 (1951), the district court refused to be bound by a decision decided only three months previously by the same court though by a different judge.

It has been held that a specially constituted three judge court is still a district court and therefore may be bound by the court of appeals within that jurisdiction. *See* United States v. Crosson, 462 F.2d 96 (9th Cir.), *cert. denied*, 409 U.S. 1064 (1972); Sunshine Anthracite Coal v. Adkins, 31 F. Supp. 125 (E.D. Ark.), *aff'd*, 310 U.S. 381 (1940).

While a decision of a federal court, other than the United States Supreme Court, may be persuasive in a state court on a federal matter, it is, however, not binding. State courts only owe obedience to the United States Supreme Court. *See* United States *ex rel.* Lawrence v. Woods, 432 F.2d 1072 (7th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971); Owsley v. Peyton, 352 F.2d 804 (4th Cir. 1965); Brown v. Palmer Clay Products Co., 290 Mass. 108, 195 N.E. 122 (1935), *aff'd on the merits*, 297 U.S. 227 (1936).

Likewise, a decision of a state court on a federal matter may be persuasive, but it is not binding in the federal courts. *See* Kansas City Steel Co. v. Arkansas, 269 U.S. 148 (1925); Marquardt Corp. v. Weber County, 360 F.2d 168 (10th Cir. 1966). *See generally*, 1B J. MOORE, FEDERAL PRACTICE ¶ 0.402[1] (2d ed. 1974).

5. For a specific enumeration of each township within the State of Indiana, *see* IND. CODE §§ 17-4-1-4 to 13 (1974).

6. IND. CODE § 17-4-6-3 (1974). For an in-depth critique of the present township trustee system and its numerous inadequacies, *see* Rosenberg, *Overseeing the Poor: A Legal-Administrative Analysis of the Indiana Township Assistance System*, 6 IND. L. REV. 385 (1973).

7. IND. CODE § 12-2-1-5 (1973).

injunction and declared the statute unconstitutional.[8] Several months later, Mr. *D.* applied for poor relief. He resided in a different township within the jurisdiction of the same federal court.[9] In disregard of the judgment obtained by Ms. *M.*, the trustee denied Mr. *D.* assistance on the basis of the residency statute. Since the trustee was not legally bound by the first adjudication on the issue, Mr. *D.*'s only recourse was to instigate another suit to obtain an injunction and bind the recalcitrant trustee.[10]

In 1975, several years later, the statute still remains on the books.[11] It has been declared unconstitutional in only one of the federal districts in Indiana.[12] Even within that jurisdiction, trustees are still denying assistance to indigents on the basis of the residency statute. Since township trustees are not responsible to one central governmental official, a judgment against one is not enforceable against another.[13] As a result, only two trustees are legally enjoined from enforcing the residency statute.

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8. Major v. Van DeWalle, CCM Pov. L. REP. ¶ 10,934 (N.D. Ind. Dec. 10, 1969) (declaration of invalidity), *permanent injunction entered,* CCH Pov. L. REP. ¶ 11,131 (N.D. Ind. Mar. 2, 1970) (Civil No. 4169, South Bend Division).

9. Ms. *M.* resided in Portage Township, County of South Bend. Mr. *D.* resided in Wayne Township, Allen County. Both townships are within the jurisdiction of the United States District Court for the Northern District of Indiana.

10. Duckett v. Wayne Township and Robert D. Wass, Civil No. 69 F. 108 (N.D. Ind. June 22, 1970). Plaintiff obtained a judgment on the pleadings on the basis of *Major* since the case was before the same judges and within the same district. It should be noted, however, that had the second suit been brought in the Southern District Court or in a state court, a different result may have been reached; or at least plaintiff would be required to carry the burden of demonstrating that the state durational residency statute was unconstitutional.

11. IND. CODE § 12-2-1-5 (1974). It is interesting to observe that the *Major* case is cited after the statute in the Compiler's Notes.

12. The United States District Court for the Northern District of Indiana. *See Major, supra* note 8 and *Duckett, supra* note 10.

13. The township trustee, as many other local officials, is the supreme administrator of his designated domain. For instance, the township trustee is not subject to any review or supervision concerning the township assistance program other than his township advisory board [IND. CODE § 17-4-28 *et seq.* (1974)] and the state board of accounts [IND. CODE § 12-2-1-30 (1973)]. The state board of account's only duty is to oversee and determinate whether there has been a misappropriation of money. The board does not regulate or control the type, standards or reasonableness of the relief distributed by the trustee. *See* Rosenberg, *Overseeing the Poor: A Legal-Administrative Analysis of the Indiana Township Assistance System,* 6 IND. L. REV. 385, 391 (1973).

The independence of each township trustee is aptly demonstrated by the need in *Duckett* to bring an entirely new suit to obtain an injunction against another trustee. This new suit had to be filed irrespective of the fact that the legal issues presented were identical to that

The present status of the statute cannot accurately be predetermined either in the state courts or in the other federal district court within the state. Since federal courts sit only as additional trial courts of the state, a state court is neither bound nor compelled to follow its holding.[14] The possibility yet remains that a state court may uphold the statute's constitutionality. However, the practical effect of this legal chaos is even more serious and immediate. Indigents in Indiana are placed in the anomalous position of having the residency statute enforced against them in some townships, while in others, the trustees are enjoined from enforcing it.

The typical remedy presently employed to prevent this unconstitutional deprivation consists of instituting separate lawsuits against each trustee still denying assistance on the basis of the statute's durational residency requirement. This process, however, could conceivably entail approximately 1000 suits. Also, the danger exists that different courts may reach different results.[15] Common

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in *Major*. This situation must be contrasted to that where one individual is in total command of an entire governmental unit. Since all employees are subject to that authority, they are in privity with and owe obedience to the head official. As a result, they may be bound by a single adjudication naming only the department director. *See* FED. R. CIV. P. 65(d).

14. *See* note 4 *supra*.

15. This danger was recognized in Guy v. Abdulla, 57 F.R.D. 14 (N.D. Ohio 1972), and incorporated as one of the bases for maintaining a defendant class. The court noted that:

> While it is highly probable that the same standards would be applied throughout the course of separate proceedings, the risk remains that inconsistent adjudications of the common issues would result. Thus, differing interpretations of the law could guarantee recovery by the trustee in some cases, while denying it against other defendants who are similarly situated. A clear purpose of Rule 23 is to avoid such anomalous results.
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> Even if a class action is not employed, a judge in a later case may feel constrained by *stare decisis* to apply previously adopted rules to different defendants. While this would eliminate the possibility of inconsistent adjudications, it becomes clear that the first suit was dispositive of the class interests as a practical matter. F.R.C.P. 23(b)(1)(B). Thus the requirements of Rule 23 should be utilized to assure that the rights of the absent parties are adequately protected.

Id. at 17.

Although not directly on point, United States *ex rel.* Lawrence v. Woods, 432 F.2d 1072 (7th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971), does serve as a useful analogy in describing the danger of inconsistent adjudications. In that case, petitioner brought a habeas corpus proceeding to relieve his state court conviction for interfering with the duties of a police officer in violation of a city ordinance. During the pendency of the petitioner's appeal to the Supreme Court of Illinois, the District Court for the Northern District of Illinois, in an unrelated declaratory judgment action, held the city ordinance was prima facie unconstitutional. Subsequently, the Supreme Court of Illinois affirmed petitioner's conviction, without referring

sense dictates the availability of a more acceptable alternative. One remedy, which would be more satisfying both to courts and all parties involved, would be to formulate both a plaintiff class of all indigents within the state denied assistance because of the durational residency statute and a defendant class of all township trustees enforcing the statute.[16] This procedure would offer several distinct practical advantages over the haphazard system now utilized.

First, a defendant class would serve the traditional purpose of class actions — the avoidance of multiplicity of suits through the elimination of repetitious litigation.[17] Through economies of time, effort and expense, judicial resources would be conserved. Also, since the defendant officials would be sued as a class, the actual presence of each official in the adjudication would no longer be

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to the federal court's prior declaration of the ordinance's invalidity. The court of appeals dismissed the writ of habeas corpus and held that the federal district court's prior declaration that the ordinance was unconstitutional was not binding on the Supreme Court of Illinois.

16. In the type of suit envisioned by this note, there must be concurrently plaintiff *and* defendant classes. There cannot be a suit with a single plaintiff (an indigent) against a defendant class of township trustees because no privity exists between the single plaintiff and the majority of the defendants. That is, the single plaintiff has not been personally injured by the unnamed members of the defendant class. In Joseph v. House, 353 F. Supp. 367 (E.D. Va. 1973), the court denied plaintiff's motion for a declaration of a class of defendants — all cities in Virginia with similar ordinances.

> *Neither, in the absence of a proper defendant class, is there a proper plaintiff class.* The only persons, other than the named plaintiffs, who have a case or controversy with the named defendants are other masseuses and massage parlor operators in Falls Church and Norfolk.

Id. at 371. (emphasis supplied). *See also* Schneider v. Margossian, 349 F. Supp. 741 (D. Mass. 1972) (defendant class of all clerks in the state not allowed in the absence of a plaintiff class); Fleetwood v. Thompson, 358 F. Supp. 310 (N.D. Ill. 1972) (a single plaintiff was not permitted to maintain a defendant class of all United States Attorneys for the failure to prosecute a particular witness in a particular case).

This "mutuality" of parties can, however, pose interesting problems. For example, in Koehler v. Ogilvie, 53 F.R.D. 98 (N.D. Ill. 1971), *aff'd*, 405 U.S. 906 (1972), the American Society of Divorced Men, Inc., brought an action constitutionally challenging certain of Illinois' divorce laws. The purported plaintiff class consisted of all divorced men in Illinois. The named defendants included the Governor, Attorney General of Illinois, and a defendant class composed of all sheriffs and Circuit Court Clerks in the state. The district court aptly observed that many of the defendants also fell into the proposed plaintiff class and in effect, would be placed in the unusual position of suing themselves. Neither of the class actions were permitted and the suit was otherwise dismissed under the doctrine of abstention.

17. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 560 (2d Cir. 1968), *rev'd on other grounds*, 479 F.2d 1005 (2d Cir. 1973), *vacated*, 94 S. Ct. 2140 (1974); Green v. Wolf Corp., 406 F.2d 291, 297 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); Dolgow v. Anderson, 43 F.R.D. 472, 484-85 (E.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825 (2d Cir. 1971).

imperative.[18] Consequently, those officials absent would be freed from constant litigation and allowed to discharge their normal duties. This procedural device is particularly useful when the validity of a statute is being challenged. The legal arguments presented in each suit will be substantially the same; the factual variants of each defendant official, if even relevant, would be at most minimal.[19] This type of class action is a "natural class action,"[20] since a later adjudication would only substantially repeat that which the first suit had already covered. These reasons alone would justify the creation of a defendant class of public officials.

Furthermore, a defendant class would permit the individual members of the class to join together counterclaims and defenses thereby presenting their strongest case. Through Rule 24 of the Federal Rules of Civil Procedure, absent members could intervene in the suit. These members could add, strengthen and enrich all available theories of the merits of the case which even the most capable representative might disregard or overlook. Defendants may also choose to pool their resources to hire competent attorneys and staff, an opportunity which they may not have otherwise been able to afford.[21]

Another advantage of such a class action is that all of the public officials would become parties, and hence become bound by a single judgment.[22] This would minimize the possibility of inconsistent ad-

18. The absence of individuals from the lawsuit for the sake of efficiency is, however, precisely the same reason that a class action can be dangerous since the rights or duties of those absentees are adjudicated in their absence.

19. When a statute or regulation is challenged as being facially unconstitutional, the legal issues will be identical for each member of the class. *See* notes 53 - 55 *infra* and accompanying text.

20. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 387 (1967). In Z. CHAFEE, SOME PROBLEMS OF EQUITY 215 (1950), Dean Chafee remarked that "[a] class suit works best when the persons are clothed in a sort of anonymity and lost in the crowd." This is precisely the case with a defendant class of public officials when the constitutionality of a statute is being challenged since "[t]he relief sought . . . is really against the statute, not the defendants." Gibbs v. Titelman, 369 F. Supp. 38, 53 (E.D. Pa. 1973).

21. More likely than not, the state's attorney general will intervene and carry the burden of defending the suit since the effect of the defendant class judgment will be statewide. *See* note 103 *infra* and accompanying text.

22. FED. R. CIV. P. 23(c)(3), provides:

The judgment in an action maintained as a class action under subdivision (b)(1) or

judications involving the same statute. Nothing could be more repulsive to common sense and one's due process and equal protection guarantees than having a statute declared void in one place, yet valid in another. A single judgment binding all officials similarly situated would also create for the first time a guarantee of a uniform standard of conduct throughout an entire state. No longer would injured parties constantly have to institute suits to bring an official into line on a subject matter previously litigated.

Finally, a defendant class offers the plaintiff class a more meaningful and substantial tool to obtain compliance against a recalcitrant official who continues to impinge upon their constitutional rights. Action against such an official would be easier because the injured party could simply plead the class judgment as res judicata since the defendant was a party to that action.[23] This dispenses with the necessity of having to bring an entirely new action to relitigate the merits. In addition, such an action carries more weight since non-compliance by the defendant official could immediately result in a contempt order against him. Although judges may be hesitant, as a practical matter, to impose a contempt citation with corresponding punishment against a fellow public official, the mere

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

23. The ease by which this enforcement mechanism can work (as opposed to relitigating the merits of an identical case which had already been fully explored) against a member of a defendant class, is shown in the case of Research Corp. v. Edward J. Funk & Sons Co., Inc., 15 FED. RULES SERV. 2d 580 (N.D. Ind. 1971). The defendant in that case was a member of the defendant class in an earlier adjudication, Research Corp. v. Pfister Associated Growers, Inc., 301 F. Supp. 497 (N.D. Ill. 1969), *appeal dismissed sub nom.*, Research Corp. v. Asgrow Seed Co., 497 F.2d 1059 (7th Cir. 1970). Because of defendant's refusal to comply with the earlier court order, plaintiff brought an action seeking a declaration that the earlier judgment was valid and binding upon the defendant. The court agreed and granted plaintiff's motion for summary judgment. The court stated that two elements must appear before an earlier class judgment is enforceable against an absent member. First, the defendant must have been a member of the class represented in the class action, and second, due process standards must have been met. Concerning the second requirement, the plaintiff is benefited by a presumption that the first action was conducted in accordance with due process standards. This places the burden on the party asserting a contrary position to raise the issue and prove otherwise.

threat of contempt may provoke these officials to comply more readily.

The purpose of this note is to explore the propriety and feasibility of defendant class actions with public officials as the named representatives when a state statute or practices thereunder are being constitutionally challenged. The examination will analyze the prerequisites in creating a defendant class under Rule 23 and enumerate both the practical difficulties and unique characteristics of a defendant class and demonstrate the difficulties imposed by the Rule itself in the maintenance of such a class. It is hoped that this note will offer new insights for individuals facing the problems that are presently encountered in creating a defendant class and serve as a working tool for attorneys and courts to avoid any pitfalls confronted in the maintenance of a class of defendants. This note will begin by examining those prerequisites which every class action must meet.

RULE 23(a)

Rule 23(a) lists four prerequisites which every class action must meet before it may be maintained. The four requirements include the following: (1) numerosity, (2) commonality, (3) typicality and (4) adequacy of representation.

"Numerosity"

The first prerequisite to maintenance of a class action is that "the class is so numerous that joinder of all members is impracticable."[24] Impossibility of joinder is not required; it is sufficient to demonstrate that it is extremely difficult or inconvenient to join all members of the class.[25] The class action device should not be utilized unless joinder under Rules 19 and 20 is impracticable.[26] This

24. FED. R. CIV. P. 23(a)(1).

25. Samuel v. University of Pittsburgh, 56 F.R.D. 435, 439 (W.D. Pa. 1972); Wallace v. Brewer, 315 F. Supp. 431 (M.D. Ala. 1970). 3B J. MOORE, FEDERAL PRACTICE ¶ 23.05, at 280 (2d ed. 1974) [hereinafter cited as MOORE]; 7 C. WRIGHT & H. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1762, at 593-94 (1972) [hereinafter cited as WRIGHT & MILLER]; Wright, CLASS ACTIONS, 47 F.R.D. 169, 172 (1969).

26. Donelan, *Prerequisites to a Class Action under New Rule 23,* 10 B.C. IND. & COM. L. REV. 527, 529 (1969) [hereinafter cited as Donelan]. *But see* Management Television Sys., Inc. v. National Football League, 52 F.R.D. 162, 164 (E.D. Pa. 1971):

> There is no requirement that the members be too numerous to join individually, in any event, an association of 26 football clubs is sufficiently large to warrant class action treatment.

requirement is simply to protect the members of a small class from being unnecessarily deprived of their rights without a day in court.[27] The plaintiff in both plaintiff and defendant class actions carries the burden of showing impracticability of joinder as well as establishing the other requirements of Rule 23.[28]

The primary criterion in determining whether joinder is impracticable in plaintiff class actions has been the number of persons in the proposed class.[29] Numbers alone, however, have not provided a suitable standard.[30] Courts have been able to interpret "extremely difficult or inconvenient" only in light of the particular circumstan-

27. Davy v. Sullivan, 354 F. Supp. 1320, 1325 (M.D. Ala. 1973); Marston v. L.E. Gant, Ltd., 56 F.R.D. 60, 61 (E.D. Va. 1972).

28. Davis v. Romney, 490 F.2d 1360, 1366 (3d Cir. 1974); Demarco v. Edens, 390 F.2d 836, 845 (2d Cir. 1968); Gibbs v. Titelman, 369 F. Supp. 38, 51 (E.D. Pa. 1973); Parrish v. Boetel & Co., 60 F.R.D. 680 (D. Neb. 1973). Professor Moore states that the generally accepted rule is that "[t]he burden is on the party, who seeks to utilize the class action, to establish his right to do so." 3B MOORE ¶ 23.02-2, at 156.

In Joseph v. House, 353 F. Supp. 367 (E.D. Va. 1973), the court denied plaintiffs' motion for a defendant class of all Virginia municipalities which have ordinances against bisexual massages. Since plaintiffs did not represent even an approximate number of cities which had such ordinances, the court held that plaintiffs failed to meet their burden of showing "numerosity."

In Mason v. Garris, 360 F. Supp. 420 (N.D. Ga.), *modified on other grounds,* 364 F. Supp. 452 (N.D. Ga. 1973), a defendant class of court marshals was denied because the plaintiff failed to make the positive showing that the named marshals would fairly and adequately represent the interests of the proposed defendant class pursuant to the requirements of Rule 23(a)(4). *See* Lopez Tijerina v. Henry, 48 F.R.D. 274 (D.N.M. 1969), *appeal dismissed,* 398 U.S. 922 (1970) (named defendant school board did not adequately represent the defendant class).

29. *See* Donelan, *supra* note 26, at 530. This is also evidenced by the caption frequently given Rule 23(a)(1), the "numerosity" requirement.

30. Cypress v. Newport News General & Nonsectarian Hosp. Ass'n., 375 F.2d 648, 653 (4th Cir. 1967); Coniglio v. Highwood Servs., Inc., 60 F.R.D. 359, 363 (W.D.N.Y. 1972), *aff'd on other grounds,* 495 F.2d 1286 (2d Cir. 1974); Samuel v. University of Pittsburgh, 56 F.R.D. 435, 439 (W.D. Pa. 1972); Marston v. L.E. Gant, Ltd., 56 F.R.D. 60, 61 (E.D. Va. 1972); Dale Electronics, Inc. v. R. C. L. Electronics, Inc., 53 F.R.D. 531, 534 (D.N.H. 1971); Roberson v. Great American Insurance Companies of N.Y., 48 F.R.D. 404, 420 (N.D. Ga. 1969). The fact that the absolute number of persons in a class is not controlling is shown by the case of Dolgow v. Anderson, 43 F.R.D. 472, 492 (E.D.N.Y. 1968), *rev'd on other grounds,* 438 F.2d 825 (2d Cir. 1970), in which it was stated that "the fact that plaintiffs cannot state the exact numbers of people in the . . . [plaintiff] class or identify them by name is irrelevant."

The inadequacy of numbers as the sole criterion is demonstrated by the inconsistent decisions when the cases are examined and viewed solely from the perspective of the numbers in each class. *See* cases cited in 3B MOORE ¶ 23.05, 272-73.

ces surrounding each case.[31] Such factors have included the nature of the action, the type of relief requested and the geographic location of the class.[32] Where economic claims are involved and monetary relief sought, courts have generally been strict in requiring a larger number to form a plaintiff class.[33] A more liberalized approach in

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> But courts should not be so rigid as to depend upon mere numbers as a guideline on practicability of joinder; a determination of practicability should depend upon all the circumstances surrounding the case.

Demarco v. Edens, 390 F.2d 836, 845 (2d Cir. 1968). *See* Cypress v. Newport News General & Nonsectarian Hosp. Ass'n, 375 F.2d 648, 653 (4th Cir. 1967); Thomas v. Clark, 54 F.R.D. 245, 249 (D. Minn. 1971); Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd without opinion,* 405 U.S. 970 (1972).

32.

> Yet other factors, [other than numbers alone] including the nature of the cause of action, and the location of the members of the class, bear on the propriety of a class action. Where the identity or location of many class members is unknown, and the total membership in the group is indeterminable at the time of institution of the action, a class action is appropriate.

Davy v. Sullivan, 354 F. Supp. 1320, 1325 (M.D. Ala. 1973). *But see* Samuel v. University of Pittsburgh, 56 F.R.D. 435, 439 (W.D. Pa. 1972):

> In this action, while the 48 proposed defendants are not particularly widely scattered, and are readily identifiable, I think the inconvenience involved in joining them serves to satisfy the numerosity requirement.

See generally 7 WRIGHT & MILLER § 1762; 3B MOORE ¶ 23.05; Donelan, *supra* note 26, at 531.

33. In patent infringement actions, a defendant class of 80, Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc., 285 F. Supp. 714 (N.D. Ill. 1968), and one of 400, Research Corp. v. Pfister Associated Growers, Inc., 301 F. Supp. 497 (N.D. Ill. 1969), *appeal dismissed sub nom.*, Research Corp. v. Asgrow Seed Co., 497 F.2d 1059 (7th Cir. 1970), were held to be sufficiently large to meet the numerosity requirement. However, a class of 13, Tracor v. Hewlet-Packard Co., 16 FED. RULES SERV. 2d 1475 (N.D. Ill. 1973), and one of 21, Sperberg v. Firestone Tire, 61 F.R.D. 70 (N.D. Ohio 1973), were held to be far short of meeting this requirement.

Likewise, in an action claiming a material omission of a prospectus, it was held that joinder of 38 defendant-underwriters, all amenable to nationwide service of process, was not impracticable. Guarantee Ins. Agcy. Co. v. Mid-Continental Rlty Corp., 57 F.R.D. 555 (N.D. Ill. 1972). An action against 86 federally chartered savings & loan associations (all in the Chicago metropolitan area) on misrepresentation on the sale of savings accounts was also held to be an insufficient number. Winokur v. Bell Fed. Sav. & Loans Ass'n, 16 FED. RULES SERV. 2d 65 (N.D. Ill. 1972).

But see Dale Electronics, Inc. v. R. C. L. Electronics, Inc., 53 F.R.D. 531 (D.N.H. 1971) (defendant class of 13 patent infringers held sufficiently large to meet the requirement of (a)(1)); Management Television Sys., Inc. v. National Football League, 52 F.R.D. 162 (E.D. Pa. 1971) (action against an association of 26 football clubs sufficiently large to warrant class action treatment). It should be noted, however, that in both of the latter cases, a judgment was entered for the defendant class.

In this type of litigation, courts have generally required more proof by the moving party than his mere belief that a certain number should be included in the class. The courts

applying the requirements of Rule 23 has been adopted when civil rights are involved.[34]

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seemingly want more than mere speculation. *See* In re Yarn Processing Patent Litigation, 56 F.R.D. 648, 652 (S.D. Fla. 1972) (defendant class denied); Technitrol, Inc. v. Control Data Corp., 164 U.S.P.Q. 552, 553 (D. Md. 1970) (defendant class denied).

34. This liberalized approach is demonstrated by the fewer number of people required by courts to maintain a class action. Twenty black teachers challenging discrimination in salaries is sufficiently numerous. Arkansas Ed. Ass'n v. Board of Ed., Portland, Ark. Sch. Dist., 446 F.2d 763 (8th Cir. 1971). Eighteen black physicians (including possible future doctors who might be deferred from moving to the community) is sufficiently large enough to constitute a class when challenging the discriminatory practices of a hospital only allowing white physicians. Cypress v. Newport News General & Nonsectarian Hosp. Ass'n, 375 F.2d 648 (4th Cir. 1967). Forty-one welfare recipients who had been denied certain benefits in the previous years is impracticable of joinder. Chatman v. Barnes, 357 F. Supp. 9 (N.D. Okla. 1973). A total of ten individuals convicted under the challenged criminal sexual psychopath statute within the last two years is sufficiently large. Davy v. Sullivan, 354 F. Supp. 1320 (M.D. Ala. 1973). A class of thirty-eight people was sufficiently numerous to maintain a class action in a suit by state prisoners challenging, on constitutional grounds, the conditions of their incarceration. United States *ex rel.* Walker v. Mancusi, 338 F. Supp. 371 (W.D.N.Y. 1971), *aff'd on other grounds,* 467 F.2d 51 (2d Cir. 1972). A possible forty students denied registration because of long hair is sufficiently large. Lansdale v. Tyler Junior College, 318 F. Supp. 529 (E.D. Texas 1970), *aff'd on other grounds,* 470 F.2d 659 (5th Cir. 1972), *cert. denied,* 411 U.S. 986 (1973). All "members, friends and associates" of the Black Muslims who operated a farm in one county are sufficiently numerous. Wallace v. Brewer, 315 F. Supp. 431 (M.D. Ala. 1970). A total of ten actual employees is sufficient in an employment discrimination suit. Local 246, Utility Worker's Union v. Southern Cal. Edison Co., 13 FED. RULES SERV. 2d 479 (C.D. Cal. 1969). *But see* Holloway v. Parham, 15 FED. RULES SERV. 2d 1390 (N.D. Ga. 1972) (welfare suit where the court held that without evidence to the contrary, the number of members in the plaintiff class is speculative and at most twenty which was not impractical). Perry v. Granada Separate School Dist., 300 F. Supp. 748 (N.D. Miss. 1969) (action by two unwed mothers challenging a school regulation in denying admission could not be maintained as a class action since there was no indication that there was a sufficient number of unwed mothers in the school district). *See generally* 7 WRIGHT & MILLER § 1771.

This liberal approach in the civil rights areas has not been without criticism. In Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1126 (5th Cir. 1969), the concurring judge warned:

> And, what may be most significant, an over-broad framing of the class may be so unfair to the absent members as to approach, if not amount to deprivation of due process. Envision the hypothetical attorney with a single client, filing a class action to halt all racial discrimination in all the numerous plants and facilities of one of America's mammoth corporations. . . . It is tidy, convenient for the court fearing a flood of Title VII cases, and dandy for the employees if their champion wins. But what of the catastrophic consequences if the plaintiff loses and carries the class down with him, or proves only such limited facts that no practice or policy can be found, leaving him afloat but sinking the class.

While this danger states a matter oftentimes overlooked by many courts, with all due deference, however, such a fear should not displace class actions in this field of litigation. On the contrary, it should only reaffirm the courts' imperative and important duty to assure that the named party adequately represents all members of the proposed class.

Several reasons can be cited for this more permissive approach with regard to civil rights. First, federal courts have a history of being notably concerned when fundamental or constitutional rights have allegedly been infringed. In such instances, they have typically taken all necessary steps to remedy the injustice.[35] A second, though more pragmatic reason, is related to the type of relief usually requested in such actions, *i.e.*, injunctive or declaratory relief. Whether the action proceeds as an individual suit or as a formal class action, the requested relief will likely affect not only the named parties but all persons similarly situated, irrespective of the number of individuals in the class.[36] This is particularly true when the action seeks to strike down a constitutionally offensive statute. Third, active participation by all class members as parties is less necessary in actions requesting injunctive rather than monetary relief.[37] In the latter cases, individual suits may still be necessary to determine and set damages for each plaintiff. Additionally, the legal theory may vary with each individual member of the plaintiff class depending upon the type or amount of claim involved. These factors are not involved when an injunction is the primary relief sought.

This reasoning is equally applicable to a defendant class of public officials. The few reported cases dealing with defendant classes have taken the same approach as in plaintiff class suits; they have not made a distinction between the two classes in this regard. A smaller number is generally permitted in formulating a defendant class in a civil rights action,[38] whereas a larger number is required

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> The very nature of the Civil Rights Act contemplates the bringing of a class action by even a small number of discriminated-against persons on behalf of all who are or may in the future be similarly situated. Its purpose is to afford a broad remedy which comes to the rescue of all persons fitting the class of plaintiffs.

Local 246, Utility Worker's Union v. Southern Cal. Edison Co., 13 FED. RULES SERV. 2d 479, 480 (C.D. Cal. 1969). For an example of the federal courts' active intervention to remedy the deprivation of constitutional guarantees, *see* Brown v. Board of Education, 347 U.S. 483 (1954), and its aftermath.

36. Davy v. Sullivan, 354 F. Supp. 1320, 1325 (M.D. Ala. 1973).

37. Goldman v. First Nat'l Bank, 56 F.R.D. 587, 592-93 (N.D. Ill. 1972).

38. In the following cases, a class of defendant public officials was permitted, each meeting the numerosity requirement: Danforth v. Christian, 351 F. Supp. 287 (W.D. Mo. 1972) (all county and other election officials in the state); Samuels v. University of Pittsburgh, 56 F.R.D. 435 (W.D. Pa. 1972) (forty-eight from all the state universities in Pennsylvania); Rakes v. Coleman, 318 F. Supp. 181 (E.D. Va. 1970) (all judges empowered to commit

in other areas, as in patent infringement suits.[39]

"Commonality"

The second prerequisite to maintenance of a class suit is the presence of "questions of law or fact common to the class."[40] Common questions need not encompass every claim or defense held by each individual class member,[41] nor need they predominate as required by subsection (b)(3), one of the four types of class actions.[42]

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persons pursuant to the state statute regarding alcoholics); Union Pac. R.R. v. Woodahl, 308 F. Supp. 1002 (D. Mont. 1970) (where the constitutionality of a state statute was being challenged, it was held that joinder of all fifty-seven county attorneys of the state would be a hardship and an inconvenience to all concerned); Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd*, 390 U.S. 333 (1968) (all county sheriffs, wardens and jailors in Alabama). *But see* Wallace v. Brewer, 315 F. Supp. 431 (M.D. Ala. 1970) (the purported defendant class of the Restore Integrity of Development Committee not allowed when the uncontradicted evidence showed that only four members were in the organization).

It should be noted that under most circumstances with a defendant class of public officials, Rule 23(a)(1) will not pose a major hurtle. As in the introductory example, when the number gets as large as 1000, there will be little difficulty in proving and meeting the numerosity requirement.

39. *See* note 33 *supra.*

40. FED. R. CIV. P. 23(a)(2). It has been noted by several commentators that this provision is redundant and therefore, perhaps superfluous. Implicit within any of the 23(b) categories which every class action must fit, is the presence of common questions. In (b)(3), they must "predominate." In subsection (b)(2), the grounds applicable to the class express commonality. The two categories under (b)(1) both suggest a substantial overlap in either common questions of law or fact. In view of this superfluity of (a)(2), these commentators have attempted to explain courts' general avoidance or mere cursory treatment of (a)(2). *See* 3B MOORE ¶ 23.06-1, at 301; 7 WRIGHT & MILLER § 1763, at 609-10. Likewise, in Vernon J. Rockler & Co. v. Graphic Enterprises, Inc., 52 F.R.D. 335, 340 n.9 (D. Minn. 1971), the court observed that:

> [A]side from serving the mechanical function of embodying the first chronological step to be taken by the court, the express requirement of (a)(2) is arguably superfluous insofar as the existence of common questions is implicit in a finding that a suit is definable as a (b)(1), (2), or (3) class action.

41. "Nothing in F.R.C.P. 23, however, mandates that the identity of the questions of fact or law be total." Katz v. Carte Blanche Corp., 52 F.R.D. 510, 514 (W.D. Pa. 1971). *See* Vernon J. Rockler & Co. v. Graphic Enterprises, Inc., 52 F.R.D. 335, 340 (D. Minn. 1971); Gerstle v. Continental Airlines, Inc., 50 F.R.D. 213, 219 (D. Colo. 1970), *aff'd*, 466 F.2d 1374 (10th Cir. 1972); Dolgow v. Anderson, 43 F.R.D. 472, 490 (E.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825 (2d Cir. 1970).

If the facts or law substantially differ on a particular issue, subclasses may be formed or the action limited to those issues in which commonality is present. *See* FED. R. CIV. P. 23(c)(4). *See* Green v. Wolf Corp., 406 F.2d 291, 299 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968).

42. *See* note 112 *infra* and accompanying text.

The rule only requires that there be some "common nucleus of operative fact" or law which would make the class action device a more advantageous method of litigation.[43] The benefits gained through such a medium would be largely defeated should each member of the class rely upon different facts or law.[44]

When a statute or an administrative regulation is challenged as being facially unconstitutional, the question of law will be common, if not identical, to all members of the plaintiff class.[45] Factual differences between members of the class, such as the reasons for which a statute is brought into play, have not been held to be fatal. Rule 23(a)(2) only requires that there be common questions of law *or* fact.[46] A sampling of the various statutes and regulations which have formed a "common nucleus of law" for plaintiff class actions includes a claim and delivery statute,[47] a sodomy statute,[48] an involuntary confinement statute,[49] a regulation pertaining to the reissuance

43. Siegel v. Chicken Delight, Inc., 271 F. Supp. 722, 726-27 (N.D. Cal. 1967), *petition for writ of mandamus granted*, 412 F.2d 830 (9th Cir. 1969). *See* Mersay v. First Republic Corp. of America, 43 F.R.D. 465, 468 (S.D.N.Y. 1968).

44. *See* Donelan, *supra* note 26, at 532.

45. In Gesicki v. Oswald, 336 F. Supp. 371 (S.D.N.Y. 1971), *aff'd on other grounds*, 406 U.S. 913 (1972), the court maintained a plaintiff class action in setting aside convictions under New York's Wayward Minor Statute. Regarding (a)(2), the court stated:

> [S]ince we hold the provisions in question unconstitutional on their face, the questions of law and the claims presented are identical for all members of the [plaintiff] class.

Id. at 374.

46. In Like v. Carter, 448 F.2d 798 (8th Cir. 1971), *cert. denied*, 405 U.S. 1045 (1972), the trial court refused to maintain a class of plaintiffs because the facts pertaining to the delay in processing welfare applications varied with each case. The court of appeals reversed stating that factual differences are not fatal if common questions of law exist. This legal commonality was found in the interpretation and validity of state and federal statutes and regulations. *See* Thomas v. Clark, 54 F.R.D. 245, 250 (D. Minn. 1971) (where there existed a clear common question of law, however, the fact that the common question of fact was "not quite so apparent" was not fatal). *See* Green v. Wolf Corp., 406 F.2d 291, 300 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); Vernon J. Rockler & Co. v. Graphic Enterprises, Inc., 52 F.R.D. 335, 340 (D. Minn. 1971); Gerstle v. Continental Airlines, Inc., 50 F.R.D. 213, 219 (D. Colo. 1970), *aff'd on other grounds*, 466 F.2d 1374 (10th Cir. 1972); Siegel v. Chicken Delight, Inc., 271 F. Supp. 722, 726-27 (N.D. Cal. 1967), *petition for writ of mandamus granted*, 412 F.2d 830 (9th Cir. 1969).

47. Thomas v. Clark, 54 F.R.D. 245 (D. Minn. 1971).

48. Dawson v. Vance, 329 F. Supp. 1320 (S.D. Texas 1971).

49. Anderson v. Solomon, 315 F. Supp. 1192 (D. Md. 1970).

of missing welfare checks,[50] and a welfare regulation relating to the time of first payment.[51]

The same considerations are involved in a defendant class of public officials. Such defendants are usually required to act pursuant to the challenged statute. Since their authority to act is commonly grounded in the same statute, the commonality of the legal issues and defenses will be identical among all members of the defendant class. As with the introductory example, the legal issues and defenses regarding the validity of the state residency statute will be identical for each of the approximately 1000 township trustees.[52] As previously discussed,[53] it is irrelevant to the predominate issue of the case (the validity of the statute which grants public officials the authority to act in a certain way) whether factual differences exist between trustees, such as the size of the township, budget, or that the reasons for triggering the statute into play differ.[54] The validity of the statutory scheme and the power of the

50. Randle v. Swank, 53 F.R.D. 577 (N.D. Ill. 1971). In that case, the fact that the amount of checks differed or that the reasons leading to the failure of the checks to arrive differed was not controlling. Commonality of fact was found in the fact that the checks did not arrive at all.

51. Rodriguez v. Swank, 318 F. Supp. 289 (N.D. Ill. 1970), *aff'd on other grounds*, 403 U.S. 901 (1971).

52. *See* note 19 *supra* and accompanying text.

53. *See* note 46 *supra* and accompanying text.

54. In Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd*, 390 U.S. 333 (1968), the named defendants asserted that there did not exist a common question of fact because their physical facilities were more elaborate and their operations more complex than most of the other jails within the state. In rejecting this contention, the court stated:

> It would be extremely difficult, if not impossible, to find members of a class to serve as representative defendants in a case, such as this one, where there are not some material differences in the physical facilities and operations involved. But since the rule requires only that there be questions of law and fact common to these defendants and the members of the class which they represent . . . then it becomes immaterial whether certain of these class defendants are not otherwise identically situated.

Id. at 330. In Union Pac. R.R. v. Woodahl, 308 F. Supp. 1002 (D. Mont. 1970), plaintiffs sought to have a certain statute pertaining to railroad procedures declared invalid. The named defendants (a county attorney representing all of the county attorneys in Montana) claimed that since the railroad was not even present in some counties, there existed no common questions of law or fact to all county attorneys. In response, the court stated:

> It cannot be said, however, that the county attorneys in counties which do not have railroads have no interest in the constitutionality of the statute. There is the possibility, for example, that railroads may be constructed in the future in the few counties which presently do not have railroads. *The predominate question here is the authority of all county attorneys to prosecute actions under the statute.* In determining the

defendant officials to enforce it will comprise not only the substance of the litigation, but will equally provide legal commonality for both the plaintiff and defendant classes.[55]

Interpretative problems of the commonality prerequisite have arisen in suits which challenge either the constitutionality of a statute as applied or certain procedures practiced by defendant officials. In such cases, the commonality requirement is more difficult to establish than when a statute is attacked on its face since the factual differences and individual considerations play a greater role. An example will further illustrate this point.

Imagine a class suit which challenges the improper administration of the defendant class of judges' discretionary power in determining bail or release on recognizance. Even though the defendant judges would be judicially linked by obtaining their authority from the same source, they would have little else in common. It is no longer their authority per se which is being challenged but rather their individual misuse of that authority. The nature of the offense charged, numerous characteristics of the accused and the personal views of each judge all play an integral role in determining the final outcome of each case. In such cases, courts have been unanimous in their rejection of a class action because of the want of commonality.[56]

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constitutionality of the statute, the court is not presented with the question of how different county attorneys are affected. For purposes of a class action involving the constitutionality of a statute and the power of defendants to prosecute actions under it, *the requirements of part (2) of Rule 23(a) are met if the authority to prosecute actions under the statute is common to all defendants.*

Id. at 1008. (emphasis supplied).

55. In Gibbs v. Titelman, 369 F. Supp. 38, 52 (E.D. Pa. 1973), the court held commonality existed because,

[t]he validity of the statutory scheme relating to the repossession of motor vehicles, as it pertains to both classes [plaintiff and defendant], comprises the substance of the action. . . . Likewise, whether some of the defendants are constitutional white hats is irrelevant. The challenge to these statutes is geared at the permissive procedures; therefore, it is facial. It is the same procedures that form the bond of legal commonality between the plaintiffs and defendants.

56. The distinction between commonality when a statute is being facially challenged and commonality when the validity of certain practices or a statute as applied is attacked, is demonstrated in the case of Hamar Theatres, Inc. v. Cryan, 365 F. Supp. 1312 (D.N.J. 1973), *prob. juris. noted*, 94 S. Ct. 1967 (April 22, 1974). In that case, plaintiffs were permitted to form a plaintiff class (all movie theatres in the state that exhibited "X"-rated and/or

Two reasons can be suggested for this result. First, the practical advantages of class suits, such as judicial economy, would be largely defeated. Each judge would be compelled to intervene and demonstrate that he did not abuse his discretion as to each individual seeking bail. As one commentator observed, the case would become a "procedural Tower of Babel."[57] Secondly, and more fundamentally, marked differences between members of the defendant class would raise concern whether their due process rights would be guaranteed in a class suit. This alternatively would directly question

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sexually oriented adult films) in their claim attacking the constitutionality of New Jersey's anti-obscenity statute. However, plaintiffs were not permitted to form the same plaintiff class in their action challenging the allegedly illegal search and seizure procedures practiced by defendants. The court held that these procedures varied considerably in each case and therefore presented different factual and legal issues which would be resolved best on a case-by-case basis.

Likewise, in Wilson v. Kelly, 294 F. Supp. 1005 (N.D. Ga.), *aff'd on other grounds*, 393 U.S. 266 (1968), the court maintained a defendant class (159 sheriffs and 72 wardens) on the issue of whether state statutes requiring segregation in prisons and jails were violative of the fourteenth amendment. The court did not, however, permit the same defendant class to be maintained regarding defendants' allegedly discriminatory hiring practices because of a want of commonality. The court stated:

> The hiring practices of each vary and have no connection with each other and they are not responsible to different supervisors. A suit against one could no more bind them all than an employment claim against one automobile dealor, one bakery, or one business of any type could bind all other like businesses within the state.

Id. at 1010. A dissenting judge, in disagreeing with the majority on the issue of certification of the respective plaintiff and defendant classes, stated in response:

> I would permit plaintiffs to complete their statistical study, which, it seems, might demonstrate the truth of their complaint that with some notable exceptions, defendants operating institutions named in the [defendant] class action, are, in fact, operating the entire system under their care solely by members of the white race . . . If the proof shows such facts, I am of the opinion that the plaintiffs would be entitled to have this practice ended.

Id. at 1015. It should be noted that the major problem for the majority was plaintiffs' lack of standing to assert the claim of discriminatory hiring practices since none of the named plaintiffs had ever applied for such employment.

See Caldwell v. Craighead, 432 F.2d 213 (6th Cir. 1970), *cert. denied*, 402 U.S. 953 (1971) (defendant class of all public school band instructors, superintendents and high school principals could not be maintained for want of commonality); Coniglio v. Highwood Servs., Inc., 60 F.R.D. 359 (W.D.N.Y. 1972) (defendant class of N.F.L. football teams could not be maintained because the ticket practices of each club depended exclusively upon local factors such as stadium seating capacity, fan interest, *etc.*); United States v. T.I.M.E.-DC, Inc., 335 F. Supp. 246 (N.D. Texas 1971) (defendant class of 70 local unions regarding discrimination in labor contracts could not be maintained because the contracts differed with each union, even though the ultimate question of discrimination is the same).

57. Donelan, *supra* note 26, at 532.

whether the named party official could adequately and fully represent all members of the defendant class.

If, however, the complaint were to allege that the practice of judges in establishing bail for a criminal defendant is determined solely on the basis of a set monetary schedule, an entirely different question is presented. Each instance where bail is permitted would now be factually common in one vital respect: the pervasive practice by judges in setting bail exclusively by reference to bail bond schedules.[58] The question of law — whether such a practice is a constitutional deprivation of an indigent's due process and equal protection guarantees — would be shared by each defendant judge currently employing the procedure. No longer would each judge be required to intervene and defend his practice. Since there is now present a "common course of conduct" among all judges, proof could be easily supplied through the introduction of statistics.[59] A judgment declaring such a practice unconstitutional would require judges to acknowledge other, less restrictive factors in establishing and administering bail and influence the development of alternative standards to implement such a program.[60]

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58. While it is true that judges in Indiana have the inherent power to reduce bail upon a proper motion, or to release an accused on his own recognizance, the infrequency with which these procedures are actually utilized should not detract from the pervasive practice by most judges of using a set money schedule in setting bail.

59. Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909, 914 (9th Cir. 1964). In Hicks v. Crown Zellerbach Corp., 49 F.R.D. 184 (E.D. La. 1968), an employment discrimination suit, defendant objected to maintenance of a plaintiff class on the grounds that there existed no commonality because each member of the class was factually different, as regards to seniority, ability, job position, *etc.*. The court held that defendant misinterpreted the thrust of the proposed class action.

> The class action is not sought in order to bring in many factual grievences; rather, it seeks to put the court in position to render a broad remedial order in the event that the defendant has an established discriminatory policy or policies which operate as to all Negroes, *apart from and regardless of* the individual circumstances of each. *Thus, the existence and operation of a pervasive policy affecting all Negroes is the question of law or fact common to all members of the class.*

49 F.R.D. at 187. (emphasis supplied). *See* Hecht v. Cooperative for Am. Relief Everywhere, Inc., 351 F. Supp. 305 (S.D.N.Y. 1972); Martarcella v. Kelly, 349 F. Supp. 575 (S.D.N.Y. 1972); Bishop v. Jelleff Associates, Inc., 16 FED. RULES SERV. 2d 544 (D.D.C. 1972).

60. A judgment declaring such a practice unconstitutional would present some difficulties in its enforcement. For instance, an individual unable to post bond may find it difficult in establishing that the judge exclusively used the set schedule and did not adequately take into account other, perhaps more relevant factors. The advantage of a class action of this nature, assuming that the defendant can muster such evidence, is that it relieves the defend-

The defendant class action offers plaintiffs an extremely important procedural weapon in this field of litigation. The evidence in a class suit may show a broad policy or pattern of discrimination or constitutional deprivation practiced by public officials which institution of separate and individual suits might be unable to demonstrate.[61] Although this type of litigation puts a greater burden on the moving party to prove commonality because of the greater factual variants, plaintiffs should at least be given the opportunity. At present, they have few other alternatives available to them to show such a common and consistent pattern of behavior.

"Typicality"

The "claims or defenses of the representative parties must be typical of the claims or defenses of the class" in order to satisfy the third prerequisite to the maintenance of a class suit.[62] The precise purpose and meaning of this requirement is obscure.[63] Courts have experienced difficulty in fully delineating the meaning of this prerequisite, as is reflected by their cursory conclusions, oftentimes without explanation, that the representative's claims are typical to those of the rest of the class.[64] Occasionally the defendant has conceded

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ant from also having to prove the unconstitutionality of such a practice to that particular judge.

61. In Bishop v. Jelleff Associates, Inc., 16 FED. RULES SERV. 2d 544 (D.D.C. 1972), the court maintained a plaintiff class in an employment suit alleging age discrimination. The court found questions of fact common to all members of the plaintiff class on the issue of whether defendants engaged in a pattern or policy of terminating workers in violation of the law.

> Although each plaintiff may have been terminated at a different time by a different agent and allegedly for different reasons, *the evidence as a whole may show a broad policy of discrimination, which policy each plaintiff, suing alone, would be unable to prove.*

Id. at 545. (emphasis supplied).

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

63. White v. Gates Rubber Co., 53 F.R.D. 412 (D. Colo. 1971); State of Minnesota v. U. S. Steel Corp., 44 F.R.D. 559 (D. Minn. 1968), *vacated,* 438 F.2d 1380 (8th Cir. 1971).

64. In La Raza Unida v. Volpe, 337 F. Supp. 221, 232 (N.D. Cal. 1971), *cert. denied,* 409 U.S. 890 (1972), *aff'd on other grounds,* 488 F.2d 559 (9th Cir. 1973), the court rejected defendant's argument that the claims of the representative were not typical by stating "the court disagrees" without further explanation. *See* Inmates of the Attica Correctional Facility v. Rockefeller, 453 F.2d 12, 24 (2d Cir. 1972); United States *ex rel.* Walker v. Mancusi, 338 F. Supp. 311, 316 (W.D.N.Y. 1971), *aff'd on other grounds,* 467 F.2d 51 (2d Cir. 1972); Moss v. Lane Co., 50 F.R.D. 122, 126 (W.D. Va. 1970), *aff'd in part, rev'd in part on other grounds,* 471 F.2d 853 (4th Cir. 1973); Lansdale v. Tyler Junior College, 318 F. Supp. 529, 534 (E.D.

the point, and thereby relieved the court from further examination of the matter.[65]

The typicality requirement focuses on the representative and his relationship to the other members of the class.[66] The most prevalent test used in determining typicality has been whether there is an absence of antagonism or conflict between the class members or a showing that the claims of the representative are not inimical to the interests of the other members of the class.[67] While this "lack of adversity" approach permits flexibility because the claims need not be factually identical among members of the class (it is only required that the claims or defenses do not conflict),[68] this test is also used as one of the factors in determining whether the representative will adequately represent the class.[69] It is understandable then that

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Texas 1970), *aff'd on other grounds,* 470 F.2d 659 (5th Cir. 1972), *cert. denied,* 411 U.S. 986 (1973); Contract Buyers League v. F. & F. Inv., 48 F.R.D. 7, 10 (N.D. Ill. 1969).

65. Epstein v. Weiss, 50 F.R.D. 387, 390 (E.D. La. 1970); Zeigler v. Gibralter Life Ins. Co., 43 F.R.D. 169, 172 (D.S.D. 1967).

66. Rule 23(a)(3) focuses on the consideration of whether the representative's interests are truly aligned and consistent with the interests of the members of the class. One note writer has suggested that the purpose of the typicality prerequisite is to help define the class. "The precision in the definition of the class vis-a-vis the representative's status is the very essence of the concept of typicality." Note, *Class Actions: Defining the Typical And Representative Plaintiff Under Subsections (a)(3) and (4) of Federal Rule 23,* 53 B.U.L. REV. 406, 413 (1973). *See* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I),* 81 HARV. L. REV. 356, 387 n.120 (1967).

67. Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12, 24 (2d Cir. 1971); Schy v. Susquehanna Corp., 419 F.2d 1112, 1117 (7th Cir.), *cert. denied,* 400 U.S. 826 (1970); Pennsylvania Ass'n, Ret'd Child. v. Commonwealth of Pa., 343 F. Supp. 279, 293 (E.D. Pa. 1972); Katz v. Carte Blanche Corp., 52 F.R.D. 510, 515 (W.D. Pa. 1971); Rakes v. Coleman, 318 F. Supp. 181, 190 (E.D. Va. 1970); Carpenter v. Hall, 311 F. Supp. 1099, 1113 (S.D. Texas 1970); Mersay v. First Republic Corp. of America, 43 F.R.D. 465, 468 (S.D.N.Y. 1968).

68.

> Although there are varying fact patterns underlying each individual odd-lot transaction, the same allegedly unlawful differential is charged to all buyers and sellers.

Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968), *rev'd,* 479 F.2d 1005 (2d Cir. 1973), *vacated,* 94 S. Ct. 2140 (1974). *See* Gerstle v. Continental Airlines, Inc., 50 F.R.D. 213, 219 (D. Colo. 1970), *aff'd on other grounds,* 466 F.2d 1374 (10th Cir. 1972); Siegel v. Chicken Delight, Inc., 271 F. Supp. 722, 726-27 (N.D. Cal. 1967), *petition for writ of mandamus granted,* 412 F.2d 830 (9th Cir. 1969).

69.

> [A]dequacy of representation requires that the interests of the representatives of the class be compatible with and not antagonistic to the interests of those whom they purport to represent.

Tijerina v. Henry, 398 U.S. 922 n.2 (1970) (Douglas, J., dissenting). *See* Hansberry v. Lee, 311 U.S. 32 (1940).

several courts have treated the typicality requirement simply as an overlap of the requirement found in (a)(4), that the named party adequately represent the class.[70]

Another test in determining typicality has been that the representative's claim for relief is grounded on the same legal or remedial theory as the rest of the class.[71] This approach is related to and in effect simply restates the "commonality" prerequisite previously examined.[72]

The confusion surrounding the "typicality" requirement has led respected commentators to divergent conclusions. Professor Moore has urged that there is no need for the clause "since all meaning attributable to it duplicate requirements prescribed by other provisions in Rule 23."[73] This is demonstrated by the duplication of the "commonality" and "adequacy of representation" prerequisites. Professors Wright and Miller have stated that

> Rule 23(a)(3) may have independent significance if it is used to screen out class actions when the legal or factual position of the representatives is markedly different from that of other members of the class even though common issues of law and fact are raised.[74]

Whatever approach or conclusion is used by a particular court, the typicality requirement will raise the same questions and present the same problems for a defendant class as discussed earlier in the commonality section.[75] When a statute is being challenged on its face, the affinity among the members of the defendant class of pub-

70. Koehler v. Ogilvie, 53 F.R.D. 98, 100 (N.D. Ill. 1971), *aff'd*, 405 U.S. 906 (1972); Mersay v. First Republic Corp. of America, 43 F.R.D. 465, 468 (S.D.N.Y. 1968). The court in Rosado v. Wyman, 322 F. Supp. 1173, 1193 (E.D.N.Y.), *aff'd on other grounds*, 437 F.2d 619 (2d Cir. 1970), *aff'd*, 402 U.S. 991 (1971), stated that the typicality requirement was "designed to buttress the fair representation requirements in Rule 23 (a)(4)." This confusion with (a)(4) may be due to the fact that both requirements come from the same source. *See* Donelan, *supra* note 26, at 534-35; Note, *Class Actions: Defining the Typical and Representative Plaintiff Under Subsections (a)(3) and (4) of Federal Rule 23*, 53 B.U.L. REV. 406, 409 (1973).

71. Gonzales v. Cassidy, 474 F.2d 67, 71 n.7 (5th Cir. 1973).

72. Rakes v. Coleman, 318 F. Supp. 181, 191 (E.D. Va. 1970); Gerstle v. Continental Airlines, Inc., 50 F.R.D. 213, 219 (D. Colo. 1970), *aff'd on other grounds*, 466 F.2d 1374 (10th Cir. 1972); Contract Buyers League v. F. & F. Inv., 48 F.R.D. 7, 10 (N.D. Ill. 1969).

73. 3B MOORE ¶ 23.06-2, at 325.

74. 7 WRIGHT & MILLER § 1764, at 614.

75. *See* page 369 *supra*.

lic officials will probably be so strong that their defenses will be identical with each other. This is true because the class is being sued on their authority and not as individuals per se. Where certain procedures practiced by officials are being attacked, the moving party will again face the same difficulties in establishing typicality as commonality because of the greater role that factual differences and individual considerations play.[76]

"Adequacy of representation"

The fourth prerequisite to maintenance of a class action demands that "the representative parties will fairly and adequately protect the interests of the class."[77] This requirement has always been a major consideration in the formation of representative suits.[78] Its fundamentality has become even greater because of the expanded binding effect of class actions since the 1966 amendment to Rule 23.[79] Where one or several members of a class are asserting or defending the interests of individuals not before the court, and those absent individuals may be bound by the adjudication, the adequacy of the representation becomes essential. Its importance arises not only out of general considerations of fairness (because such individuals are deprived of the long-favored policy that each person is entitled to his day in court), but more seriously, those absent members who may be bound are constitutionally guaranteed due process

76. *See* notes 52-61 *supra* and accompanying text.

77. FED. R. CIV. P. 23(a)(4).

78. *See* Hansberry v. Lee, 311 U.S. 32 (1940).

79. The 1966 amendment to Rule 23 eliminated the old "spurious" class suit, which was "little more than a permissive joinder device," Dolgow v. Anderson, 43 F.R.D. 472, 493 (E.D. N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825 (2d Cir. 1970), and in which judgments were binding only upon class members who "opted in." *See* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968), *rev'd on other grounds*, 479 F.2d 1005 (2d Cir. 1973), *vacated*, 94 S. Ct. 2140 (1974); Siegel v. Chicken Delight, Inc., 271 F. Supp. 722, 727 (N.D. Cal. 1967), *petition for writ of mandamus granted*, 412 F.2d 830 (9th Cir. 1969). Since the 1966 amendment, all members of a (b)(1) and (b)(2) class action are bound as are all members of a (b)(3) class action who fail to request exclusion from the class. *See* FED. R. CIV. P. 23(c)(3); Research Corp. v. Asgrow Seed Co., 425 F.2d 1059, 1060 (7th Cir. 1970).

Adequacy of representation becomes particularly important for members of a class maintained under (b)(1) or (b)(2). Such members do not have the privilege of opting out of the suit that is accorded to class members of a (b)(3) suit. *See* notes 117-18 *infra* and accompanying text. Also, the mandatory notice requirements of 23(c)(2) do not apply; notice is rather discretionary with the court. *See* FED. R. CIV. P. 23(d)(2). As a result of these distinctions, class members in (b)(1) and (b)(2) actions must necessarily rely on their representative to protect their interests.

of law.[80] It is generally agreed that this factor becomes even more crucial when a judgment is sought against a class of defendants.[81]

The major requirement for establishing this prerequisite has been that the named representative will vigorously and uncompromisingly protect the interests of the entire class.[82] In short, the court must be assured that "the representative [will] put up a real fight."[83] Courts and commentators have interpreted this to mean that the named representative must have a substantial desire to pursue the claim and obtain the appropriate relief.[84] Desire is usually manifested by the representative's personal stake in the outcome. It is contended that the greater the personal stake in the outcome, the more likely the representative will put up a "real

80. Hansberry v. Lee, 311 U.S. 32 (1940). Thus, an absent class member who can demonstrate that the representative has failed to fully and vigorously represent his (the absentee's) interests, will not be bound by the class judgment. Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973).

81. Marston v. L. E. Gant, Ltd., 56 F.R.D. 60, 62 (E.D. Va. 1972); C. WRIGHT, LAW OF FEDERAL COURTS § 72, at 308 & notes 23-24 (2d ed. 1970). *But see* 7 WRIGHT & MILLER §1770, at 658-59, where this distinction between plaintiff and defendant classes is discounted because of the lack of abuse shown in the reported cases and the courts' obligation and demonstrated willingness to carefully consider the adequacy of representation.

82.

> [T]he primary criterion is the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class, so as to insure them due process.

Mersay v. First Republic Corp. of America, 43 F.R.D. 465, 470 (S.D.N.Y. 1968). *See* Gonzales v. Cassidy, 474 F.2d 67, 75 (5th Cir. 1973); Hohman v. Packard Instrument Co., 399 F.2d 711, 714 (7th Cir. 1968); Katz v. Carte Blanche Corp., 52 F.R.D. 510, 515-16 (W.D. Pa. 1971); Feder v. Harrington, 52 F.R.D. 178, 183 (S.D.N.Y. 1970); Epstein v. Weiss, 50 F.R.D. 387, 392 (E.D. La. 1970); Berland v. Mack, 48 F.R.D. 121, 127 (S.D.N.Y. 1969); Dolgow v. Anderson, 43 F.R.D. 472, 496 (E.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825 (2d Cir. 1970); Note, *The Class Representative: The Problem of the Absent Plaintiffs*, 68 NW. U.L. REV. 1133 (1974); Note, *The Vigorous Prosecution Requirement: Initial Determination and Retrospective Evaluation*, 68 NW. U.L. REV. 1156 (1974).

83. Dolgow v. Anderson, 43 F.R.D. 472, 494 (E.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825 (2d Cir. 1970), *quoting*, Z. CHAFEE, SOME PROBLEMS OF EQUITY 231 (1950). *Accord*, Herbst v. Able, 47 F.R.D. 11, 15 (S.D.N.Y. 1969).

84. In Hodgson v. Hamilton Municipal Court, 16 FED. RULES SERV. 2d 550 (S.D. Ohio 1971), plaintiff sought to enjoin a class of state court judges and clerks from continued adherence to the state statutory garnishment standards which had allegedly been preempted by the restrictions of the Consumer Credit Protection Act. One of the named defendants took no adversary position; another, the court noted, was "exceedingly zealous and obviously sincerely involved." In rejecting plaintiff's motion for maintenance of the defendant class, the court stated, "[i]n our view, neither a nonadversary nor one who is too zealous can provide such 'adequate' representation." *Id.* at 552.

fight." If the representative puts up such a fight, then it is presumed that the absent members' interests are adequately protected.[85]

This test of the representative's personal stake in the outcome has little applicablity in the context of defendant class actions. A single defendant has nothing to gain by being named a representative of a class. A class suit could become both procedurally and substantively more complex than an individual suit. The named representative could be taxed with increased costs for such a suit without guarantee that he will be reimbursed for his efforts by the absent class members.[86] The named representative only faces greater responsibilities and burdens without obtaining any tangible benefits. Most annoying is the fact that the named representative is confronted with these extra obligations without his own consent.

The representative's personal motivation to be the representative of a class should not play more than a nominal role in a defendant class action. Otherwise, every possible representative would claim a lack of desire to be the named party.[87] This, like the "opt-

85. The representative's personal stake in the outcome is usually determined by the degree of his economic interest in the matter. *See* Contract Buyers League v. F. & F. Inv., 48 F.R.D. 7, 10 (N.D. Ill. 1969). However, in small claimant plaintiff class actions, it is oftentimes the representative's attorney who holds the real stake in the outcome rather than the individual members of the class. Wolfson v. Solomon, 54 F.R.D. 584, 590 (S.D.N.Y. 1972), *quoting,* Smolowe v. Delendo Corp., 136 F.2d 231, 241 (2d Cir. 1943), "[i]n many cases such as this the possibility of recovering fees will provide the sole stimulus for the enforcement of class rights." *See* Berland v. Mack, 48 F.R.D. 121, 127 (S.D.N.Y. 1969); Dolgow v. Anderson, 43 F.R.D. 472, 494-95 (E.D.N.Y. 1968), *rev'd on other grounds,* 438 F.2d 825 (2d Cir. 1970).

Even in class actions where only injunctive relief is sought, courts have found incentive to prosecute. One court has held that welfare recipients attacking the validity of a welfare regulation "have a sufficiently large economic stake in the proceedings to insure diligent and thorough prosecution of the litigation." Rodriguez v. Swank, 318 F. Supp. 289, 294 (N.D. Ill. 1970), *aff'd on other grounds,* 404 U.S. 90 (1971).

86. Not only will the fees for the representative's attorneys be substantially increased, but these additional fees for the representative's attorneys' greater procedural involvement may well be unnecessary to the representative's immediate and personal interests.

87. *See* Research Corp. v. Pfister Associated Growers, Inc., 301 F. Supp. 497 (N.D. Ill. 1969), *appeal dismissed sub nom.,* Research Corp. v. Asgrow Seed Co., 425 F.2d 1059 (7th Cir. 1970). In that case, the court held that where one of the world's largest agricultural commodities companies was the named defendant representative, the factor of desire as opposed to ability, "should not be given more than token weight." 301 F. Supp. at 499.

In one of the first cases to consider a defendant class action under amended Rule 23, the court *in dictum* expressed "serious misgivings" as to the standing of the named representative to raise the issue of adequacy of representation. The court believed that such a defense would enure only to the benefit of the members of the class that the named defendants were

out" provision in (b)(3), would practically render meaningless any defendant class action.[88] Motivation becomes even less of a factor when the named representative is a public official. Such an official has a legal obligation to defend the state's position. In contrast to a typical defendant who may hold a personal desire to avoid an adverse monetary judgment, a public official usually has nothing personally to lose. Such actions are against, in reality, the state or its statutory scheme and not the individual officials per se.[89] If desire, then, is not a crucial factor in defending individual actions, there is no apparent reason to require it when the official is named as a representative of a class.[90] This is particularly true when the constitutionality of a statute is being challenged since the work load in defending such an attack will not be that much greater than if

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allegedly representing. Washington v. Lee, 263 F. Supp. 327, 330 n.3 (M.D. Ala. 1966), *aff'd*, 390 U.S. 333 (1968). This proposition has been rejected by other courts on the basic premise that an obligation is imposed on the named defendants to assume the defense, not only for itself, but of all other absent defendants. Also, courts generally recognize that this obligation may result in a tremendous increase in the cost to the named defendants without any commensurate benefit. *See* Winokur v. Bell Fed. Sav. & Loan Ass'n, 16 FED. RULES SERV. 2d 65, 69 (N.D. Ill. 1972).

The vigorous opposition by the named defendant representative to the formation of a defendant class and his status as the representative, can be a good trial tactic because it brings to the attention of the court the numerous problems which face a named defendant representative. For example, in Dudley v. Southeastern Factor & Fin. Corp., 57 F.R.D. 177, 180 (N.D. Ga. 1972), the court held, after observing the named defendant's vigorous opposition, that:

> [a]lthough the court has concluded that a class action may be maintained, it sees no reason to make Mrs. McDaniel the named defendant representative bear the burdens of managing it, especially since plaintiff, rather than Mrs. McDaniel, stands to benefit from this form of action.

88. *See* notes 117-21 *infra* and accompanying text.

89. This is not to say that a public official does not care about the adjudication, and as a result, will be a poor defendant for the state in protecting its interests. First, the official may be personally liable for failure to comply with a court order in a contempt proceeding. Second, acknowledgment of this proposition would mean that one could never sue a public official, or at least without a determination by the court that the official "cares" enough. This is, however, completely untenable. Finally, these factors give even more weight to the argument favoring a defendant class action with public officials since other officials who are not so reluctant or lethargic can intervene as party members, thereby perhaps providing a better defense.

90. *But see* Rakes v. Coleman, 318 F. Supp. 181, 190 (E.D. Va. 1970), where one of the cited reasons for maintenance of a defendant class of state court judges was named defendant judge's failure to object to his representative status.

the suit were an individual, non-class action.[91] In sum, personal motivation to be the named party should be immaterial.

Another problem of adequate representation in a defendant class action is that it is the plaintiff who initially appoints the representative for the defendant class.[92] The obvious fear is that the plaintiff will choose an adversary whose defense will be less than zealous[93] or possibly non-existent.[94] It has been aptly observed that "[i]t is a strange situation where one side picks out the generals for the enemy's army."[95] For instance, in patent infringement cases (which have made frequent use of defendant classes), the plaintiff, patent holder, can choose from any one of the numerous infringers.[96]

91.

> The lawyer's task with respect to common questions of law and fact is not more difficult whether he is representing one person or a class of a million. In either case, he will have to prove the same allegations if he is to prevail.

Dolgow v. Anderson, 43 F.R.D. 472, 473 (E.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825 (2d Cir. 1970). In fact, the named representative of a defendant class of public officials may have less of a work load than had he had to defend the suit alone. The named defendant may receive aid in defending the class suit either through the intervention of other members of his class or through the intervention of the state's attorney general.

92. Defendant class actions are actually procedural weapons for plaintiffs since it is the plaintiff who usually makes the motion for a defendant class. *See* note 28 *supra*. Occasionally, however, the defendants themselves may desire to form their own class. In Gonzales v. Fairfax-Brewster School, Inc., 353 F. Supp. 1200 (E.D. Va. 1973) (action by parents of black children denied admission to privately supported schools), the Southern Independent School Association intervened as a party-defendant, asserting that it represented non-profit, private white schools in seven states and the class of all similarly situated schools and their associated parents and students. The court, without explanation, denied both motions for a plaintiff and defendant class.

Also, it may be the court which, upon its own initiation, may formulate a defendant class. *See* Danforth v. Christian, 351 F. Supp. 287 (W.D. Mo. 1972).

93. The danger is illustrated by a well-known state case in which the entire class of defendants was held bound by an action against carefully choosen class representatives with a very small financial interest and who made only a token defense. Richardson v. Kelly, 144 Tex. 497, 191 S.W.2d 857 (1945), *cert. denied*, 329 U.S. 798 (1956), *noted in*, Z. CHAFFE, SOME PROBLEMS OF EQUITY 239 *et seq.* (1950); Note, *Due Process Requirements of a State Class Action*, 55 YALE L.J. 831 (1946); and Comment, *Denial of Due Process Through Use of the Class Action*, 25 TEXAS L. REV. 64 (1946).

94. Ramirez v. Brown, 9 Cal. 3d 199, 107 Cal. Rptr. 137, 507 P.2d 1345 (1973), *rev'd sub nom.*, Richardson v. Ramirez, 94 S. Ct. 2655 (1974), where the original three named defendant representatives (county clerks) defaulted and gave the court notice that they would not contest the action.

95. Z. CHAFEE, SOME PROBLEMS OF EQUITY 237 (1950).

96. *See* Dale Electronics, Inc. v. R. C. L. Electronics, Inc., 53 F.R.D. 531 (D.N.H. 1971); Research Corp. v. Pfister Associated Growers, Inc., 301 F. Supp. 497 (N.D. Ill. 1969), *appeal*

The plaintiff can choose the infringer with the most limited resources or choose the one least likely to defend and contest the action. Even if the plaintiff has the most laudable of intentions, there is no assurance that the named party defendant whom he chooses will meet with the general approval of the members of the defendant class or truly represent the class.[97]

The fear of collusive suits in defendant class actions is not as legitimate when the defendant is a public official. In contrast to the patent infringement area, the named plaintiff representative can only name that defendant official by whom he has been personally injured. He does not have the freedom to pick and choose an official similarly situated with whom he is not in privity. If the named party official is incompetent as a represenative of the defendant class, it

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dismissed sub nom., Research Corp. v. Asgrow Seed Co., 425 F.2d 1059 (7th Cir. 1970); Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc., 285 F. Supp. 714 (N.D. Ill. 1968). *But see* In re Yarn Processing Patent Litigation, 56 F.R.D. 648 (S.D. Fla. 1972); Technitrol, Inc. v. Control Data Corp., 164 U.S.P.Q. 552 (D. Md. 1970); Note, *Class Actions in Patent Suits: An Improper Method of Litigating Patents?*, 1971 U. ILL. L.F. 474 (1971).

97. Because of the unique characteristics of defendant classes, the usual attitudes concerning an adversary proceeding are somewhat inappropriate. Dean Chafee in this regard, has aptly observed:

> [S]uch considerations throw an especial responsibility upon the court when a class of defendants is sued. The judge ought to realize that he can not accept the plaintiff's choice of the representatives as final, anymore than he would allow a plaintiff to choose the defendant's lawyer. Consequently, the court ought to scrutinize the selected representatives of the defendant class with the greatest care and arrange for changes and additions if there is the slightest reason to suspect incompetence or the absence of the will to fight. The judge ought to regard the unnamed members of the sued class as wards of the court for the time being, and assume the same sort of responsibility in making sure that their interests are properly safeguarded as when he chooses a receiver or a trustee in bankruptcy. He knows that the nominees of creditors are not always ideal persons to operate or liquidate a business. He ought to be just as wide awake to the fact that the nominees of plaintiffs are not always ideal persons to conduct the defense of an equity suit.

Z. CHAFEE, SOME PROBLEMS OF EQUITY 238 (1950). He ends his observation by warning that "[u]nless the judge looks after the unnamed persons, nobody looks after them." *Id.* at 242.

These extra responsibilities facing the court mandate the utilization of new and alternative remedies to protect the absent members. One such option would be to appoint independent counsel to represent the defendant class other than the named defendants. *See* Appleton Electric Co. v. Advance-United Expressways, 494 F.2d 126 (7th Cir. 1974). The court can also issue notice pursuant to FED. R. CIV. P. 23(d)(2), to ensure that the named defendant is an adequate representative. Notice also gives assurance to the court that its decision will not be later collaterally attacked on due process grounds because of inadequate representation. *See* notes 218-21 *infra* and accompanying text.

is as a result of geographic location, not by a deliberate or inadvertent choice of the plaintiff.[98]

The inherent difficulties with using incentive as a factor in determining adequacy of representation in defendant class actions and the fear of collusive suits led one court to instead formulate two requirements: that the named representative have the intention to defend and that he have the ability to do so.[99] Courts have found that the ability of the named party is best reflected by the quality and caliber of the attorney representing the class.[100] Although courts have not been uniform in their method of determining compe-

98. This may be of little comfort to the absent members of the defendant class. More importantly, it should not induce courts to relinquish their duty to independently scrutinize the named defendant's capacity to fully and fairly represent all members of the class.

99. Research Corp. v. Pfister Associated Growers, Inc., 301 F. Supp. 497, 499 (N.D. Ill. 1969), *appeal dismissed sub nom.*, Research Corp. v. Asgrow Seed Co., 425 F.2d 1059 (7th Cir. 1970).

100. Gonzales v. Cassidy, 474 F.2d 67, 72 (5th Cir. 1973); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968), *rev'd on other grounds*, 479 F.2d 1005 (2d Cir. 1973), *vacated*, 94 S. Ct. 2140 (1974); Management Television Sys., Inc. v. National Football League, 52 F.R.D. 162, 164 (E.D. Pa. 1971). It should be noted, however, that nowhere in Rule 23 is the matter of competency of counsel enumerated. The requirement appears to have originated in *Eisen*. *See* Note, *The Class Representative: The Problem of the Absent Plaintiffs*, 68 Nw. U.L. REV. 1133, 1136 n.31 (1974).

The rationale underlying the importance of the representative's counsel was examined in La Mar v. H. & B. Novelty & Loan Co., 489 F.2d 461 (9th Cir. 1973), when the court stated:

> The fourth prerequisite is that "the representative parties will fairly and adequately protect the interests of the class." This is particularly troublesome in class actions, such as these, in which the injury to any possible representative party is quite small. Either no one of the injured class is a suitable representative or anyone is. From this it may be said to follow that each possible representative party could "fairly and adequately protect the interests of the class."
>
> The difficulty with this position is that compliance with the prerequisite must necessarily be determined more by examination of the fitness of the counsel of the candidate for the representative party status than by the attributes of the candidate. Once the ability of counsel becomes the measure by which compliance with the fourth prerequisite is determined, there remains only a formal and technical reason for insisting that there be a representative party at all.

489 F.2d at 465-66. The relative importance of counsel and corresponding unimportance of the named class representative is reflected by the willingness of courts to allow a class action to continue despite the fact that the representative's claim has become moot. *See* Wymelemberg v. Syman, 54 F.R.D. 198, 200 (E.D. Wis. 1972) (plaintiff representative died, held not moot); Thomas v. Clarke, 54 F.R.D. 245, 252 (D. Minn. 1971) (plaintiff representative regained possession of his automobile, held not moot); Note, *Does Mooting of the Named Plaintiff Moot a Class Suit Commenced Pusuant to Rule 23 of the Federal Rules of Civil Procedure*, 8 VAL. U.L. REV. 333 (1974).

tency,[101] the foremost criterion has been that the attorney be experienced and generally be able to conduct the particular type of litigation involved.[102]

Competency of counsel will usually not present a major stumbling block when the defendants are a class of public officials. Many states have statutes which permit the state's attorney general to intervene when injunctive relief is sought against a public official or the validity of a statute is being constitutionally challenged.[103]

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101. Several courts have looked at the quality of the attorney's work, such as discovery, techniques, arguments and briefs. If all the relevant theories to protect the class' interests were sufficiently covered to the court's satisfaction, there then existed a vigorous prosecution. Northern Natural Gas v. Grounds, 292 F. Supp. 619, 635 (D. Kan. 1968), *cert. denied*, 404 U.S. 951, *reh. denied*, 404 U.S. 1065, *modified on other grounds*, 441 F.2d 704 (10th Cir. 1971). *See* Katz v. Carte Blanche Corp., 52 F.R.D. 510, 516 (W.D. Pa. 1971); Epstein v. Weiss, 50 F.R.D. 387, 392 (E.D. La. 1970); Dolgow v. Anderson, 43 F.R.D. 472, 496 (E.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825 (2d Cir. 1970).

One court recognized that the firm of the representative's attorney was "one of high standing." Dale Electronics, Inc. v. R. C. L. Electronics, Inc., 53 F.R.D. 531, 536 (D.N.H. 1971). In Carpenter v. Hall, 311 F. Supp. 1099, 1114 (S.D. Texas 1970), counsel for the plaintiff class were praised for belonging to the second oldest law firm in Houston and for the quality of their previous work before the same court. The same court also observed that the attorneys were "men of integrity . . . of determination and are in excellent health." *Accord*, Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc., 285 F. Supp. 714, 721 (N.D. Ill. 1968) (counsel had the "means, skill and integrity" to prosecute the defendant class action).

102. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968), *rev'd on other grounds*, 479 F.2d 1005 (2d Cir. 1973), *vacated*, 94 S. Ct. 2140 (1974); Williams v. Local 19, Sheet Metal Wkrs, 59 F.R.D. 49, 55 (E.D. Pa. 1973); Samuel v. University of Pittsburgh, 56 F.R.D. 435, 439 (W.D. Pa. 1972); Wolfson v. Soloman, 54 F.R.D. 584, 590 (S.D.N.Y. 1972); Management Television Sys., Inc. v. National Football League, 52 F.R.D. 162, 164 (E.D. Pa. 1971); Carpenter v. Hall, 311 F. Supp. 1099, 1114 (S.D. Texas 1970); Berland v. Mack, 48 F.R.D. 121, 127 (S.D.N.Y. 1969); Philadelphia Electric Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 457 (E.D. Pa. 1968).

Courts are generally reluctant to rule on the sensitive issue of whether an attorney is competent. Frequently, it is only given a cursory treatment. *See, e.g.*, Katz v. Carte Blanche Corp., 52 F.R.D. 510, 516 (W.D. Pa. 1971); Comment, *Class Actions: Defining the Typical and Representative Plaintiff under Subsections (a)(3) and (4) of Federal Rule 23*, 53 B.U.L. REV. 406, 410 n.35 (1973). At least as regards plaintiff classes, courts often presume that the attorneys for the named representatives are qualified and competent. Dolgow v. Anderson, 43 F.R.D. 472, 496 (E.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825 (2d Cir. 1970). This presumption and cursory treatment is shown by the want of reported cases which hold that the attorney for the representative is unqualified and therefore a class action cannot be maintained. *See* Anderson v. Moorer, 372 F.2d 747, 751 n.5 (5th Cir. 1967); Shields v. Valley Nat'l Bank, 56 F.R.D. 448, 449 (D. Ariz. 1971).

103. *E.g.*, IND. CODE §§ 4-6-2-1 to -1.5 (1974); N.Y. EXEC. LAW § 71 (McKinney 1972); WIS. STAT. ANN. § 165.25 (1974). Also, the state's attorney general may be named as an

Practically speaking, the state's attorney general will frequently carry the major burden of defending the suit. This possibility becomes even more likely when because of the defendant class action, the adjudication will have a statewide effect. Under such circumstances, it would be most difficult for members of the defendant class later to complain that their representation was inadequate.[104]

A second factor in ascertaining whether the named defendant is an adequate representative of the class is that he have an intention to challenge the plaintiffs' allegations.[105] The underlying concern is that if the named party has no intention to defend on the merits and a judgment is entered against the class, the absent members' due process guarantees would be seriously jeopardized. Under such circumstances, the typicality prerequisite of (a)(3) would also be wanting since the named party's defense would no longer be "typical" to that of the rest of the class.[106]

Several alternatives are available to a court when the named defendant does not contest the plaintiffs' legal claim. The most obvious is to deny the defendant class on the basis that the named party neither adequately represents the interests of the class nor possesses defenses typical with those of the class. If the defendant class is denied, however, the plaintiff class would also have to fall because of lack of privity.[107] For example, if the defendant class of

individual party defendant in the litigation thereby making his intervention unnecessary. Many United States district courts also have local rules requiring the party raising the constitutionality of a state statute to immediately advise the court in writing so that the state may be notified. *E.g., Rules of the United States District Court for the Northern District of Indiana* 16 (1974).

104. In Pennsylvania Ass'n, Ret'd Child. v. Commonwealth of Pa., 343 F. Supp. 279, 292 (E.D. Pa. 1972), an absent member of the defendant class complained that his representation had been inadequate. The court responded to that allegation by simply stating ". . . we are satisfied that the Attorney General adequately represented the interests of all of the defendants before the objectors entered the case." *See also* Lewis v. Baxley, 368 F. Supp. 768 (M.D. Ala. 1973) (attorney general took complete control in litigating the suit).

105. Research Corp. v. Pfister Associated Growers, Inc., 301 F. Supp. 497, 499 (N.D. Ill. 1969), *appeal dismissed sub nom.*, Research Corp. v. Asgrow Seed Co., 425 F.2d 1059 (7th Cir. 1970).

106. *See* notes 62-76 *supra* and accompanying text.

107. *See* note 16 *supra*. Another reason why a plaintiff class would not be permitted is because the named plaintiff is no longer a member of the plaintiff class. Because of the named defendant's acquiescence, the named plaintiff will have received his requested relief, whereas the other members of his class will not. It is uniformly agreed that one may not represent a class of which he is not a part. Bailey v. Patterson, 369 U.S. 31, 32-33 (1962).

township trustees was denied, the plaintiff could not maintain a plaintiff class of all indigents within the state because the majority of the members of plaintiff's class was not injured by the single remaining trustee defendant.[108]

This option has serious defects despite the fact that the individual plaintiff's legal claim may be personally satisfied. Since a plaintiff class could no longer be maintained, the members of that class would continue to sustain the same injury unless they institute similar suits against their trustees. This option also produces the possibility of different standards of statutory conduct within a single state. Since the named official has conceded plaintiff's claim, presumably he will no longer enforce the residency statute against indigents within his township. However, the other trustees, since they are no longer defendant parties, may continue to enforce the statute. Concepts of equal protection and common sense suggest a better solution.

A preferable alternative would be to proceed as the Supreme Court of California did recently in *Romirez v. Brown.*[109] In that case, three ex-felons sought a writ of mandate to force certain county clerks to register them to vote. The three officials did not contest the plaintiffs' claim and advised the court that they would register the ex-felons. A fourth clerk, who was defending similar litigation in a lower court, expressed desire to intervene so that her rights would not be prejudiced.[110] Because the case posed a question of broad public interest, the clerk was joined as an additional party

108. Technically, the size of the plaintiff class could be reduced to include only those indigents injured by the single trustee, for instance, all indigents residing in Portage Township. However, this procedure would still fail to achieve the major goal of a defendant class action: uniform statutory construction and practice throughout an entire state.

109. 9 Cal. 3d 199, 107 Cal. Rptr. 137, 507 P.2d 1345 (1973), *rev'd sub nom.*, Richardson v. Romirez, 94 S. Ct. 2656 (1974).

110. Confusion exists as to whether the defendant officials are defined as a defendant class or not. The suit was originally filed in the Supreme Court of California as a petition for writ of mandate. Named as defendants were three county election officials, "individually and as representatives of the class of all other" county election officials in the state. The Supreme Court of California did not specifically discuss the procedural issue of whether the suit was a proper defendant class. Whether the court did or did not has little importance for the present discussion since state officials, by reason of a "special relationship" to the court of last resort in their state, are bound by its conclusion. 94 S. Ct. at 2660. *Cf.* North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973).

defendant. This latter clerk took the burden of litigating the case on the merits for the entire class.[111]

Institution of such a procedure, that of providing for some type of notice to members of the class and allowing interested members the chance to intervene, solves both of the deficiencies of the first approach discussed without jeopardizing the due process rights of the absent members of the class. Through a single suit, a final adjudication would achieve uniformity of statutory interpretation and conduct. This would thereby grant appropriate relief to all members of the plaintiff class. In addition, if the intervening official(s) adequately represents the class, the absent members' due process guarantees would be fully protected.

In sum, although Rule 23(a)(4) raises special considerations and corresponding problems for a defendant class of public officials, none are so insurmountable that the benefits of such a procedural device should not be utilized, at least when judicial caution is properly exercised.

RULE 23(b)

A class action may be maintained when all four of the general prerequisites set forth in Rule 23(a) are satisfied, and in addition, when it falls within the purview of any one of the three alternative categories in Rule 23(b). The category most frequently utilized and which has stirred the most controversy is the common-question class action of (b)(3).

The (b)(3) category

For a class action to be formulated under (b)(3), the moving party must satisfy two essential prerequisites. First, the common questions of law or fact found in (a)(2) must "predominate over questions affecting only individual members."[112] Without this predominance of common questions, the claims or defenses of the class members will not be "sufficiently similar so that adjudication by representation will be appropriate."[113] In addition, (b)(3) requires

111. The intervening defendant sufficiently demonstrated that she was an adequate representative. Although she lost her case in the Supreme Court of California, she obtained a reversal in the United States Supreme Court.

112. FED. R. CIV. P. 23(b)(3).

113. Note, *Proposed Rule 23: Class Actions Reclassified,* 51 VA. L. REV. 629, 642 (1965).

that the class action device be "superior to other available methods for the fair and efficient adjudication of the controversy."[114] The rule enumerates four, non-exhaustive factors to be considered in determining whether the class action device is a superior method. They include the absent members' interests in personal control over their claims or defenses, whether the issue has been previously litigated, the desirability of the particular forum and manageability problems. The superiority factor, together with the predominance element, reflect the general objective of the drafters of Rule 23 that class actions should be maintained only when they would achieve

> economies of time, effort, expense and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bring about other undesirable results.[115]

Generally, the class members in a (b)(3) type class action enjoy less affinity with each other than the other types of class actions found under 23(b). In (b)(1) and (b)(2) actions, class members are joined together either by the relief sought or the adverse side effects of separate litigation. This presupposes that the class shares more than mere commonality of questions.[116] In (b)(3) class actions, the commonality of certain questions of law or fact is all that binds the members of the class together. As a result, the drafters of Rule 23 created several procedural safeguards peculiar to the (b)(3) category to insure protection of the absent class members' interests. These safeguards include a mandatory notice provision, a right of automatic intervention and most importantly for the present discussion, the opportunity to "opt-out" of the class action.[117] Those members of the class who for a variety of reasons affirmatively request exclusion from the action are not bound by the final judgment.[118] While they may not partake of the fruits should their named representative win on the merits, neither do they lose. This "opt-out" provi-

114. FED. R. CIV. P. 23(b)(3).

115. Advisory Comm. Note, 39 F.R.D. 98, 102-03 (1966).

116. Therefore most cases satisfying either (b)(1) or (b)(2) could also be maintained under (b)(3). Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 390 n.130 (1967). *See* Van Gemert v. Boeing Co., 259 F. Supp. 125, 130 (S.D.N.Y. 1966).

117. FED. R. CIV. P. 23(c)(2).

118. FED. R. CIV. P. 23(c)(3).

sion has significant ramifications for any class composed of defendants. A defendant class whose members could freely remove themselves from the litigation would obviously not be very meaningful.[119] The opting out of any number of trustees from the case challenging the constitutionality of the state residency statute would completely frustrate the purpose in orginally creating such a class.[120] Thus, as a practical matter, the (b)(3) category of class actions is totally ineffective and useless when applied to any defendant class.[121]

The (b)(2) category

A Rule 23(b)(2) class action is maintainable when

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.[122]

Rule 23(b)(2), as opposed to the other subsections of 23(b), is concerned with the type of relief sought.[123] It is intended to provide the primary vehicle when final injunctive or declaratory relief is requested.[124] Through such a medium, the legality of a party's be-

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119. This was noted in Benzoni v. Greve, 54 F.R.D. 450, 455 (S.D.N.Y. 1972), a securities fraud case, where one of the cited reasons for denying a defendant class action was that the defendants would probably "opt-out" under (b)(3). *See* Guy v. Abdulla, 57 F.R.D. 14, 17 (N.D. Ohio 1972); Technitrol, Inc. v. Control Data Corp., 164 U.S.P.Q. 552, 553 (D. Md. 1970).

120. As a result, courts and commentators urge that a class action be maintained under (b)(1) and/or (b)(2) if possible, rather than under (b)(3). This is to give full *res judicata* effect to a judgment and avoid the "opt-out" provision in (b)(3) which thwarts the policies underlying the (b)(1) and (b)(2) class suits. *See* Bing v. Roadway Express, Inc., 485 F.2d 441, 447 (5th Cir. 1973); Guy v. Abdulla, 57 F.R.D. 14, 17 (N.D. Ohio 1972); Johnson v. City of Baton Rouge, 50 F.R.D. 295, 300-01 (E.D. La. 1970); Van Gemert v. Boeing Co., 259 F. Supp. 125, 130-31 (S.D.N.Y. 1966); 3B MOORE ¶ 23.32[3], at 526-27; 7A WRIGHT & MILLER § 1777, at 49-50.

121. *But see* Dudley v. Southeastern Factor and Fin. Corp., 57 F.R.D. 177 (N.D. Ga. 1972) (defendant class of all present and former shareholders who had received certain preferred shares maintained under (b)(3)); Union Pac. R.R. Co. v. Woodahl, 308 F. Supp. 1002 (D. Mont. 1970) (defendant class of all county attorneys in Montana apparently maintained under (b)(3)).

122. FED. R. CIV. P. 23(b)(2).

123. Subsection (b)(2) was added in the complete revision of Rule 23 in 1966. There was no comparable provision in the earlier rule. 7A WRIGHT & MILLER § 1775, at 19.

124.

> If the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has

havior with respect to an entire class can be firmly settled in a single action.[125] As a result, the (b)(2) category is particularly suitable for accommodating civil rights actions.[126]

When a group of individuals has been injured by a defendant and it seeks to redress the wrong by requesting injunctive relief, (b)(2) becomes the viable medium for the maintenance of a plaintiff class. The plaintiff's burden in establishing a Rule 23(b)(2) class is relatively light. The only requirements are that defendant's conduct, either affirmatively or negatively, be generally applicable to the plaintiff class, and that final injunctive relief be requested which would be appropriate to all members of the plaintiff class.[127] When, however, the plaintiff attempts to form a defendant class under the same category, he finds that (b)(2) is permeated with problems. This section will closely examine Rule 23(b)(2) in order to demonstrate the nature and extent of these difficulties. Specifically, it will show that irrespective of judicial decisions to the contrary,[128] a defendant class cannot be maintained under the (b)(2) category.

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been requested, the action should be allowed to proceed under subdivision (b)(2). 7A WRIGHT & MILLER § 1775, at 23.

125. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 389 (1967).

126. Advisory Comm. Note, 39 F.R.D. 98, 102 (1966); Contract Buyers League v. F. & F. Inv., 48 F.R.D. 7, 13 (N.D. Ill. 1969).

127. 7A WRIGHT & MILLER § 1775, at 19.

128. The following cases have maintained a defendant class under subsection (b)(2): Gibbs v. Titelman, 369 F. Supp. 38 (E.D. Pa. 1973) (all banking institutions who have carried out extrajudicial nonconsensual repossession of motor vehicles under color of the challenged statutes); Lynch v. Household Fin. Corp., 360 F. Supp. 720 (D. Conn. 1973) (all persons who have garnisheed debts owing the plaintiff class); Danforth v. Christian, 351 F. Supp. 287 (W.D. Mo. 1972) (all officers and other officials charged with the enforcement of the laws prescribing qualifications for registration and voting); Pennsylvania Ass'n, Ret'd Child. v. Commonwealth of Pa., 343 F. Supp. 279 (E.D. Pa. 1972) (all school districts in Pennsylvania); Samuel v. University of Pittsburgh, 56 F.R.D. 435 (W.D. Pa. 1972) (all state universities and colleges in Pennsylvania); Dale Electronics, Inc. v. R. C. L. Electronics, Inc., 53 F.R.D. 531 (D.N.H. 1971) (class of patent infringers); Ferguson v. Williams, 330 F. Supp. 1012 (N.D. Miss. 1971), *vacated on merits*, 405 U.S. 1036 (1972) (all county election officials in the state); Rakes v. Coleman, 318 F. Supp. 181 (E.D. Va. 1970) (all state court judges empowered to commit persons); United States v. Cantrell, 307 F. Supp. 259 (E.D. La. 1969) (all persons operating bars and cocktail lounges in Plaquemines County); Research Corp. v. Pfister Associated Growers, Inc., 301 F. Supp. 497 (N.D. Ill. 1969), *appeal dismissed sub nom.*, Research Corp. v. Asgrow Seed Co., 425 F.2d 1059 (7th Cir. 1970) (class of patent infringers); Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc., 285 F. Supp. 714 (N.D. Ill. 1968) (class of patent infringers).

There are numerous cases in which defendant classes have been maintained, yet the

For purposes of analysis, (b)(2) can be broken into two separate components: (1) the opposing party's conduct must be "generally applicable" to the class, and (2) the opposing party's conduct "thereby" makes appropriate final injunctive relief (or corresponding declaratory relief) with respect to the entire class.

1. The opposing party's conduct must be "generally applicable" to the class

This prerequisite requires that the party opposing the class act or refuse to act and that this conduct be "generally applicable" to the proposed class. This latter clause serves a particularly important function in plaintiff class actions because it aids in identifying who is a member of the plaintiff class and in defining the size of that class.[129] The phrase "generally applicable" does not require that the defendant act directly against each member of the purported class. Rather, it is satisfied when the defendant's conduct entails such a consistent pattern of activity that it would affect all persons similarly situated with the named plaintiff if the opportunity would be presented.[130] As a result, those persons who are in a like situation with the named plaintiff and who would be similarly affected by the defendant's conduct, should be included as members of the plaintiff class. In the absence of conduct by the party opposing the class

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precise category of subsection (b) was not stated in the reported decision. Since most of the cases involved civil rights claims and since injunctive relief was the primary relief sought, presumably the defendant class was maintained under (b)(2). Lewis v. Baxley, 368 F. Supp. 768 (M.D. Ala. 1973) (all officials, at least including all district attorneys, empowered to take action against the plaintiff class under the provisions of the ethics statute); Hadnott v. Amos, 295 F. Supp. 1003 (M.D. Ala.), *rev'd on other grounds*, 394 U.S. 358 (1968) (the probate judges of all counties in Alabama); Jehovah's Witnesses in State of Wash. v. King County Hosp., 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd on other grounds*, 390 U.S. 598, *reh. denied*, 391 U.S. 961 (1968) (all medical doctors in Washington employed in public institutions); Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd*, 390 U.S. 333 (1968) (all jailors and wardens in Alabama).

129. Yaffe v. Powers, 454 F.2d 1362, 1367 (1st Cir. 1972); Note, *Proposed Rule 23: Class Actions Reclassified*, 51 VA. L. REV. 629, 648 (1965).

130.

> Action or inaction is directed to a class within the meaning of this subsection even if it has taken effect or is threatened only as to one or few members of the class, provided it is based on grounds generally applicable to the class.

Advisory Comm. Note, 39 F.R.D. 98, 102 (1966). *See* 3B MOORE ¶ 23.40, at 651; 7A WRIGHT & MILLER § 1775, at 19; Comment, *Rule 23: Categories in Subsection (b)*, 10 B.C. IND. & COM. L. REV. 539, 542 (1969).

[here, the defendant], the plaintiff class would not be readily ascertainable.

In the context of a defendant class of public officials, this same clause loses much of its practical utility. The same criterion must be met: the opposing party's [now, plaintiff's] conduct must be generally applicable to the [defendant] class. A prima facie showing of this requirement by the plaintiff will not be difficult. However, the reason underlying this requirement, to identify and define the size of the class [here, the defendant class] has disappeared. A defendant class of public officials is defined irrespective of any conduct by the plaintiffs. When the constitutionality of a statute is being challenged, the defendant officials, whether sheriffs, township trustees, clerks or justices of the peace, are already bound in a relationship. They are linked by a bond of legal commonality in that they are officials of a single state and its subordinate units of government, and they act under common statutory authority. Being so juridicially linked, their class is easily ascertainable and definable. When certain practices by the defendant officials are being challenged, such as the setting of bail exclusively by reference to set bail bond schedules, the defendant class is defined as all those officials participating in the unlawful conduct. In this type of case, it is the defendants' own conduct which further defines their own class. The plaintiffs' conduct in no way alters the membership or size of this type of defendant class. Therefore, this clause of Rule 23(b)(2) as applied to defendant class actions fails to serve any useful purpose.

Several alternative conclusions can be drawn from this want of utility. First, this prerequisite can be ignored as being superfluous. If ignored, this clause of (b)(2) will be met de facto in every defendant class action sought by a plaintiff class. Second, the rule cannot apply to a defendant class because to apply a rule without substance or meaning is unjustified. Based upon this conclusion, a defendant class cannot be maintained under Rule 23(b)(2). After examination of the second prerequisite, the latter conclusion is the only reasonable choice.

2. The opposing party's conduct "thereby" makes appropriate final injunctive relief (or corresponding declaratory relief) with respect to an entire class

This prerequisite demands that final injunctive or declaratory relief be sought. In the context of a typical plaintiff class action, it

is plaintiffs who request the final relief. The basis for the relief is the opposing party's conduct [that of the defendant]. It is defendant's conduct which "thereby" gives rise to plaintiffs' claim for relief. Therefore, the final relief must follow the claim for relief; the relief must be sought in favor of the plaintiff class, or similarly, against the party opposing the class.[131]

This same clause when read in light of a defendant class of public officials becomes problematical. It would read literally: "plaintiffs' conduct thereby makes the relief sought appropriate."[132] As noted above, the relief must be sought against the party opposing the class, here the plaintiff class. However, the defendants will usually have no need to request injunctive relief against the plaintiff class. Without this affirmative request for relief, a defendant class cannot fulfill this criterion.[133] As a result, a defendant class can neither be maintained nor enjoined under Rule 23(b)(2).

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131. 7A WRIGHT & MILLER § 1775, at 21-22. *See* Note, *Class Actions in Patent Suits: An Improper Method of Litigating Patents?*, 1971 U. ILL. L.F. 474, 489-90 (1971).

132. Since a plaintiff is usually the only party which seeks relief, to interpret this phrase literally would permit plaintiff by his own action or inaction to justify injunctive relief against other parties, namely, defendants. Such a construction would be completely intolerable. *See* 3B MOORE ¶ 23.40, at 67 n.17 (Supp. 1974).

133. Several courts in the patent infringement area have struggled with this clause in order to maintain a defendant class under (b)(2). By doing so, however, they have merely created legal fictions. In Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc., 285 F. Supp. 714, 723 (N.D. Ill. 1968), the court found that plaintiffs (patent holders) had acted on grounds generally applicable to the defendant class by: (1) obtaining patents, (2) notifying some alleged infringers of the patents, (3) threatening some of them with infringement suits unless they take licenses, and (4) by bringing civil actions against some of them. Since defendants amended their counterclaims to pray for declaratory and injunctive relief, the court permitted a defendant class of patent infringers under (b)(2). Likewise, in Research Corp. v. Pfister Associated Growers, Inc., 301 F. Supp. 497, 500 (N.D. Ill. 1969), *appeal dismissed sub nom.*, Research Corp. v. Asgrow Seed Co., 425 F.2d 1059 (7th Cir. 1970), the court found that the plaintiff acted on grounds applicable to the defendant class citing *Technograph*. However, in *Research*, the defendants did not even counterclaim for injunctive relief. Nevertheless, the court believed that should defendants win on the merits, they would request such relief to prevent plaintiffs from suing them again. The court in *Research* also held that a defendant class was properly maintainable under (b)(2). The legal fiction created by these two courts is demonstrated in two ways. First, the maintenance of a defendant class under (b)(2) solely on a "belief" or "assumption" that defendants *may* request injunctive relief is a practice certainly not in accord with Rule 23. The (b)(2) category demands that injunctive relief be actually requested. Second, the plaintiff's various enumerated "acts" towards the defendant class of infringers do not make the final injunctive relief appropriate. It is rather the defendant class' own acts (by disregarding plaintiff's parents) which justifies the injunctive relief and which becomes the primary subject matter of the suit. *See* Note,

Numerous courts have nevertheless employed (b)(2) as a basis for establishing a defendant class.[134] While it is unfortunate that the majority of these courts have failed to supply reasons to support their holdings, several can be suggested. First, a defendant class may have also been maintained under other subsections of Rule 23(b), thereby making an exhaustive inquiry less necessary.[135] Second, the defendants themselves may not have objected to a determination allowing the case to proceed as a class action.[136] Finally, the overwhelming policy considerations in favor of a defendant class of this type may have colored the courts' reasoning process.

One court did, however, briefly articulate its justification in maintaining a defendant class of all school districts within the state.[137] Applying Rule 23(b)(2) to the facts of the case, the court held that

> the party opposing the class (of defendants) (*i.e.*, the plaintiff class) has acted or refused to act on grounds generally applicable to the class (of defendants) (*e.g.*, the plaintiffs have acted in such a way that the defendants are excluding them from public schools) making appropriate final injunctive relief or corresponding declaratory relief with respect to the class (of defendants) as a whole.[138]

Although at first glance it would appear that this court solved the problem of fitting defendant classes into Rule 23(b)(2), a closer examination proves otherwise. Admittedly, plaintiffs will have acted on grounds generally applicable to the defendant class,

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Class Actions in Patent Suits: An Improper Method of Litigating Patents?, 1971 U. ILL. L.F. 474, 489 (1971).

134. *See* note 128 *supra*.

135. Gibbs v. Titelman, 369 F. Supp. 38 (E.D. Pa. 1973) (b)(1); Danforth v. Christian, 351 F. Supp. 287 (W.D. Mo. 1972) (b)(1)(A); Pennsylvania Ass'n, Ret'd Child. v. Commonwealth of Pa., 343 F. Supp. 279 (E.D. Pa. 1972) (b)(1)(B); Dale Electronics, Inc. v. R. C. L. Electronics, Inc., 53 F.R.D. 531 (D.N.H. 1971) (b)(1)(A) & (B); Ferguson v. Williams, 330 F. Supp. 1012 (N.D. Miss. 1971), *vacated on merits*, 405 U.S. 1036 (1972) (b)(3); United States v. Cantrell, 307 F. Supp. 259 (E.D. La. 1969) (b)(1)(B); Research Corp. v. Pfister Associated Growers, Inc., 301 F. Supp. 497 (N.D. Ill. 1969), *appeal dismissed sub nom.*, Research Corp. v. Asgrow Seed Co., 425 F.2d 1059 (7th Cir. 1970) (b)(1)(A) & (B); Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc., 285 F. Supp. 714 (N.D. Ill. 1968) (b)(1)(A) & (B).

136. Rakes v. Coleman, 318 F. Supp. 181, 190 (E.D. Va. 1970).

137. Pennsylvania Ass'n, Ret'd Child. v. Commonwealth of Pa., 343 F. Supp. 279 (E.D. Pa. 1972).

138. *Id.* at 292 n.32.

thereby superficially meeting the first prerequisite. As noted earlier though, this requirement is superfluous to a defendant class because of its failure to serve the underlying purpose of identifying and defining the defendant class.[139] The court also held that the second requirement was met because the relief, though sought by plaintiffs, was also appropriate to the defendant class. Another court stated on this point that "a decision on the constitutionality of the statutes in question is appropriate and will have a declaratory effect on each class as a whole."[140] Such a construction, however, merely reiterates the truism that a legal determination of legal rights will affect all parties involved. Since this relationship is present in every legal determination, this clause when applied to a defendant class with only the plaintiff class seeking relief, is meaningless. When added together with the first prerequisite, Rule 23(b)(2) as applied to defendant classes becomes a rule solely of form, a rule without substance or purpose. The practical consequence of such a construction is that a defendant class has been formulated only by meeting the requirements of Rule 23(a). This is in clear contravention to the wording of Rule 23 which requires that at least one of the categories of subsection (b) must be met.[141]

The (b)(1) category

Rule 23(b)(1) considers the prejudicial result that separate non-class suits may have to the different parties involved.[142] The category is structurally divided into two clauses, one from the viewpoint of the party opposing the class, the other, from the class itself.

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139. *See* pages 31-32 *supra.*

140. Gibbs v. Titelman, 369 F. Supp. 38, 53 (E.D. Pa. 1973). This case is the only reported case in which the defendant directly challenged, though unsuccessfully, the inapplicability of Rule 23(b)(2) to defendant class actions. In support of his position, the defendant apparently only relied on a statement from 7A WRIGHT & MILLER § 1775, that the relief must be sought in favor of the class. The court was not persuaded by this single statement of authority.

141. FED. R. CIV. P. 23(b). *See* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 561 (2d Cir. 1968), *rev'd on other grounds,* 479 F.2d 1005 (2d Cir. 1973), *vacated,* 94 S. Ct. 2140 (1974).

142. As one writer has noted, category (b)(1) requires the trial judge:

> to view the total effect of a single adjudication, including not only formal *res judicata* consequences but also adverse practical effects upon parties opposing the class or upon absentees which might influence the decision as to how widely the judgment should operate.

Note, *Proposed Rule 23: Class Actions Reclassified,* 51 VA. L. REV. 629, 645 (1965).

Clause (A)

The (b)(1)(A) type of class action focuses upon the adverse effects that non-class adjudications may have on the party opposing the class. Actions under clause (A) may be maintained when

> the prosecution of separate actions *by or against* individual members of the class would create a risk of . . . inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct to the party opposing the class.[143]

Rule 23(b)(1)(A) entails two requirements. Both requisites must be satisfied before this category may be invoked. The first requires the existence of a risk of multiple adjudications on the same issue.[144] The likelihood must exist that at least some of the individual members of the class will bring or defend separate lawsuits against the party opposing the class. For example, in *Eisen v. Carlisle & Jacquelin,*[145] the plaintiff was not allowed to maintain a plaintiff class of all odd-lot investors on the New York Stock Exchange under clause (A) because the individual class members were small claimants who could not individually afford the expense of lengthy anti-trust litigation. Since the risk was small that plaintiffs would bring their own individual suits, there was little danger that the party opposing the class would face "incompatible standards of conduct." All of the practical reasons for evoking class action treatment disappear in the absence of this risk of multiple litigation.

In addition, the risk must also exist that as a result of multiple litigation, the party opposing the class could be faced with "inconsistent standards of conduct" to different members of the same class.[146] That is, the party opposing the class must be placed in a "conflicted position" with respect to individual members of the class.[147] This "conflicted position" is the hazard which clause (A)

143. FED. R. CIV. P. 23(b)(1)(A) (emphasis supplied).

144. 7A WRIGHT & MILLER § 1773, at 18. *See* Comment, *Rule 23: Categories of Subsection (b),* 10 B.C. IND. & COM. L. REV. 539, 540-41 (1969).

145. 391 F.2d 555 (2d Cir. 1968), *rev'd on other grounds,* 479 F.2d 1005 (2d Cir. 1973), *vacated,* 94 S. Ct. 2140 (1974). *See* Goldman v. First Nat'l Bank, 56 F.R.D. 587, 590 (N.D. Ill. 1972).

146. FED. R. CIV. P. 23(b)(1)(A). *See* 7A WRIGHT & MILLER § 1773, at 9.

147. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (I),* 81 HARV. L. REV. 356, 388 (1967).

was specifically designed to remedy.[148] The rule was not intended to correct different results as to adjudications involving different members of the class when the results are distinguishable on the basis of different facts.[149] This clause, therefore, serves a particularly necessary function when, for example, a single governmental office or officer is in a position with respect to an entire class of people. Should different results ensue from separate adjudications on the same issue, the governmental agency would be placed in a most unusual and precarious situation.[150]

A (b)(1)(A) class action, as opposed to the (b)(2) category, does not in and of itself preclude the maintenance of a defendant class.

148.

> The provision [(b)(1)(A)] was to obviate the actual or virtual dilemma which would . . . confront the party opposing the class when incompatible adjudications would trap him in the inescapable legal quagmire of not being able to comply with one such judgment without violating the terms of another. . . . The inconsistencies and uncertainties [defendants being ordered to refund contributions to some members of the plaintiff class, but not others] would not place defendants in a dilemma of the sort contemplated by (b)(1)(A), for the varying adjudications would not preclude compliance with the judgment in each case.

Walker v. City of Houston, 341 F. Supp. 1124, 1131 (S.D. Texas 1971). *See* La Mar v. H. & B. Novelty & Loan Co., 489 F.2d 461, 466 (9th Cir. 1973).

Thus, some courts have held that actions for money damages cannot be maintained under (b)(1)(A), even though the party opposing the class might have to pay some class members, yet not others. It is argued that this would only result in inconsistent actions for the individual defendant and would not create "inconsistent standards of conduct" by which the party opposing the class would not be able to comply with one judgment without violating another. Albert v. United States Indus., Inc., 59 F.R.D. 491, 499 (C.D. Cal. 1973); Rodriguez v. Family Publications Servs., Inc., 57 F.R.D. 189, 192 (C.D. Cal. 1972). *See* Comment, *Rule 23: Categories of Subsection (b),* 10 B.C. IND. & COM. L. REV. 539, 540 (1969).

Also, since the rule was drafted to protect a defendant (the party opposing the class in the typical plaintiff class action) from being placed in a "conflicted position," some courts have not permitted a plaintiff class under (b)(1)(A) when the defendant, by opposing the class action motion, was apparently willing to accept the risk. Alsup v. Montgomery Ward & Co., 57 F.R.D. 89, 92 (N.D. Cal. 1972); Kenny v. Landis Financial Group, Inc., 349 F. Supp. 939, 951 (N.D. Iowa 1972).

149. Contract Buyers League v. F. & F. Inv., 48 F.R.D. 7, 14 (N.D. Ill. 1969).

150. The Advisory Committee for the Proposed Rules of Civil Procedure's Note illustrates clause (A) of category (b)(1) by describing a situation in which a municipality in separate actions is called upon to declare a bond issue invalid. Separate actions could result in different and inconsistent decisions regarding the legality and validity of the bond issue. The municipality as the party opposing the class would then be forced to establish incompatible courses of conduct by having to choose one court's decree over another. Advisory Comm. Note, 39 F.R.D. 98, 100 (1966). *See* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (I),* 81 HARV. L. REV. 356, 388 (1967).

The rule only seeks to avoid the adverse effects of inconsistent adjudications to the party opposing the class. It is irrelevant whether the class is a plaintiff or defendant one as long as the party opposing the class would be placed in a "conflicted position." For example, this subdivision has been used in patent litigation where the patent owner formulates a defendant class of the alleged infringers.[151] If the issue of patent validity were litigated in separate and individual actions, the possibility would exist that inconsistent determinations would be reached in different jurisdictions. This would place the patent holder in the anomalous position of having his patent declared valid and enforceable against some of the defendant infringers, but not against others.[152]

The general construction of (b)(1)(A), however, suggests that the party opposing the class can only be a single, non-class party. This poses difficulty for the type of suit envisioned by this note where a plaintiff and defendant class are maintained concurrently in the same adjudication. The choice of the phrase "the party opposing the class" implies that either the defendant or plaintiff must be a single party. This construction is further strengthened by the Advisory Committee's Notes. In describing the type of problem which this clause sought to obviate, they state:

> *One person* may have rights against, or be under duties toward, numerous persons constituting a class, and be so positioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct. . . . The

151. Dale Electronics, Inc. v. R. C. L. Electronics, Inc., 53 F.R.D. 531 (D.N.H. 1971); Research Corp. v. Pfister Associated Growers, Inc. 310 F. Supp. 497 (N.D. Ill. 1969), *appeal dismissed sub nom.*, Research Corp. v. Asgrow Seed Co., 425 F.2d 1059 (7th Cir. 1970); Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc., 285 F. Supp. 714 (N.D. Ill. 1968).

152. The argument that varying adjudications established inconsistent standards of conduct for the patent holder was directly rejected in Technitrol, Inc. v. Control Data Corp., 164 U.S.P.Q. 552 (D. Md. 1970). The court made an analogy to the situation where the same case is tried in different jurisdictions and stated that:

> the fact that the law in one jurisdiction may differ from that in another does not impose different types of duty on the plaintiff or defendant; simply, they take the law as it is in a particular jurisdiction.

Id. at 553. *See* Note, *Class Actions in Patent Suits: An Improper Method of Litigating Patents?*, 1971 U. ILL. L.F. 474, 486 (1971).

> matter has been stated thus: "The felt necessity for a class action is greatest when the courts are called upon to order or sanction the alteration of the *status quo* in circumstances such that a large number of persons are in a position to call on a *single person* to alter the *status quo,* or to complain if it is altered, and the possibility exists that (the) *actor* might be called upon to act in inconsistent ways."[153]

Although the (b)(1)(A) category has been frequently used in constitutional and civil rights cases, all of the reported cases have either been brought by, or more typically, against a single party. For example, such actions have included a suit to enjoin state officers from terminating unemployment compensation without a hearing,[154] an action seeking a declaration of eligibility for fatherhood deferments under the Selective Service Act[155] and an action adjudicating the rights of food stamp recipients under the Federal Food Stamp Act of 1964.[156] Even though other parties may have been named as defendants in these actions, at least one of the party defendants was at the apex of the governmental agency under attack. That party was the single person through whom the status quo could be altered which would affect all members of the class. Because of his position, he had control and corresponding responsibility for all subordinate members who were in privity with each member of the plaintiff class.

In the type of litigation contemplated by this note, there is no single head official who can change the status quo by being singly made a party to the litigation. This lack of a single person is the chief purpose in formulating a defendant class because a decision regarding a statute's validity cannot be effectively and uniformly enforced in any other way. It is precisely at this point where a class of defendants is most urgently needed that Rule 23(b)(1)(A) apparently becomes inapplicable. The problem can be best illustrated by referral to the introductory example.

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153. Advisory Comm. Note, 39 F.R.D. 98, 100 (1966) (emphasis supplied).

154. Crow v. California Dep't of Human Resources, 325 F. Supp. 1314 (N.D. Cal. 1970), *cert. denied,* 408 U.S. 924 (1972), *rev'd on other grounds,* 490 F.2d 580 (9th Cir. 1973).

155. Gregory v. Hershey, 51 F.R.D. 188 (E.D. Mich. 1970), *rev'd on other grounds sub nom.,* Gregory v. Tarr, 436 F.2d 513 (6th Cir.), *cert. denied,* 403 U.S. 922 (1971).

156. Stewart v. Butz, 356 F. Supp. 1345 (W.D. Ky. 1973), *aff'd on other grounds,* 491 F.2d 165 (6th Cir. 1974).

Plaintiff, as the party opposing the purported class, has a claim against the particular trustee who invoked the state durational residency statute in denying plaintiff assistance. Plaintiff does not have a claim against those trustees from whom he has not been harmed.[157] Therefore, plaintiff could not formulate a defendant class of all trustees in the state. It may be contended, however, that he could move to another township in which he would again be denied township assistance. This would place plaintiff in a "conflicted position." It is doubtful, especially after the restrictive approach of *Eisen v. Carlisle & Jacquelin,*[158] whether plaintiff's potentiality for moving would create a sufficient or substantial risk of multiple adjudication. At the time of the first suit, it would be only conjecture whether plaintiff would move. It is even more questionable whether plaintiff would still require poor-relief assistance. Further, it is only speculative whether the trustee in the township in which plaintiff moved would enforce the statute against him.[159] As a result, a defendant class of public officials cannot be maintained under clause (A) if the party opposing the defendant class of trustees was read solely as a single, indigent plaintiff.

An argument can be made that the phrase, "the party opposing the class," be read as the plaintiff class of all indigents in the state denied poor-relief on the basis of the residency statute. The class of plaintiff-indigents as a whole would equally have rights against the entire class of township trustees since all of the plaintiffs are subject

157. For a plaintiff to have standing, he must demonstrate injury to himself by the parties whom he sues before he can state a cause of action. Weiner v. Bank of Prussia, 358 F. Supp. 684 (E.D. Pa. 1973) (defendant class of all national banks within the court's jurisdiction denied because plaintiff did not have standing to sue those unnamed defendant banks from whom he had not personally suffered injury.) *See* La Mar v. H. & B. Novelty & Loan Co., 489 F.2d 461 (9th Cir. 1973). *See also* note 16 *supra.*

158. 391 F.2d 555 (2d Cir. 1968), *rev'd on other grounds,* 479 F.2d 1005 (2d Cir. 1973), *vacated,* 94 S. Ct. 2140 (1974).

159. For example, in Wallace v. Brewer, 315 F. Supp. 431 (M.D. Ala. 1970), the plaintiffs, Black Muslims, sought to enjoin all county officials, including all district attorneys and sheriffs in Alabama. The individual defendants were allegedly attempting to prevent the plaintiffs, their friends and associates, from developing a farm in St. Clair County. The court, in denying certification for a defendant class, stated:

> It is only speculative whether plaintiffs will attempt to develop farms in other areas of Alabama and, if they attempt to do so, whether the officials in that county will initiate a planned program to prevent the development.

Id. at 438.

to the same statute which all of the defendants are required to enforce. Concededly, different results through individual separate suits would not necessarily result in different standards of conduct for each individual township trustee.[160] However, as noted earlier,[161] the different results could not be explained on the basis of different sets of facts.[162] More importantly, multiple adjudications could result in different standards of conduct regarding the same statute — the real party defendant in this type of action.[163] The right of each plaintiff is not against each individual trustee per se, but rather against the residency statute. The statute is, in effect, the single mechanism at the apex of the dispute which is in privity with and affects each individual plaintiff-indigent within the state. Under this more permissive interpretation, a plaintiff and defendant class could be simultaneously maintained under the (b)(1)(A) category.[164]

Clause (B)

Clause (B) seeks to protect the interests of those members of the class not actually participating in the litigation. A (b)(1)(B) class action is maintainable when

> adjudications with respect to individual members of the class would as a practical matter be dispositive of the interest of other members not parties to the adjudications or

160. The fact that several courts may reach inconsistent decisions regarding the durational residency statute would not place individual township trustees in a "conflicted position." While some trustees may be personally ordered to refrain from using the statute and others not, no trustee would be placed in the dilemma of not being able to comply with one judgment without violating the terms of another.

161. *See* note 149 *supra.*

162. When the constitutionality of a statute or regulation is being facially attacked, varying factual distinctions, if any, are irrelevant. *See* notes 53-55 *supra* and accompanying text.

163. This was recognized in Gibbs v. Titelman, 369 F. Supp. 38, 53 (E.D. Pa. 1973), where the court stated that "[t]he relief sought here is really against the statute, not the defendants."

164. Danforth v. Christian, 351 F. Supp. 287 (W.D. Mo. 1972) (defendant class of all election officials in the state); Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619 (D. Kan. 1968), *aff'd in part, rev'd in part on other grounds,* 438 F.2d 704 (10th Cir.), *cert. denied,* 404 U.S. 951 (1971) (defendant classes of landowners and lessee-producers). Plaintiff and defendant classes were also maintained in Gibbs v. Titelman, 369 F. Supp. 38 (E.D. Pa. 1973). However, the court did not state precisely under which clause of (b)(1) these classes were maintained.

substantially impair or impede their ability to protect their interests.[165]

As opposed to the requirements of (b)(1)(A), it is not necessary to establish that the risk of separate actions is feasible or likely.[166] The risk is not in separate adjudications, but rather that the absent members of the class will have their interests effectively impaired or impeded should the suit proceed as an individual non-class action.[167] Nor does the rule require that the adjudications be legally binding on the absent members. It simply states that a separate, non-class action "as a practical matter" would adversely affect the absent parties. The obvious fear is that the absentees' interests could be adversely affected without the protection of adequate representation in the action.[168]

The application of Rule 23(b)(1)(B) to a defendant class places the moving party, the plaintiff, in a highly unusual and abnormal position. On the one hand, the plaintiff seeks a defendant class to enjoin and bind legally all defendant officials in one adjudication. On the other hand, in order to formulate the defendant class, the plaintiff must adequately demonstrate to the court that a separate non-class action would be dispositive of the defendants' interests or substantially impair their ability to protect their interests. This superficial concern for the defendants' welfare is totally antagonistic to traditional notions of an adversary proceeding. It also ignores and contradicts the realities of the plaintiffs' situation. The plaintiffs have no reason to be concerned whether the defendant's interests or ability to defend is impaired. Normally, such an impair-

165. FED. R. CIV. P. 23(b)(1)(B).

166. *See* 7A WRIGHT & MILLER § 1774, at 14.

167. This impairment is particularly dangerous when injunctive or declaratory relief is sought by or against a class. Since such relief affects the legal relationship of all parties involved, one's fundamental rights may be practically precluded, even without institution of other and separate suits. This danger is particularly acute when the constitutionality of a statute is being challenged since an individual's right may be easily impaired even though that individual is absent from the adjudication.

168.

> This clause takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter. The vice of an individual action would lie in the fact that other members of the class, thus practically concluded, would have had no representation in the lawsuit.

Advisory Comm. Note, 39 F.R.D. 98, 100-01 (1966).

ment works towards plaintiffs' benefit, especially should he sue them individually. Plaintiffs' purpose in maintenance of a defendant class of public officials is simply to obtain uniform statutory treatment and construction. It seems incongruous to demand from plaintiffs proof of defendants' resultant disabilities. Nevertheless, plaintiffs must show an impairment of the absent officials' interests if they want to maintain a defendant class under (b)(1)(B).

Although numerous courts have maintained class actions under clause (B),[169] little case law has emerged in defining when the impairment of interests is sufficiently substantial to impose class action treatment. Differences have arisen, however, as to the proper scope and construction of the phrase, "as a practical matter." Some courts, predominately in Truth-in-Lending actions, have stated that this clause should be given a literal or restrictive interpretation.[170] Precisely what courts mean by this prescription is difficult to determine. They have, however, stated that a Rule 23(b)(1)(B) class action should not be utilized simply because legal precedent may be established by a separate, non-class suit.[171] It is argued that the drafters of Rule 23 did not intend to create a right to a class action simply to remedy possible stare decisis effects that individual suits might entail. Otherwise any action satisfying the criteria of (a)(2), commonality, and (b)(3), that the questions predominate, would a fortiori qualify as a (b)(1)(B) class action. This, it is thought, would render as superfluous the other subdivisions of 23(b).[172]

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169. *See, e.g.*, Stanford v. Gas Serv. Co., 346 F. Supp. 717 (D. Kan. 1972) (termination proceedings without due process); Walker v. City of Houston, 341 F. Supp. 1124 (S.D. Texas 1971) (action against a common fund); Mungin v. Florida E. Coast Ry., 318 F. Supp. 720 (M.D. Fla. 1970), *aff'd per curiam*, 441 F.2d 728 (5th Cir.), *cert. denied*, 404 U.S. 897 (1971) (action for breach of collective bargaining agreements); Collins v. Bolton, 287 F. Supp. 393 (N.D. Ill. 1968) (action to enjoin statutory assessment).

170. Weit v. Continental Ill. Nat'l Bank & T. Co., 60 F.R.D. 5, 7 (N.D. Ill. 1973); Eovaldi v. First Nat'l Bank, 57 F.R.D. 545, 547 (N.D. Ill. 1972). *But see* Zachary v. Chase Manhattan Bank, 52 F.R.D. 532, 534 (S.D.N.Y. 1971).

171. Kristiansen v. John Mullins & Sons, Inc., 17 FED. RULES SERV. 2d 101, 105 (E.D.N.Y. 1973); Winokur v. Bell Fed. Sav. & Loan Ass'n, 16 FED. RULES SERV. 2d 65, 69-70 (N.D. Ill. 1972); Goldman v. First Nat'l Bank, 56 F.R.D. 587, 591 (N.D. Ill. 1972); Olson v. Regents of the Univ. of Minnesota, 301 F. Supp. 1356, 1357 (D. Minn. 1969); William Goldman Theaters, Inc. v. Paramount Film Distrib. Corp., 49 F.R.D. 35, 41 (E.D. Pa. 1969).

172. Travers & Landers, *The Consumer Class Action*, 18 KAN. L. REV. 811, 823-24 (1970). *Accord*, Alsup v. Montgomery Ward & Co., 57 F.R.D. 89, 92 (N.D. Cal. 1972); Gold-

Whatever the merits of this stare decisis argument in consumer or other small claimant class actions, it is inappropriate when applied to a defendant class of public officials. In the first instance, the other subdivisions of Rule 23(b) are inapplicable to a defendant class. The "opt-out" provision inoculates the (b)(3) category as applied to defendant classes.[173] The wording of the (b)(2) category does not even allow maintenance of a defendant class of public officials.[174] To argue that (b)(1) should not apply, or apply only in the most restrictive of situations, would be practically to destroy the concept of defendant class actions in amended Rule 23. This is in clear contravention of the policy of the rule which explicitly states that "a class may sue *or be sued.*"[175]

Furthermore, when constitutional or civil rights are involved, the adverse effects of a non-class suit are potentially greater and more severe than in small claimant class actions in which the stare decisis argument has predominately arisen. In the latter type of cases, separate trials would create only an inconvenience to each individual plaintiff. Since each individual claim is small, the extent of any adverse effect, if any, would be minimal. Thus, the compelling necessity for class action treatment may frequently be wanting.

When the constitutionality of a statute or certain practices thereunder are being challenged, the reasons for maintenance of a plaintiff class action become more compelling. Since the rights are more basic and fundamental, courts are required to maintain especial caution to insure that these individual guarantees are not infringed, impaired or otherwise disposed. The court's obligation becomes particularly important when an individual is not even in court to protect his own interests. It is understandable that courts have taken a broader and more liberalized approach in interpreting

man v. First Nat'l Bank, 56 F.R.D. 587, 591 (N.D. Ill. 1972). *But see* Guy v. Abdulla, 57 F.R.D. 14, 18 (N.D. Ohio 1972) (court rejected stare decisis argument when applied to a defendant class); Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc., 285 F. Supp. 714, 723 (N.D. Ill. 1968) (court observed in maintenance of a defendant class under clause (B) that adjudications on patent issues are accorded great weight in industrial relations because of the use of comity).

173. *See* notes 119-21 *supra* and accompanying text.

174. *See* note 128 *supra* and accompanying text.

175. FED. R. CIV. P. 23(a).

"as a practical matter" when such rights are at issue.[176]

For example, actions challenging the constitutionality of a statute by all those affected by the provision have been maintained under (b)(1)(B).[177] Courts have uniformly held, though often without explanation, that an adjudication of the statute's validity was dispositive as to all members of the plaintiff class.[178] Although express reasons for such holdings have not been provided, undoubtedly the underlying policy considerations have played a key role. They include the gravity of the rights involved, the due process concerns that potential impairment through separate actions might entail and the uniformity of statutory construction.

Using that same rationale, there should be no difficulty in maintaining a defendant class of public officials under (b)(1)(B). An adjudication as to a statute's validity is as dispositive of the defendant class' interests as that of the plaintiff class.[179] As a result, courts are now just beginning to utilize the (b)(1)(B) category to maintain defendant classes of this nature.[180]

NOTICE

Class members who may be bound by a judgment are entitled

176.

> The trend under Rule 23 has been one of liberal construction, so that in doubtful cases the maintenance of the class action is favored. The theory behind liberal construction of the rule is that determination of the propriety of a class action is to be made at an early stage of the proceedings; thereafter the court maintains the power to supervise the course of the action, and to modify the order as necessary when the facts become developed. If subsequent developments call for it, the court at its discretion can even strike the class allegation.

Gerstle v. Continental Airlines, Inc., 50 F.R.D. 213, 216 (D. Colo. 1970), *aff'd on other grounds*, 466 F.2d 1374 (10th Cir. 1972).

177. Gesicki v. Oswald, 336 F. Supp. 371, 374 (S.D.N.Y. 1971), *aff'd w/o opinion*, 406 U.S. 913 (1972) (constitutionality of Wayward Minor Act); Denny v. Health & Social Serv. Bd. of the State of Wis., 285 F. Supp. 526 (E.D. Wis. 1968) (constitutionality of welfare residency statute).

178. *E.g.*, Gesicki v. Oswald, 336 F. Supp. 371, 374 (S.D.N.Y. 1971), *aff'd w/o opinion*, 406 U.S. 913 (1972).

179.

> Furthermore, as a practical matter, the adjudication of the differentials' validity with respect to individual members of the classes both plaintiff and defendant would be dispositive as to all class members because the differentials cannot be enforced or withdrawn piecemeal.

Cranston v. Freeman, 290 F. Supp. 785, 788 (N.D.N.Y. 1968), *rev'd on other grounds*, 428 F.2d 822 (2d Cir. 1970), *cert. denied*, 401 U.S. 949 (1971).

to the safeguards and guarantees of due process of law.[181] Notice of the pendency of a class action is one, if not the primary means for affording absent class members their due process protection.[182] Although Rule 23 establishes three categories of class actions under subsection (b), it does not treat notice in a uniform manner. Personal notice is made explicitly mandatory only in the (b)(3) type class action.[183] In (b)(1) and (b)(2) actions — those subsections used most frequently by courts to maintain defendant classes — notice is left to the discretion of the court.[184] The draftsmen of Rule 23 did not precisely enunciate the reasons behind this divergent use of notice except to state generally that the mandatory and discretion-

180. Gibbs v. Titelman, 369 F. Supp. 38 (E.D. Pa. 1973) (all banking institutions who have carried out extrajudicial nonconsensual repossession of motor vehicles under color of the challenged statutes); Pennsylvania Ass'n, Ret'd Child. v. Commonwealth of Pa., 343 F. Supp. 279 (E.D. Pa. 1972) (all school districts in Pennsylvania); Guy v. Abdulla, 57 F.R.D. 14 (N.D. Ohio 1972) (holders of voidable preferences and/or fraudulent conveyances); United States v. Cantrell, 307 F. Supp. 259 (E.D. La. 1969) (all persons operating bars and cocktail lounges in Plaquemines County); Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619 (D. Kan. 1968), *aff'd in part, rev'd in part on other grounds*, 441 F.2d 704 (10th Cir.), *cert. denied*, 404 U.S. 951 (1971) (defendant classes of landowners and lessee-producers of natural gas); Cranston v. Freeman, 290 F. Supp. 785 (N.D.N.Y. 1968), *rev'd on other grounds*, 428 F.2d 822 (2d Cir. 1970), *cert. denied*, 401 U.S. 949 (1971) (defendant-intervening class of milk producers).

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

182. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). Plaintiffs in *Mullane* were numerous beneficiaries of defendant bank which managed a common trust fund. Although not a true class action, the commonality of the class of beneficiaries and the broadness of the language suggest the case is equally applicable to the present discussion.

183. FED. R. CIV. P. 23(c)(2) states:

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

This provision has been uniformly interpreted to mean that personal notice is mandatory. Travers & Landers, *The Consumer Class Action*, 18 KAN. L. REV. 812, 828 (1970). Obviously, one of the reasons for mandatory notice in (b)(3) class actions is to make meaningful the absent members right to "opt-out."

It should also be observed that notice is mandatory under FED. R. CIV. P. 23(e) for any dismissals or compromises of the class action.

184. FED. R. CIV. P. 23(d)(2) states:

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

(emphasis supplied).

ary notice provisions taken together were designed "to fulfill requirements of due process to which the class action procedure is of course subject."[185]

A heated debate has arisen as to whether notice is required in (b)(1) and (b)(2) class actions as a matter of due process. Since *Mullane v. Central Hanover Bank & Trust Co.*,[186] the issue has focused upon whether courts have the authority to render a decision binding on the class in the absence of any notice to the absent members. This conflict has become particularly acute since the amendment to Rule 23.[187] At present, this controversy has narrowed into three judicial approaches. They include adequacy of representation, discretionary notice and mandatory notice. A brief survey of these approaches, which are framed in the context of plaintiff classes, will prove beneficial in elucidating the problems of notice with respect to defendant classes.

Adequacy of Representation

A sizable number of courts[188] and commentators[189] have main-

185. Advisory Comm. Note, 39 F.R.D. 98, 107 (1966), *citing* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) and Hansberry v. Lee, 311 U.S. 32 (1940).

186. 339 U.S. 306 (1950).

187. *See* note 79 *supra*. This conflict is most dramatically illustrated by the case of Gregory v. Hershey, 311 F. Supp. 1 (E.D. Mich. 1969), *rev'd sub nom.*, Gregory v. Tarr, 436 F.2d 513 (6th Cir.), *cert. denied*, 403 U.S. 922 (1971), and the series of cases which rapidly followed. Plaintiff in *Gregory* sought to maintain a plaintiff class composed of all selective service registrants denied III-A fatherhood status in the United States. Because of the number of class members, the difficulty in their identification, and because the class was certified under categories (b)(1) and (b)(2), the court did not issue notice to the plaintiff class. In subsequent actions, members of the alleged plaintiff class asserted that the *Gregory* judgment declaring them entitled to the deferments was *res judicata* as to the Selective Service. In Whitmore v. Tarr, 318 F. Supp. 1279 (D. Neb. 1970), *vacated*, 443 F.2d 1370 (8th Cir.), *cert. denied*, 403 U.S. 922 (1971), and Germonprez v. Director of Selective Serv., 318 F. Supp. 829 (D.D.C. 1970), two courts held the judgment binding, irrespective of the lack of notice. In Pasquier v. Tarr, 318 F. Supp. 1350 (E.D. La. 1970), *aff'd per curiam*, 444 F.2d 116 (5th Cir. 1971), and McCarthy v. Director of Selective Serv. Sys., 322 F. Supp. 1032 (E.D. Wis. 1970), *aff'd per curiam*, 460 F.2d 1089 (7th Cir. 1972), two courts rejected plaintiffs' *res judicata* claims and held that notice is required, as a matter of due process, in all class actions.

An interesting question is presented by the *Gregory* series. Although plaintiffs won their claim in the district court, the decision was reversed by the court of appeals. *See* Gregory v. Tarr, 436 F.2d 513 (6th Cir.), *cert. denied*, 403 U.S. 922 (1971). Had all the subsequent courts accepted plaintiffs' *res judicata* claims, would all of the members of the plaintiff class be forever barred from bringing an action after the court of appeals reversed the decision in the original class judgment?

188. Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619 (D. Kan. 1968), *aff'd in*

tained that there is no constitutional requirement of notice to class members in (b)(1) and (b)(2) class actions. As a result, members of a plaintiff class may be legally bound by a judgment irrespective of receipt of notice or knowledge of the suit.[190] These proponents cite the other procedural safeguards of Rule 23 as found in the prerequisites in 23(a). Most particularly, guarantee of the absent members' due process rights is held to lie primarily with the adequacy of the named plaintiff.[191] The theory underlying class actions is that all members of the class are before the court in the person of the representative.[192] If the absent member's interests are adequately represented, the absentee, in effect, will have had his day in court.[193]

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part, rev'd in part on other grounds, 441 F.2d 704 (10th Cir.), *cert. denied*, 404 U.S. 951 (1971), is the leading case although the court did order prejudgment notice. Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825 (2d Cir. 1970). *See also* Hammond v. Powell, 462 F.2d 1053 (4th Cir. 1972); Francis v. Davidson, 340 F. Supp. 351 (D. Md.), *aff'd*, 409 U.S. 904 (1972); Baxter v. Savannah Sugar Ref. Corp., 350 F. Supp. 139 (S.D. Ga. 1972); Woodward v. Rogers, 16 FED. RULES SERV. 2d 241 (D.D.C. 1972); Wilczynski v. Harder, 323 F. Supp. 509 (D. Conn. 1971); Gregory v. Hershey, 51 F.R.D. 188 (E.D. Mich. 1970), *rev'd on other grounds sub nom.*, Gregory v. Tarr, 436 F.2d 513 (6th Cir.), *cert. denied*, 403 U.S. 922 (1971); Clark v. American Marine Corp., 297 F. Supp. 1305 (E.D. La. 1969).

189. 7A WRIGHT & MILLER § 1784, at 142-44; 3B MOORE ¶ 23.55, at 1152-53; Degnan, *Adequacy of Representation in Class Actions*, 60 CALIF. L. REV. 705, 718-19 (1972); Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 645-46 (1971); Kirkpatrick, *Consumer Class Actions*, 50 ORE. L. REV. 21, 37-38 (1970); Maraist & Sharp, *Federal Procedure's Troubled Marriage: Due Process and the Class Action*, 49 TEXAS L. REV. 1, 9-10 n.37 (1970); Note, *Constitutional and Statutory Requirements of Notice under Rule 23(c)(2)*, 10 B.C. IND. & COM. L. REV. 571, 573 (1969); Note, *Proposed Rule 23: Class Actions Reclassified*, 51 VA. L. REV. 629, 638 (1965).

190. *See, e.g.*, RESTATEMENT OF JUDGMENTS § 86, comment *h* at 425 (1942):

> If, however, the conduct of the proceeding is proper, it is immaterial that the other members of the class were not given or did not know of the existence of the action.

191.

> We think the essential requisite of due process as to absent members of the class is not notice, but adequacy of representation of their interest by named parties.

Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619, 636 (D. Kan. 1968), *aff'd in part, rev'd in part on other grounds*, 441 F.2d 704 (10th Cir.), *cert. denied*, 404 U.S. 951 (1971). *See also* Dolgow v. Anderson, 43 F.R.D. 472, 500 (E.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825 (2d Cir. 1970). The effect of the *Grounds* statement is somewhat diluted because the court did in fact issue prejudgment notice to the absent members of the class concerning the adequacy of representation and the advancement of any new claims. The court required the "best notice practicable under the circumstances" which in that case involved "individual notice to all members of each class." 292 F. Supp. at 636.

192. *See* Calagaz v. Calhoon, 309 F.2d 248, 254 (5th Cir. 1962).

193. *See* Johnson v. City of Baton Rouge, 50 F.R.D. 295, 301 (E.D. La. 1970). *See also* Z. CHAFEE, SOME PROBLEMS OF EQUITY 231 (1950), wherein the author states:

> When the interests of the unnamed persons are closely identified with the interests

Accordingly, due process standards will have been met, thereby rendering as unnecessary and superfluous the requisite of notice.[194] Support for the position that adequacy of representation is a self-sufficient criterion is found in *Hansberry v. Lee*,[195] where the Supreme Court stated:

> It is a familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by a judgment where they are in fact adequately represented by the parties who are present, or where they actually participate in the conduct of the litigation in which the members of the class are present as parties . . . or where the interests of the members of the class, some of whom are present as parties is joint or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter.[196]

This position is reinforced by Rule 23 itself. Since Rule 23(c)(2) indicates that notice must be given solely in (b)(3) class actions, it is contended that notice is not required in the (b)(1) and (b)(2) categories. Further support is found in the discretionary notice provision in Rule 23(d)(2). The provision for discretionary notice would be superfluous if notice were mandatory in all types of class actions. This implies that notice can be totally dispensed with in certain situations without diluting the absent members' procedural safeguards. Presumably then, the draftsmen of the rule also believed that the representative character of the named parties would be sufficient protection of the absentees' due process rights.[197]

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of the representatives and when the representatives put up a real fight, their day in court is accepted as if the unnamed persons were in court too.

194. *See* Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 315 (1972).

195. 311 U.S. 32 (1940). In this case, it was emphasized that the representative action was a recognized exception to the general rule that a judgment could not bind persons not formally joined as parties. The use of notice to absent members of the class as a means of satisfying due process was not directly mentioned or discussed.

196. *Id.* at 42-43.

197. *See* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 379-80 (1967). *Accord*, Ward & Elliott, *The Contents and Mechanics of Rule 23 Notice*, 10 B.C. IND. & COM. L. REV. 557, 561 (1969).

It has also been suggested that as a practical matter, if the plaintiff class meets the requirements of subsections (b)(1) and (b)(2), the class will be more cohesive than its "amorphous" counterpart in (b)(3) which is tied together only by the predominance of common questions of law or fact.[198] If the class is more cohesive, then it becomes more likely that the absent members will have truly had their day in court since the claims and defenses raised by the named party will be identical to those of the rest of the class. In short, as the cohesiveness of the class and the adequacy of the representation increases, the practical need for individualized notice to insure due process proportionately decreases.[199] In those situations in which the plaintiff class is internally and externally cohesive, there arises no need to demand notice.

Discretionary Notice

Another approach concerning the role of notice in plaintiff class actions has been a tacit acceptance and literal construction of the discretionary notice provision in Rule 23(d)(2). Although recognizing that notice is not mandatory for (b)(1) and (b)(2) class actions, these courts simply acknowledge and exercise their broad powers that they "*may* make appropriate orders" to demand notice "for the protection of the members of the class or otherwise for the fair conduct of the action."[200] Reliance is placed not on the underlying

198. 7A WRIGHT & MILLER § 1793, at 203.

199.

> In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice will tend to a minimum.

Advisory Comm. Note, 39 F.R.D. 98, 106 (1966). *See* Note, *Constitutional and Statutory Requirements of Notice under 23(c)(2)*, 10 B.C. IND. & COM. L. REV. 571, 574 n.28 (1969). This formula has led one note writer to state:

> Since the importance of notice increases with the dangers of inadequate representation, it would seem more necessary where the class is a defendant than where it is a plaintiff.

Note, *Binding Effect of Class Actions*, 67 HARV. L. REV. 1059, 1063 (1954). However, the same writer has recognized that the need for notice is less where it may be presumed that the absent defendants would have consented to their representation, as where the class members are associated for some common purpose aside from the particular litigation in question.

200. FED. R. CIV. P. 23(d)(2). The following courts have held that notice is not mandatory for (b)(1) and (b)(2) class actions: Hammond v. Powell, 462 F.2d 1053 (4th Cir. 1972); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969); Baham v. Southern Bell Tel. & Tel. Co., 55 F.R.D. 478 (W.D. La. 1972); Baxter v. Savannah Sugar Refining Corp., 350 F. Supp. 139 (S.D. Ga. 1972), *modified on other grounds*, 495 F.2d 437 (5th Cir. 1974); Mungin v. Florida East Coast Ry., 318 F. Supp. 720 (M.D. Fla. 1970), *aff'd per curiam*, 441 F.2d 728 (5th Cir.), *cert. denied*, 404 U.S. 897 (1971).

fundamental constitutional issues, but rather upon the practicalities of notice under the circumstances of each case.[201] In determining whether the protection of the plaintiff class necessitates notice, courts have considered several factors.

The two most common factors have been the size of the purported class and the possibility of its being specifically identified.[202] Generally, the smaller the class or the greater possibility of its identification, the more likely that courts will demand notice. For example, in an employment discrimination suit against a single employer, the court required notice in a (b)(2) class action because the plaintiff class was "relatively small" in size and easily identifiable.[203] However, where the class of plaintiffs consisted of all selective service registrants denied III-A fatherhood status in the United States, the court did not require notice.[204]

Another factor has been the nature of the action and the practical effect of a judgment on the absent members of the class. Where injunctive relief was requested to stop the construction of a highway, a court held that notice was not necessary to protect the interests of those persons who may be affected by the rulings or judgment of the court.[205] But where, for example, the litigation could have a

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201.

> [T]he rule couldn't be plainer, it mandates 23(c)(2) notice in (b)(3) class actions, not in 23(b)(1) or 23(b)(2) class actions. Even though notice under Rule 23(d)(2) is not required in a 23(b)(2) class action, the court still retains discretionary power under Rule 23(d)(2) to order publication of notice to absent class members. In the exercise of that discretion, we decline, in this case, to order such publication of notice.

Johnson v. City of Baton Rouge, 50 F.R.D. 295, 301 (E.D. La. 1970). The court preceded the final determination with a discussion of *Eisen* (*see* notes 210-15 *infra* and accompanying text):

> We are not unaware that the Court of Appeals for Second Circuit has held that notice to absent members of a class is required as a matter of due process in all representative actions, regardless of whether they are brought under 23(b)(1), (2), or (3). . . . This court, after carefully studying Professor Moore's persuasive commentary, thinks that the *Eisen* position is unsound.

Id. at 301.

202. *See* 7A WRIGHT & MILLER § 1793, at 207.

203. Hayes v. Seaboard Coast Line R.R., 46 F.R.D. 49 (S.D. Ga. 1968).

204. Gregory v. Hershey, 51 F.R.D. 188 (E.D. Mich. 1970), *rev'd on other grounds sub nom.*, 436 F.2d 513 (6th Cir.), *cert. denied*, 403 U.S. 922 (1971). In Johnson v. City of Baton Rouge, 50 F.R.D. 295 (E.D. La. 1970), one of the reasons the court did not require notice was because the black community was well over 90,000 people.

205. Citizen's Environmental Council v. Volpe, 364 F. Supp. 286 (D. Kan.), *aff'd*, 484

substantial effect on the absent members' jobs, pay or promotion, courts have been more stringent by demanding at least some form of notice to all members of the plaintiff class.[206]

A fourth factor has been the effect of notice among the class itself. Where prisoners sought to have a statute denying them good behavior credit for pre-sentence judgment declared unconstitutional, the court did not require notice because it could be "potentially disruptive of the prison routine."[207] Likewise in a suit challenging alleged discriminatory practices of the police against the black community, the court believed that notice would only pose an unnecessary risk of further "disturbing interracial relations in the community while adding nothing to the lawsuit."[208] However, in an employment discrimination suit, the court could not understand the named plaintiff's objection to issuance of notice when there was no foreseeability of "any possible harm or hurt flowing from notice."[209]

Mandatory Notice

The third approach embraces the view that concepts of due process require mandatory notice in all representative suits, regardless of whether they were brought under 23(b)(1), (2) or (3). Notice is seen as a constitutional mandate which holds supremacy over Rule 23's guidelines regarding notice.[210] The leading case on this

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F.2d 870 (10th Cir. 1973). *See* Francis v. Davidson, 340 F. Supp. 351 (D. Md.), *aff'd w/o opinion*, 409 U.S. 904 (1972) (plaintiffs, unemployed fathers, sought to enjoin defendants from denying them application for A.F.D.C. benefits).

206. Hayes v. Seaboard Coast Line R.R., 46 F.R.D. 49 (S.D. Ga. 1968). Although notice in (b)(2) actions is not required, "[i]t is usual, however, to authorize some form of notice to possible claimants in class actions." McGriff v. A. O. Smith Corp., 51 F.R.D. 479, 486 (D.S.C. 1971) (employment discrimination suit).

207. Royster v. McGuinnis, 332 F. Supp. 973, 981 (S.D.N.Y. 1971), *rev'd on other grounds*, 410 U.S. 263 (1973).

208. Johnson v. City of Baton Rouge, 50 F.R.D. 295, 302 (E.D. La. 1970).

209. Hayes v. Seaboard Coast Line R.R., 46 F.R.D. 49, 56 (S.D. Ga. 1968). The court further stated:

> I think that notice to members of an identifiable, unnumerous class may be salutary and of value. I do not foresee any possible harm or hurt flowing from notice. I cannot understand the apparent reluctance of plaintiffs to let non-party employees know that litigation which may affect their jobs, including higher pay and promotion, is in progress. A disclosed rather than a secretive agency is preferable in such cases.

Id. at 56.

210. *See* 28 U.S.C. § 2072 (1966) (Rules Enabling Act). In Sibbach v. Wilson & Co., 312 U.S. 1, 9 (1940), the Court stated:

> Congress has undoubted power to regulate the practice and procedure of federal

point is *Eisen v. Carlisle & Jacquelin.*[211] It distinguished the specific notice requirement in Rule 23(c)(2) for common question class actions (the (b)(3) category) as being merely a particularized form of notice.[212] In support of its position, the *Eisen* court cited the Supreme Court in *Mullane v. Central Hanover Bank & Trust Co.,*[213] which stated that

> [m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.[214]

Although the statements in *Eisen* were only dicta, courts have with increasing frequency adopted its interpretation as being dispositive of the issue by requiring notice to all members of a class as a matter of due process of law.[215]

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courts, and may exercise that power by delegating to . . . federal courts authority *to make rules not inconsistent with the statutes or Constitution of the United States.* (emphasis supplied).

211. 391 F.2d 555 (2d Cir. 1968), *rev'd on other grounds,* 479 F.2d 1005 (2d Cir. 1973), *vacated,* 94 S. Ct. 2140 (1974).

212. *Id.* at 564-65.

213. 339 U.S. 306 (1950).

214. *Id.* at 313.

215. In Cranston v. Freeman, 290 F. Supp. 785, 787 (N.D.N.Y. 1968), *rev'd on other grounds,* 428 F.2d 822 (2d Cir. 1970), *cert. denied,* 401 U.S. 949 (1971), the court directed that all members of the plaintiff and defendant classes receive formal notice of the pendency of the action, "[i]n view of the recent decision of the United States Court of Appeals for this Circuit in *Eisen v. Carlisle & Jacquelin,* 391 F.2d 555 (2d Cir. 1968)." *See also* Schraeder v. Selective Serv. Sys. Loc. Bd. No. 76 of Wis., 470 F.2d 73 (7th Cir.), *cert. denied,* 409 U.S. 1085 (1972); Zeilstra v. Tarr, 466 F.2d 111 (6th Cir. 1972); Arey v. Providence Hosp., 55 F.R.D. 62 (D.D.C. 1972); Zachary v. Chase Manhattan Bank, 52 F.R.D. 532 (S.D.N.Y. 1971); McCarthy v. Director of Selective Serv. Sys., 322 F. Supp. 1032 (E.D. Wis. 1970), *aff'd on other grounds,* 460 F.2d 1089 (7th Cir. 1971). In Pasquier v. Tarr, 318 F. Supp. 1350 (E.D. La. 1970), *aff'd on other grounds,* 444 F.2d 116 (5th Cir. 1971), the court stated:

> This rule [that notice is not mandated and the adequacy of representation is the sole test] it seems to us, is lacking in fundamental fairness in that it gives absent members of the class two bites at the apple at the expense of the defendant. For if a court rules on the merits in favor of the [plaintiff] class, the absent members can reap the benefits of such a decision. But if the court should rule against the class on the merits, then, as we have hitherto noted, they can argue that they were not adequately represented. This leaves a defendant to a Rule 23(b)(1) or 23(b)(2) class action in a most precarious position, and we simply cannot subscribe to a rule of law with such unfair consequences.

Notice in Defendant Class Actions

The issue now focuses upon the necessity of notice in (b)(1) and (b)(2) class actions when a defendant class of public officials is sought to be maintained. In those jurisdictions which have adopted the *Eisen* rationale, the answer is obvious — personal notice is mandatory in all defendant class actions.[216] The answer is not so clear in those jurisdictions which maintain that notice is not constitutionally mandated and issue it only with discretion. Upon examination of the functions which notice can provide in pursuing the goals of maintaining a defendant class of public officials, it will be demonstrated that notice must be required, irrespective of the constitutional issues on which authorities have differed. An examination of those functions follows.

1. Assure Adequate Representation

A class action may not be maintained unless the court is satisfied that the named party will adequately represent the class.[217] Since inadequate representation is one of the chief grounds upon which a class action judgment can be later collaterally attacked,[218]

318 F. Supp. at 1353. *See* Snyder v. Bd. of Trustees of Univ. of Ill., 286 F. Supp. 927 (N.D. Ill. 1968). In Richard v. Cheatham, 272 F. Supp. 148 (S.D.N.Y. 1967), the court stated that without mandatory notice

> [p]laintiffs would have all the benefits of Rule 23 without assuming any of the burdens. It is not what the defendants insist on, but what the rule and due process require. This cavalier treatment of the notice required by the rule is but another facet of the inadequacy of representation.

272 F. Supp. at 156.

The following commentators have argued that notice is constitutionally mandated: Ward & Elliott, *The Contents and Mechanics of Rule 23 Notice,* 10 B.C. IND. & COM. L. REV. 557, 560-61 (1969); Comment, *Federal Class Actions: A Suggested Revision of Rule 23,* 46 COLUM. L. REV. 818, 833-36 (1946); Comment, *Can Due Process be Satisfied by Discretionary Notice in Federal Class Actions,* 4 CREIGHTON L. REV. 268, 300-02 (1971); Comment, *Revised Federal Rule 23, Class Actions: Surviving Difficulties and New Problems Require Further Amendment,* 52 MINN. L. REV. 509, 521-24 (1967).

216. Prejudgment notice in *all* class actions is apparently required in the second, sixth and seventh circuits. *See* Schraeder v. Selective Serv. Sys. Loc. Bd. No. 76 of Wis., 470 F.2d 73 (7th Cir.), *cert. denied,* 409 U.S. 1085 (1972); Zeilstra v. Tarr, 466 F.2d 111 (6th Cir. 1972); Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968), *rev'd on other grounds,* 479 F.2d 1005 (2d Cir. 1973), *vacated,* 94 S. Ct. 2140 (1974).

217. FED. R. CIV. P. 23(a)(4).

218. Sam Fox Publishing Co., Inc. v. United States, 366 U.S. 683, 691 (1960); Hansberry v. Lee, 311 U.S. 32, 42-43 (1940). In Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973), the court held that the absent members were not bound by a class judgment because their representa-

courts want assurance that the named party is, in fact, an adequate representative of the class. In the typical plaintiff class action, for example, the defendant may have little interest in exposing an inadequate plaintiff representative; he may, at times, have a real incentive in not doing so.[219] Notice to the members of the plaintiff class has been frequently used to provide that added assurance to courts that their finding is an accurate one.[220]

This reasoning applies equally well, if not more, in the context of a defendant class. A court cannot assume that a plaintiff will designate a strong and resourceful adversary. A plaintiff neither holds any personal incentive to do so, nor can one expect he would do so out of considerations of fairness to the absent defendant members. This places a particular burden upon the court to protect the absent defendants. The easiest and probably the most efficient method to obtain this protection, would be to order personal notice to all members of the defendant class.

Issuance of notice to the defendant class also works to the benefit of the plaintiffs who may be concerned with obtaining a binding judgment. Should the absent members fail to object to the adequacy of their representation in the suit, they may find it more difficult to challenge collaterally the same issue in a later action.[221]

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tion had been inadequate (the representative failed to appeal a decision adverse to the interests of the plaintiff class). The court set forth a two-pronged test to determine whether the class representative adequately represented the class so that the judgment in the class suit would bind the absent members. The test includes:

(1) Did the trial court in the first suit correctly determine, initially, that the representative would adequately represent the class? and

(2) Does it appear, after the termination of the suit, that the class representative adequately protected the interests of the class?

474 F.2d at 72. *See generally* Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 HARV. L. REV. 589 (1974).

219. If the defendant believes that the representative plaintiff would inadequately represent the plaintiff class or is otherwise incompetent, it may be in defendant's interest not to challenge plaintiff's motion for a class determination. Should defendant win on the merits, all members of the plaintiff class will be bound. Although such a judgment is subject to collateral attack (*see* note 218 *supra*), defendant would now place the burden of challenging the inadequacy of representation on the absent members of the plaintiff class.

220. Harper v. Mayor & City Council of Baltimore, 359 F. Supp. 1187, 1192 n.1 (D. Md.), *modified on other grounds*, 486 F.2d 1134 (4th Cir. 1973); Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619, 636 (D. Kan. 1968), *aff'd in part, rev'd in part on other grounds*, 441 F.2d 704 (10th Cir.), *cert. denied*, 404 U.S. 951 (1971).

221. While the right to challenge the adequacy of representation is always available to

2. Allow for Intervention

Notice can also be utilized to allow absent members the opportunity to exercise their right of intervention. Intervention can satisfy the absent members' opportunity to be heard should some members of the class have a desire to appear personally and litigate the matter. Also, by broadening the representative base, it assures the court that all claims and defenses will be brought out and fully litigated. This would likewise be important to a defendant class, especially when the validity of a statute is at issue. It becomes imperative that all facts and theories be fully explored and weighed by a court before a final determination be made on a matter of such serious import and one which would have a statewide effect. Fundamental considerations of fairness would demand no less.

3. Disseminate Knowledge

Notice also would make all members of the class aware of the suit. This would be particularly applicable to a defendant class of public officials. It has been repeatedly stated that one of the major goals of such a class is to assure uniform statutory construction or corresponding practice. Although it is the single suit which makes this possible, implementation can only be effectuated by actual knowledge of the suit to all members of the class. A court may indeed have justifiable concern should plaintiff argue that notice need not be given in (b)(1) and (b)(2) actions when the same party later exhorts that a defendant class should be maintained to obtain the benefits of uniform treatment.

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absent members of the class (since due process would be violated without it) (*see* note 218 *supra*), it is to the absentees' interests to object as early as possible. Since collateral attacks arise only after the merits have been argued and decided, courts may be reluctant to reverse a trial judge's determination that the representation was adequate. A liberalized allowance for collateral attacks would effectively destroy one of the primary reasons for class actions: efficient judicial administration through the elimination of repetitious litigation.

Also, the failure to intervene or at least object to the suit, may have serious ramifications for absentees who may wish to appeal. For example, in Research Corp. v. Asgrow Seed Co., 425 F.2d 1059 (7th Cir. 1970), the appellants, who were unnamed members of a defendant class below, appealed from a consent judgment concerning patent validity and infringement. The court of appeals summarily rejected their argument because appellants had not taken even minimal steps to preserve their appeal. The court noted that although appellants had both actual and constructive notice, they did not seek exclusion nor offer to intervene nor object to the consent form. The court held that a right to appeal from an adverse judgment exists only when the unnamed members of the class object to the dismissal or compromise.

4. Ease in Enforcement

A related goal of bringing an action against a class of defendants comprised of public officials is to make the process of enforcement easier and to have a more powerful and meaningful weapon against recalcitrant officials. By binding all officials to a single judgment, there no longer is the need to relitigate constantly the merits of the case against each official. Any failure to comply with such a judgment could hopefully be met by a more simple contempt proceeding. However, before a contempt citation can issue, knowledge of the previous judgment must be established. Only notice can adequately provide this prerequisite.[222]

Personal notice should be mandatory for all defendant class actions.[223] As demonstrated, notice so closely coincides with the major goals of a defendant class that it would appear impossible to establish such a class without it.[224] Although the class of public officials may be so numerous as to make any notice costly and burdensome,[225] the fact that the class is easily identifiable suggests

222. Due process requires that a person cited for contempt have knowledge of the court order, either actual or by service of process. United States *ex rel.* Carter v. Jennings, 333 F. Supp. 1392 (E.D. Pa. 1971).

223. There is insufficient space to examine the difficulties in devising an adequate system of notice. Several prefatory words are, however, in order. If notice is made equivalent to service of process, the advantages of a defendant class action will be largely defeated. On the other hand, the less formal the notice and the machinery to issue it become, the greater chance that individual members of the defendant class will not receive it. This dilemma forced Dean Chafee to state: "Yet there ought to be *something*—perhaps postcards, perhaps an advertisement on the financial page of the *New York Times.*" Z. CHAFEE, SOME PROBLEMS OF EQUITY 231 (1950).

In Danforth v. Christian, 351 F. Supp. 287 (W.D. Mo. 1972), the court utilized an interesting mechanism to issue notice to the respective plaintiff and defendant classes. The court had the various parties issue a joint press release which was sent to the members of the defendant class and to the news media for publication and broadcast.

224. *But see* Lynch v. Household Fin. Corp., 360 F. Supp. 720, 722 n.3 (D. Conn. 1973); Pennsylvania Ass'n, Ret'd Child. v. Commonwealth of Pa., 343 F. Supp. 279, 291-92 (E.D. Pa. 1972).

225. Neither Rule 23 nor the Advisory Committee Note specify who shall pay the cost of notice. The generally accepted rule is that this cost should always be borne by the plaintiff. Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140, 2153 (1974). The underlying rationale for this approach is that since the class action (either plaintiff or defendant) is a weapon for the plaintiff, he should bear the cost as a burden of the litigation. Notice costs become another prerequisite to maintenance of a class action. One court has also noted that plaintiff's refusal to pay for notice reflected on the adequacy of his representation. Richard v. Cheatham, 272 F. Supp. 148, 156 (S.D.N.Y. 1967).

that the task is not insurmountable. Such a procedure not only assures the court that the defendants' due process rights will be protected, but it also guarantees the plaintiff class that the judgment will be a final one not subject to a later reversal due to a lack of due process.

CONCLUSION

The sanctions which are presently employed against public officials have not proved effective in securing their compliance to judicial decisions which pertain to their authority and practices. The sheer number of these officials and the fact that they are not directly subject to a common authority have made effective and meaningful enforcement of judgments against them difficult, if not impossible. The procedural device of a defendant class is an ideal method to fill gaps left by the existing set of remedies. Maintenance of a defendant class facilitates efficient judicial administration by eliminating repetitious and frequently needless litigation. More importantly, the defendant class action promotes the ends of justice by providing the means for establishing a uniform construction of state statutes. The expanded binding effect of amended Rule 23 also establishes statewide implementation of this statutory construction by giving plaintiffs a meaningful enforcement mechanism against recalcitrant officials.

The wording of Rule 23, however, is deficient in that it accommodates, preserves and even encourages the general tendency of

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Counterbalancing this practice, is the argument that placing the expense of notice upon plaintiffs would end possibly meritorious suits. This, it is argued, would frustrate the policy behind amended Rule 23. *See* Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 269 (1971). In other words, arbitrarily burdening plaintiff with the costs of notice will often permit a defendant to win by default since the plaintiff, even though his case is strong, may be unable to pay for the requisite notice.

Who should bear the cost of notice when a defendant class of public officials is sought to be maintained has received very little attention. In Hadnott v. Amos, 295 F. Supp. 1003 (M.D. Ala. 1968), the costs were equally divided between plaintiffs and one of the named defendants, the secretary of state. In Wilson v. Kelly, 294 F. Supp. 1005 (N.D. Ga. 1968), the court held that the costs should be taxed to the defendant class, "but the Court is of the opinion that the state should pay such costs." *Id.* at 1013. This latter practice should be preferred. It is the state and not the class of local officials who are the real party defendants to the action. The state is in a far better position to pay for such costs, plus, the class action provides important res judicata effects should the state win on the merits.

226. *See* notes 218 and 221 *supra.*

courts and commentators to conceptualize class actions solely in terms of plaintiff classes. As a result, the rule does not adequately foster an appreciation for the distinctive characteristics of defendant classes. The impotence of (b)(3), the impropriety of (b)(2), and the vagueness surrounding the notice provisions and their correlation to due process requirements all serve as prime examples of this inadequacy.

It is unrealistic to anticipate an immediate revision of Rule 23 which would more definitively accommodate defendant classes. Courts are therefore required to apply the rule to defendant classes notwithstanding its present conceptual and practical difficulties. Accordingly, attorneys seeking to reap the numerous benefits and advantages inherent in maintaining a defendant class of public officials must thereby employ one of the troublesome (b) categories. To avoid the most serious pitfalls, the formation of a defendant class can be most satisfactorily based on (b)(1)(B) since an adjudication concerning a certain statute or practice will be dispositive of the defendant class' interests. In this manner, the advantages of a defendant class can be secured without requiring the practitioner to wait for Rule 23 to be further modified.